[Cite as *Addison Holdings, L.L.C. v. Fox, Byrd & Co., P.C.*, 2022-Ohio-4784.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

ADDISON HOLDINGS, LLC, ET AL.,	:	
Plaintiffs-Appellants,	:	CASE NO. 21CA8
	:	
v.	:	
FOX, BYRD & COMPANY, P.C., ET AL.	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

Daniel R. Swetnam, Columbus, Ohio, and Michael R. Sklaire, McLean, Virginia, for appellants.

Richard G. Witkowski and R. Christopher Yingling, Cleveland, Ohio, for appellees.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:12-20-22
ABELE, J.

{¶1} This is an appeal from a Jackson County Common Pleas Court summary judgment in favor of Fox, Byrd & Company, P.C. (Fox Byrd), defendant below and appellee herein. Addison Holdings, LLC and Craig Donley, plaintiffs below and appellants herein, raise the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY CONCLUDING THAT PLAINTIFFS-APPELLANTS WERE NOT WITHIN THE CLASS OF PERSONS TO WHOM DEFENDANT FOX, BYRD & COMPANY, P.C. OWED A DUTY UNDER *HADDON VIEW INV. CO. V. COOPERS & LYBRAND*, 70 OHIO ST.2D 154, 436 N.E.2D 212 (1982)."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT FOX, BYRD & COMPANY, P.C. SINCE THERE WERE GENUINE ISSUES OF MATERIAL FACT WHICH SHOULD HAVE BEEN DECIDED BY A JURY."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY RULING ON AN ISSUE NOT RAISED BY DEFENDANT FOX, BYRD & COMPANY, P.C. IN ITS MOTION FOR SUMMARY JUDGMENT."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON THE ISSUE OF JUSTIFIABLE RELIANCE SINCE THERE WERE GENUINE ISSUES OF MATERIAL FACT WHICH SHOULD HAVE BEEN DECIDED BY A JURY."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON PLAINTIFFS-APPELLANTS' CONSPIRACY CLAIM."

{¶2} Appellants collectively invested nearly $3 million in a tire business that Jason Adkins owned, Landash Corporation (Landash). Appellants later learned that Adkins lured them into

a Ponzi scheme. Appellants subsequently filed a complaint against appellee, the accounting firm that prepared financial compilations for two of Adkins' businesses (Midwest Coal, LLC and Landash) and a 2014 tax return for Adkins and his wife.

{¶3} Appellants asserted that appellee negligently or intentionally misrepresented the financial position of Adkins' businesses and that appellants relied upon the misrepresentations when they decided to invest in Landash. Appellants claimed that appellee is liable for their financial losses under the following theories: (1) negligence; (2) negligent misrepresentation; (3) intentional misrepresentation; and (4) civil conspiracy.

{¶4} After the parties conducted discovery, appellee filed a summary judgment motion and asserted that appellants could not demonstrate that appellee owed appellants a duty because, when appellee prepared the financial documents, appellee did not know that (1) appellants existed, (2) Adkins would provide the documents to appellants, or (3) appellants would rely upon the documents. Appellee further pointed out that it addressed the financial compilations to Adkins' businesses and contained disclaimers to inform readers that appellee did not audit the businesses and that appellee made no representations regarding the accuracy of the financial information.

{¶5} Appellee also argued that appellants could not maintain their intentional misrepresentation claim because none of the evidence shows that appellee had any communication with appellants or made any representation to appellants. Appellee also asserted that it had no duty to disclose due to the lack of any relationship between appellee and appellants.

{¶6} Appellants asserted they are members of a limited class of investors and appellee specifically foresaw that appellants, when deciding whether to invest in Adkins' business, would rely upon the financial documents that appellee prepared for Adkins' businesses. Appellants therefore argued that appellee owed them a duty of care and that they relied upon the financial documents when they decided to invest in Adkins' business.

{¶7} To support their claim that appellee owed them a duty, appellants relied upon the depositions and documents and contended that the evidence establishes (1) appellee knew that Adkins used investors and short-term financing to fund his business, and (2) this knowledge demonstrates that appellee knew Adkins would show appellee's financial documents to potential

investors.[1] Appellants claimed this knowledge illustrates that they were a limited class of investors whose reliance upon appellee's representation was specifically foreseen. As such, appellants asserted that appellee owed appellants a duty.

{¶8} The trial court, however, disagreed with appellants and concluded that the evidence failed to show that appellee had any knowledge that Adkins intended to provide the financial documents to a limited class of investors. Instead, the court determined that the evidence merely indicated "that Adkins might show the tax returns and financial statements to the general investing public." The court additionally found that appellants did not justifiably rely upon the financial compilations because the financial compilations included disclaimers to warn readers that the compilations had not been audited and that appellee did not provide any assurances or opinions regarding the financial information. The court concluded that the existence of these disclaimers negated, as a matter of law, appellants' claim of justifiable reliance. The court further pointed out that appellants did not identify "what is actually false or misrepresented in the Fox Byrd documents" or "what

[1] The relevant evidence is summarized in an appendix to this decision.

misrepresentations they justifiably relied upon."

{¶9} Thus, the trial court concluded that no genuine issues of material fact remained regarding appellants' claims for negligence, negligent misrepresentation, intentional misrepresentation, or civil conspiracy. Consequently, the court entered summary judgment in appellee's favor. This appeal followed.

I

{¶10} In all of their assignments of error, appellants assert that the trial court erred by entering summary judgment in appellee's favor. We therefore first set forth the standard of review that applies when appellate courts review summary judgment decisions.

{¶11} Appellate courts conduct a de novo review of trial court summary judgment decisions. *E.g., State ex rel. Novak, L.L.P. v. Ambrose*, 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 209, ¶ 8; *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 13; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Thus, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. *Grafton*, 77 Ohio St.3d at 105.

{¶12} Civ.R. 56(C) provides, in relevant part, as follows:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶13} Accordingly, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Pelletier* at ¶ 13; *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12; *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶14} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and

to identify those portions of the record that demonstrate the absence of a material fact. *Vahila, supra*; *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The moving party cannot discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 147, 677 N.E.2d 308 (1997); *Dresher, supra*. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher, supra*.

{¶15} "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." *Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc.*, 110 Ohio App.3d 732, 742, 675 N.E.2d 65 (2nd Dist.1996). Once the moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists.

Civ.R. 56(E); *Dresher, supra*.

{¶16} In responding to a summary judgment motion, the nonmoving party may not rest on "unsupported allegations in the pleadings." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Instead, Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact. Moreover, "conclusory affidavits that merely provide legal conclusions or unsupported factual assertions are not proper under Civ.R. 56(E)" and are insufficient to establish a genuine issue of material fact. *Moore v. Smith*, 4th Dist. Washington No. 07CA61, 2008-Ohio-7004, ¶ 15 (citations omitted); *Wertz v. Cooper*, 4th Dist. Scioto No. 06CA3077, 2006-Ohio-6844, ¶ 13, citing and quoting *Evans v. Jay Instrument & Specialty Co.*, 889 F.Supp. 302, 310 (S.D.Ohio 1995) ("'bald self-serving and conclusory allegations are insufficient to withstand a motion for summary judgment'"); *accord McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 357–358, 609 N.E.2d 216 (6th Dist.1992) (trial court considering a summary judgment motion is not required to accept conclusory allegations that are devoid of any evidence to create an issue of material fact).

{¶17} A nonmoving party need not try its case when defending against a summary judgment motion. A nonmoving party must,

however, produce more than a scintilla of evidence to support its case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Carsey v. Alexander Cemetery, Inc.*, 4th Dist. Athens No. 00CA028, 2001-Ohio-2438. Moreover, "'[t]he non-moving party may not rely on isolated facts to support his claim. Indeed, he must show that the evidence as a whole substantiates his claim.'" *Williams v. 312 Walnut Ltd. Partnership*, 1st Dist. Hamilton No. C–960368, 1996 WL 741982 (Dec. 31, 1996), quoting *Paul v. Uniroyal Plastics Co., Inc.*, 62 Ohio App.3d 277, 282, 575 N.E.2d 484, 487 (6th Dist.1988). The essential question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–252.

{¶18} In the case sub judice, after our review we agree with the trial court that appellee satisfied its burden to show the absence of a material fact regarding appellants' claims for relief. As we explain below, the evidence appellants submitted fails to demonstrate the existence of any genuine issue of material fact.

II

{¶19} In their first assignment of error, appellants assert that the trial court incorrectly determined that appellee did

not owe them any duty. Appellants contend that, even though they lack privity with appellee, appellee nonetheless owed them a duty because, under *Haddon View Inv. Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154, 436 N.E.2d 212 (1982), (1) they were a limited class of investors, and (2) appellee specifically foresaw that appellants would rely upon the financial documents that appellee prepared for Adkins and his businesses.

{¶20} Appellants claim they presented evidence to show that they belonged to a limited class of investors – investors making loans to Adkins to help purchase tire inventory – and appellee knew that Adkins used the financial documents that appellee prepared to solicit investors. Appellants contend they presented evidence to show (1) appellee knew the financial information it prepared for Adkins would be distributed to a limited class of investors who would rely on those materials when deciding whether to loan money to Adkins' businesses; (2) appellee knew Adkins used investor funds to 'purchase' the tire inventory; (3) "Johnson testified that he knew the financial statements were being provided to investors"; and (4) appellants' expert opined that appellee "should have foreseen that investors like [a]ppellants would rely upon [appellee's] work product."

