[Cite as *Am. Chem. Soc. v. Leadscope,* 2010-Ohio-2725.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The American Chemical Society,	:	
Plaintiff-Appellant/Cross-Appellee,	:	
	:	No. 08AP-1026
v.		(C.P.C. No. 02CVC-07-7653)
	:	
Leadscope, Inc. et al.,		(REGULAR CALENDAR)
	:	
Defendants-Appellees/ Cross-Appellants.	:	

D E C I S I O N

Rendered on June 15, 2010

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant/cross-appellee, The American Chemical Society ("ACS"), appeals from a judgment, pursuant to jury verdict, of the Franklin County Court of

Common Pleas in favor of defendants-appellees/cross-appellants, Leadscope, Inc., Paul E. Blower, Jr., Wayne P. Johnson, and Glenn J. Myatt (collectively, "defendants"). Because the trial court did not err (1) in denying ACS's motion for judgment notwithstanding the jury's verdict finding ACS liable to Leadscope, Blower, Johnson and Myatt, on their counterclaims for unfair competition, defamation, and tortious interference with business relations, (2) in not reducing the jury's award of compensatory and punitive damages, and (3) in awarding attorney fees, we affirm.

I. Procedural History

{¶2} The civil action subject of this appeal arises from an intellectual property dispute between ACS and three of its former employees, Blower, Johnson, and Myatt (collectively, "individual defendants"). The individual defendants left ACS in 1997 to start their own business venture, which eventually became Leadscope, Inc., a provider of specialized research software.

{¶3} ACS is a non-profit organization that provides information services to chemists, chemical engineers, and related professions. ACS's largest division, the Chemical Abstracts Service ("Chemical Abstracts"), accounts for 60 percent of ACS's gross revenue and is based in Columbus, Ohio. Robert Massie is president of Chemical Abstracts and reports to the executive director of ACS, who operates from Washington, D.C.

{¶4} Broadly described, Chemical Abstracts provides a service allowing scientists and researchers to access and research databases of chemical compounds and chemical reactions. During their employment with ACS, Blower and Myatt worked to develop a software tool named "PathFinder" that was intended to improve the ability of

researchers to access and organize chemical information available in ACS's databases. Johnson did not participate directly in creating the ACS PathFinder software, but late in the project he became involved in an effort that typified the scope of the PathFinder project: to pursue usability studies, marketing research, and investigation of possible technical collaboration with related firms and hardware product. To that end, Johnson cooperated with the electronics firm Toshiba to explore the possibility of adapting PathFinder to Toshiba's new "tablet" computer hardware.

{¶5} Chemical Abstracts suspended the PathFinder project in 1997, to the disappointment of Blower and Myatt who felt the software product had untapped potential. Blower, Myatt, and Johnson soon resigned from Chemical Abstracts with the express intent of developing and marketing a software product that would provide the same capabilities as PathFinder. In slightly less than two years, the individual defendants created Leadscope and developed its software product; in 1999 they began public presentations and publication of peer-reviewed articles unveiling and discussing the software. ACS, which had not entirely abandoned hope of someday commercializing its comparable PathFinder product, continued to monitor Leadscope's efforts to market its product. Because the Leadscope principals worked on comparable products at ACS, Chemical Abstracts president Robert Massie personally expressed concern to his colleagues that the individual defendants may have appropriated some software code or other intellectual property developed during their employment with ACS. ACS, however, took no concrete action on Massie's concerns until Leadscope received a patent for its software on November 27, 2001.

{¶6} Michael Dennis, whom the parties refer to as ACS's chief legal counsel, contacted Leadscope by telephone in April 2002 to express his concerns about the possible misappropriation of intellectual property from Chemical Abstracts. In particular, he directed his comments to the software code and conceptual lines of development Blower and Myatt created during their employment with ACS. Dennis followed up with a letter to Leadscope's chief financial officer, Michael Conley, to state ACS's demands and to present Leadscope with a copy of a draft complaint that would be filed if the parties could not resolve the matter without litigation.

{¶7} In discussions that lasted approximately two weeks, ACS initially demanded a large cash payment and total ownership of the Leadscope patent. In ensuing discussions, ACS also suggested arbitration proceedings where the similarity of Leadscope's product to ACS's PathFinder software could be independently determined. In response, Leadscope indicated throughout negotiations that it was prepared to respond to ACS-initiated litigation with its own litigation based on various theories. The discussions did not lead to agreement.

{¶8} ACS initially filed suit in the Federal District Court for the Southern District of Ohio. Leadscope and the individual defendants moved to dismiss the complaint for lack of diversity jurisdiction, prompting ACS to voluntarily dismiss the case and re-file it in the Franklin County Court of Common Pleas. ACS's common pleas complaint included claims for misappropriation of trade secrets, breach of employment agreements, unfair competition, breach of fiduciary duty, conversion, and violation of implied license under shop rights. Leadscope and the individual defendants responded to the complaint with counterclaims for defamation, tortious interference with business relations, unfair

competition, violations of the Ohio Deceptive Practices Act, and violations of the Ohio Pattern of Corrupt Activities statute.

{¶9} Litigation began with a lengthy stay of the underlying action, during which Leadscope and the individual defendants litigated with their own insurer to establish the insurer's duty to advance defense costs in ACS's action against them and to provide coverage should ACS prevail. Once the insurance issues were resolved, the underlying litigation went through extensive motion practice during which many evidentiary issues were resolved and the parties' claims were sifted and narrowed.

{¶10} After an eight-week jury trial, the jury returned verdicts against ACS on its remaining claims for breach of contract and misappropriation of trade secrets. The jury returned verdicts in favor of Leadscope, Blower, Johnson, and Myatt on their counterclaims for defamation, tortious interference, and unfair competition, awarding Leadscope and the individual defendants a total of $26.5 million in compensatory and punitive damages.

{¶11} The trial court overruled ACS's post-verdict motions for judgment notwithstanding the verdict, for new trial, and for remittitur. Pursuant to motion, the trial court then awarded Leadscope and the individual defendants their attorney fees and costs of approximately $7.9 million.

II. Assignments of Error

{¶12} ACS assigns the following errors on appeal:

> I. The trial court erred in failing to enter judgment notwithstanding the verdict, or in the alternative in failing to order a new trial, on Defendants' counterclaim for defamation.

> II. The trial court erred in failing to enter judgment notwithstanding the verdict, or in the alternative in failing to order a new trial, on Defendants' unfair competition counterclaim.
>
> III. The trial court erred in failing to enter judgment notwithstanding the verdict, or in the alternative in failing to order a new trial, on Defendants' tortious interference counterclaim.
>
> IV. The trial court erred in failing to enter judgment notwithstanding the verdict, or in the alternative in failing to order a new trial or remittitur, with respect to the jury's compensatory and punitive damages awards.
>
> V. The trial court erred in awarding attorneys' fees to Defendants.
>
> VI. The trial court erred in failing to order a new trial on all claims.

{¶13} Leadscope and the individual defendants filed a conditional cross-appeal and assign the following assignment of error on cross-appeal:

> The trial court erred in its January 25, 2008 Decision and Entry Denying Plaintiff's November 15, 2007 Motion for Summary Judgment by holding that the following statements were absolutely privileged: (1) a complaint ACS filed in federal court on May 1, 2002; (2) a letter ACS sent to the Defendants on April 15, 2002; with the attached (3) draft complaint prepared by ACS; and (4) statements made by ACS during meetings between the parties in April 2002.

III. Pending Motion Addressing Notice of Appeal

{¶14} Before discussing the merits of the appeal, we first address a motion Leadscope and the individual defendants filed that asks us to reconsider and vacate our order allowing ACS to amend its notice of appeal. We deny the motion.

{¶15} ACS initiated this appeal by filing on November 20, 2008 a notice of appeal from the trial court's October 21, 2008 judgment denying ACS's motion for judgment

notwithstanding the verdict. Because Leadscope's motion for attorney's fees was still pending before the trial court at that time, we lacked a final appealable order. We, however, considered ACS's November 20, 2008 filing to be a premature notice of appeal that, pursuant to App.R. 4(C), would become effective when the trial court rendered its final appealable order in the case. The appeal remained on our docket under the present case number.

