[Cite as *Klarfeld v. Flynn*, 2026-Ohio-4573.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ARI B. KLARFELD, ET AL.,	:	
Plaintiffs-Appellants/ Cross-Appellees,	:	
v.	:	No. 115860
THOMAS J. FLYNN, ET AL.,	:	
Defendants-Appellees/ Cross-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: November 19, 2026

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-24-992534

Appearances:

Dworken & Bernstein Co., L.P.A. and Erik L. Walter, *for appellants/cross-appellees.*

Henderson, Schmidlin & McGarry Co., LPA, Brendan M. Mewhinney, and Hunter T. Schmidlin, *for appellees/cross-appellants.*

ANITA LASTER MAYS, J.:

{¶ 1} Plaintiffs-appellants/cross-appellees Ari B. Klarfeld and New Direction Driving School, L.L.C. (collectively, "New Direction") appeal the trial court's judgment granting summary judgment in favor of defendants-appellees/ cross-appellants Thomas J. Flynn ("Flynn") and Suburban Driving School, L.L.C. ("Suburban") (collectively, "appellees"), and dismissing New Direction's claims.[1] Appellees cross-appeal the dismissal of appellees' counterclaim and challenge the enforceability of the parties' restrictive covenants. For the reasons that follow, we reverse the judgment and remand for further proceedings.

I. Facts and Procedural History

{¶ 2} Flynn formerly owned and operated Behind the Wheel School of Driving, a business providing driving instruction in Cuyahoga and Geauga counties. In May 2020, New Direction purchased substantially all of the business's assets pursuant to an asset purchase agreement. Flynn also entered into an employment agreement under which he continued working as a driving instructor.

{¶ 3} The purchase price was calculated through a gross-revenue-sharing arrangement. Generally, New Direction agreed to pay Flynn 25 percent of the qualifying gross business revenue collected during the first two years after closing

[1] We refer to Klarfeld and New Direction Driving School, L.L.C. collectively for ease of analysis. Our use of the collective term does not determine which of them is the "Purchaser" under the purchase agreement or whether either is individually liable on Flynn's counterclaim. *See* ¶ 40.

and 15 percent during the third year. The purchase agreement also afforded Flynn access to information and records through which he could verify the revenue share.

{¶ 4} Both the purchase agreement and the employment agreement contained restrictive covenants. The provisions at issue restricted Flynn's participation in competing driving-school activities in Cuyahoga and Geauga counties for five years after closing. The employment agreement also addressed confidential information and provided that certain confidentiality obligations continued after termination of employment.

{¶ 5} Flynn left New Direction in 2023 and began working for Suburban. New Direction alleged that his new employment violated the restrictive covenants. It further alleged that Flynn interfered with its business relationships and contractual rights, retained or exercised control over its proprietary materials, and caused financial harm.

{¶ 6} New Direction filed its complaint in February 2024, asserting claims for breach of contract, tortious interference, conversion, civil conspiracy, and injunctive relief. Flynn counterclaimed for breach of contract, alleging that New Direction failed to pay the full amount due under the gross-revenue-sharing arrangement.

{¶ 7} The parties filed competing motions for summary judgment. New Direction sought partial summary judgment based principally on Flynn's alleged violations of the restrictive covenants and Suburban's alleged interference. Flynn maintained that New Direction's prior failure to pay the purchase price constituted

a material breach that excused Flynn's further performance. He also challenged the enforceability of the covenants and the sufficiency of New Direction's damages evidence.

{¶ 8} The trial court determined that Flynn materially breached the purchase agreement by competing with New Direction and that New Direction materially breached the agreement by substantially underpaying Flynn. The court concluded that the parties' respective breaches prevented either side from recovering against the other. On that basis, the trial court granted both motions for summary judgment and, in doing so, "dismissed" both the complaint and the counterclaim. New Direction appealed, and appellees cross-appealed the dismissal of Flynn's counterclaim.

II. Assignments of Error

{¶ 9} New Direction raises the following assignment of error:

> The Trial Court's Decision to grant Appellee's Motion for Summary Judgment and use the same to negate Appellants grant of partial summary judgment was in error.