{¶21} Appellants conclude that "[t]he trial court either

misapplied [the applicable law], erroneously determined there was no evidence, or improperly weighed evidence." Appellants argue that if the trial court correctly applied the law, it would have determined that appellants established that genuine issues of material fact remain for trial regarding whether appellee is liable to appellants for professional negligence.

{¶22} Conversely, appellee entirely disagrees with appellants' characterizations. Appellee asserts that, when it prepared the financial information, it had no knowledge that Adkins would share the financial documents with a specific group of investors, like appellants, who would rely on the documents when deciding whether to loan money to Adkins. Appellee contends that appellants fall within the "investing public-at-large" and the evidence fails to support any inference they were members of a limited class of investors whose reliance upon the financial documents appellee specifically foresaw.

{¶23} "In order to establish actionable negligence, the plaintiff must show the existence of a duty, a breach of the duty, and an injury proximately resulting therefrom." *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998). "The failure to prove any one of these elements is fatal to a claim of negligence." *Rieger v. Giant Eagle, Inc.*, 157 Ohio St.3d 512, 2019-Ohio-3745, 138

N.E.3d 1121, ¶ 10. In the case sub judice, appellee claims that appellants cannot establish the existence of a duty.

{¶24} "A person's failure to exercise ordinary care in doing or failing to do something will not amount to actionable negligence unless such person owed to someone injured by such failure a duty to exercise ordinary care." *United States Fire Ins. Co. v. Paramount Fur Serv., Inc.*, 168 Ohio St. 431, 156 N.E.2d 121 (1959), paragraph three of the syllabus; *see also Gedeon v. E. Ohio Gas Co.*, 128 Ohio St. 335, 338, 190 N.E. 924 (1934) ("before failure to use [ordinary care] can be made the basis for recovery it must appear that the plaintiff falls within the class of persons to whom a duty of care was owing"). In other words, if there is no duty, there can be no liability for negligence. *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989). Whether a duty exists in a negligence action is a question of law for a court to decide. *E.g., Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

{¶25} A "question of law" is "'[a]n issue to be decided by the judge, concerning the application or interpretation of the law.'" *Henley v. Youngstown Bd. Of Zoning Appeals*, 90 Ohio St.3d 142, 148, 735 N.E.2d 433 (2000), quoting Black's Law Dictionary (7th Ed.1999) 1260. A question of law does not become a question of fact simply because a court must consider

facts or evidence. *Id.*; *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 25 ("That facts are involved in the analysis does not make the issue a question of fact deserving of deference to a trial court."); *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68, 430 N.E.2d 935 (1982) ("simply because resolution of a question of law involves a consideration of the evidence does not mean that the question of law is converted into a question of fact or that a factual issue is raised"). As stated in *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph two of the syllabus: "The fact that a question of law involves a consideration of facts or the evidence, does not turn it into a question of fact or raise a factual issue; nor does that consideration involve the court in weighing the evidence or passing upon its credibility." Thus, "[w]ith respect to questions of law, *O'Day* requires a court to consider both facts and evidence in reaching its legal determination and enjoins the court from weighing the evidence or passing on issues of credibility." *Pangle v. Joyce*, 76 Ohio St.3d 389, 391, 667 N.E.2d 1202 (1996) (citation omitted).

{¶26} In the absence of privity of contract between two disputing parties, the general rule is "'there is no * * * duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm

to persons and tangible things.'" *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n*, 54 Ohio St.3d 1, 3, 560 N.E.2d 206 (1990), quoting Prosser & Keeton, Law of Torts (5 Ed.1984) 657, Section 92; *accord Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 44–45, 537 N.E.2d 624 (1989). In *Haddon View Inv. Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154, 436 N.E.2d 212 (1982), however, the court "partially withdrew the privity requirement with respect to malpractice actions taken against accountants." *Floor Craft*, 54 Ohio St.3d at 4. The *Haddon View* court held that "[a]n accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen." *Id.* at syllabus.

{¶27} In the case at bar, appellants assert that, under *Haddon View*, they are members of a limited class that appellee specifically foresaw would rely upon appellee's representations. Appellee, on the other hand, contends that appellants are not members of a limited class and appellee did not specifically foresee that appellants would rely upon appellee's representations. Resolving the parties' dispute requires that we ascertain the meaning of the rule set forth in *Haddon View*, i.e., when is a third party a member of a limited class and when

does an accountant specifically foresee that the third party would rely upon the accountant's representation.

{¶28} In *Haddon View*, the court determined that partners in a limited partnership are members of a limited class and the accounting firm, retained to perform accounting work for the limited partnership, specifically foresaw that the limited partners would rely upon the accounting firm's representations. *Id.* at 155 (identifying issue on appeal as "whether an accountant retained by a limited partnership to perform auditing and other services may be held responsible to an identifiable group of limited partners in such partnership for negligence in execution of those professional services"). In reaching its decision, the supreme court noted that an oft-cited 1931 case suggested that "only those in privity with accountants could ever hold them liable for professional negligence." *Id.*, citing *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931), and *O'Connor v. Ludlam*, 92 F.2d 50, 53 (C.A.2 1937). The court further observed, however, that more recent cases "have declined to employ a strict privity rule to bar third parties from recovery for accountants' professional negligence." *Id.* at 155-156. Instead, these more recent cases "allow recovery by a foreseen plaintiff, or one who is a member of a limited class whose reliance on the accountant's representation

is specifically foreseen." *Id.* at 156 (citations omitted). The *Haddon View* court agreed with this interpretation and incorporated the analysis set forth in one of the leading cases at the time that adopted this interpretation, *White v. Guarente*, 3 N.Y.2d 356, 361-362, 372 N.E.2d 315 (1977).

{¶29} In *White*, the plaintiff was a limited partner in a hedge fund. The hedge fund retained an accounting firm to prepare an audit and a tax return and the plaintiff filed a complaint against, inter alia, the accounting firm for professional negligence. Following the trial court's dismissal of his complaint, plaintiff appealed and, on appeal, the accounting firm asserted that the plaintiff lacked privity with the accounting firm and could not maintain a cause of action against the accounting firm.

{¶30} The court of appeals did not agree with the accounting firm's argument. The *White* court noted that *Ultramares* involved an "'indeterminate class of persons who, presently or in the future, might deal with the (debtor-promisee) in reliance on the audit.'" 43 N.Y.2d at 361, quoting *Ultramares*, 255 N.Y. at 183. In contrast, in *White*, "the services of the accountant were not extended to a faceless or unresolved class of persons, but rather to a known group possessed of vested rights, marked by a definable limit and made up of certain components." *Id.* The

White court noted that the case "did not involve prospective limited partners, unknown at the time and who might be induced to join." *Id.* Instead, the aggrieved party was an "actual limited partner[], fixed and determined." *Id.* The court concluded that the accounting firm, retained by a limited partnership, "must have been aware that a limited partner would necessarily rely on or make use of the audit and tax returns of the partnership, or at least constituents of them, in order to properly prepare his or her own tax returns." *Id.* The court determined that the accounting firm, by assuming "the task of auditing and preparing the returns" also assumed "a duty to audit and prepare carefully for the benefit of those in the fixed, definable and contemplated group whose conduct was to be governed." *Id.* at 361-362. The court further noted that the accounting firm and the hedge fund entered into a retaining agreement and that "given the contract and the relation, the duty is imposed by law." *Id.* at 361-362.

{¶31} The *White* court thus concluded that the "plaintiff was a member of a limited class whose reliance on the audit and returns was, or at least should have been, specifically foreseen." *Id.* at 362. The court further observed that "the import of *Ultramares* is its holding that an accountant need not respond in negligence to those in the extensive and

indeterminable investing public-at-large." *Id.* at 361.

{¶32} Subsequently, the *Haddon View* court approved the *White* court's analysis as in "accord with reason and justice." *Haddon View*, 70 Ohio St.2d at 156. The court observed that the Restatement (Second) of Torts, Section 552 "and various commentators have come to the same conclusion." *Id.* at 156-157, citing Mess, Accountants and the Common Law: Liability to Third Parties 52 Notre Dame Lawyer 838, 857.

{¶33} The court further noted that "accountants make reports on which people other than their clients foreseeably rely in the ordinary course of business." *Id.* at 157. Thus, an "accountant's duty to prepare reports using generally accepted accounting principles extends to any third person to whom they understand the reports will be shown for business purposes." *Id.* Accordingly, the court held that "an accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen." *Id.* at 157. As the court otherwise stated: "'An accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited classes of persons.'" *Id.*, quoting *Rusch Factors, Inc. V. Levin*, 284 F.Supp 85, 93 (D.R.I.1968) (in *Rusch*, the plaintiff's complaint

alleged that the "defendant knew that his certification was to be used for, and had as its very aim and purpose, the reliance of potential financiers of the Rhode Island corporation," 284 F.Supp. at 92–93).

