Sindell and Sindell, L.L.P
Attorneys and Counselors at Law
Chagrin Plaza West
23611 Chagrin Boulevard, Suite 227
Cleveland, Ohio 44122
Telephone: (216) 292-3393
Facsimile: (216) 292-3877

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED
2020 DEC -9 P 3:48
CLERK OF COURTS
CUYAHOGA COUNTY

Tina Renee King
1369 Newton St.
Tallmadge, Ohio 44278

and

Marie Gelle
199 Kenwick Drive
Northfield, Ohio 44067

Plaintiffs

vs.

Menorah Park Foundation
c/o Statutory Agent
Taft Service Solutions Corp.
425 Walnut St., Suite 1800
Cincinnati, Ohio 45202

and

The Montefiore Home,
An Ohio Domestic Corporation
1 David Myers Parkway
Beachwood, Ohio 44122-1162

and

The Montefiore Foundation
c/o The Montefiore Home
1 David Myers Parkway
Beachwood, Ohio 44122-1162

and

Menorah Park Center for
Senior Living Bet Moshav Zekenim
Hadati
c/o Statutory Agent Taft Services
Solutions Corp.
200 Public Square, Suite 3500

Judge: KELLY ANN GALLAGHE

Case No. CV 20 941131

Complaint

COMPLAINT

Trial by Jury Requested

CV20941131 115381281

$ 250 DEPOSITED
DEC - 9 2020
SECURE COSTS
Cuyahoga County Clerk of Courts
Per _____ Deputy

Cleveland, Ohio 44114

and Menorah Park at Home, LLC
c/o Statutory Agent Taft Service
Solutions Corp.
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202

and

James P. Newbrough Jr.
Menorah Park President and CEO
754 Hillcrest Drive
Wadsworth, Ohio 44281-9006

and

Richard Schwalberg, COO
7335 Hillside Lane
Solon, Ohio 44139-5063

and

Menorah Park Women's & Men's
Association
c/o Statutory Agent Richard S. Rivitz
200 Public Square
Cleveland, Ohio 44114

and

John Does I-X, Inclusive

Defendants

JURISDICTION AND PARTIES

1. This action is brought by Plaintiffs pursuant to the common law recognized in the State of Ohio, including for defamation, tortious interference with Plaintiffs' economic and contractual opportunities, including related to business opportunities and employment relationships, as well as for wrongful termination of employment in violation of the public policy of the State of Ohio.

2. Plaintiff Tina Renee King is a Registered Nurse licensed in the State of Ohio who was employed as the Director of Nursing with Defendants beginning in November 2016 and who was wrongfully terminated from her employment by Defendants on or about October 29, 2020.

3. Plaintiff Marie Gelle is a Registered Nurse licensed in the State of Ohio who was employed as the Assistant Director of Nursing with Defendants beginning in 2017 and who was wrongfully terminated from her employment by Defendants on or about October 29, 2020.

4. Defendants Menorah Park Foundation, the Montefiore Home, the Montefiore Foundation, Menorah Park Senior Living Bet Moshav Zekenim Hadati and Menorah Park at Home, LLC are variously Ohio Corporations and entities with their principal places of business in the City of Beachwood, County of Cuyahoga, State of Ohio. These Defendants are variously engaged in the business of providing health and medical care for members of the public, and include the provision of facilities for skilled nursing care, rehabilitation, long-term care, and assisted living. These facilities and businesses are duly licensed and/or are authorized to do business and provide services in the State of Ohio.

5. Defendant James P. Newbrough, Jr. is the President and CEO of Defendants.

6. Defendant Richard Schwalberg is the COO of Defendants.

7. At all times hereinmentioned, all Defendants engaged in the acts, omissions, and events set forth in this complaint in the County of Cuyahoga, State of Ohio.

8. At all times hereinmentioned, Defendants John Does I through X, inclusive, are sued herein pursuant to Rule 15(D) of the Ohio Rules of Civil Procedure in that their true names and identities are not presently known to nor can they be presently ascertained by Plaintiffs. When the true names and identities of Defendants John Does I through X, inclusive, become known to and ascertained by Plaintiffs, this Complaint will be amended and/or supplemented to so allege same.

9. At all times hereinmentioned, Defendants John Does I through X, inclusive, are individuals and/or entities who and/or which engaged in various wrongful tortious and/or illegal acts or omissions as alleged herein giving rise to their liabilities to Plaintiffs for injuries and damages proximately caused to them.

10. At all times hereinmentioned, all Defendants are the agents, servants and employees of all other Defendants acting within the course and scope of their respective agencies, services and employments. All actions and/or omissions of all Defendants were done and/or omitted by and through their respective agents, servants and employees acting within the course and scope of their respective agencies, services and employments.

11. All actions and/or omissions of all Defendants herein were done maliciously, intentionally, willfully, unlawfully, consciously, in bad faith, against public policy, wrongfully, retaliatorily, illegally, arbitrarily, capriciously, fraudulently, culpably, wantonly, recklessly,

negligently, carelessly, tortiously, defamatorily, in malicious interference with Plaintiffs' economic, employment and business relationships and in conscious and reckless disregard for the rights of Plaintiffs herein.

12. At all times hereinmentioned, all Defendants acted jointly, severally, individually, in combination, in conspiracy, aiding and abetting, and pursuant to a pattern and practice of tortious misconduct, including against Plaintiffs.

13. This action is brought pursuant to the common law, the laws and public policy recognized in the State of Ohio. The allegations and claims in this action are intended to assert rights and causes of action only and exclusively under and pursuant to the laws of the State of Ohio. No claim or cause of action herein is made to assert any right, question, issue, remedy or relief under any federal law of the United States. It is the specific intention of Plaintiffs herein to litigate their claims and causes of action in the courts of the State of Ohio. Therefore, should the allegations in this Complaint and/or any evidence adduced during discovery in this action imply, suggest or indicate in any way any possibility that Plaintiffs herein are asserting or claiming any right or cause of action pursuant to any federal law of the United States, Plaintiffs specifically eschew and reject any such implication, suggestion or indication and hereby announce and assert, in advance, that they are not pursuing and have never intended to pursue such a claim, right or cause of action for any relief or remedy under any federal law of the United States, thereby precluding any effort by Defendants at any time after the filing of this Complaint to remove this action to any federal court based upon federal question jurisdiction.

FACTUAL ALLEGATIONS

14. The overriding factual conclusions to be drawn from these allegations are that Defendants were confronted with the pandemic Covid 19 Coronavirus and made upper management misjudgements at the highest levels of management, above the authorities of Plaintiffs as the Director and Assistant Director of Nursing. These misjudgments in protocols, procedures and controls created and fostered the spread of this terrible virus to staff, patients, and residents, which have already caused and will continue to cause widespread illnesses, injuries and deaths. Defendants attempted to hide and cover up these upper management misjudgments and mismanagement and the aforementioned deleterious harm thereby caused to staff, patients and residents. When the widespread increase of Covid 19 cases could no longer be hidden and covered up, Defendants wrongfully attempted to deflect the misjudgments and mismanagement of its upper management by publicly, tortiously, falsely, defamatorily and maliciously blaming and scapegoating Plaintiffs as well as wrongfully terminating their employments, because of and in retaliation against them for objecting to the misguided and dangerous upper level management misjudgments and mismanagement decisions they made, resulting in the aforementioned widespreading of Covid 19 contractions by staff, residents and patients.

(A) PLAINTIIFS' EXPRESSED OBJECTIONS TO DEFENDANTS' VIOLATIONS OF PUBLIC POLICY

15. Plaintiffs, in meetings with their upper management superiors and other employees, and on many other occasions prior to the mid-October 2020 widespread Covid 19 outbreak urged Defendants to secure Covid 19 testing results for staff sooner than 3 to 7 days after

testing sample collections. This urging by Plaintiffs is consistent with the public policy in Ohio, expressed by the Governor, the Ohio Department of Health, Ohio laws and Ohio Administrative Code provisions and Ohio's incorporation into its public policy and laws of the orders and guidance for the Center for Disease Control, MACPAC, the Center for Medicare and Medicaid Services, the U.S. Department of Health and Human Services and other Ohio and Federal agencies incorporated into Ohio law and/or public policy. It was the policy and practice of Defendants to conduct weekly Covid 19 testing of residents and patients and submit those samples to the Cleveland Clinic which, in turn, promptly reported the testing results within 24 hours after samples were collected. However, with testing of staff (including nurses and other caregivers who worked directly on a hands on basis with Defendants' residents and patients) the samples were sent to outside labs (other than the Cleveland Clinic) which reported results 3 to 7 days **after** Defendants' staff samples were collected. Although staff members who tested positive were quarantined upon receipt of their positive test results, for 3 to 7 days before the positive results were reported and thus became known, the Covid 19 infected staff members were directly hands-on treating residents and patients, obviously spreading the Coronavirus throughout the various residents and patients of Defendants.

In fact, Defendants had a "Point of Care" testing machine capable of giving results within seconds for any tested individual. Plaintiffs were ordered by Defendants not to utilize that machine to test any residents, patients or staff, including symptomatic individuals, expressing the fear that it would reveal "too many" positive results.

When Plaintiffs spoke out at the aforementioned meetings with their upper management supervisors about the aforementioned and other staffing shortages and

deficiencies, they were ordered by Defendants, including by the Administrator, not to discuss or raise these shortages and deficiencies in these meetings.

