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CHRISTINA CRUZ, ET AL.

CA 15 103714

vs.

Judge:

ENGLISH NANNY & GOVERNESS SCHOOL INC., ET AL.

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IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

CHRISTINA CRUZ, *et. al.*, Plaintiff-Appellees/ Cross-appellants, v. ENGLISH NANNY & GOVERNESS SCHOOL, *et al.*, Defendant-Appellants/ Cross-appellees.	Case No. CA 15-103714 Appeal from Common Pleas Case No. CV 11-768767

BRIEF OF PLAINTIFF-APPELLEES/CROSS-APPELLANTS

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ASSIGNMENTS OF ERROR

Assignment of Error 1: Appellants argue that "the trial court erred by denying Defendants' motions for directed verdict and [JNOV] on Appellee Cruz's claim for intentional infliction of emotional distress in the absence of evidence of an emotional injury that was 'both severe and debilitating.'" This assignment of error should be overruled because, as shown below, the jury's verdict on Cruz's IIED claim was supported by sufficient evidence that she suffered an emotional injury that was "serious," or, "both severe and debilitating."

Assignment of Error 2: Appellants argue that "the trial court erred by denying Defendants' motions for directed verdict and [JNOV] on Plaintiff-Appellee Kaiser's wrongful discharge claim." This assignment of error should be overruled because, despite Appellants' argument to the contrary, allowing employers to terminate employees in retaliation for their refusal to suppress child-abuse reports would jeopardize Ohio's public policy of recognizing and preventing child abuse.

CROSS-ASSIGNMENTS OF ERROR

Cross-assignment of Error 1: The trial court abused its discretion by granting Defendant's Motion for Remittitur of the Jury's $75,000 economic-damages award on Cruz's IIED claim despite that Cruz presented sufficient evidence to support the verdict. (R. 385).

Cross-assignment of Error 2: The trial court abused its discretion by reducing Plaintiffs' attorneys' fees award by more than 75% of the lodestar calculation, thereby frustrating the purpose of the jury's attorneys'-fees award: to deter those who intentionally inflict "serious harm" by "extreme and outrageous conduct" and put public policy at risk. (R. 390).

Cross-assignment of Error 3: The trial court erred as a matter of law by sanctioning Plaintiffs' counsel under R.C. 2323.51 for sharing scheduling information and publicly available pleadings with a newspaper reporter, conduct that is protected by the First Amendment and explicitly permitted by Prof.Cond. R. 3.6. (R. 408).

ISSUES PRESENTED BY APPELLANTS' ASSIGNMENTS OF ERROR

1. A claim for intentional infliction of emotional distress requires injury that substantially impairs the plaintiff's ability to function. Complete debilitation is not required. Medical diagnoses of psychiatric disorders, or the exacerbation of such disorders, constitute sufficient evidence of harm that is serious, or, "severe and debilitating." At trial, Plaintiff Christina Cruz's own testimony and that of three physicians showed that Cruz suffered substantial impairment as a result of Defendants' extreme and outrageous conduct, including a recurrence and aggravation of major depressive and anxiety disorders. Did Cruz present legally sufficient evidence of serious emotional injury?

2. A plaintiff meets the jeopardy element of a claim for wrongful discharge in violation of public policy when the threat of termination will discourage conduct that furthers the public policy at issue. At trial, the jury found that Plaintiff Heidi Kaiser proved that Defendants terminated her because she refused to participate in their attempt to suppress Christina Cruz's child-sex-abuse report. Has Kaiser met the jeopardy element of her claim.

ISSUES PRESENTED ON CROSS-APPEAL

1. Remittitur is only permissible when the jury's award "is so gross as to shock the sense of justice and fairness, or cannot be reconciled with the undisputed evidence." Below, the trial court erased the jury's $75,000 economic damages award on Cruz's IIED claim. In doing so, it disregarded the competent, credible evidence that, as a direct and proximate result of Defendants' tortious conduct, Cruz suffered from diminished earning capacity and lost a unique "lifetime" earning opportunity worth at least $75,000. Did the trial court abuse its discretion?

2. Plaintiffs who recover attorneys' fees as part of a jury's punitive damages award are entitled to a reasonable fee and the lodestar calculation is "strongly presumed to yield a reasonable fee." Here, the trial court slashed Plaintiffs' fee award by more than 70% of the lodestar calculation due to the existence of a contingency fee agreement, thereby incentivizing the "extreme and outrageous" conduct at issue in this case, and frustrating the purpose of the jury's attorneys' fees award. Did the trial court abuse its discretion in reducing Plaintiffs' attorneys' fees?

3. Prof.Cond.R. 3.6(b) explicitly permits an attorney to publicize scheduling information and information that is already in the public record, even when such information "creates a substantial likelihood of material prejudice." Below, the trial court sanctioned Plaintiffs' counsel for sharing scheduling information and publicly available pleadings with a reporter. Did the trial court err when it sanctioned Plaintiffs' counsel for engaging in conduct that Prof.Cond.R. 3.6(b) and the First Amendment protect?

INTRODUCTION

With their brief, Appellants attempt to rewrite history and invite the Court to rewrite Ohio law to effectively eliminate claims for intentional infliction of emotional distress and wrongful discharge in violation of public policy. They mislead the Court from the start by claiming to be mere "surrogate villains," "who were alleged only to have discouraged or disapproved of Plaintiffs' … efforts to report or oppose" the sexual abuse of a nine-year-old girl by Appellants' client, the girl's father. (Appellants' Br. at 2–3)(internal quotations omitted). But this wishful telling avoids that the jury's verdict was based on its finding, by "clear and convincing evidence," that Appellants not only retaliated against Plaintiffs to suppress and delegitimize Christina Cruz's child-abuse report, but in doing so engaged in conduct that is "extreme and outrageous" under Ohio IIED law, "beyond reasonable bounds of decency and ... excessive, wanton, or gross under the circumstances." (T. 3482:16–23; R. 361–62). As Appellants pointed out in the trial court, Ohio courts define "extreme

and outrageous" conduct extremely narrowly. (R. 74, ENGS Motion for Summary Judgment v. Cruz, p. 34). If Appellants were merely "surrogate villains" as they claim, they would have appealed the jury's finding on this issue as being unsupported by the evidence, as well as the jury's determination that Appellants terminated Plaintiff Heidi Kaiser because she resisted their efforts to suppress Cruz's report. (T. 3490:13–22; R. 361–62).

But they are unable to challenge the evidence that they engaged in the "extreme and outrageous" conduct as alleged, so Appellants instead attempt to excuse themselves by arguing that their conduct was, as a matter of law, harmless. First, as to Cruz's claim for intentional infliction of emotional distress, they argue that an IIED plaintiff must be *completely* debilitated by the defendant's conduct to establish a legally cognizable claim. And regarding Kaiser's claim for wrongful discharge in violation of public policy, Appellants – while conceding the jury's finding that they terminated Kaiser, without an overriding business justification, because she refused to participate in their attempt to suppress Cruz's child-abuse report – nevertheless argue that, as a matter of law, Ohio's public policy of preventing child abuse would not be put at risk by permitting employers to engage in such retaliatory conduct. Neither logic nor Ohio law supports these positions, as discussed below.

Also below, Cruz and her counsel set forth three cross-assignments of error pertaining to the Court's rulings on three post-trial motions. The first is regarding the trial court's remittitur of the jury's $75,000 economic-damages award to Cruz despite competent, credible evidence supporting the verdict. The second assignment of error asserts that the trial court abused its discretion by slashing Plaintiffs' attorneys' fees award by more than 75% of the lodestar calculation, frustrating the purpose of the fee award: to deter the "extreme and outrageous" conduct at issue. Finally, the third cross-assignment of error pertains to the trial court's sanction of Plaintiffs' counsel for sharing publicly available pleadings and scheduling information with a newspaper editor despite the fact that this conduct is protected by the First Amendment and explicitly permitted by Prof.Cond. R. 3.6.

STATEMENT OF FACTS

1. The English Nanny & Governess School sells Hollywood dreams, "unlimited" salaries, and exclusive access to "high-profile" clients for nannies & governesses who complete their three-month training course.

Defendant-Appellants Sheilagh Roth and Bradford Gaylord are the sole owners and managers of Defendant-Appellant corporations, English Nanny & Governess School and English Nannies & Governesses, Inc. (together, "ENGS"), a nanny training school and placement agency in Chagrin Falls, Ohio. (T. 160: 19–21; 161: 12–18).

ENGS sells, for about $10,000 per student, a three-month training program of "unique curriculum … taught by a distinguished academic faculty … exclusively dedicated to the education, training and placement of Certified Professional Governesses and Certified Professional Nannies." (T. 153:19–154:9; 176:10, Ex. 130). It advertises decades "of leadership in educating Certified Professional Nannies and Certified Professional Governesses," and "the placement of nannies in the top nanny jobs internationally and in the US." (T. 166:21–167:13; 176:10, Ex. 130). As of 2011, ENGS was one of only two "nanny schools" in the United States and one of fewer than ten such schools in the world, and claims that its "certified graduates are the recognized leaders in the profession." (T. 167:22–25; 168:21–23).

Nannies who are accepted and complete ENGS's program become "Certified Professional Nannies" who are then eligible to be placed through the placement service with ENGS's "high-caliber" clientele, which has historically included many celebrities and extremely wealthy families, including Troy Aikman, James Brown, Billy Joel, and Stevie Wonder. (T. 152:4–25; 154:10–15; 200:23–202:5; 207:11–17; 308:15–19; 2270:4–2273:20). ENGS clients register with the placement service for a $350 fee, and the placement service then works to match them with an ENGS graduate to hire as a nanny or governess. (T. 155:12–156:4). The ENGS placement service places only ENGS graduates, and under an "Exclusive Placement Agreement" that it enters with all ENGS students, it

is obliged to "make all possible effort" to arrange employment for its graduates, who are also promised a right to "lifetime placement" through the corporation. (T. 156:5–7; 254:15–259:7; 2240:16–25). ENGS advertises on its website and Gaylord confirmed at trial that ENGS's "registered families" are "high-profile," and their "graduates are earning the highest salaries in private childcare." (T. 2244:14–2245:24).

ENGS's website also prominently features the "constant media attention" the business has received. (T. 170:20-171:12; 173:20-174:8; 175:9-18). Most prominently, in the summer of 2011, just weeks before the events giving rise to the lawsuit at issue, ENGS was featured on a segment of ABC's *Nightline*, titled *Celebrity Secrets: Mommywood*, in which the program's host, Lara Spencer, reported that, "even though attending the school costs each student a whopping $10,000, each nanny stands to make that back almost immediately." (T. 209:6–11; 259:15–22, Ex. 98). In this segment, Mr. Gaylord states that earning potential for ENGS graduates is "unlimited," and that he "ha[s] people making exorbitant salaries," up to $250,000. (T. 2275:21–2276:23). In a contemporaneous news article that appeared at Cleveland.com about ENGS's Nightline appearance, Gaylord explained that, "his dream [was] to host a nanny school reality show." (T. 191:16–22; 2274:1–7).

Roth acknowledged that ENGS provided its students with "Mary Poppins-type carpetbags," and that her students viewed famous fictional and fictionalized nannies like Maria Von Trapp of "The Sound of Music" and Fran Drescher's character in the long-running sitcom "The Nanny"—each of whom ended up in a romantic relationship with her wealthy client—as "ideals to strive for." (T. 186:1–187:2; 188:7-14; 19–25).

In various media appearances, including the Nightline segment and a *Sun News* article that appeared at Cleveland.com, ENGS advertised that they train their nannies to dine with royalty. (T. 177:17–24; T. 206:15–18). When asked at trial to identify the royalty for whom their clients have

worked, Roth and Gaylord could only name a German "count" named Von Bismarck, and Roth testified that she had "a team" of up to five women who were hired "over the course of time" to work for "a very large" and "very private" family that is "part of the royal family" in the United Arab Emirates. (T. 181:3–184:4). Roth explained that, while she knew that one of these ENGS graduates was still in the UAE working for this family, she did not know if any of the rest were, "because they are very -- very confidential." (R. 182:23–183:18). As of May 4, 2011, the following notice was posted on the ENGS website: "Attention graduates. We have a number of positions available with the Royal Family in Abu Dhabi, United Arab Emirates, as well as a European Presidential family." (R. 2248:8–21; 2254:21–24, Ex. 186).

2. ENGS promised Christina Cruz protection from abuses inherent in the home-childcare industry.

Before attending ENGS, Plaintiff-Appellee Christina Cruz, a native of the Albany, New York area (T. 708:17), had various discussions with ENGS representatives about their program's benefits. This included protection from abuses inherent in the home-childcare industry, of which Ms. Cruz wrote in an email to ENGS admissions director Lori Raichilson, in January of 2011, before she enrolled in the school:

> I have yet to find positions consistent with professional household industry standards, laws and regulations, (as indicated in the Household HR Handbook, 'How to Hire a Nanny,') and find the families that treat or even respect this position as a professional job with offered benefits, health insurance, vacation, or even overtime compensation are few and far between. …
>
> So, yes – I am still interested in the school as there is definitely something to be said for this training and the protection that goes with it in dealing with this type of employment.
>
> I have learned even from my first work experience as a Nanny that the waters can become very murky when mixing employment in a family setting, as standardized practices in the real world are easily blurred and neglected. (T. 731:14–734:16).

Cruz also discussed these issues with Gaylord "in depth," and was assured that Gaylord "share[d] many of the same viewpoints regarding the industry in general." (T. 736:17–21). Gaylord communicated to Cruz that he was "confident [she] would get a great position which [she] would thrive on." (T. 735:2–10). And ENGS promises to work on behalf of all of its graduates to "negotiat[e] favorable contractual agreements, compensation and benefits for outstanding nanny jobs." (T. 2245:5–11).

3. **Cruz attended ENGS in 2011 after meeting "the high admissions standards" for acceptance, including a background check and psychosocial screening.**

As a condition to Cruz's admission to the program, Defendants, as they did with all of their students, put her through an extensive background check, and a "psychosocial assessment" by a licensed therapist who determined that Cruz was fit for admission to ENGS and placement as a nanny. (T. 391:21–392:4; 393:6–20). As part of the psychosocial screening, Defendants spoke with Anna Burky, MD, a psychiatrist who treated Cruz for anxiety issues in 2008. (T. 498:7–9; R. 213, Burky Dep. at 77:2–9, 78:2–18). As reflected by Dr. Burky's phone records, she told Defendants that Cruz was "stable" and that she'd "be fine" to work as a nanny. (T. 498:7–9; R. 213, Burky Dep. at 82:18–83:11).

On April 4, 2011, Sheilagh Roth sent Cruz a letter stating that Cruz "[has] met [ENGS's] high admissions standards and [is] now qualified for provisional acceptance into ENGS's Professional Nanny program for Session 104, commencing on April 4, 2011 [to] June 24, 2011 … ." (T. 215:6–20).

4. **ENGS sent Cruz to interview with their client, where she witnessed him sexually abuse his 9-year-old daughter.**

After Cruz graduated from ENGS's training program earning mostly A or A+ grades in her classes, several ENGS clients were interested in hiring her, with one offering to fly her to Aspen, Colorado for an interview. (T. 218: 3–8; 1834:6–1835:18; 1836:15–1837:9). Another of these clients,

Vince Willis, a single father with two young daughters who represented himself to be a Harvard and University of Pennsylvania-educated attorney, flew Cruz to West Chester, PA at his own expense to spend three days with the family as an extended job-interview. (T. 260:11-14; 1836:15–1837:9). In convincing Cruz to attend the interview with Willis, Gaylord, who testified that "I call myself a matchmaker," told Cruz about other nannies who married single clients and said that this man "could be your knight in shining armor." (T. 763:21–765:13; 2417:20–23; 2420:4–7).

