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The Bullet Point: Ohio Commercial Law Bulletin

Am I subject to the Fair Debt Collection Practices Act?

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Civil Liability for Criminal Act

***Buddenberg v. Weisdack*, Slip Opinion No. 2020-Ohio-3832**

In this case, the Ohio Supreme Court held that a criminal conviction is not a condition precedent to filing a claim under R.C. 2307.60 for a civil cause of action based on injuries sustained due to a criminal act.

- **The Bullet Point:** Pursuant to R.C. 2307.60(A)(1), "anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law * * *." Previously, there was a split amongst courts as to whether a person had to have been convicted of a criminal act before civil liability was possible under this statute. In analyzing R.C. 2307.60, the Court noted that the fact a person commits criminal actions that may subject the person to prosecution in no way establishes that they will be prosecuted. Moreover, being subjected to prosecution does not mean that the person will in fact be convicted. As succinctly summarized by the Court, the word "conviction" is noticeably absent from R.C. 2307.06(A)(1). Therefore, the Court construed the statute as written according to its plain language, and held that R.C. 2307.60 does not require a criminal conviction as a prerequisite for civil liability.

"Debt" under the FDCPA

***Necak v. Select Portfolio Servicing, Inc.*, S.D.Ohio No. 2:19-cv-3997, 2020 U.S. Dist. LEXIS 133510 (July 27, 2020)**

In this case, the District Court for the Southern District of Ohio granted a loan servicer's motion to dismiss, finding that its failed attempt to have its fees taxed as costs did not constitute an attempt to collect a debt in violation of the Fair Debt Collection Practices Act (FDCPA).

- **The Bullet Point:** Under the FDCPA, a "debt collector" means "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. […]" 15 U.S.C. § 1692(a)(6). Fundamentally, a debt collector under

the FDCPA is a person attempting to collect debts owed or due to another. As such, a person attempting to collect its own fees or debts it is owed is not a debt collector. Further, under the FDCPA, a "debt" is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes…" 15 U.S.C. § 1692(a)(5). In other words, the FDCPA covers debts that arise out of consensual consumer transactions where parties negotiate or contract for consumer-related goods or services. Conversely, civil litigation is not considered a consumer transaction for purposes of the FDCPA. The court explained that while documents filed in a proceeding to collect on a consumer debt are subject to the FDCPA, an obligation to pay money that arises out of a civil liability is not. Simply put, the issue turns on whether or not the subject proceeding is to collect on a debt. If not, a prevailing party's motion to the court to collect its own associated costs incurred from litigation is not acting as a "debt collector" and civil litigation costs are not a "debt" under the FDCPA.

Foreign Subpoena

***Byrd v. Lindsay Corp.*, 9th Dist. Summit No. 29491, 2020-Ohio-3870**

In this appeal, the Ninth Appellate District affirmed the trial court's decision, agreeing that the documents requested under the foreign subpoena duces tecum were not relevant to the underlying litigation.

- **The Bullet Point:** R.C. 2319.09 codifies the Uniform Interstate Depositions and Discovery Act (UIDDA) and describes the procedures for an Ohio court to issue a subpoena for discovery originating in a foreign jurisdiction. Pursuant to the UIDDA, a party seeking discovery in Ohio must submit a foreign subpoena to an Ohio clerk of court, who then issues a subpoena for service upon the person to which the foreign subpoena is directed. R.C. 2319.09(C)(2). Although originating in a non-Ohio jurisdiction, the Ohio Rules of Civil Procedure apply to subpoenas issued under the UIDDA. And under the UIDDA, a party from whom discovery is sought may file an application to the court for a protective order or to enforce, quash, or modify a subpoena. R.C. 2319.09(E)/(F).

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SLIP OPINION NO. 2020-OHIO-3832

BUDDENBERG *v.* WEISDACK ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Buddenberg v. Weisdack*, Slip Opinion No. 2020-Ohio-3832.]

Civil actions—Civil cause of action pursuant to R.C. 2307.60 for injuries based on a criminal act does not require an underlying criminal conviction—Criminal conviction for intimidation is not a condition precedent to civil claim pursuant to R.C. 2921.03(C).

(No. 2018-1209—Submitted November 13, 2019—Decided July 29, 2020.)

ON ORDER from the United States District Court for the Northern District of Ohio, Eastern Division, Certifying Questions of State Law, No. 1:18-cv-00522-DAP.

O'CONNOR, C.J.

{¶ 1} This case is before us on the certification of state-law questions by the United States District Court for the Northern District of Ohio, Eastern Division. The federal court asks that we answer the following questions:

1. Does [R.C.] 2307.60's creation of a civil cause of action for injuries based on a "criminal act" require an underlying criminal conviction?

2. Is a criminal conviction a condition precedent to a civil claim pursuant to [R.C.] 2921.03?

{¶ 2} We answer the certified state-law questions in the negative.

Relevant Background

{¶ 3} The federal court provided the following facts and allegations from which the questions of law arise. Respondent, Rebecca Buddenberg, is the plaintiff in the underlying action filed in the United States District Court for the Northern District of Ohio, Eastern Division. She brought a civil-rights action pursuant to federal and Ohio anti-discrimination laws against the petitioners here, including: her former employer, the Geauga County Health District; her former supervisor, Geauga County Health Commissioner Robert K. Weisdack; the Geauga County Health District's attorney, James Budzik; and certain members of the Geauga County Board of Health.