(B) DEFAMATION BY DEFENDANTS

16. On October 29, 2020, after Plaintiffs' were terminated from their employments with Defendants, Defendants published and continued thereafter to publish and/or broadcast , the following false defamatory statements both in writing and orally:

(i) Defendants, including specifically President and CEO, Defendant Newbrough, disseminated attached Exhibit A to the entire staff of Defendants, stating among other things that:

(1) Plaintiffs, specifically identified as "Montefiore's Director of Nursing and Assistant Director of Nursing [namely Plaintiffs] actually submitted false tests";

(2) Plaintiffs, as above identified, "failed to follow protocols and procedures related to Covid 19";

(3) Plaintiffs, as above identified, "failed to follow nursing standards of practice as it related to conducting the tests";

(4) Plaintiffs, as above identified, "violated the values that are at the core of our organization".

Those statements were false and untrue, and were known to be false and untrue by Defendants, and were made intentionally and maliciously with the knowledge that the statements were false and untrue, in conscious and reckless disregard as to their truth and

falsity (Attached Exhibit B, Blatnik v. Avery Dennison, 148 Ohio App. 3d 494 (11th App. Dist., Lake Cty., 2000).

(ii) Defendants, including specifically Defendant Newbrough, disseminated attached Exhibit C to all "Family Members and Residents" of Defendants, containing the same aforementioned statements in attached Exhibit A. By this reference, Plaintiffs incorporate herein all of the allegations set forth hereinabove in subpart (i) of this paragraph 16.

(iii) Defendants published to the Cleveland Jewish News the same false and untrue statements in attached Exhibits A and C as a result of which on or about October 29, 2020, the Cleveland Jewish News published and disseminated to large numbers of readers of and subscribers to the Cleveland Jewish News the statements included in attached Exhibit D. The contents of Exhibit D were published on internet media accessible to countless numbers of users, some of whom expressed their responsive upset and disdain toward Plaintiffs on the internet, some of which are set forth in attached Exhibit D. Plaintiffs incorporate herein by this reference all of the allegations set forth in preceding subparts (i) and (ii).

(iv) On or about October 29, 2020, after Defendants terminated the employment of Plaintiffs, Defendants, including specifically Defendants' COO, Defendant Schwalberg, published on Television Channel 3, (WKYZ), a news broadcast during which the news announcers repeated the false and untrue statements that Plaintiffs, identified as the Director of Nursing and Assistant Director of Nursing of Defendants, submitted false Covid 19 tests and failed to follow protocols causing a Coronavirus outbreak among residents and patients of Defendants. Defendant Schwalberg specifically endorsed those untruths and falsehoods, in person, during

the aforementioned broadcast. Plaintiffs incorporate herein by this reference all of the aforementioned allegations set forth in preceding subparts (i), (ii) and (iii) of this Paragraph 16.

The link to the aforementioned news broadcast in this subpart (iv) is: https://www.wkyc.com/article/news/investigations/beachwood-nursing-outbreak-covid-19/95-4211e718-e0c8-43c8-85c9-4801bd674ce6 . Plaintiffs also incorporate herein into this paragraph 16 attached Exhibits A, B, C and D.

(C) TORTIOUS INTERFERENCE WITH ECONIMIC BUSINESS AND CONTRACTS

17. Plaintiffs incorporate herein all of the preceding Factual Allegations in this Complaint. Plaintiffs each sought employment as nurses subsequent to the termination of their employments by Defendants. As a direct and proximate result of Defendants' aforementioned actions, Plaintiffs were deprived of their ability to obtain and maintain job offers to them from prospective employers, in some cases offers that were extended, accepted and then rescinded by prospective employers.

FIRST CLAIM FOR RELIEF

(Intentional and Malicious Defamation)

18. Plaintiffs hereby incorporate herein by this reference all of the preceding allegations of this Complaint.

19. Defendants and each of them, without privilege or justification, published, disseminated and/or broadcast intentional and defamatory false and untrue statements about Plaintiffs, imputing their honesty and integrity including pertaining to their professions. These statements constituted defamation per se.

20. As a direct and proximate result of the aforementioned defamation of Defendants, Plaintiffs were injured and economically damaged, and suffered emotional distress, humiliation and upset as well as past and continuing economic loss, including loss of income.

SECOND CLAIM FOR RELIEF

(Malicious and Intentional Tortious Interference with Plaintiffs' Economic, Business, Employment and Contractual Relationships)

21. Plaintiffs' hereby incorporate herein by this reference all of the preceding allegations of this Complaint.

22. Defendants and each of them maliciously, intentionally and tortiously interfered with Plaintiff's economic, business, employment and contractual relationships without privilege or justification to do so.

23. As a direct and proximate result of the Defendants aforementioned tortious interference, Plaintiffs were injured and economically damaged and suffered emotional distress, humiliation and upset as well as past and continuing economic loss, including loss of income.

THIRD CLAIM FOR RELIEF

(Wrongful Termination in Violation of Public Policy)

24. Plaintiffs hereby incorporate herein by this reference all of the preceding allegations of this Complaint.

25. At all times hereinmentioned, the public policy of the State of Ohio that nursing homes and skilled nursing and long-term care and assisted living facilities in Ohio take and/or follow all reasonable and necessary steps, measures, protocols, guidances, regulations, orders, laws

and practices to protect its patients and residents from contracting the Covid 19 Coronavirus, as alleged herein. Plaintiffs expressed to their upper management superiors urgent complaints about and objections to Defendants' failures and deficiencies in Defendants' adherence to steps, measures, protocols, guidances, regulations, orders, laws and practices to protect Defendants' staff, patients, and residents from contracting the Covid 19 Coronavirus during the ongoing pandemic, taking into account among other things the widely known fact that this virus was and is highly contagious, even from exposure to persons, including staff members, who were infected with the virus without showing or having symptoms. As a result of Plaintiffs' various concerns, objections, and complaints to Plaintiffs' upper management supervisors, as aforementioned, which Defendants chose to ignore, when Defendants' patients and residents began contracting the virus on a widespeard basis, Defendants wrongfully terminated the employment of Plaintiffs in violation of Ohio's public policy because of the aforementioned prior concerns, complaints and objections, including with respect to staff-related issues and testing practices utilized by Defendants for determining if staff members as well as patients were positive, infected with and capable of transmitting the virus to others in Defendants' facilities.

26. As a direct and proximate result of Defendants' aforementioned wrongful termination of Plaintiffs' employment in violation of public policy, Plaintiffs were injured and economically damaged and suffered emotional distress, humiliation and upset as well as past and continuing economic loss, including loss of income.

WHEREFORE, on all Claims for Relief, Plaintiff Tina Renee King and Plaintiff Marie Gelle each pray for judgment against all Defendants and each of them as follows:

1. For compensatory damages in a sum which will fully, fairly and adequately compensate each Plaintiff for her injuries and damages alleged herein and in a **sum well in excess** of $25,000;

2. For punitive damages which will fully, fairly and adequately punish Defendants and each of them for their intentional and malicious misconduct as alleged herein and which will set an example of these Defendants and each of them in a **sum well in excess** of $25,000;

3. For each of the Plaintiffs' reasonable attorney fees and litigation expenses incurred in connection with the prosecution of this action;

4. For each of the Plaintiffs' costs in this action;

5. For such other relief, including equitable relief, which this Court deems just and equitable in the premises.

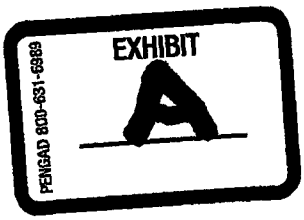
Respectfully Submitted

Steven A. Sindell, Esq. (0002508)
Rachel Sindell, Esq. (0078463)
23611 Chagrin Blvd., Suite 227
Beachwood, Ohio 44122
Tel: (216) 292-3393
Fax: (216) 292-3577
Cell: (216) 401-4913
Email: info@sindellattorneys.com
Attorneys for Plaintiffs

TRIAL BY JURY REQUESTED

Plaintiffs request a trial by jury with the maximum number of jurors permitted by law.

Steven A. Sindell, Esq. (0002508)



From: Kristen Christian [mailto:kchristian@menorahpark.org]
Sent: Thursday, October 29, 2020 9:46 AM
To: EveryoneList; MontefioreAllUsers; Weils All Users
Subject: Important Update: COVID Testing and Montefiore

10-29-20

TO: Staff
FR: Jim Newbrough
RE: COVID-19 Testing at Montefiore

I want to update you on the recent uptick in positive COVID-19 test results at Montefiore and alert you regarding some key personnel changes we have made there as well.

As you know, in mid-October, a number of Montefiore residents in one of our units began exhibiting symptoms of COVID-19. Tests were conducted, but the results were negative. After rerunning the tests, several residents tested positive. Fearing that we might be facing a widespread outbreak on our campus, we immediately called in resources from throughout the county and the state to assist us. We were able to retest all the residents in question, confirm positive diagnoses in 34 residents and transfer them to a separate unit for special care. Our most recent testing indicates that the situation is under control and the number of cases at Montefiore has stabilized.