While on this interview, Ms. Cruz witnessed Willis engaged in sexual activity with his nine-year-old daughter. (T. 776:25–782:16). After safely arriving home in New York, she sought Defendants' guidance in reporting the suspected abuse under the standard that they had taught her at the nanny school: that child abuse is to be reported if it is suspected "for any reason; physical proof or other validation is not required." (T. 231:7-232–11; 782:17–785:7; 789:11–796:17; 800:10–824:23; 1689:16–1690:16). But instead of helping Cruz, Defendants did the opposite, abusing their position of power over her in attempting first to suppress her report, and then to delegitimize it (and Cruz, in the process) when she insisted on making it over their objections.

5. Defendants attempted to suppress Cruz's report of child abuse.

Fearing damage to their public image and business prospects as well as a lawsuit from the alleged sexual predator, Defendants first tried to suppress the report. (T. 1860:10–15). On the evening of Saturday July 9, 2011, the day she returned to New York from her interview, Ms. Cruz made a full report of the suspected child-sex-abuse to Plaintiff-Appellee Heidi Kaiser, who was working as ENGS's placement director. (T. 1849:1–1851:8). The following Monday morning, July 11, Kaiser relayed Cruz's report to Gaylord in his office. (T. 1851:9–15).

Gaylord immediately reacted with anger, directing Kaiser to suppress Cruz's report despite having no reason at all to doubt it. (T. 1851:16–20; 1632:3–10; 1633:2–6). "She doesn't know what

she saw; she's crazy; he's going to sue us." Gaylord said. "Tell her not to report. No more interviews for Christina." (T. 1851:16–20).

6. **ENGS employee Heidi Kaiser resisted Defendants' efforts to suppress Cruz's report.**

Kaiser and Gaylord then had an argument in which Kaiser told Gaylord that he had no reason to doubt Cruz's report, expressed her disapproved of Gaylord's stated intent to blackball Cruz from further interview opportunities, and told Gaylord that he should "err on the side of caution for this young girl." (T. 1851:21–1852:25). In response, Gaylord said, "she didn't know what she saw, she's crazy," and ordered Kaiser to send more nanny resumes to Willis. (T. 1852:22–25).

In response to Gaylord's instruction, Kaiser first emailed Willis two resumes that she knew would be unacceptable to him. (T. 1856:24–1857:11). Willis responded to Kaiser by email on July 12 to complain that, "clearly we are not being given access to the A level talent," and stated, "I am not sure where we go from here. I am deeply concerned and perhaps it would be best to just refund our money." (T. 1859:15–1860:5).

On the same day, Kaiser informed Gaylord that she would not participate further in the attempted placement of a nanny with Willis. Gaylord reiterated that he was afraid that Willis would sue ENGS and again ordered Kaiser to keep Cruz from reporting. (T. 1860:6–1861:1).

Kaiser disregarded Gaylord's instruction to suppress Cruz's report. Instead, she warned Cruz that Defendants were upset about her report, and "wanted her blackballed." (T. 1866:1–22).

7. **Defendants terminated Kaiser's employment in retaliation for her resistance to their efforts to suppress Cruz's report.**

The next day, July 13, 2011, Defendants wrote Kaiser a letter with the subject line: "Job performance," accusing her of "unsatisfactory results" in creating an Excel spreadsheet "to detail all current clients and all graduates/students currently seeking positions" and "requesting to see a working document by the end of the day." (T. 447:6–23; 1873:9–19).

The next day, July 14, Cruz told ENGS Director of Operations Barbara Francis that she was "getting the feeling that [Gaylord was] not happy about [her report], that it's going to affect [her] placement." When pressed, Cruz told Francis that "Heidi kind of indicated that [Gaylord] was a little annoyed [by the report] and that it would cause a big mess." (T. 793:13–794:14).

Four days later, on July 18, 2011, Defendants terminated Kaiser's employment. (T. 1879:12–20). Prior to the July 13 letter, ENGS had never created a document suggesting that Kaiser was deficient in any way in her work performance. To the contrary, less than three weeks before Kaiser's termination, Roth wrote letters to two separate parties praising her as a "great asset" and "wonderful asset" to ENGS, noting in one of the letters that, "we love having Heidi here." (T. 458:3–16; 459:2–16). Kaiser's former ENGS co-worker Cheryl McNulty testified to Kaiser's "dedication" to her job, and that she "worked hard to place the girls." (T. 1638:2–1639:8).

The evidence showed that the spreadsheet issue was a pretext for retaliation. There was no evidence that it was essential to ENGS's operation or Kaiser's performance of her duties, and Kaiser's successor as ENGS Placement Director, Lynne Behrman, testified that she does not use any such spreadsheet or master document to track the work done matching graduates with clients, and that no one had ever asked her to create such a document. (T. 2111:15–18; 2112:1–14).

On appeal, Defendants concede the jury's finding that they terminated Kaiser, without an overriding business justification, because she refused to participate in their attempt to suppress Cruz's child-abuse report. (T. 3547:18–3548:3).

8. Defendants retaliated against Cruz in a last-ditch effort to suppress and delegitimize her report.

Meanwhile, contrary to public policy and their own curriculum, Defendants continued to urge Cruz that she should not make her report, emphasizing over all else that reporting child abuse "can ruin lives." (267:23–268:8; 804:13–16; 818:25–819:10; 1694:10–20; 2319:1–12). They repeatedly advised Cruz that she was not a mandated reporter, but did nothing to follow up on the applicable

legal standard despite having received advice from Shari Nacson, a social worker whom ENGS had recently hired to teach a class on recognizing and reporting child abuse, that Pennsylvania law mandated a report. (T. 271:19–25; 296:16–298:10; 1727:20–1729:5; 1761:8–16; 1768:24–1769:9). Defendants also made clear to Cruz that her career prospects would suffer if she made the report, as relayed by Kaiser, as well as by directly communicating to Cruz that her access to job opportunities through their placement service would depend on whether she made the report. (T. 1866:1–22; 809:20–810:3; 533:20–22).

Cruz nevertheless persisted, and told Roth that she would make her report whether ENGS participated or not. So after having put Cruz off for weeks,[1] Roth finally advised her to call Nacson. (T. 818:25–819:4, 820–12-821:19). After speaking with Cruz, Nacson advised both Cruz and Roth that the report needed to be made. (T. 530:6–12). But instead of accepting this advice, Roth and Gaylord doubled down on their attempt to suppress the report, and trashed Cruz's reputation and career prospects in an effort to justify their cover-up.

As reflected in a written log that Nacson kept of her interactions with Defendants relating to Cruz's report, Roth embarked on a "campaign to persuade" Nacson that Cruz was a lunatic; someone "unstable," "untrustworthy," and "almost schizophrenic," whose report of suspected child abuse should be ignored. (T. 512:6–513:7; 542:16–554:12). Nacson disregarded this attempted character assassination, explained to Roth that Cruz "had been consistent, and very professional the

[1] Despite Kaiser's testimony that Roth and Gaylord knew about Cruz's report on July 11 (T. 1853:3–25), Roth claimed at trial that she didn't learn about it until July 26, the same day that she advised Cruz to speak with Nacson. (T. 263:18–264:16). Gaylord changed his deposition testimony to claim that he didn't learn about the report until July 25. (T. 2288:11–2293:9). Yet ENGS Director of Operations Barbara Francis, who is third in command at ENGS behind Roth and Gaylord, testified that she first heard from Cruz about her report as early as July 13 or 14, but never spoke of it with Gaylord, and didn't speak of it with Roth for "several days, perhaps more than a week" thereafter. (T. 1759:24–1760:9; 1764:14–21; 294:3–25). Roth, Gaylord and Francis each testified that the first time they learned of Cruz's report was when Cruz told them about it herself, separately. (T. 265:6–9; 1756:7–15; 1758:15–18; 2288:11–14).

entire time," and advised Roth in writing that there should be no further delay in making the report. (T. 288:24–292:16; 554:16-560:15–20). She then advised Cruz to seek counsel against ENGS, assisted Cruz with making a full report to law enforcement, and resigned her position with ENGS due to Defendants' mistreatment of Cruz and her report. (T. 540:11–542:88; 561:10–563:18, 566:6–18; 570:25–573:4; 315:21–345:18; 349:22–23, Ex. 21).

Meanwhile, Defendants proceeded with their efforts to delegitimize Cruz and her report, including by misrepresenting communications that they initiated with Cruz's former therapist Dr. Burky in a surreptitious effort to support their so-called "conclusion" that Cruz was medically unfit to work as a nanny.[2] (T. 376:9–377:10; 378:3–18; 381:25–383:23; 393:3–23; 394:8–396:3; 398:10-399:2; 402:25-403:15; 406:2-408:8; 412:1419:1; 422:4–423:6; R. 213, Burky Dep. 82:10–83:11; 86:17-95:25; 114:5–13). Additionally, they withheld employment opportunities from Cruz despite their contractual obligation to "make all possible effort to arrange interviews" for her, and despite that before Defendants perceived an interest in blackballing Cruz, they regularly promoted her to their clients, several of whom expressed enthusiastic interest in hiring her. (*See* Section 5 at page 8 above, citing T. 218:3–8; 1834:6–1835:18; 1836:15–1837:9). But after Cruz reported what she witnessed in the Willis home on June 9, Defendants repeatedly recommended 20 other indistinguishable candidates to 11 other families a total of 48 times before August 18, while withholding these opportunities from Cruz for no other apparent reason. (T. 2199:13–2201:1; 2202:6–2203:4).

Defendants eventually cut Cruz off completely, while never mentioning to her their so-called "conclusion" that she was medically unfit to work as a nanny and never asking her to submit to a

[2] In her videotaped testimony that was presented at trial, Dr. Burky disavowed Defendants' attempt to misrepresent their communications with her, confirming that throughout her conversations with Defendants she never communicated anything about Cruz's health that was inconsistent with what she told them in 2008, when she told Gaylord that Cruz was "stable" and would be "fine" to work as a nanny. (R. 213, Burky Dep. 82:10-83:11; 86:17-95:25; 114:5-13). Roth could not deny that she only became concerned with digging into Cruz's medical history after Cruz witnessed the suspected child-sex-abuse. (T. 383:6-384:2; 386:14-18).

follow-up examination. Instead, they falsely blamed their so-called "inability" to find her a placement on "a slow economy." (T. 413:7–10; 424:20–425:10; 427:15–20; 428:22–429:7; 438:18–439:11). Defendants were so intent on avoiding the consequences of Cruz's report that they immediately attempted to send another nanny to work for the alleged sexual predator without any warning to the nanny about Cruz's allegations, even after that nanny raised a specific concern that Willis might be racist. (T. 357:14–24; 363:5–366:22; 368:1–369:2).

The evidence at trial, as outlined above, made clear that Defendants were primarily in the business of selling servants with ultimate discretion and loyalty to their clients. (*See also*, T. 208:3–13). Defendants believed they were protecting their business by punishing Cruz for violating their preference that nannies stay silent at all costs about what goes on behind the closed doors of their "high-profile" clientele.

9. Cruz suffered serious emotional injury as a result of Defendants' retaliation.

In retaliating against Cruz, Defendants destroyed her career prospects and inflicted serious emotional injury on her, as diagnosed by Cruz's treating physician and a forensic psychiatrist who offered expert testimony. This evidence is discussed in detail in Section 1B beginning at page 21, below.

10. Cruz and Kaiser prevailed on their claims after a 26-day jury trial.

After a 26-day jury trial in which the parties introduced testimony from 15 different witnesses and more than 150 documentary exhibits, Plaintiffs succeeded on all three of their claims against Defendants. The jury awarded the following:

- $150,000 in compensatory damages—split evenly between economic and non-economic damages—and $168,750 in punitive damages on Cruz's IIED claim;
- $10 in nominal damages on Cruz's breach-of-contract claim; and
- $20,000 in compensatory damages and $54,000 in punitive damages on Kaiser's claim of wrongful discharge in violation of public policy.

In addition to this $392,000 in damages, the jury also determined that Ms. Cruz and Ms. Kaiser should receive attorneys' fees and expenses. (R. 361–62, JEs of 6/19/15; T. 3543:14–3549:4; 3667:18–3675:22).

The trial court then granted Defendants' motion for remittitur of the $75,000 economic damages award to Cruz, and applied statutory punitive-damages caps to reduce the total damages award to $194,066.76. (R. 385, JE of 8/20/15). The trial court then awarded Plaintiffs $125,504.45 in fees and expenses, based on Plaintiffs' 40% contingency-fee agreement with their counsel, making $319,571.16 the total amount awarded. (R. 390, 398, Rulings of 8/28/15 (at p. 7-8) and 9/29/15).

LAW AND ARGUMENT

1. Appellants' first assignment of error should be overruled because the jury's verdict on Cruz's claim for intentional infliction of emotional distress was supported by sufficient evidence that Cruz suffered a serious, or, "severe and debilitating" emotional injury.

In their first assignment of error, Appellants argue that the trial court erred by denying Defendants' motions for directed verdict and JNOV on Appellee Cruz's IIED claim "in the absence of evidence of an emotional injury that was both 'severe and debilitating.'" The Court's review here is *de novo*, and it should only sustain the assignment of error if, "after construing the evidence most strongly in favor of [Appellee], it finds that reasonable minds could come to but one conclusion … and that conclusion is adverse to [Appellee]." *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶ 14 (8th Dist.).

Appellants fail to meet their burden. Contrary to their argument, the serious, or, "severe and debilitating" harm required to establish an IIED claim need not be harm that completely destroys the plaintiff's ability to function. Rather, "'debilitate' means to impair the strength, or weaken," and "severe and debilitating" distress is that which substantially impairs the plaintiff's ability to function. *See Binns v. Fredendall*, No. 85AP-259, 1986 WL 4939 at *6 (Ohio App. 10 Dist., Apr. 22, 1986). Ohio

law recognizes the crucial gate-keeping role that testifying physicians play in assessing whether emotional injury is "severe and debilitating," or, "serious," and medical diagnoses of traumatically induced depressive or anxiety disorders constitute legally sufficient evidence of such harm. (*See* Section 1. A. iii, at p. 19 below). At trial, the jury was properly instructed and its verdict was supported by Cruz's own testimony and that of three physicians demonstrating that she suffered substantial impairment as a result of Defendants' extreme and outrageous conduct, including a recurrence and substantial aggravation of major-depressive and anxiety disorders. (*See* Section 1 B. at p. 21, below). Appellants' cherry-picked evidence suggesting that Cruz was able to function at some level in some aspects of her life does not mandate a ruling to the contrary. As explained fully below, Appellants' first assignment of error should be overruled.

A. The trial court applied the proper standard in evaluating whether Cruz presented sufficient evidence that she suffered from serious emotional injury.

To prove a claim for intentional infliction of emotional distress, a plaintiff must show:

1. that [defendant] either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff;

2. that [defendant's] conduct was extreme and outrageous, that it went beyond all possible bounds of decency and that it can be considered as utterly intolerable in a civilized community;

3. that [defendant's] actions were the proximate cause of the plaintiff's psychic injury; and

4. that the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it.

Pyle v. Pyle, 11 Ohio App.3d 31, paragraph two of the syllabus, 463 N.E.2d 98 (8th Dist. 1983).

Appellants challenge the jury's verdict only on the fourth element, claiming that the trial court did not apply the proper standard to evaluate whether Cruz suffered "serious" harm. (Appellants' Br. at 16). In doing so, they misrepresent the law, and urge the Court to adopt a

perverse standard that would allow defendants to inflict any measure of harm by "extreme and outrageous conduct" short of completely destroying a plaintiff's ability to function.

i. Serious, or, "severe and debilitating" emotional injury is that which substantially impairs a plaintiffs' ability to function; complete debilitation is not required.

