

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii, iv
INTRODUCTION.....	1
STATEMENT OF THE FACTS.....	1
ARGUMENT	3
 <u>APPELLANT’S PROPOSITION OF LAW AS ACCEPTED FOR DISCRETIONARY REVIEW:</u>	
In replacing alimony with "spousal support," the legislature did not reject <i>Kunkle v. Kunkle</i> , but kept intact its analysis that court-ordered payments for "sustenance and support" lose their statutory authority where healthy divorced spouses are financially independent.	3
 <u>APPELLEE’S RESPONSIVE PROPOSITION OF LAW :</u>	
R.C. 3105.18 as amended on January 1, 1991 directs trial courts to consider the appropriateness and reasonableness of spousal support rather than limiting such a consideration to financial necessity.....	3
 CONCLUSION	 23
PROOF OF SERVICE	26
SUPPLEMENTAL APPENDIX	Supp. Appx. Page
Appellant-Defendant James C. Janosek Memorandum in Support of Jurisdiction to the Supreme Court of Ohio (Pages ?).....	SA-1

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Blakemore v. Blakemore</i> (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.....	5, 6,
<i>Bolinger v. Bolinger</i> (1990), 49 Ohio St.3d 120, 551 N.E.2d 157.....	6
<i>Brown v Brown</i> , (May 11, 1995), 10 th Dist No. 94APF09-1306, 1995 WL 311407.....	9
<i>Cherry v. Cherry</i> (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293.....	5
<i>Chester Township v. Geauga Co. Budget Comm.</i> (1976), 48 Ohio St.2d 372, 358 N.E.2d 610.....	6
<i>Conner v. Conner</i> (1959), 170 Ohio St. 85, 162 N.E.2d 852.....	6
<i>Davis v Davis</i> , 8 th Dist.No. 82343, 2003-Ohio-4657.....	20
<i>Dorton v Dorton</i> , (June 15, 2001), 5 th District No. 00CAF10029, 2001 WL 715860.....	9,22
<i>Gerlach v Gerlach</i> , 10 th District Nos. 03AP-22, 872, 2004-Ohio-1607.....	9
<i>Gray v Gray</i> , 8 th Dist.No. 80625, 2002-Ohio-3793.....	20
<i>Handschumaker v Handschumaker</i> , 4 th Dist. No. 08CA19, 2009-Ohio-2239.....	22
<i>Hiscox v Hiscox</i> , 7 th Dist.No. 07 CO 7, 2008-Ohio- 5209.....	15
<i>Holcomb v Holcomb</i> , (1989), 44 Ohio St.3d 128, 541 N.E.2d 597.....	5
<i>Howard v. Miami Twp. Fire Div.</i> , 119 Ohio St.3d 1, 2008 -Ohio- 2792.....	16
<i>Kennedy v. Kennedy</i> , 7th Dist. No. 03 CO 37, 2004-Ohio-6798.....	15
<i>Kunkle v Kunkle</i> , (1990), 51 Ohio St. 3d 64, 544 N.E. 2d 83.....	1,
.....	2, 3, 5, 6, 7, 8, 14, 16,17,20,22
<i>Leversee v. Leversee</i> (Mar. 25, 1993), Franklin App. No. 92AP-1307.....	15
<i>Mandelbaum v Mandelbaum</i> (2009), 121 Ohio St. 3d 433, 2009-Ohio-1222, 905 N.E.2d 172.....	17
<i>Martin v. Martin</i> (1985), 18 Ohio St.3d 292, 342, 480 N.E.2d 1112.....	6
<i>McConnell v McConnell</i> (Feb. 3, 2000), 8 th Dist No.74974, 2000 WL 126730.....	20
<i>Okos v Okos</i> (2000), 137 Ohio App.3d 563, 571-572; 739 N.E.2d 368.....	23
<i>Pitzer v. Pitzer</i> (Oct. 22, 2001), 12 th Dist No. 2000-01-004, 2001 WL 1255866.....	9
<i>Pruden v Pruden</i> , (June 2, 1994), 10 th District No. 93APF10-1428, 1994 WL 24253.....	9
<i>Schultz v. Schultz</i> (1996), 110 Ohio App.3d 715.....	4

State v. Adams (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.....6
Steiner v. Custer (1940), 137 Ohio St. 448, 31 N.E.2d 855.....6
Thomas v Thomas (April 29, 1999), 10th Dist.No. 98AP-621, 1999 WL 252483.....22
Tokar v Tokar, 8th District No. 89522, 2008-Ohio-6467.....9
Waller v Waller, (2005), 163 Ohio App. 3d 303, 2005-Ohio- 4891, 837 N.E. 2d 843.....9,15
Wolfe v. Wolfe (1976), 46 Ohio St.2d 399, 350 N.E.2d 413.....5
Young v. Young (Dec. 29, 1993), Lorain App. No. 93CA005554.....15

STATUTES:

R.C.§3105.18.....1,
.....3, 4,5,9,10,11,12,13,14,15,16,17,18,20,21,23

INTRODUCTION

Appellant's argument would have this Court discount almost twenty years of recognition by Ohio appellate courts that the General Assembly amended R.C. 3105.18 in January 1991. The need standard argued by Appellants as being set forth in *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83 ignores the nature of the long term marriage presented and the long-standing legislative reality that the determinative statute now incorporates in an "appropriate and reasonable" standard to be used by the lower courts when determining an award of spousal support.

In the present matter the trial court exercised its sound discretion in awarding spousal support after due consideration of the required factors enumerated in R.C. 3105.18(C) (1) (a)-(n). After considering the extensive analysis undertaken by the lower court, the Eighth District Court of Appeals correctly found no error in the lower court's analysis and award of spousal support given the totality of the circumstances presented in the case.