As we were addressing this situation, we also began investigating information provided by a member of the nursing staff in the affected unit, who alerted her manager as well as Human Resources that the original tests might not have been conducted appropriately. I am very sorry to report that after conducting a number of interviews with staff, confirming lab results and reviewing patient records, our investigator concluded that Montefiore's Director of Nursing and the Assistant Director of Nursing actually submitted false tests, thereby failing to follow official protocols and procedures related to COVID-19 and failing to follow nursing standards of practice as it related to conducting the tests. I am also sorry to tell you that Montefiore's Administrator failed to oversee the situation appropriately.

However, our investigation did confirm that this situation was limited to a very short period of time, was isolated to one unit at Montefiore and only involved the three staff members identified.

At Menorah Park and Montefiore we hold ourselves to a very high standard of care. In this case, these three individuals clearly failed to meet that standard. They violated the values that are at the core of our organization and we've terminated their employment.
We are in the process of notifying the appropriate state authorities about this matter and we will fully cooperate with any investigation any of them decide to undertake as a result of the information we have shared. Our goal throughout this situation has been, and will continue to be, full transparency.

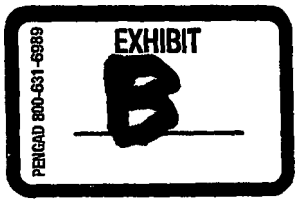
Before I close, I want to apologize for any worry or concern this situation might have caused. These are very difficult times and I know COVID-19 testing can be stressful under the best of circumstances. I am grateful that a member of our staff came forward to alert us to this issue and enabled us to act quickly to address it. That individual's decision reflects the way we always want to treat our residents – as valued members of the Montefiore and Menorah Park family.

If you have any questions, please contact Beth Silver at 216-839-6678 or bsilver@menorahpark.org.

Sincerely,

Jim Newbrough

Jim Newbrough, Menorah Park President and CEO



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LEXSEE 148 OHIO APP. 3D 494

MICHAEL A. BLATNIK, et al., Plaintiffs-Appellees, - vs - AVERY DENNISON, et al., Defendants-Appellants.

CASE NO. 2000-L-110

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

148 Ohio App. 3d 494*; *2002 Ohio 1682*; *774 N.E.2d 282*; *2002 Ohio App. LEXIS 1661

April 12, 2002, Decided

PRIOR HISTORY: [***1] CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas. Case No. 99 CV 000167.

DISPOSITION: Affirmed in part; reversed in part.

COUNSEL: ATTY. JAMES P. BOYLE, ATTY. CATHLEEN M. BOLEK, ATTY. STEVEN A. SINDELL, SINDELL, YOUNG, GUIDUBALDI & SUCHER, P.L.L., Cleveland, OH (For Plaintiffs-Appellees).

ATTY. DANIEL R. WARREN, ATTY. SINDY J. POLICY, THOMPSON, HINE & FLORY, L.L.P., Cleveland, OH (For Defendants-Appellants).

JUDGES: HON. WILLIAM M. O'NEILL, P.J., HON. JUDITH A. CHRISTLEY, J., HON. ROBERT A. NADER, J. CHRISTLEY, J., dissents with Dissenting Opinion, NADER, J., concurs.

OPINION BY: WILLIAM M. O'NEILL

OPINION

[*498] [**285] O'NEILL, P.J.

Appellants, Avery Dennison Corporation ("Avery Dennison"), David Scheibel ("Mr. Scheibel"), and Thomas Loria ("Mr. Loria"), appeal the judgment of the Lake County Court of Common Pleas, which entered a favorable verdict on the defamation and loss of consortium claims of appellees, Michael A. and Michelle A. Blatnik ("Mr. and Mrs. Blatnik"), in the amount of $ 735,000 following a jury trial. For the reasons that follow, the judgment of the trial court is reversed in part as to the loss of consortium claim, [***2] but affirmed in all other respects.

On February 5, 1999, appellees filed a complaint against Avery Dennison, Mr. Scheibel, and Mr. Loria, alleging that immediately after Mr. Blatnik was terminated, appellants held a series of meetings with the employees of Avery Dennison. According to the complaint, during these meetings, false and defamatory statements were made to the employees that Mr. Blatnik had been terminated for sexual harassment, and that he had engaged in improper conduct while an employee of Avery Dennison. It was further alleged that these false statements were made with actual malice, and that there was no business reason for the publication of these statements to the employees of Avery Dennison.

In addition to Mr. Blatnik's defamation claim, Mrs. Blatnik brought a claim for loss of consortium on the basis that she had been deprived of the services and companionship of her husband as a result of the defamatory statements made by appellants.

This matter proceeded to trial where the following facts were adduced. Mr. Blatnik commenced employment with Avery Dennison in 1989. While employed with the company, Mr. Blatnik worked at both the Mentor and Painesville plants. By [***3] February 1994, he was the lead process operator in the specialty tape division at the Mentor plant.

During this time, Marleah Zacharias ("Ms. Zacharias") was hired as a process operator in the specialty tape division where Mr. Blatnik was her supervisor and conducted evaluations of her work. Soon after [**286] her employment began, Ms. Zacharias made claims of sexual harassment against Mr. Blatnik. Then, after only four months of employment, Ms. Zacharias resigned in June 1994.

In August 1994, Ms. Zacharias filed a charge of discrimination with the Ohio Civil Rights Commission ("OCRC") and the Equal Employment Opportunity Commission ("EEOC"), alleging that she was sexually harassed by the lead process operator at Avery Dennison. After conducting an investigation, Avery Dennison prepared a position statement for the OCRC indicating that "*no* [*499] *evidence* exists of a hostile work environment involving behavior or comments of a sexual nature." (Emphasis added.)

While the OCRC/EEOC found no probable cause with respect to Ms. Zacharias' claims, it provided her with a right to sue letter. As a result, in January 1997, Ms. Zacharias filed a complaint against Avery Dennison and Mr. Blatnik for, [***4] *inter alia*, sexual harassment. In response, Avery Dennison conducted another investigation into the allegations by deposing Ms. Zacharias and interviewing numerous employees. However, the parties ultimately reached a settlement in early 1998. Thereafter, in February 1998, Mr. Blatnik was terminated.

As a result of his termination, Mr. Scheibel, the vice-president and general manager of the specialty tape division, together with Mr. Loria, the director of operations, held a series of "communication meetings" with the employees in the specialty tape division at the Mentor and Painesville plants. At these meetings, the following statement was read to the employees:

"*I have called you together to inform you that Avery Dennison has terminated the employment of Michael Blatnik and to discuss with you the reasons for that decision. Mr. Blatnik's employment with the Company was terminated because we believe that he engaged in abusive behavior towards a female co-worker in 1994 which may be viewed as sexual harassment. This decision was based upon information that came to us through our investigations, both internal and external, through interviews of Avery employees who were present* [***5] *at the time who witnessed certain of the events in question, and through sworn testimony given in litigation which resulted from his misconduct. In the course of that investigation, we obtained evidence that indicated that Mr. Blatnik:*

"*-repeatedly used abusive and obscene language toward a female employee;*

"*-interfered with the work of a female employee by refusing to assist her as a member of her team;*

"*-made an obscene reference to a female employee over a facility public address system;*

"*-endangered the safety of a female employee who was performing maintenance on machinery by activating the equipment being serviced; and*

"*-disrupted production by a female employee by altering equipment controls.*

"*Conduct of this type cannot and will not be tolerated by Avery Dennison and has no place anywhere within the Company.*

[*500] "It is critical that everyone at Avery Dennison understands and supports the Company's policy concerning sexual harassment, discrimination of any kind, and abusive behavior by any Avery Dennison employee. Such conduct is unacceptable to Avery Dennison under any circumstances. Behavior of this type is unlawful [**287] and undermines the [***6] positive spirit of cooperation and teamwork which is essential to our working environment. Anyone who engages in such behavior is subject to discipline up to and including discharge.

"It has always been Avery Dennison's policy that:

"1) every employee is to treat every other employee with respect and dignity, in a professional manner, in the manner with which each of us would like to be treated;

"2) any employee who has any problem is free and

encouraged to raise that problem with anyone at the Company and to pursue that problem until it is resolved;

"3) every employee has the right to discuss any problem with Avery Dennison Management or Human Resources Personnel in a confidential setting, completely free from any form of retaliation;

"4) the Company will thoroughly investigate any report of misconduct or unlawful or abusive behavior and take appropriate action based upon the facts determined in that investigation including counseling or disciplinary action up to and including discharge, if necessary.

"In order for the Company to investigate and rectify instances of improper conduct, it is essential that information be provided to the appropriate persons in a timely manner.

[***7] "-Avery Dennison strongly encourages any person with information concerning such behavior to bring that information to the attention of Avery Dennison management so that this behavior can be investigated in a responsible, timely, and confidential manner.

"-Every Avery Dennison employee should understand that state and federal law prohibits any employer from taking any retaliatory action against an employee who provides factual information concerning any form of discrimination.

"-Avery Dennison has always supported and fully supports this vitally important legal principle. Under no circumstances will the Company take or tolerate any form of retaliation against any employee who provides factual information to the Company in the course of an investigation of workplace misconduct. Any employee who feels that he or she has been the victim of retaliation by anyone should immediately report that retaliation to Company [*501] management. All retaliatory conduct will be investigated by the Company and addressed appropriately.