In Ohio, "[s]erious emotional distress describes emotional injury that is both severe and debilitating." (Appellants' Br. at 18-19 citing *Paugh v. Hanks*, 6 Ohio St.3d 72, 78 (1983)). But Appellants take a tortured detour from this standard in attempting to convince the court that "debilitating" injury refers only to injury that is "completely debilitating." They do so by invoking a "quagmire" in Ohio IIED law that does not exist, selectively citing some of the more extreme examples of emotional injury discussed in Ohio cases (*Id.* at 23–24), and accusing the trial court of applying a "watered-down standard" based on its observation that the "emotional stress caused by [the Defendants] impaired – although [did] not completely debilitate [Cruz] … ." (*Id.* at 25). From there, Appellants cherry-pick details from Cruz's testimony suggesting that she was able to function at some level in some aspects of her life to argue that, under their invented "completely debilitating" standard, the jury's verdict must be undone. (*Id.* at 25–30).

But "the Supreme Court's use of the word 'debilitating' [does not] require the emotional distress to be of extreme gravity in order for the injured party to be entitled to recovery." *Binns v. Fredendall*, 10th Dist. No. 85AP-259, 1986 WL 4939 at *6 (Apr. 22, 1986). The *Binns* Court cited the Ohio Supreme Court's statement in *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983), quoted with approval in *Paugh*, 6 Ohio St.3d 72 at 78, that: "Serious emotional distress can be as severe and debilitating as physical injury and is no less deserving of redress." The court then went on to explain:

> [T]he word 'debilitating' … does not suggest one so feeble as to require a straight jacket or nursing care … but, rather, to debilitate means only to impair the strength or to weaken. Thus, emotional distress may be found to be severe and debilitating and, accordingly,

> serious, where the degree of emotional stress is more than a trifling mental disturbance, mere upset or hurt feelings.

Binns, 1986 WL 4939 at *6.

This is consistent with the Supreme Court's standard stated in *Paugh* (cited approvingly by Appellants) that "severe and debilitating" emotional distress "may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." (Appellants' Br. at 19). And it is also consistent with the trial court's instructions to the jury,[3] which stated:

> [T]he emotional injury [must be] serious and of a nature that no reasonable person could be expected to experience without serious suffering. … Serious emotional distress is distress that a reasonable person, under normal conditions, would not be able to contend with or face satisfactorily without substantial impairment of her ability to function as she normally does. The emotional distress cannot be brief in duration, but must last for a sufficient period of time to impair one's ability to carry on normal functions. The emotional distress cannot be merely upset or hurt feelings or anger. People are required to endure some emotional discomfort from incidents which do not cause physical harm. (R. 3480:22-25; 3483:13-3484:2).

Simply put, where emotional distress creates significant or "substantial impairment of [a reasonable plaintiff's] ability to function as she normally does" (R. 3483:13–18), then that plaintiff is "unable to cope adequately" with that distress. *Paugh*, 6 Ohio St.3d at 78. Her ability to normally function has been significantly or substantially weakened, thus she has suffered "more than a trifling mental disturbance, mere upset or hurt feelings," and the harm inflicted is properly considered to be "both severe and debilitating." *Paugh*, 6 Ohio St.3d at 78; (T. 3483:23-24). As shown below, Ohio

[3] Appellants do not quote or even mention the jury instructions in their brief. Rather, their accusation that the trial court applied a "watered-down standard" is based entirely on selected statements from the court's opinion denying their motion for JNOV. (Appellants' Br. at 24-25). Specifically, appellants criticize the trial court for its statement that the "emotional distress caused by [Appellants] impaired – although not completely debilitating her – her ability to carry on normal functions." (*Id.* at 25). But this statement is consistent with Ohio law in that complete debilitation is not required to establish an IIED claim.

courts routinely apply this standard with the critical assistance of expert physicians in assessing whether sufficient evidence exists that plaintiffs are in fact substantially impaired. It would be absurd and cruel if a plaintiff were required to show complete debilitation to recover for injury intentionally inflicted by another's extreme and outrageous conduct. Ohio law properly requires no such thing.

ii. Ohio law recognizes the crucial role that testifying physicians play in assessing whether emotional injury is serious.

Seeking to support their invented "complete debilitation" standard for IIED claims, Appellants point out the Restatement's acknowledgement, in 1965, of prior "fear of fictitious or trivial claims" and "the difficulty of setting up any satisfactory boundaries to liability." (Appellants' Br. at 18). Appellants, however, dismiss the fact that such boundaries have long since been set by the requirement that a plaintiff "present some guarantee of genuineness in support of his or her claim, such as expert evidence, to prevent … judgment in favor of the defendant." *Paugh*, 6 Ohio St.3d at 78. "The Ohio Supreme Court has held, 'In most instances, expert medical testimony will help establish the validity of the claim of serious emotional distress.'" *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 822 N.E.2d 830, ¶ 40 (2nd Dist., 2004) citing *Schultz*, 4 Ohio St.3d at 135. While expert medical testimony is not required to establish "serious" emotional distress in Ohio, courts have observed that it helps "prevent the tort from being reduced to a single element of outrageousness," allowing "the elements of outrageous conduct and serious mental injury [to] remain distinct." *Id.* at ¶ 43.

Of course, Appellants would prefer the Court ignore the voluminous testimony provided by physicians showing that Cruz suffered serious emotional injury (hardly mentioned in Appellants' brief but discussed in detail below). So rather than acknowledge the naturally crucial gate-keeping role that physicians play in assessing the level of Plaintiffs' impairment to determine whether emotional harm is "severe and debilitating," Appellants instead argue that the sky is falling, claiming that, "all that seems to be required is a belated trip to a counselor, or a professional expert witness."

(Appellants' Br. at 24). This ignores the basic reality that physicians are the only ones who can testify to psychiatric impairment with medical certainty.[4] As such, and as shown below, it is properly a matter of routine in Ohio courts that when a plaintiff presents independent evidence that a medically diagnosed psychiatric disorder resulted from a defendant's "extreme and outrageous" conduct, reasonable minds may infer "substantial impairment" and, thus, "severe and debilitating" harm. Appellants were free to and did present their own expert testimony and cross-examine the physicians called by Cruz in an attempt to discredit her medical evidence. The jury was well within its province to weigh this evidence, as it did, in Cruz's favor.

iii. Reasonable minds may conclude that serious injury exists when a plaintiff presents independent evidence that a medically diagnosed psychiatric disorder, or an exacerbation of such a disorder, resulted from defendant's "extreme and outrageous" conduct.

The very purpose of codifying psychiatric disorders is to recognize and treat significant mental impairment. Thus, while testimony from a doctor is not necessary to establish serious, or "severe and debilitating" harm in Ohio, where independent evidence of a diagnosis is present, such harm may be found. *See Russ v. TRW*, 59 Ohio St.3d 42, 570 N.E.2d 1076 (1991) (serious harm established by testimony from treating psychiatrist that plaintiff suffered from depression and PTSD as proximate result of defendant's conduct); *Reamsnyder v. Jaskolski*, 10 Ohio St.3d 150, 462 N.E.2d 392 (1984) (serious harm where plaintiff was taken to "emergency room for treatment," with "a headache, nosebleed and was suffering from extreme nervous tension," and was recommended for psychiatric treatment); *Lewandowski v. Penske Auto Group*, 8th Dist. Cuyahoga No. 94377, 2010 WL 5238581 (Dec. 16, 2010) (serious harm where "a treating psychologist testified that both [plaintiffs] suffered from post-traumatic stress disorder and other conditions as a result of the traumatic

[4] Appellants' "floodgates" argument is further undermined by the fact that, as Appellants pointed out in the trial court, Ohio courts set an extremely high bar for the "extreme and outrageous conduct" element of the IIED tort. (R. 74, ENGS Motion for Summary Judgment v. Cruz, filed 4/29/13, p. 34).

incident"); *Radcliff v. Steen Elec., Inc.*, 164 Ohio App.3d 161, 841 N.E.2d 794 (9th Dist., 2005) (serious harm established by two affidavits from plaintiff's friends observing that plaintiff was "crying and shaking;" "very upset and could not talk without crying"); *Gulley v. Markey*, 5th Dist. Holmes No. 01COA030, 2003 WL 169953 (Jan. 24, 2003) (serious harm established by testimony from doctor stating that plaintiff suffered from PTSD and dysthymia (a form of depression not as elevated as major depression but likely to last a longer time) as a result of defendant's conduct); *Harmon v. GZK, Inc.*, 2nd Dist. Montgomery No. 18672, 2002 WL 191598 (Feb. 08, 2002) (serious harm where defendant "presented evidence that she sought counseling and that she has been placed on anti-depressants as a result of [defendant's conduct]"); *Uebelacker v. Cincom Systems, Inc.*, 48 Ohio App.3d 268, 549 N.E.2d 1210 (1st Dist. 1988) (serious harm established by affidavit of plaintiff's wife, asserting that plaintiff "was highly emotional, moody, tearful, forgetful, distrusting of others, compulsive, uncommunicative and unsupportive"); *Nichols v. Indian River Corr. Facility*, Ct. of Cl. No. 2004-06852, 2005 WL 1020895 (Apr. 21, 2005) (serious harm established by letter from treating psychologist opining that plaintiff suffers from PTSD as a result of plaintiff's conduct).

And the jury was well within its province when it rejected Appellants' efforts to dismiss the harm they inflicted upon Cruz by pointing out that she suffered from depression and anxiety disorders prior to attending ENGS. "[T]here is no free pass to inflict emotional abuse on … people because they have previously suffered through emotional trauma." *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 822 N.E.2d 830, ¶ 37 (2nd Dist., 2004). "Despite past incidents of psychological problems or emotional trauma," plaintiffs have "every right to pursue a properly supported claim for intentional infliction of emotional distress." *Id.* at ¶ 38. Evidence of the exacerbation or recurrence of pre-existing conditions, as Cruz presented at trial, constitutes a sufficient showing of severe and debilitating harm. *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 411, 644 N.E.2d 286, 289 (1994).

B. Cruz presented sufficient evidence from which reasonable minds could conclude that she suffered from serious emotional injury, including her own testimony and that of three physicians confirming that she suffered from a recurrence of major depressive disorder and a worsening of a pre-existing anxiety disorder.

At trial, Cruz offered testimony as to the substantial impairment she suffered as a result of Appellants' "extreme and outrageous" conduct. This was supported by testimony from three physicians, including Defendants' own expert, confirming that Defendants' conduct caused Cruz to suffer a recurrence of major depressive disorder and an exacerbation of a pre-existing anxiety disorder. Consistent with the law cited above, more than enough evidence existed to support the jury's finding that Cruz suffered serious harm.

i. Christina Cruz's testimony

At trial, Cruz testified to the impact of Appellants' attempt to suppress her report and their subsequent retaliation against her. She explained that she has suffered sustained depression, with "constant emotional issues," "panic attacks" and "anxiety attacks" caused by Appellants having "ma[de] her choose between [her livelihood] … or reporting this about a little girl." (T. 865:3–11; 1351:21–24). She testified that she has "felt powerless," and "awful," her "sense of self-esteem is not the same," she has had trouble sleeping, has suffered "anxiety attacks and nightmares," has alternated between being unable to eat and "stuffing [her] feelings," and that Appellants' abusive conduct "has affected how [she] feel[s] about [her]self" and "affected her relationships" to the point that she feels unable "to even be in a relationship." (T. 864:8–11; 865:22–24; 867:13–16; 1352:16–21). She testified that she "experience[s] anxiety on the job" and that "the depression is something that [she's] had to hide." (T. 1357:9–16). And she explained of Roth's misrepresentations about her mental health:

> They made me think I was crazy. … I literally thought maybe I was schizophrenic. … Thinking irrational thoughts about myself because I thought that maybe if all these people are saying you're crazy, what's the common denominator? … They made me feel like I'm not even human because I'm – I was on antidepressants …; that I had no

> right to be around children … You shouldn't have to always go around feeling ashamed of yourself because people basically used that as an excuse for getting rid of you. (T. 1354:6–1355:8).

Cruz also introduced emails that she sent to social worker Shari Nacson in late August of 2011 describing "deep depression," "intense burning" and "paralyz[ing]" anxiety that also caused physical symptoms. (T. 879:1–17). She explained that Appellants' conduct "tie[d] up [her] mind and confuse[d] her … mak[ing] thinking clearly, calmly and logically a problem." (*Id.*) And her testimony established that she had been unable to maintain steady employment such that she had not earned more than $10,000 in a year since 2011. (T. 1312:6–22).

ii. Dr. Monifa Seawell's expert testimony

Dr. Monifa Seawell provided expert testimony on Cruz's behalf that established the medical significance of the impairment Cruz described. Specifically, Dr. Seawell testified, "to a reasonable degree of medical certainty," that "Cruz had preexisting major depressive disorder and panic disorder, but that she experienced a significant worsening of both of these conditions as a proximate result of [Appellants'] actions," and was left "severely impaired after and as a result of these incidents" with "ongoing symptoms of significant depression and anxiety … likely [to] continue." (T. 1444:2–1445:1; 1447:15–24; 1469:2–16).

Dr. Seawell explained that she "closely reviewed [Cruz's] mental health functioning and how she was doing in the time period before [the events at issue] occurred, and then closely reviewed her mental health functioning and the symptoms she was having after these events occurred." (T. 1448:5–9). She explained in detail the support for her conclusion that, by the time Cruz attended the nanny school in 2011, she was substantially unimpaired by her pre-existing anxiety and depression disorders. (T. 1448:10–1451:11). This explanation included reference to medical records from Dr. Manuel Astruc (who treated Cruz in 2010), showing that she "made a lot of improvement" under his care. (T. 1450:18–1451:11; 1471:6–14).

Dr. Seawell used the Global Assessment of Functioning (GAF) scale, as is generally accepted practice in the psychiatric profession (T. 1442:22–1443:6; 3191:12–18), to assign a GAF score of 61 to 70 to Cruz for the time period of July 2010 to July 2011, just before she attended the English Nanny and Governess School. (T. 1451:17–1452:4). Dr. Seawell explained that a GAF score of 61 to 70 is assigned to:

> Someone who is having some mild symptoms. The diagnostic manual gives the example that someone could be having a depressed mood or some difficulty sleeping, so some mild symptoms or some difficulty in work, school, or how they're functioning. But generally functioning pretty well. (T. 1452:9–15).

Dr. Seawell then proceeded to discuss in detail the substantial worsening of these conditions immediately after Cruz's experience with Appellants, and that her symptoms went from mild to serious, with her GAF score falling from 61-70 to 41-50. (T. 1452:16–1455:). Dr. Seawell explained that a GAF score of 41-50 is assigned to one who is suffering "serious impairment in how they're functioning in different areas ... in school, at work, or socially." (T. 1455:11–18).

And she continued by explaining her detailed evaluation of Cruz's condition from 2011 to the present day, which showed that the severity of these symptoms never subsided, with Cruz's GAF score never again climbing above 41-50, while dipping as low as 21-30 in November of 2013, indicating "an inability to function in almost all areas" and "serious considerations of killing herself." (T. 1456:23–1465:12). Dr. Seawell explained that Cruz's symptoms impaired her ability to function at work (T. 1462:14–1463:1), and testified that from January 2014 to April 2014, Cruz's "depression symptoms were so severe they impacted her academic performance," and that "her feelings of depression, low energy and fatigue also made it difficult for her to concentrate on her work," "which ultimately resulted in her having to withdraw from school." (T. 1466:1–23).

iii. Dr. Fabio Urresta's testimony

Cruz also introduced testimony from Fabio Urresta, M.D., a licensed psychiatrist in New York State who has treated Cruz regularly since July 2011. (T. 1613:9–13; R. 265, Urresta Dep., 13:8; 39:6–20). Dr. Urresta testified that after reviewing Dr. Seawell's expert report and her supporting documentation, his first-hand experience treating Cruz gave him no reason to question Dr. Seawell's conclusions. (*Id.* at 17:10–25:11). He further clarified that he "concur[s] completely [with Dr. Seawell]," "to a reasonable degree of medical certainty," "on the severity of the symptoms and the whole sequence of events and the dynamics that led Ms. Cruz to experience the worsening she experienced." (*Id.* at 119:25-120:13; 144:9–20).

iv. Appellants' medical expert Dr. Joel Steinberg further supported Cruz's claim that she suffered serious emotional harm.