{¶ 10} Appellees raise the following cross-assignments of error, which their brief designates as Assignments of Error II and III:

> I. The Trial Court Erred by Dismissing Flynn's Counterclaim for Breach of Contract when Appellants materially breached the Purchase Agreement Prior to any Material Breach by Flynn.
>
> II. The Trial Court Erred by Failing to find the Non-Compete Provisions Unenforceable as a Matter of Law

III. Standard of Review

{¶ 11} We review an order granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is appropriate when no genuine issue of material fact remains, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach only a conclusion adverse to the nonmoving party when the evidence is construed most strongly in that party's favor. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

{¶ 12} The moving party bears the initial burden of identifying the portions of the record demonstrating the absence of a genuine issue of material fact concerning the essential elements of the nonmoving party's claims. If that burden is satisfied, the nonmoving party must identify specific facts demonstrating a genuine issue for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996).

{¶ 13} The filing of competing motions does not relieve either party of its burden under Civ.R. 56. "When assessing cross-motions for summary judgment, each motion must be considered individually and separately, construing the evidence most strongly in favor of the party against whom the motion under consideration was filed." *TMS Ents., Ltd. v. Cleveland*, 2026-Ohio-3229, ¶ 31 (8th Dist.), quoting *State ex rel. Montgomery v. Ruckman*, 2026-Ohio-2671, ¶ 17 (7th Dist.). If neither movant is entitled to judgment as a matter of law, both motions must be denied. *Id.* A determination that one party is not entitled to summary judgment, therefore, does not by itself establish that the opposing party is entitled to judgment.

IV. Law and Analysis

A. New Direction's Assignment of Error

1. Effect of the Parties' Material Breaches

{¶ 14} New Direction argues that Flynn's admitted conduct established violations of the restrictive covenants and that the trial court erred by using the alleged payment deficiency against it in resolving its claims. Flynn responds that New Direction's substantial underpayment preceded Flynn's employment with Suburban and relieved him of further performance.

{¶ 15} A breach-of-contract claim requires proof of a contract, performance by the claimant, breach by the opposing party, and resulting damages. *DPLJR, Ltd. v. Hanna*, 2008-Ohio-5872, ¶ 16 (8th Dist.). Whether a party's failure to perform excuses the opposing party's performance depends on the nature of the obligation and the materiality of the breach. A material breach is "a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform." *Westlake v. VWS, Inc.,* 2014-Ohio-1833, ¶ 29 (8th Dist.). Only a material breach excuses the other party's further performance. *Nious v. Griffin Constr., Inc.*, 2004-Ohio-4103, ¶ 16 (10th Dist.). Consequently, for each claim, the court must determine (1) when the relevant obligation became due, *Lucarell v. Nationwide Mut. Ins. Co.*, 2018-Ohio-15, ¶ 41; (2) whether an earlier material breach excused performance of that obligation, *Treasurer of Cuyahoga Cty. v. Henen*, 2024-Ohio-2263, ¶ 24 (8th Dist.); (3) whether the claim had already accrued, *White v. Bowling Green State*

Univ., 2021-Ohio-4069, ¶ 9 (10th Dist.); R.C. 1302.98; and (4) what remedy, if any, is available. A material breach may permit the nonbreaching party to treat the contract as terminated and seek rescission or to sue for damages. *Rhodes v. Rhodes Industries, Inc.*, 71 Ohio App.3d 797 (8th Dist. 1991).

{¶ 16} The trial court's analysis did not adequately account for that distinction. It determined that New Direction's underpayment relieved Flynn of his obligations under the purchase agreement. Yet it also concluded that Flynn's violation of the noncompete provision prevented him from recovering the unpaid purchase price. The court treated the parties' breaches as mutually extinguishing their claims without determining how the timing and effect of those breaches governed their respective rights.

{¶ 17} The conclusion that both parties failed to perform does not, standing alone, establish that the agreement was void or that neither party may recover. A court must determine which obligations remained enforceable, whether performance was excused, and whether any claim had accrued before a subsequent failure to perform. Nor does the existence of competing claims establish that the damages, if any, are equal or that the claims cancel one another.