"-Only through open, candid communication, without fear of retaliation, can all of us at Avery Dennison work together to achieve and maintain a workplace which is free of [***8] discriminatory and abusive behavior.

"-We hope that we can count on each of you to work with us toward that goal." (Emphasis added.)

While Mr. Blatnik takes issue with the emphasized portion of this statement, Mr. Scheibel stated that it was necessary to mention Mr. Blatnik at the meetings and state the reasons for his termination in order for the employees to understand the sexual harassment policy. Further, Mr. Scheibel indicated that there was no reason to disbelieve the claims against Mr. Blatnik, and that he did not have any doubt regarding the reliability of the information upon which the statements were based.

At trial, appellees presented the testimony of several employees of Avery Dennison, including: Richard Pohl, Patricia Lee Naumann, Peggy Fulmer, Mark R. Rago, William Wood, and Mike Webster. [**288] Generally, these employees stated that they *never* observed Mr. Blatnik sexually harass Ms. Zacharias. Mr. and Mrs. Blatnik also testified on their own behalf.

In turn, appellants offered the testimony of the following Avery Dennison employees: Edward F. Kloc ("Mr. Kloc"), Paul Phipps, Keith Lipovich, and Paul Durda. Generally speaking, these witnesses stated that Mr. Blatnik [***9] used abusive and derogatory sexual language towards Ms. Zacharias and explained that she complained to them about Mr. Blatnik sexually harassing her.

For instance, Mr. Kloc testified that he observed the following incidents between Mr. Blatnik and Ms. Zacharias:

"A. *** Mr. Blatnik asked if I would take these gloves down to her [Ms. Zacharias] and when I got down to her station he got on the microphone and he asked me in front of her, she heard it, I tried, if I was going to try to get into that red bush while I was down there giving her the gloves, Ms. Zacharias got quite upset and started crying and apologized for me being involved in this conversation, I told her not to worry about it. ***

"Q. Mr. Kloc, can you describe any other actions that you observed between Michael Blatnik and Marleah Zacharias?

"A. One night the machine was running quite well and when the machine is running well and things are going smooth you get in conversations, you have a little bit of conversation and one night I was standing there with Mr. Blatnik and Ms. Zacharias and Patty, at that time it was Patty Balog and we're [*502] standing there talking and he looked over at Ms. Zacharias and asked

her when [***10] is the last time she got screwed and to me, I'm sorry, it's not appropriate."

Additionally, appellants introduced Ms. Zacharias as a witness by reading portions of her deposition testimony to the jury. In her deposition testimony, Ms. Zacharias indicated that she was sexually harassed by Mr. Blatnik.

After a three day trial on this matter, the jury returned a verdict in favor of appellees and awarded $ 735,000 in damages, to wit: $ 100,000 in compensatory damages awarded to Mr. Blatnik on his defamation claim; $ 135,000 awarded to Mrs. Blatnik on her loss of consortium claim; and $ 500,000 in punitive damages.

In response to the jury verdict, appellants filed a motion for a new trial, or, in the alternative, remittitur, along with a motion for judgment notwithstanding the verdict. Upon consideration, the trial court denied these motions in a judgment entry dated June 7, 2000.

From this judgment, appellants appeal advancing four assignments of error for our consideration:

"[1.] The trial court erred in overruling Avery Dennison's motion for summary judgment, motions for directed verdict, and motion for judgment notwithstanding the verdict on the defamation claim.

"[2.] The [***11] trial court erred in permitting the jury to award punitive damages against Avery Dennison, and in denying the motions for judgment notwithstanding the verdict and new trial with regard to punitive damages.

"[3.] The trial court erred in excluding Zacharias's [*sic*] diary.

"[4.] The trial court erred in overruling Avery Dennison's motion for a directed verdict and motion for judgment notwithstanding the verdict on the loss of consortium claim."

In the first assignment of error, appellants challenge the trial court's denial of the following: (1) motion for leave to file [**289] summary judgment instanter; (2) motion for directed verdict; (3) motion for judgment notwithstanding the verdict; and (4) motion for new trial. As such, we will address each in turn.

With respect to the September 29, 1999 motion for leave to file summary judgment instanter, the parties seemingly concede to the fact that at the time the motion was filed, a pretrial conference and trial date was already set in this matter; October 15, 1999 and December 6, 1999, respectively. In such [*503] instances, "a motion for summary judgment may be made only with leave of court." [1]

1 *Civ.R. 56(B).*

[***12] In reviewing this instant cause, we are mindful of the fact that the decision to grant a motion for leave to file summary judgment is within the sound discretion of the trial court. [2] As such, we will not reverse the trial court's decision denying appellants' motion for leave unless we determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. [3] We are further aware of the fact that an abuse of discretion cannot be found simply because a reviewing court would have decided the case differently. [4]

2 *Slack v. Cropper (2001), 143 Ohio App.3d 74, 83, 757 N.E.2d 404.*

3 *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.*

4 *Hutchinson v. Hutchinson (1993), 85 Ohio App.3d 173, 178, 619 N.E.2d 466.*

[***13] Upon consideration, we determine that the trial court was within its discretion to deny appellants' motion for leave to file summary judgment as a pretrial conference was scheduled and the matter was set for trial. We are, nevertheless, cognizant of the fact that the trial court seemed to address the merits of appellants' motion for summary judgment in its October 5, 1999 judgment entry:

"Upon review, the Court finds that although qualified privilege exists for some communications, *outstanding issues of fact remain to be determined*; therefore, said Motion is not well taken and ought to be denied." (Emphasis added.)

However, to consider the merits of the motion, the trial court must have first granted leave, which it refused to do in this case. Therefore, the fact that the trial court commented on the merits of appellants' motion for summary judgment is of no consequence. Accordingly, we discern no abuse of discretion.

The second and third issue presented under the first assignment of error challenges the trial court's denial of

appellants' motions for directed verdict and judgment notwithstanding the verdict. Generally, according to appellants, appellees failed to present clear [***14] and convincing evidence of actual malice to defeat the qualified privilege.

Because the standard for granting these motions is identical, we will consider these issues in a consolidated manner.

[*504] At the outset, we note that our review of the trial court's ruling on motions for directed verdict and judgment notwithstanding the verdict is *de novo.* [5] Further, it has been recognized that "[a] motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but [**290] a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." [6]

5 *Krannitz v. Harris (Jan. 19, 2001), 2001 Ohio App. LEXIS 248*, Pike App. No. 00CA649, unreported, 2001 WL 243388, at *3; *Davis v. Safe Auto Ins. Co. (Mar. 31, 2000), 2000 Ohio App. LEXIS 1385*, Ashtabula App. No. 98-A-0103, unreported, 2000 WL 522495, at *4.

[***15]

6 *O'Day v. Webb (1972), 29 Ohio St.2d 215, 280 N.E.2d 896*, paragraph three of the syllabus.

In *Allen v. Znidarsic Bros., Inc.*, this court articulated the standard for considering motions for a directed verdict and judgment notwithstanding the verdict:

"In deciding whether to grant a motion for a directed verdict or a judgment notwithstanding the verdict, *a trial court must construe all of the evidence most strongly in favor of the party against whom the motion was made, and, where there is substantial evidence to support its side of the case, upon which reasonable minds may reach a different conclusion, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions. Posin v. A.B.C. Motor Court Hotel (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334.*" [7]

7 (Parallel citation omitted and emphasis added.) *Allen v. Znidarsic Bros., Inc. (Dec. 29, 2000), 2000 Ohio App. LEXIS 6206*, Lake App. No. 99-L-088, unreported, 2001 WL 20726, at *3.

[***16] As for appellants' fourth issue concerning the denial of their motion for a new trial, they urge that the judgment was contrary to law and not supported by the weight of the evidence.

It is within the trial court's sound discretion to grant or deny a *Civ.R. 59(A)* motion for a new trial. As such, an appellate court will not reverse the trial court's determination absent an abuse of discretion. [8]

8 *Kitchen v. Wickliffe Country Place (July 13, 2001), 2001 Ohio App. LEXIS 3191*, Lake App. No. 2000-L-051, unreported, at *8.

With the foregoing standards in mind, we conclude that the trial court did not err in denying appellants' motions for a directed verdict and judgment notwithstanding the verdict because reasonable minds could reach a different conclusion on the issue of whether there was substantial evidence that appellants acted with actual malice. Further, we determine that appellants are [*505] not entitled [***17] to a new trial as the verdict is not contrary to law or against the manifest weight of the evidence.

In the instant matter, the trial court found that the statements made by appellants during the communication meetings with the specialty tape division employees were defamatory *per se.* Despite this determination, appellants invoked the defense of qualified privilege. Under the qualified privilege doctrine, a defamation action is barred when the communication is made in good faith on a matter of common interest between an employer and an employee concerning the conduct of a former employee. [9]

9 *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council (1995), 73 Ohio St.3d 1, 8, 651 N.E.2d 1283; Hahn v. Kotten (1975), 43 Ohio St.2d 237, 244-246, 331 N.E.2d 713; Hanly v. Riverside Methodist Hosp. (1991), 78 Ohio App.3d 73, 81, 603 N.E.2d 1126; Gray v. Gen. Motors Corp. (1977), 52 Ohio App.2d 348, 351, 370 N.E.2d 747.*

[***18] In the present cause, the trial court appropriately determined that the defense of qualified privilege applied as a matter of law. "Where the circumstances of the occasion for the alleged defamatory communications are not in dispute, the determination of whether the occasion gives the privilege is a question of

[**291] law for the court." [10]

10 (Citation omitted.) *A & B Abell*, 73 Ohio St.3d at 7.