{¶16} The trial court addressed defendants' request for fees and costs and entered its final judgment on February 6, 2009. Without seeking leave from this court, ACS on March 6, 2009 filed an amended notice, which included the trial court's final judgment, under the same appellate case number. On April 29, 2009, ACS filed a motion for leave to amend its notice of appeal not only to reflect the March 6 amended notice but to supplement the record with the transcripts and filings relating to the fee hearing and decision. We granted ACS's motion on May 1, 2009. Leadscope responded with a motion to vacate our May 1 order and to preclude our considering on appeal matters not contained in the trial court's initial October 21, 2009 decision.

{¶17} In support of its motion, defendants argue ACS failed to perfect an appeal from the trial court's February 6, 2009 final judgment, or at least from those aspects of the February 6 judgment that do not incorporate determinations already expressed in the October 21, 2008 judgment and prior orders of the court. Defendants reason that ACS's initial, premature notice of appeal did not, and could not, name the subsequent final order as the order being appealed. Defendants further point out the March 6 amended notice of appeal was filed without seeking leave of court. Finally, although defendants acknowledge ACS's subsequent motion seeking leave to amend, defendants note it was

filed more than 30 days after entry of the trial court's final judgment and is therefore out of rule. With those observations, defendants assert that we lack jurisdiction to address the new issues, principally attorney's fees and costs, resolved in the trial court's final February 6, 2009 order, because no timely notice of appeal specifies the February 6 order as the order being appealed.

{¶18} Defendants essentially articulate a multi-stage argument founded on four independent procedural postulates. Initially, defendants argue a premature notice of appeal under App.R.4(C) does not grant appellate jurisdiction over the trial court's eventual final order but only over the issues resolved in the interlocutory order, or prior orders subsumed in it, from which the appeal was prematurely taken. Secondly, defendants assert that in order to invoke appellate jurisdiction over the eventual final order, ACS was required to amend the premature notice of appeal under App.R. 3(F) to specifically designate, as App.R. 4(D) requires, the final judgment as the order being appealed. Thirdly, defendants contend ACS's amendment must be made within 30 days of the final order or the jurisdictional requirement of App.R. 4(A) is not met. Lastly, defendants maintain not only that ACS needed to seek and obtain leave from this court to amend ACS's notice of appeal, but that we lack the discretion to allow such amendment unless leave first is sought. The first three premises are, at the least, debatable under Ohio law, which is not settled on these questions. Our disagreement with the last-listed premise is itself determinative.

{¶19} Some courts have applied a restrictive view on the requisites for amending a notice of appeal. See *State v. West* (Jan. 19, 2001), 2d Dist. No. 2000CA56, 2001 WL 43110, at *3 (stating that "[p]ursuant to App.R. 3(F), the notice of appeal may be

amended to include other orders or judgments subsequently rendered by the trial court in the same proceeding," but "the amendment must be made within thirty days after the order or judgment involved"); see also *TJX Cos., Inc. v. Hall*, 183 Ohio App.3d 236, 2009-Ohio-3372 (holding the notice of appeal must specifically identify the lower court judgment from which the appeal is taken); *Rickard v. Trumbull Twp. Zoning Bd.*, 11th Dist. No. 2008-A-0024, 2009-Ohio-2619 (noting an attempt to add party via amended notice of appeal must be struck as untimely because "App.R. 3(F) does not allow for the relation back of amendments" filed more than 30 days after order being appealed). This court on occasion, but not always, has adopted the stricter view. See *Marcum v. Colonial Ins. Co. of Wisconsin*, 10th Dist. No. 02AP-917, 2003-Ohio-4369 (holding an amended notice of appeal filed more than 30 days after the order appealed from, in order to add a case number, did not give the court jurisdiction to consider the issues in the added case because the notice of appeal must state the case appealed from and be filed within 30 days).

{¶20} Other cases, however, take a more lenient view. See *Natl. Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St.3d 14 (holding a failure to file separate notices of appeal for each of two cases consolidated before the trial court, even where local appellate rule requires separate notices, is not a jurisdictional defect); *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, syllabus (concluding that, "[p]ursuant to App.R. 3(A), the only jurisdictional requirement for a valid appeal is the timely filing of a notice of appeal," leaving the court of appeals with discretion to determine whether sanctions, including dismissal, are warranted when presented with other defects in the notice of appeal); *Interstate Gas Supply, Inc. v. Calex Corp.*, 10th Dist. No. 04AP-980, 2006-Ohio-638

(considering all assigned errors in an appeal even where the notice of appeal did not mention a third-party defendant who was the object of part of the trial court's judgment); *In re Guardianship of Love* (1969), 19 Ohio St.2d 111, 115 and *Maritime Mfrs., Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 258-59 (both observing the rules of appellate procedure should be construed liberally to protect the right of appeal and reach the merits of the case).

{¶21} ACS's appeal ultimately does not require that we reconcile these dissonant authorities. We need not consider whether we would have jurisdiction over the final order in the absence of any amendment to the premature notice of appeal or whether we could have allowed the amendment after 30 days had passed. Rather, the question is whether we have discretion to allow ACS to amend its premature notice of appeal to include issues raised in the trial court's final order when ACS's initial attempt to amend the notice of appeal was made within 30 days of the final order but without an express motion for leave to amend.

{¶22} App.R. 3(F) does not explicitly require that a party seek and obtain leave of court to amend a notice of appeal, but some courts have viewed the rule as "implicitly" so mandating. See, e.g., *Cox v. Cox* (Dec. 7, 1994), 2d Dist. No. 14446; *State v. Southerland* (Dec. 30, 1999), 12th Dist. No. CA99-01-013. Cf. *Williams v. Global Constr. Co.* (1985), 26 Ohio App.3d 119. We disagree with *Cox* and *Southerland* on this point because, in the absence of an express requirement under the rule, we have discretion to accept or deny amendment of the notice of appeal within 30 days of the order appealed from, with or without a motion seeking explicit leave to do so.

{¶23} To curtail our discretion to allow an amended notice of appeal by implying, outside of any express condition imposed under rule or statute, a mandatory requirement that the appellant seek leave would not be consistent with the liberal construction of the appellate rules *Love* and *Maritime Mfrs.*, supra, prescribe. Moreover, under the circumstances here, any denial of leave to amend arguably would constitute an abuse of discretion, as ACS could have achieved the same end through the more cumbersome route of timely filing a new and separate notice of appeal from the trial court's final order and docketing it under a new appellate case number that necessarily would be consolidated with the original notice of appeal.

{¶24} Our May 1, 2009 order granting ACS's motion to amend its notice of appeal and supplement the record stated that the "March 6, 2009 Amended Notice of Appeal is the properly-docketed and operative notice of appeal in this case." The March 6 amended notice of appeal was filed within 30 days of the trial court's final order and specifies that judgment as the order subject of ACS's appeal. Because not only was the amended notice of appeal timely filed, but the lack of a contemporaneous motion for leave to file the amended notice does not impair our discretion to allow the amendment, we deny defendants' motion for reconsideration.

IV. First, Second, Third and Fourth Assignments of Error—Judgment Notwithstanding the Verdict

{¶25} ACS's first four assignments of error, which we address out of order for ease of discussion, assert the trial court erred when it failed to grant ACS's motion for judgment notwithstanding the jury verdict finding ACS liable to Leadscope and the individual defendants. In reviewing a decision denying a motion for judgment

notwithstanding the verdict, an appellate court applies the same test it applies in reviewing a motion for a directed verdict. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679.

{¶26} When considering a motion for a directed verdict, a court must construe the evidence most strongly in favor of the party against whom the motion is directed. Civ.R. 50(A). A motion for a directed verdict raises questions of law, not factual issues, because it tests whether the evidence is legally sufficient to allow the case to be presented to the jury for deliberation. Id. at 679-80; *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119. The court's disposition of the motion thus does not involve weighing the evidence or the credibility of the witnesses. *Texler* at 679-80. The court must deny the motion where any evidence of substantial probative value favors the nonmoving party and reasonable minds might reach different conclusions on that evidence. Id.; *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284-85.

{¶27} Accordingly, when reviewing a denied motion for judgment notwithstanding the verdict, we construe the evidence most strongly in favor of the party against whom the motion is made, without weighing the evidence or addressing issues of credibility. Civ.R. 50(A); *Faieta v. World Harvest Church,* 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶7. Our standard of review is markedly deferential to the fact-finding function of the jury at trial. *Sutphen Towers, Inc. v. PPG Industries, Inc.,* 10th Dist. No. 05AP-109, 2005-Ohio-6207, ¶38.