Appellants offered testimony from Joel Steinberg, M.D. to claim that Cruz did not suffer "severe and debilitating" harm. Dr. Steinberg's testimony on cross-examination supported Cruz's claim:

- Dr. Steinberg testified that he found the medical history given by Cruz to be credible, and consistent with the medical history that she gave to Dr. Seawell. (T. 3189:19–3190:7);
- He confirmed that the course of events as alleged by Cruz, if true, could cause a worsening of anxiety or depressive disorders. (T. 3190:17–23);
- He confirmed that "a person with a history of depression or anxiety would be more likely to have a more severe response to a stressor than a person without such a history." (T. 3194:3–8);
- He confirmed that the methods Dr. Seawell used in performing her assessment of Cruz were generally used in the practice of psychiatry. (T. 3191:12–18);
- He expressed his opinion that, prior to Defendants' tortious conduct against her, Cruz was in good mental health ("firing on all eight cylinders") when she came to ENGS in 2011. (T. 3195:7–17);
- And he could not say to a degree of medical certainty that the GAF scores assigned by Dr. Seawell to Cruz over the various time periods at issue were inaccurate. (T. 3200:5–9).

v. The jury was entitled to disregard Defendants' cherry-picked evidence that Cruz was able to function at some level in some aspects of her life.

Under the proper legal standard, as set forth above, the trial testimony discussed above was plenty to allow a reasonable jury to conclude that Cruz suffered harm that was "both severe and debilitating." The evidence Appellants cite to support their claim to the contrary (at pages 25-29 of their brief), could only be significant if Ohio law required complete and total debilitation to support an IIED claim. It does not, and the jury was entitled to reject Appellants' efforts at trial to prove that Cruz was not substantially impaired simply because she was able to function at some level in some aspects of her life. *State v. Washington*, 1st Dist. Hamilton No. C-000754, 2001 Ohio App. LEXIS 3604, *18–19 (Aug. 17, 2001)("[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact, and because the trier of fact is free to believe all, part or none of the testimony of each witness, we should disregard the jury's verdict only in the exceptional case.")(internal quotations omitted).

As Dr. Seawell explained at trial, "It is not inconsistent for someone to be able to function in some areas while still having psychiatric symptoms":

> The DSM explicitly mentions that there can be situations where someone has really serious or significant symptoms but is able to function in certain areas of their life, differently than what you might expect based on their symptoms. … One can have really significant mental health symptoms and go to work and have a job of some sort, but it doesn't mean that they're performing at a high level. They could still have a lot of impairment, but still go to work and try to do something at work, but not necessarily the optimum level of performance. (1460:21-1461:20; 1581:6-12).

The notion that Cruz could not, as a matter of law, have suffered "severe and debilitating" harm simply because she persisted in trying to work and attend school despite her impaired condition, has no basis in law or fact. The Court should overrule Appellants' first assignment of error.

2. Appellants' second assignment of error should be overruled because allowing employers to terminate employees in retaliation for their refusal to suppress child-sex-abuse reports would jeopardize Ohio's public policy of recognizing and preventing child abuse.

For their second assignment of error, Appellants claim that the trial court erred in denying their motions for directed verdict and JNOV on Appellee Heidi Kaiser's claim for wrongful discharge in violation of public policy. As cited above, the Court's review of the denial of these motions is *de novo*. As discussed below, Appellants' second assignment of error is based on another twisted interpretation of Ohio law and it, too, should be overruled.

A. Appellants concede the jury's finding that they terminated Heidi Kaiser, without an overriding legitimate justification, because she refused to participate in their attempt to suppress Cruz's child-sex-abuse report.

To establish a claim for wrongful termination in violation of public policy, a plaintiff must show:

> 1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element);
>
> 2. That [the] dismissal jeopardized the public policy (the jeopardy element);
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> 3. [The] dismissal was motivated by conduct related to the public policy (the causation element); and
>
> 4. [Defendant] lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Alexander v. Cleveland Clinic Found., 8th Dist. Cuyahoga No. 95727, 2012-Ohio-1737, ¶ 21 (Ohio App. 8 Dist., Apr. 19, 2012) citing *Greeley v. Miami Valley Maintenance Contractors.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990); *Painter v. Graley*, 70 Ohio St.3d 377, 384 FN8, 639 N.E.2d 51 (1994).

Appellants concede the jury's finding that they terminated Kaiser, without an overriding legitimate justification, because she refused to participate in their attempt to suppress Christina

Cruz's child-sex-abuse report. (T. 3547:18-3548:3.)[5] They also concede the trial court's holding that Ohio has a clear public-policy of recognizing and preventing child abuse. (T. 3490:1-4). Their second assignment of error is based solely on the jeopardy element, and the rather stunning argument that public policy would not be put at risk if employees could be discharged in retaliation for refusing to participate in an employer's attempt to suppress a child-sex-abuse report. (Appellants' Br. at 33–34.)

B. Ohio's public policy of preventing child abuse is not "adequately protected" so as to justify denying relief to plaintiffs who are terminated for refusing to suppress child-sex-abuse reports.

Appellants argue that Ohio's public policy of preventing child abuse "is adequately protected" by existing criminal and regulatory statutes, public children's services agencies, and the availability of civil damages for child-abuse *victims*, such that it would not be put at risk if employees could be discharged for refusing to cover-up child abuse reports. (Appellants' Br. at 33–35, 39.) Besides being absurd on its face, this argument is circular, contrary to Ohio law and public policy, and, if it were accepted, it would swallow *Greeley* claims almost entirely.

First, it defies logic to suggest that public policy wouldn't be jeopardized if employers were permitted to discharge employees in retaliation for refusing to suppress child-abuse reports. But to the extent that it's necessary to break down what is effectively a truism, it's useful to refer to Professor Henry Perritt's treatise on the jeopardy element that Appellants appended to their brief and cited no fewer than seven times. (Appellants' Br. at 31, 33, –34, 37 citing 2 Henry Peritt, Employee Dismissal Law and Practice, Section 7.17, at 42 (4th Ed. 1998)). As Professor Perritt

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[5] The jury found that "Kaiser … proved by a preponderance of the evidence that a deciding factor in the decision of [Appellants] to discharge [her] was that she was resisting efforts to suppress Miss Cruz's report [of] the Willis incident." (T. 3547:18-3548:3). The jury also found, "by clear and convincing evidence," that Appellants, "in wrongfully terminating [Kaiser]," "acted with A) a state of mind characterized by ill will or a spirit of revenge, or B) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (R. 3673:18-3674:17).

explains (in a portion of Appellants' appended excerpt that they avoided mentioning), "proving jeopardy involves proving several subordinate factual propositions":

> 1. That the plaintiff engaged in particular conduct, such as an act while off duty, a protest of an employer's policy, or a refusal of an employer's order;
>
> 2. That the conduct proven in step 1 furthers the public policy asserted, either because the public policy directly promotes the conduct (as in the public policy in favor of jury service) or because the conduct is necessary to effective enforcement of the public policy (as in a public policy against excess consumer loan charges, which depends on vigilance by bank employees); and
>
> 3. That threat of dismissal will discourage the conduct. (*Id.* at 43).

To apply Professor Perritt's three-step analysis to this case:

> 1. Appellants concede the jury's finding that Kaiser was terminated because she "resist[ed] [Appellants'] efforts to suppress [Cruz's child-abuse] report … ." (R. 3547-48.)
>
> 2. Reporting child abuse (and, consequently, resistance of employers' efforts to suppress child-abuse reports) is necessary to effective enforcement of the public policy of preventing child abuse; and
>
> 3. Threat of dismissal will discourage employees from reporting child abuse and resisting efforts to suppress child-abuse reports.

While Kaiser was required to introduce sufficient proof that "she engaged in [the] particular conduct," per step 1 of Professor Perritt's analysis, it was the trial court's province to determine, as a matter of law and policy, whether the conduct "furthers the public policy asserted," and whether "threat of dismissal would discourage the conduct" per steps 2 and 3. *Collins v. Rizkana*, 73 Ohio St. 3d 65, 70, 652 N.E. 2d 653 (1995)("[The clarity and jeopardy elements] involve relatively pure law and policy questions, questions of law to be determined by the court."). As Professor Perritt notes, "it [can be] relatively easy to conclude that chilling [certain] conduct jeopardizes the asserted policy." (Perritt at 45). That is surely the case here.

So to avoid the plainly mandated legal consequences of their conduct, Appellants have concocted a jeopardy argument based on a line of cases where public policy was "adequately protected" by the availability of alternative statutory remedies *to the wrongfully dismissed employee* for the employer's violation. *See* Appellants' Br. at 32, 35, citing *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526.[6] Yet, because they understand that without a public-policy claim there would otherwise be no remedy for a plaintiff in Kaiser's position, who is wrongfully terminated for resisting her employer's efforts to suppress a child-sex-abuse report, Appellants are forced to argue that the "adequacy of remedies" analysis employed in these cases somehow does not apply here. Appellants' Br. at 35. They base this argument on an out-of-context quotation from a case that stands for exactly the opposite proposition that they are trying to support. *Id.* (citing *Collins,* 73 Ohio St. 3d at 73, for the proposition that "[the adequacy of remedies] analysis is confined to cases where right and remedy are part of the same statute which is the sole source of the public policy opposing the discharge")(emphasis in original).

In *Collins*, the Ohio Supreme Court distinguished between "sole source" and "multiple source" public policy and did state that "the issue of adequacy of remedies is confined to cases '[w]here right and remedy are part of the same statute which is the sole source of the public policy opposing the discharge.'" *Id.* But in making this statement, the *Collins* court was referring only to sole-source cases where courts *denied* a public-policy claim based on the availability of an alternative

[6] In *Wiles*, the Ohio Supreme Court held that "the remedial scheme of the [FMLA] provides an employee with a meaningful opportunity to place himself or herself in the same position the employee would have been absent the employer's violation of the FMLA." Therefore, the court "conclude[d] that Ohio does not recognize a cause of action for wrongful discharge in violation of public policy when the cause of action is based solely on a discharge in violation of the FMLA." 2002-Ohio-3394 at ¶ 17. *See also Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, ¶ 27, citing *Wiles* ("It is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct.").

remedy *to the plaintiff*. *Id.* In doing so, it was *expanding* the availability of public-policy claims by holding that Ohio courts need not deny such claims on the "adequacy of remedies" basis in cases of multiple-source public-policy, even where an alternative remedy is available to the plaintiff. *Id.* at 74. And more to the point, the *Collins* court, in analyzing a multiple-source public-policy claim just like Kaiser's, made clear that the adequacy of remedies analysis applies to such claims by going on to hold on an alternative basis that "the availability of remedies under [an alternative statute] cannot serve to defeat [plaintiff's] wrongful discharge claim because those remedies are simply not available to [plaintiff]." *Id.* Thus, *Collins* directly contradicts Appellants' argument. And numerous examples of controlling precedent are in accord with this *Collins* holding, as discussed below.

But first, to consider the circularity of Appellants' argument: If employers could simply point to criminal or regulatory statutes and common-law remedies for victims of crimes as "adequate protection" of public policy, there would hardly be such a thing as public-policy claims. Plaintiffs in these cases are required to refer to applicable statutes and other enforcement mechanisms to meet the "clarity" element of the tort in the first place. *Painter v. Graley*, 70 Ohio St.3d 377, 384, 639 N.E.2d 51 (1994), paragraph three of the syllabus. By Appellants' requested interpretation, this requirement for meeting the "clarity" element would simultaneously void the "jeopardy" element by establishing "adequate protection of society's interest" in the applicable public policy.

This helps explain why, when Appellants' first made this argument to the trial court in seeking summary judgment, every single case they cited in support involved a situation unlike Kaiser's case, where the statutes at issue already provided an adequate remedy *to the terminated plaintiff*. (*See* R. 124, Plaintiffs' sur-reply in opposition to summary judgment, p. 10, FN6 (distinguishing Defendants' cases)). On appeal, the best Appellants have been able to do is misrepresent a handful

of cases that are each highly distinguishable from this case, as shown in footnote 7, below.[7] Thus, despite Appellants' argument to the contrary, Ohio law requires courts to focus on the remedies available *to the terminated plaintiff* in analyzing the jeopardy element. *See Dille v. LVI Environmental Services, Inc.*, N.D. Ohio No. 1:06 CV 448, 2007 WL 2459934 (Aug. 24, 2007) ("[W]hile the Ohio Supreme Court has not ruled as to whether a [public-policy claim] is available when a plaintiff elects to seek relief for a wrongful discharge pursuant to a statute, Ohio appellate courts generally do not allow a plaintiff to pursue both remedies.").

As for more precedent, like *Collins*, that is actually controlling and on point, the Ohio Supreme Court in *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 152, 155, 677 N.E.2d 308 (1997), allowed a public-policy claim where the applicable policy was "supported by a host of statutes and

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[7] In addition to *Wiles*, discussed in Footnote 7 at page 32 above, appellants discuss the following highly distinguishable cases in support of their public policy argument at pages 36-39 of their brief: *White v. Sears, Roebuck & Co.*, 163 Ohio App. 3d 416, 2005-Ohio-5086, 837 N.E.2d 1275 (10th Dist.) (where employee alleged that he was terminated for altering a single time card, the court held that "[g]iven the regulatory oversight [MWSA and FLSA] and the civil and criminal penalties, the public policy requiring the maintenance of accurate employee time records is adequately protected"); *Urda v. Buckingham, Doolittle, & Burroughs*, 9th Dist. Summit No. 23226, 2006-Ohio-6915, ¶ 24 (where a non-attorney alleged breaches of fiduciary duty and violations of the Code of Professional Responsibility against attorneys with whom she worked, the court held that her complaints were "uninformed" and "interfered with the harmony and productivity of the work place," such that "the interest in harmony and productivity in the workplace outweighs the interest in [plaintiff] speaking out on topics unrelated to her job responsibility on topics with which she is unfamiliar"); *Buelow v. Vocational Guidance Servs.*, 8th Dist. Cuyahoga No. 74965, 1999 Ohio App. LEXIS 4931 at 13-14 (Oct. 21, 1999) (where "there [was] no evidence in the record to support [plaintiff's] claim that he suddenly had a fiduciary duty to report to the Board actions similar to those taken in the past and approved by the independent auditors," and "appellant admitted that the financial statements presented to the Board accurately reflected appellee's financial situation," the court "declined" to find a public-policy claim "on these facts"); *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1344, 1346 (3d Cir. 1990) (under Pennsylvania law, where the courts have "declined to set forth any general principles for determining when a plaintiff has alleged [a public-policy claim] but rather "shape the [doctrine] on a case-by-case basis," the court declined to allow the claim where the plaintiff "did not report his concerns ... until months after the suspected events may have occurred and he was attempting to explain the adverse personnel actions against him.").

constitutional provisions." *Id.* This included statutory remedies to "an aggrieved employee who is discharged, disciplined, or otherwise retaliated against in violation of the statute."

In *Anders v. Specialty Chemical Resources, Inc.*, 121 Ohio App.3d 348, 358, 700 N.E.2d 39 (8th Dist., 1997), an employee alleged that he was terminated because he refused to participate in an allegedly "improper scheme," including his "refusal to create documents to support the termination of two [coworkers]" and his "refusal to participate in a scheme to increase [certain insurance claims]." *Id.* at 355. This Court held that this was sufficient to state a public policy claim even if the alleged "scheme" didn't involve a crime, or a violation of any statute. *Id.* at 356. In addressing defendant's argument that the Whistleblower Statute preempted plaintiff's claims, the court pointed out that this argument "would leave employees who simply refuse their employers' order to violate the law or nonstatutory public policy without any remedy whatsoever." *Id.* at 358.