{¶ 18} Whether a breach is material is ordinarily a question of fact that requires the assessment of several factors, including the extent to which the injured party is deprived of an expected benefit, whether the injured party can be compensated without terminating the contractual relationship, whether terminating the relationship will cause the breaching party to suffer forfeiture,

whether the breaching party is willing or able to cure, and whether the breaching party acted in good faith. *Ahmed v. Univ. Hosps. Health Care Sys., Inc.*, 2002-Ohio-1823, ¶ 41 (8th Dist.). The record contains evidence on these factors that points in different directions. The shortfall in the gross-revenue share was roughly 35 percent on the bank summaries and about 42 percent on the Forms 1099. But Section 2.4 of the purchase agreement addressed late payments by providing for interest on amounts that remained unpaid ten business days after written notice, a remedy that did not end the relationship, and Flynn gave no written notice, continued to work for New Direction, and accepted payments for three years. That conduct may support an inference that Flynn treated the deficiency as compensable rather than as a reason to end the relationship. Flynn's evidence that he did not learn the extent of the underpayment until discovery, however, supports a contrary inference. Flynn testified that he raised the issue verbally and left in part because of the underpayment, while Klarfeld testified that he believed Flynn had been paid in full, testimony that bears on good faith even though it does not create a dispute about the existence of a shortfall. Construed in Flynn's favor, the size of the shortfall and his testimony would permit a finding that the underpayment defeated an essential purpose of the sale. Construed in New Direction's favor, the late-payment remedy, the absence of written notice, and Flynn's continued performance would permit a finding that the breach could be compensated in damages without excusing Flynn's remaining obligations. Because reasonable minds could reach either conclusion, whether New Direction's underpayment was material, and whether it excused

Flynn's later performance under the noncompete covenants, therefore could not be resolved on summary judgment.

{¶ 19} We, therefore, agree with New Direction that the trial court's mutual-breach rationale does not support its disposition of the entire action. We do not agree, however, that identifying that error entitles New Direction to retain a favorable liability determination and proceed directly to a damages hearing. Flynn's prior material-breach defense bears on whether Flynn's subsequent conduct constituted an actionable breach at all. As explained below, we nonetheless conclude that the purchaser's liability for the gross-revenue-share installments that came due before Flynn's later conduct is established as a matter of law, leaving the amount owed, any setoff, and the identity of the liable party for remand.

2. Payment Evidence and Contractual Notice

{¶ 20} The evidentiary and contractual questions addressed in this section bear on both New Direction's assignment of error and Flynn's first cross-assignment of error. New Direction challenges the evidence supporting the finding of underpayment. It contends that the court improperly relied on a spreadsheet prepared by Flynn's counsel and on an affidavit that contradicted Flynn's deposition testimony.

{¶ 21} Flynn maintains that the spreadsheet discussed during Klarfeld's deposition was not the KeyBank summary submitted in support of his motion. He further contends that the KeyBank summary was admissible under Evid.R. 1006 because it summarized voluminous records made available to New Direction.

{¶ 22} These arguments require attention to the particular exhibit offered and the foundation supporting it. An objection to one document does not necessarily establish the inadmissibility of another. Likewise, describing a document as a summary under Evid.R. 1006 does not dispense with the applicable evidentiary requirements. We need not resolve the dispute over the KeyBank summary to determine whether a shortfall exists. However, New Direction's interrogatory answers placed the gross-revenue share owed to Flynn at $83,840.22.[2] (T.d. 40, Ex. E, Interrogatory No. 30.) New Direction also stated that it paid Flynn only through deposits from a single KeyBank account. (*Id.*, Interrogatory No. 29.) Yet the IRS Forms 1099 that New Direction issued to Flynn reported total payments of only $48,725.37. (T.d. 40, Ex. F.) Klarfeld acknowledged that the forms were issued by his company. He also acknowledged that they did not add up to the amount he calculated was owed and that without additional records, "it's very difficult to show that we paid what we said we paid." (T.d. 48, Ex. B at 46-47.) Even the higher total reflected in the disputed bank summaries, $54,347.71, falls well short of the amount owed. Klarfeld otherwise testified only that he believed Flynn had been paid in full, and New Direction produced no records of the additional payments he believed had been made. That generalized assertion does not set forth specific facts demonstrating a genuine issue for trial as to whether a shortfall exists. Civ.R. 56(E); *Dresher*, 75 Ohio St.3d at 293. Our determination that