Here, there is no dispute as to the circumstances under which the defamatory statements were made or the contents of those statements. The communications were made during several meetings with Mr. Blatnik's immediate co-workers wherein the corporation stated that Mr. Blatnik was terminated for sexual harassment and explained its sexual harassment policy. According to Mr. Taras Szmagala, the purpose of conducting the meetings was to prevent rumors from developing and ensure that the employees clearly understood [***19] the company's sexual harassment policy. Similarly, Mr. Scheibel testified that the meetings were held "to let folks know that we had - we had terminated [Mr. Blatnik] and to - to suggest that Avery does not tolerate the kind of environment that had been created by [Mr. Blatnik]." Therefore, under these particular circumstances, the determination of the existence of qualified privilege was a question of law for the trial court. [11]

11 See, *e.g., Hanly, 78 Ohio App.3d at 81* (holding that a hospital had a qualified privilege to make allegedly defamatory statements about employees suspended pending a sexual harassment investigation where the communication was made in an employment setting concerning a matter of common hospital interest, to wit: the sexual harassment policy).

To defeat the qualified privilege, appellees had to show, *by clear and convincing evidence*, that appellants' communications [***20] were made with [*506] actual malice. [12] In order to prove actual malice, appellees had to demonstrate that the published statements were made with knowledge of their falsity or with reckless disregard as to their truth or falsity. [13] "This standard carries the requirement that we conduct an independent review of the sufficiency of the evidence." [14] Reckless disregard may be established by clear and convincing evidence that the false statements were made with a "'*high degree of awareness of* *** *probable falsity*,' *** or that 'the defendant in fact entertained *serious doubts* as to the truth of his publication.'***" [15]

12 *Jacobs v. Frank (1991), 60 Ohio St.3d 111, 573 N.E.2d 609*, paragraph two of the syllabus; *Vitale v. Modern Tool & Die Co. (June 22, 2000), 2000 Ohio App. LEXIS 2743*, Cuyahoga App. No. 76247, unreported, 2000 WL 804617, at *4.

13 *Jacobs, 60 Ohio St.3d 111* at paragraph two of the syllabus; *Vitale 2000 Ohio App. LEXIS 2743* at *4.

14 *A & B-Abell, 73 Ohio St.3d at 12*, citing *Jacobs, 60 Ohio St.3d at 116.*

[***21]

15 (Citations omitted and emphasis added.) *Varanese v. Gall (1988), 35 Ohio St.3d 78, 80, 518 N.E.2d 1177.*

Further, in *Varanese*, the Supreme Court of Ohio had the opportunity to comment on the reckless disregard standard of actual malice:

"The United States Supreme Court has emphasized that '*reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.* There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.' *St. Amant, supra*, 390 U.S. at 731. *The plaintiff must prove the defendant's actual knowledge or reckless disregard for the truth with convincing clarity in order to warrant submission of the cause to the jury. Grau v. Kleinschmidt, 31 Ohio St. 3d 84, 509 N.E.2d 399,* [***22] *supra*, . Finally, *actual malice is to be measured* [**292] *as of the time of publication. Dupler, supra*, 64 Ohio St.2d at 124." [16]

16 (Parallel citations omitted and emphasis added.) *Varanese, 35 Ohio St.3d at 80.*

With these principles in mind, we turn now to a consideration of whether appellants were entitled to a directed verdict, judgment notwithstanding the verdict or a new trial.

This case presents a dilemma for anyone trying to find the truth. Ms. Zacharias claims she was sexually harassed on the job in a most egregious [*507] fashion. Possibly the most damaging testimony in this matter was the allegation that Mr. Blatnik got on the public address system and made sexually suggestive comments about Ms. Zacharias. Such conduct, if it occurred, is clearly actionable. Thus, it was not surprising that Ms. Zacharias filed a complaint with the OCRC.

From a legal standpoint, however, what happened next is significant. Avery Dennison issued a position statement to the OCRC claiming that [***23] "[Ms. Zacharias] never did complain to management about being sexually harassed and that "[she] did not communicate her concerns with sexual harassment to anyone who was in a position to respond to those concerns." From this, the company, through its representatives, concluded that "the harassment of which Marleah complains is not due to her gender and *no evidence exists of a hostile work environment involving behavior or comments of a sexual nature.*" (Emphasis added.) Thus, the truth, as defined by appellants, was that *no sexual harassment had taken place.*

Truth is not situational. Something is either true or false. That designation will not change with circumstances which benefit or harm individuals. Thus, for the purposes of this litigation, as of the time that Avery Dennison was responding to the OCRC, the truth of the matter was that Mr. Blatnik had not sexually harassed Ms. Zacharias. This version of the truth was further supported at trial when numerous employees testified under oath that they never observed such conduct.

Sexual harassment in the workplace [***24] is serious business. If it happened, then it must be dealt with in a professional manner. Such vigilance, however, carries with it significant perils. One who is rightfully or wrongfully accused of such activities can essentially say good-bye to their career. In either event, they have become damaged goods in the workplace. That is precisely why the law is clear, that if you show reckless disregard for the truth, you are liable to the person harmed by your reckless conduct.

In responding to a motion for a directed verdict or judgment notwithstanding the verdict, the non-moving party is entitled to have all the evidence construed in their favor. [17] The motion shall be denied unless reasonable minds can reach one conclusion. [18] That simply is not the case in this matter. Placing all the inferences on the side of the non-moving party, in this case appellees, this court can only reach the same conclusion reached by the trial court. The question is narrow and easily resolved: if an employer admits [***25] on one day that there was no sexual harassment at their plant, and on another day that [*508] there was, have they shown a reckless disregard for the truth? By demonstrating this seemingly inconsistent behavior under oath, have appellees presented enough evidence to survive a directed [**293] verdict, judgment notwithstanding the verdict or a motion for a new trial? The answer is in the affirmative. The jury could have concluded that appellants acted with actual malice from the fact that they previously admitted to the OCRC that there was *no evidence* that Mr. Blatnik sexually harassed Ms. Zacharias, and that such knowledge may have existed at the time appellants made the communications at issue.

17 *Allen, 2000 Ohio App. LEXIS 6206* at *3.

18 *Id., 2000 Ohio App. LEXIS 6206*

A jury was duly impaneled in this matter to answer whether appellants' conduct rose to the level of actual malice. Few among us would question the proposition that falsely labeling an individual as one who is [***26] guilty of sexual harassment in the workplace would be anything other than harmful to future employment prospects. On the other side of that same coin, however, few would argue with the right of a company to publicly condemn sexual harassment by an employee. That is specifically why a qualified privilege exists. A company must have the freedom to manage its workforce, and sometimes that requires making truthful, but unpleasant remarks. However, in order to enjoy the freedom of expression granted by the privilege, the law requires that the communication be made with careful regard to the truth. This lawsuit is not only about whether the statements were true; but also about whether appellants were reckless in evaluating their veracity.

This panel is not the first group of individuals to be troubled by the task at hand. During their deliberations, the jury asked the trial judge, in writing, first "what is the definition of the 'qualified privilege'" and then to "define reckless disregard ***." The judge properly instructed the jury, in writing, that "you may find that publication of a defamatory statement is made with actual malice only if you find, by clear and convincing evidence, [***27] that [appellants] published the statements either with actual knowledge that the statements were false or with a reckless disregard as to their truth or falsity." Thus, the trial court clearly told the jury the legal standard in Ohio, as dictated by the Supreme Court of Ohio in *Jacobs, supra.*

There is no question that the jury found the statements of appellants were made with reckless disregard to their truth. Once a bell has rung, you cannot

un-ring it. A man's reputation is ruined when he is publicly labeled as one who cannot be trusted around women in the workplace. If the label is accurate, so be it. But if it is not, then damages will naturally flow from the defamatory statements. Only a jury can decide these matters with certainty. And, as stated by the trial court in its judgment entry denying appellants' motion for a new trial, "[this] jury concluded that [appellees] proved, by clear and [*509] convincing evidence, that [appellants'] defamatory remarks were made in conscious or reckless disregard for the truth."

It is wholly improper for this court to overturn [***28] a verdict which has been reached by a jury after they have been properly instructed in the law of Ohio. The Supreme Court of Ohio has established the standard to be met. The trial court applied that standard, and it was within the province of the jury to decide which version of the facts to believe. Accordingly, appellants' first assignment of error is meritless, and the verdict stands.

In assignment of error two, appellants maintain that the trial court erred in denying their motions for judgment notwithstanding the verdict and new trial with respect to the award of punitive damages for two reasons. First, appellants claim that the award will deter desirable behavior; second, the record contains no evidence [**294] that appellants' acted with actual malice to support a punitive damages award.

However, as can be seen from our discussion of the first assignment of error, we conclude that the jury could reasonably have found that appellants consciously disregarded Mr. Blatnik's right not to be subjected to defamatory statements or have his reputation injured.