{¶34} Applying these principles led the *Haddon View* court to "conclude that the limited partners in the * * * partnerships constitute a limited class of investors whose reliance on the accountant's certified audits for purposes of investment strategy was specifically foreseen by defendant." *Id.* The decision does not, however, shed much more light on the precise meaning of the rule when applied outside of the general partnership and limited partnership context. Furthermore, *Haddon View* does not provide a precise definition of the phrase "specifically foreseen." We note that the term "specifically" means "in a specific manner," "in a definite and exact way," or "with precision." https://www.merriam-webster.com/dictionary/specifically. Alternately, it may be "used to indicate the exact identity, purpose, or use of something." *Id.* To "foresee" means "to see (something, such as a development) beforehand." https://www.merriam-webster.com/dictionary/foreseen. Thus, to specifically foresee that a limited class of investors will rely upon an accountant's representations might suggest that the accountant precisely must

see in advance that the limited class of investors will rely upon the accountant's representations. We recognize, however, that the dictionary definitions could support other interpretations of the phrase "specifically foreseen."

{¶35} We further observe that the *Haddon View* court approved of the *White* and *Rusch* courts' analysis, while also seemingly approving of the Restatement approach and law review article. Later cases indicated, however, that the Restatement approach differs from the *White* court's analysis. *See, e.g., Bily v. Arthur Young & Company*, 3 Cal.4th 370, 834 P.2d 745 (1992).

{¶36} Furthermore, the law review article *Haddon View* cited appears to endorse a "reasonably foreseeable test," but later courts found this to be at odds with the Restatement approach. *See, e.g., id.* at 389-392. The law review article notes that "[t]wo tests have resulted from [the] reexamination [of *Ultramares*]: the reasonably foreseeable test, and the actually foreseen test." Mess, *supra* at 857. The article suggests that the actually foreseen test "fails to provide sufficient protection to parties that may be expected to rely on the accountant's report but are unknown to the accountant when the report is prepared." *Id.* The article thus concludes that "[t]he reasonably foreseeable test * * * provides the best protection for relying third parties." *Id.*

{¶37} Three years after *Haddon View*, the New York Court of Appeals further refined the New York rule for accountant liability as set forth in *White* (the reasoning of which *Haddon View* found "to accord with reason and justice"). *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 483 N.E.2d 110 (1985). In *Credit Alliance*, the court set out three requirements to hold accountants liable in negligence when privity is absent:

> (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

Id. at 551. The court explained that the three "criteria permit some flexibility in the application of the doctrine of privity to accountants' liability," but "they do not represent a departure from the principles articulated in *Ultramares* * * * and *White*." *Id.* Instead, "they are intended to preserve the wisdom and policy set forth therein." *Id.*

{¶38} Thus, given the refinements in the various views that have occurred since the court decided *Haddon View* in 1982, we find it debatable whether *Haddon View* intended to adopt what is

now the *Credit Alliance* approach, the Restatement approach, or the reasonable-foreseeability approach. *See Floor Craft*, 54 Ohio St.3d at 10 (Brown, J., dissenting) (stating *Haddon View* "held that accountants may be liable for professional negligence, in the absence of privity, to persons whose reliance on the accountants' work product is reasonably foreseeable"); *Caruso v. Natl. City Mtge. Co.*, 187 Ohio App.3d 329, 2010-Ohio-1878, 931 N.E.2d 1167, ¶ 16 (1st Dist.) (footnotes omitted) (Ohio law regarding Section 552 of the Restatement "is far from clear"). We recognize, however, that the Ohio Supreme Court has cited *Haddon View* since 1982 and concluded that *Haddon View* did, in fact, endorse the Restatement approach. *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701; *Floor Craft; Gutter v. Dow Jones, Inc.*, 22 Ohio St.3d 286, 288, 490 N.E.2d 898 (1986) (*Haddon View* "applied the elements contained in * * * Section 552").

{¶39} In *Corporex*, the court stated that *Haddon View* "discussed the liability of an accountant for professional negligence in accord with 3 Restatement of the Law 2d, Torts (1979), Section 552." *Id.* at ¶ 9. The *Corporex* court explained that Section 552

> recognizes professional liability, and thus a duty in tort, only in those limited circumstances in which a person, in the course of business, negligently supplies

> false information, knowing that the recipient either intends to rely on it in business, or knowing that the recipient intends to pass the information on to a foreseen third party or limited class of third persons who intend to rely on it in business.

Id., citing Restatement of Torts 2d, 126–127, Section 552; *see also Floor Craft*, 54 Ohio St.3d at 4 (stating that "[t]he *Haddon View* court only partially withdrew the privity requirement with respect to malpractice actions taken against accountants).

Section 552 provides as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

{¶40} Ohio appellate courts have interpreted *Haddon View* as endorsing the Restatement approach, and decisions that apply *Haddon View* to ascertain an accountant's liability have reached different results, depending upon the facts in each case. In

general, Ohio courts have determined that an accountant may be liable to a third party when the evidence suggests that the accountant knew that the third party would review and rely upon the accountant's representations.

{¶41} In *D&H Autobath, LLC v. PJCS Properties 1, Inc.*, 2012-Ohio-5845, 983 N.E.2d 981 (12th Dist.), for example, the court determined that an accountant could be liable for negligent misrepresentation that involved a third party's purchase of the accountant's client's business when the accountant knew that the third party required that the business's financial reports have a "stamp of approval." *Id.* at ¶ 39. In that case, the plaintiffs purchased one of the three car wash businesses that PJCS owned and the broker created financial documents for all three businesses that he reviewed with PJCS. The broker later requested PJCS obtain a letter from an accountant that attested to the accuracy of the profit and loss statements for the businesses. PJCS's former accountant subsequently certified the financial records, but, allegedly the financial records misstated the businesses' value. The plaintiffs later sued the accountant for negligent misrepresentation.

{¶42} After the accountant requested summary judgment, which the trial court granted, the plaintiffs appealed. The appellate court observed that the accountant stated that he "knew that

'the people that [PJCS] was working with needed a third party's stamp of approval' on the financial records." *Id.* The court thus concluded that the accountant "was aware that the financial records would be shown to a third party for business purposes." *Id.* Consequently, the court determined that the trial court erred in granting judgment in the accountant's favor as to the negligent misrepresentation claim.

{¶43} In *Ortner v. Kleshinski, Morrison & Morris*, 5th Dist. Richland No. 02-CA-4, 2002-Ohio-4388, the court concluded that reasonable minds could find that an accounting firm that had prepared investor marketing materials specifically foresaw that investors, like the plaintiff, would rely upon the materials when they decided whether to invest in the dealership. In *Ortner*, the plaintiff and Jeff Maibach discussed the purchase of a farm implement dealership and the dealership's accounting firm prepared information for potential investors. "The document, titled 'Confidential Corporate Marketing Document,' was prepared for use by prospective purchasers in considering their interest in acquiring [the dealership]." *Id.* at ¶ 4. This document included a disclaimer, some general information about the company, and a financial review. Maibach gave the plaintiff a copy of this document and introduced one of the dealership's accountants. After the plaintiff invested in the dealership,

the plaintiff learned that discrepancies appeared on the financial reports and he sold his interest in the dealership.

{¶44} Later, the plaintiff filed a complaint against the accounting firm for professional negligence, fraud, and breach of fiduciary duty. The trial court determined with respect to the professional negligence claim that plaintiff "was not a member of the limited class whose degree of reliance on the marketing document was specifically foreseen by appellees." *Id.* at ¶ 9.

{¶45} The appellate court, however, reversed the judgment and held that "reasonable minds could conclude that [the plaintiff's] reliance on the representations and the financial reports prepared by appellees was specifically foreseen." *Id.* at ¶ 21. The court noted that the marketing document "specifically states that it was prepared for potential investors." *Id.* at ¶ 22. Additionally, the plaintiff met with one of the accountants from the firm "to specifically discuss the matters in the report and the potential investment." *Id.* The plaintiff asked the accountant "if an independent accountant should go over the financial condition of the company," and the accountant informed the plaintiff that it "would be a waste of time and money as [the firm] had already completed the same work." *Id.* The court concluded that the evidence would allow

reasonable minds to "conclude that [the plaintiff] falls within a limited class of investors who [the firm] should have specifically foreseen would rely upon [its] representations." *Id.*

{¶46} In the foregoing two cases, the plaintiffs presented some evidence to indicate that the accountant knew that the plaintiffs would rely upon the accountant's work. However, when no evidence suggests that an accountant knew that a plaintiff would rely upon an accountant's work, in those circumstances courts have determined the accountant did not owe a duty to the plaintiff.

{¶47} In *Second National Bank of Warren v. Demshar*, 124 Ohio App.3d 645, 707 N.E.2d 30 (11th Dist.1997), the court concluded that the accountant owed no duty to its client's creditor, a bank, when the accountant did not know that the bank would rely upon his report when it decided whether to extend additional credit to his client, Beidler-Taylor Roofing Company. In *Demshar*, the roofing company hired an accountant to review its 1993 financial statements. Before the accountant completed his report, Second National Bank of Warren already loaned the company $250,000. After the bank received the accountant's report, it loaned the company an additional $50,000. Several months later, the company defaulted on its loan obligation.

{¶48} The bank filed a complaint for professional negligence against the accountant and asserted that the accountant negligently reviewed the company's financial statements. The accountant, however, contended that he did not owe a duty of care to the bank and noted that the financial information he prepared for the company contained a disclaimer that indicated the accountant did not express any opinion regarding the financial statements. The bank argued genuine issues of fact remained as to whether the accountant specifically foresaw that the bank would rely upon the accountant's representations and pointed out that the accountant stated in his deposition that he knew that the bank was one of the company's creditors and he expected the bank would review the financial statement. The bank further observed that its loan officer stated in his deposition that, despite the disclaimer, he believed the accountant expressed an opinion regarding the financial statements.