[2] Klarfeld's deposition calculation placed the amount owed at $83,820.72. (T.d. 48, Ex. B at 46-47.) The $19.50 difference does not affect our analysis.

a shortfall exists rests solely on New Direction's own interrogatory answers, the Forms 1099 it issued, and Klarfeld's deposition admissions; it does not depend on Flynn's affidavit or on the KeyBank summary, and the evidentiary objections to those materials therefore do not affect it. The amount of the shortfall, including whether the KeyBank summary was properly authenticated and considered in calculating it, and whether the shortfall was material, remain for the trial court on remand.

{¶ 23} New Direction's affidavit argument also requires a distinction between contradictory and supplementary testimony. In determining the effect of a party's affidavit that appears inconsistent with the party's deposition, the trial court must consider whether the affidavit contradicts or merely supplements the deposition. *Byrd v. Smith*, 2006-Ohio-3455, paragraph one of the syllabus; *Pettiford v. Aggarwal*, 2010-Ohio-3237, ¶ 24. Because Flynn moved for summary judgment, if his affidavit is inconsistent with his deposition testimony and he offers no sufficient explanation for the inconsistency, summary judgment may not be granted in his favor. *Byrd* at paragraph two of the syllabus. Flynn explains that he could not state a figure at his deposition because he did not have the financial records in front of him and that his affidavit calculation rests on documents produced in discovery. Flynn's inability to identify a precise damages figure during his deposition does not necessarily contradict a later calculation based on financial records. The relevant inquiry concerns the substance of the testimony and affidavit, rather than the fact that the affidavit supplies an amount not previously stated.

{¶ 24} New Direction further argues that Flynn materially breached the purchase agreement by failing to exercise his audit rights. The construction of a written contract is a matter of law, and common words in a written instrument are given their ordinary meaning. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraphs one and two of the syllabus. The language identified by the parties, however, affords Flynn a right to examine information and verify the revenue share. A contractual right to audit is not, without additional language imposing that obligation, a duty to audit. *Schwartz v. Stewart Title Guar. Co.*, 134 Ohio App.3d 601, 612-613 (8th Dist. 1999). To the contrary, Section 2.3A places the obligation to correct any discrepancy on the purchaser: "Purchaser shall promptly correct such discrepancies and remit any payment owed to Flynn." Flynn's failure to exercise that right does not itself establish that he breached the agreement or forfeited payment otherwise due.

{¶ 25} The written-notice provision presents a different question. Section 2.4 addresses delinquent payments and provides for interest when a payment deficiency remains uncured after written notification. The operation of that provision must be considered according to its terms. A condition governing the accrual of contractual interest should not be treated, without further analysis, as a condition eliminating the underlying obligation to pay the purchase price. Section 2.4 nevertheless remains relevant to materiality. The availability of a contractual remedy for late payment bears on whether Flynn could be compensated without terminating the relationship. It does not, however, establish that substantial

nonpayment was immaterial. New Direction's related contention that Flynn's failure to give written notice amounted to a failure to mitigate does not alter this analysis. A failure to mitigate, if established, may reduce the damages recoverable; it does not extinguish the obligation to pay for installments that have already come due. To the extent that issue was properly raised below, it remains for the trial court on remand.

{¶ 26} These issues bear on the parties' competing claims and the available relief. They do not support the trial court's categorical conclusion that findings of breach on both sides necessarily dispose of the entire action.

3. The Employment Agreement and Remaining Claims

{¶ 27} New Direction also contends that the employment agreement contains separate enforceable obligations. Flynn responds that the employment agreement was incorporated into the purchase agreement and that New Direction's material breach therefore excused performance under both documents. New Direction argues that Flynn did not raise this argument below. Flynn counters that New Direction itself described the employment agreement to the trial court as "made part of" the purchase agreement. Because the trial court did not address the employment agreement and we remand for reconsideration of the competing motions, the parties may address the relationship between the agreements on remand.