A**.** ACS's Second Assignment of Error – Unfair Competition

{¶28} ACS's second assignment of error asserts the trial court erred in failing to enter judgment notwithstanding the verdict on Leadscope's unfair competition

counterclaim. Leadscope asserted ACS both engaged in malicious litigation against Leadscope and circulated false and disparaging statements about Leadscope and its principals. The second aspect of the claim, concerning false and disparaging statements, is addressed in our discussion of Leadscope's defamation claims; the bad faith element discussed in the context of the malicious litigation claims involves the same element of bad faith that underpins our later discussion addressing the award of attorney's fees in the case.

{¶29} Ohio recognizes malicious litigation as a basis for an unfair competition claim. *Water Mgt. Inc. v. Stayanchi* (1984), 15 Ohio St.3d 83, 85; *Henry Gehring Co. v. McCue* (1926), 23 Ohio App. 281, 283-84; *Microsoft Corp. v. Action Software* (N.D.Ohio 2001), 136 F.Supp.2d 735, 735-40. In response to Leadscope's claim, ACS initially cites the *Noerr-Pennington* Doctrine. The doctrine provides that the First Amendment protects the right to petition or file lawsuits for the purpose of influencing the government unless the activity is "objectively baseless." *Professional Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.* (1993), 508 U.S. 49, 56, 113 S.Ct. 1920, 1926. Relying on the *Noerr-Pennington* Doctrine, ACS contends it cannot be liable on Leadscope's claims of malicious litigation unless ACS's civil action against Leadscope was "objectively baseless." Ohio courts considering comparable malicious litigation claims have not applied the "objectively baseless" standard.

{¶30} *Henry Gehring*, the seminal Ohio case adopting malicious litigation as a basis for the tort of unfair competition, explicitly applies a bad faith standard, concluding "[t]here are numerous cases of successful recoveries because of malicious acts by way of litigation in the courts, where it appears that the litigation was not founded upon good

faith, but was instituted with the intent and purpose of harassing and injuring a rival." *Henry Gehring* at 283. See also *Harco Corp. v. Corrpro Cos.* (Oct. 29, 1986), 9th Dist. No. 1465 (similarly suggesting, although the instruction was not specifically reviewed on appeal, that the standard is whether the allegedly malicious litigation was undertaken in bad faith).

{¶31} Consistent with Ohio law, we conclude the bad faith standard is better suited to the nature of the malicious litigation claim than is an objectively baseless standard. Bad faith better encompasses the elements of scope, context, timing, and intent that may reveal the malicious character of the litigation than does the bare requirement that at the time litigation commenced no possible combination of yet-to-be-disproved facts could support the claims asserted. The trial court properly instructed the jury that litigation not founded in good faith, but brought for the purpose of harassing and injuring a rival who was producing and selling the same commodities, could support Leadscope's unfair competition claim.

{¶32} As to whether ACS in bad faith initiated litigation against Leadscope and the individual defendants, the jury was presented with volumes of conflicting evidence about the timeline and circumstances of ACS's approach to dealing with Leadscope's potentially competing product. Much of the evidence supported Leadscope's claims that ACS's unfair competition was rooted in its alleged desire to suppress, by any means necessary, Leadscope as a new software competitor. To that end, Leadscope presented testimony regarding the ill-will of Chemical Abstracts' president Massie toward the new company and his former employees, as well as his direct and indirect actions to inhibit their commercial potential.

{¶33} Within that context, Leadscope's evidence, in part, emphasized the timing of ACS's legal action. Testimony presented at trial established that ACS generally, and Massie in particular, possessed sufficient information to be well aware that Leadscope's delicate developmental position had it standing at the crossroads of refining its software product and securing the financing necessary to commercially exploit a product ready to market fully. In addition, Leadscope presented evidence describing the general tenor of ACS's approach to dealing with Leadscope as a competitor in the chemical research software field, including allegedly false or misleading statements and actions ACS senior management took to impair Leadscope's reputation.

{¶34} Massie's approach, by his own testimony, included an "action plan" to monitor Leadscope as soon as Leadscope announced its new product in 1999, and he regularly discussed Leadscope with his senior management team. (Tr. 371, 396.) According to Massie, in 2000 he spoke personally with Allen Richon, who as the then president of Leadscope unequivocally assured Massie that "absolutely" no ACS-owned intellectual property was in the Leadscope software. (Tr. 264.) Robert Swann, a former ACS employee who worked as director of information technology for Chemical Abstracts during the time relevant to the case, testified Massie had taken the entire situation "very personally," so that when Leadscope obtained its patent, Massie became even more intense about the situation. (Tr. 3751-52.) Swann recounted instances in which Massie noted Leadscope soon would run out of money and would need to raise further venture capital financing. (Tr. 3763.) Significantly, Swann's testimony revealed that when Massie inquired whether the Leadscope software infringed in any known way on ACS's intellectual property, Swann could not say that it had. (Tr. 3749.)

{¶35} In early February of 2002, before the litigation commenced, Massie learned then Ohio Governor Robert Taft intended to visit Leadscope to publicize the business start-up as an Ohio high-tech success. In accord with his plan, Massie determined that, based on his personal acquaintance with the governor, he would dissuade the governor from giving the appearance of endorsing Leadscope through a personal visit. (Tr. 269-70, 3761.) Correspondence in the record indicates Massie actually sent an electronic mail message to the Governor's office to dissuade the visit. The message informed the Governor that some question existed as to the derivation of the Leadscope software code. The message further questioned how the Governor would be perceived if he associated with a company that based its product on materials removed from ACS. (Def. Ex. 30.) Massie, consistent with his message to the Governor, contacted Spotfire, a software competitor, to marshal opposition to Leadscope's commercializing its product. (Tr. 3729-30.) According to both Swann and Chemical Abstracts' vice-president of finance Peter Roche, Massie at about the same time indicated Blower was risking his ACS pension due to his involvement with Leadscope. (Tr. 2301-02, 3762.)

{¶36} Leadscope's chief financial officer, Conley, testified that when Michael Dennis contacted Leadscope on behalf of ACS on April 15, 2002, Dennis threatened both civil and criminal complaints and "fast and furious publicity" if Leadscope refused to meet with ACS immediately. (Tr. 4209-10, 4235.) Leadscope had planned an April 19, 2002 financing action to raise more capital, and the first response letter from Leadscope, dated April 16, 2002, mentioned the plan. (Def. Ex. 41.) Noting the adamant spirit with which ACS's proposal was made, Conley testified that ACS, in its initial written proposal to Leadscope, demanded ownership of Leadscope's patent, $1 million in cash payment, and

Leadscope's stopping all sales efforts. (Tr. 4217-18.) ACS did not reduce its demands during the brief period before it filed its first complaint in federal court. (Tr. 4218.)

{¶37} Fulfilling Dennis's threat during negotiations, ACS commenced litigation with a quickly-abandoned complaint filed in federal court that included allegations of breach-of-duty claims under R.C. 1333.81, which carry criminal penalties pursuant to R.C. 1333.99. After Leadscope and the individual defendants struggled to establish their insurer's duty to advance defense costs (R. 248-51), ACS dismissed that part of its complaint upon which coverage initially was predicated. (R. 371.) Leadscope asked the jury to infer ACS did so in order to again attempt to deprive Leadscope and the individual defendants of defense costs through their insurer.

{¶38} The jury, as trier of fact, was entitled to draw permissible inferences from the chronology, course, and scope of litigation ACS undertook and to conclude ACS's civil action constituted malicious litigation undertaken in bad faith, regardless of whether Leadscope fell short of proving ACS knew at the time it filed its complaint that it could never substantiate its intellectual property claims in any way.

{¶39} ACS also argues the verdict in favor of the individual defendants on the unfair competition claim must be reversed because the individual defendants were employees of Leadscope and could not be "competitors" in their individual capacities. Initially, ACS's argument is inconsistent with ACS's position on its own claims against the individual defendants. In those allegations, ACS stated "Blower, Johnson and Myatt have used and continue to use ACS's confidential and proprietary information and trade secrets to sustain Leadscope's business, to develop and offer competing products, and to apply for patents." (ACS Amended Complaint, ¶43.) The trial court noted, and ACS does

not dispute, that the three individuals are listed as inventors on the patent application for the Leadscope software and as the applicants for the patent ultimately assigned to the corporate Leadscope entity.