And in *Rebello v. Lender Processing, Servs.*, 8th Dist. Cuyahoga No. 101764, 2015-Ohio-1380, ¶ 55–57, this Court undertook an adequacy of remedies analysis in a multiple-source public policy case to find in favor of the plaintiff on the jeopardy element. In doing so, the Court observed that a federal statute that defendants claimed was part of the "adequately protected" public policy at issue, "contains no statutory remedies protecting employees who complain about, refuse to participate in and threaten to disclose an employer's unauthorized access and disclosure of nonpublic consumer information." *Id.* at ¶ 56. Thus, the court held, "there is no existing statutory remedy that adequately protect[s] society's interest [in] discouraging this wrongful conduct." *Id.* (citations and quotations omitted). "If employers were allowed to terminate employees for objecting to, refusing to participate in and threatening to disclose the unauthorized access and disclosure of nonpublic consumer information, such retaliatory practices could deter employees from reporting or taking other steps to protect nonpublic consumer information from unauthorized access and disclosure." *Id. See also Alexander v. Cleveland Clinic Found.*, No. 95727, 2012-Ohio-1737, 2012 WL 1379834 ¶ 23 (Ohio App.

8 Dist., Apr. 19, 2012) ("Clearly, public policy in this state would be seriously compromised (jeopardized) if employers were allowed to fire its police officers for upholding or enforcing the law, no matter if the police force is in a municipal/county/state or non-traditional setting."); *Kirk v. Shaw Environmental, Inc.*, N.D. Ohio No. 1:09-cv-1405, 2010 U.S. Dist. LEXIS 31759, *19 (May 25, 2010) ("Ohio courts have allowed *Greeley* [public policy] claims based upon laws that provide significant civil or criminal penalties."). *Jenkins v. Central Transport, Inc.*, N.D. Ohio No. 09CV525, 2010 U.S. Dist. LEXIS 7739, *35-36 (Jan. 29, 2010) ("Indeed, it seems that the only way ***Plaintiff*** can vindicate these statutes is through a [public policy claim].") (emphasis added).

Under the proper jeopardy analysis as employed in these cases, "there is no question that Ohio's policy [against child abuse] would be seriously compromised (jeopardized) if employers were allowed to fire employees for" refusing to participate in schemes to suppress child-abuse reports. *Kulch*, 78 Ohio St.3d at 154; *Alexander*, 2012-Ohio-1737, ¶ 42. There is no legitimate argument for dismissing Kaiser's claim on the jeopardy element. Appellants' second assignment of error should be overruled.

3. <u>Cross-assignment of Error 1</u>: The trial court abused its discretion by granting Defendant's Motion for Remittitur of the Jury's $75,000 economic damages award on Cruz's IIED claim despite that Cruz presented sufficient evidence to support the verdict.

The trial court's reduction on remittitur of the $75,000 economic damages award to Christina Cruz was an abuse of discretion and should be overturned. *See Castle v. Seelig*, 6th Dist. Huron No. H-94-047, 1995 Ohio App. LEXIS 3045, *9 (July 21, 1995) (reversing trial court's remittitur on an abuse-of-discretion review). Reduction of a damages award by remittitur is appropriate only in extreme circumstances where a damages award "is so gross as to shock the sense of justice and fairness," or "cannot be reconciled with the undisputed evidence in the case." *Kinasz v. Davis*, 8th Dist. Cuyahoga No. 101417, 2015-Ohio-602, ¶ 19 citing *Tenaglia v. Russo*, 8th Dist.

Cuyahoga No. 87911, 2007-Ohio-833, ¶ 22. No such circumstances exist here, where Cruz submitted evidence from which the jury could reasonably infer that she suffered an economic loss worth at least $75,000. This included evidence that Cruz suffered diminished earning capacity and lost a unique "lifetime" earning opportunity due to Defendants' tortious conduct.

While Cruz could not prove the exact amount of her diminished earning capacity or this lost earning opportunity, "a less stringent standard" applies to proving the extent of consequential losses in tort, only requiring "as much certainty as the nature of the tort and the circumstances permit." *Ahmed v. Univ. Hosps. Health Care Sys.*, 8th Dist. Cuyahoga No. 79016, 2002-Ohio-1823, ¶ 58; Restatement of the Law 2d, Torts, Section 212. On the evidence presented at trial, it was well within the jury's province to conclude that Cruz's diminished earning capacity or the lost earning opportunity caused by Defendants' tortious conduct was worth at least $75,000. As explained fully below, the trial court's remittitur of the jury's economic damages award to Ms. Cruz should be reversed and the $75,000 award should be reinstated.

A. A damages award should not be reduced as against the manifest weight of the evidence unless it is "so gross as to shock the sense of justice and fairness, or cannot be reconciled with the undisputed evidence in the case."

"[A]s to remittitur on compensatory damages awards, it has long been held that 'a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive.'" *Isquick v. Dale Adams Enters.*, 9th Dist. No. 20839, 2002-Ohio-3988, ¶ 35 citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 655, 635 N.E.2d 331. In the Eighth District, "a damages award will not be [reduced as] against the manifest weight of the evidence unless it is 'so gross as to shock the sense of justice and fairness, [or] cannot be reconciled with the undisputed evidence in the case … .'" *Kinasz v. Davis*, 8th Dist. Cuyahoga No. 101417, 2015-Ohio-602, ¶ 19 citing *Tenaglia v. Russo*, 8th Dist. Cuyahoga No. 87911, 2007-Ohio-833, ¶ 22.

B. A tort victim is not required to prove damages with exact precision, especially where the defendant's wrongful conduct makes it difficult to ascertain the precise amount of damages suffered.

"Even if these consequential losses could not be included in contract damages because not properly quantified, the jury could consider them under the less stringent standard of tort recovery," which requires only "as much certainty as the nature of the tort and the circumstances permit." *Ahmed v. Univ. Hosps. Health Care Sys.*, 8th Dist. No. 79016, 2002-Ohio-1823, ¶ 58; Restatement of the Law 2d, Torts, Section 212, Comment a.[8] "A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927).

C. Cruz presented sufficient evidence at trial to support the jury's $75,000 economic-damages award.

Defendants did not meet the high standard for remittitur in the trial court. The $75,000 in economic damages suffered over a course of four years and into the future was supported by the evidence and cannot possibly be considered "so gross as to shock the sense of justice and fairness."

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[8] Restatement of the Law 2d, Torts, Section 212 provides that: "One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." Comment a. explains that: "There is, however, no general requirement that the injured person should prove with like definiteness the extent of harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered. Particularly is this true in situations where there can not be any real equivalence between the harm and compensation in money, as in case of emotional disturbance, or where the harm is of such a nature as necessarily to prevent anything approximating accuracy of proof, as when anticipated profits of a business have been prevented."

In concluding that the evidence was insufficient to support the economic-damages award, the trial court made two critical and related errors:

First, regarding Cruz's claim of diminished earning capacity, the trial court improperly required Cruz "to prove earnings prior to Defendants' wrongful conduct" (R. 385, 8/20/15 Ruling, p. 3) even though: 1) the jury was not bound to accept such earnings as conclusive of Cruz's future earning power; and 2) Cruz presented evidence showing that her earning power was at a sufficient level precisely because of the unique training and earning opportunity that Defendants provided her. Additionally, even if Cruz had not presented sufficient evidence of diminished earning capacity, the jury was still entitled to conclude that Defendants' tortious conduct deprived her of a lifetime earning opportunity worth at least $75,000.

i. Cruz introduced sufficient evidence of diminished earning capacity of at least $75,000.

"The measure of damages for impairment of earning capacity is the difference between the amount which the plaintiff was capable of earning before h[er] injury and that which [s]he is capable of earning thereafter." *Hanna v. Stoll*, 112 Ohio St. 344, 353, 147 N.R. 339 (1925). While "[a]n award cannot be made from mere conjecture or without proper data furnished as evidence, … the evidence need not be clear and indubitable to entitle it to go to the jury, and the law exacts only the kind of proof of which the fact to be proved is susceptible." *Id.* "[T]he jury may consider the earnings of the plaintiff at the time of the injury, but the jury is not bound to accept such earnings as conclusive of h[er] future earning power." *Andler v. Clear Channel Broad., Inc.*, 670 F.3d 717, 726 (6th Cir. Ohio 2012) citing *Bartlebaugh v. Penn. R. Co.*, 51 Ohio Law Abs. 161, 78 N.E.2d 410, 413 (10th Dist. 1948). Instead, the jury "may reasonably depart from historical earning patterns in light of changed circumstances that occurred prior to the injury but were not yet reflected in the plaintiff's actual salary." *Id.* Otherwise, defendants would be free to inflict harm on such plaintiffs with

impunity, including those who have recently received new training, credentials, or access to new business connections or opportunities.

Below, the trial court improperly required Cruz "to prove earnings prior to Defendants' wrongful conduct," and ignored evidence of changed circumstances pertaining to her earning capacity. (R. 385, 8/20/15 Ruling, p. 3). Specifically, the trial court failed to consider the evidence that Cruz's earning capacity had changed precisely because of the unique training and access that Defendants had provided on her. This includes evidence showing that Defendants aggressively marketed a unique "lifetime" opportunity for Cruz to build a career for herself that was not available to her without the English Nanny and Governess School. Evidence was presented by both sides showing that Defendants provided Cruz with special education and career certification, as well as lifetime access and recommendations to Defendants' extensive and exclusive profile of "high caliber" clients, and certain benefits and opportunities that were otherwise unavailable to Cruz. In sum, the jury's modest economic-damages award was supported by evidence showing that:

- Immediately prior to their retaliation against Cruz, Defendants provided her with specialized nanny training in which she excelled, including in the classroom and in a practicum working for families with small children. (T. 218:3–8; 220–27, Ex. 28). By completing Defendants' program, Cruz also earned certification as a Certified Professional Nanny and the right to "lifetime placement" through Defendants' placement service, with exclusive access to their wealthy "high profile" clientele. (*See* p. 9 above citing T. 156:5–7; 254:15–259:7; 2240:16–25; 2244:14–2245:24).

- Defendants withheld placement opportunities from Cruz as part of their attempt to suppress and delegitimize her child-sex-abuse report, thereby depriving Cruz of her right to lifetime placement with Defendants' "high profile" clients. (*See* p. 16-17 above, citing T. 2199:13–2201:1; 2202:6–2203:4; 413:7–10; 424:20–425:10; 427:15–20; 428:22–429:7; 438:18–439:11);

- In the few weeks before Defendants began to retaliate against her, several of their clients were interested in hiring Cruz, with two of them offering to fly Cruz across the country for interviews. (*See* p. 12 above, citing 1834:6–1835:18; 1836:15–1837:9);

- Cruz specifically sought protection from the difficulties faced by nannies seeking employment in a largely unregulated industry without the help of a placement service, and Defendants promised to alleviate precisely these difficulties; (See p. 10-11 above, citing T. 731:14–734:16; 736:17–21; 735:2–10; 2245:5–11);

- Nannies placed through Defendants' service worked on standardized contracts earning annual salaries of at least $28,000 to $40,000, plus benefits. (*See* p. 10-11 above, citing T. 2245:5–11; *See also* T. 2208:10–2210:10);

- Nannies placed through Defendants' placement service "are earning the highest salaries in private childcare." (*See* p. 9 above, citing T. 2244:14–2245:24);

- Defendants were recognized world leaders in nanny training and placement. Their school and placement service was one of only two of its kind in the nation and one of a small handful in the world. (*See* p. 9 above, citing T. 166:23–167:25; 168:21–23; *See also* T. 170:20–172:14);

- As of May 2011, Defendants were advertising up to 70 available placements in Ohio and exotic locations worldwide, including New York City, San Diego, Honolulu, Istanbul, Kenya, Bermuda, and India, and positions working for "the Royal Family in Abu Dhabi," a European Presidential family," and an "international entrepreneur," promising "European and U.S. travel." (*See* p. 10 above, citing R. 2248:8–21; 2254:21–24, Pls.' Ex. 186; *See also* R. 2249:15–2251:3);

- Defendants had an extensive list of celebrity clients. (*See* p. 9 above, citing 2270:4–2273:20);

- Defendants participated and heavily advertised a nationally televised network news segment about "celebrity nannies" in which it was stated that, "each [ENGS graduate] stands to make her [$10,000 tuition] back almost immediately," and that "these girls [ENGS graduates] are headed to Hollywood." (See p. 9-10 above, citing T. 209:6–11; 259:15–22; *See also* Ex. 98);

- Defendant Bradford Gaylord stated in this network news segment that "he has people making exorbitant salaries," up to $250,000, with "unlimited" earning potential, after which the narrator states, "on top of that, all the extravagant perks that go along with living life alongside a mega-famous star" (*See* p. 10 above, citing T. 2275:21–2276:23; *See also* Ex. 98);

- Cruz was interested in a long-term career as a nanny, and intended to work as a nanny for at least a few years while she finished college. (T. 715:21–716:6; 718:19–22);

- Cruz had overcome a period of personal difficulty, and was set to embark on a new more productive phase of her life when she attended ENGS in 2011. As Defendants' own expert witness acknowledged, Cruz was "firing on all eight cylinders" when she attended ENGS. (T. 3195:7–17).

- Cruz suffered anxiety and depression as a result of Defendants' retaliation against her, which diminished her day-to-day functioning, including her capacity to function in school and at work, and to gain and keep employment and earn wages; (*See* p. 21–24 above, citing trial testimony on the emotional injury that Cruz suffered); and

- Cruz never earned more than $10,000 in any of the four years since her experience with Defendants. (T. 1312:6–22).

In light of all this evidence, it was not necessary for Cruz "to prove earnings prior to Defendants' wrongful conduct" to establish that Defendants wrongdoing caused her to suffer diminished earning capacity. (R. 385, 8/20/15 Ruling, p. 3). Here, the jury "had a right to, and probably did, find that [Cruz's] earning power [had] increased" thanks to the special education and career certification that Defendants' provided her, as well as lifetime access and recommendations to their extensive and exclusive profile of "high-profile" clients, and the special protections and benefits that were otherwise unavailable to her. *Bartlebaugh v. Pennsylvania R. Co.*, 51 Ohio Law Abs. 161, *13. While Cruz was not required "to demonstrate a specific denial of employment" due to Defendants' retaliation against her, it is significant that Defendants' clients were routinely interested in hiring Cruz in the few weeks before the retaliation. *Baird v. Owens Cmty. College*, 10th Dist. Franklin No. 15AP-76, 2016-Ohio-537, ¶ 19 (Ohio Ct. App., Franklin County Feb. 16, 2016). Given Cruz's uncontradicted testimony that she never earned more than $10,000 in any of the four years between her experience with Defendants and trial, and the evidence that Defendants' graduates earned, at a minimum annual salaries between $30,000 and $40,000 with benefits and up to $250,000 and more, the jury was well within its province to value Cruz's diminished earning capacity at more than $75,000, even if only from 2011-2015 alone. "To the extent that Plaintiff's … evidence may be contradicted by or undermined by other evidence in the record, weighing that evidence or evaluating Plaintiff's credibility [was] a task for the jury, not [the trial court]." *Smith v. LexisNexis Screening Solutions Inc.*, E.D. Mich. No. 13-CV-10774, 2015 U.S. Dist. LEXIS 131962, *33–34 (Sept. 30, 2015).

ii. Cruz introduced sufficient evidence that she lost access to a unique lifetime earning opportunity worth at least $75,000.