{¶ 28} Incorporation is relevant to construing the parties' agreements, but it does not complete the inquiry. The court must consider the language governing the

particular obligation, including any provision addressing survival, severability, or the consequences of termination. Section 4.2 of the employment agreement, for example, prohibits Flynn from disclosing confidential information "at any time, either during the Term of this Agreement or subsequent to the termination of this Agreement for any reason," and Section 4.3 provides that the covenants in Section 4 "are severable and distinct covenants and provisions." In addition, because the employment agreement was executed together with the purchase agreement, its covenants are evaluated in light of the sale. *Century Business Servs. v. Urban*, 2008-Ohio-5744, ¶ 22, 25 (8th Dist.). The effect of a payment breach on that obligation cannot be assumed merely because one agreement incorporates the other.

{¶ 29} The same need for separate analysis applies to New Direction's tort claims. A defense to enforcement of a noncompete covenant may affect a claim that Suburban improperly induced its breach. It does not necessarily resolve a claim involving the wrongful exercise of control over property previously transferred to New Direction.

{¶ 30} Tortious interference requires more than knowledge of a contract or the existence of competition. The claimant must establish the applicable elements, including improper interference and resulting damages. *See Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171 (1999), paragraph one of the syllabus; *Byrne v. Univ. Hosps.*, 2011-Ohio-4110, ¶ 28 (8th Dist.). Similarly, conversion requires proof of ownership or a right to possession, wrongful interference with that right,

and damages. *Dream Makers v. Marshek*, 2002-Ohio-7069, ¶ 19 (8th Dist.). On remand, the trial court must therefore distinguish among New Direction's claims that Suburban interfered with the restrictive covenants, that appellees interfered with identified customer or business relationships, that Flynn exercised wrongful control over lesson plans or other transferred materials, and that appellees conspired to commit an actionable tort.

{¶ 31} Flynn identifies asserted evidentiary deficiencies concerning customer diversion, the use of retained materials, and damages. New Direction relies on deposition testimony and affidavits addressing those subjects. Those arguments must be evaluated against the elements of the particular claims. The conclusion that every claim arose from the parties' contractual relationship does not substitute for that analysis. Although our review is de novo, resolving these claims would require us to decide in the first instance whether the expert opinion in the Gross affidavit is admissible, a question raised in Flynn's motion that the trial court never decided. Because that question determines what evidence may be weighed, we decline to resolve these claims in the first instance.

{¶ 32} Civil conspiracy likewise depends on an actionable underlying tort. *Figgie v. Figgie*, 2025-Ohio-451, ¶ 38-39 (8th Dist.). Its disposition therefore follows from a proper determination of the underlying claims, rather than from the general observation that the parties both breached their agreement.

{¶ 33} Any request for injunctive relief or damages also requires consideration of the specific obligation sought to be enforced and its duration. The

parties agree that the five-year noncompetition period under Section 6.1 of the purchase agreement commenced at closing on May 27, 2020, and ran through May 27, 2025. Because New Direction initiated this action in February 2024, during the active term of the covenants, claims for accrued damages or retrospective relief for alleged violations occurring before May 27, 2025, remain justiciable. The restriction in Section 6.1, however, has now expired. Any request to enjoin competition after that date, or to extend the restricted period as an equitable remedy, shall be addressed by the trial court in the first instance. Prospective relief may also rest on the continuing post-termination confidentiality and property provisions of the employment agreement.

{¶ 34} Accordingly, New Direction's sole assignment of error is sustained in part. The trial court erred when it dismissed the complaint on the ground that the parties' respective breaches extinguished all claims. The record establishes that New Direction paid Flynn less than the gross-revenue share owed. But whether that shortfall was material, and whether it excused Flynn's later performance under the covenants, remain questions of fact for the trial court. Our determination does not establish liability against Flynn or Suburban on any claim. Nor does it entitle New Direction to retain a favorable liability determination or to proceed to a hearing limited to damages. To that extent, the assignment of error is overruled.