{¶ 4} Relevant here, Buddenberg's complaint asserts claims for civil liability pursuant to R.C. 2307.60 for alleged violations of three criminal statutes: R.C. 2921.05 (retaliation); R.C. 2921.03 (intimidation); and R.C. 2921.45 (interfering with civil rights). The relevant defendants moved to dismiss those claims, arguing that Buddenberg cannot state a claim for relief because none of the defendants were convicted of the underlying criminal offenses. The federal court denied the motions to dismiss without prejudice, "finding no clear authority on whether a conviction is a condition precedent to civil liability pursuant to [R.C.] 2307.60."

The State Law Questions

{¶ 5} Following the denial of their motion to dismiss, the petitioners moved to certify state-law questions to this court. The federal court certified the following questions:

> 1. Does [R.C.] 2307.60's creation of a civil cause of action for injuries based on a "criminal act" require an underlying criminal conviction?
>
> 2. Is a criminal conviction a condition precedent to a civil claim pursuant to [R.C.] 2921.03?

We agreed to answer the questions. 153 Ohio St.3d 1502, 2018-Ohio-4288, 109 N.E.3d 1259.

Analysis

Does R.C. 2307.60 require an underlying criminal conviction?

{¶ 6} In its decision certifying the questions, the federal court noted that this court recently held that R.C. 2307.60 "independently authorizes a civil action for damages caused by criminal acts." *See Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203. The federal court recognized, however, that *Jacobson* left unanswered what a plaintiff must do to prove a claim under R.C. 2307.60. We are now presented the opportunity to answer whether a plaintiff must prove the existence of an underlying criminal conviction to support his or her claim for civil liability under R.C. 2307.60.

{¶ 7} R.C. 2307.60(A)(1) states:

> Anyone injured in person or property by a *criminal act* has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil

> action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.

(Emphasis added.)

{¶ 8} Petitioners argue that a plain reading of the statute shows that the General Assembly intended for there to be an underlying conviction before civil liability could be imposed. Petitioners also argue that the requirement of an underlying conviction in R.C. 2307.60 is supported by a review of the legislative history.

{¶ 9} Buddenberg counters that the statute predicates civil liability on a "criminal act" rather than a "conviction" and that the plain meaning of those terms is distinct. Buddenberg also argues that the absence of a conviction requirement is supported by the statute's structure, history, and purpose.

{¶ 10} When a court interprets the meaning of a statute, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage," R.C. 1.42, and the court must give effect to all of the statute's words, *Bryan v. Hudson*, 77 Ohio St.3d 376, 380, 674 N.E.2d 678 (1997). "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996). Additionally, a court must give effect " ' "to the natural and most obvious import of [a statute's] language, without resorting to subtle and forced constructions." ' " *Lancaster v. Fairfield Cty. Budget Comm.*, 83 Ohio St.3d 242, 244, 699 N.E.2d 473 (1998), quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 627, 64 N.E. 574 (1902), quoting *McCluskey v. Cromwell*, 11 N.Y. 593, 601 (1854); *see also Ohio*

Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 22.

{¶ 11} We agree with Buddenberg that the plain language of the statute does not require proof of an underlying criminal conviction.

{¶ 12} First, the word "conviction" is noticeably absent from R.C. 2307.60(A)(1). That subdivision states that "[a]nyone injured in person or property by *a criminal act* has, and may recover full damages in, a civil action unless specifically excepted by law * * *." (Emphasis added.) *Id*. Petitioners argue that the use of the word "criminal" indicates the General Assembly intended that there must be an underlying conviction before an individual may recover damages. They argue that "for a crime to have been committed there must necessarily be a conviction." Petitioners also point to the definition of "criminal act" as an "unlawful act that subjects the actor to prosecution under criminal law." *Black's Law Dictionary* 30 (10th Ed.2014).

{¶ 13} But crimes can be committed without a conviction. They often are. The fact that a person's actions subject him or her to prosecution in no way establishes that he or she will in fact *be* prosecuted. And being *subjected* to prosecution, as mentioned in the definition in *Black's Law Dictionary*, does not mean a conviction necessarily results. It is certainly possible for an individual to commit an unlawful act and be prosecuted, yet evade conviction for a variety of reasons. Thus, we do not read the phrase "a criminal act" to mean "a criminal act that resulted in a conviction."

{¶ 14} Second, reading a conviction requirement into R.C. 2307.60(A)(1) renders R.C. 2307.60(A)(2) superfluous. R.C. 2307.60(A)(2) provides:

> A final judgment of a trial court that has not been reversed on appeal or otherwise set aside, nullified, or vacated, entered after a trial or upon a plea of guilty, but not upon a plea of no contest or

> the equivalent plea from another jurisdiction, that adjudges an offender guilty of an offense of violence punishable by death or imprisonment in excess of one year, when entered as evidence in any subsequent civil proceeding based on the criminal act, shall preclude the offender from denying in the subsequent civil proceeding any fact essential to sustaining that judgment, unless the offender can demonstrate that extraordinary circumstances prevented the offender from having a full and fair opportunity to litigate the issue in the criminal proceeding or other extraordinary circumstances justify affording the offender an opportunity to relitigate the issue. The offender may introduce evidence of the offender's pending appeal of the final judgment of the trial court, if applicable, and the court may consider that evidence in determining the liability of the offender.