{¶40} As ACS's allegations tacitly acknowledge, this is not a case in which the individuals as shareholders improperly seek personal recovery for a wrong done to the corporation. See, e.g., *Adair v. Wozniak* (1986), 23 Ohio St.3d 174. Rather, the individuals in the present case were made defendants in ACS's lawsuit in their personal capacities and individually were the object of ACS's allegedly false and misleading statements. They have seen their commercial and professional futures clouded, whether they apply their efforts on behalf of Leadscope or another entity in the same field competing with ACS. In the context of this case, the individual defendants have standing as competitors of ACS to seek redress for unfair competition.

{¶41} With respect to the proximate causation of damages, Leadscope and the individual defendants presented the jury with the extensive analysis of damages through their expert, Rebekah Smith, who quantified Leadscope's projected lost profit and lost business value at $36.6 million. Supplying in part the basis for her conclusions, the individual defendants and Leadscope employees testified to the impact of ACS's activities. For example, Myatt testified that although concerns about Leadscope's litigation exposure never arose before ACS's actions against Leadscope, after Leadscope customers were aware of ACS's lawsuit they tended to discuss the ramifications of the lawsuit rather than the merits of the product itself. (Tr. 4760-63.) Leadscope's president, Loftus Lucas, similarly testified that even though Leadscope lowered the price of its product and made improvements after negative publicity from the litigation, it nonetheless

failed to sell multi-year enterprise contracts (Tr. 4764), and the sales force did not meet its goals. (Tr. 4728-29.) According to Lucas, Leadscope not only shrank from 39 to 13 employees, but was unable to take advantage of several merger or acquisition opportunities. (Tr. 2850, 4739, 4746-47.) Lucas' testimony also identified 12 customers by name whose sales Leadscope lost because of the ongoing litigation and other ACS activities.

{¶42} Conley also identified some of the financial ramifications, testifying not only that the terms under which he eventually obtained financing for Leadscope were less favorable because of the litigation and all that surrounded it, but that he could obtain only equity financing rather than debt financing, causing the ownership percentage of the existing investors and principals to shrink. (Tr. 4241, 4248.) Conley stated that, among committed investors, he had ongoing contacts with Battelle Technology Ventures ("BTV"), a venture capital vehicle; Columbus-based Battelle Memorial Institute, a world-renowned private, nonprofit science and technology development firm, partially funded BTV. Conley expected BTV to participate in the expanded financing as Leadscope ramped up for full commercial activity. (Tr. 4191.) Corroborating Conley's testimony, Curtis Crocker, BTV's managing partner, testified that his fund had continued interest in Leadscope and performed due diligence on the company through the early months of 2002 in preparation for a substantial investment. (Tr. 4463-90.)

{¶43} On March 22, 2002, Crocker sent an electronic mail message to Charles Burdick, one of his contacts at Battelle Memorial Institute, describing his interest in investing in Leadscope and asking about Leadscope's reputation in the technology and science community. Burdick replied that Leadscope was very well considered in its field

and had a good product. (Tr. 4497-4502.) Crocker anticipated closing on the financing round for Leadscope by mid-April 2002. (Tr. 4518.) After a conversation during this time frame with ACS's Michael Dennis, Crocker discerned that intellectual property issues between Leadscope and ACS made investment unwise, and he resolved to hold off until Leadscope could assure him the issues were resolved. (Tr. 4530, 4542.) His doubts were confirmed when Crocker read an article in a local newspaper announcing the litigation. (Tr. 4531.)

{¶44} ACS does not specifically suggest any limitation in Ohio law, beyond the required proximate causation, that constrained the jury's ability to award damages arising from unfair competition, once the jury determined that such unfair competition occurred. Moreover, ACS never rebutted with specific projections and analyses the extensive analysis Smith offered relating lost profits, lost sales, and the lost potential exit value from merger or sale proceeds to the company and its principals arising from ACS's actions. Yet on appeal, ACS attacks the amount of damages on the sole basis that they are merely "speculative." As a prediction of events that did not and could not occur, such projections are inherently speculative, in the ordinary sense of the term. Such an acknowledgement, however, does not mean they are insufficiently reliable as a basis for damages. Particularly in the absence of any comparably analyzed projections in rebuttal, the jury had sufficient evidence upon which to base its conclusions on the amount of damages arising from unfair competition.

{¶45} In summary, the trial court did not err in denying ACS's motion for judgment notwithstanding the verdict on the unfair competition claim, and ACS's second assignment of error is overruled.

B. First Assignment of Error - Defamation

{¶46} ACS's first assignment of error challenges the trial court's refusal to set aside the jury verdict for Leadscope and the individual defendants on their defamation claims. ACS argues that the trial court should have entered judgment notwithstanding the verdict or, in the alternative, reduced pursuant to ACS's motion for remittitur the amount of damages the jury awarded.

{¶47} The defamation claims in this case rest upon two relatively brief statements made more or less contemporaneously with ACS's initiating the lawsuit against Leadscope and the individual defendants; ACS officials made the first, while ACS's legal counsel made the second. The first was a memorandum ACS sent to all its staff informing employees that ACS filed a legal complaint against Leadscope and its founders "who sought and received a patent for technology indistinguishable from a project on which they worked while employees of the Society's Chemical Abstract Service in the mid-1990s." The memorandum further advised all ACS employees to refrain from communicating or commenting on the lawsuit, as it was ongoing. The record suggests the memorandum would have reached as many as 1,900 ACS employees worldwide.

{¶48} The second statement was published in the May 10, 2002 edition of Columbus' Business First newspaper. The article described the allegations in the complaint and presented Leadscope's response, including both Myatt's statement that the lawsuit was unfounded and a statement of Leadscope's counsel implying that the timing of the lawsuit demonstrated its lack of underlying merit. Counsel for ACS provided the following quote, upon which the defamation claim rests for the article: "Our motivation in

filing suit is to acquire back the protected information that they took from us." (Business First, May 10, 2002, A7.)

{¶49} Defamation is the publication of a false statement " 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.' " *Jackson v. Columbus,* 117 Ohio St.3d 328, 2008-Ohio-1041, ¶9 (quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council,* 73 Ohio St.3d 1, 7, 1995-Ohio-66). Under Ohio common law, actionable defamation falls into one of two categories: defamation per se or defamation per quod. In order to be actionable per se, the allegedly defamatory statement must fit within one of four classes: (1) the words import a charge of an indictable offense involving moral turpitude or infamous punishment; (2) the words impute some offensive or contagious disease calculated to deprive a person of society; (3) the words tend to injure a person in his trade or occupation; and (4) the words tend to subject a person to public hatred, ridicule, or contempt. *Schoedler v. Motometer Gauge & Equip. Corp.* (1938), 134 Ohio St. 78, 84; *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 592. Defamation per se occurs if a statement, on its face, is defamatory. *Moore v. P.W. Pub. Co.* (1965), 3 Ohio St.2d 183, 188-89; *Becker v. Toulmin* (1956), 165 Ohio St. 549, 556.

{¶50} On the other hand, a statement is defamatory per quod if it can reasonably have two meanings, one innocent and one defamatory. *Moore* at 189; *Becker* at 556. Therefore, when the words of a statement are not themselves, or per se, defamatory, but they are susceptible to a defamatory meaning, then they are defamatory per quod. *Moore*

at 188; *Becker* at 553-54. Whether an unambiguous statement constitutes defamation per se is a question of law. *Becker* at 555.

{¶51} When a statement is defamatory per se, a plaintiff "may maintain an action for [defamation] and recover damages, without pleading or proving special damages." *Becker* at 553. In other words, in cases of defamation per se, the law presumes the existence of damages. *Wampler v. Higgins,* 93 Ohio St.3d 111, 127, fn. 8, 2001-Ohio-1293; *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 208 (stating that "[a]t common law, once a plaintiff proved that material was defamatory *per se,* he was entitled to recover presumed damages," as "[p]roof of the defamation itself established the existence of some damages"). When, however, a statement is only defamatory per quod, a plaintiff must plead and prove special damages. *Becker* at 557.

{¶52} ACS first argues the above statements were not actionable as a matter of law because they were made "during and relevant to judicial proceedings" and thus are "absolutely immune from civil suits for [defamation]." *Willitzter v. McCloud* (1983), 6 Ohio St.3d 447, 448-49. ACS also asserts the statements were truthful and not actionable as a matter of law.