In granting remittitur, the trial court also failed to recognize that "a claim for lost earning opportunity is distinct from a claim for impaired earning capacity and lost future income." *Cook v.*

Cook, 216 W. Va. 353, 364 (W. Va. 2004). This distinction was usefully addressed by the Supreme Judicial Court of Maine in *Snow v. Villacci*, 2000 ME 127, 754 A.2d 360, ¶ 3 (Me. 2000), where the plaintiff, due to an injury caused by defendant's negligence, was unable to complete a training program in which he was enrolled that would have allowed him to become a Merrill Lynch financial consultant. The plaintiff "[did] not claim that his ... capacity to earn an income has been impaired; rather, he claim[ed] that he lost a unique opportunity to obtain certain future earnings due to [defendant's] negligence." *Id.* at ¶ 13. The *Cook* court observed that courts across the country "have generally recognized a claim for lost earning opportunity, and in those cases where evidence of such a loss is not allowed, exclusion is generally based on the remote or conjectural nature of the evidence." *Id.* at ¶ 12, FN9. The court went on to note that "because the distinction between ordinary earnings damages and lost earning opportunity is a matter of evidentiary reliability rather than a fundamental distinction in recoverability, there is no logical or public policy reason to deny recovery to a person who has lost an opportunity due to the negligent acts of another person." Id. at ¶ 15. Thus, the court held that "if a plaintiff has in fact lost a unique opportunity to increase her earnings, and that loss was caused by the defendant's actions, she should be able to recover those damages just as she would have if the defendant's wrongdoing had caused her to lose wages," provided that she can prove the following elements:

> (1) the opportunity was real and not merely a hoped-for prospect; (2) the opportunity was available not just to the public in general but to the plaintiff specifically; (3) the plaintiff was positioned to take advantage of the opportunity; (4) the income from the opportunity was measurable and demonstrable; and (5) the wrongdoer's negligence was a proximate cause of the plaintiff's inability to pursue the opportunity. *Id.* at ¶ 15-16.

Applying this test to Cruz's evidence, as summarized in the section immediately above, it is clear that she has presented sufficient proof to support the jury's $75,000 economic-damages award on a lost-earning-opportunity theory. As a result of Defendants' tortious conduct, Cruz lost lifetime

access to Defendants' recommendations for extremely unique set of job opportunities, including guaranteed salary and benefits, with privileged access to Defendants' exclusive high-profile client list. Whatever the precise value of this access, (which, in the mere few weeks prior to Defendants' retaliation, had already borne fruit in the form of offers of flights across the country for job interviews with wealthy clients), it could not have been worth nothing. And it was the jury's job to determine a value that would adequately compensate Cruz for it. *Wightman v. CONRAIL*, 86 Ohio St. 3d 431, 438, 1999-Ohio-119, 715 N.E.2d 546 ("[I]t is the function of the jury to assess the damages and, generally, it is not for the trial or appellate court to substitute its judgment for that of the trier of fact.").

Given the evidence set forth above, the $75,000 award was not "so gross as to shock the sense of justice and fairness" and the trial court abused its discretion in disrupting the jury's assessment. The remittitur should be reversed and the jury's $75,000 economic-damages award to Cruz should be reinstated. Additionally, should the Court overrule the second cross-assignment of error, below, the attorneys' fees payable to Cruz should be increased by $30,000 (40% of $75,000), consistent with the trial court's ruling determining attorneys' fees based on the 40% contingency agreement between Plaintiffs and their counsel. (R. 390, 8/28/15 Ruling at p. 6-8).

4. <u>Cross-Assignment of Error 2</u>: The trial court abused its discretion by reducing Plaintiffs' attorneys' fees award by 77% of the lodestar amount, and frustrating the fee-shifting award's very purpose: to deter those who intentionally inflict "serious harm" by "extreme and outrageous conduct" and put public policy at risk.

A trial court's determination of the amount of attorneys' fees to be paid as part of a punitive-damages award should be reversed upon a showing that the court abused its discretion. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 145, 569 N.E.2d 464 (1991). An abuse of discretion implies that the trial court's decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1985). In Ohio, the lodestar calculation is "strongly presumed to yield a reasonable fee." By slashing Plaintiffs' fees by *more than 75% of the lodestar* based merely upon

Plaintiffs' contingent-fee agreement with counsel, the trial court frustrated the purpose of the jury's fee-award, which is to encourage competent counsel to take on such cases, and serve the broader public interest by deterring those who intentionally inflict serious injury by "extreme and outrageous conduct." The trial court's decision was thus manifestly unreasonable as against public policy, unconscionable under the circumstances, and an abuse of discretion.

A. An attorneys' fees award must be reasonable and the lodestar calculation carries a "strong presumption" of reasonableness.

The Eighth District, citing the U.S. Supreme Court, has held that "the prescribed … method for calculating reasonable attorney fees" is the lodestar: the "number of hours reasonably expended on the litigation times a reasonable hourly rate." *Sivit v. Village Green of Beachwood*, 8th Dist. Cuyahoga No. 98401, 2013-Ohio-103, ¶ 70 (*aff'd in part, rev'd in part on other grounds*, 2015-Ohio-1193) (quoting *Blanchard v. Bergeron,* 489 U.S. 87, 94, (1989)). "The lodestar is strongly presumed to yield a 'reasonable' fee." *Id.* at ¶ 70. Once the lodestar baseline is determined, a court may modify the calculation by applying factors found in Prof.Cond.R. 1.5, which the Ohio Supreme Court has described as follows:

> the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent

Bittner, 58 Ohio St. 3d at 145–46 (citing the professional-conduct rule now known as Prof.Cond. R. 1.5); "The ultimate determination of reasonableness must take into consideration all the factors relating to reasonableness of the fees in the particular case." *Bigler v. Pers. Serv. Ins. Co.*, 7th Dist. Belmont No. 12 BE 10, 2014-Ohio-1467, ¶ 217 (Mar. 31, 2014).

B. In cutting the lodestar by 77%, the trial court failed to award a reasonable fee.

In its August 28, 2015 ruling on attorneys' fees, the trial court awarded Plaintiffs fees and expenses in the amount of $95,308.97, later amending this award to a total of $125,504.45 in its ruling on Plaintiffs' motion for reconsideration regarding litigation expenses for which the court failed to account. (R. 390, 398, Rulings of 8/28/15 and 9/29/15). The court based its ruling on Plaintiffs' 40% contingency agreement with counsel, awarding that percentage of the amount recoverable in damages ($194,066.76) for an award of $77,626.70 in attorneys' fees plus $47,877 in litigation expenses reasonably incurred. In doing so, the court slashed Plaintiffs' submitted lodestar calculation of $540,277.11 by 77%. (R. 390 at 7-8). The court concluded that the 1,122 hours submitted by lead counsel, Peter Pattakos, was "a conservative estimate" of time spent, but found that his standard rate of $300 should be reduced on a sliding scale of $25 increments from $150 in 2011 to $250 in 2015. (*Id.* at 4). Using these hourly rates and reducing Pattakos's 1,122 hours to 1,000 hours, the court concluded that the fees for Pattakos's compensable work alone amounted to $191,000. (*Id.* at 5–6). But the court completely disregarded a 560 hours and $151,704 in documented time spent by Pattakos's co-counsel at The Chandra Law Firm ($128,579.50) and Cohen, Rosenthal & Kramer ($23,124.50). (*Id.* at 5; R. 368, Pls' Mot. for Attorneys' Fees, filed 7/8/15, p. 1, 8-10). Nor will the fee awarded take into account the substantial investment of attorney time necessary to defend the verdict on appeal.

In awarding a mere $77,626.70 for all of Plaintiffs' counsels' work, the trial court relied on only one of the Prof.Cond.R. 1.5 factors: the fact that Plaintiffs had a 40% contingent-fee agreement with counsel. The court attempted to distinguish this case from consumer-protection and civil-rights cases requiring fully compensable attorneys' fee awards by explaining that in those cases "a contingency fee would not adequately compensate plaintiff's counsel, the prevailing party has limited resources, and a substantial public interest beyond the private interest of the plaintiff is served by

encouraging private counsel to pursue the issues." (R. 390 at 7). As explained below, the court abused its discretion in failing to consider that these very same considerations apply with equal if not greater force to this case, which involves the intentional infliction of serious harm by "extreme and outrageous conduct" taken to suppress a report of child-sex-abuse.

i. When Ohio courts consider the existence of contingency-fee agreements in determining fee awards, it is typically to award upward adjustments to the lodestar, not downward adjustments.

Following the second step of the *Bittner* test, courts are permitted to make upward or downward adjustments from the lodestar calculation based on the factors set forth in Prof.Cond. R. 1.5, including "whether the fee is fixed or contingent." When Ohio courts adjust fee awards based on this factor, they typically do so to award an *upward* adjustment to the lodestar fee.

For example, in *Bigler v. Personal Service Insurance Co.*, 7th Dist. Belmont No. 12 BE 10, 2014-Ohio-1467, ¶ 217, the trial court doubled the lodestar amount based on the existence of a contingency agreement. In upholding the fee award on this basis, the court of appeals explained that "the attorneys took a risk by accepting the case on a contingency basis, a risk which increased as each year passed and each new issue required the expenditure of more time and/or fronting of more expenses." *Id. See also American Chemical Soc. v. Leadscope*, 10th Dist. No. 08AP-1026, 2010-Ohio-2725, ¶ 87-90 (upholding the trial court's doubling of the lodestar where "the novelty and difficulty of the issues presented, the absorption of counsels' resources to the preclusion of other employment, the result obtained, and the contingency fee arrangement all supported an upward adjustment"); *Faieta v. World Harvest Church*, 147 Ohio Misc. 2d 51, 2008-Ohio-3140, ¶¶105-106, 891 N.E.2d 370 (C.P.) (upward adjustment to lodestar where plaintiffs' counsel "took on a very significant financial risk [by] entering into a contingent-fee agreement"); *Phoenix Lighting Group Llc v. Genlyte Thomas Group LLC*, Summit C.P. No. CV-2012-08-4444, 2014 Ohio Misc. LEXIS 581 (Sept. 29, 2014) (upward

adjustment where "[contingent] fee arrangement forced [plaintiffs'] counsel to assume a great financial risk).

ii. Denying fees based on the existence of a contingency-fee agreement frustrates the purpose of awarding attorneys' fees to deter those who intentionally inflict "serious harm" by "extreme and outrageous" conduct and put public policy at risk.

The trial court's reliance on the "contingency" agreement to dramatically *reduce* counsels' fee is contrary to the policy and purpose behind awarding attorneys fees as punitive damages for intentional tortious conduct. This is especially true in a case like this involving the intentional infliction of "serious harm" by "extreme and outrageous conduct" that jeopardizes Ohio's public policy of protecting children from sexual abuse. As shown below, in such cases the focus in determining fee awards should be the reasonableness of the fee sought—as reflected in the lodestar calculation—not the form or content of any fee agreement, contingent or otherwise.

The U.S. Supreme Court's opinion in *Blanchard v. Bergeron* is instructive. 489 U.S. 87, 109 S. Ct. 939, 103 L.Ed.2d 67 (1989). In *Blanchard*, the court held that a contingent-fee agreement should not limit fee awards in civil-rights cases where federal statutes provide for attorneys' fees. *Id.* at 93. The court emphasized that even where there are contingent-fee arrangements, it is the lodestar calculation—based on hours reasonably expended multiplied by a reasonable rate— rather than what the agreement says, that is the "centerpiece of attorney's fee awards." *Id.* at 94. The court explained that the purpose of these awards is "to make sure that competent counsel was available to civil-rights plaintiffs," and to encourage "the benefits of such litigation for the named plaintiff and for society at large." *Id.* at 93-94, 96.

In reaching this holding, the *Blanchard* court distinguished civil-rights claims from "*most* private tort [cases]," thereby acknowledging that in *certain* private tort cases the very same principles mandate fully compensatory fee-awards. *Id.* at 96. This is surely one such case, and the principles announced by the U.S. Supreme Court in *Blanchard* apply just as surely in the 8th District. *Turner v.*

Progressive Corp., 140 Ohio App. 3d 112, 117-118, 746 N.E.2d 702 (8th Dist. 2000)("Counsel is also entitled to fees for his representation during the appellate process [despite existence of contingent-fee agreement]. ... [T]he purpose behind most statutory fee authorizations [is] the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.").

Even if these principles should not apply to every case where an intentional tort is proven—by clear and convincing evidence—to have been committed with malice, they should apply here. And even if these principles should not apply to every IIED case where a plaintiff proves the intentional infliction of "serious injury" by "extreme and outrageous" conduct (with the legal standard applied to find "extreme and outrageous conduct" implicating Ohioans' definition of a "civilized community," and, thus, "society at large"), it should certainly apply to this case, where the conduct at issue has been held, as a matter of law, to jeopardize Ohio's clear public policy in favor of reporting and preventing the sexual abuse of children. There is no Ohio law or policy argument to the contrary. And indeed, it is hard to imagine a public policy more worthy of "vindication," whether by statutory or common law. *Blanchard*, 489 U.S. at 96.

Just as it is hard to imagine that competent counsel would ever take on a case like this knowing that they would receive less than a quarter on the dollar for their work, and even then only upon achieving an outstanding result at trial and succeeding on appeal after five years and counting of extremely contentious litigation while fronting $50,000 of expenses in the process. The trial court paradoxically alluded to this reality in justifying its low fee award, by noting that Attorney Pattakos was "an inexperienced trial attorney." (R. 390 at 7). But it was precisely due to his inexperience and his status as a solo practitioner that he took this case in 2011 after several other attorneys had refused, causing Cruz to nearly give up hope of obtaining legal relief. (T. 1275:24–25; 1276:8–25;

1277:5-7; Ex. MMMM-1).[9] To uphold the trial court's dramatic slashing of fees in this case will make it even harder (if not altogether impossible) for the next Christina Cruz to find counsel: it will discourage even inexperienced or otherwise desperate counsel from taking on such a case.

Not only would such a result be inconsistent with the lodestar approach, it would deter, rather than attract, competent counsel to handle cases like this, where an enormously important public policy should be vindicated and deplorable conduct deterred, but the possible damages are relatively low and the allegations sure to be hotly contested. The trial court's failure to account for the importance of the public interest at issue in this case in taking such a radical contingent-agreement-based departure from the lodestar was unreasonable enough to constitute an abuse of discretion. *See Gilson v. Am. Inst. of Alternative Med.*, 10th Dist. Franklin No. 15-AP-548, 2016-Ohio-1324, NaN-P131(Mar. 29, 2016) (abuse of discretion due to "shockingly low and unreasonable hourly rate" where trial court reduced counsel's hourly rate by 67% to compute the lodestar figure); This Court should vacate the attorneys' fees award and remand for a determination based on the lodestar approach, using counsel's current standard rate to account for the delay in payment. [10]

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[9] Defendants introduced an e-mail dated Sept. 12, 2011 from Cruz to Shari Nacson in which Cruz writes, "I'm really happy you hooked me up with Peter [Pattakos]. He is so different from the other lawyers I spoke with. ... After no [other lawyer] really feigned interest [in the case], I was pretty down and out and assuming it would be difficult to even pursue." (T. 1275:21-25; 1276:12-15, Ex. MMMM-1). Cruz testified of this document that "[Pattakos] was actually the first lawyer I spoke to that – I mean, he couldn't believe the things I was telling him. ... I think that before I found him, most of the lawyers were only concerned with getting their $350 an hour. They didn't seem that interested in the case, or that somebody had tried to cover up child abuse ... and he was the only person that I had spoken to that was just – I mean he was like flabbergasted. ... I mean, he was the first person that was actually saying like I can't believe they did this to you." (T. 1276:10-11, 19-24; 1277:5-7).

[10] The U.S. Supreme Court has affirmed the use of current rates (or, in the alternative, enhancement of historic rates) to take into account the delay in payment that fee-shifting matters present. *See, e.g., Perdue v. Kenny A.*, 130 S. Ct. 1662, 2675 (2010)("[c]ompensation for ...delay [in payment] is generally made 'either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value") (quoting *Missouri v Jenkins*, 491 U.S. 274, 283-84 (1989)); see also *Barnes v City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005).

5. Cross-Assignment of Error 3: The trial court erred as a matter of law by sanctioning Plaintiffs' counsel under R.C. 2323.51 for sharing scheduling information and publicly available pleadings with a newspaper reporter, conduct that is protected by the First Amendment and explicitly permitted by Prof.Cond.R. 3.6.