B. Flynn's Cross-Appeal

1. The Grant of New Direction's Motion and Flynn's Counterclaim (First Cross-Assignment of Error)

{¶ 35} In his first cross-assignment of error, Flynn argues that the trial court erred in granting New Direction's motion for summary judgment, in granting summary judgment against him on his counterclaim, and in failing to award him damages.

{¶ 36} Flynn argues that New Direction's failure to pay the agreed purchase price preceded his employment with Suburban. He maintains that the trial court could not find that the payment breach excused his further performance while simultaneously treating that later performance as obligatory for purposes of dismissing his counterclaim.

{¶ 37} We agree that the counterclaim could not be disposed of on that reasoning. The gross-revenue-share payments came due monthly from the May 2020 closing through the end of the third year in May 2023. Each installment came due before Flynn began working for Suburban in June 2023. A party's uncured material failure to perform excuses the other party's remaining performances that come due later. Restatement of the Law 2d, Contracts, § 237 (1981); *see Nious* at ¶ 16. Flynn's later conduct, whatever its materiality, therefore, could not retroactively discharge New Direction's obligation to pay for a business it had already received and retained. If Flynn's conduct was not excused, New Direction's remedy is damages or setoff, as Section 2.1 of the purchase agreement contemplates, not forfeiture of the unpaid purchase price. Nor does the record reflect a material

breach by Flynn that preceded the installments at issue. The trial court found that Flynn "solicited private driving lessons from at least one former customer of New Direction while he was employed at Suburban." (T.d. 56 at 7.) Like his employment with Suburban, that conduct postdates the installments at issue. New Direction also characterizes Flynn's two-week resignation notice as a material breach. (Appellants' reply brief at 4-5.) But Flynn gave that notice at the end of the three-year payment period, after the shortfall had accrued. At most, it could bear on an installment that came due after the notice was given; it cannot excuse installments that had already come due.

{¶ 38} A summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Civ.R. 56(C). Flynn moved for summary judgment on his counterclaim, and our review of that motion is de novo because the record establishes a shortfall independent of Flynn's affidavit and the KeyBank summary, *see* ¶ 22, and because Flynn's later conduct could not discharge installments that had already come due, the purchaser's liability for those installments is established, subject to any setoff New Direction may prove on remand. The amount owed, and the party or parties liable for it, remain to be determined. The trial court computed an unpaid balance of $29,492.51 by subtracting the $54,347.71 reflected in the KeyBank summary from the $83,840.22 that New Direction calculated was owed. But the amount actually paid remains unsettled. The KeyBank summary's admissibility has not been resolved, and the Forms 1099 that New Direction issued report lower payments, between $39,816.56

and $48,725.37. *See* fn. 2. Flynn's request for "at least" $29,492.71 appears to reflect a typographical variation of the trial court's figure rather than a separate calculation. The trial court shall determine the unpaid balance on remand from competent, admissible evidence.

{¶ 39} Flynn's request for interest involves three distinct questions. First, contractual interest at 7 percent under Section 2.4 accrues only on amounts that remain uncured ten business days after written notification, and Flynn conceded that he never gave written notice. Whether the contractual rate was ever triggered must be resolved on remand. Second, the absence of written notice does not necessarily foreclose prejudgment interest at the statutory rate on amounts that became due and payable. R.C. 1343.03(A). Third, postjudgment interest applies under R.C. 1343.03(A) once a judgment for a sum certain is entered. The trial court shall determine which rate applies and when interest began to accrue.

{¶ 40} An award of attorney fees, or the imposition of liability on a particular party, requires an established legal and factual basis. Appellees ask for judgment against Klarfeld and New Direction Driving School, L.L.C., jointly and severally. Whether Klarfeld is individually bound by the payment obligation depends on the terms of the purchase agreement and the capacity in which he executed it, and the trial court shall resolve that question on remand.

{¶ 41} The trial court also erred in granting New Direction's motion for summary judgment. As previously explained, whether Flynn's later conduct was an actionable breach cannot be determined until the materiality of New Direction's

underpayment, and its effect on Flynn's obligations under the covenants, has been resolved. Flynn's first cross-assignment of error is therefore sustained to the extent it challenges the grant of New Direction's motion and the dismissal of his counterclaim. It is overruled to the extent it seeks entry of a specified monetary judgment. To the extent it challenges the dismissal of his counterclaim, the purchaser's liability for the installments that came due before Flynn's later conduct is established, as set forth herein.