{¶53} With respect to ACS's assertion the jury should not have considered either the ACS internal memorandum or statements in the newspaper article on the basis that they were absolutely privileged, ACS is correct that under Ohio law "parties * * * are absolutely immune from civil suits for defamatory remarks made during and relevant to judicial proceedings." *Willitzer* at 448-49. This court examined the scope of such immunity in *Morrison v. Gugle* (2001), 142 Ohio App.3d 244. To fall under the absolute privilege relating to statements in connection with litigation, the statements must "be: (1) made in

the regular course of preparing for and conducting a proceeding that is contemplated in good faith and under serious consideration; (2) pertinent to the release sought; and (3) published only to those directly interested in the proceeding." Id. at 260.

{¶54} While none of the parties cites an Ohio case directly on point, and we have found none, Leadscope and the individual defendants pinpoint several cases from other states that have applied the distinction concerning publication to concerned employees and publication to the entire workforce of an employer involved in litigation. See *Hayes Microcomputer Prod. v. Franza* (2004), 268 Ga.App. 340 (concluding electronic mail sent to all employees was not absolutely privileged because plaintiff failed to show how communication to all employees with e-mail addresses, including foreign employees, was pertinent information on the part of all addressees); *Nutri-Metics Internatl., Inc. v. Carrington Labs, Inc.* (C.A.9, 1992), U.S. App. Lexis 34226 at *23 (determining internal memorandum to all division managers was not privileged when some recipients had no interest in the litigation).

{¶55} Ohio cases dealing with the issue of immunity principally address the immunity of attorneys representing clients in litigation, granting them absolute immunity for statements in judicial proceedings before the court. See, e.g., *Justice v. Mowery* (1980), 69 Ohio App.2d 75; *Michaels v. Berliner* (1997), 119 Ohio App.3d 82. Other cases involve communications between counsel and client or much more restricted distribution lists. See *Krakora v. Gold* (Sept. 28, 1999), 7th Dist. No. 98CA141; *Simmons v. Climaco* (1986), 30 Ohio App.3d 225. None of the Ohio cases, however, addresses the precise issue concerning the breadth of publication for purposes of immunity.

{¶56} In the end, the relevant cases compel us to conclude the trial court properly considered and assessed the scope and circumstances of the statements ACS or its representatives distributed in the form of the memorandum and newspaper article when the court determined ACS's immunity argument. The court's assessment led to the inevitable conclusion that neither the internal memorandum nor the Business First statements were published to persons "directly interested" in the proceedings. Instead, the internal memorandum was addressed to all ACS employees, including those without any interest in, impact on, or involvement with the litigation and unlikely to develop any connection with it in the future. The Business First statement, of course, was available to all readers of the article, meaning the general public. The trial court correctly concluded neither statement was absolutely privileged.

{¶57} ACS next argues that the allegedly defamatory statements could not have supported a defamation claim because they were true. ACS asserts the two statements accurately and briefly identified ACS's pending legal claims and thus simply provided a "accurate summary of the allegations * * * made in the lawsuit." *Early v. The Toledo Blade* (1998), 130 Ohio App.3d 302, 329. The essence of the allegations in the internal memorandum and Business First article exceeds a mere statement that the parties disputed ownership of the intellectual property incorporated in Leadscope's products. Leadscope and its principals alleged, and the jury accepted Leadscope's argument, that the published statements branded the Leadscope principals as morally and legally impeachable in their actions.

{¶58} While Leadscope also stresses that the jury rejected all of ACS's claims on the underlying intellectual property dispute, such action alone does not dispose of the

defamation issue. Falsity as a question of factual veracity is distinct from the defamatory nature of statements, which is a question of law. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 94 S.Ct. 2997; see also *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.* (1974), 43 Ohio App.2d 105. Even so, Leadscope and the individual defendants urged the jury to consider the published statements as accusing the individual defendants of theft; if so taken, they unambiguously accused co-defendants of criminal behavior and are libelous per se. *Gosdon* at 207. The evidence thus was sufficient to allow the jury to conclude the manner in which ACS characterized Leadscope's principals went beyond the mere failure of ACS's intellectual property claim.

{¶59} ACS next challenges the jury's conclusion that ACS acted with actual malice. The trial court instructed the jury that both statements were subject to a qualified privilege and thus were actionable only if made with actual malice, that is "with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 116. Such reckless disregard can be measured as "a high degree of awareness of probable falsity." *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 85 S.Ct. 209, 216. Alternatively, it is publication when one "in fact entertain[s] serious doubts as to the truth of his publication." *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 88 S.Ct. 1323, 1325. In this context, however, actual malice "may not be inferred from evidence of personal spite, ill will, or deliberate intent to injure, as the defendant's motives for publishing are irrelevant." *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 80. Moreover, the inquiry does not extend to information available to the parties after publication; actual malice must be measured as of the time of publication of the

allegedly defamatory statement. Id. at 80. Actual malice must be proved by clear and convincing evidence. *A & B-Abell Elevator Co.* at 12.

{¶60} On appeal, the standard is a review of the evidence to determine "whether a reasonable jury could find from a totality of the circumstances the existence of actual malice with convincing clarity." *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 91. In applying that standard, we construe the evidence most strongly in favor of the appellee and defer to the jury's credibility determination. Id. at 91. If reasonable minds can differ as to the sufficiency of the evidence supporting actual malice, the appellate court should affirm. *Gray v. Allison Div., Gen. Motors Corp.* (1977), 52 Ohio App.2d 348, 353-54.

{¶61} Here, the course of events leading up to litigation, and the alleged defamatory statements released in connection with the beginning of that litigation, are sufficient evidence upon which the jury could find by clear and convincing evidence that ACS published the statements in the memorandum and the Business First article with actual malice. In the context of ACS's other activity, both published statements suggest ACS's inferable intent to suppress a competitor by any means necessary. They thus both lend substantial credence to contentions that the statements were made with reckless disregard for their probable veracity and allow the jury to conclude the veracity of the statements was irrelevant to ACS compared to the inferable purpose of harming Leadscope's reputation and undermining its financing process.

{¶62} In addition to arguing the evidence did not support liability for defamation, ACS asserts that, even if liability were found, the jury awarded excessive damages. Most of the discussion with respect to monetary figures falls under ACS's fourth assignment of error to be addressed below, but we here touch on the nature of damages under

defamation law. The jury was instructed to compute damages on two theories: (1) special damages for specific injury, such as business injury that includes lost profits or other economic harm, and (2) general damages, as compensation for loss of reputation arising from the defamatory statements.

{¶63} Leadscope presented detailed expert testimony at trial that computed its economic loss from lost future sales profits as well as "exit value" from the potential sale of the new business. The individual defendants also presented their own personal testimony regarding their personal humiliation, mental suffering, and loss of reputation due to the wide dissemination of ACS's theft accusations through the internal memorandum and Business First article. Several other persons testified about the impact of the published allegations on Leadsope and the individual defendants.

{¶64} "Once a plaintiff makes a prima facie case of defamation, the amount of damages to award is a determination for the jury." *Isquick v. Dale Adams Ent.*, 9th Dist. No. 20839, 2002-Ohio-3988, ¶38. The injured party is not required to provide the jury with a precise arithmetic formula by which to compute the damage award. Id. Here, as Leadscope and individual defendants point out, ACS never objected to the trial court's instruction on general damages and has waived any objections to the jury's considering this issue. Moreover, the damages the jury awarded for both special and general damages were properly supported in the noted evidence. The trial court did not err in overruling ACS's motion for judgment notwithstanding the verdict on Leadscope's counterclaim for defamation or in refusing to reduce the amount of damages pursuant to ACS's motion for remittitur. ACS's first assignment of error accordingly is overruled.

C. Third Assignment of Error—Tortious Interference with Business Relations

{¶65} ACS's third assignment of error asserts the trial court erred in failing to enter judgment notwithstanding the verdict on Leadscope's claims for tortious interference with business relations. "The tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another." *Geo-Pro Serv., Inc. v. Solar Testing Laboratories, Inc.* (2001), 145 Ohio App.3d 514, 525 (citations omitted). "The elements of tortious interference with a business relationship are (1) a business relationship, (2) the wrongdoer's knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom." Id. ACS argues it could not have known of any specific business relationship between Leadscope and any third parties.