{¶49} The trial court determined that the accountant did not owe a duty of care to the bank. On appeal, the court concluded that the evidence failed to show that the accountant specifically foresaw that the bank would rely on his work:

> Even if we accept that [the accountant] knew that

> his client, Beidler-Taylor, was going to give [the bank] a copy of the March 9, 1994 letter and report, we cannot conclude that appellant satisfied the *Haddon View* test. *Haddon View* requires that an accountant have specifically foreseen that a third party was a member of a limited class who intended to rely on the accountant's work product for business purposes. While appellee knew that appellant was a creditor of Beidler-Taylor and that appellant might *review the letter and report* after their submission to Beidler-Taylor, this does not establish that appellee specifically foresaw that the bank, as a result of such review, would *rely on his work product for business purposes*, despite the disclaimer.

Id. at 650 (emphasis sic.). The court signified that, even if the accountant knew that the bank might review the financial statement, he did not know that the bank might rely upon the financial statement when it decided whether to extend additional credit to the company. The court thus concluded that the bank failed to present any evidence that the accountant "should have specifically foreseen that a report to a client, which included a very specific disclaimer as to the veracity of the data relied upon, would be relied upon for business purposes by a third party such as [the bank]." *Id.* at 653.

{¶50} In reaching its decision, *Demshar* relied upon *BancOhio National Bank v. Schiesswohl*, 33 Ohio App.3d 329, 515 N.E.2d 997 (9th Dist.1986), which interpreted Section 552 of the Restatement to mean that the accountant must have been "'manifestly aware' that the financial statements in controversy would be provided to the class." *Id.* at 331, quoting Section

552, comment a.

{¶51} Another Ohio appellate court has concluded that "[t]he Restatement clearly indicates that liability may be imposed for negligent misrepresentation only if the disseminator of the information intends to supply it to a specific person or to a limited group of people." *Amann v. Clear Channel Communications*, 165 Ohio App.3d 291, 297, 846 N.E.2d 95 (10th Dist.2006) (determining that a radio station's listeners are not a limited class).

{¶52} Other state and federal courts have also discussed the import of *Ultramares* and the Restatement. These cases shed additional light on the meaning of the *Haddon View* holding that "[a]n accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen." In particular, a decision from the United States Court of Appeals for the Fourth Circuit appears to align with the *Haddon View* court's reasoning and with the facts involved in the case before us. *Ellis v. Grant Thornton LLP*, 530 F.3d 280 (C.A.4, 2008).

{¶53} In *Ellis*, the court determined that an accounting firm (Grant Thornton) did not owe a duty of care to a prospective employee (Gary Ellis) of its client (First National Bank of

Keystone). In that case, First National Bank of Keystone (Keystone) was the subject of an Office of the Comptroller of Currency (OCC) investigation into its banking activities. The OCC later required Keystone to retain an accounting firm to perform an audit, and Keystone retained Grant Thornton to audit Keystone's consolidated financial statements.

{¶54} Stan Quay, the lead Grant Thornton partner who worked on Keystone's audit, and a junior manager at Grant Thornton failed to discover a $515 million discrepancy in Keystone's financial statements. Quay informed Keystone's board, prospective board members, and shareholders "that Keystone was going to get an unqualified or 'clean' audit opinion on its 1998 financial statements." At a shareholders meeting, Quay also distributed copies of Keystone's financial statements.

{¶55} Later, Grant Thornton "issued and delivered to Keystone's board its audit opinion stating that Keystone's financial statements were fairly stated in accordance with the GAAP and reflecting a shareholder's equity of $184 million." *Id.* at 285. In reality, however, Keystone was insolvent. Yet, due to Grant Thornton's report, "Keystone's board continued to declare dividends and operate the bank." *Id.*

{¶56} While Grant Thornton worked on the audit, Ellis crossed paths with Keystone's chairman of the board, Billie

Cherry. Cherry invited Ellis to attend Keystone's annual shareholders meeting and "suggested that Ellis should consider becoming president of Keystone." *Id.* at 285.

{¶57} Ellis accepted the invitation to attend Keystone's shareholders meeting, but first attended Keystone's board meeting. The board agreed to allow Ellis to review the bank's financial condition and to speak with Quay and "other Keystone insiders." *Id.* Ellis later met with Quay and two outside directors, and Quay informed Ellis "that Keystone was going to receive a 'clean [audit] opinion.' (J.A. 401)." *Id.* at 285-286.

{¶58} Ellis also attended the shareholders meeting when Quay informed the attendees that "Grant Thornton was going to give Keystone a clean audit opinion for 1998." *Id.* at 286. Several days later, Ellis again met with Quay, and Quay informed Ellis that "Keystone would receive a clean audit opinion." *Id.*

{¶59} The next month, Ellis attended another board meeting and reviewed Grant Thornton's final audit report. After the board approved Ellis as Keystone's president, Ellis accepted the position, but six months later Keystone was declared insolvent.

{¶60} Numerous lawsuits ensued, including Ellis's claim against Grant Thornton for negligent misrepresentation. Ellis claimed he accepted employment with Keystone "only because he

relied on negligent misrepresentations" that the accounting firm and its partner made. *Id.* at 283. Ellis asserted that "he relied on Grant Thornton's audit, which was consistent with Quay's earlier * * * statements that Grant Thornton was going to issue a clean audit opinion for 1998, in deciding to accept the job as president of Keystone." *Id.* at 286.

{¶61} At trial, the court found in favor of Ellis's negligent misrepresentation claim. The court determined that Ellis, when he decided to accept the job offer, relied upon the financial statements that Quay gave to him, Quay's verbal statements regarding the audit report, and Grant Thornton's written audit report. The court further found that "'Quay intended and knew that Ellis would rely on his statements.' (J.A. 2707)." *Id.* The court awarded Ellis $2,419,233 in damages and Grant Thornton appealed.

{¶62} On appeal, the Fourth Circuit reversed the district court's decision. In doing so, the court noted that West Virginia law applied and the state's highest court previously adopted the Restatement approach when it answered a certified question that asked "whether the lack of privity between an accountant and a bank was a complete defense to the bank's suit against the accountant for professional negligence in preparing a financial statement." *Id.* at 287. The *Ellis* court observed

that the West Virginia court answered the certified question in the negative. *First Nat. Bank of Bluefield v. Crawford*, 182 W.Va. 107, 386 S.E.2d 310, syllabus (1989) ("In the absence of privity of contract, an accountant is liable for the negligent preparation of a financial report only to those he knows will be receiving and relying on the report."). The court stated, however, that the West Virginia court "gave no further meaningful guidance concerning under what circumstances an accountant can be liable to third parties for negligent misrepresentations under [Section] 552." *Ellis* at 288. The Fourth Circuit thus defined its duty as "predict[ing] whether, under the facts of this case, Grant Thornton owed Ellis a duty of care under the West Virginia law of misrepresentation." *Id.* at 287.

{¶63} To predict how the state's highest court would resolve the issue, the *Ellis* court reviewed the Restatement's language and the elements needed to impose liability under the Restatement. The court indicated that the comments to the Restatement show that "[t]he Restatement approach is deliberately restrictive to encourage the free flow of commercial information" and that it "seeks to protect suppliers of commercial information from liability in instances in which they oblige themselves to provide information but the terms of

the obligation are unknown to them." *Id.* at 289, quoting Section 552, comment a ("By limiting the liability for negligence of a supplier of information to be used in commercial transactions to cases in which he manifests an intent to supply the information for the sort of use in which the plaintiff's loss occurs, the law promotes the important social policy of encouraging the flow of commercial information upon which the operation of the economy rests.").

{¶64} Next, the court set forth six elements, derived from the Restatement and identified in *North American Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 41-42 (C.A.1, 2001), that a third party must establish to succeed on a negligent misrepresentation claim against an accountant:

> (1) inaccurate information, (2) negligently supplied, (3) in the course of an accountant's professional endeavors, (4) to a third person or limited group of third persons for whose benefit and guidance the accountant actually intends or knows will receive the information, (5) for a transaction (or for a substantially similar transaction) that the accountant actually intends to influence or knows that the recipient so intends, (6) with the result that the third party justifiably relies on such misinformation to his detriment.

Id. at 289, citing *Lapalme*. Furthermore, "the accountant's 'actual knowledge * * * should be ascertained at the time the audit report or financial statement is issued.'" *Id.*, quoting *Lapalme*, 258 F.3d at 39, 42.