This language establishes that a final judgment of guilt as described in the statute may provide a rebuttable evidentiary presumption. But if an underlying conviction was the *only* basis on which civil liability could be established for a "criminal act," there would be no need to carve out a presumption for evidence of a conviction. In other words, R.C. 2307.60(A)(2) permits the use of a conviction as evidence, but does not require it.

Is a criminal conviction a condition precedent to a civil claim pursuant to R.C. 2921.03?

{¶ 15} R.C. 2921.03(A) describes the elements required for the criminal offense of intimidation, a third-degree felony. R.C. 2921.03(C) provides:

> A person who violates this section is liable in a civil action to any person harmed by the violation for injury, death, or loss to

> person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs, and other expenses incurred as a result of prosecuting the civil action commenced under this division. A civil action under this division is not the exclusive remedy of a person who incurs injury, death, or loss to person or property as a result of a violation of this section.

{¶ 16} Petitioners argue that the plain language of R.C. 2921.03(C) makes a criminal conviction a prerequisite for civil liability because "[t]he only way to have a criminal violation and a committed offense is through a conviction." Petitioners also argue that other uses of the word "offense" in the Revised Code require an underlying conviction.

{¶ 17} Buddenberg counters that the text and the structure of the statute do not demonstrate that the General Assembly intended for a conviction to be a prerequisite to civil liability and that the legislative history and purpose support such a conclusion.

{¶ 18} For similar reasons as those discussed above with respect to the language in R.C. 2307.60, we conclude that civil liability under R.C. 2921.03(C) is not limited to a person convicted of intimidation. The word "conviction" is absent from the statutory language. And we are not persuaded by petitioners' argument that the "commission of the offense" necessarily means that a formal declaration of criminal guilt has occurred.

{¶ 19} R.C. 2921.03(C) provides for civil liability against a "person who violates" the intimidation statute, but it does not say that liability is limited to someone who is *found guilty* of violating the statute. Petitioners point to R.C. 2921.13, which contains language similar to R.C. 2921.03(C) and attaches civil liability to a falsification offense. *See* R.C. 2921.13(G). In one case cited by petitioners, the Tenth District Court of Appeals declined to recognize a civil claim

for falsification "without the initiation of criminal charges or criminal proceedings" under the statute. *Hershey v. Edelman*, 187 Ohio App.3d 400, 2010-Ohio-1992, 932 N.E.2d 386, ¶ 29 (10th Dist.). The court noted, "Here, there is absolutely no evidence that defendant was arrested for or charged or indicted for a falsification offense." *Id.* But, as explained above with respect to R.C. 2307.60, the *initiation* of criminal proceedings does not necessarily mean a conviction results from those proceedings. Thus, *Hershey* does not support petitioners' argument that the statute requires a conviction.

{¶ 20} Petitioners also argue that the term "offense" as used in R.C. 2921.03(C) is synonymous with "crime," and that both terms are used to mean "acts that have been the subject of criminal proceedings." But, again, being the subject of a criminal proceeding is not the equivalent of being convicted of the crimes charged. And the word conviction is not in the statute. Without any clear indication from the legislature in the language of the statute that a conviction is required, we decline to read such intent into the statute.

{¶ 21} Reading R.C. 2921.03(C) as petitioners request would require us to add words to the statute. *See Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶ 24. We instead construe R.C. 2921.03(C) as written and conclude that the plain language does not require a criminal conviction as a prerequisite for civil liability.

Conclusion

{¶ 22} For the foregoing reasons, we answer the certified state-law questions in the negative.

So answered.

FRENCH, FISCHER, DEWINE, DONNELLY, and STEWART, JJ., concur.

KENNEDY, J., concurs in judgment only.

The Chandra Law Firm, L.L.C., Subodh Chandra, and Donald P. Screen, for respondent.

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Paul W. Flowers Co., L.P.A., and Louis E. Grube; and Elizabeth Well, in support of respondent for amicus curiae Ohio Crime Victim Justice Center

Paul W. Flowers Co., L.P.A., and Louis E. Grube; and Camille Crary, in support of respondent for amicus curiae Ohio Alliance to End Sexual Violence.

Paul W. Flowers Co., L.P.A., and Louis E. Grube, in support of respondent for amicus curiae Ohio Now Education and Legal Fund.

Frantz Ward, L.L.P., and Kelley Barnett, in support of respondent for amicus curiae Cleveland Rape Crisis Center.

Bonezzi, Switzer, Polito & Hupp Co., L.P.A., and William A. Peseski, in support of petitioners for amicus curiae Ohio Association of Civil Trial Attorneys.

Isaac, Wiles, Burkholder & Teetor, L.L.C., Mark Landes, and Dale D. Cook, in support of petitioners for amici curiae Ohio School Boards Association, Ohio Transit Risk Pool, and County Commissioners Association of Ohio.

Dave Yost, Attorney General, Benjamin M. Flowers, State Solicitor, and Michael J. Hendershot, Chief Deputy Solicitor, in support of neither party for amicus curiae the State of Ohio.