In *Moskovitz v. Mt. Sinai Med. Ctr.*, the Supreme Court of Ohio defined actual malice needed to assess punitive damages:

" [***29] 'Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) *a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.*'" [19]

19 (Emphasis added and citation omitted.) *Moskovitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638, 652, 635 N.E.2d 331.*

An appellate court will not reverse an award of punitive damages "unless it is based upon passion and prejudice." [20]

20 *Okocha v. Fehrenbacher (1995), 101 Ohio App.3d 309, 324, 655 N.E.2d 744.* See, also, *West Channel Yacht Club v. Turner (Dec. 3, 1999), 1999 Ohio App. LEXIS 5757*, Lake App. No. 98-L-156, unreported, 1999 WL 1313694, at *5.

[***30] While appellants may have been motivated by their need to further its sexual harassment policy, there was evidence to indicate that they consciously refused to recognize the truth. This could be inferred from appellants' early admission to the OCRC that no evidence of sexual harassment existed but now claim otherwise. As such, the jury could have concluded from this evidence that (1) appellants consciously disregarded the rights and safety of Mr. [*510] Blatnik to be free from defamatory statements; and (2) that appellants' conduct had a great probability of causing substantial harm, to-wit: damaging Mr. Blatnik's reputation.

Furthermore, before the jury concluded their deliberations, they once again asked the trial court for guidance in the law, when they asked, "what is the definition of punitive damages?" The court properly responded, in writing, that "punitive damages are an additional punishment beyond general damages for a wrongful act and it tells the community and those perpetrating wrongful acts that such wrongs will not be tolerated." That is the law of Ohio.

Accordingly, we hold the trial court did not err in denying appellants' motions for judgment notwithstanding the verdict [***31] or new trial. Nor was the award of $ 500,000 in punitive damages manifestly excessive in light of the facts of the instant case. The second assignment of error is, therefore, without merit.

In the third assignment of error, appellants submit that the trial court erred when it excluded Ms. Zacharias' personal diary on the basis of hearsay.

It is within the trial court's discretion to admit or exclude evidence. As such, the trial court's determination will not be disturbed on appeal absent an abuse of discretion. [21]

21 *Sines & Sons, Inc. v. Shell Oil Co. (Sept. 18,*

1998), 1998 Ohio App. LEXIS 4370, Geauga App. No. 96-G-2040, unreported, 1998 WL 683938, at *2.

Contrary to appellants' assertion, Ms. Zacharias' diary contains out-of-court statements that were offered by appellants to prove the truth of the matters asserted therein. Accordingly, Ms. Zacharias' [**295] diary and the entries made [***32] therein constitute hearsay. Pursuant to *Evid.R. 802*, hearsay evidence is inadmissible unless some exception applies to permit its introduction.

Appellants claim that the testimony fell into *Evid.R. 803(3)* exception to the hearsay rule in that it shows Mr. Scheibel's state of mind with respect to forming his belief that Mr. Blatnik sexually harassed Ms. Zacharias. *Evid.R. 803(3)* reads as follows:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

" ***

"(3) Then existing, mental, emotional, or physical condition. *A statement of the declarant's then existing state of mind*, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact [*511] remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." (Emphasis added.)

The diary is inadmissible under *Evid.* [***33] *R. 803(3)* for the following reasons. Even if Mr. Scheibel relied on the diary during his investigation, the *declarant* of the diary is Ms. Zacharias, and it does *not* show Mr. Scheibel's then existing state of mind with respect to his decision making process. Therefore, the diary was inadmissible under *Evid.R. 803(3)*.

Appellants also claim that the diary fell into the prior consistent statement exception. According to them, at trial, Ms. Zacharias' credibility was attacked; therefore, the diary should have been admitted for rehabilitation purposes.

Pursuant to *Evid.R. 801(D)(1)(b)* a declarant's prior consistent statement is not hearsay if: (1) *the declarant testifies at trial and is subject to cross-examination concerning the statement*; (2) the statement is consistent with his/her prior testimony, and (3) it is offered to rebut an express or implied charge of recent fabrication.

In the instant matter, Ms. Zacharias was *not* available for cross-examination at trial concerning her alleged prior consistent statements. In fact, she *never* testified at trial; rather, her deposition [***34] testimony was admitted. As such, the diary was inadmissible under *Evid.R. 801(D)(1)(b)*. [22] Accordingly, the trial court did not abuse its discretion when it excluded Ms. Zacharias' diary, and appellants' third assignment of error is not well-taken.

22 See, *e.g., State v. Brown (1981), 3 Ohio App.3d 131, 138, 443 N.E.2d 1382*; *State v. Weicht (May 25, 1993), 1993 Ohio App. LEXIS 2719*, Franklin App. No. 92AP-1776, unreported, 1993 WL 186648, at *4.

The fourth assignment of error challenges the trial court's decision to deny appellants' motions for directed verdict, judgment notwithstanding the verdict, and new trial as to Mrs. Blatnik's claim for loss of consortium. Initially, appellants submit that the claim fails because there is no evidence of bodily injury suffered by Mr. Blatnik. To support its position, appellants rely on this court's decision in *Morgan v. Enterprise Rent-A-Car.* [23]

23 *Morgan v. Enterprise Rent-A-Car (Mar. 31, 2000), 2000 Ohio App. LEXIS 1431*, Trumbull App. No. 98-T-0103, unreported, 2000 WL 523085.

[***35] In *Morgan*, the jury awarded the wife-plaintiff $ 5,000 on her loss of consortium claim. On appeal, defendants argued that "a loss of consortium claim is dependant upon bodily injury to the [**296] spouse, and that bodily injury does not include emotional distress." [24] From this, defendants concluded that since the [*512] husband suffered only emotional distress, the wife was not entitled to damages for loss of consortium.

24 *Morgan, 2000 Ohio App. LEXIS 1431* at *6.

Upon consideration, we found defendants' argument to be persuasive:

"Appellants are correct in their assertion that a claim for loss of consortium is dependent upon bodily injury to the spouse. *Bowen v. Kil-Kare, Inc. (1992), 63 Ohio St.3d 84, 93, 585 N.E.2d 384.* The key question is

whether the term 'bodily injury' includes non-physical harms such as emotional distress. *Ohio courts, including this one, have repeatedly held that it does not. Tomlinson v. Skolnik (1989), 44 Ohio St.3d 11, 14, 540 N.E.2d 716*; [***36] *Bowman v. Holcomb (1992), 83 Ohio App.3d 216, 219, 614 N.E.2d 838*; *Vance v. Sang Chong, Inc.* (Nov. 9, 1990), Lake App. No. 88-L-13-188, unreported, at 3." [25]

25. (Emphasis added.) *Morgan, 2000 Ohio App. LEXIS 1431* at *6. See, also, *Black v. Columbus Public Schools (S.D. Ohio 2000), 124 F. Supp. 2d 550, 589-590.*

Contrary to appellants' assertion, the above proposition of law existed prior to this court's decision in *Morgan.* [26] Nevertheless, appellants failed to present the lack of bodily injury argument to the trial court in its motions for directed verdict, judgment notwithstanding the verdict or new trial. As such, this court will not consider an error which the party could have raised, but did not, in the trial court at a time when such error could have been avoided or corrected by the trial court. [27] Thus, absent plain error, appellants have waived [***37] this argument concerning the lack of bodily injury for purposes of appeal. [28] Further, not only did appellants fail to bring the lack of bodily injury argument to the attention of the trial court, they filed the following proposed jury instruction:

"Michelle Blatnik's Consortium Claim: If you find that [appellants are] liable for defaming Michael Blatnik, you may award an amount that will reasonably compensate Michael Blatnik's wife, Michelle Blatnik, for damages which you find resulted from a loss of consortium. Consortium includes services, society, companionship, comfort, sexual relations, love, and solace."

26 See *Bowen v. Kil-Kare, Inc., 63 Ohio St.3d at 93.*

27 *Nozik v. Kanaga (Dec. 1, 2000), 2000 Ohio App. LEXIS 5615*, Lake App. No. 99-L-193, unreported, 2000 WL 1774136, at *2; *O'Brikis v. O'Brikis (Oct. 6, 2000), 2000 Ohio App. LEXIS 4663*, Portage App. No. 99-P-0045, unreported, 2000 WL 1488041, at *3.

28 *Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 121-122, 679 N.E.2d 1099* (holding that while the plain error doctrine is applicable to civil cases, it is limited to extremely rare cases involving exceptional circumstances).

[***38] In fact, the trial court provided the above instruction *practically verbatim* to the jury, and appellant did not object:

[*513] "If you find [appellants] are liable for defaming Michael Blatnik you may award an amount that will reasonably compensate Michael Blatnik's wife, that is Michelle Blatnik, for damages which you find resulted from a loss of consortium.

"Consortium includes services, society, companionship, comfort, conjugal relations, love and solace."

While generally, this court will not apply the plain error doctrine because appellants seemingly invited the error to [**297] occur, [29] exceptional circumstances exist in this particular case. We believe that the judicial system would be undermined if this court were to uphold the jury's award of $ 135,000 for Mrs. Blatnik's loss of consortium claim in the absence of any evidence indicating that Mr. Blatnik suffered bodily injury.

29 *Czup v. Czup (Sept. 17, 1999), 1999 Ohio App. LEXIS 4324*, Ashtabula App. No. 98-A-0046, unreported, 1999 WL 744034, at *7.