The trial court's application of R.C. 2323.51 to sanction Plaintiffs' counsel Peter Pattakos (1) interferes with the Supreme Court of Ohio's exclusive authority to regulate the practice of law and (2) violates the First Amendment. Pattakos sent public records and scheduling information to a reporter and encouraged him to report on the upcoming trial. That conduct was expressly protected by the safe-harbor provision of Prof.Cond.R. 3.6(b), and, nevertheless, created no threat of material prejudice to the underlying proceedings. To punish Pattakos for conduct that is expressly protected by Ohio's ethics rules is an unconstitutional application of R.C. 2323.51. The trial court's order cannot stand.

"[I]n cases raising First Amendment issues…an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (ellipsis in *Gentile*) (internal quotations omitted).

The record shows that trial court's first impulse was to sanction Pattakos for what it wrongly assumed to be a violation of the trial-publicity rule, Prof.Cond.R. 3.6. But when the evidentiary hearing and subsequent briefing demonstrated that no Rule 3.6 violation had occurred—and that Pattakos's conduct was firmly ensconced within Rule 3.6(b)'s safe harbor—the trial court abandoned its original focus and used the frivolous-conduct statute, R.C. 2323.51, to impose a sanction. That exercise of judicial authority not only violated Pattakos's First Amendment rights but also interpreted a legislative enactment to usurp the Ohio Supreme Court's judgment on where to draw the line in terms of attorney free-speech. This interpretation of the frivolous-conduct statute violates separation of powers.

A. Factual background of the sanctions order

i. Plaintiffs' counsel shared public records and scheduling information with members of the media. *Cleveland Scene* published an article about the case.

In June 2013, Attorney Pattakos provided copies of Plaintiffs' summary-judgment opposition to several reporters including his friend Vince Grzegorek of *Cleveland Scene Magazine*. (T. 3831:6–8, 3833:22–3834:5; 3835:5–8). Pattakos later emailed Grzegorek Plaintiffs' pretrial statement. (T. 3857:11–3858:8). In January 2015, Pattakos emailed Grzegorek that the trial would begin on January 20. (T. 3832:23–3833:12). On March 30, Pattakos sent Grzegorek a text message indicating that trial would start the following day. (T. 3852:19–3853:18). On March 31 and April 1, 2015, *Scene* published in its online and print versions respectively an article regarding the case that was critical of Defendants. (T. 3854:19–3855:11). That article quoted portions of pleadings Pattakos had provided to Grzegorek. (T. 3857:11–15; 3873:19–3874:7).

ii. After the article appeared, the trial court expressed its disapproval and sanctioned Plaintiffs by rescinding its prior order closing the courtroom to prevent public airing of Ms. Cruz's medical records. The trial court denied the defense motion for a mistrial after voir dire revealed that none of the jurors had read the article.

Defense counsel brought the issue of the article's publication to the trial court's attention on April 2, 2015. (Supp. T. 607:6–25). Pattakos immediately acknowledged communicating with his friend about the case. (Supp. T. 610:11–20). The trial court, at Defendants' request—and as a sanction for Pattakos's communications with Grzegorek—immediately rescinded its prior order that would have partially closed the trial to prevent public disclosure of Ms. Cruz's medical records. (Supp. T. 607:14–18; 617:11–618:14). But that did not satisfy Defendants; they sought a mistrial. (Supp. T. 620:19–621:5.) Before ruling on the mistrial motion, the trial court questioned the eight jurors and two alternates to confirm that they had followed the standard instruction to avoid media coverage about the case. (Supp. T. 622:21–652:20). All reported that they had not read any articles

about the case, *id.*, though one juror reported having seen the headline on her Facebook newsfeed, which she did not read or click on. (Supp. T. 635:22–636:6; 638:4–13). The trial court denied the defense motion for a mistrial. (Supp. T. 653:9–14).

When the *Scene* article was first discussed on April 2, the trial court pulled no punches in firmly articulating its disapproval of lawyers communicating with the press:

> I'll tell you my view on this. I think it is not professionally a good idea to initiate communication with any media about a pending case. And its clear purpose of [R]ule 3.6, I believe, is to restrain lawyers' ability to initiate publicity. And it's an attempt to balance the right of a free press to contact lawyers who are engaged in litigation.
>
> I think as I read this rule, the instruction to the lawyer is you don't initiate publicity about the case. In other words, you don't try your case in the media. Unfortunately, that seems to have been done at this point.
>
> So the best we can do is try to make sure it's not affected, but I would encourage the lawyers to read this rule and think about what I have just said. I think you're bordering on professional misconduct in initiating things with the media.

(Supp. T. at 656:10–657:5).

iii. Defendants sought further sanctions; following a hearing, the trial court ordered Plaintiffs' counsel to pay for Defendants' attorneys' fees for the voir dire regarding the *Scene* article and incurred in seeking sanctions against him.

Defendants moved for further sanctions on April 17. R. 311. On May 1, the trial court held the motion in abeyance until the conclusion of trial. (R. 322). On August 20, 2015, the trial court set a hearing on the sanctions motion for September 14. (R. 383). The August 20 order cited Prof.Cond.R. 3.6 and articulated the "substantial likelihood of material prejudice" standard from *Gentile v. State Bar of Nevada*, which, as discussed below, are the controlling legal authorities in the context of attorney free speech. That order did not reference the frivolous-conduct statute (R.C. 2323.51), which has never before been applied to punish an attorney for communicating with the press.

During the September 14 hearing, the trial court reiterated what it had stated on the record on April 2: that the trial court considered Prof.Cond.R. 3.6(a) to be a bar on lawyers "initiating" contact with the media, even to provide only information contained within the safe harbor of R. 3.6(B).[11] Defense counsel described the purpose of the hearing as "…to present testimony regarding

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[11] "It seems to me that is a statement that lawyers don't initiate publicity about their case." Supp. T. 3907:9–11. "I think lawyers basically have an obligation not to talk about their cases…" *Id.* at 3936:14–16. "…I guess I've come from an era when I always thought the role of the lawyer was not to try his case in the media. I guess I had an early experience in my life, as some of you are aware of, where we didn't give the media any information, you know, and we investigated the assassination of President Kennedy. We kept that entire process to ourselves until we could get out a final report. We recognized that even though there was a right of freedom of the press, our role as lawyers was not to participate in the media process. I guess I'm suggesting to you that that's a threshold question that every lawyer has to deal with in a matter of any sort." *Id.* at 3939:18–3940:7.

Judge Griffin's first impulse—that attorneys may not initiate contact with the press—is consistent with former ABA Canon 20, which was in force at the time of the Warren Commission that investigated President Kennedy's death. Canon 20, titled "Newspaper Discussion of Pending Litigation," provided as follows:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.

But since the Warren Commission, there have been two significant changes in the ethics rules concerning media contact (not to mention significant changes in media technology such as the television and the Internet). The 1970 ABA Model Code of Professional Ethics advanced a complex regulatory scheme that separately specified what lawyers could and could not say in the context of civil, criminal, and administrative matters. DR 7-107(G) provided:

> A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
>
> (2) The character, credibility, or criminal record of a party, witness, or prospective witness.

whether the articles and comments that were made available through *Scene Magazine* posed a substantial likelihood of materially prejudicing the trial…" (T. 3902:25–3903:9).

iv. Hearing testimony confirmed that Plaintiffs' counsel's communications with the press about this case's subject matter were limited to providing public records and scheduling details.

The testimony at the September 14 hearing established that Pattakos sent *Cleveland Scene* editor Vince Grzegorek "certain pleadings at certain points in time" and emailed Grzegorek to "update him on the status of the case." (T. 3832:3–10). Those updates included scheduling matters such as when the trial was going forward, was postponed, or rescheduled. (T. 3833:6–21). All of the information that appeared in the *Scene* article was contained in the public record. (T. 3857:11–3858:8; *See also* R. 297). Pattakos did not believe that there was any likelihood of prejudicing the proceedings by sharing scheduling information and court filings with Grzegorek. (T. 3864:6–19; 3872:19–24). There is no evidence that Pattakos ever provided a reporter with information about the case that was not contained in the public record or court's docket.[12] There is no evidence that Pattakos engaged in any conduct not shielded by the safe harbor of the ethics rule. There is no evidence to

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(3) The performance or results of any examination or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

After the U.S. Supreme Court decided *Gentile v. State Bar of Nevada*, the ABA responded with Model Rule 3.6, which Ohio adopted as Prof.Cond.R. 3.6. This latest formulation of the trial-publicity rule dramatically scaled back restrictions on attorney free speech. This change was consistent with the appropriate balancing of interests required by *Gentile* to both protect lawyer speech and ensure fair trials.

[12] The statements the *Scene* article attributes to "Cruz's lawyers" are direct quotes from R. 297 Plaintiffs' Third Final Pretrial Statement and Witness List at 2–3. All of the information contained in the *Scene* article appears in that document or in R. 99 Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. *See* R. 321 Plaintiffs' Memorandum in Opposition to Sanctions Motion at 4–6, n.2 (detailing the precise location in the pleadings where facts asserted in the *Scene* article appear).

suggest that Pattakos's conduct created a substantial likelihood of materially prejudicing the proceedings.

v. The trial court invoked R.C. 2323.51 to sanction Plaintiffs' counsel for providing public records and scheduling information to the *Cleveland Scene* editor.

On October 30, 2015, the trial court entered an order requiring Pattakos to pay Defendants' attorneys fees for the voir dire of jurors on April 2, 2015 and in pursuing the motion for sanctions. (R. 408, 10/30/15 Ruling on Motion for Sanctions and Motion for Prejudgment Interest). To avoid protracted litigation on the issue of the precise fees involved, the parties stipulated that—should the sanctions order stand—the amount of attorneys' fees would be $10,961.75.

The trial court's sanctions order relied on R.C. 2323.51(A)(1)(a), which defines "[f]rivolous conduct" as conduct that "obviously serves merely to harass or maliciously injure another party to the civil action … or is for another improper purpose, including, but limited to, causing unnecessary delay or needless increase in the cost of litigation." R.C. 2323.51(A)(2)(a)(i). The trial court found that Pattakos's involvement in the publication of the *Scene* article "was a malicious attempt to injure and was intended to 'harass' each of the defendants." R. 408 at 12. "Urging *Scene* to begin coverage constituted initiating harassment." *Id.*[13] Again, there was no evidence before the trial court to suggest that Pattakos had provided any information about the case to Grzegorek aside from public filings and scheduling information.

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[13] Though acknowledging that under R.C. 2323.51, the challenged action must "merely" be to harass or maliciously injure the opposing party, R. 408 at 13, the trial court sanctioned Pattakos despite finding that Pattakos had the legitimate purpose of "generat[ing] news coverage that would inform the public about the need to report child abuse." *Id.* The trial court determined that, even though Pattakos had that purpose, it was "secondary" and "not necessary to producing a fair and orderly resolution of the court case." *Id.* The order then contradicts itself by stating that "the sole purpose of Pattakos urging *Scene* on March 30 to begin coverage once the trial began was to harass or maliciously injure the defendants outside the litigation process—that soliciting news media coverage once trial began served no purpose of achieving an orderly or fair adjudicative process or settlement." *Id.* at 14.

B. Law & argument

To find that the trial court could contort R.C. 2323.51 to attack conduct that the Supreme Court of Ohio has—through Rule 3.6(b)—expressly authorized would be to step on two constitutional land mines. First, it would infringe on the Ohio Supreme Court's exclusive authority to set and maintain professional standards and rules of conduct to sustain the use of R.C. 2323.51—a legislative enactment—to punish conduct that the ethics rules expressly permit. And beyond the separation-of-powers problem, sanctioning Pattakos for the conduct at issue here would violate his First and Fourteenth Amendment rights.

i. Ohio's trial publicity rule—Prof.Cond.R. 3.6—protects counsel's conduct.

Prof.Cond.R. 3.6, which governs trial publicity by lawyers involved in pending cases, provides in relevant part as follows:

> (a) A lawyer who is participating … in the … litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6,[14] a lawyer may state any of the following: …
>
> (2) information contained in a public record; …
>
> (4) the scheduling or result of any step in litigation; …

Comment [1] to Prof.Cond.R. 3.6 explains how the rule was intended to strike the appropriate balance between protecting free speech and fair trials:

> [1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective

[14] Prof.Cond.R. 1.6 defines an attorney's obligation to maintain the confidentiality of client communications. It is not implicated here.

> effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Courts nationwide recognize that Rule 3.6 balances these competing concerns of protecting both free speech and the right to a fair trial.[15] The safe-harbor provision of Rule 3.6(b) demonstrates this balance, by permitting a lawyer to share public records and scheduling information "notwithstanding" the risk of prejudice stated in division (a). As explained in Comment [4], Rule 3.6(b)'s safe-harbor provision lists communications that are always permissible:

> [4] Division (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and **should not in any event be considered prohibited** by the general prohibition of division (a). Division (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to division (a).

Subsection (b)—the so-called "safe harbor" provision—immunizes Pattakos's communications from sanction. It is undisputed that Pattakos's actions fall within Rule 3.6's safe-harbor provision: he

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[15] *See e.g.*, *Atty. Grievance Comm'n of Md. v. Gansler*, 377 Md. 656, 681, 835 A.2d 548 (Md.Ct.App. 2003) ("Rule 3.6 of the Model Rules of Professional Conduct … attempted to regulate trial publicity in a way that constitutionally balanced the lawyers' right to free expression and an accused's right to a fair trial."); *In re Goode*, 5th Cir. No. 15-30643, 2016 U.S. App. LEXIS 6918, *14 (Apr. 18, 2016) (The rule "constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.") (internal citations omitted); *Graham v. Weber*, D.S.D. No. CV 13-4100, 2015 U.S. Dist. LEXIS 135343, *18 (Oct. 5, 2015) ("[I]n an effort to balance the attorneys' First Amendment rights and the defendants' fair trial rights, the court instructed the attorneys to adhere to the commands of Alabama Rule of Professional Conduct 3.6. The court felt confident that the attorneys were capable of interpreting the Rule and applying it accordingly."); *U.S. v. McGregor*, 838 F.Supp.2d 1256, 1267(D.Ala. 2012) ("strik[ing] a balance between defense counsel's First Amendment rights and the government's interest in a fair trial [by] requiring the attorneys and their trial teams to comply with Alabama Rule of Professional Conduct 3.6.").

shared no information about the case apart from pleadings that had been publicly filed and scheduling information. Any attorney consulting the ethics rules to determine whether Pattakos's conduct was permitted could reach only one conclusion: yes.

ii. By imposing a sanction under R.C. 2323.51 for conduct that Rule 3.6(b) expressly permits, the trial court elevated a legislative enactment over the Supreme Court of Ohio's judgment (which violates separation of powers).

a. The Supreme Court of Ohio has exclusive authority over the practice of law in this state.

Section 2(B)(1)(g), Article VI of the Ohio Constitution vests with the Ohio Supreme Court the "exclusive power to regulate, control, and define the practice of law in Ohio." *Greenspan v. Third Fed. S. & L. Ass.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567, ¶ 16 (citation omitted). And "it has been methodically and firmly established that the power and responsibility to … promulgate and enforce professional standards and rules of conduct, and to otherwise broadly regulate, control, and define the procedure and practice of law in Ohio rest[s] inherently, originally, and exclusively in the Supreme Court of Ohio." *Shimko v. Lobe*, 103 Ohio St.3d 59, 2004-Ohio-4202, 813 N.E.2d 669, ¶ 15. To that end, the Supreme Court of Ohio adopted the Rules of Professional Conduct effective February 1, 2007 including Prof.Cond.R. 3.6.[16] When, in the past, the General Assembly has enacted legislation that infringed on the Supreme Court's exclusive authority, the Court has struck down the provision on separation-of-powers grounds. *See, e.g., Dayton Supply & Tool Co. v. Montgomery County Bd. of Revision*, 111 Ohio St.3d 367, 2006-Ohio-5852, 856 N.E.2d 926, ¶ 62 (declaring unconstitutional a statute that tried to interfere with the Supreme Court's duty to define the practice of law in Ohio).