{¶66} Particularly on the question of prospective financing for Leadscope, ACS contends it was entirely unaware of any specific contacts between Leadscope and prospective investors. ACS asserts that, at most, it knew Leadscope generally would require outside funding at some time to pursue its development. According to ACS, a mere general awareness of the claimant's business dealings with unidentified third parties is insufficient to support the tort of tortious interference. ACS explains that all businesses are likely to require financing and have dealings with investors, just as all businesses are likely to have actual and prospective customers. ACS asserts that, absent evidence from Leadscope of a specifically identified and definable, concrete relationship with a specific investor or customer, the elements of the tort are not met.

{¶67} In response to ACS's arguments, Leadscope presented a persuasive line of cases that indicates a business relationship with an identifiable *class* of third persons may fulfill the requirement of a prospective business relationship for purposes of tortious interference claims. See, e.g., *Trau-Med of America, Inc. v. Allstate Ins. Co.* (Tenn., 2002), 71 S.W.3d 691, 701; *Hayes v. N. Hills Gen. Hosp.* (S.D.1999), 590 N.W.2d 243, 249-50; *Crinkley v. Dow Jones & Co.* (1978), 67 Ill.App.3d 869, 880; *Lucas v. Monroe Co.* (C.A.6, 2000), 203 F.3d 964, 979 (concluding an identifiable class of stranded motorists likely to require tow services was sufficient to establish tortious interference with towing company's business relationship with such class).

{¶68} Leadscope, however, also presented evidence at trial that ACS's knowledge exceeded the bounds of generalities to the point that ACS knew of Leadscope's immediate need for financing at such a juncture in its commercial development and knew of potential investors. President Massie's conversations with other senior ACS managers indicated such knowledge as a near certainty based on typical startup business models in the high-tech field. Indeed, Leadscope's initial letter of April 16, 2002 in response to ACS's threats explicitly stated Leadscope had a financing plan scheduled to go forward in a matter of days and ACS's claims would impact it. In addition, Michael Dennis of ACS in February 2002 spoke with Battelle's Crocker regarding Battelle's potential financing for Leadscope, and Crocker divulged his investment intents at that time; Crocker testified ACS's actions toward Leadscope specifically blunted Battelle's interest in investing in Leadscope.

{¶69} Because sufficient evidence establishes Leadscope's tortious interference claim and the damages proximately caused from ACS's actions, ACS's third assignment of error is overruled.

D. Fourth Assignment of Error—Compensatory and Punitive Damages

{¶70} ACS's fourth assignment of error asserts the trial court erred in refusing to reduce the compensatory and punitive damages the jury awarded. The total jury award was $26.5 million, divided among the various parties and claims as follows: (1) $10 million in compensatory damages and $312,500 in punitive damages to Leadscope on its defamation counterclaim; (2) $1 million in compensatory damages and $312,500 in punitive damages to each of the individual defendants on their respective defamation counterclaims; (3) $750,000 in compensatory damages and $2.25 million in punitive damages to Leadscope on its tortious interference counterclaim; (4) $750,000 in compensatory damages and $1 million in punitive damages to Leadscope on its unfair competition counterclaim; (5) $1 million in compensatory damages and $1 million in punitive damages to Blower on his unfair competition counterclaim; (6) $1.25 million in compensatory damages and $1 million in punitive damages to Johnson on his unfair competition counterclaim; and (7) $1.5 million in compensatory damages and $1 million in punitive damages to Myatt on his unfair competition counterclaim. In total, the jury awarded Leadscope $11.5 million in compensatory damages.

{¶71} To support Leadscope's claims, Loftus Lucas testified he was unable to sell contracts, despite his own professional marketing expertise, when Leadscope's principals, who were principally scientists and researchers, had been able to do so prior to the ACS lawsuit. Similarly, Leadscope's landlord testified he sensed the company was

uncertain because of the "bad press," noting general business activity at the Leadscope offices dropped significantly as Leadscope's reputation was impaired. (Tr. 3601, 3627.)

{¶72} More significant to the jury's award, however, was the extensive testimony of Leadscope's expert witness, Rebekah Smith, who detailed her computations for lost profits. Smith relied on financial statements, business plans, past sales, and sales projections, in many instances stating she adjusted projections downward from Leadscope's own internal goals. (Tr. 4876.) In addition, Leadscope presented testimony from its president, Lucas, who identified as many as 12 customers from whom he lost sales traceable to ACS's actions. While ACS asserts testimony from past or potential customers is required to support such forgone sales, Ohio authority does not so require. *Rubbermaid, Inc. v. Hartford Steam Boilers and Inspection Co.* (1994), 96 Ohio App.3d 406, 410-11; *Isquick* at ¶6 (affirming claims for defamation and tortious interference without requiring testimony from potential customers).

{¶73} Smith also presented extensively researched and analyzed computations regarding the lost exit value. Although Leadscope concedes no absolute formula determines a sale price for a technological start-up firm as a going concern, ACS in defense presented no conclusive authority that the multipliers of sales to sale price Smith used in her analyses were excessively optimistic. Projected sales are a valid basis when determining injury to a business and computing damages from the injury. See, e.g., *K.M.C. Co., Inc. v. Irving Trust Co.* (C.A.6, 1985), 757 F.2d 752.

{¶74} ACS also contests the jury's punitive damages award. Under Ohio law, an award of punitive damages in a tort case shall be made only upon the finding of actual malice, fraud, oppression, or insult on the part of the defendant. R.C. 2315.21; *Berge v.*

Columbus Comm. Cable Access (1999), 136 Ohio App.3d 281, 316. ACS's argument on appeal is not with the trial court's determination that damages could be awarded but with the actual amount awarded. ACS asserts the damages are excessive in light of the guideposts the United States Supreme Court set forth in *State Farm Mut. Auto Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S.Ct. 1513, and *BMW of N. America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589. The guideposts include three factors: the reprehensibility of the tortfeasor's conduct, the ratio of punitive damages to compensatory damages, and civil penalties authorized in comparable cases.

{¶75} Of these three, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599. With respect to this factor, *Gore* enumerated the five typical indicia: (1) physical, as opposed to economic harm; (2) tortious conduct evidenced by indifference or reckless disregard to others, (3) financial vulnerability of the target, (4) repeated actions; and (5) harm resulting from intentional malice, trickery, or deceit. *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521, citing *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599. Although the present case undisputedly presents economic rather than physical harm, cases involving economic injury nonetheless may warrant an award of substantial punitive damages when the harm is committed "intentionally through affirmative acts of misconduct or when the party is financially vulnerable." *Gore,* 517 U.S. at 576, 116 S.Ct. at 1599. The evidence supporting the extended course of tortious conduct ACS undertook, in conjunction with the evident financial vulnerability of Leadscope at the time, falls under two of the indicia of reprehensibility enumerated in *Gore*. The jury having concluded that ACS intended in

various ways to harm the business prospects and reputation of Leadscope and the individual Leadscope principals, an award of punitive damages was warranted under *Gore, State Farm,* and their progeny.

{¶76} ACS also attacks the ratio of punitive damages to compensatory damages in this case. The numbers on their face are not excessive, even applying the stricter interpretation of recent United States Supreme Court cases. Ratios in the present case range from roughly two-and-a-half times the cumulative compensatory damages to amounts between roughly three times to three-and-a-half times the compensatory damages for the individual claimants. While ACS claims *State Farm* established a 3-to-1 ratio of punitive to compensatory damages as an absolute limit, *State Farm* itself suggests to the contrary in language indicating no absolute multiplier exists and higher awards may be justified on various facts. Even if, as ACS claims, State Farm established the noted ratio as a general range, the awards in the present case cumulatively are well within that limit, and the awards for the individual defendants on their individual claims are either below it or exceed it only by minor figures.

{¶77} Lastly, ACS asserts the jury awarded duplicative compensatory damages to the individual defendants. Pointing out that the jury awarded for each individual precisely the same amount on his respective defamation and unfair competition claims, ACS asserts the inescapable inference is that each award represents recovery in the same amount for identical underlying damages, or double recovery for a single wrong. The jury was not given interrogatories that would have broken out the basis for the damages awarded, by different type of claim, for each of the individual defendants.