[***39] Accordingly, as a matter of law, the claim for loss of consortium in this case cannot stand as there is no evidence of bodily injury sustained by Mr. Blantik. For this same reason, the award is also against the manifest weight of the evidence.

As to this point, appellees claim that the proposition of law announced in *Morgan, supra, 2000 Ohio App. LEXIS 1431*, is unconstitutional as it violates the provisions of the open courts, right to remedy by due process, the equal protection provision, and the right to a jury trial. We find appellees' claims to be unpersuasive.

Contrary to appellees' contention, the Supreme Court of Ohio has, indeed, limited claims for loss of consortium to instances where the spouse has suffered bodily injury:

"***[A] claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort *upon the spouse who suffers bodily injury.*" [30]

30 (Emphasis added.) *Bowen, 63 Ohio St.3d at*

93.

[***40] As such, this court is unwilling to hold that the above statement of law as dictated by the Supreme Court to be unconstitutional. Accordingly, appellants' fourth assignment of error has merit to the extent indicated. Appellants also submit that Mrs. Blatnik's loss of consortium claim fails because there was no evidence offered regarding the marital relationship after Avery Dennison terminated Mr. Blatnik and made the communications at issue. This argument, however, is moot in light of our initial disposition of the fourth assignment of error.

[*514] Based on the foregoing analysis, the judgment of the trial court is reversed as to the loss of consortium claim, but affirmed in all other respects. Accordingly, the judgment in favor of appellees is reduced by $ 135,000.

PRESIDING JUDGE WILLIAM M. O'NEILL

CHRISTLEY, J., dissents with Dissenting Opinion,

NADER, J., concurs.

DISSENT BY: JUDITH A. CHRISTLEY

DISSENT

DISSENTING OPINION

CHRISTLEY, J.

I respectfully dissent from that portion of the majority opinion concerning the issues of actual malice and punitive damages.

While I generally agree with the [***41] case law cited by the majority, I would note that this case involves the reporting of a third party's allegations, to wit: Ms. Zacharias. When hearsay allegations are involved, "recklessness may be found where there are *obvious reasons to doubt the veracity of the informant or the accuracy of his* [or her] *reports.*" (Emphasis added.) *St. Amant v. Thompson (1968), 390 U.S. 727, 732, 20 L. Ed. 2d 262, 88 S. Ct. 1323.*

In their answer brief, appellees insist that the testimony of Mr. Scheibel, the vice-president and general manager of the specialty tape division, provided clear and convincing evidence that appellants had doubts about the truthfulness of Ms. Zacharias' claims against Mr. Blatnik. [**298] However, a close review of Mr. Scheibel's testimony reveals otherwise.

During the trial, Mr. Scheibel, along with Mr. Szmagala, division counsel for Avery Dennison, repeatedly stated they believed that the company's statements made at the 1998 communication meetings were true. Moreover, Mr. Scheibel and Mr. Szmagala *never* stated that, *at the time the company statements were made*, they entertained *serious doubts* as to the truth of the published statements.

[***42] Rather, Mr. Scheibel explained that the veracity of the claims against Mr. Blatnik arguably might have been questioned initially because a number of interviewed coworkers had stated they did not personally observe Mr. Blatnik sexually harass Ms. Zacharias. He further stated that two coworkers considered Ms. Zacharias to be a liar. Out of context, the failure to consider such facts might be enough to prove that appellants acted with actual malice. In context, it was readily apparent that those facts were only part of the total body of evidence available to Mr. Scheibel at the time the statements were finally made by the company.

Hence, Mr. Scheibel admittedly may have had concerns in the beginning days of the investigation. However, some early doubts as to the *possible* falsity of the claims against Mr. Blatnik were insufficient to meet the standard of clear and convincing evidence. *Varanese v. Gall (1988), 35 Ohio St.3d 78, 82, 518* [*515] *N.E.2d 1177.* Rather, the focus of the jury's evaluation should have been whether, *at the time of the published statements, appellants had a high degree of awareness of the probable falsity of the published statements. Id. at 80.* [***43]

Appellees, along with the majority, make much of the fact that Avery Dennison reversed its position as to whether Mr. Blatnik sexually harassed Ms. Zacharias. In 1994, Avery Dennison initially told the OCRC that it found "no evidence *** involving behavior or comments of a sexual nature" directed at Ms. Zacharias. From this, the majority concludes that actual malice in the company's later actions exists:

"The question is narrow and easily resolved: if an employer admits on one day that there was no sexual harassment at their plant, and on another day that there was, have they shown a reckless disregard for the truth?

By demonstrating this seemingly inconsistent behavior under oath, have appellees presented enough evidence to survive a directed verdict, judgment notwithstanding the verdict or a motion for a new trial? The answer is in the affirmative. *The jury could have concluded that appellants acted with actual malice from the fact that they previously admitted to the OCRC that there was no evidence that Mr. Blatnik sexually harassed Ms. Zacharias, and that such knowledge may have existed at the time appellants made the communications at issue.*" (Emphasis added.)

[***44] With all due respect to the majority, I simply disagree. The record definitively shows that there were actually two investigations undertaken by the company. The first investigation was conducted in response to the OCRC action. However, the bulk of the employee interviews, including Ms. Zacharias' deposition, were not taken until *after* Ms. Zacharias brought suit against Avery Dennison in January 1997.

At most, appellants may have acted *negligently* when they issued their position statement to the OCRC indicating that they found no evidence of sexual harassment. The conclusion to be drawn from that initial statement was simply that appellants failed to thoroughly investigate Ms. Zacharias' OCRC allegations. The fact [**299] that Avery Dennison subsequently did a better job of investigating and, as a result, changed its position and conclusion, does *not*, in any way, rise to the level of actual malice as the majority suggests. See *Scott v. News-Herald (1986), 25 Ohio St.3d 243, 248, 496 N.E.2d 699*, quoting *Dupler v. Mansfield Journal (1980), 64 Ohio St.2d 116, 119, 413 N.E.2d 1187* (holding that "'since reckless disregard is not measured by lack [***45] of reasonable belief or of ordinary care, even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice.'"). See, also, *Harte-Hanks Comm., Inc. v. Connaughton (1989), 491 U.S. 657, 688, 105 L. Ed. 2d 562, 109 S. Ct. 2678*; [*516] *Kassouf v. Cleveland Magazine City Magazines, Inc. (2001), 142 Ohio App.3d 413, 423, 755 N.E.2d 976* (holding that "even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice").

The evidence was uncontroverted that, in 1997 after Ms. Zacharias filed her suit against Avery Dennison, and prior to publishing the statements made at the 1998 communication meetings, Avery Dennison consulted its legal counsel, conducted numerous additional employee interviews, and deposed Ms. Zacharias. At the completion of its investigation, Avery Dennison was aware there were conflicting stories, and that the majority of employees did not observe any sexual harassment. Nevertheless, a few employees stated that Mr. Blatnik used abusive and derogatory sexual language towards Ms. Zacharias, and that she had confided in them that Mr. Blatnik was sexually harassing [***46] her. In fact, Mr. Szmagala acknowledged this on cross-examination:

"A. *** *I weighed the credibility of individuals and the testimony* [interviews conducted with Avery Dennison employees], *you know, you have to make a judgment call, I mean the fact is that someone's not telling the truth and so you really have to use your best judgment to determine what happened and that's what I did.*

"Q. *And you testified that in using your best judgment I think you say everything, you said three or four times you had no doubt whatsoever, no doubt as to the truthfulness of all of her [Ms. Zacharias] allegations with the exception of these two you mentioned; is that correct?*

"A. *That's correct.*

"Q. *So that all of these different individuals who said they saw nothing who worked in the same place who testified the way they did or gave statements the way they did -*

"A. Well -

"Q. - just a moment, let me finish the question.

"A. Sure, I apologize.

"Q. *All of these other individuals including Patty Naumann you took those into account and then concluded you had no doubt?*

"A. *That's right, when I took individuals into account I considered where they worked, whether* [***47] *they were in finishing, behind the wall, whether they were able to be exposed to the day-to-day activities of the interaction of Mr. Blatnik and Ms. Zacharias, whether they were in the headquarters building, the fact of the matter is that when I came on the scene in December of '97 I had every interest of getting to the bottom of this and looked at as much as I could to* [*517] *determine what our liability to Ms. Zacharias was and weighed the*

credibility and the testimony of all the witnesses." (Emphasis added.)

At best, this evidence merely shows that appellants knew the evidence as to the truth of the allegations against [**300] Mr. Blatnik was not clear cut. This awareness by appellants that they would have to make a choice as to who to believe, however, is not fatal. This is because appellees had to demonstrate by clear and convincing evidence that the published statements were made with "a *high degree of awareness of its probable falsity.*" (Emphasis added.) *Varanese, 35 Ohio St.3d at 80.* Doubts as to *possible* falsity are immaterial. *Id., 35 Ohio St.3d at 82.*

Moreover, Avery Dennison's 1994 position statement to the OCRC is not the only evidence [***48] which had to be considered in proving actual malice because "actual malice is to be measured *as of the time of publication[,]*" which in this case occurred in 1998. (Emphasis added.) *Varanese, 35 Ohio St.3d at 80.*

In summation, there was absolutely no evidence of convincing clarity presented by appellees which demonstrated that, at the time the statements were made, appellants acted with any degree of malice, much less actual malice. As such, the trial court erred in denying appellants' motions for a directed verdict, judgment notwithstanding the verdict, and/or a new trial as to this point.