2. Enforceability of Restrictive Covenants

{¶ 42} In his second cross-assignment of error, Flynn argues that the trial court erred by failing to hold the noncompete covenants unenforceable as a matter of law. The trial court did not expressly address enforceability. It noted that the noncompete provision "was heavily negotiated between the parties and repeatedly agreed to in writing by Flynn," and it found that Flynn's violation of Section 6.1 of the purchase agreement was material. (T.d. 56 at 6-7.) The court thus treated the covenant as enforceable without evaluating it under *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21 (1975). It did not address the covenant in Section 4.1 of the employment agreement. Courts may modify or amend employment agreements to achieve such results. *Id.* In determining whether a restriction is reasonable, a court considers its scope, whether it prevents the employee from obtaining meaningful employment for an unreasonable period, and whether its enforcement would harm the public. *Granzier v. Cabbage, Inc.*, 2003-Ohio-3532, ¶ 9 (8th Dist.).

{¶ 43} Flynn argues that the covenants merely prevent ordinary competition and do not protect a legitimate business interest. He emphasizes that he worked for Suburban as a driving instructor and possessed his professional skills before New Direction purchased the business. New Direction responds that Flynn negotiated and accepted the restrictions and that they protect the business interests acquired in the sale.

{¶ 44} A noncompete restriction is reasonable when it is no greater than necessary to protect the employer's legitimate interests, does not impose undue hardship on the employee, and is not injurious to the public. *Raimonde* at paragraph two of the syllabus. In applying that standard, courts consider, among other things, whether the covenant contains time and space limitations; whether the employee is the sole contact with the customer; whether the employee possesses confidential information or trade secrets; whether the covenant seeks to eliminate unfair competition or merely ordinary competition; whether it stifles the employee's inherent skill and experience; whether the benefit to the employer is disproportionate to the detriment to the employee; whether it bars the employee's sole means of support; whether the employee's talent was developed during the employment; and whether the forbidden employment is merely incidental to the main employment. *Id.* at 25. The party seeking enforcement must prove by clear and convincing evidence that a legitimate interest warrants protection and that the restraint is reasonable. *MetroHealth Sys. v. Khandelwal*, 2022-Ohio-77, ¶ 17 (8th Dist.). *Raimonde* addressed a covenant ancillary to employment. This court has

held that "restrictive covenants entered into ancillary to the sale of a business should be afforded less scrutiny than ones entered into by employees as consideration for employment." *Century Business Servs., Inc. v. Urban*, 2008-Ohio-5744, ¶ 18 (8th Dist.). That reduced scrutiny extends to a covenant contained in an employment agreement executed at the same time as the sale. *Id.* at ¶ 22, 25. Accordingly, where, as here, the covenants were given in connection with the sale of Flynn's business, the reasonableness inquiry must account for the goodwill New Direction purchased.

{¶ 45} Flynn's participation in negotiating the covenants is relevant, but his agreement to their terms does not eliminate the reasonableness inquiry. Similarly, describing his later position as that of a driving instructor does not resolve the interests implicated by the sale of his established business. The agreements and the circumstances of the transaction must be considered together.

{¶ 46} Our reversal removes the judgment that treated Flynn's conduct as an actionable breach without first determining the effect of New Direction's alleged prior breach. The enforceability question nevertheless remains live. If the trier of fact determines that Flynn's performance was not excused, New Direction's breach-of-contract claim will depend on whether the covenants are enforceable. On this record, we cannot say that a five-year covenant limited to the two counties served by the business Flynn sold is unreasonable per se or unenforceable as a matter of law. Because the reasonableness inquiry requires an individualized factual assessment of the interests protected, the hardship imposed, and the public interest, in light of the sale of Flynn's business, and because the trial court did not conduct that analysis,

we decline to decide in the first instance whether the covenants are enforceable as written. If the trial court finds the restrictions unreasonable as written, it may enforce them to the extent necessary to protect New Direction's legitimate interests. *Raimonde* at paragraph one of the syllabus. On remand, the trial court should consider what goodwill or other legitimate interest New Direction purchased, how each restriction protects that interest, and whether restricting Flynn's work as an in-car instructor is broader than necessary to protect it. The court should also construe each covenant according to its own terms. Section 6.1 of the purchase agreement contains handwritten deletions, while Section 4.1 of the employment agreement expressly reaches employment with a competitor and the offering of private driving lessons.