{¶78} The individual defendants presented testimony from an expert, Harvey Rosen, Ph.D., to establish their personal damages, apart from the enterprise damages demonstrated in the testimony of Leadscope's expert, Rebekah Smith. Dr. Rosen described various classes of damages in the case and stated he would not discuss damages Leadscope suffered as an ongoing business and the consequent loss to its shareholders. Instead he focused on and analyzed the lost earning capacity, including economic damages from lost income due to loss of employment and professional opportunities, of the three individual defendants based upon their respective ages, past earnings history, and current employment:

- Dr. Blower: $1,073,672 in lost earning capacity (Tr. 4625), contrasted with a jury award of $1,000,000 on his defamation claim and $1,000,000 on his unfair competition claim.
- Mr. Johnson: lost earning capacity of $2,933,420 to $3,482,058 depending on age of retirement (Def. Ex. 1129), compared with a jury award of $1,250,000 on his defamation claim and $1,250,000 on his unfair competition claim.
- Dr. Myatt: lost earning capacity of $1,859,266 to $2,158,912 depending on age of retirement (Def. Ex. 1130), compared with a jury award of $1,500,000 on his defamation claim and $1,500,000 on his unfair competition claim.

{¶79} The cumulative economic harm Dr. Rosen computed therefore exceeded the aggregate verdict for Johnson. Even in the case of Blower and Myatt, for whom the aggregate jury awards exceeded the lost income Dr. Rosen projected, the jury's award is

not necessarily duplicative, because the individual plaintiffs sought recovery for more than just lost wages.

{¶80} Even if the jury's consideration of compensatory damages for tortious interference was limited to the direct economic and consequential damages proximately flowing from it, *Gray-Jones v. Jones* (2000), 137 Ohio App.3d 93, 101-02, citing 4 Restatement of the Law 2d, Torts (1979) 54, Section 774A, the jury had a wider scope to consider when addressing damages arising from other tortious conduct at issue in this case. *Ahmed v. Univ. Hospitals Health Care Sys., Inc.,* 8th Dist. No. 79016, 2002-Ohio-1823. The tort of defamation per se, as the jury found in this case, gives rise to presumed damages attributable to loss of reputation in the community, personal emotional distress, and humiliation, all of which could support damages awards beyond the scope of Dr. Rosen's computations.

{¶81} Moreover, the amounts the jury awarded are not inconsistent with the verdicts on each claim and the evidence heard at trial. Nor is a jury award presumed duplicative on the sole basis that the jury awarded identical amounts on different claims. *Gentile v. County of Suffolk* (C.A.2, 1991), 926 F.2d 143, 153-54. We likewise will not in effect presume error on the part of the jury in its general verdict and in computing damages when the evidence provides a sound basis for the amount of damages awarded for each claim. Weighing the evidence in favor of defendants as the nonmoving party opposing a motion for judgment notwithstanding the verdict, we conclude the award here reflects single recovery for distinct damages attributable to each of two claims, not double recovery for a single injurious course of conduct.

{¶82} Sufficient evidence supports the verdict setting the amount of compensatory and punitive damages. The trial court properly overruled ACS's motion for judgment notwithstanding the verdict, and ACS's fourth assignment of error is overruled.

V. ACS's Fifth Assignment of Error

{¶83} ACS's fifth assignment of error asserts the trial court erred in awarding attorney's fees in addition to the compensatory and punitive damages in the case. The trial court awarded fees on two grounds. The trial court initially awarded fees pursuant to R.C. 1333.64(A) for costs Leadscope and the individual defendants incurred in defending ACS's trade secret misappropriation claims, which the jury found were made in bad faith. Secondly, the trial court awarded fees under the common law in connection with Leadscope's successful counterclaims for defamation, unfair competition, and tortious interference with a business relationship.

{¶84} R.C. 1333.64 provides that a court "may award reasonable attorney's fees to the prevailing party, if * * * a claim of misappropriation is made in bad faith." ACS argues on appeal that in a misappropriation of trade secrets case, the action is brought in bad faith only if it is "objectively specious," citing *Computer Economics, Inc. v. Gartner Group, Inc.* (Dec. 14, 1999), S.D.Cal. No. 98-CV-0312 TW, 1999 WL 33178020, at *6. Otherwise put, ACS contends the claim either clearly must not be colorable, *Contract Materials Processing, Inc. v. Kataleuna GmbH Catalysts* (D.Md., 2002), 222 F.Supp.2d 733, 744, or must be without substance and devoid of merit. *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002), 95 Cal.App.4th 1249, 1261. ACS asserts its trade secret claim was plainly colorable on the grounds that its former employees left the company and two years later began marketing a product serving the same function as the

software they worked on while employed at ACS. ACS further notes the trial court's refusal to grant summary judgment to Leadscope and the individual defendants prior to trial establishes not only that ACS had a colorable claim but that the jury's bad faith finding cannot stand under the above authorities.

{¶85} We review the trial court's award of R.C. 1333.64(A) attorney's fees under an abuse of discretion standard. *Becker Equip. v. Flynn,* 12th Dist. No. CA2002-12-313, 2004-Ohio-1190, ¶11. Here, the jury found ACS brought its misappropriation claim in bad faith. Despite ACS's motion for judgment notwithstanding the verdict, the trial court declined to disturb the jury's verdict on the issue, and we affirmed the jury's finding in resolving an earlier assignment of error. Ohio precedent does not support ACS's attempt to introduce a new and more stringent standard than that set forth in the statute, and the circumstances of this case do not call for us to inject a higher standard than the statute provides.

{¶86} With respect to the common-law award of attorney's fees on Leadscope's counterclaims, Ohio law provides that "attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted." *Zoppo v. Homestead Ins. Co.,* 71 Ohio St.3d 552, 558, 1994-Ohio-461. ACS suggests the award of punitive damages, if upheld, sufficiently compensates Leadscope and its principals both for their damages and the expense of obtaining judicial redress for them. ACS's approach in effect makes an award of punitive damages and attorney's fees interchangeable. The Ohio Supreme Court, however, stated that an award of punitive damages is grounds for an award of attorney's fees; it did not state it is a substitute for such an award. *Galmish v. Cicchini,* 90 Ohio St.3d 22, 35, 2000-Ohio-7. See also

Columbus Finance, Inc. v. Howard (1975), 42 Ohio St.2d 178, 183; *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 664. Because the court's award of attorney's fees both for defending ACS's bad faith claim and prosecuting the Leadscope defendants' prevailing counterclaims was not an abuse of discretion in principle, we address ACS's argument that the fees awarded were excessive.

{¶87} The trial court held a lengthy hearing on the amount of fees and heard evidence from the expert witnesses both parties presented. ACS at this point in the proceedings questions neither the hours counsel for Leadscope expended nor the billable rate applied to those hours. Instead, ACS argues solely that the trial court abused its discretion by doubling the "lodestar" amount for the counterclaim-related fees when it considered two additional factors, the existence of a contingency agreement governing attorney's fees and the outcome of the litigation. ACS argues those factors are included in a typical lodestar calculation. ACS's argument does not comport with applicable Ohio law.

{¶88} The lodestar amount is established by determining the number of hours reasonably expended on a case, multiplied by an hourly fee. The court then may modify that figure by applying the factors listed in Prof.Con.R. 1.5. *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, syllabus (applying comparable predecessor rule DR2-106(B)). Some of the factors set forth in the rule are the time and labor involved in maintaining the litigation, the novelty, complexity, and difficulty of questions involved, the experience, reputation and ability of the attorneys, the amounts at stake in the case and the results obtained, and whether services are performed under a fixed or contingency arrangement. Prof.Con.R. 1.5; *Ariguzo v. K-Mart Corp.* (Sept. 30, 1999), 10th Dist. No.

98AP-1268; *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36 (both cases applying DR2-106(B)).

{¶89} The trial court here followed *Bittner* in enhancing the lodestar amount. The trial court noted that the novelty and difficulty of the issues presented, the absorption of counsels' resources to the preclusion of other employment, the result obtained, and the contingency fee arrangement all supported an upward adjustment of the lodestar amount. While ACS stresses the contingency arrangement alone would not support fee enhancement, *Borror v. MarineMax of Ohio, Inc.,* 6th Dist. No. 0T-06-010, 2007-Ohio-562, ¶56, that was not the sole basis for the trial court's fee enhancement. The record supports the other factors the trial court cited, particularly the heavily favorable results counsel for Leadscope obtained. The Ohio Supreme Court expressly stated in *Bittner* that "the degree of success obtained by the prevailing party" is an important consideration when determining the lodestar enhancement. *Bittner* at 145-46; see also *Blum v. Stenson* (1984), 465 U.S. 886, 104 S.Ct. 1541.