STATEMENT OF THE FACTS

Appellee has recited operative facts that are relevant to the issues presented by this appeal as accepted by The Ohio Supreme Court as those facts are presented within the body of the Appellee's Merit Brief. This Court accepted this matter on Appellant's single proposition of law, stating that the trial court and the 8th District Court of Appeals had failed to apply an analysis that was consistent with the holdings in *Kunkle v Kunkle*. Part of the singular proposition of law that was accepted for appeal was the legal determination that the holdings in *Kunkle* regarding the award of spousal support, should

be retained by the Courts of Ohio despite the fact that The General Assembly had amended R.C. 3105.18 after the *Kunkle* decision was announced.

Appellee views this appeal as one that is controlled by this Court's interpretation of the General Assembly's legislative intent in changing the relevant statutory language of R.C. §3105.18, as well as an analysis of the case precedent that has been established by the Ohio Appellate Courts on this issue since the 1991 statutory amendment.

Appellee has referred to the record throughout the body of the Appellee Merit Brief when discussing the salient legal issues presented by this appeal. Most of these facts were determinations by the lower court. Appellee asserts that the lower court's factual conclusions are relevant to the legal analysis of this appeal. Rather than repeat these holdings as facts, Appellee adopts those factual determinations as part of the Appellee Merit Brief Statement of Facts.

The Statement of Facts contained in the Appellant Merit Brief accurately refers to the record in this case. However, Appellee objects to the characterization of those recited facts, and also the relevance of some facts as determinative of the legal issues accepted for review by this appeal. For instance, Appellant asserts that the concept of present money value was a 'fact' that was decided in this case. Yet the recitation to the record for this 'fact' is actually a reference to Ohio case law that is not part of the record in this case and to the dissenting opinion from the Eighth District concerning this appeal under review.¹

¹ See Appellant Merit Brief at 8 ¶ 1, FN 31.

Appellee further reserves the right to argue the characterization of the relevant facts presented by this appeal as those facts are presented in the body of the Appellee Merit Brief.

ARGUMENT

APPELLANT'S PROPOSITION OF LAW AS ACCEPTED FOR DISCRETIONARY REVIEW:

In replacing alimony with "spousal support," the legislature did not reject *Kunkle v Kunkle*, but kept intact its analysis that court-ordered payments for "sustenance and support" lose their statutory authority where healthy divorced spouses are financially independent.

APPELLEE'S RESPONSIVE PROPOSITION OF LAW:

R.C. 3105.18 as amended in January, 1991, directs trial courts to consider the appropriateness and reasonableness of spousal support rather than limiting such consideration to financial necessity.

Appellant filed his memorandum in support of jurisdiction with the Ohio Supreme Court reciting but one proposition of law, not the five enumerated propositions as actually identified and included in Appellant's Merit Brief. Appellant's single proposition of law proposes the mistaken crux of Appellant's argument and is recited above as set forth in appellant's jurisdictional memorandum. The Ohio Supreme Court accepted this appeal in its Journal Entry dated January 27, 2010. Appellee formally addresses the sole proposition of law that was included in Appellant's jurisdictional memorandum and accepted for discretionary review by this Court.²

² Additionally, it must be noted that the sole proposition placed before the Court in Appellant's jurisdictional memorandum is not formally included in Appellant's Merit Brief.

Appellee's Merit Brief herein references as appropriate, Appellant's numerous additional propositions of law within the framework of Appellee's response.

A. R.C. §3105.18 as amended in January 1991, provides that a trial court can award spousal support as it determines to be appropriate and reasonable after considering the required fourteen statutory factors.

Notwithstanding the significant legislative amendment recognized by the Eighth District Court of Appeals (Eighth District), Appellant argues that the amended codification of R.C. §3105.18 did not change the manner in which Courts across the State of Ohio are to approach the fundamental issue of awarding spousal support. Appellant would have this Court reduce any spousal support decision to one in which the determination of whether to award "sustenance and support", as required by statute, is to be made solely upon the determination of whether a former spouse could "sustain" him or herself without the financial aid of the other spouse. Appellant fails to address in considering what is meant by "sustain" the reality of long-standing marital lifestyle in his analysis. Instead, Appellant chooses to emphasize that absolute "need" is the almost singular criteria upon which the Court's analysis should focus its attention in resolving what has traditionally been a complex issue.

In portraying the issue as one in which the determination of "need" is the crux of any support decision, Appellant has asked this Court to overlook the rules of statutory construction; and to overturn the practice of the overwhelming number of jurisdictions throughout the State of Ohio who consider 'need' as one factor among the other statutory considerations in arriving at an "appropriate and reasonable" decision under the circumstances presented concerning spousal support. See e.g. *Schultz v. Schultz* (1996), 110 Ohio App.3d 715, 724 ("This court takes note of the

fact that need is still a consideration. However, it is only a consideration and not the test.”)

1. The standard for this Court’s review is Abuse of Discretion and not a *De Novo* review as argued by Appellant in the Revised First Proposition of Law.³

It is also important to note that the Court in *Kunkle v Kunkle*, (1990), 51 Ohio St. 3d 64, 544 N.E. 2d 83, did not overrule, modify, or alter the appellate review standard that has been consistently applied when analyzing spousal support issues. In fact, the *Kunkle* Court reaffirmed that standard of review. That standard of review is not *de novo* as Appellant would have this Court apply to the facts of this case.⁴ The holding in *Kunkle* is revealing:

Courts in this state derive their power to award sustenance alimony from the statutes. R.C. 3105.18(A) and (B) provide a trial court with guidelines for determining whether alimony is necessary and the nature, amount and manner of alimony payments. *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 414, 75 O.O.2d 474, 482, 350 N.E.2d 413, 423. The trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case, but such discretion is not unlimited. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355, 20 O.O.3d 318, 322, 421 N.E.2d 1293, 1299. *A reviewing court cannot substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion. Holcomb, supra, 44 Ohio St.3d at 131, 541 N.E.2d at 599. As we noted in Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142, for an abuse of discretion to exist, the court's attitude must be unreasonable, arbitrary or unconscionable and not merely an error of law or judgment.*

Accordingly, in this appeal, we must look at the totality of the circumstances and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in awarding sustenance alimony to Appellee.

³ While not included as a proposition in Appellant’s jurisdictional memorandum the First Proposition of Law included in Appellant’s Merit Brief states: “Where a trial court’s judgment ordering spousal support in divorce rests on a contested question of statutory interpretation, an appellate court must review that judgment *de novo*.”

⁴ See Appellant’s Merit Brief at p. 16-17.

(*Kunkle*, at 67, (emphasis added)).

Therefore, unless Appellant can show that the lower courts had demonstrated an abuse of discretion, then this Court should be reluctant to disturb those findings. Abuse of discretion involves more than mere error of law or judgment:

The term “abuse of discretion” was defined by this court in *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144 [16 O.O.3d 169]:

“The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable. Steiner v. Custer (1940), 137 Ohio St. 448 [31 N.E.2d 855] [19 O.O. 148]; Conner v. Conner (1959), 170 Ohio St. 85 [162 N.E.2d 852] [9 O.O.2d 480]; Chester Township v. Geauga Co. Budget Comm. (1976), 48 Ohio St.2d 372 [358 N.E.2d 610] [2 O.O.3d 484].”

Although *Adams* dealt with “abuse of discretion” in a criminal law context, our citation of *Conner* implies that the term has the same meaning when applied in a domestic relations context.

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

This standard, by which the lower court decisions concerning the determination of spousal support issues are reviewed, has been consistently applied across the Ohio Appellate Districts. The abuse of discretion standard that was initially announced in *Blakemore* and subsequently utilized in the *Kunkle*, has been universally applied as the standard of review for spousal support issues. The Eighth District, citing *Martin v. Martin* (1985), 18 Ohio St.3d 292, 342, 480 N.E.2d 1112, properly recognized that the appeal below was “governed by an abuse of discretion standard.”⁵ Moreover, the appellate court allowed that the trial court enjoyed “wide latitude in determining the appropriateness as well as the amount of spousal support.”⁶

⁵ Eighth Appellate Court of Appeals decision, Appendix at 00017.

⁶ *Id.* citing *Bolinger v. Bolinger* (1990), 49 Ohio St.3d 120, 551 N.E.2d 157.

2. Appellant misconstrues the application of the *Kunkle* decision to this appeal.

Appellant misconstrues the holding in *Kunkle* in urging this Court to adopt a standard for the award of “spousal support” that would eliminate consideration of such support where the receiving spouse is arguably “self supporting” and arguably not in “need” of sustenance payments to sustain the simple costs of living.⁷ Appellant incorrectly argues the facts and actual pre-amendment holding in *Kunkle* in attempting to support this misplaced conclusion.

In *Kunkle*, (*Id at 70*), this Court held that the use of a percentage formula in awarding alimony, and an Order that did not include a specific termination date for support payments acted as a penalty upon the payor spouse. The Court further held that a spousal support award that acted as a penalty upon the payor spouse was contrary to the statutory purpose. Paragraph 2 of the Court’s Syllabus holds:

2. Absent an agreement between payor and payee spouses, it is improper to include in an award of sustenance alimony a clause requiring the payor to pay alimony based on a fixed percentage of the payor's income, gross or otherwise, *when the award is in the form of a penalty or is not based on the payee's need.* (Emphasis added.)

Kunkle, at 64.

This Court did not reverse the Appellate court’s affirmation of the trial court’s ruling in *Kunkle* because the lower courts had abused their discretion. *Id.* at 87. Rather, the Court remanded the issue to the lower court for review of the spousal support award issue in light of the new boundaries that the Ohio Supreme Court added to the award of alimony. This Court in remanding the case instructed:

“In summary, we reverse the judgment of the court of appeals as it pertains to the question of alimony. We remand this cause and these issues

⁷ Appellant Merit Brief at p. 32.

to the trial court with instructions to award appellee sustenance alimony in a definite amount for a specific and reasonable period of time based upon appellant's ability to pay and appellee's need, taking into consideration the length of the marriage and appellee's resources, ability and potential to become self-supporting. Such an order may include, of course, a provision that any ascertainable unpaid sums still due at appellant's death may be a charge against his estate."

Id. at 73.

First, there is no issue that the spousal support awarded to Appellee in this present matter establishes any such penalty. Additionally, Appellants have ignored the full holding in the first syllabus paragraph of *Kunkle*, which expressly excluded from its holding both long term marriages and situations where meaningful employment outside of the home was not probable:

"1. *Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home ...*" (*Kunkle*, at 64 Syllabus Paragraph 1), (emphasis added)).

In addition to consideration of the subsequently amended statute, the facts presented differ from those in *Kunkle*. The Janoseks were married for more than 27 years, and Sandra had acted as a homemaker for all but the first two years of the marriage. Even though she held a college degree, she had not worked outside of the home for a considerable period of time. At age 52, when the divorce was finalized, she was realistically without any meaningful prospects of returning to the workforce. In addition to years out of the job market, the lifestyle that Appellee's family unit had attained during marriage virtually dictated that Appellee could not find employment that would enable her to approach supporting the lifestyle that was enjoyed before and at the time of

the divorce. The trial court certainly considered this unusual set of circumstances before arriving at its conclusions.⁸

3. The Eighth District's decision considered and recognized that the Trial Court had properly contemplated the factors required by R.C. §3105.18 before rendering its' decision.

Courts have generally looked at the record on review to determine if the lower courts had considered the 14 factors that are enumerated in R. C. Section 3105.18 (C) (1) before determining whether the lower court had abused its discretion in either awarding, or failing to award, spousal support. The emergent standard consistently applied by the Appellate Districts in Ohio is to authorize, "Within the limits provided by the statute, [to grant] the trial court...broad discretion to determine what is equitable under the facts and circumstances of each case..." *Waller v Waller*, 163 Ohio App. 3d 303, 317, 837 N.E. 2d 843 (2005) at Paragraph 60; see also, *Pruden v Pruden*, (June 2, 1994), 10th District No. , 93APF10-1428, 1994 WL 24253, at *8, *Gerlach v Gerlach*, 10th District Nos. 03AP-22, 872, 2004-Ohio-1607at Paragraph 35; *Brown v Brown*, (May 11, 1995), 10th Dist No. 94APF09-1306, 1995 WL 311407at *2; *Dorton v Dorton*, (June 15, 2001), 5th District No. 00CAF10029, 2001 WL 715860,at *2, *Pitzer v. Pitzer* (Oct. 22, 2001), 12th Dist No. 2000-01-004, 2001 WL 1255866, at *4; *Tokar v Tokar*, 8th District No. 89522, 2008-Ohio-6467, 2008 WL 5191386 at *3.

The Eighth Appellate District Court of Appeals reviewed the extraordinarily detailed record in this case and rightfully concluded that:

*"The lower court looked at the totality of the circumstances, including information from thousands of pages of documents, 27 days of trial and many hours of testimony before coming to its decision."*⁹

7. See Trial Court's Ruling, Appendix 5 p. 046.

⁹ See Eighth Appellate Court of Appeals decision, Appendix at 023.

Importantly, the trial court's decision makes clear that the lower court had considered all of the elements enumerated in R. C. 3105.18 (C) (1) that both the legislature and the courts have required the trial court to consider before arriving at its decision.

Each of the fourteen necessary factors was addressed by the trial court as recounted in the following summary of that Court's analysis:

1. The trial court found that Appellant could be expected to earn approximately \$4 Million Dollars a year from the businesses that he controlled, and had been awarded after the distribution of the marital estate. Appellee was expected to earn approximately 4% per annum from the passive investment of the marital assets that she was awarded from the dissolution of the marital estate.¹⁰ (R.C. §3105.18 (C) (1) (a)).¹¹
2. The trial court found that Appellee was capable, but unlikely, to return to the workforce, and that Appellant would continue to earn income from the management of his several businesses at a rate consistent with his historical earnings.¹² (R.C. §3105.18 (C) (1) (b)).¹³
3. The trial court found Appellee was age 56 at the time of the decision and that Appellant was age 57. Both parties were in good health.¹⁴ (R.C. §3105.18 (C) (1) (c))¹⁵

¹⁰ See trial court Order of July 23, 2008, Appendix at 044-045.

¹¹ (a) *The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;*

¹² See trial court Order of July 23, 2008, Appendix at 046.

¹³ (b) *The relative earning abilities of the parties;*

¹⁴ See trial court Order of July 23, 2008, Appendix at 046.

4. The trial court found that Appellee owned a \$1 Million Dollar retirement account, and that although Appellant was left without a retirement account, he was left with over 93% ownership in a business that held retained earnings in the amount of \$7 Million Dollars.¹⁶ (R.C. §3105.18 (C) (1) (d)).¹⁷

5. The trial court found that the marriage lasted for over 27 years.¹⁸ (R.C. §3105.18 (C) (1) (e))¹⁹

6. The trial court found that all four children were emancipated.²⁰ (R.C. §3105.18 (C) (1) (f))²¹

7. The trial court found that the parties had enjoyed an “affluent” and “opulent” life style that resulted from their marital life together. The parties enjoyed, million dollar homes, numerous country clubs, ‘*and a variety of chattels valued well into six figures.*’²²(R.C. §3105.17 (C) (1) (g))²³

¹⁵ (c) *The ages and the physical, mental, and emotional conditions of the parties;*

¹⁶ See trial court Order of July 23, 2008, Appendix at 047.

¹⁷ (d) *The retirement benefits of the parties;*

¹⁸ See trial court Order of July 23, 2008, Appendix at 047.

¹⁹ (e) *The duration of the marriage;*

²⁰ See trial court Order of July 23, 2008, Appendix at 047.

²¹ (f) *The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;*

²² See trial court Order of July 23, 2008, Appendix at 047-048.

²³ (g) *The standard of living of the parties established during the marriage;*

8. The trial court found that each of the parties held bachelor degrees from college, noting that their educational backgrounds would benefit them in managing their individual wealth.²⁴ (R.C. §3105.18 (C) (1) (h))²⁵

9. The trial court found that each of the parties realized over \$11 Million Dollars in marital assets. Neither party held any real financial liabilities. Appellant had a significant earning advantage in using his business assets to generate income. The trial court also recognized that Appellant would have to “*expend active efforts*” to generate his income; while Appellee’s income would be derived from passive income producing assets. In balancing these equities the trial court found that Appellee was owed spousal support for a period of time.²⁶ (R.C. §3105.18 (C) (1) (i))²⁷

10 and 11. The trial court considered the parties individual contributions to the education, training, or earning ability of the other party. The trial court also considered Appellee’s need for additional education, or job training in order to enhance her ability to earn more income through future employment. However, the trial court did not consider that these factors were very relevant to these parties situation given the amount of wealth

²⁴ See trial court Order of July 23, 2008, Appendix at 048.

²⁵ *(h) The relative extent of education of the parties;*

²⁶ See trial court Order of July 23, 2008, Appendix at 048.

²⁷ *(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;*

and financial security that they had each accumulated during the marriage.²⁸ (R.C. §3105.18 (C) (1) (j) and (k))²⁹

12. The trial court found that Appellant would receive a tax benefit from the payment of spousal support and that Appellee would receive income from the receipt of the periodic spousal support payments. The court further found that Appellant was in a stronger position to utilize the tax savings benefit than Appellee.³⁰ (R.C. §3105.18 (C) (1) (l))³¹

13. The trial court found that Appellee remained a homemaker and mother to the couples' four children throughout the parties' marriage. These household responsibilities certainly diminished her wage earning potential. However, the trial court further found that again, because of the high standard of living that the parties enjoyed, it was unlikely that Appellee's continuation in the work force could have ever permitted her to exceed the wealth that had been created by the parties in the marital relationship.³² (R.C. §3105.18 (C) (1) (m))³³

²⁸ See trial court Order of July 23, 2008, Appendix at 049.

²⁹ (j) *The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;*

(k) *The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;*

³⁰ See trial court Order of July 23, 2008, Appendix at 050.

³¹ (l) *The tax consequences, for each party, of an award of spousal support;*

³² See trial court Order of July 23, 2008, Appendix at 050.

14. Finally, the trial court considered that Appellant's receipt of the corporate businesses that he received in the division of the marital assets had positioned him to earn substantially greater income than had the Appellee who had received liquid assets from the division of the marital estate. The trial court found that this scenario had created a disparity in earning capacity and earning opportunities. The trial court found the disparity to be substantial, and a factor to be considered in the award of spousal support.³⁴ (R.C. §3105.18 (C) (1) (n))³⁵

The record is clear that the trial court had considered all of the necessary factors required by the statute, before rendering a decision that it deemed appropriate and reasonable considering all of the circumstances that were presented and unique to this case. The lower court's analysis also complied with the requirements of the *Kunkle* case. It is simply misleading and untrue to label the lower court's findings as being a disregard of the *Kunkle* decision.³⁶

4. The amended statutory language provides for an 'Appropriate and Reasonable' standard and does not equate with the limited 'Necessary' standard that has been proposed by Appellant.³⁷

³³ (m) *The lost income production capacity of either party that resulted from that party's marital responsibilities;*

³⁴ See trial court Order of July 23, 2008, Appendix at 050.

³⁵ (n) *Any other factor that the court expressly finds to be relevant and equitable.*

³⁶ See Appellant's Merit Brief at page 12.

³⁷ Appellant's Second and Third Propositions of Law, respectively, though not recognized in Appellant's jurisdictional memorandum as propositions to be placed before this Court in this discretionary appeal are phrased as follows (2) "For over 170 years, Ohio's alimony statutes divided marital property in divorce and gave courts the option to order one spouse to pay money to the other into the future for "sustenance and support." (3) "When the legislature revised the alimony statute in 1991, it codified the prevailing jurisprudence governing sustenance alimony."

Appellant has argued that support should be “necessary” before it is awarded. Appellant advocates that this should be the focal determination, yet the statutory construction trend announced by Ohio’s Appellate courts has ruled otherwise. As recognized in the Eighth District’s Opinion³⁸, the trend has been to allow court’s to consider all relevant factors, not just whether alimony is needed to maintain minimal sustenance. Courts that have declined to limit their analysis to this single determination includes *Hiscox v Hiscox*, 7th Dist.no. 07 CO 7, 2008-Ohio- 5209, ¶ 36 where the Court of Appeals reasoned:

Appellant's argument is premised largely on his conclusion that the spousal support award exceeds Appellee's demonstrated need for support. We have repeatedly held that, “need is but one factor among many that the trial court may consider in awarding reasonable spousal support.” *Waller v Waller*, 163 Ohio App. 3d 303, 2005-Ohio-4891, 837 N.E. 2d 843 ¶ 63; *Kennedy v. Kennedy*, 7th Dist. No. 03 CO 37, 2004-Ohio-6798, ¶ 14. Thus, whether or not an award of spousal support is greater or less than the total financial needs established at trial is only one factor for the court to consider.

See also *Pruden*, supra wherein the 10th Appellate District allowed:

“R.C. 3105.18, effective April 11, 1991, established a significantly different standard for awarding spousal support. The new ‘appropriate and reasonable’ standard is broader than the old ‘necessary’ standard. Thus, once the fourteen factors have been considered, the amount of spousal support is within the sound discretion of the trial court.”

Id., citing *Young v. Young* (Dec. 29, 1993), Lorain App. No. 93CA005554, unreported; *Leversee v. Leversee* (Mar. 25, 1993), Franklin App. No. 92AP-1307, unreported.

A major flaw in Appellant’s argument is the claim that the legislature did not alter the proposition that alimony should be based solely upon need when R. C. § 3105.18 was

³⁸ See Eighth District Court of Appeals decision, Appendix at 0018-0021.

revised in 1991.³⁹ In an effort to piggyback on the *Kunkle* decision language, Appellant tries to read into the legislative meaning an intention that is clearly opposite from what should be determined from the ordinary construction of the statute's amendment.

The General Assembly adopted the following guidelines for courts to consider when determining the issue of spousal support. The statute since enactment in 1991 has read:

(C)(1) *In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments...* (Emphasis added.)

The previous codification of the same provision offered a more narrow view and was also considered more narrowly by the courts as well. R.C. §3105.18, enacted on April 19, 1988 and effective until the 1991 modification read:

(B) *In determining whether alimony is necessary, and in determining the nature, amount, and manner of payment of alimony, the court shall consider all relevant factors, including, but not limited to, the following:* (Emphasis added.)⁴⁰

Obviously, substantive legislative changes are not undertaken as mere whimsy. Rather, as previously recognized by this Court in analyzing legislative intention to change rejected reliance on the status quo where, “[t]o find otherwise is to conclude that the legislature's action in amending the statute was a superfluous act.” *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008 -Ohio- 2792, at ¶ 25.

In contrast, Appellant argues that the inclusion of the need requirement found in *Kunkle* was absorbed into the amended statutory enactment⁴¹. Appellant argues that

³⁹ See Appellant Merit Brief at page 26.

⁴⁰ See Appendix at 0121.

⁴¹ See Appellant Merit Brief at page 32, 33.

although the statutory language changed, the legislative intent was to follow the old statutory interpretation that *Kunkle* provided. Appellant recites *Mandelbaum v Mandelbaum* (2009), 121 Ohio St. 3d 433, 439-440, 2009-Ohio-1222, 905 N.E.2d 172 at ¶ 29, 31, for the proposition that R.C. 3105.18 (C) should be given the same restrictive requirement of spousal “need” that the Ohio Supreme Court gave the statute before its’ amendment in 1991. *Mandelbaum* was a case that interpreted the statutory requirements for modifying support payments under R.C. §3105.18 (F). The Court in *Mandelbaum* decided that there must be substantial changed circumstances shown before a spousal support order can be modified under the statute. The substantial requirement was added through case law precedents. But the substantial requirement had never been used in the statute itself.

RC §3105.18 (C) is an express statutory language change from a definitive and restrictive term, to language that permits the courts greater latitude in the use of spousal support under the statute. “Appropriate and reasonable” is a more expansive consideration than indicated by the prior use of the word “necessary”, and inevitably expands consideration of the circumstances concerning when spousal support should be appropriately and reasonably awarded. Determining whether spousal support is appropriate and reasonable under individual circumstances is a different consideration than determining whether spousal support is necessary. In an effort to provide equitable results to both parties from the marriage that are consistent with the most recent legislative changes, the Eighth District and other Appellate Courts have expanded the analysis of when and how to award spousal support.

5. The Eighth Appellate Judicial District recognized that the Trial Court had awarded appropriate and reasonable spousal support in compliance with R.C. §3105.18.⁴²

The lower court in this matter formulated a good faith belief that the financial equities of the parties were imbalanced. Primarily, Appellant was left with marital assets that had a far greater income producing capacity than the liquid and passive investments that were owned by Appellee. As such, the overall earning potentials of both parties were left imbalanced. Appellant had a much greater capacity to maintain his wealthy lifestyle without depleting his marital assets than did Appellee. In considering all of these factors, the lower court balanced the financial equities by awarding spousal support.⁴³

The 8th District Court of Appeals reviewed the trial court's reasoning and held that the lower court had satisfactorily analyzed and utilized the §3105.18 (C) (1) statutory factors before arriving at its decision. Therefore, no error was committed by the trial court.⁴⁴

Appellant urges the Court to focus on the wealth of the Appellee alone in order to deny her spousal support as awarded under the statute.⁴⁵ However, Appellant's argument is devoid of any evaluation of the Appellant's own wealth in assessing the parties' circumstances. Although it is not debatable that Appellee is wealthy, the lower courts

⁴² Appellant's fourth and fifth propositions of law, respectively, though not recognized in Appellant's jurisdictional memorandum as propositions to be placed before this Court in this discretionary appeal are phrased as follows: (4) A court has no statutory authority to order one divorced spouse to pay spousal support to a healthy former spouse who has ample income to sustain that spouse's court-approved standard of living. (5) Payments ordered for the purpose of "growing a spouse's property division" do not qualify as spousal support.

⁴³ See trial court Order at Appendix page 051.

⁴⁴ See 8th District Court of Appeals Judgment entry at Appendix page 024.

⁴⁵ See Appellant Merit Brief at page 21.

found and concluded that Appellant was far wealthier than Appellee. The trial court concludes in its decision that,

“...the demonstrated annual earning capacity of Mr. Janosek, from corporate enterprises that he has directly owned over the years, and that have prospered during the long period of the marriage, is substantially greater than the annual passive earning capacity of Mrs. Janosek from her share of the marital estate.”⁴⁶

A simple comparison of the annual income of both parties that has been established in the record illustrates the disparity in income earning capacity. Appellant has historically earned approximately \$4Million dollars a year that was used to support the parties' affluent lifestyle.⁴⁷ The court expected that the Appellant would continue to earn at that rate. Appellee on the other hand had not worked outside of the home for over 22 years of the parties' 27 year marriage. The Court's calculation of Appellee's passive investment income was approximately \$240,000.00 to \$320,000.00 annually.⁴⁸

The trial court was left with the obvious conclusion that the disparity in the parties' earning capacity was glaring. As the trial court found:

The challenging decision for this court is to determine whether Mrs. Janosek should be required to earmark, for day to day expenses, the investment income from her share of the marital estate, with the result that the corpus may not grow in value, whereas Mr. Janosek's share of the marital estate has a demonstrative potential to grow substantially, perhaps exponentially. Also, his historical annual active-income-producing capacity, at three to four million dollars, is ten times, plus or minus, the passive-income-earning-capacity of Mrs. Janosek.⁴⁹

Appellant offers a relatively obvious argument that Appellee possesses sufficient wealth to provide for her own sustenance. Nonetheless, this circumstance alone should

⁴⁶ See trial court Order at Appendix page 050.

⁴⁷ See trial court Order at Appendix page 046.

⁴⁸ See trial court Order at Appendix page 045.

⁴⁹ See trial court Order at Appendix 051.

not be dispositive of the spousal support issue when Appellant's own wealth should also be considered. Following its own established precedent, both the trial court and the 8th District Court of Appeals determined that all of the circumstances that are peculiar to each case should be analyzed. Financial need is only one element. In *McConnell v McConnell*, (Feb. 3, 2000), 8th Dist No. 74974, 2000 WL 126730 at *3 the Eighth Appellate Judicial District held:

Appellant argues that appellee did not need the support. In light of the fact that we presume the trial court reviewed the factors, and it is, of course, the trial court's discretion to make the award, we are persuaded that the trial court acted properly in awarding the support amount.

Justice Resnick wrote a powerful dissent in *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83. She recognized that all divorces are unique and the trial court operating in that uniqueness must be given latitude to look at all of the pertinent factors when awarding spousal support. The equitable standard of an award should be measured by whether the payee-spouse will be able to support herself in some reasonable degree to that established during the marriage.

After *Kunkle*, the General Assembly redefined R.C. 3105.18 (C) (1) to include the appropriate and reasonable standard. Suggesting at least that the need factor is not the only barometer in which a trial court may be guided to award spousal support.

A similar analysis was followed in *Davis v Davis*, 8th Dist.No. 82343, 2003-Ohio-4657, ¶ 23; *Gray v Gray*, 8th Dist.No. 80625, 2002-Ohio-3793, ¶¶ 15-18.

Appellant would also have you believe that the 8th District Court of Appeals and the trial court in this matter failed to recognize that need was considered in the spousal support analysis. Again, Appellant's argument is misleading.

The Eighth District Court of Appeals held that the trial court had not committed error in awarding spousal support. Before passing on the trial court's handling of that issue the Court of Appeals recited in the Opinion's footnotes how the Eighth District

Court of Appeals viewed the issue.⁵⁰ It is clear from the Appellate Court's opinion that it had not abandoned the concept of need, but instead deliberated the concept along with the 14 factors listed in R.C. §3105.18 (C) (1). The Eighth District writes, "*A review of the above noted statute reveals that an award of spousal support is no longer predicated on the idea of need.*"⁵¹

Inherent in the concept of need is an analysis of the marital parties' lifestyle. The trial Court specifically considered the parties standard of living, and the effect that their respective earning potential would have on their lifestyles. Future individual lifestyles after marriage are a direct result of each party's prospective financial future.⁵² As a result, it was necessary for the trial court to consider the manner in which the parties would provide for that lifestyle.

The trial court held that the statute (R.C. §3105.18) required the court to determine the award of both "*sustenance and support*".⁵³ In examining the issue of support, the trial court rejected the Appellee's proffered evidence that her standard of living amounted to approximately \$22,000.00 a month. Instead, the Court reduced the temporary support Order of \$22,000.00 a month to the sum of \$15,000.00 a month.⁵⁴ Taking into account that Appellee would receive passive investment earnings, and would be required to draw down her retirement account by age 60; the trial court determined that her monthly support payments should be reduced by \$7,000.00 a month over the eighteen years before Appellee would reach her 71st birthday. The fact that these

⁵⁰ See Eighth District Court of Appeals Opinion, Appendix 020, 021 at FN 5, and 6.

⁵¹ See Eighth District Court of Appeals Opinion, Appendix 020.

⁵² See trial court Order, Appendix 048.

⁵³ See trial court Order, Appendix 051.

⁵⁴ See trial court Order, Appendix 052.

periodic support payments would cease upon her death, or her future marriage or cohabitation, reflects that the trial court actually determined that the Appellee required financial support to help her maintain a prosperous lifestyle that both parties had enjoyed during the years of their marriage.

Appellant has argued that periodic monthly payments ordered over the set period of eighteen years is tantamount to an additional award of marital assets.⁵⁵ The trial court found that the parties had been married for more than 27 years, and that Appellee remained absent from the workforce for almost that entire time while providing as a homemaker and mother for the Appellant's four children.⁵⁶

In marriages of long duration (i.e. more than 20 years), it is possible to award indefinite spousal support under certain circumstances. In *Dorton v Dorton*, (June 15, 2001), 5th District No. 00CAF10029, 2001 WL 715860, *3, the Court of Appeals held that indefinite periodic spousal support payments were appropriate under the decision announced in *Kunkle*, supra, and after application of the factors considered in R.C.

§3105.18 (C) (1):

Based on the trial court's findings, which are consistent with R.C. 3105.18(C)(1), we find that the trial court did not abuse its discretion in ordering spousal support to be \$1,000.00 per month. Further, we find that the trial court did not abuse its discretion in failing to set a specific termination date. The Ohio Supreme Court, in *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, paragraph one of the syllabus, stated that: Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities.

⁵⁵ See Appellant's Merit Brief at 37, 38.

⁵⁶ See trial court Order, Appendix 046,047.

The parties in *Dorton* had been married 26 years and the Court considered that to be a marriage of long duration. See also *Handschumaker v Handschumaker*, 4th Dist. No. 08CA19, 2009-Ohio-2239, at ¶¶ 15, 18, 19; *Cox v Cox*, 3rd Dist.No. 8-06-17, 2007-Ohio-5769 at ¶ 19.

Appellant also complains that the trial court failed to consider Appellee's passive-investment- income in making its' spousal support determination. Appellant recites *Thomas v Thomas* (April 29, 1999)10th Dist.No. 98AP-621, 1999 WL 252483 as legal authority for the proposition that the trial court was required to consider interest income before awarding spousal support. (Id.*1,* 4).

The trial court in this case considered the effect of Appellee's income as required by statute.⁵⁷ Exact calculations were not written out by the trial court, but as stated, the trial court did reduce the temporary spousal support payment from \$22,000.00 per month to \$7,000.00 per month.

In determining the award of spousal support in a case such as this, equity dictates that both parties should be left with similar lifestyles that the parties had enjoyed during a marriage of long duration. Appellant argues quite the opposite.⁵⁸ Appellant has argued that the two parties should remain as 'strangers' after the division of marital assets. According to the Appellant's argument, each party is obligated to provide for their own sustenance without regard to earning capacity, so long as the other party can provide for his or her own needs. Neither the trial court nor the Eighth District Court of Appeals

⁵⁷ See trial court Order, Appendix 048 ¶ 2.

⁵⁸ See Appellant's Merit Brief at 35, 38, 39.

accepted Appellant's argument, holding that the statutory language of R.C. §3105.18 permitted the court to fashion a more equitable result.⁵⁹

Appellant provides a quote from *Okos v Okos* (2000), 137 Ohio App.3d 563, 571-572, 739 N.E.2d 368, as support for the above referenced argument. The Court's quotation is dicta, and does not address the Court's reasoning for reversing the award of spousal support. The factors and circumstances of the parties in *Oskos* (Ibid. 572) provide no guidance or relevance to the analysis of the spousal support issue in this case.

CONCLUSION

The Eighth District Court of Appeals properly upheld the trial court's award of spousal support based on the recognition that the award was appropriate and reasonable and constituted a proper exercise of the Court's discretion under the totality of the circumstances given the broader support standard established with the 1991 amendments to R.C. §3105.18. For the reasons addressed above, it is requested that the Eighth District's opinion supporting the lower court's award of spousal support in favor of Appellee be sustained.

Respectfully submitted,



JAMES C. COCHRAN (0026172)
Counsel of Record

⁵⁹ See trial court's Order, Appendix 051 ¶ 1.
See Eighth District Court of Appeals Opinion, Appendix 022 ¶3.

17008 Scullin Drive
Cleveland, Ohio 44111
Tel: (216) 389-9522
FAX: (440) 248-3919
jimcplex@yahoo.com

Gary S. Singletary (0037329)
17204 Greenwood Avenue
Cleveland, Ohio 44111
Tel: (216) 534-2007
gmsinglet5@sbcglobal.net

Counsel for Appellee-Plaintiff
Sandra L. Janosek

CERTIFICATE OF SERVICE

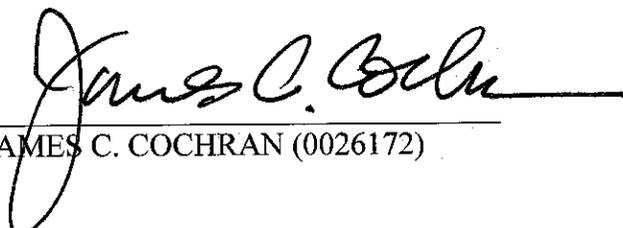
I hereby certify that a true and accurate copy of the "Merit Brief of Plaintiff-Appellee Sandra L. Janosek" was served by regular U.S. mail this 14th day of July 2010 to:

James A. Loeb (0040943)
counsel of record
David L. Marburger (0025747)
Suzanne M. Jambe (0062007)
Matthew J. Cavanagh (0079522)
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114

Counsel for Appellant James C. Janosek
Larry W. Zuckerman (0029498)

Paul B. Daiker (0062268)
Zuckerman Daiker & Lear Co., LPA
3912 Prospect Ave.
Cleveland, Ohio 44115

Co-counsel for Appellant James C. Janosek



JAMES C. COCHRAN (0026172)

APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 09-1705

On Appeal from the Cuyahoga County Court of Appeals,
Eighth Appellate District,
Case Nos. 08-091882 and 08-091914

SANDRA L. JANOSEK,
Plaintiff-Appellee,

v.

JAMES C. JANOSEK,
Defendant-Appellant.

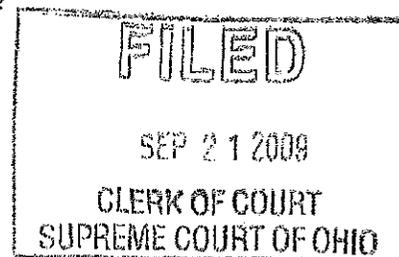
**Memorandum In Support Of Jurisdiction
Of Appellant James C. Janosek**

James A. Loeb (0040943)
counsel of record
David L. Marburger (0025747)
Suzanne M. Jambe (0062007)
Matthew J. Cavanagh (0079522)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114
Tel: (216) 621-0200
Fax: (216) 696-0740
jloeb@bakerlaw.com

Counsel for Appellant James C. Janosek

Vincent A. Stafford (0059846)
Gregory J. Moore (0076156)
STAFFORD & STAFFORD CO., L.P.A.
The Stafford Building
2105 Ontario Street
Cleveland, Ohio 44115
Tel: (216) 241-1074
Fax: (216) 241-4572

*Counsel for Appellee
Sandra L. Janosek*



Larry W. Zukerman (0029498)
Paul B. Daiker (0062268)
ZUKERMAN, DAIKER & LEAR CO., LPA
3912 Prospect Ave.
Cleveland, Ohio 44115
Tel: (216) 696-0900
Fax: (216) 696-8800
lwz@duiohio.com

Co-counsel for Appellant James C. Janosek

TABLE OF CONTENTS

	<u>Page</u>
The substantial legal issue of public and great general interest.....	1
I. Crux of the issue.	1
II. Core legal history underlying the issue.....	2
A. Ohio law before 1991.....	2
B. The 1991 statutory revision.....	4
How the courts of appeals diverge.....	5
A. The 9 th appellate district.....	5
B. The 10 th appellate district.....	6
C. The 8 th appellate district – Cuyahoga County.....	6
D. The 12 th appellate district.....	7
E. The 7 th appellate district.....	8
F. The 2d appellate district.....	8
III. This Court should review this case.....	9
Statement of Facts and Statement of the Case.....	10
I. The Parties.....	10
II. Welded Ring Products Co.....	11
III. Trial and original judgment entry.....	11
IV. The first appeal – <i>Janosek-1</i> (2007)	12
V. James seeks this Court’s review in <i>Janosek-1</i>	12
VI. Remand: the parties agree on dividing the property	12

VII. Spousal support on remand.....	13
VIII. A divided Cuyahoga County Court of Appeals affirms – <i>Janosek-2</i> (2009)	14
Argument: the crux of why the dissenting judge is correct.....	14
<u>Proposition of law:</u> In replacing alimony with “spousal support,” the legislature did not reject <u>Kunkle v. Kunkle</u> , but kept intact its analysis that court-ordered payments for “sustenance and support” lose their statutory authority where healthy divorced spouses are financially independent.	14

“Need is no longer the standard,” the trial court ruled, declining to follow Cuyahoga County appellate precedents that follow Kunkle and emphasize “need” for support.¹⁷ Contesting that interpretation of the spousal support statute, James appealed.

VIII. A divided Cuyahoga County Court of Appeals affirms – *Janosek*¹⁻² (2009).¹⁸

On August 6, 2009, a divided panel of the court of appeals affirmed. Departing from its own precedents, the majority agreed with the trial court that “need is no longer the standard.”¹⁹ The panel divided on that legal issue with the majority following the Franklin County decision in Purden.

In dissent, Judge Stewart concluded that “an award of spousal support would not be appropriate if a spouse did not ‘need’ additional support.”

Argument: the crux of why the dissenting judge is correct

Proposition of law: In replacing alimony with “spousal support,” the legislature did not reject Kunkle v. Kunkle, but kept intact its analysis that court-ordered payments for “sustenance and support” lose their statutory authority where healthy divorced spouses are financially independent.

In construing statutory amendments for modifying spousal support, this Court ruled just months ago that a statutory change does not automatically or presumptively abrogate judicial analyses of predecessor laws addressing the same thing. Rather, unless statutory changes contradict prior judicial rulings or the General Assembly expresses an intent to reject them, the judicial analyses remain intact and inform the new statutes.

¹⁷ (T.Ct findings on remand, 7-23-08, at 13-14.)

¹⁸ 2009 WL 2400313, 2009-Ohio-3882.

¹⁹ *Janosek-2*, 2009 WL 2400313 at *6, *9, 2009-Ohio-3882, ¶s 43, 31.