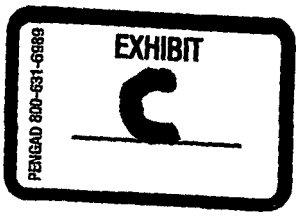
As for appellees' prayer for punitive damages, they failed to present any evidence tending to show that appellants' conduct was motivated by hatred, ill will, revenge, or a conscious disregard for Mr. Blatnik's rights. To the contrary, despite their initial position, appellants ultimately conducted a thorough investigation. Mr. Scheibel was aware that he would have to make credibility assessments because of the conflicting stories as to whether Mr. Blatnik sexually harassed Ms. Zacharias. As illustrated through his testimony, Mr. Scheibel set out the basis on which he [***49] made those assessments. He, along with Mr. Szmagala, unequivocally stated that the purpose of making the statements was to ensure that the employees understood the company's sexual harassment policy and to show that such conduct would not be tolerated.

What is most compelling is the fact that appellees failed to rebut this final assertion during trial. The record indicates that appellees presented no other evidence as to any malicious motive or contrary reason for appellants' conduct.

Further, it is also clear that appellees' punitive damages and loss of consortium claims were derivative in nature. Because appellees did not have a primary claim for relief appellees' derivative claims must also fail. See, *e.g., Bowen v. Kil-Kare, Inc. (1992), 63 Ohio St.3d 84, 92-93, 585 N.E.2d 384.* [*518]

Based on the foregoing reasons, I believe that the jury verdict should be reversed, and judgment should be entered in favor of appellants as to all issues.

JUDGE JUDITH A. CHRISTLEY



10-29-20

TO: Family Members and Residents
FR: Jim Newbrough
RE: Important Update: COVID-19 Testing at Montefiore

I want to update you on the recent uptick in positive COVID-19 test results at Montefiore and alert you regarding some key personnel changes we have made there as well.

As you know, in mid-October, a number of Montefiore residents in one of our units began exhibiting symptoms of COVID-19. Tests were conducted, but the results were negative. After rerunning the tests, several residents tested positive. Fearing that we might be facing a widespread outbreak on our campus, we immediately called in resources from throughout the county and the state to assist us. We were able to retest all the residents in question, confirm positive diagnoses in 34 residents and transfer them to a separate unit for special care. **Our most recent testing indicates that the situation is under control and the number of cases at Montefiore has stabilized.**

As we were addressing this situation, we also began investigating information provided by a member of the nursing staff in the affected unit, who alerted her manager as well as Human Resources that the original tests might not have been conducted appropriately. I am very sorry to report that after conducting a number of interviews with staff, confirming lab results and reviewing patient records, our investigator concluded that Montefiore's Director of Nursing and the Assistant Director of Nursing actually submitted false tests, thereby failing to follow official protocols and procedures related to COVID-19 and failing to follow nursing standards of practice as it related to conducting the tests. I am also sorry to tell you that Montefiore's Administrator failed to oversee the situation appropriately.

However, our investigation did confirm that this situation was limited to a very short period of time, was isolated to one unit at Montefiore and only involved the three staff members identified.

At Menorah Park and Montefiore we hold ourselves to a very high standard of care. In this case, these three individuals clearly failed to meet that standard. They violated the values that are at the core of our organization and we've terminated their employment.

We are in the process of notifying the appropriate state authorities about this matter and we will fully cooperate with any investigation any of them decide to undertake as a result of the information we have shared. Our goal throughout this situation has been, and will continue to be, full transparency.

Before I close, I want to apologize for any worry or concern this situation might have caused you or your loved one. These are very difficult times and I know COVID-19 testing can be stressful under the best of circumstances. I am grateful that a member of our staff came forward to alert us to this issue and enabled us to act quickly to address it. That individual's decision reflects the way we always want to treat our residents – as valued members of the Montefiore and Menorah Park family.

If you have any questions, please contact Director of Public Relations Beth Silver at 216-839-6678 or bsilver@menorahpark.org.

Sincerely,

Jim Newbrough

Jim Newbrough, Menorah Park President and CEO

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October 29 at 4:50 PM ·

Faced with 34 cases of COVID-19 at Montefiore in Beachwood in October, the administrator, nursing director and assistant nursing director were terminated following an investigation which the nursing director and assistant nursing director submitted false tests and Montefiore's administrator "failed to oversee the situation appropriately," according to Jim Newbrough, president and CEO of Menorah Park.

CLEVELANDJEWISHNEWS.COM

Montefiore administrator, others terminated over COVID-19 testing concerns

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Most Relevant

Write a comment...

Goldie Shawel
Thank the good lord my dear Dad was released from there before lockdown started in the winter. Literally one day before. Bh Even before covid came, there were issues there about care. So awful.

Like · Reply · 1w 2

Top Fan
Linda Goldbaum Pickus
Kudos to the nurse who reported the situation.

Like · Reply · 1w 14

Michelle Kabert Sefcik
Horrible. Incompetent people jeopardized At-Risk residents!

Like · Reply · 1w 3

Bonnie Danziger Chizek
Absolutely horrific

Like · Reply · 1w 2

Jan Hershey Silverman
Who is the administrator?

Like · Reply · 1w 1

4 Replies

Kenneth Lowenstein
What's worse was the care towards patients when I was working privately with a patient their. Its very scary when we get older will there be quality care.

Like · Reply · 1w 2

3 Replies

Barbee Bray

1 Reply

Top Fan
Marcia Shultz Arons
Very sad!

Like · Reply · 1w

Jeffrey Rosen
Should go to jail. Disgraceful!

Like · Reply · 1w 2

Sanford Shapiro
The higher up the screw up goes the worse it got. Thank you to the nurse who made people aware of the situation.

Like · Reply · 1w 2

Top Fan
Merilyn A. Ruben
OMG!!!!!

Like · Reply · 1w

Mary Ann Vincent
WOW--this is terrible!!

Like · Reply · 1w

Barbara Lebovitz Cott
Monstrous story!!

Like · Reply · 1w

Marinita Durán
Tragic

Like · Reply · 1w

Nadine Danziger
This makes me sick

Like · Reply · 1w

Vera Dombcik
OMG Shocking.

Like · Reply · 1w

Karen Marinelli-Perlmuter
Omg!

Like · Reply · 1w

Sarah Leah Stark
what??

Like · Reply · 1w

Top Fan
Bruce Washburn

Common Pleas Court of Cuyahoga County, Ohio

DESIGNATION FORM TO BE USED TO INDICATE THE

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CLERK OF COURTS
CUYAHOGA COUNTY

Judge: KELLY ANN GALLAGHER

CV 20 941131

Date: _____

Tina Renee King and Marie Gelle
Plaintiff

Vs.

Menorah Park Foundation, et. al
Defendant

Has this case been previously filed and dismissed? Yes ☐ No ■
Case #: _____ Judge: _____
Is this case related to any new cases now pending or previously filed? Yes ☐ No ■
Case #: _____ Judge: _____

CIVIL CLASSIFICATIONS: ***Place an (X) In ONE Classification Only.***

Professional Torts:
☐ 1311 Medical Malpractice
☐ 1315 Dental Malpractice
☐ 1316 Optometric Malpractice
☐ 1317 Chiropractic Malpractice
☐ 1312 Legal Malpractice
☐ 1313 Other Malpractice

Product Liability:
☐ 1330 Product Liability

Other Torts:
☐ 1310 Motor Vehicle Accident
☐ 1314 Consumer Action
■ 1350 Misc. Tort

Workers Compensation:
☐ 1550 Workers Compensation
☐ 1531 Workers Comp. Asbestos

Foreclosures:
☐ Utilize Separate Foreclosure Designation Form

Commercial Docket:
☐ 1386 Commercial Docket
☐ 1387 Commercial Docket with Foreclosure

Administrative Appeals:
☐ 1540 Employment Services
☐ 1551 Other

Other Civil:
☐ 1500 Replevin/Attachment
☐ 1382 Business Contract
☐ 1384 Real Estate Contract
☐ 1388 Consumer Debt
☐ 1390 Cognovit
☐ 1391 Other Contracts
☐ 1490 Foreign Judgment
☐ 1491 Stalking Civil Protection Order
☐ 1501 Misc. Other
☐ 1502 Petition to Contest Adam Walsh Act
☐ 1503 Certificate of Qualification for Employment

Amount of Controversy:
■ None Stated
☐ Less than $25,000
☐ Prayer Amount _____

Parties have previously attempted one of the following prior to filing:
☐ Arbitration
☐ Early Neutral Evaluation
☐ Mediation
■ None

I certify that to the best of my knowledge the within case is not related to any now pending or previously filed, expect as noted above.

Sindell and Sindell, LLP	Steven A. Sindell
Firm Name (Print or type)	*Attorney of Record (Print or Type)*
23611 Chagrin Blvd.	0002508
Address	*Supreme Court #*
Suite 227	info@sindellattorneys.com
Address	*Email Address*
Beachwood, Ohio 44122	Steven A. Sindell
Phone 216-292-3393 Cell: 216-401-4913	*Signature*