[16] Its predecessor under the Code of Professional Responsibility was DR 7-107. Prof.Cond.R. Appendix A at A-4; Appendix B at B-4.

b. The Supreme Court of Ohio has determined that attorneys may communicate with the media within the bounds of Rule 3.6.

In regulating the practice of law in Ohio, the Supreme Court has chosen not to impose the kind of general prohibition on attorney communications with the media that characterized earlier iterations of the trial-publicity rule[17] and for which the trial court expressed a preference:

> We make clear that Ohio law imposes no blanket prohibition on an attorney's communications to the media. Attorneys and their clients retain a panoply of First Amendment rights and are free to speak to the public about their claims and defenses provided that they do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements.

Am. Chem. Soc'y v. Leadscope Inc., 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90 (citing Prof.Cond.R. 3.6). That sentiment cannot be reconciled with the trial court's sanction, which would fasten the muzzle that Ohio Supreme Court rejected in *Leadscope*. The Court cannot permit the trial court to use an enactment of the General Assembly to punish conduct that this state's highest judicial authority has chosen—without exception—to permit. Separation of powers requires this Court to vacate the trial court's sanctions order.

iii. In imposing a sanction under R.C. 2323.51 for conduct that Rule 3.6(b) expressly permits, the trial court violated Pattakos's First Amendment rights.

a. Under *Gentile v. State Bar of Nevada*, attorney conduct within the safe harbor of the ethics rules is protected by the First Amendment and may not be sanctioned.

In *Gentile v. State Bar of Nevada*, the U.S. Supreme Court restricted limitations on attorney free speech. 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed. 888 (1991). Attorney Gentile represented a client accused of stealing cocaine. Following his client's indictment, Gentile held a press conference where he made certain statements including that his client was a "scapegoat" and that the state had not

[17] *See* supra n.12 (detailing the progression from Canon 20 (forbidding contact) to the 1970 Model Rule DR 7-107 (complex mechanism authorizing some contact) to the current Prof.Cond.R. 3.6 (more permissive regulation protecting attorney free speech).

"been honest enough to indict the people who did it; the police department; crooked cops." *Id.* at 1034. The state bar sanctioned him under Nevada Supreme Court Rule 177(1), which regulated trial publicity as follows:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The safe-harbor provision—Nevada Bar Rule 177(3)—provided that "notwithstanding" the prohibitions above, a lawyer could state "without elaboration" certain details about the case such as the general nature of a claim, information in the public record, or scheduling information without fear of reprisal. *Id.* at 1048. The Court held that the rule was void for vagueness as interpreted and struck down the sanction against Gentile. *Id.*

The Supreme Court also held that the "substantial likelihood of material prejudice" standard articulated in the ethics rule struck the "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.* at 1074. After *Gentile*, the ABA Model Rules and then the various state bars—including Ohio—incorporated the "substantial likelihood of material prejudice standard" that appears in the current trial-publicity rule.[18] In *Akron Bar Association v. Shenise*, 143 Ohio St.3d 134, 2015-Ohio-1548, 34 N.E.3d 910, the Ohio Supreme Court recently reaffirmed imposing this high bar to sanction attorney speech.

Applying *Gentile*, the Ohio Supreme Court in *Shenise* rejected sanctions against an attorney for alleged discourteous treatment of a judge. The attorney had complained to the media that he had not received notice of a hearing or that an arrest warrant had been issued for his client. In reversing the board's determination that the attorney had violated Prof.Cond.R. 3.5(a)(6), the court affirmed

[18] "The Rule [3.6] puts flesh on the bones of the 'substantial likelihood of material prejudice' standard endorsed by the United States Supreme Court." *Constand v. Cosby*, 229 F.R.D. 472 (E.D. Pa. 2005).

the principle that attorney speech may be sanctioned only if it is "highly likely to obstruct or prejudice the administration of justice" under *Gentile*. *Id.* at ¶ 17.

Specifically construing the safe-harbor provision in *Gentile*, the U.S. Supreme Court held that "[b]y necessary operation of the word 'notwithstanding,' the Rule contemplates that a lawyer [acting within the safe harbor] need fear no discipline, … even if he 'knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding.'" *Id.* at 1048 (first ellipsis and second brackets in *Gentile*).

In rejecting Pattakos's argument that Prof.Cond.R. 3.6(b) immunized his conduct because the information he shared fell squarely within the safe harbor, the trial court stated: "Rule 3.6 does not address the questions of how and when a lawyer may encourage publication of information protected by Rule 3.6(b) without violating the prohibition against frivolous conduct in R.C. 2323.51." R. 408 at 15. "While the information communicated to *Scene* by Pattakos may well have been protected by Rule 3.6(b), his urging that reporting begin once the jury was selected raised a substantial likelihood that the jury would read about his clients[']claims." *Id.*

But—under *Gentile* and *Shenise*— that is not the standard by which trial publicity is judged. "Any limitation on the attorney's speech must be narrow and necessary, carefully aimed at comments likely to influence the trial or judicial determination." *U.S. v. Scarfo*, 263 F.3d 90, 93 (3d Cir. 2001). The trial court flipped the onus when it admonished Pattakos because his communications with the media "served no purpose of achieving an orderly or fair adjudicative process or settlement." Lawyers are free to speak unless their speech is *substantially* likely to *materially* prejudice an adjudicative proceeding. And for information within the safe harbor—such as the pleadings or scheduling info that is what is at issue here—the conduct is immune from consequence even if it could or does materially prejudice a proceeding. As in *Gentile*, Rule 3.6(b)'s exception structure in relation to Rule 3.6(a) above it makes that clear.

Pattakos had no obligation to discourage publicity or even to avoid encouraging it. Yet the trial court sanctioned him seemingly based on the trial court's personal views about the propriety of attorney communications with the media, regardless of governing law. The sentiments the trial court repeatedly expressed disapproving of attorney contact with the media were unmoored from the actual requirements of the modern ethics rules and current constitutional protections.

Likewise, the trial court's assertion that the sanction imposed was based in part on the fact the Pattakos did not "give the Court advance notice that he had engaged in conversations with *Scene* that might produce an article which could prejudice the jury," R. 408 at 16, is unconnected to any specific ethical-rule requirement and not an appropriate basis for imposing a sanction.[19] Given the "almost invariable assumption of the law that jurors follow their instructions," *Shannon v. U.S.*, 512 U.S. 573, 585, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994) (internal quotation omitted), it is unclear why an article appearing in an alternative weekly like *Scene* should present a cause for concern. Indeed, the voir dire the trial court conducted after the article was published confirmed that the jurors had complied with the court's instructions to avoid media coverage of the case. Supp. T. 622:21–652:20.

[19] The trial court cites no authority for imposing such an obligation on Pattakos, nor did Plaintiffs' research efforts unearth any. Some ethics rules—such as Rule 1.12(b) (law clerk negotiating for employment with party); Rule 3.3(b) (disclosure to tribunal of criminal or fraudulent conduct); Rule 3.3(d) (informing a tribunal of material facts in an *ex parte* proceeding); or Rule 3.5(b) (revealing to the tribunal improper conduct by a juror)—do require an attorney to provide notification to a court. Rule 3.6 does not. Nor have Ohio attorneys been previously sanctioned under R.C. 2323.51 for failing to notify a court about a news story.

The notion that an attorney has an obligation to give a court notice that something may be or has been published about a case is a slippery slope that would be impossible to police. Would the trial court impose on all attorneys an obligation to monitor all media sources for stories on pending cases and inform that court if something appears? Would the source matter? If alternative weeklies like *Scene* warrant notification, obviously the *New York Times* or *Cleveland Plain Dealer* would require it. What about the *Chagrin Valley Times*? Or a high school newspaper? What about a blog? Or a tweet? If someone tweets something negative about an opposing party, does the lawyer have to notify the judge or face the risk of a sanction? What if the lawyer isn't in court that day: must a notice be filed or can it wait until the next court appearance?

The trial court made no finding that Pattakos shared case information beyond public records and scheduling details, or that his actions were substantially likely to materially prejudice the proceedings. The sanctions order against Pattakos cannot stand consistent with the standard set in *Gentile*.

b. Under *Gentile*, the language of R.C. 2323.51 is too vague to constitutionally apply to sanction Pattakos for communicating with a reporter: lawyers are not required to guess about the limits of protected speech.

Applying R.C. 2323.51 to punish conduct that the ethics rules immunized is an impermissibly vague application of the frivolous-conduct statute. In *Grayned v. City of Rockford*, the U.S. Supreme Court enunciated the test for vagueness in the context of speech restrictions:

> First, because we assume that man is free to steer between lawful and unlawful conduct we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.

408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (internal citations omitted).

In *Gentile*, the U.S. Supreme Court found that the Nevada Supreme Court's interpretation of the safe-harbor provision in sanctioning Gentile was unconstitutionally vague because it "misled [Gentile] into thinking that he could give his press conference without fear of discipline." 501 U.S. at 1048. In other words, the rule provided insufficient guidance to lawyers seeking to avail themselves of the safe-harbor provision and created "a trap for the wary as well as the unwary." *Id.* at 1050.

Consistent with *Gentile*, Ohio attorneys must have notice of what is permitted and what is prohibited. They must be able to rely on the ethics rules to guide their conduct, and should not face

discipline, sanctions, or other consequences if they act within Rule 3.6's safe harbor. In the sanctions order, the trial court cited no precedent for invoking R.C. 2323.51 to punish attorney communication with the media that the professional-conduct rules expressly authorize. An exhaustive search revealed no federal or state case law nationally where an attorney has been sanctioned—under R.C. 2323.51, another state's equivalent statute, or any other theory—for sharing with the media scheduling information or public records, or for encouraging media interest in a matter. Indeed, courts have refused to impose sanctions where an attorney's contact with the media did not violate Rule 3.6 or that state's equivalent.[20] And courts nationwide have regularly rejected requests for case-specific limitations on attorney speech that exceed Rule 3.6's boundaries.[21]

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[20] *See, e.g., State of Rhode Island v. Lead Indus. Assn., Inc.*, 951 A.2d 428, 466 (R.I. 2008) (reversing trial judge's contempt citations against Rhode Island attorney general for extrajudicial statements made in connection with lead-based paint litigation; comments to media about not giving in "to those who would spin and twist the facts" (referring to the defense) did not violate Rule 3.6 because "the record does not support the conclusion that the Attorney General knew or reasonably should have known that his remarks could create a substantial likelihood of material prejudice."); *Coleman-Hill v. Governor Mifflin Sch. Dist.*, E.D. Pa. No. 09-cv-5525, 2010 U.S. Dist. LEXIS 127710 (Dec. 2, 2010) (denying motion for sanctions based on defense counsel's press release posted on defendant's website).

[21] *See, e.g., Marceaux v. Lafayette City-Parish Consol. Gov't*, 731 F.3d 488 (5th Cir.2013) (limiting parties' and counsel's extrajudicial communications to, inter alia, "information contained in the public record" or "scheduling" matters); *Munoz v. City of New York*, S.D.N.Y No. 11 Civ. 7402, 2013 U.S. Dist. LEXIS 67827, *4 (May 10, 2013) (denying defendant's motion to require plaintiff's counsel to remove video of the incident from its website and instead adopting N.Y. Bar Rule 3.6 as a court order to govern attorney extrajudicial communications to protect parties' right to fair trial); *Commonwealth of Pa. v. Lambert*, 723 A.2d 684, 686, 694 (Pa.Super.1998) (affirming order precluding counsel from making public comment "except in accordance with Rule 3.6 of the Rules of Professional Conduct" noting "the attorney may discuss…any information contained in the public record…The attorney may also discuss matters of public record, such as the time and place set for court hearings, without violating Rule 3.6."); *U.S. v. Scrushy*, N.D.Ala. No. CR-03-BE-0530-S, 2004 U.S. Dist. LEXIS 6711 (Apr. 13, 2004) (imposing a protective order limiting extrajudicial statements forbidden by Ala. Prof. Cond. R. 3.6, expressly excluding public records and scheduling information from the restriction); *Ex parte Wright*, 166 So.3d 618 (Ala. 2014) (gag order was overly broad because it did not provide exceptions for making statements within the safe harbor of Rule 3.6); *U.S. v. McGregor*, 838 F.Supp.2d 1256 (M.D.Ala.2012) (declining to impose gag order and instead requiring all attorneys to comply with Ala. R. Prof. Cond. 3.6); *Berndt v. California Dep't of Corrections*, N.D. Cal. No. C03-3174, 2004 U.S. Dist. LEXIS 15896 (Aug. 9, 2004) (declining to impose restrictions on attorney's right to make extrajudicial statements).

Construing the frivolous-conduct statute to sanction an attorney for conduct the ethics rules expressly authorize is an unconstitutional application of R.C. 2323.51 under *Gentile;* courts may not make lawyers "guess" at the contours of prohibited conduct. *Id.* at 1048. "The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement…" *Id.* at 1051. The trial court's sanctions order imposed the paradigm of infinite guesswork that *Gentile* rejected. That uncertainty is underscored by the following case.

In *In re Grand Jury Investigation*, the subject of a grand-jury investigation intervened to seek sanctions against an assistant county prosecutor for disclosing to a *Washington Post* reporter that the intervenor would be indicted. 23 Ohio App.3d 159, 160, 492 N.E.2d 459 (8th Dist. 1985). This Court affirmed the trial court's refusal to punish the prosecutor under DR 7-107 (the predecessor to Rule 3.6) for communicating with the media about the case. *Id.* And it was the same trial judge—Judge Burt Griffin—who declined to sanction that attorney for communicating with the media. *Id.*

So if Pattakos had not only read the ethics rule, but also researched this exact trial judge's past interpretation of this ethics rule and its predecessor, Pattakos would have had no reason to suspect that he would be disciplined for his conduct. This is the precise vagary that makes imposing a sanction unconstitutional here under *Gentile*. It was not incumbent on Pattakos to guess that the trial judge would marshal a more general legislative enactment to punish conduct that the ethics rules expressly permit. The Court should vacate the sanctions order.

Prof.Cond.R. 3.6 strikes the proper balance between attorney free speech and protecting the integrity of trial proceedings. *Gentile*, 501 U.S. at 1074. What Pattakos did was protected by Rule 3.6(b)'s safe harbor. Any person could have collected through the Cuyahoga County Common Pleas Court docket all the information he shared. No evidence exists that he knew or reasonably should have known that sharing scheduling information or public records could prejudice the proceedings (let alone materially so). And no reasonable attorney would have ever imagined that such conduct

would result in a sanction. Under separation of powers and the First and Fourteenth Amendments, this Court should vacate the October 30, 2015 sanctions order (R. 408).

CONCLUSION

For the reasons explained above, the Court should:

1. Overrule Appellants' first assignment of error;

2. Overrule Appellants' second assignment of error;

3. Sustain Appellees' first cross-assignment of error by reversing the trial court's remittitur of the $75,000 economic damages award on Cruz's IIED claim (and, should it overrule Appellees' second cross-assignment of error, the Court should add a corresponding 40% ($30,000) to the trial court's award of attorneys' fees that was based on Plaintiffs' 40% contingency-fee agreement with counsel);

4. Sustain Appellees' second cross-assignment of error by vacating the August 28, 2015 ruling on attorneys' fees and remanding this case to the trial court to determine a reasonable amount of fees consistent with the lodestar calculation; and

5. Sustain Appellees' third cross-assignment of error by vacating the October 30, 2015 sanctions order.

Date: May 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on May 13, 2016:

/s/ Peter Pattakos
Attorney for Plaintiff-Appellees/Cross-appellants