Date and Time: Friday, July 31, 2020 8:13:00 AM CDT

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1. *Necak v. Select Portfolio Servicing, Inc., 2020 U.S. Dist. LEXIS 133510*

Client/Matter: 010319.0120/16422

Search Terms: 2020 US Dist LEXIS 133510

Search Type: Natural Language

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Cases	Sources: Jurisdiction

Necak v. Select Portfolio Servicing, Inc.

United States District Court for the Southern District of Ohio, Eastern Division

July 27, 2020, Decided; July 27, 2020, Filed

Case No. 2:19-cv-3997

Reporter
2020 U.S. Dist. LEXIS 133510 *

TRACEY A. NECAK, Plaintiff, v. SELECT PORTFOLIO SERVICING, INC., Defendant.

Core Terms

foreclosure, consumer, Partial, nonmoving, prevailed, lawsuit

Counsel: [*1] For Tracey A. Necak, Plaintiff: Troy John Doucet, Doucet Gerling Co., L.P.A., Dublin, OH.

For Select Portfolio Servicing, Inc., Defendant: Harold T Schisler, II, LEAD ATTORNEY, Dinsmore & Shohl - 1, Cincinnati, OH.

Judges: ALGENON L. MARBLEY, CHIEF UNITED STATES DISTRICT JUDGE. Magistrate Judge Jolson.

Opinion by: ALGENON L. MARBLEY

Opinion

OPINION & ORDER

This matter is before the Court on Defendant Select Portfolio Servicing, Inc.'s ("SPS") Motion to Dismiss (ECF No. 3) and Plaintiff Tracey A. Necak's Motion for Partial Summary Judgment (ECF No. 6). For the following reasons, Defendant's Motion to Dismiss is **GRANTED** and Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

I. BACKGROUND

On February 9, 2017, U.S. Bank filed a foreclosure action against Tracey Necak and her husband in the Medina County Court of Common Pleas. (ECF No. 6 Ex. 1). Mrs. Necak prevailed after a bench trial and the foreclosure action was dismissed. (ECF No. 6 Ex. 2). While the state foreclosure action was ongoing, Mrs. Necak filed suit in Northern District of Ohio on July 13, 2017 against Defendant SPS after SPS acquired servicing rights to the mortgage loan, alleging violations of the *Real Estate Settlement Procedures Act ("RESPA")*. *Necak v. Select Portfolio Servicing, Inc., 1:17-cv-1473, 2019 U.S. Dist. LEXIS 71147, 2019 WL 1877174 (N.D. Ohio April 26, 2019)*. In her response to SPS's motion to dismiss or stay the RESPA litigation, Mrs. Necak argued the actions "must receive independent resolution" because the RESPA suit was "strictly for money damages and cannot affect the ownership or disposition of the subject property at issue in the foreclosure." (ECF No. 10 Ex. A). After losing the RESPA case after a jury trial, SPS filed a motion to tax costs in connection with the litigation. (ECF No. 6 Ex. 3). On July 25, 2019, the Court entered an order finding the majority of SPS's request not recoverable. (ECF No. 6 Ex. 6). SPS's motion to tax costs forms the basis of Mrs. Necak's FDCPA claim in this lawsuit.

Mrs. Necak filed this complaint on September 11, 2019 against SPS seeking monetary damages for alleged violations of the *Fair Debt Collection Practices Act ("FDCPA")*, *15 U.S.C. § 1692*, alleging SPS unlawfully attempted to collect expenses for the state foreclosure case in its motion to tax costs in federal court. (ECF No. 1). SPS moved to dismiss Plaintiff's complaint on November 7, 2019 for failure to state a claim, arguing its

motion to tax costs was not an attempt to collect a "debt" and it was **[*2]** not acting as a "debt collector" under the statute. (ECF No. 3). On December 12, 2019, Plaintiff submitted a response in opposition to Defendant's motion to dismiss and moved for partial summary judgment on liability and statutory damages, while requesting a trial to determine emotional distress damages. (ECF No. 6). Defendant filed a response on January 9, 2020 (ECF No. 10) and Plaintiff filed her reply on February 6, 2020 (ECF No. 15). Both motions are now ripe for review.

II. STANDARD OF REVIEW

A. Motion to dismiss for failure to state a claim

The Court may dismiss a cause of action under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." Such a motion "is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." Golden v. City of Columbus, 404 F.3d 950, 958-59 (6th Cir. 2005). The Court must construe the complaint in the light most favorable to the non-moving party. Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 (6th Cir. 2008). If more than one inference may be drawn from an allegation, the Court must resolve the conflict in favor of the plaintiff. Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). The Court cannot dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which **[*3]** would entitle him to relief." *Id.* The Court is not required, however, to accept as true mere legal conclusions unsupported by factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Although liberal, Rule 12(b)(6) requires more than bare assertions of legal conclusions. Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236, 1240 (6th Cir. 1993) (citation omitted). Generally, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint's factual allegations "must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). It must contain "enough facts to state a claim to relief that is plausible on its face." Id. at 570. A claim is plausible when it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

B. Summary judgment

Federal Rule of Civil Procedure 56(a) provides, in relevant part, that summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." In evaluating such a motion, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in the non-moving party's favor. United States Sec. & Exch. Comm'n v. Sierra Brokerage Servs., Inc., 712 F.3d 321, 327 (6th Cir. 2013) (citing Tysinger v. Police Dep't of City of Zanesville, 463 F.3d 569, 572 (6th Cir. 2006)).