{¶65} When applying these six elements, the court concluded that the record contained no evidence to support the fourth, fifth, and sixth elements. The court first found that Ellis did not present any evidence to demonstrate that he, or any other potential employee, was a member of a limited group of persons for whose benefit Grant Thornton prepared the audit report. The court stated that "Ellis failed to show that Grant Thornton knew (or intended) that potential employees, like Ellis, were intended to receive the audit report for their benefit and guidance." *Id.* The court pointed out that Grant Thornton delivered the audit report to Keystone's board of directors and the report "plainly states that the audit report was *not* intended for use by third parties." *Id.* (emphasis sic.). The audit report that Grant Thornton delivered to Keystone's board "plainly stated on the first page" that the "'report is intended for the information and use of the Board of Directors and Management of The First National Bank of Keystone and its regulatory agencies and should not be used by third parties for any other purpose.' (J.A. 2903)." *Id.* at 285. The court recognized that, although Ellis stated he relied upon Quay's verbal representations regarding Keystone receiving a clean audit opinion, Ellis's reliance upon Quay's statements did not show that Grant Thornton actually intended to benefit potential

employees like Ellis, or that it knew that potential employees would receive the financial information. The court pointed out that Grant Thornton "was Keystone's auditor and was hired to conduct an audit for the benefit of Keystone and the OCC. Grant Thornton was not hired to go over with each potential employee the soundness of Keystone's financial condition." *Id.* at 290. Additionally, "Grant Thornton was not aware of the existence of the potential employment transaction between Ellis and Keystone until after Grant Thornton reached its decision to give Keystone a clean audit opinion. If the scope of the audit involved potential employees, one would expect at least some knowledge on the part of Grant Thornton before [it] formed [its] audit opinion." *Id.*

{¶66} The *Ellis* court further concluded that "the clean audit opinion information was disclosed for the benefit of Keystone's board and not potential employees such as Ellis." *Id.* The court stated that Ellis's attempt to use Quay's verbal statements "into ones for his benefit, by virtue of his meetings with Quay, ignores the business reality that Grant Thornton was hired and performed the audit for the benefit of Keystone and the OCC. It also ignores the fact that any release of information to Ellis was done at the behest of Keystone, not Grant Thornton." *Id.* Thus, the court concluded that "[t]here

is no evidence in the record to support the conclusion that Ellis was a member of any limited group of people for whose benefit Quay's statements were made." *Id.*

{¶67} To further support its conclusion, the *Ellis* court quoted an illustration that appears in the comments to the Restatement:

> "A, an independent public accountant, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. A is not informed of any intended use of the financial statements; but A knows that the financial statements, accompanied by an auditor's opinion, are customarily used in a wide variety of financial transactions by the corporation and that they may be relied upon by lenders, investors, shareholders, creditors, purchasers, and the like, in numerous possible kinds of transactions. In fact B Company uses the financial statements and accompanying auditor's opinion to obtain a loan from X Bank. Because of A's negligence, he issues an unqualifiedly favorable opinion upon a balance sheet that materially misstates the financial position of B Company, and through reliance upon it X Bank suffers pecuniary Loss. A is not liable to X bank."

Id., quoting Section 552, comment h, illus. 10.

{¶68} The *Ellis* court also found "Illustration 10 * * * materially indistinguishable." *Id.* at 291. The court explained:

> Like the accountant in the illustration, Grant Thornton was not aware of an intended use of its audit opinion beyond the customary business planning use of an audit opinion by a corporation such as Keystone and the use by the OCC for oversight, as it was hired "to conduct an annual audit of the customary scope for [Keystone]

> and to furnish [its] opinion on [Keystone's] financial statements." Indeed, Grant Thornton was not aware that any potential employee of Keystone was going to base their decision to seek employment with Keystone on the outcome of the audit. Rather, in performing its audit function, Grant Thornton was aware that its audit opinion and any statements made leading up the issuance of the audit opinion may be relied upon by shareholders, investors, and perhaps potential employees such as Ellis. However, more than a tenuous awareness of this sort is required to impose liability on Grant Thornton. To hold otherwise would transform the Restatement approach into the foreseeability approach * * * . Ellis was required to show that Grant Thornton knew that its audit opinion would be used by Keystone to assist potential employees in making their decision concerning whether to come to work for Keystone. The record simply does not demonstrate that Ellis made such a showing.

Id.

{¶69} Next, the *Ellis* court examined "the fifth element's substantiality requirement." *Id.* The court stated that the fifth element requires courts to consider two questions. First, courts consider, "from the accountant's standpoint, what risks he reasonably perceived he was undertaking when he delivered the challenged report or financial statement." *Id.*, citing *Lapalme*, 258 F.3d at 41. "If the accountant is unaware of a potential risk, then liability cannot attach." *Id.* Next, courts objectively compare "the transaction to which the accountant had actual knowledge and the transaction that in fact occurred." *Id.* The court explained that this objective comparison should not "be hypertechnical, but, rather, must be conducted in light

of customary business world practices and attitudes." *Id.*, citing Section 552, comment j. The essential aim of the comparative inquiry "'is to determine whether the two transactions share essentially the same character. If so, the actual transaction is substantially similar to the contemplated transaction (and, therefore, liability-inducing).'" *Id.*, quoting *Lapalme*, 258 F.3d at 41.

{¶70} Applying these principles, the *Ellis* court determined that "[w]hen Grant Thornton issued its audit report, it was not assuming the risk that third parties would rely on the report. As noted above, the report itself states that it is not to be used by third parties." *Id.* Additionally, the court did not believe that Ellis's reliance on Quay's statements suggested that Grant Thornton "was assuming the risk of being liable for Ellis' future lost earnings." *Id.*

{¶71} The *Ellis* court also determined that the transactions were not substantially the same. The court explained that Grant Thornton was hired to perform an audit and knew that "the audit was being done for the benefit of Keystone and the OCC." *Id.* at 292. Grant Thornton was not, however, aware "that its audit was being performed for the benefit of potential employees of Keystone." *Id.* The court concluded that "to find the fifth element satisfied, [it] would have to materially change the

transaction from an audit undertaken to benefit Keystone and the OCC to one intended to benefit potential employees of Keystone." *Id.*

{¶72} With respect to the sixth element, the *Ellis* court determined that Ellis did not justifiably rely upon the audit report or Quay's statements. The court pointed out that "the audit report stated that it was not intended for use by third parties." *Id.* Additionally, Ellis knew

> at the time he signed his employment contract that the audit report was not to be used by third parties. A person as sophisticated and experienced in the banking business as Ellis is, he knew he could not justifiably rely on Quay's statements when the report itself stated otherwise.

Id. The court thus reversed the district court's judgment.

{¶73} After our review, we believe that the facts in the case before us are "materially indistinguishable" from Illustration 10. *Id.* at 291. Like the scenario described in the Restatement, Adkins retained appellee to prepare financial compilations of the customary scope. Appellee was not retained to furnish any opinion regarding Midwest Coal's or Landash's financial statements, nor informed of any intended use of the financial compilations that it prepared. Appellee may have known that financial compilations might be used in a wide variety of circumstances, but, like the accountant in

Illustration 10, appellee is not liable for pecuniary loss suffered by one who, completely unbeknownst to appellee, relied upon the compilations. Furthermore, the facts in the case at bar closely align with *Ellis*, *Demshar*, and *Schiesswohl*. In those cases, none of the accountants knew of any intended use of the financial documents beyond the customarily used business purposes. The accounting firm in *Ellis*, for example, knew that the corporation would use its financial statements, but did not know that potential employees of the corporation would rely upon its financial statements when they decided whether to accept employment with the company. In *Demshar*, the accountant knew that the bank might review his client's financial information, but did not know that the bank would rely upon the information when it decided to increase the client's line of credit. In *Schiesswohl*, the accountants were aware that its client submitted financial statements to one company (John Deere), but did not know at the time they prepared the statements that its client might submit the financial statements to a bank.

{¶74} Likewise, in the case at bar, appellee knew that Adkins and his businesses might rely upon the compilations and the tax return, but appellee did not know of any intended use, beyond the customarily used business purposes, of the financial compilations it prepared. We further note that, between April

2015 and July 2015, when appellee prepared the 2014 Midwest Coal compilation and Adkins' 2014 tax return, appellee did not have any knowledge, or specifically foresee, that Adkins intended to use the first draft of the Midwest Coal compilation (which showed $7 million net revenue) and Adkins' personal tax return to influence potential investors.

{¶75} Furthermore, even if appellants presented evidence to show that appellee knew, when it prepared the 2014 Midwest Coal compilation, that Adkins had investors, or that he used short-term financing to obtain the tire inventory, no evidence shows that appellee knew, when it prepared the financial compilations, that Adkins might use the compilations to influence investors or to obtain short-term financing.[2] As *Shiesswohl* indicates,

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[2] Appellants contend that the following evidence shows that appellee knew that investors relied upon the financial documents that appellee prepared for Midwest Coal and Landash:

1. Johnson was aware that an entity named Sterling Consulting and Management, LLC forwarded Midwest Coal's financial information to appellee and that this email also included Adkins and an entity named Sabine Capital. Appellants claim that the involvement of Sterling and Sabine "would have alerted Johnson that investors likely [were] involved."

2. Johnson was aware that Adkins had sent appellee bank statements from investors who provided Adkins the statements "to show wires for tires going in and out."

3. Johnson was aware that Adkins' 2013 and 2014 inventory was

however, being aware that Midwest Coal already had investors or short-term financing does not also indicate that appellee knew, or specifically foresaw, that Adkins would use the draft compilation report to influence additional investors.

{¶76} After appellee finalized the 2014 Midwest Coal

"short term finance."

4. Johnson received an email from Adkins' attorney, Edwin Martin, that stated, "Platinum Partners is conducting its due diligence before funding Mustang Mining's tire deals. Midwest is participating in the deals." The email continued to explain that Platinum Partners "want[ed] to see the primary purchase-and-sale paper trail [Johnson] used to compile the tire purchase (COGS) and sale (Sales) info appearing on Midwest's financial statements, along with the financial statements themselves, and a brief description of how the main source documents related to the COGS and Sales line items on the financial statements."

5. Johnson stated that in late 2015, he was aware that the statements "were being sent to investors."

6. On January 30, 2016, Johnson received a call from a potential lender.

7. Johnson knew that Nick Lather raised money for Adkins' tire deals because Adkins asked Johnson how Adkins should handle Lather "who raises money for my tire deals."