{¶90} The trial court did not err in awarding attorney's fees in the present case, either for those incurred in defending against ACS's claims or in prosecuting the counterclaims; nor did the trial court err in computing the amount of fees to be awarded. ACS's fifth assignment of error is overruled.

VI. ACS's Sixth Assignment of Error

{¶91} ACS's sixth assignment of error asserts the trial court erred in failing to order a new trial on all claims. ACS moved for a new trial under Civ.R. 59(A), alleging "numerous and substantial irregularities in the proceedings." ACS argued that opposing counsel "repeatedly misrepresented the evidence, mischaracterized ACS's conduct as

criminal, injected insurance considerations, and blatantly appealed directly to the passions and prejudices of the jury." (R. 826, at 53.) ACS's brief on appeal contends "the trial in this case was replete with error, infecting almost every issue of significance." (ACS brief at 50.)

{¶92} ACS does not articulate in its appellate brief, beyond the issues addressed in connection with the first five assignments of error, which of the trial court's evidentiary rulings, opposing counsel's allegedly prejudicial misconduct, or other specific circumstances would warrant a new trial. Nor does ACS propose a standard under which a new trial would be granted. Unsupported assignments of error and undeveloped arguments normally cannot form the basis for reversing a trial court's judgment. *Bank of New York v. Barclay*, 10th Dist. No. 04AP-48, 2004-Ohio-4555, ¶10. We nonetheless will examine, based upon the relevant memoranda in the record, the arguments ACS raised before the trial court in its motion for a new trial.

{¶93} To support a finding of passion or prejudice under Civ.R. 59(A)(4), ACS must demonstrate that the jury's assessment of liability and damages "was so overwhelmingly disproportionate as to shock reasonable sensibilities." *Pena v. Northeast Ohio Emergency Affiliates, Inc.* (1995), 108 Ohio App.3d 96, 104. To obtain a new trial on grounds of misconduct or irregularities at trial, ACS must establish the presence of serious irregularities in the proceedings that deprive the party of a fair trial, such as those that "could have a material adverse effect on the character of and public confidence in judicial proceedings." *Wright v. Suzuki Motor Co.*, 4th Dist. No. 03CA2, 2005-Ohio-3494, ¶114; see also *Meyer v. Srivastava* (2001), 141 Ohio App.3d 662; *Mullins v. Inderbitzen*, 6th Dist. No. L-03-1121, 2004-Ohio-1658. "The term 'irregularity' in the context of a

motion for a new trial is historically described as 'very comprehensive,' and a departure from the due proceeding whereby a party, 'with no fault on his part, has been deprived of some right or benefit otherwise available to him.' " *Wright* at ¶115, quoting *In re Guardianship of Pierce*, 4th Dist. No. 03CA2712, 2003-Ohio-3997, ¶24.

{¶94} In appellate review, the trial court's decision to deny a party's motion for new trial "is entitled to deference to the extent that the trial court exercised judicial discretion in reaching its decision. However, to the extent that the trial court decision being challenged did not involve the exercise of discretion, but was based on a question of law, no deference is afforded." *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 460, 1999-Ohio-309, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, paragraphs one and two of the syllabus. On issues left to the sound discretion of the trial court, absent a finding that the court's decision to deny a Civ.R. 59 motion is an abuse of discretion, we will not disturb the judgment. *Poske v. Mergl* (1959), 169 Ohio St. 70, 75 (noting an abuse of discretion under such circumstances implies an unreasonable, arbitrary or unconscionable attitude of the court in ruling on the motion); *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 184.

{¶95} Most of the allegedly objectionable statements and mischaracterizations of evidence in this case occurred during Leadscope's closing argument. They include implications the evidence supported president Massie's knowledge that his misappropriation claims were groundless, as well as allegations ACS's initial negotiations were done in bad faith and were a sham whose sole purpose was extortion. ACS also objects to opposing counsel's dramatic recitation in closing argument of Rudyard Kipling's poem "If," with interlineated references to the facts of the case and delivered with such

heartfelt passion that counsel purportedly moved himself to tears, which last point we will take as correct since the transcript does not supply the emotional state of counsel. (Tr. 5825-26.)

{¶96} Counsel traditionally is afforded great latitude in closing argument. *Pang v. Minch* (1990), 53 Ohio St.3d 186, paragraph two of the syllabus. Much of the closing statement was doubtless delivered with spirit and conviction. The evidentiary inferences and characterizations suggested to the jury were based on facts and testimony properly in the record, and by definition closing argument "presents counsel with the opportunity to comment on the evidence and the reasonable inferences to be drawn" from it. *Roetenberger v. Christ Hosp.*, 163 Ohio App.3d 555, 2005-Ohio-5205. Especially in view of the often heated and personal tone of the controversy both sides adopted through and even before litigation, the closing presented no great escalation or increased appeal to the passion and prejudice of the jury.

{¶97} ACS also objects that the trial court allowed the jury to hear and consider evidence related to several claims abandoned or dismissed during the course of trial, or at least, to hear and consider Leadscope's references to those claims. According to ACS, Leadscope used these no-longer-relevant claims to color the jury's perception of ACS's conduct. The claims were (1) Leadscope's Pattern of Corrupt Activities claim, upon which the trial court eventually granted summary judgment; (2) ACS's abandoned R.C. 1331.81 "employee breach of confidence" claim, and (3) ACS's abandoned conversion claim. The allegations regarding the pattern of corrupt activities claim are difficult to discern, since the evidence ACS complains of was either innocuous, such as disputes over whether ACS and Chemical Abstracts were separate entities, or also was introduced in support of,

and was relevant to, the remaining unfair competition and tortious interference claims, such as ACS's threatening conduct during initial settlement negotiations.

{¶98} The R.C. 1331.81 employee breach of confidence claim ACS brought against its former employees appeared in the initial complaint in federal court and was not abandoned until well into the course of litigation in the court of common pleas. Leadscope and the individual defendants characterized ACS's conduct as a criminal charge fulfilling the threat, described in Conley's testimonial account of the initial contacts between himself and Dennis, that ACS would file "civil and criminal" claims against Leadscope and its principals. Since violation of R.C. 1331.81, pursuant to the associated penalty section, R.C. 1331.99, constitutes a first-degree misdemeanor offense, the criminal aspect of the claim is indisputable. Particularly because the jury was allowed to consider malicious litigation as a basis for the unfair competition claim, the references to the abandoned R.C. 1331.81 claim were properly allowed to support the unfair competition and tortious interference claims Leadscope made.

{¶99} Lastly, ACS challenges Leadscope's references to ACS's purportedly strategic decision to abandon its conversion claims. After a lengthy struggle that constituted the opening phase of the current case, Leadscope succeeded in establishing that its insurer owed a duty to advance defense costs. The duty, however, at first was stated to hinge solely on ACS's conversion claim. In what Leadscope characterized as an attempt to deny Leadscope the benefit of a defense its carrier would fund, ACS dropped the conversion claim. Having so characterized ACS's tactics, Leadscope from that point referred to ACS's conduct as part of ACS's pattern of malicious litigation and oppressive conduct. ACS now describes its decision as an attempt to further judicial efficiency and

ease the burden on the trial court by eliminating duplicative or unsubstantiated claims. Once, however, the jury was allowed to consider a malicious litigation theory, evidence of and reference to ACS's litigation strategy were proper, and the jury was free to consider how Leadscope characterized these actions.

{¶100} Because, for the noted reasons, the trial court did not abuse its discretion in denying ACS's motion for a new trial, ACS's sixth assignment of error is overruled.

VII. Leadscope's Assignment of Error on Cross-Appeal

{¶101} Leadscope's sole assignment of error on cross-appeal, which addresses unfavorable evidentiary rulings regarding privileged statements the trial court did not allow the jury to consider for defamation purposes, is couched as conditional and is to be considered only if the trial court's judgment is disturbed in other respects. As our disposition of ACS's assignments of error leaves the trial court's judgment entirely intact, we do not address Leadscope's assignment of error.

VIII. Conclusion

{¶102} In accordance with the foregoing, ACS's six assignments of error are overruled, Leadscope's assignment of error is moot, and the judgment of the Franklin County Court of Common Pleas is affirmed in all respects.

Motion denied;
judgment affirmed.

TYACK, P.J., and FRENCH, J., concur.

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