A fact is deemed material only if it "might **[*4]** affect the outcome of the lawsuit under the governing substantive law." Wiley v. United States, 20 F.3d 222, 224 (6th Cir. 1994) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." Moore v. Philip Morris Cos., Inc., 8 F.3d 335, 340 (6th Cir. 1993). The mere possibility of a factual dispute is insufficient to defeat a motion for summary judgment. *See* Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992). Summary judgment is inappropriate, however, "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

The necessary inquiry for this Court is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Patton v. Bearden, 8 F.3d 343, 346 (6th Cir. 1993) (quoting Anderson, 477 U.S. at 251-52). It is proper to enter summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the nonmoving party has "failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," the moving party is entitled to judgment **[*5]** as a matter of law. *Id.* (quoting Anderson, 477 U.S. at 250).

III. LAW & ANALYSIS

A. FDCPA claims

The relevant sections of the FDCPA provide:

15 U.S.C. § 1692(e):

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> (2) The false representation of--
> (A) the character, amount, or legal status of any debt; or
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. § 1692(f):

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized **[*6]** by the agreement creating the debt or permitted by law.

The FDCPA, *15 U.S.C. § 1692(a)*, defines "consumer," "debt," and "debt collector," as follows:

> (3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.
> (5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. [...]

Plaintiff alleges Defendant's erroneous attempt to collect costs associated solely with the state foreclosure action in its motion to tax costs in the RESPA litigation violated *§ 1692(e)(2)* "because its inflated and unlawful demands" in its motion "were a false representation of the character, amount, or legal status of a debt." **[*7]** (ECF No. 1 at ¶ 71). She further claims SPS violated *§ 1692(e)(5)* because its motion was "a threat to take an action that could not legally be taken" and (f)(1) "because the amount SPS attempted to collect was not expressly authorized by an agreement or permitted by law." (*Id.* at ¶¶ 72-73). SPS moves to dismiss Plaintiff's complaint for failure to state a claim under *Rule 12(b)(6)* on the grounds that its application to tax costs is not a "debt" nor was SPS acting as a "debt collector" under the statute when it filed its application. (ECF No. 3).

Fed. R. Civ. P. 54(d)(1) allows a court to award costs, and to tax costs, to the prevailing party. Plaintiff's argument is that Defendant's inclusion of some costs in its motion that the district court found unrecoverable constituted an unlawful attempt to collect a debt. This argument is not supported by the statute or case law. Defendant's partially unsuccessful motion for costs to the district court cannot constitute debt collection under the FDCPA. First, SPS is not a debt collector in this context because it is attempting to collect its *own* fees—not "debts owed or due or asserted to be owed or due *another*." *15 U.S.C. § 1692(a)(6)* (emphasis added). Furthermore, SPS's motion to collect costs is not a "debt" **[*8]** because the RESPA litigation was not a consumer transaction and civil litigation costs are not debts "primarily for personal, family, or household purposes." *15 U.S.C. § 1692(a)(5)*. *See* *Shorts v. Palmer, 155 F.R.D. 172, 174-75 (S.D. Ohio 1994)* (obligation to pay money that arises out of a civil liability is not a debt under the FDCPA).

The Eleventh Circuit in *Miljkovic v. Shafritz & Dinkin*, adopted the broad view that "documents filed in court in the course of judicial proceedings to collect on a debt...are subject to the FDCPA." *791 F.3d 1291, 1295 (11th Cir. 2015)*. But even under this approach, SPS's motion to tax costs is not a "debt" because it is not a document filed in a proceeding *to collect on a debt.* The motion filed in *Milijkovic* still pertained to Defendant's

attempt to collect the original consumer debt—in that case, plaintiff's automobile debt. *Miljkovic, 791 F.3d at 1294-95* (holding the FDCPA applied to defendant's filing of a reply brief attempting to garnish plaintiff's wages for an unpaid automobile debt after knowing plaintiff was exempt).

Plaintiff attempts to characterize the underlying debt as the mortgage debt, citing the Sixth Circuit's decision in *Glazer v. Chase Home Finance, LLC* for the proposition that a mortgage foreclosure constitutes a consumer debt collection action. *704 F.3d 453, 461 (6th Cir. 2013)*. But the RESPA litigation was **[*9]** a separate civil suit for damages brought by Mrs. Necak. As SPS points out, SPS was not party to the original foreclosure action and Plaintiff herself argued that her RESPA lawsuit was distinct from the state foreclosure suit. (ECF No. 6 Ex. 1; ECF No. 10 Ex. A).

SPS prevailed in the RESPA lawsuit after a jury trial and filed for costs pursuant to *Rule 54(d)*. SPS's motion to tax litigation costs as a prevailing party in the RESPA litigation is the subject of Plaintiff's complaint in this suit, not the original foreclosure action. "[T]he FDCPA limits its reach to those obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services." *Taylor v. Javitch, Block & Rathbone, LLC, No. 1:12CV708, 2012 U.S. Dist. LEXIS 86727, 2012 WL 2375494, at *2 (N.D. Ohio June 22, 2012)* (quoting *Bass v. Stolper, Koritzinsky, Brewster & Neider, S. C., 111 F.3d 1322, 1326 (7th Cir.1997))*. SPS's *Rule 54* motion to the court to collect associated costs incurred from the RESPA litigation is not a consumer-related or consensual transaction and thus not a "debt" under the statute.

In her combined Response to Defendant's Motion to Dismiss and Motion for Partial Summary Judgment, Mrs. Necak again attempts to characterize SPS's motion to collect costs in the RESPA litigation as "arising from" the original consumer transaction, or **[*10]** mortgage debt. (ECF No. 6 at 8). She makes analogies to situations where a debt collector attempts to collect bogus fees or makes false statements *in their foreclosure action*, but these fact patterns have no bearing on the instant case about fees incurred in separate ligation. (*Id.* at 8-9). The Court finds Plaintiff has failed to state a claim under the FDCPA because the alleged action by Defendant does not constitute a "debt" under the statute and therefore there are "no set of facts in support of [Plaintiff's] claim which would entitle [her] to relief." *See Mayer, 988 F.2d at 638*.

Because this Court finds Plaintiff has failed to state a claim under the FDCPA, her Complaint is **DISMISSED** and her Motion for Partial Summary Judgment is **DENIED**.

B. Attorneys' fees

Finally, SPS asks the Court to award attorneys' fees because it argues Plaintiff's counsel filed this lawsuit "in bad faith and for the purpose of harassment" pursuant to *15 U.S.C. § 1692k(a)(3)*. While the Court ultimately finds Plaintiff's legal arguments unpersuasive, it does not find the action rises to the level of bad faith or was pursued solely with the intent to harass. *See Deere v. Javitch, Block and Rathbone LLP, 413 F.Supp.2d 886, 889 (S.D. Ohio 2006)* ("zealous advocacy about the parameters of FDCPA's consumer protection... does not suggest any nefarious **[*11]** motive or bad faith"). Courts have declined to award attorney fees "when a claim is 'minimally colorable' and without additional facts supporting bad faith or harassment." *Sohi v. Diversified Adjustment Serv., No. 1:15-CV-563, 2016 U.S. Dist. LEXIS 61941, 2016 WL 2745298, at *9 (S.D. Ohio May 10, 2016)* (citing *Brown v. Van Ru Credit Corp., No. 14-12136, 2015 WL 225727, at *5 (E.D. Mich. Jan. 16, 2015)*, *aff'd*, *804 F.3d 740 (6th Cir. 2015))*. The Court finds Plaintiff's continued pursuit of her claim despite Defendant's "communica[tion] with Plaintiff... regarding the merit of her Complaint" (ECF No. 3 at 15) does not constitute sufficient "additional facts supporting bad faith or harassment." *Sohi, 2016 U.S. Dist. LEXIS 61941, 2016 WL 2745298, at *9*.

IV. CONCLUSION

For the foregoing reasons, Defendant Select Portfolio Servicing, Inc.'s Motion to Dismiss is **GRANTED** and Plaintiff Tracey Necak's Motion for Partial Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Algenon L. Marbley

ALGENON L. MARBLEY

CHIEF UNITED STATES DISTRICT JUDGE

DATE: July 27, 2020

End of Document

[Cite as *Byrd v. Lindsay Corp.*, 2020-Ohio-3870.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
MALCOLM BYRD, as personal representative of the Estate of Wilbert Byrd, deceased Appellee v. LINDSAY CORPORATION, et al. Appellants	C.A. No. 29491 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. MS 2018-00-0063

DECISION AND JOURNAL ENTRY

Dated: July 29, 2020

CALLAHAN, Presiding Judge.

{¶1} Appellant, Lindsay Corporation, appeals an order that granted a motion to quash/motion for a protective order related to a foreign subpoena issued by the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Malcolm Byrd filed a complaint in Hamilton County, Tennessee against Lindsay Corporation ("Lindsay") and other defendants in his capacity as the personal representative of his father, Wilbert Byrd, who died in an automobile accident on July 2, 2016. With respect to Lindsay and its related corporate defendants, the complaint alleged that Wilbert Byrd suffered fatal injuries as a result of the defendants' negligence in connection with "the design, development, manufacture, assembly, testing, inspection, marketing, promotion, training, distribution,

advertising, sale or processing" of X-LITE guardrail end terminal and related guardrail systems. The complaint also asserted a claim for products liability.

{¶3} On November 27, 2018, Lindsay filed a foreign subpoena duces tecum issued by the Circuit Court of Hamilton County, Tennessee, with the Summit County Court of Common Pleas pursuant to the Uniform Interstate Deposition and Discovery Act, R.C. 2319.09. The subpoena directed John Durkos, a nonparty who resides in Summit County, Ohio, to produce:

> All documents (electronic and hard copy) and communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) that discuss, mention or relate in any way to Lindsay, X-Lite, X-Tension, or MAX-Tension. For e-mail communications, identify any individual(s) that are blind copied (BCC);
>
> All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports calendar appointments) between you and Stephen Eimers. For e-mail communications, identify any individual(s) that are blind copied (BCC);
>
> All documents (electronic and hard copy) that discuss, mention or relate in any way to Stephen Eimers;
>
> All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between you and Victor Childers. For e-mail communications, identify any individual(s) that are blind copied (BCC);
>
> All communications (electronic and hard copy) that discuss, mention or relate in any way to Victor Childers;
>
> All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between you and the Tennessee Department of Transportation. For e-mail communications, identify any individual(s) that are blind copied (BCC);
>
> All documents (electronic and hard copy) that discuss, mention or relate in any way to the Tennessee Department of Transportation;
>
> All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between [*sic*] and any member of the Tennessee General Assembly, past and present, including their legislative aides. For e-mail communications, identify any individual(s) that are blind copied (BCC);

> All documents (electronic and hard copy) that discuss, mention or relate in any way to any member of the Tennessee General Assembly, past and present, including their legislative aides;
>
> All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between you and any official elected to the United States Congress, past and present, including their legislative aides. For e-mail communications, identify any individual(s) that are blind copied (BCC); [and]
>
> All documents (electronic and hard copy) that discuss, mention or relate in any way to any official elected to the United States Congress, past and present, including their legislative aides[.]

Mr. Durkos filed written objections, then moved to quash the subpoena and for a protective order, arguing, in part, that the subpoena required the disclosure of privileged or protected matter and requested documents the subject matter of which was not relevant to the subject matter involved in the underlying action. Specifically, Mr. Durkos argued that because he was an employee of Lindsay's competitor, whose conduct and products were not at issue in the underlying litigation, the information sought by Lindsay could not lead to information relevant to the issues in that case and could contain trade secrets. He also noted that Lindsay could obtain the information requested through other means and that the potential harm to Mr. Durkos and his employer outweighed Lindsay's need to obtain it through discovery.

{¶4} On April 11, 2019, the magistrate granted Mr. Durkos' motion, concluding that the material sought by Lindsay was not relevant to the underlying action and that the subpoena constituted a "fishing expedition" on Lindsay's part. In the alternative, the magistrate also noted that "Lindsay * * * failed to establish a substantial need for the subpoenaed documents from Mr. Durkos" and "failed to establish that the requested documents cannot be obtained through alternate means."

{¶5} Lindsay filed objections to the magistrate's decision. On July 2, 2019, the trial court overruled Lindsay's objections, adopted the magistrate's decision, and granted Mr. Durkos' motion. Lindsay filed this appeal.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN GRANTING APPELLEE JOHN DURKOS' MOTIONS TO QUASH AND FOR PROTECTIVE ORDER[.]

{¶6} In Lindsay's only assignment of error, it has argued that the trial court erred by granting Mr. Durkos' motion to quash or for a protective order prohibiting the discovery sought by the subpoena. This Court does not agree.

{¶7} R.C. 2319.09, which codifies the Uniform Interstate Depositions and Discovery Act, describes the procedures for an Ohio court to issue a subpoena for discovery originating in a foreign jurisdiction. Pursuant to the Act, a party seeking discovery in Ohio must submit a foreign subpoena to an Ohio clerk of court, which must in turn "promptly issue a subpoena for service upon the person to which the foreign subpoena is directed." R.C. 2319.09(C)(2). The Ohio Rules of Civil Procedure apply to subpoenas issued under R.C. 2319.09, and "[a]n application to the court for a protective order or to enforce, quash, or modify a subpoena" may be filed by the person from whom discovery is sought. R.C. 2319.09(E)/(F). *Compare Lampe v. Ford Motor Co.*, 9th Dist. Summit No. 19388, 2000 WL 59907, *3 (concluding that under a previous version of R.C. 2319.09, an Ohio Court had "the authority to examine the facts underlying a subpoena and to quash when necessary").

{¶8} Civ.R. 26, which regulates discovery, provided at all times relevant to this case that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the

subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" Civ.R. 26(B)(1).[1] On motion of a party or any other person from whom discovery is sought, a trial court "may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" including orders that provide that the discovery will not be allowed. Civ.R. 26(C). An individual subject to a request for discovery may seek relief under Civ.R. 26(C)(1) on the basis that the material sought is not "'relevant to the subject matter involved in the pending action.'" *See*, *e.g., Herrick-Hudson, L.L.C. v. Cleveland-Cuyahoga Cty. Port Auth.*, 8th Dist. Cuyahoga No. 104053, 2016-Ohio-7716, ¶ 22. Similarly, material subpoenaed pursuant to Civ.R. 45 "'must have some relevance to [the proceeding] and be reasonably necessary[.]'" *Martin v. The Budd Co*., 128 Ohio App.3d 115, 119 (9th Dist.1998), quoting *McMillan v. Ohio Civ. Rights Comm*., 39 Ohio Misc. 83, 94 (C.P.1974). Consequently, a motion to quash under Civ.R. 45(C) may also be granted if the material is not relevant to the underlying proceeding. *See Martin* at 120.

{¶9} This Court reviews a trial court's decision to quash a subpoena or to grant a protective order for an abuse of discretion. *Praetorium Secured Fund I, L.P. v. Keehan*, 9th Dist. Lorain No. 18CA011433, 2019-Ohio-3414, ¶ 8, citing *Kaplan v. Tuennermann-Kaplan,* 9th Dist. Wayne No. 11CA0011, 2012-Ohio-303, ¶ 10 (motion to quash); *Herrick-Hudson* at ¶ 22 (protective order).[2] An abuse of discretion is present when a trial court's decision "'is contrary to

[1] Substantial amendments to Civ.R. 26 became effective on July 1, 2020. Those amendments are not at issue in this appeal.

[2] Lindsay's merit brief frames its arguments in terms of an abuse of discretion, but suggests in its reply brief that this Court should review each argument under a de novo standard. This Court does review a trial court's interpretation and application of statutes de novo. *Karvo Cos., Inc. v. Ohio Dept. of Transp.*, 9th Dist. Summit No. 29294, 2019-Ohio-4556, ¶ 6. This rule is not implicated in this case. Regardless, our discussion is limited to the trial court's determination

law, unreasonable, not supported by evidence, or grossly unsound.'" *Menke v. Menke*, 9th Dist. Summit No. 27330, 2015-Ohio-2507, ¶ 8, quoting *Tretola v. Tretola*, 3d Dist. Logan No. 8-14-24, 2015-Ohio-1999, ¶ 25.

{¶10} During a hearing before the magistrate, Lindsay noted that by that point, "only Requests 1 through 5 [were] at issue[.]" Those requests required the production of:

> All documents (electronic and hard copy) and communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments that discuss, mention or relate in any way to Lindsay, X-Lite, X-Tension, or MAX-Tension. For e-mail communications, identify any individual(s) that are blind copied (BCC);
>
> All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports calendar appointments) between you and Stephen Eimers. For e-mail communications, identify any individual(s) that are blind copied (BCC);
>
> All documents (electronic and hard copy) that discuss, mention or relate in any way to Stephen Eimers;
>
> All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between you and Victor Childers. For e-mail communications, identify any individual(s) that are blind copied (BCC); [and]
>
> All communications (electronic and hard copy) that discuss, mention or relate in any way to Victor Childers[.]

The first request pertains to documents that relate to four products manufactured by Lindsay, the direct competitor of the company that employs Mr. Durkos. The second and third requests pertain to an individual identified as Stephen Eimers. According to the parties, Mr. Eimers is the parent of a young woman who perished in an automobile accident that occurred after the one in which Wilbert Byrd lost his life. The parties also note that Mr. Eimers is the plaintiff in litigation that

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regarding relevancy, which is an exercise of its discretionary function in regulating discovery. *See Ruwe v. Bd. of Twp. Trustees of Springfield Twp.*, 29 Ohio St.3d 59, 61 (1987); *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 57 (1973).

alleges that Lindsay's guardrail end terminals and related systems were at fault in the accident that led to her death and that Mr. Eimers has become an outspoken advocate for action against Lindsay, particularly in the context of state governments. The fourth and fifth requests relate to documents that involve an individual identified as Victor Childers. According to Lindsay, Mr. Childers is "a former road safety consultant to [the] Michigan [Department of Transportation], whom Mr. Durkos introduced to Mr. Eimers[.]"

{¶11} Lindsay argued that the documents in requests numbers one through five were relevant in anticipation that Mr. Byrd would attempt to prove defects in the X-LITE system indirectly—namely, by presenting evidence that various state departments of transportation had removed or had considered removing the X-LITE system from their roadways. Lindsay reasoned that Mr. Eimers' advocacy in this regard—which Lindsay characterized as a "crusade to destroy X-LITE"—would provide an alternative to this narrative. Specifically, Lindsay maintained that the documents set forth in request numbers one through five would demonstrate that the governmental entities acted not based on an assessment of the safety of the X-LITE system, but in response to a concerted campaign by Mr. Eimers to discredit Lindsay while Mr. Durkos "worked surreptitiously to aid" his efforts.

{¶12} The claims at issue in this case, however, allege negligence and products liability in connection with the death of Wilbert Byrd on July 2, 2016. As the trial court noted, the accident that took the life of Mr. Eimers' daughter occurred on November 1, 2016. Mr. Eimers' advocacy, and the relationship between Mr. Durkos and Mr. Eimers that forms the basis that Lindsay articulated for the relevance of the document requests, postdates the accident at issue in this case by at least four months. As the trial court also observed, correspondence between Lindsay and Mr. Durkos' employer on September 26, 2018, also calls into question Lindsay's purpose for

seeking the documents at issue because in that correspondence, Lindsay suggested that the information purportedly contained in the documents could give rise to claims of "'tortious interference with business relations, trade libel, and/or [u]nfair [c]ompetition.'"

{¶13} This Court has observed that "discovery proceedings may not be used to conduct a mere fishing expedition for incriminating evidence." *Martin*, 128 Ohio App.3d at 119, citing *Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App.3d. 663, 668 (9th Dist.1990). Given that Lindsay characterized Mr. Durkos' alleged relationship with Mr. Eimers as tortious conduct and that document requests one through five pertain to events that occurred after the date of Wilbert Byrd's death, the trial court did not err by concluding that those documents were not relevant to the underlying litigation. It follows that the trial court did not abuse its discretion by quashing the subpoena pursuant to Civ.R. 45(C) or by granting Mr. Durkos' motion for a protective order pursuant to Civ.R. 26(C).

{¶14} Lindsay's assignment of error is overruled.

III.

{¶15} Lindsay's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

LYNNE S. CALLAHAN
FOR THE COURT

CARR, J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

MATTHEW J. BLAIR, Attorney at Law, for Appellants.

SHELBY RINEY, Attorney at Law, for Appellants.

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MARGO S. MEOLA, Attorney at Law, for Appellee.