8. Mario Shane contacted Johnson, asked about financial statements, and explained, "we want to show the growth of the business, as we prepare information for institutions requesting expanding the credit facility."

9. Shane asked Johnson to help with "a financial model/projections from the income statement for 2016, 2017, [and] 2018." Shane indicated that he wanted "to consider the impact on the future financials for the $50-$100 mil credit facility coming available for the business near term."

financial compilation, and before Adkins had engaged appellee to compile financial information for Landash, Shane asked Johnson about private equity or institutional investors. Johnson told Shane that obtaining private equity or institutional investors would require audited financial statements. Clearly, the record presented on appeal contains no evidence that Shane or Adkins requested audited financial statements.

{¶77} Appellants did present some evidence that Johnson learned, at the end of 2015 or early 2016, that Adkins provided financial information to third parties. However, any financial information that had been provided to third parties during that time frame would have been the financial compilations that appellee had already prepared for Midwest Coal and finalized in July 2015. Again, when appellee prepared this compilation, appellee did not know that Adkins showed financial information to investors or potential investors. Instead, appellee did not learn that Adkins showed the 2014 Midwest Coal compilations to any third parties until after appellee had completed them. Thus, appellee cannot be charged with knowing, when it prepared the 2014 Midwest Coal compilations, that Adkins intended to use them to influence others to invest in Landash.

{¶78} At the end of April 2016, Adkins engaged appellee to prepare financial documents for Landash. At this time, appellee

may have gathered general knowledge, based upon Johnson's conversation with Shane and Adkins, that Adkins might be interested in additional investors. This general knowledge, however, does not satisfy the Restatement standard that the accountant be manifestly aware that a third party would rely upon the accountant's representation for a specific purpose, or that Adkins would provide the financial documents to third parties to influence investment decisions. *See Schiesswohl*, 33 Ohio App.3d at 331.

{¶79} Additionally, appellee's engagement letters did not indicate that the financial documents were prepared for the benefit of potential investors or any other third party. Thus, when appellee agreed to compile the financial information, appellee did not know that Adkins intended to show the documents to potential investors to influence their decision to invest in Landash. Instead, appellee knew that, as a general matter, Adkins might possibly show the financial documents to others. "However, more than a tenuous awareness of this sort is required to impose liability on [appellee]. To hold otherwise would transform the Restatement approach into the [reasonable] foreseeability approach * * * ." *Ellis*, 580 F.3d at 291; *accord Trustcorp Mortg. Co. v. Zajac*, 1st Dist. Hamilton No. C-060119, 2006-Ohio-6621, ¶ 33 ("Trustcorp in this case was one of many

lenders, mortgage brokers, or borrowers that might have relied upon the appraisal reports, and the record does not reflect that the appraisers had prior dealings with Trustcorp.").

{¶80} Moreover, unlike the accountant in *D&H Autobath* who knew that a third party had requested a "stamp of approval" for a business's financial reports, neither Adkins nor Shane nor anyone else involved in the conversations suggested to Johnson that third parties had requested a "stamp of approval" on Midwest Coal's or Landash's financial compilations. Even though Jamie Frauenberg may have interpreted the financial compilations in that manner, Frauenberg's interpretation does not establish that appellee specifically foresaw that Frauenberg, or similar investors, would rely upon the documents in such a manner.

{¶81} Additionally, in contrast to the accounting firm in *Ortner* that prepared marketing materials for investors, here appellee did not prepare the financial compilations as part of a marketing package to present to potential investors. Rather, appellee's engagement letters defined the scope of its work, and none of its work included providing financial information for the benefit of any third parties.

{¶82} Thus, in view of the foregoing, we do not believe that any evidence exists to demonstrate that appellee specifically foresaw that third parties would rely upon the information

contained in the 2014 draft Midwest Coal compilation report, Adkins' 2014 tax return, or the Landash financial compilations. While appellee could have had an inkling that Adkins might show financial compilations to banks, potential investors, and others, the Restatement and *Haddon View* require more than an inkling that the financial compilations might be disseminated to others.

{¶83} In sum, even if the evidence shows that appellee may have acquired some general knowledge that investors may be involved in Adkins' businesses, the evidence does not show that appellee specifically foresaw that a limited class of investors would rely upon the representations contained in appellee's financial compilations and Adkins' tax return when deciding whether to invest in Landash.

{¶84} Additionally, appellee's financial compilations carried disclaimers to alert readers that appellee did not provide any assurances or opinions regarding the financial information contained in the compilations. The *Demshar* court determined that the presence of a disclaimer meant that the accountant did not specifically foresee that a third party would rely upon the accountant's report. *Demshar*, 124 Ohio App.3d at 650. Moreover, as we explain in our discussion of appellants' second, third, and fourth assignments of errors, in light of

those disclaimers, appellants' claimed reliance on those documents is not reasonable.

{¶85} Consequently, we disagree with appellants that the trial court incorrectly determined that appellants are not within the limited class of individuals whose reliance upon appellee's representations was specifically foreseen. Therefore, we believe that the trial court correctly concluded that appellee did not owe appellants a duty as it relates to a professional negligence claim in general, or as it relates to a negligent misrepresentation claim under Section 552 of the Restatement.

{¶86} Accordingly, based upon the foregoing reasons, we overrule appellants' first assignment of error.

III

{¶87} For ease of discussion, we consider appellants' second, third, and fourth assignments of error together.

{¶88} In their second assignment of error, appellants assert that the trial court erred by granting appellee summary judgment regarding their claims for negligence, intentional misrepresentation, and negligent misrepresentation. In their third assignment of error, appellants argue that the trial court erred by ruling upon the element of justifiable reliance when appellee had not asserted in its summary judgment motion that no

genuine issues of material fact remained as to whether appellants justifiably relied upon the financial documents. Appellants contend that because appellee failed to point to a lack of evidence regarding the element, appellants did not have a corresponding duty to demonstrate the existence of a genuine issue of material fact. In their fourth assignment of error, appellants assert that the trial court incorrectly determined that no genuine issues of material fact remained as to whether it justifiably relied upon the financial documents.

{¶89} We first observe that our disposition of appellants' first assignment of error renders the second assignment of error moot as it relates to appellants' negligence and negligent misrepresentation claims. Thus, we will review appellants' second assignment of error as it relates to intentional misrepresentation.

{¶90} A successful intentional misrepresentation claim (also known as fraud) requires the complaining party to establish all six of the following elements: (1) a representation or, when a duty to disclose exists, concealment of a fact, (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into

relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.[3] *E.g., State ex rel. Seibert v. Richard Cyr, Inc.*, 157 Ohio St.3d 266, 2019-Ohio-3341, 134 N.E.3d 1185, ¶ 36; *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-

[3] We observe that the Ohio Supreme Court consistently refers to the claim involving these six elements as fraud. *State ex rel. Seibert v. Richard Cyr, Inc.*, 157 Ohio St.3d 266, 2019-Ohio-3341, 134 N.E.3d 1185, ¶ 36; *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 61; *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27; *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 47; *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986). Ohio appellate courts sometimes refer to fraud and intentional misrepresentation as separate claims for relief. *Martcheva v. Dayton Bd. of Education*, 2021-Ohio-3524, 179 N.E.3d 687, ¶ 58, 61 (2nd Dist.) (recognizing two separate claims for fraud and intentional misrepresentation and defining elements necessary to prove each claim as the same). Other courts refer to the claim as intentional misrepresentation. *Jones v. Carpenter*, 10th Dist. Franklin No. 17AP-401, 2019-Ohio-619, ¶ 47; *Cuspide Properties, Ltd. v. Earl Mechanical Servs.*, 6th Dist. No. L-14-1253, 2015-Ohio-5019, 53 N.E.3d 818, ¶ 54; *Wells Fargo Bank, N.A. v. Perkins*, 10th Dist. Franklin No. 10AP-1022, 2011-Ohio-3790, ¶ 20. Still other courts refer to the claim as fraudulent misrepresentation. *HSBC Bank USA, Natl. Tr. Co. v. Teagarden*, 2013-Ohio-5816, 6 N.E.3d 678, ¶ 29-30 (11th Dist.); *Glazer v. Chase Home Fin., L.L.C.*, 8th Dist. Cuyahoga No. 99736, 2013-Ohio-5589, ¶ 80 ("fraudulent representation or concealment"). At least one court has noted that in Ohio, "fraud and intentional misrepresentation possess the same elements." *Groedel v. Arsham*, 8th Dist. Cuyahoga No. 88245, 2007-Ohio-1715, ¶ 23; *accord Applegate v. Northwest Title Co.*, 10th Dist. Franklin No. 03AP-855, 2004-Ohio-1465, fn.2 (noting that "[t]he terms 'fraud' and 'intentional misrepresentation' have been used interchangeably by the courts in cases where an intentional misrepresentation of a fact forms the basis for a cause of action for fraud, as in the present case").

Ohio-1189, 843 N.E.2d 1170, ¶ 47.

{¶91} We note that "privity is not required to assert a claim of common law fraud, out of a concern that an innocent third party should not suffer at the hands of an intentional wrongdoer." *Haddon View*, 70 Ohio St.2d at 158; *accord Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, ¶ 11, quoting *Simon v. Zipperstein*, 32 Ohio St.3d 74, 76, 512 N.E.2d 636 (1987) ("necessity for privity may be overridden if special circumstances such as 'fraud, bad faith, collusion or other malicious conduct' are present"); *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 415, 834 P.2d 745 (1992) ("no authority that would immunize auditors from liability to third parties for intentional misrepresentation"). Furthermore, the *Haddon View* court indicated that a third party that asserts fraud against an accountant need not establish that the accountant intended "to induce reliance." *Haddon View*, 70 Ohio St.2d at 158, citing 3 Restatement of Torts 2d 66, Section 531.[4]

[4] Section 531 of the Restatement provides as follows:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

{¶92} A more recent Ohio Supreme Court case, however, states that a plaintiff may not assert a fraud claim based "on misrepresentations made to third parties." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, paragraph seven of the syllabus. Nevertheless, in light of the fact that *Lucarell* did not explicitly overrule *Haddon View*, we believe we must follow the *Haddon View* rule to ascertain an accountant's potential liability to a third party for fraud.

{¶93} In the case sub judice, we agree with appellee that no genuine issues of material fact remain as to whether appellee made a false representation. Assuming, arguendo, that appellants fall within the class of persons appellee intended, or had reason to expect, to act or to refrain from action in reliance upon the financial documents, appellants cannot establish that a genuine issue of material fact remains regarding the falsity of appellee's representations made via the financial documents. As appellee points out, appellants did not identify any specific statement or numbers contained in appellee's financial documents that are false. When asked to identify a falsity, none of the appellants or the appellants' expert could identify a false assertion that appellee made in the financial documents. At best, appellants' expert identifies

three "red flags" that he believes appellee should have further investigated before finalizing the financial documents. Beyond blaming appellee for failing to further investigate the financial information that Adkins relayed to appellee, the expert does not point to any specific falsehoods contained in the financial documents that appellee prepared.

{¶94} Additionally, appellee's 2014 financial compilation contained a disclaimer that stated:

> * * * We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or provide any assurance about whether the financial statements are in accordance with the cash basis of accounting, which is a comprehensive basis of accounting other than accounting principles generally accepted in the United States of America.
>
> The owner is responsible for the preparation and fair presentation of the financial statements in accordance with the cash basis of accounting and for designing, implementing, and maintaining the internal control relevant to the preparation and fair presentation of the financial statements.
>
> Our responsibility is to conduct the compilation in accordance with the Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. The objective of a compilation is to assist the owner in presenting financial information in the form of financial statements without undertaking to obtain or provide any assurance that there are no material modifications that should be made to the financial statements.
>
> The owner has elected to omit substantially all disclosures ordinarily included in financial statements prepared in accordance with the cash basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's assets,

> liabilities, capital, revenues and expenses. Accordingly, the financial statements are not designed for those who are not informed about such matters.

{¶95} The Landash compilations contained a similar disclaimer. Both disclaimers specifically cautioned individuals that the financial compilations carry no assurances or opinions regarding the financial information contained in the compilations. Thus, any reliance appellants may have placed upon appellee's financial compilations is not justifiable. *See Lucarell* at ¶ 64 (lack of reasonable reliance as a matter of law when "pro forma included a disclaimer"); *Bender v. Logan*, 2016-Ohio-5317, 76 N.E.3d 336, ¶ 53-55 (4th Dist.) (question of justifiable reliance ordinarily a question of fact, but summary judgment appropriate when no genuine issues of material fact exist as to whether a party justifiably relied on a misrepresentation); *see also Shannak v. Yark Automotive Group, Inc.*, 6th Dist. Lucas No. L-21-1027, 2021-Ohio-2372, ¶ 19 ("a plaintiff cannot claim to have justifiably relied on representations that contradict the terms of [a] written agreement"); *Crown Property Dev., Inc. v. Omega Oil Co.*, 113 Ohio App.3d 647, 657, 681 N.E.2d 1343 (12th Dist.1996), citing *Lepera v. Fuson*, 83 Ohio App.3d 17, 26, 613 N.E.2d 1060 (1st Dist.1992) ("[r]eliance is justified if the representation does not appear unreasonable on its face and if, under the

circumstances, there is no apparent reason to doubt the veracity of the representation"); *Dakota Bank v. Eiesland*, 645 N.W.2d 177, 183 (Ct.App.Minn. 2002) ("the disclaimers that accompanied the compilations in this case prevented any justifiable reliance by Dakota on the representations contained in those compilations"); *Evans v. Israeloff, Trattner & Co.*, 208 A.D.2d 891, 617 N.Y.S.2d 899, 900 (1994) (third party's reliance on unaudited financial statements containing alleged misrepresentations by accountants was not justified as a matter of law where the statements contained a disclaimer); *First Nat. Bank of Newton Cnty. v. Sparkmon*, 212 Ga.App. 558, 559, 442 S.E.2d 804 (Ga.App.1994) ("disclaimers effective to preclude any justifiable reliance by a third party upon the review and compilation reports they prefaced").

{¶96} We recognize that in their third assignment of error, appellants assert that appellee failed to seek summary judgment on the element of justifiable reliance and, as such, they argue that the trial court erred by ruling on the issue. We observe, however, that appellants, in their memorandum in opposition to appellee's summary judgment motion, specifically asserted that they justifiably relied on appellee's financial documents. Appellants stated, "as discussed above, [appellants] justifiably relied on the financial statements when making the loans."

Memo. Opp. at 37. Furthermore, appellants' argument that appears on pages 32 through 36 of their opposition memorandum focuses upon their reliance on appellee's documents and the import of the disclaimer. Consequently, because appellants raised and argued the issue, we do not agree that they were deprived of an opportunity to submit evidence regarding justifiable reliance. *See Revlock v. Lin*, 8th Dist. Cuyahoga No. 99243, 2013-Ohio-2544, ¶ 11-12 (court did not err by granting summary judgment on issue that nonmovant raised in opposition to summary judgment motion even though moving party had not raised in summary judgment motion); *Hunter v. Wal-Mart Stores, Inc.*, 12th Dist. Clinton No. CA2001-10-035, 2002-Ohio-2604, ¶ 14 (court did not err by ruling on issue nonmovant raised in opposition to summary judgment).

{¶97} We therefore disagree with appellants that the trial court erred by ruling on the question of justifiable reliance, or by determining that no genuine issues of material fact remained, regarding whether appellants justifiably relied upon the financial information.[5]

[5] To the extent that our conclusion under the first assignment of error that appellee did not owe a duty to appellants is arguably incorrect, the lack of a genuine issue of material fact regarding appellants' justifiable reliance provides an alternate ground to uphold the trial court's summary judgment regarding appellants' negligent misrepresentation claim.

{¶98} Accordingly, based upon the foregoing reasons, we overrule appellants' second, third, and fourth assignments of error.

IV

{¶99} In their fifth assignment of error, appellants assert that the trial court erred by entering summary judgment in appellee's favor regarding appellants' civil conspiracy claim.

{¶100} A civil conspiracy is "a malicious combination of two or more persons to injure another person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863 (1995), quoting *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 126, 512 N.E.2d 640 (1987), citing *Minarik v. Nagy*, 8 Ohio App.2d 194, 196, 193 N.E.2d 280 (8th Dist.1963). Ohio law does not recognize civil conspiracy as an independent cause of action. *Minarik*, 8 Ohio App.2d at 195-196. Rather, to prevail upon a civil conspiracy claim, a plaintiff must demonstrate the existence of an underlying unlawful act. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998), citing *Gosden v. Louis*, 116 Ohio App.3d 195, 219, 687 N.E.2d 481 (9th Dist.1996).

> The element of "malicious combination to injure" does not require a showing of an express agreement between defendants, but only a common understanding or

> design, even if tacit, to commit an unlawful act. *See Pumphrey v. Quillen* (1955), 102 Ohio App. 173, 177-178, 2 O.O.2d 152, 154-155, 141 N.E.2d 675, 679-680, citing Prosser on Torts (Hornbook Series), Section 109, at 1094, and cases cited. *See, also,* Restatement of the Law 2d, Torts (1979) 316, Section 876, Comments a and b. In *Pumphrey*, the court went on to state that not even a meeting is necessary and that "it is sufficient that the parties in any manner come to a mutual understanding that they will accomplish the unlawful design." *Id.* at 178, 2 O.O.2d at 155, 141 N.E.2d at 680, citing *Houston v. Avery* (1935), 19 Ohio Law Abs. 142, 147. The "malice" in "malicious combination" is legal or implied malice, "which the law infers from or imputes to certain acts," and is defined as "that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another." *See Pickle v. Swinehart* (1960), 170 Ohio St. 441, 443, 11 O.O.2d 199, 200, 166 N.E.2d 227, 229 (defining "malice" for purposes of "malicious prosecution"). This "malice," then, would be inferred from or imputed to a common design by two or more persons to cause harm to another by means of an underlying tort, and need not be proven separately or expressly.

Gosden, 116 Ohio App.3d at 219-220.

{¶101} In the case before us, after our review we have concluded that no genuine issues of material fact remain regarding appellants' underlying tort claims. Because appellants cannot demonstrate the existence of a genuine issue of material fact concerning their underlying tort claims (whether labeled negligent/intentional misrepresentation or fraud) against appellee, they cannot establish a genuine issue of material fact regarding their claim that appellee maliciously combined with Adkins to commit fraud. None of the evidence

suggests that appellee shared a common design with Adkins to harm appellants. Consequently, the trial court did not err by entering summary judgment in appellee's favor regarding appellants' civil conspiracy claim.

{¶102} Accordingly, based upon the foregoing reasons, we overrule appellant's fifth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants 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 Jackson County Common Pleas Court to carry this judgment into execution.

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

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

APPENDIX

{¶103} Kerry Johnson is the accountant at Fox, Byrd who worked on Adkins' businesses financial compilations. Johnson worked on financial information for two of Adkins' businesses: Midwest Coal, LLC and Landash Corporation.

{¶104} Johnson stated that the objectives of Adkins' initial engagement were to (1) "accumulate financial information for a non-assurance compilation statement, which would exclude statement of cash flows and exclude financial statement disclosures normally found in the footnotes"; (2) "prepare a tax return for Mr. and Ms. Adkins for 2014"; and (3) "provide general business and tax advice as needed."

{¶105} Johnson explained that "[a] compilation is putting financial information in a financial statement format. The accountant does not have any kind of obligation to verify or correspond or review the information that's been supplied by company management." Johnson stated that if he encounters information when preparing a compilation that is "clearly wrong, then [h]e would want to look deeper into that information." However, for "non-assurance services," "if there's not something obviously wrong with the data, the accountant has no obligation to verify the information."

{¶106} To prepare the 2014 statements for Midwest Coal, Johnson obtained bank statements and "details of sales and cost of sales records" and then inserted the details into a

spreadsheet. He also interviewed Adkins and Adkins' attorney about the activities and "asked specific questions about inventory, questions about accounts that weren't obvious from the records we had already received, inventory being the biggest."

{¶107} Johnson also received "balance information * * * with respect to some notes payable and notes receivable." Adkins informed Johnson that "the inventory was financed with a short-term loan." Additionally, Adkins and his attorney informed Johnson that the "short-term loans" "were institutional lending." Johnson did not receive any names of specific institutions. Johnson also learned that some of the bank statements that Adkins had sent were from "investors."

{¶108} On April 24, 2015, Johnson sent Adkins a draft financial compilation for Midwest Coal. Johnson explained that this draft compilation was not the final version and that over the ensuing three months, he continued to work on the final compilation. The draft financial compilation included an unsigned cover letter that stated that Fox, Byrd had "not audited or reviewed the accompanying financial statements and, accordingly, [did] not express an opinion or provide any assurance about whether the financial statements are in accordance with the cash basis of accounting." The letter further stated that "[t]he owner is responsible for the

preparation and fair presentation of the financial statements in accordance with the cash basis of accounting and for designing, implementing, and maintaining internal control relevant to the preparation and fair presentation of the financial statements." The letter defined Fox, Byrd's duty as conducting "the compilation in accordance with the Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants" and explained that "[t]he objective of a compilation is to assist the owner in presenting financial information in the form of financial statements without undertaking to obtain or provide any assurance that there are no material modifications that should be made to the financial statements."

The letter further explained:

> The owner has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared in accordance with the cash basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's assets, liabilities, capital, revenues and expenses. Accordingly, the financial statements are not designed for those who are not informed about such matters.

{¶109} On July 23, 2015, Johnson sent Adkins the final 2014 compilation for Midwest Coal. The final showed that Midwest Coal had net income of $4.9 million. The draft compilation had indicated that Midwest Coal had net income of $7.3 million. Johnson indicated that part of the reason for the large

discrepancy is that he had been waiting for Adkins to provide the commission expenses so that Johnson could add them to the compilation.

{¶110} Also at the end of July 2015, Johnson finished a draft 2014 tax return for Adkins and sent it to Adkins via email.

{¶111} In late 2015, Adkins hired an outside controller named Mario Shane. Johnson spoke with Shane, and Shane asked Johnson about investors. Johnson explained that he and Shane discussed private equity investors and large, institutional investors. Johnson told Shane and Adkins "that if they were even going to consider anything along those lines, they had to have audited financial statements, that these compiled financial statements of – the non-assurance compiled financial statements would not be sufficient for private equity or a large institutional investor."

{¶112} Around the same time that he spoke with Shane, Johnson learned that Adkins was providing financial statements to investors. However, Johnson stated that as of August 2015, he did not know that Adkins had been sharing the financial statements with any investors. Johnson explained that when he received an email asking about financial information, he told Adkins that "[i]f they wanted financials provided, they would have to do it themselves."

{¶113} At the end of January 2016, Johnson received "a phone

call from a person who identified themselves as a potential lender" and notified Adkins. Johnson indicated that "[t]he only information" that Johnson gave the caller "was that [Johnson] had prepared a 2014 tax return and that [he] was not authorized to provide any additional information at this time."

{¶114} At the end of April 2016, Adkins engaged Johnson to prepare financial compilations for Landash Corporation. Shortly thereafter, Johnson sent Adkins drafts of the compilations. On May 4, 2016, he sent Adkins the final compilation reports for Landash. Like the earlier 2014 Midwest Coal compilations, these 2016 Landash compilations contained a disclaimer that the financial statements were not audited and that appellee did "not express an opinion, a conclusion, nor provide any form of assurance on these financial statements."

{¶115} Jamie Frauenberg and his father own Addison Holdings, LLC. At his deposition, Jamie stated that in January 2016, he learned about Adkins' business opportunity through his father. At that time, Frauenberg received Adkins' 2014 tax return and the 2013 and 2014 financial compilations that Fox, Byrd had prepared for Midwest Coal that showed 2014 net income of $7,265,236. After reviewing Adkins' tax return and the Midwest Coal financial compilations and having additional conversations with Adkins, Addison Holdings loaned Landash Corporation $1.29 million.

{¶116} In May 2016, Adkins sent Frauenberg the 2015 and March 31, 2016 financial compilations that Fox, Byrd had prepared for Landash. Addison Holdings later loaned Landash an additional $530,000.

{¶117} Frauenberg explained that he understands that "there is a difference between a compilation and audited financials." However, Frauenberg "relied on a third-party CPA, Fox Byrd, on those tax returns with the assumption that they had done some sort of due diligence, some, any, to put those numbers on the return. Clearly, as we learned, it was all fake."

{¶118} Frauenberg also submitted an affidavit. Frauenberg attested that when making the loans to Adkins' business, he relied upon appellee's financial statements and tax returns. Frauenberg stated:

> Having the name of an accounting firm on the documents gave me added comfort concerning the legitimacy of Adkins and his business ventures. Based upon my years of experience working with accounting firms and my review of financial statements in other investments, I believed that Fox Byrd had performed appropriate due diligence and with respect to the information contained in the financial statements and tax returns it prepared. I would not have approved the loans to Landash without financial statements and the tax returns prepared by an accounting firm like Fox Byrd.

{¶119} Cal Klausner, appellants' expert, is a certified fraud examiner who opined that appellee's financial statements "were not prepared in accordance with the Code of Professional Conduct." He further stated that the financial statements

contain "inconsistencies that are not explained." Klausner explained that the balance sheet "had a number of issues" that "jump off the page as being very odd." He explained that in comparing the 2013 and 2014 balance sheets, the inventory figures are "nice round numbers" and the notes payable are "exactly in the same amount, which is an oddity that would require a question as to why." Klausner further noted that the "proprietor's capital" account had an ending balance in 2013 of $18,793, but in 2014, it was negative $7,186,000 with no explanation. Klausner admitted, however, that he reviewed the documents that were provided to Fox, Byrd to prepare the compilation and he did not find "anything inconsistent with the supporting documentation." Regardless, Klausner believes that Johnson made "a lot of assumptions" when he prepared the statement and that he "made a lot of mistakes."

{¶120} Klausner could not, however, identify which numbers on the compilation reports were inaccurate without performing an audit. He believes that "there is some glaring errors on the statements compared to the bank statements" and that Johnson "ignored a lot of the statements and made assumptions on his own to produce these financial statements." Klausner would have included an explanation for the difference in the proprietor's capital account. Klausner stated that "the whole [balance sheet] is a mistake." Klausner believes that Johnson "should

have made additional inquires as required to determine the correctness of these numbers."

{¶121} He believes that Fox, Byrd "owed a duty to both any investor and to the general public based on their duties under the Code of Professional Conduct." But he further stated that he is not providing a legal opinion regarding whether appellee owed appellants a duty.

{¶122} Klausner further believes that Johnson performed the services "in a hastily, rushed manner and ignoring obvious inconsistencies and things within the documents that were supplied to him, which he chose to ignore and not take into account when preparing the financial statements." Still, Klausner stated that he is not aware of any intentional misrepresentation that Fox, Byrd made.

{¶123} Klausner also submitted an affidavit. In his affidavit, Klausner stated:

> I am aware that Fox Byrd has asserted that it did not know, or have any reason to know, that the compiled financial statements were being prepared for use by third party investors. That assertion is not credible in my opinion based upon 45 years of experience preparing compiled financial statements. Compiled financial statements are most often prepared for the sole purpose of providing company financial data to investors or lenders. It is the rare occasion that a compiled financial statement is prepared only for the client's internal uses. In fact, in this case, at the outset of the engagement in April 2015, Mr. Adkins provided bank statements and wire transfer documents to Fox Byrd and expressly stated that those documents were provided by investors in his tire

business. Given the investor information provided to Fox Byrd by Mr. Adkins and the hurried timing of the request, it was clear that this was not being prepared solely for Mr. Adkins' internal use.