{¶ 47} Accordingly, Flynn's second cross-assignment of error is sustained in part. The trial court's implicit treatment of the covenants as enforceable is vacated, and their enforceability is remanded for determination under *Raimonde*. To the extent Flynn asks this court to hold the covenants unenforceable as a matter of law, the second cross-assignment of error is overruled.

3. Damages Evidence

{¶ 48} As part of his second cross-assignment of error, Flynn also argues that New Direction's claims fail as a matter of law because it produced no competent, credible evidence of damages. He contends that damages for breach of a noncompetition agreement must be established with reasonable certainty through lost net profits rather than lost gross revenues, citing *Yagour Group, L.L.C. v.*

Ciptak, 2024-Ohio-73, ¶ 39-42 (8th Dist.), and that New Direction's expert improperly measured gross revenue.

{¶ 49} The trial court did not reach the question of damages, and it did not rule on Flynn's motion challenging New Direction's damages expert. A motion not expressly decided when a case concludes is ordinarily presumed overruled. *Kostelnik v. Helper*, 2002-Ohio-2985, ¶ 13. That presumption has no practical effect here, however, because the trial court never reached damages and we reverse its judgment. The trial court may consider that motion on remand. Because the challenged expert opinion forms part of New Direction's damages showing and its admissibility remains unresolved, we decline to determine the sufficiency of that showing on the present record. To the extent Flynn's second cross-assignment of error challenges the sufficiency of New Direction's damages evidence, it is overruled as premature. Our disposition does not reject the argument on its merits, and Flynn may renew it on remand.

V. Conclusion

{¶ 50} The trial court erred by treating the parties' respective breaches as automatically extinguishing all claims arising from their transaction. The court was required to consider the sequence and materiality of the alleged breaches, the obligations affected, and the elements and evidentiary support of each claim.

{¶ 51} New Direction's sole assignment of error and Flynn's first and second cross-assignments of error are each sustained in part and overruled in part, as stated

in this opinion. The judgment disposing of the complaint and counterclaim is reversed, and the matter is remanded for further proceedings.

{¶ 52} The following remain for the trial court on remand: the evidentiary objections, including those to the KeyBank summary, Flynn's affidavit under *Byrd v. Smith*, 2006-Ohio-3455, and New Direction's damages expert; the amount of the unpaid balance, any setoff, and whether Klarfeld, New Direction Driving School, L.L.C., or both are liable for it; the applicable interest; whether the underpayment was material and excused Flynn's later performance; if not, the enforceability of each covenant under *Raimonde* in light of the sale of the business; and New Direction's tort, conspiracy, and injunctive-relief claims. On remand, the trial court shall reconsider the competing motions under Civ.R. 56 and rule on the evidentiary objections necessary to resolve them, including the objections to the KeyBank summary, the application of *Byrd v. Smith* to Flynn's affidavit, and Flynn's motion challenging New Direction's damages expert. The court shall determine whether New Direction's underpayment was material and the effect of any prior material breach on the particular obligations at issue. In doing so, it shall recognize that the purchaser's liability for the gross revenue share installments that came due before Flynn's later conduct is established, subject to any setoff, and that the amount owed remains to be determined. If Flynn's performance under the covenants was not excused, the court shall determine their enforceability under *Raimonde*, considering the sale of the business. The court shall separately consider the tort, conspiracy, and injunctive-relief claims. Except as stated in this opinion, neither

party is entitled, by virtue of this decision, to a determination of liability or a specified damages award.

{¶ 53} Judgment reversed and case remanded.

It is ordered that the parties share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR