[Cite as *Duff v. Christopher*, 2023-Ohio-4873.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY

PATRICIA DUFF, Plaintiff-Appellee, - vs - THOMAS CHRISTOPHER, Defendant-Appellant.	**CASE NO. 2023-L-053** Civil Appeal from the Court of Common Pleas Trial Court No. 2021 CV 000780

O P I N I O N

Decided: December 29, 2023
Judgment: Reversed and remanded

David L. Harvey, III, *Matthew B. Abens*, and *Brian M. Yusko*, Harvey, Abens, Iosue Co., LPA, 19250 Bagley Road, Suite 102, Middleburg Heights, OH 44130 (For Plaintiff-Appellee).

Erik L. Walter, Dworken & Bernstein Co., LPA, 60 South Park Place, Painesville, OH 44077 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, Thomas Christopher, appeals from the judgment of the Lake County Court of Common Pleas, denying his motion to dismiss the matter and compel arbitration. For the following reasons, we reverse the judgment of the lower court and remand for further proceedings consistent with this opinion.

{¶2} On July 2, 2021, plaintiff-appellee, Patricia Duff, filed a Complaint in the Lake County Court of Common Pleas, raising claims of Assault and Intentional Infliction of Emotional Distress in relation to an alleged incident in which Christopher threatened to

shoot her in the head while holding his hand up mimicking a handgun.

{¶3} On October 11, 2021, Christopher filed a Motion to Dismiss to Compel Arbitration. Therein, and in his attached affidavit, he contended that the alleged incident occurred during employment hours at a work meeting at the Thomas Christopher Group (TCG), of which Christopher is president, that the statements related to Duff's employment, and the police report indicated that Christopher said "shoot" relates to terminating someone from a project. He contended that the matter was subject to an arbitration clause contained in Duff's employment contract. The Employment Agreement, entered into between TCG and Duff, stated, in pertinent part:

> In consideration of the mutual promises herein, TCG and the EMPLOYEE hereby waive all rights to adjudicate any dispute with the other in a court of law * * * and in lieu thereof agree to submit any and all disputes for binding resolution by arbitration. For the purpose of this agreement, TCG shall include its successors, agents, employees, officers, directors, subsidiaries, or affiliates. * * * This Arbitration Agreement shall apply to all claims of any kind against TCG or any of its officers, directors, managers or employees, or against Employee by TCG, including but not limited to: claims for any alleged contract violation by either party; any employment claim including claims brought based on the EEOC or similar state statute related to the enforcement of employment laws; employment termination issues; any claim for sexual or other harassment, claims for any form of discrimination, including any claims that come under the Policy Against Sexual Harassment And All Other Harassment, and any other harassment policy adopted by TCG * * *.

It provided that arbitration will be conducted in Sarasota County, Florida unless otherwise agreed upon by the parties in writing.

{¶4} On October 25, 2021, Duff filed a Brief in Opposition in which she argued that the arbitration clause did not apply because the intentional tortious conduct committed by Christopher did not fall under the clause or require reference to the

employment agreement.

{¶5} In a November 4, 2021 Judgment Entry, the trial court denied Christopher's Motion. It found that the claims raised by Duff did not fall within the scope of Christopher's employment duties and were not subject to the arbitration agreement.

{¶6} Christopher appealed, arguing that the trial court erred by failing to require that the matter be submitted to arbitration. On appeal, this court found that "there exists a factual dispute as to the exact circumstances of the incident that occurred between Christopher and Duff" and that, "[u]nder these differing versions of the events, Christopher's actions may be either a tort committed outside of the scope of the agreement or an action related, at least in part, to employment and which would arguably fall under the arbitration clause." *Duff v. Christopher*, 11th Dist. Lake. No. 2021-L-122, 2023-Ohio-349, ¶ 21. The matter was remanded for the trial court to hold a hearing to take evidence on the issue of whether the causes of action arose out of or related to the employment agreement. *Id.* at ¶ 25 ("[i]n order for the court to determine whether the causes of action arose out of or related to the employment agreement or whether it would be an 'absurdity' to proceed to arbitration on such claims, it is necessary to review the facts giving rise to the claims").

{¶7} On May 4, 2023, the trial court held an evidentiary hearing. The following pertinent testimony was presented:

{¶8} Patricia Duff was employed at TCG, an HR recruiting firm of which Christopher was the owner/president, on the date of the alleged incident on July 30, 2019. She testified that around 5 p.m. on that date, she was chatting with co-workers in the office when Christopher began "storming down the hallway" and screaming that "he was

going to kill somebody." Upon being asked by a coworker who he was going to kill, Christopher pointed at Duff and said "I'm going to shoot you in the head * * * or I'm going to shoot my client." She stated that he was upset because he could not get in contact with a candidate on the phone. He made a gun gesture while making this statement. Duff indicated that she had a history of violence in her past, Christopher was aware of this, and Christopher making a handgun gesture "brought back memories." Duff was not aware of the word "shoot" being used as an industry term in relation to firing someone. When asked if she had used the term "shoot" in the workplace, she testified: "I can't recall using that term. I'm not saying I didn't, I'm just saying that I don't recall using that term."

{¶9} Christopher testified that on the date in question, he received a phone call from a client who was upset due to difficulty reaching a candidate who was working with Duff. The client also raised questions about whether Duff had falsified a candidate's compensation. According to Christopher, he went to the conference room area where several employees, including Duff, were present. He told another employee, Erin Merker, that he was angry and that employees of TCG should not lie or falsify information. He stated: "Somebody's lying here and I need to know who we're going to shoot or who's going to get shot for this, is it the candidate's lying, is it the client's lying." He did not believe he specifically referenced Duff and denied holding his hand in a gun gesture. Duff's employment was terminated shortly thereafter.

{¶10} Christopher testified that the phrase "shooting" a candidate or client is part of TCG office vernacular, has been used throughout the company's existence, and means "to terminate them or fire them, to terminate the relationship or terminate the project." He explained that he was familiar with the term "shoot" being used within other companies,

by his candidates, he has heard CEOs use it, and it is a "commonly used HR term." In relation to the present matter, he stated that he "was going to fire that candidate and put them on our blacklist. I was going to fire that client and return their money or I was going to fire [Duff] from either the project or ultimately our company because I can't have someone in my company who lies." He testified that Duff had heard the term "shoot" and had used it in reference to a candidate.

{¶11} Logan Johnson, an employee of TCG, testified that, within TCG "we often use the term to shoot the candidate, shoot the client" and it means to terminate a relationship. It was a common phrase and "we all know what it means." Johnson had heard Duff use the term in relation to terminating a candidate or client relationship.

{¶12} Tillman Anselmi, a managing partner at TCG, testified that the term "shoot" is used in relation to terminating a client, candidate, or employee both at TCG and in other companies, including in the consulting field and in HR. He was aware of Christopher using the term relating to a candidate that would not be going forward. Matt Schiffer, the current president of TCG, similarly testified about "shooting" being used in TCG in reference to firing a candidate or client. Schiffer had never seen anyone use a handgun gesture while making a statement about "shooting" in this context.

{¶13} Paula Christopher, Christopher's wife and chief administrative officer at TCG, also testified that TCG employees frequently used the term "shoot," which means to end a relationship with a candidate or to terminate somebody. She had heard the term "at any place" she had worked before. She had not seen anyone use this term with a gun gesture and stated that Christopher did not use the term in reference to harming anyone.

{¶14} On May 10, 2023, the trial court issued a Judgment Entry denying the

request to compel arbitration. It found the evidence presented "was consistent with the facts already before this court when it ruled on the motion to compel arbitration" and "[t]he only additional evidence presented was the testimony of the TCG employees that 'shoot' is a term used casually around the TCG office to mean 'terminate' an employee while when ruling on the motion to compel arbitration this court only had Defendant's Affidavit." It observed that no witnesses to the incident between Duff and Christopher testified, found the "quantity of evidence is not the same as quality of evidence," and concluded that the evidence did not establish Duff's claims fell under the arbitration clause.

{¶15} Christopher timely appeals and raises the following assignment of error:

{¶16} "The Trial Court's decision to again deny Defendant-Appellant's Motion to Dismiss to Compel Arbitration was in error because the parties had a valid agreement to arbitrate and Plaintiff-Appellee's claims are in the scope of the arbitration agreement."

{¶17} As an initial matter, we will first address Duff's argument that this court should not consider the hearing transcript since it is not part of the record on appeal.

{¶18} On June 16, 2023, Christopher filed a request for an extension of time to file the transcript, subsequently accompanied by an affidavit of the court reporter. This court granted an extension, via a magistrate's order, until July 20 to complete and file the transcript, with instructions to the clerk of court to supplement the record with the transcript. On September 1, 2023, this court issued a magistrate's order noting that the transcript had been filed with the trial court on July 28 but not supplemented into the record and sua sponte ordered that the clerk of courts supplement the record with the transcript. Duff was given ten days to file an amended answer brief but did not do so. Since the transcript was made part of the record before this court by the magistrate's

order and Duff was given an opportunity to amend her brief, we find that the transcript is properly considered on appeal.

{¶19} In his assignment of error, Christopher argues that the trial court erred by finding that the claims do not fall under the arbitration clause since the testimony presented at the evidentiary hearing demonstrated that the event occurred at work, related to a specific work issue raised by a client, and were covered by the employment contract.

{¶20} "The scope of an arbitration clause, that is whether a controversy is arbitrable under the provisions of a contract, is a question for the court to decide upon examination of the contract." (Citations omitted.) *TN3 LLC v. Jones*, 2019-Ohio-2503, 139 N.E.3d 473, ¶ 14 (11th Dist.). "Therefore, this court reviews de novo a trial court's legal conclusion as to whether a party is contractually bound by an arbitration clause." (Citation omitted.) *Knight v. Altercare Post-Acute Rehab. Ctr., Inc.*, 2017-Ohio-6946, 94 N.E.3d 957, ¶ 9 (11th Dist.). While "[t]he standard of appellate review in determining the enforceability of an arbitration provision is de novo" the trial court's factual findings "must be accorded deference." *TN3* at ¶ 14, citing *Jamison v. LDA Builders, Inc.*, 11th Dist. Portage No. 2011-P-0072, 2013-Ohio-2037, ¶ 21.

{¶21} "Ohio public policy favors arbitration" and "an arbitration provision must be enforced unless it is not susceptible of an interpretation that covers the asserted dispute, with any doubt being resolved in favor of arbitration." *Alkenbrack v. Green Tree Servicing, L.L.C.*, 11th Dist. Geauga No. 2009-G-2889, 2009-Ohio-6512, ¶ 14, citing *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 14.

{¶22} In order to refer proceedings to arbitration and stay proceedings pending before the trial court, it must be proven that there is "a valid written agreement to arbitrate disputes between the parties" and "the scope of the agreement is sufficiently broad to cover the specific issue which is the subject of the pending case." (Citation omitted.) *Scharf v. Manor Care of Willoughby, OH, LLC*, 11th Dist. Lake No. 2019-L-062, 2020-Ohio-1322, ¶ 22. "Both factual requirements are predicated upon the legal proposition that, while the arbitration of disputes is strongly encouraged under the law, a party should not be forced to proceed to arbitration unless she expressly agreed to do so." (Citation omitted.) *Id.*

{¶23} "To determine whether the claims asserted in the complaint fall within the scope of an arbitration clause, the Court must 'classify the particular clause as either broad or narrow.'" (Citation omitted.) *Academy of Medicine* at ¶ 18. "[A]n arbitration clause that contains the phrase 'any claim or controversy arising out of or relating to the agreement' is considered the paradigm of a broad [arbitration] clause." (Citation omitted.) *Hicks v. Cadle Co.*, 11th Dist. Trumbull No. 2013-T-0017, 2014-Ohio-872, ¶ 13, citing *Academy of Medicine* at ¶ 18. There is no question here that the arbitration clause is broad, as it states that the parties agreed to submit "any and all disputes for binding resolution by arbitration."

{¶24} However, "[e]ven a broad arbitration clause * * * does not render all claims subject to arbitration." *Hicks* at ¶ 13; *see Kennedy v. Stadtlander*, 8th Dist. Cuyahoga No. 110416, 2021-Ohio-4167, ¶ 24, citing *McCourt Constr. Co. v. J.T.O., Inc.*, 11th Dist. Portage No. 96-P-0036, 1996 WL 586422, *2 (Sep. 20, 1996) (only the claims that arise from the contract which contains the clause can be submitted to arbitration). "The Ohio

Supreme Court has held that whether a cause of action is within the scope of an arbitration agreement may be determined by applying the federal standard found in *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386 (6th Cir.2003)." *Hicks* at ¶ 14 and 4 (applying the *Fazio* standard in the case of an arbitration agreement including a clause that "[a]ny controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to this instrument"); *Academy of Medicine* at ¶ 15.

{¶25} *Fazio* provides that, to determine "whether an issue is within the scope of an arbitration agreement * * * [a] proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." *Fazio* at 395. "Torts may often fall into this category," but "[e]ven real torts can be covered by arbitration clauses '[i]f the allegations underlying the claims 'touch matters' covered by the [agreement].'" (Citation omitted.) *Id.* The Ohio Supreme Court has emphasized that "[t]he *Fazio* test * * * functions as a tool to determine a key question of arbitrability—whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the other party, regardless of how unrelated to the subject of the agreement." *Academy of Medicine* at ¶ 29.

{¶26} On remand, to resolve whether the causes of action were torts falling outside of the scope of the arbitration clause, there was extensive testimony presented that the term "shoot" was used both in the HR industry and at TCG specifically not as an act of violence but to terminate an individual from employment or as a client. Further, both Christopher and Duff indicated that, in relation to the incident in question, Christopher had become upset because of an issue with a candidate who Duff worked

with, which led to the disputed comments about shooting Duff and/or the client. Under these circumstances, Christopher's comments involved employment-related issues. While we recognize the deference to be provided to the trial court on factual matters, the facts elicited on remand almost exclusively support a claim that references to "shooting," in the context of an employment-related dispute, are related to work disputes rather than intentional torts. In such a matter, it is reasonable to conclude that reference to the employment contract and employment relationship is necessary, as it provides the context for the alleged threats. The facts elicited at the hearing demonstrate that Christopher's comments were in relation to Duff's employment performance and the dispute arose out of the employment relationship. *See Fazio* at 395 (dispute fell under arbitration clause where the fraudulent conduct arose out of activities contemplated by an account agreement and the lawsuit necessarily must describe why the defendant was in control of the plaintiff's money and what the obligations of the parties were). To conclude that arbitration is warranted in this matter is consistent with *Academy of Medicine* as it does not create an absurd result by allowing for litigation of matters entirely unrelated to the subject matter of the employment agreement and the broad arbitration clause.

{¶27} The trial court found to the contrary, observing that witnesses to the incident between Duff and Christopher did not testify and that the quality of the evidence was not outweighed by the quantity of the witnesses. We note, however, that the question at this stage is not to resolve the merits of the claims themselves or to spell out every fact of the incident through testimony of all witnesses present during the actions in dispute. *See Niles Edn. Assn. v. Niles City School Dist. Bd. of Edn*., 11th Dist. Trumbull No. 2019-T-0081, 2020-Ohio-6804, ¶ 54, citing *Council of Smaller Ents. v. Gates, McDonald & Co.*,

80 Ohio St.3d 661, 666, 687 N.E.2d 1352 (1998) ("in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims"). Rather, the question is solely whether, given the facts presented, the matter falls within the arbitration clause. While the issue of whether the actions were a tort or an employment-related conflict cannot and should not be definitively resolved at this stage, the presentation of copious evidence showing that references to shooting are employment-related rather than an act of assault or harassment is significant to resolving the issue of arbitrability. It must be emphasized that there is a presumption of arbitrability and that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Emphasis added.) *Academy of Medicine* at ¶ 14.

{¶28} Duff argues that her claims do not relate to the employment agreement and are not subject to arbitration. She cites *I Sports v. IMG Worldwide, Inc.*, 157 Ohio App.3d 593, 2004-Ohio-3113, 813 N.E.2d 4 (8th Dist.), as dispositive of this matter in that it supports her conclusion that she can prevail on her claims of intentional torts without reference to the agreement. In *I Sports*, the parties seeking to compel arbitration were not signatories to the arbitration clause and sought to apply arbitration under an estoppel theory on the grounds that the dispute was "intertwined with the existence and terms of the consultancy agreement." *Id.* at ¶ 15. The court held that a nonsignatory is bound to arbitrate under principles of equitable estoppel for "intertwined claims" only where the signatory "must rely on the terms of the written agreement in asserting its claims against the nonsignatory" and that, for such principles to apply, it is "not sufficient that plaintiff's

claims 'touch matters' concerning the agreement or that the claims are 'dependent upon' the agreement." (Citation omitted.) *Id.* at ¶ 17. Unlike in *I Sports*, here, we did not find the arbitration clause to be enforceable under estoppel due to "intertwined claims" but because the arbitration clause applied "to all claims of any kind against TCG or any of its officers, directors, managers or employees," which included Christopher. *Duff*, 2023-Ohio-349, at ¶ 15. This distinction leads to the application of a different standard to justify imposition of arbitration. *See I Sports* at ¶ 18 ("[w]hile this particular statement may touch upon the agreement, we do not find that the defamation claims brought by I Sports arise from, or are so intertwined with, the agreement to justify the imposition of arbitration under an equitable estoppel theory").

{¶29} Duff also cites *Jurevicius v. Cleveland Browns Football Co. LLC*, N.D. Ohio No. 1:09 CV 1803, 2010 WL 8461220 (Mar. 31, 2010), for the proposition that the intentional torts alleged do not fall within the scope of the employment agreement. *Jurevicius* held that the court did not need to interpret a collective bargaining agreement to evaluate a claim of negligent misrepresentation since that tort can be maintained regardless of the existence of such agreement. While it may be the case that if Christopher's acts constituted intentional torts, they would not be covered by the arbitration clause, this court already recognized that the context of the dispute was relevant when it remanded for more evidence to be taken on this issue. *Duff* at ¶ 21. As noted above, we find that, given this evidence, the dispute is related to Duff's employment and the matters fall within the scope of the broad arbitration clause. The fact that Duff alleged her claims as intentional torts does not alter that conclusion since "[a] party cannot avoid contractual arbitration simply by casting the claim as a tort." (Citations omitted.)

Sumber Co. Pte. Ltd. v. Diversey Corp., 1st Dist. Hamilton No. C-950360, 1996 WL 365885, *4 (Feb. 28, 1996).

{¶30} The dissent, in essence, contends that, by using the term "shoot" in conjunction with a hand gesture involving the thumb and forefinger, Christopher effectively removed the matter from the arbitration provision of Duff's employment contract, and placed it within the realm of intentional tort which can be considered without reference to her employment. This leads to an absurdity when any of the following also well-recognized, commonly used idioms, as a substitution for "shoot," are employed in the same context: "terminate," "cut," "fire," "discharge," "chop" or "chopping block," "end," "burn," "axe," along with a corresponding gesture or motion, to avoid the same arbitration clause. Such a scenario places form over substance, where the image matters more than truth.

{¶31} We hold that, based on the record present before the court, this matter is properly referred to arbitration given that the claims raised relate to Duff's employment and fall under the arbitration clause. Although Christopher requested that the matter be dismissed, "[a]rbitration does not normally require dismissal of the claims referable to arbitration; it warrants only a stay of those claims pending arbitration." *Morgan Stanley Dean Witter Commercial Fin. Servs., Inc. v. Sutula*, 126 Ohio St.3d 19, 2010-Ohio-2468, 929 N.E.2d 1060, ¶ 3. As explained in *Duff*, "[w]hile Christopher characterized his filing before the trial court seeking arbitration as a motion to dismiss * * *, it is properly treated as a motion to stay or to compel arbitration under R.C. 2711.02 or .03." *Duff*, 2023-Ohio-349, at ¶ 22. Upon remand, the trial court is instructed to issue an order staying proceedings and referring the matter to arbitration. *Discover Bank v. Bennington*, 2018-

Ohio-3246, 118 N.E.3d 283, ¶ 24 (11th Dist.).

{¶32} The sole assignment of error is with merit.

{¶33} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, denying Christopher's motion to dismiss the matter and compel arbitration, is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

EUGENE A. LUCCI, J., concurs,

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

{¶34} As I did in *Duff v. Christopher*, 11th Dist. Lake No. 2021-L-122, 2023-Ohio-349 ("*Duff I*"), I must respectfully dissent because I find, as the trial court found on remand, that nothing changed with the presentation of witness testimony. Ms. Duff's intentional tort claims for assault and intentional infliction of emotional distress do not fall within the scope of the employment agreement's arbitration clause.

{¶35} In *Duff I*, the trial court correctly found that Ms. Duff's claims, i.e., threats of physical violence, did not fall within the scope of her employment duties, did not fall within any of the categories of employment-related activities contained in the arbitration clause, and, thus, were not subject to the arbitration agreement. *Id*. at ¶ 6. On appeal, the majority erroneously determined that since "[t]here are conflicting versions of the events,"

there must be a mini-trial to take evidence on the meaning of the alleged threats before the trial court may determine arbitrability. *Id*. at ¶ 25. I disagreed then because there was no need for an evidentiary hearing to determine whether assault and intentional infliction of emotional distress touched matters covered by this arbitration agreement. *Id*. at ¶ 46 (Trapp, J., dissenting). As I explained, even assuming Mr. Christopher's comments to Ms. Duff occurred during a work meeting and in relation to her work performance, Ms. Duff's claims do not fall within the scope of the arbitration clause. *Id*.

{¶36} On remand, the trial court's opinion did not change because no new evidence was adduced during the hearing that would turn a claim for relief arising from threats of physical violence into a claim for relief one would expect to arise out of an employment contract. The majority now reverses the trial court's decision. I continue to disagree that additional testimony about the meaning of the term "shoot" in the context of Mr. Christopher's business is the lynchpin to arbitrability.

{¶37} The Supreme Court of Ohio has held that whether a claim for relief is within the scope of an arbitration agreement may be determined by applying the federal standard found in *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386 (6th Cir.2003). *See Academy of Medicine of Cincinnati v. Aetna Health, Inc*., 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 15. *Fazio* provides that to determine "whether an issue is within the scope of an arbitration agreement[,] * * * [a] proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement. Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. * * * Even real torts can be covered by arbitration clauses '[i]f

the allegations underlying the claims "touch matters" covered by the [agreement]." *Fazio* at 395, quoting *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987).

{¶38} The Supreme Court explained:

{¶39} "The *Fazio* test does not act as a detriment to arbitration. It functions as a tool to determine a key question of arbitrability—whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the other party, regardless of how unrelated to the subject of the agreement. It allows courts to make determinations of arbitrability based upon the factual allegations in the complaint instead of on the legal theories presented. It also establishes that the existence of a contract between the parties does not mean that every dispute between the parties is arbitrable." (Emphasis sic.) *Academy of Medicine* at ¶ 29. The court emphasized the holding in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir.1995), where, although the arbitration clause encompassed antitrust claims generally between the parties, this "did not mean every conceivable claim between the two was arbitrable." *Academy of Medicine* at ¶ 21. Rather, "Coors could litigate any antitrust claims against Molson not related to its licensing agreement, just as anyone else with standing could." *Id*. The court also explained that a contrary holding would lead to absurd results. *Id*. at ¶ 23. "'For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship.'" *Id.*, quoting *Coors* at 1516.

{¶40} Similarly, in *Hicks v. Cadle Co*., 11th Dist. Trumbull No. 2013-T-0017, 2014-Ohio-872, this court determined the arbitration clause in a promissory note did not apply to claims for intentional infliction of emotional distress, tortious interference with business relations, and engaging in a pattern of corrupt activity. We explained that "[n]one of these claims require reference to the note, as none seek to enforce any right or obligation or derive any benefit from the note." *Id*. at ¶ 19.

{¶41} Here, the employment contract states that the arbitration agreement shall apply to "all claims of any kind, * * * including but not limited to: claims for any alleged contract violation by either party; any employment claim including claims brought based on the EEOC or similar state statute related to the enforcement of employment laws; employment termination issues; any claim for sexual or other harassment, claims for any form of discrimination, including any claims that come under the Policy Against Sexual Harassment And All Other Harassment, and any other harassment policy adopted by TCG * * *." Mr. Christopher contends that the police report Ms. Duff filed alleged "harassing communication." Since the arbitration clause expressly references claims of "harassment," he argues, this claim falls directly under the agreement.

{¶42} Despite the broadness of the arbitration clause, Ms. Duff's claims can be maintained without reference to the agreement. The above examples of "claims" subject to arbitration involve matters that are generally employment and employment law-related. For instance, sexual harassment is a particular form of employment discrimination based on sex. *See Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176, 729 N.E.2d 726 (2000). Ms. Duff has not alleged any breaches of the agreement, wrongful termination, employment discrimination, violations of state or federal employment

statutes, or any other type of employment claim. Rather, she alleges that Mr. Christopher engaged in a very specific type of tortious conduct—an alleged incident in which he threatened to shoot her in the head while holding his hand up mimicking a handgun. Such alleged conduct is beyond an act of "harassment." Critically, we must consider whether the claims raised may be maintained outside of the agreement. Any person to whom Mr. Christopher had made the alleged threats could have maintained the same claims as Ms. Duff, regardless of whether they had an employment contract.

{¶43} Mr. Christopher also cites this court's decision in *TN3 LLC v. Jones*, 2019-Ohio-2503, 139 N.E.3d 473 (11th Dist.), for the proposition that the employment contract was intertwined with the alleged acts, and, thus, the arbitration clause must be enforced. *TN3* involved a distinguishable situation. In that case, TN3 entered into a consulting agreement with one of the defendants for services relating to TN3's intention to become a profitable, publicly-traded company and to acquire holding companies. *Id*. at ¶ 3. TN3 later filed claims alleging that the defendant and others engaged in a scheme to mislead and deceive it rather than offer legitimate consultation services and to cause its controlling interest in a company to be transferred through a securities agreement. *Id*. at ¶ 18. This court found that the plaintiff's tort claims "are derived from the contracts between the parties and are intertwined with them." *Id*. Therefore, we held that TN3's tort claims could "not be maintained without reference to the parties' contracts and are subject to arbitration." *Id*. at ¶ 19. *See also Alkenbrack v. Green Tree Servicing, LLC*, 11th Dist. Geauga No. 2009-G-2889, 2009-Ohio-6512, ¶ 22 (claims alleging misrepresentations in monthly statements and conversion of payments "stem from" the enforcement of a security interest under the contract and, thus, are "intertwined" with it). Here, Mr.

Christopher fails to identify any portion of the employment contract with which claims of assault and intentional infliction of emotional distress are intertwined or must be referenced to resolve the dispute.

{¶44} The fact that Mr. Christopher's alleged conduct may have occurred during a meeting that related to Ms. Duff's work performance cannot be utilized to eliminate any tortious act from being litigated outside of the arbitration clause. Otherwise, a party could commit any criminal act or civil wrong at a place of employment or during a work meeting, no matter how serious or unrelated to employment, and still seek enforcement of the arbitration clause. This is precisely what the Supreme Court of Ohio sought to avoid when emphasizing the absurdity of an arbitration clause barring litigation of any matter against the other party. *See Academy of Medicine* at ¶ 29. Thus, the majority is incorrect in claiming its decision is consistent with that precedent. *See* Majority Opinion at ¶ 26.

{¶45} Any evidence indicating Mr. Christopher used the word "shoot" in relation to termination from a work project speaks to the merits of Ms. Duff's tort claims. In other words, it may be less likely that she can establish Mr. Christopher's conduct rose to the level of being tortious. However, the merits of her claims are not relevant in determining arbitrability. *See Council of Smaller Ents. v. Gates, McDonald & Co*., 80 Ohio St.3d 661, 666, 687 N.E.2d 1352 (1998), quoting *AT & T Technologies, Inc.*, *v. Communications Workers of Am*., 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("'[I]n deciding whether the parties have agreed to submit a particular [claim] to arbitration, a court is not to rule on the potential merits of the underlying claims'").

{¶46} The Eighth District's decision in *Arnold v. Burger King*, 2015-Ohio-4485, 48 N.E.3d 69 (8th Dist.), is also instructive in this matter. In *Arnold*, the plaintiff asserted she

was raped by her supervisor while at work. *Id*. at ¶ 3. She filed claims against her employer and supervisor for sexual harassment, respondeat superior/negligent retention, emotional distress, assault, intentional tort, and employment discrimination. *Id*. at ¶ 5. The employer and supervisor moved to compel arbitration under an arbitration agreement that pertained to "'any and all disputes, claims or controversies for monetary or equitable relief arising out of or relating to [Arnold's] employment,' as well as 'claims or controversies relating to events *outside the scope of [Arnold's] employment*.'" (Emphasis sic.) *Id*. at ¶ 4. The Eighth District found that the plaintiff's claims were not within the scope of the mandatory arbitration agreement. The court explained that "'[b]ecause even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.'" *Id*. at ¶ 35, quoting *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151-152, 644 S.E.2d 705 (2007). The court concluded that "ongoing verbal and physical contact culminating in sexual assault as well as retaliation, harassment, or other detrimental acts against Arnold based on the unlawful conduct is not a foreseeable result of the employment." *Id*. at ¶ 67. *See also Crider v. GMRI, Inc.*, 2020-Ohio-3668, 154 N.E.3d 1250, ¶ 18 (8th Dist.) ("verbal and physical contact culminating in sexual assault as well as retaliation, harassment, or other detrimental acts against Crider based on the unlawful conduct is not a foreseeable result of the employment").

{¶47} Here, it was not a foreseeable result of employment that allegedly tortious conduct occurring during working hours at a business office in Ohio would be subject to binding arbitration in Florida. This case is distinguishable from those in which particular

torts have been specifically included in the agreement since the consequences of entering into the arbitration clause were clearer to the plaintiff. *See*, *e.g.*, *McGuffey v. LensCrafters, Inc.*, 141 Ohio App.3d 44, 53, 749 N.E.2d 825 (12th Dist.2001) (assault found to be within the scope of the agreement where such claim was listed in the arbitration clause).

{¶48} The majority suggests that Ms. Duff improperly recast her claims as torts simply to avoid the arbitration clause. Majority Opinion at ¶ 29. However, the case the majority cites in support is readily distinguishable. In *Sumber Co. Pte Ltd. v. Diversey Corp.*, 1st Dist. Hamilton No. C-950360, 1996 WL 365885 (Feb. 28, 1996), the plaintiff filed a tortious interference claim based on allegations that the defendant breached the parties' technology license agreement. *Id*. at *4. The First District found that the defendant's liability was "necessarily contingent upon whether there was, in fact, a breach of" that agreement. *Id*. Therefore, the plaintiff's allegations arose out of or related to that agreement "no matter how they are labeled." *Id*. As stated, Ms. Duff's claims are not based on any alleged breaches of the employment agreement.

{¶49} The majority also suggests that the trial court improperly reached the merits of Ms. Duff's claims in determining they were not subject to arbitration. Majority Opinion at ¶ 27. The majority is projecting. By determining that Mr. Christopher's "references to shooting are employment-related rather than an act of assault or harassment," it is the majority, not the trial court, that has effectively determined the merits of Ms. Duff's intentional tort claims.

{¶50} Finally, I strongly disagree with the majority's approach to reviewing the evidence submitted on remand. The trial court stated that "quantity of evidence is not the

same as quality of evidence." In essence, the trial court questioned the weight and credibility of Mr. Christopher's evidence, which included testimony from himself, some of his employees, and his wife, but, notably, no testimony from the three alleged witnesses to the incident.

{¶51} The majority states that the trial court's factual findings "must be accorded deference," Majority Opinion at ¶ 20, which is an incomplete statement of the governing law. According to the Supreme Court of Ohio, "When a trial court makes factual findings * * *, those factual findings should be reviewed with *great deference*." (Emphasis added.) *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 38. "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "A fact finder is free to believe all, some, or none of the testimony of each witness appearing before it." *State v. Fetty*, 11th Dist. Portage No. 2011-P-0091, 2012-Ohio-6127, ¶ 58.

{¶52} The majority disregards the trial court's weight and credibility determinations, claiming that "the facts elicited on remand almost exclusively support a claim that references to 'shooting,' in the context of an employment-related dispute, are related to work disputes rather than intentional torts." Majority Opinion at ¶ 26. In doing

so, the majority fails to accord *any* deference to trial court's factual findings, much less *great* deference. The majority also misapprehends the concept of weighing evidence, which "'is not a question of mathematics, but depends on [the evidence's] *effect in inducing belief*.'" (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

{¶53} For the foregoing reasons and based upon the authorities cited, I respectfully dissent.