The Bullet Point: Ohio Commercial Law Bulletin

Volume II, Issue 18
August 28, 2018
Jim Sandy and Richik Sarkar

The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

To further our goal of providing bullet points of commercial intelligence to help people do business better and better monitor the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs, the Bullet Point will provide previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, *The Bullet Point* will highlight industry issues that would benefit from amicus brief support. If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

The Bullet Point: Does the Savings Statute Rescue My Claim?

Ohio Savings Statute

***Portee v. Cleveland Clinic Foundation*, Slip Op. No. 2018-Ohio-3263.**

This case involved a medical malpractice action against the defendant in Indiana in 2012. Ultimately the case was dismissed for lack of personal jurisdiction, and the plaintiffs filed the same lawsuit in state court in Ohio. The defendant moved for summary judgment arguing that the claim was time-barred and that Ohio's savings statute did not apply. The trial court agreed but, on appeal, the Eighth Appellate District reversed, finding that the savings statute did apply. Accepting a jurisdictional appeal to address the issue, the Ohio Supreme Court reversed, finding that the Ohio savings statute does not apply to a federal or state court action commenced in another state that fails otherwise than on the merits.

The Bullet Point: Ohio's amended "savings statute" states: "in any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." R.C. 2305.19. Nothing in the statute, or its predecessors, indicates that the legislature intended to expand the statute's scope to lawsuits outside of Ohio; and in *Portee*, the Ohio Supreme Court declined the opportunity to do so, notwithstanding the language in the amended savings statute that it applies to "any action."

Intentional Infliction of Emotional Distress

***Clay v. Schriver Allison Courtley Co.*, 7th Dist. Mahoning No. 17 MA 0003, 2018-Ohio-3371.**

This case was an appeal of the trial court's decision to grant summary judgment to the defendant on claims of breach of contract and intentional infliction of emotional distress. The lawsuit centered around the preparation and execution of funeral services for the plaintiff's mother.

After plaintiff's mother passed away, they contracted with the defendant for funeral arrangements. As part of those arrangements, they requested that the defendant retrieve their mother's body from Cleveland and return her to Youngstown. Defendant sent an independent contractor who arrived in a van, not a hearse. He then returned to Youngstown at an extremely high rate of speed while plaintiff attempted to keep up. Plaintiff claims that her mother was not properly or timely embalmed, suffered bruising from the transportation to the funeral home, and was prepared for her wake in a sub-standard fashion. In addition, the defendants allegedly began collecting the flowers and cards during the eulogy and failed to put together a funeral procession to the cemetery.

Eventually plaintiff filed suit for breach of contract and intentional infliction of emotional distress, and the trial court eventually granted the defendants summary judgment on those claims. The plaintiff appealed. On appeal, the Seventh Appellate District affirmed in part and reversed in part. Regarding the intentional infliction of emotional distress claim, the Court found that while rude and thoughtless, much of the defendant's actions could not be defined as being "beyond the bounds of all decency" as required to recover under a theory of intentional infliction of emotional distress.

The Bullet Point: The elements required to recover in a claim for intentional infliction of emotional distress are:

(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff;
(2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it can be considered as "utterly intolerable in a civilized community," Restatement of Torts 2d (1965) 73, Section 46, comment d;
(3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and
(4) that the mental anguish suffered by plaintiff is serious and of a nature that "no reasonable man could be expected to endure it."

A defendant's conduct is not "extreme and outrageous" merely because it is " 'tortious or * * * criminal.' " Nor is it "extreme and outrageous" simply because the defendant intended to inflict emotional distress. Moreover, absent an actual, contemporary physical injury, plaintiffs must establish that defendant intentionally or recklessly caused them "serious" emotional distress for plaintiffs to sustain a claim for tortious infliction of emotional distress. "A non-exhaustive litany of some examples of serious emotional distress should include traumatically induced neurosis, psychosis, chronic depression, or phobia." This is an extremely high burden to meet. As the court in Clay noted, "in Ohio, claims of intentional infliction of emotional distress demand a virtually insurmountable burden of proof, imposing liability solely for conduct that goes beyond all possible bounds of decency, and that is atrocious and utterly intolerable in a civilized community. The resulting emotional damages must be unendurable to a normally-constituted reasonable person and there must be a substantial causal connection to the conduct of the defendant."

Doctrine of Mootness

***Enervest Operating, L.L.C. v. JSMB0912, L.L.C.*, 11th Dist. Portage No. 2016-Ohio-P-0080, 2018-Ohio-3322.**

This was an appeal of the trial court's decision to grant the county treasurer summary judgment on a claim for delinquent taxes. The case involved two adjoining parcels, one of which contained a manufacturing plant and office

building. The plaintiff purchased this parcel, whereas the other parcel contained a sewage treatment plant which serviced the first parcel. Eventually, a company, JSMB0912 (the defendant), bought the sewage plant and then attempted to get the plaintiff to pay more for its use. Plaintiff refused, citing a prior agreement between the prior owners of the property. Eventually the a lawsuit was filed between plaintiff and defendant that was eventually settled. While the settlement was being worked out, the county treasurer sought to intervene to collect back taxes and eventually obtained summary judgment. The defendant appealed. On appeal the Eleventh Appellate District affirmed, finding that the defendant's claims were mooted by its settlement and dismissal of the case with the plaintiff.

The Bullet Point: "'The doctrine of mootness is rooted in the "case" or "controversy" language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint * * * It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.' In other words, an issue is moot when it has no practical significance, being instead merely hypothetical or academic."

Ohio's Statute of Frauds

***Holloway v. Bucher*, 6th Dist. Wood No. WD-18-014, 2018-Ohio-3301.**

This was an appeal of the trial court's decision to dismiss the plaintiff's breach of contract action. Plaintiff claimed that the defendant owed her over $60,000 from a loan. She claimed that she orally agreed to owe the defendants $163,800 at a 1.5% interest rate. The loan was provided in two installments. The defendants were required to make monthly payments of $300 and if they sold their current home, the payment increased to $500. Defendants made payments for a number of years but then stopped. While the parties tried to work out the default they were unable to do so, and eventually plaintiff filed suit. Defendants ultimately moved for summary judgment, finding that the agreement was unenforceable under the statute of frauds. On appeal, the Sixth Appellate District affirmed, finding that the contract could not be completed within one year and was unenforceable under Ohio's statute of frauds.

The Bullet Point: Ohio's statute of frauds states: "No action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized." The statute "applies only to agreements which, by their terms, cannot be fully performed within a year; and not to agreements which may possibly be performed within a year." "[T]hus, where the time for performance under an agreement is indefinite, or is

dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds."

An exception to the statute of frauds is the doctrine of partial performance. "The doctrine of partial performance precludes the operation of the statute of frauds if the "acts of the parties * * * are such that it is clearly evident that such acts would not have been done in the absence of a contract and * * * there is no other explanation for the performance of such acts except a contract containing the provisions contended for by the plaintiff." Notably, this doctrine has been limited in its application to "cases involving the sale or leasing of real estate, wherein there has been a delivery of possession of the real estate in question, and in settlements made upon consideration of marriage, followed by actual marriage."

SLIP OPINION NO. 2018-OHIO-3263

PORTEE ET AL., APPELLANTS, *v.* CLEVELAND CLINIC FOUNDATION ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Portee v. Cleveland Clinic Found.*, Slip Opinion No. 2018-Ohio-3263.]

Statutes of limitations—R.C. 2305.19 (saving statute)—If an action is commenced in another state in either a state or federal court and fails otherwise than upon the merits and the statute of limitations for commencement of the action has expired, R.C. 2305.19, Ohio's saving statute, does not apply to permit recommencement of the action in Ohio within one year—Savings statute does not apply to action commenced in Ohio that was originally commenced in federal court in Indiana—Court of appeals' judgment reversed and trial court's judgment reinstated.

(No. 2017-0616—Submitted May 22, 2018—Decided August 16, 2018.)

APPEAL from the Court of Appeals for Cuyahoga County,
No. 104693, 2017-Ohio-1053.

SYLLABUS OF THE COURT

If an action is commenced in another state in either a state or federal court and fails otherwise than upon the merits, and the statute of limitations for commencement of such action has expired, the Ohio savings statute does not apply to permit commencement of a new action within one year.

O'DONNELL, J.

{¶ 1} The Cleveland Clinic Foundation, Peter J. Evans, M.D., Ph.D., and Nathan Everding, M.D., appeal from a judgment of the Eighth District Court of Appeals that reversed a grant of summary judgment in connection with a medical malpractice action filed by Pamela and Haskell Portee. The issue presented on this appeal is whether the Ohio savings statute applies to a federal court action commenced in another state that fails otherwise than upon the merits, thereby permitting a new action to be commenced in an Ohio court within one year after that failure.

{¶ 2} We conclude that the Ohio savings statute does not apply to a federal or state court action commenced in another state that fails otherwise than upon the merits. Thus, the attempted recommencement in an Ohio state court is barred by the applicable statute of limitations, and therefore we reverse the judgment of the appellate court.

Facts and Procedural History

{¶ 3} On October 3, 2012, Pamela Portee, an Indiana resident, had elbow surgery at the Cleveland Clinic. She alleged that the negligent conduct of Dr. Evans and Dr. Everding resulted in the severance of her ulnar nerve, requiring a second surgery. On October 2, 2013, she and Haskell Portee filed a medical malpractice action against the Cleveland Clinic Foundation, Dr. Evans, and Dr. Everding (collectively, the "Clinic") in the United States District Court for the Southern

District of Indiana. On July 28, 2014, the federal court dismissed the case for lack of personal jurisdiction.

{¶ 4} On July 17, 2015, the Portees filed an identical action against the Clinic in the Cuyahoga County Common Pleas Court. The Clinic moved for summary judgment, asserting that the one year statute of limitations in R.C. 2305.113 for medical malpractice actions barred the action and that R.C. 2305.19, the Ohio savings statute, did not apply to save it because the original action had been commenced in another state and pursuant to *Howard v. Allen*, 30 Ohio St.2d 130, 283 N.E.2d 167 (1972), could not be refiled in Ohio because the savings statute applies only to actions originally commenced in Ohio within the period of the statute of limitations. The trial court, relying on *Howard*, concluded that the action was untimely and granted the motion for summary judgment.

{¶ 5} The court of appeals reversed the judgment of the trial court and remanded the case for further proceedings, concluding the savings statute did apply, explaining that "R.C. 2305.19 permits a plaintiff, '[i]n any action that is commenced,' to refile his or her case within one year after the action has failed otherwise than upon the merits, even if the applicable statute of limitations has expired" and "does not specify in which court an action must be commenced for the savings statute to apply." 2017-Ohio-1053, 80 N.E.3d 556, ¶ 7-8. The court acknowledged *Howard* held that R.C. 2305.19 " 'is not applicable to actions commenced or attempted to be commenced in foreign states,' " *id.* at ¶ 9, quoting *Howard* at 132, but it determined *Howard* was not dispositive because (1) in that case, the plaintiff filed the original action in a foreign state court, (2) in *Wasyk v. Trent*, 174 Ohio St. 525, 191 N.E.2d 58 (1963), this court held that the savings statute applied to an action originally commenced in a federal court, and (3) "*Howard* does not mention federal courts, nor does it mention, let alone overrule, *Wasyk*," 2017-Ohio-1053, 80 N.E.3d 556, at ¶ 10. The appellate court noted that *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 763 N.E.2d 160

(2002), "carved out an exception to *Howard*" with respect to class-action litigation and "further implied that *Howard* was not infallible." 2017-Ohio-1053, 80 N.E.3d 556, at ¶ 12. It also noted that *Osborne v. AK Steel/Armco Steel Co.*, 96 Ohio St.3d 368, 2002-Ohio-4846, 775 N.E.2d 483, applied the savings statute to a claim originally commenced in federal court. The appellate court concluded that "given the law and the policy considerations behind a liberal application of the savings statute," it applied to save the action filed by the Portees in Ohio. 2017-Ohio-1053, 80 N.E.3d 556, at ¶ 21.

{¶ 6} The Clinic appealed and presented one proposition of law: "The Ohio savings statute, R.C. 2305.19, generally does not apply to save actions originally commenced outside the State of Ohio."

Positions of the Parties

{¶ 7} The Clinic asserts R.C. 2305.19 generally does not apply to save actions originally commenced outside of Ohio, and it maintains that in concluding the statute applied here, the appellate court improperly disregarded *Howard*. According to the Clinic, for purposes of applying the savings statute, there is no reason to distinguish between an action originally commenced in a foreign state court, as in *Howard*, and an action originally commenced in a federal court in a foreign state, as in this case. The Clinic also maintains that *Wasyk*, *Vaccariello*, and *Osborne* are inapposite.

{¶ 8} The Portees maintain that R.C. 2305.19 applies to actions originally commenced in federal court, relying on *Wasyk*, *Vaccariello*, and *Osborne*. They emphasize that the savings statute is a remedial statute that should be liberally construed to permit decisions on the merits. In addition, they assert that *Howard* and its progeny stand only for the proposition that R.C. 2305.19 does not apply to actions originally commenced in foreign state courts and has no application to actions originally commenced in federal courts. They also argue that "the *Howard*-contemporary justifications for limitations of any kind have been eroded since that

case was initially decided" and that the "modern trend" is "toward * * * foreign state claimants being permitted to refile under a host state's savings statute."

Issue

{¶ 9} The issue here is whether a party who commences a federal court action in a foreign state that fails otherwise than upon the merits may recommence that action in an Ohio court after the applicable statute of limitations has expired by using the Ohio savings statute.

Law and Analysis

{¶ 10} In 1953, the General Assembly recodified Section 11233 of the General Code as R.C. 2305.19, which at that time stated:

> In an action commenced, or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of * * * failure has expired, the plaintiff * * * may commence a new action within one year after such date.

See Am.H.B. No. 1, 125 Ohio Laws 7.

{¶ 11} In *Howard*, we considered whether R.C. 2305.19 saved an action originally commenced in a common pleas court in South Carolina and unanimously held the statute "is *not applicable* to actions commenced or attempted to be commenced *in foreign states*." (Emphasis added.) 30 Ohio St.2d at 132, 283 N.E.2d 169. Rather, the statute "applies only to actions 'commenced or attempted to be commenced' in Ohio within the appropriate statute of limitations." *Id.* at syllabus, quoting R.C. 2305.19. We noted this conclusion was consistent with the majority rule at that time and stated:

> The following will illustrate the logic of the majority rule: *Given*: 1. The Ohio saving clause cannot save an action from the running of the statute of limitation unless the original action was commenced or attempted to be commenced within the applicable period of limitation (R.C. 2305.19). 2. The commencement of an action in one state does not toll the running of limitations against an action for the same cause of action and between the same parties in another state. *Conclusion*: Although plaintiff's original action was filed in the foreign jurisdiction within two years after it accrued, the action was not commenced within the Ohio period of limitation, and plaintiff cannot for that reason avail herself of R.C. 2305.19.
>
> The applicable statute of limitation is that of Ohio. If the action is barred by the Ohio statute of limitation, no action can be maintained in this state, even though the action is not barred elsewhere. Suit must be brought in Ohio before the Ohio statute has run. A suit in another state can no more toll the Ohio statute, applicable to suits in Ohio, than an unexpired claim under the statute of another state can operate to lift the statute of limitation and thereby make the saving clause available.

(Italics sic and citation omitted.) *Id.* at 133-134.

{¶ 12} Additionally, we noted:

> An examination of the Ohio Rules of Civil Procedure does not reveal an intent that an action filed in a foreign state be considered "commencement" or "attempted commencement" for purposes of applying Ohio procedural law. Civ.R. 3(A) defines "commencement" in Ohio as "(1) filing a complaint with the court

> and (2) obtaining service within one year from the filing." It is apparent that the word "court," as used in Civ.R. 3(A) refers to an *Ohio* court, since Rule 1(A) provides that the Ohio Rules of Civil Procedure be limited to "courts of this state." Accordingly, the phrase "*commenced or attempted to be commenced*" contained in R.C. 2305.19 must be limited to actions before the courts of this state, *absent an express provision to the contrary*.

(Second emphasis added.) *Id.* at 135.

{¶ 13} The General Assembly has amended the savings statute twice since *Howard* but never abrogated our decision. In 2004, it amended the statute to state:

> (A) In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

Am.Sub.H.B. No. 161, 150 Ohio Laws, Part III, 3423, 3423-3424. The amended statute contains no language demonstrating a legislative intent to expand the application of R.C. 2305.19 to actions originally commenced outside of Ohio, and notably, the title of House Bill 161 reflects that the General Assembly's intent was "to modify the period within which a plaintiff may commence a new action after the reversal of a judgment for the plaintiff or the plaintiff's failure otherwise than upon the merits." *Id.* at 3423. And when the General Assembly later amended the statute a second time, effective in 2010, it made no changes to R.C. 2305.19(A). 2009 Sub.S.B. No. 106.

{¶ 14} Although *Howard* involved an action originally commenced in a foreign state court and this case involves an action originally commenced in a federal court in a foreign state, that is a distinction without a difference for purposes of the savings statute, which contains no express exception for such circumstances.

{¶ 15} Thus, the Ohio savings statute generally does not apply to permit recommencement of an action in Ohio after the statute of limitations has expired if the plaintiff commenced the action in another state and failed otherwise than upon the merits, and the appellate court erred in concluding otherwise.

Wasyk, Vaccariello, *and* Osborne

{¶ 16} The reliance of the appellate court and the Portees on *Wasyk*, *Vaccariello*, and *Osborne* is misplaced.

Wasyk

{¶ 17} Edmund Wasyk filed an action in the United States District Court for the Southern District of Ohio, Western Division, against Arvel Trent for damages arising out of an automobile collision based on diversity of citizenship. *Wasyk*, 174 Ohio St. at 525, 191 N.E.2d 58. Trent moved to dismiss for lack of jurisdiction, and after a hearing, the federal court granted the motion, concluding that both parties were Ohio residents at the time Wasyk commenced the action. *Id.* at 525-526. Wasyk then refiled the action against Trent in a common pleas court in Ohio after the statute of limitations expired. *Id.* at 526. The trial court concluded the action was time barred and granted Trent's motion for summary judgment, and on appeal, the appellate court affirmed. *Id.* We reversed, holding:

> Where a plaintiff institutes a civil action in a federal court and defendant appears generally by counsel and files a motion to dismiss on the ground that there is no diversity of citizenship, and that court, after a hearing, dismisses the action on that ground, the action is commenced and its dismissal is a failure of the action

> otherwise than upon the merits, and such plaintiff can bring a new action in a court of this state under the provisions of Section 2305.19, Revised Code.

Id. at syllabus.

{¶ 18} *Wasyk* is not controlling in this case because it predated *Howard* and because the parties did not specifically dispute whether the savings statute could apply to an action originally commenced in a federal court. The dispute in *Wasyk* centered on Trent's contention that the lack of subject matter jurisdiction in the federal court rendered those proceedings "a nullity" such that the savings statute did not apply. *Id.* at 527.

Vaccariello

{¶ 19} Mary Vaccariello filed suit against Smith & Nephew Richards, Inc. et al. claiming failure to warn of risks associated with a medical device. *Vaccariello*, 94 Ohio St.3d at 380-381, 763 N.E.2d 160. Smith moved for summary judgment, asserting the action was untimely, but the trial court denied that motion and concluded the statute of limitations was tolled during the pendency of a motion for class-action certification in a putative class action in a Pennsylvania federal court where Smith was a defendant and Vaccariello was a potential class member. *Id.* at 381. The appellate court reversed the denial of Smith's motion. *Id.*

{¶ 20} On appeal to this court, we affirmed that ruling, holding that the "filing of a class action, whether in Ohio or the federal court system, tolls the statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *id.* at syllabus, and we "modif[ied] *Howard* to the extent that it conflicts with this holding," *id.* at 383 (lead opinion). The lead opinion observed:

> This court has not had occasion to revisit, or even cite, *Howard* in the intervening thirty or so years.
>
> Much has changed since *Howard* was decided. Most notably, in *American Pipe*, the United States Supreme Court found that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Since then, "the majority of states which have considered the tolling doctrine [of *American Pipe* and its progeny] have accepted it."

(Citations omitted.) *Id.* at 381-382.

{¶ 21} And we explained that our holding

> merely allows a plaintiff who could have filed suit in Ohio irrespective of the class action filed in federal court in Pennsylvania to rely on that class action to protect her rights in Ohio. To do otherwise would encourage all potential plaintiffs in Ohio who might be part of a class that is seeking certification in a federal class action to file suit individually in Ohio courts to preserve their Ohio claims should the class certification be denied. The resulting multiplicity of filings would defeat the purpose of class actions.

Id. at 383.

{¶ 22} Thus, *Vaccariello* is distinguishable on its facts in that it modified *Howard* solely in the context of class-action litigation, and the policy reason for that modification is not implicated in this case.

Osborne

{¶ 23} Suzanne Osborne filed a claim for age discrimination in violation of R.C. Chapter 4112 against AK Steel/Armco Steel Company in a United States District Court, which dismissed that claim without prejudice. *Osborne*, 96 Ohio St.3d 368, 2002-Ohio-4846, 775 N.E.2d 483, at ¶ 1. She refiled her claim in an Ohio common pleas court in reliance on the savings statute, but the common pleas court dismissed that action and the appellate court affirmed. *Id.* We reversed and rejected AK Steel's claim that R.C. 2305.19 does not apply to age discrimination claims filed pursuant to R.C. Chapter 4112. *Id.* at ¶ 3-5.

{¶ 24} *Osborne* is not controlling here because the singular issue in that case was whether the statute of limitations in R.C. Chapter 4112 precluded application of the savings statute.

Conclusion

{¶ 25} If an action is commenced in another state in either a state or federal court and fails otherwise than upon the merits, and the statute of limitations for commencement of such action has expired, the Ohio savings statute does not apply to permit commencement of a new action within one year. Because the Portees originally commenced their medical malpractice action in a federal court in Indiana, the savings statute does not apply to this action, filed in Ohio after the expiration of the statute of limitations. Accordingly, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

Judgment reversed.

O'CONNOR, C.J., and FRENCH, FISCHER, DEWINE, and CUNNINGHAM, JJ., concur.

KENNEDY, J., dissents, with an opinion.

PENELOPE R. CUNNINGHAM, J., of the First District Court of Appeals, sitting for DEGENARO, J.

KENNEDY, J., dissenting.

{¶ 26} In *Howard v. Allen*, we construed a prior version of Ohio's saving statute, R.C. 2305.19, and held that it did not apply to actions initially commenced or attempted to be commenced in other states. 30 Ohio St.2d 130, 132, 283 N.E.2d 167 (1972). Today, almost a half-century later, we are asked to decide whether this construction of the saving statute still controls, given that the holding in *Howard* has been modified by a subsequent decision of this court, that the statute has been amended to encompass "any action," and that the reasoning and policy concerns on which the holding in *Howard* is grounded have been eroded by the General Assembly's enactment of R.C. 2305.03(B), the borrowing statute. In light of these developments, the meaning of R.C. 2305.19 warrants a fresh review, and because the plain language of the saving statute applies to "any action that is commenced or attempted to be commenced," it applies to an action commenced or attempted to be commenced in another state, whether in state or federal court. For these reasons, I would affirm the judgment of the court of appeals.

The Flawed Analysis of *Howard*

{¶ 27} In *Howard*, we examined former R.C. 2305.19, which at that time provided: "In *an action* commenced, or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of * * * failure has expired, the plaintiff * * * may commence a new action within one year after such date." (Emphasis added.) *See* Am.H.B. No. 1, 125 Ohio Laws 7. We construed this language as permitting refiling only when the dismissed action had been commenced or attempted to be commenced in Ohio within the applicable limitations period. *Howard*'s reasoning, however, no longer withstands scrutiny.

{¶ 28} In *Howard*, we concluded that the Ohio statute of limitations applied to all actions filed in this state and that "[t]he commencement of an action in one state does not toll the running of limitations against an action [in Ohio] for the same

cause of action and between the same parties in another state." *Id.* at 134. However, whether an action brought in another state *tolls* the Ohio limitations period is irrelevant, because the saving statute applies only if the limitations period has *expired*. To "toll" means to stop the running of a time period, *Black's Law Dictionary* 1716 (10th Ed.2014), so that when a limitations period has been tolled, it has not yet expired. "R.C. 2305.19 has no application unless an action is timely commenced and is then dismissed without prejudice after the applicable statute of limitations has run." *Lewis v. Connor*, 21 Ohio St.3d 1, 4, 487 N.E.2d 285 (1985).

{¶ 29} Further, it is no longer true that Ohio's statute of limitations applies to all actions brought in this state. Effective in 2005, the General Assembly enacted the borrowing statute, R.C. 2305.03(B), which provides:

> No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

Am.Sub.S.B. No. 80, 150 Ohio Laws, Part V, 7915, 7930-7931. The borrowing statute is "a legislative exception to the general rule that a forum state always applies its own statute-of-limitations law," *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, 72 N.E.3d 573, ¶ 37, and Ohio courts will now apply another state's limitations period if it is shorter than this state's, R.C. 2305.03(B). Therefore, any policy concerns about forum shopping for a longer limitations period have been alleviated and are no longer a basis for declining to apply the saving statute to actions initially brought in another state.

{¶ 30} The court in *Howard* relied on Civ.R. 3(A) to conclude that for purposes of the saving statute, "commencement" means filing a complaint with the court and obtaining service within one year of filing. Because the Ohio Rules of Civil Procedure apply only to the "courts of this state," the court reasoned, "the phrase 'commenced or attempted to be commenced' contained in R.C. 2305.19 must be limited to actions before the courts of this state, absent an express provision to the contrary." *Howard*, 30 Ohio St.2d at 135, 283 N.E.2d 167. The flaw in that reasoning, however, is that at the time the General Assembly enacted the saving statute as part of the General Code, the Ohio Rules of Civil Procedure did not exist; therefore, the legislature could not have intended to incorporate Civ.R. 3(A) when enacting the saving statute. Moreover, our authority to promulgate procedural rules would not permit us to interpret Civ.R. 3(A) as limiting the scope of the saving statute. "[I]f a rule created pursuant to Section 5(B), Article IV [of the Ohio Constitution] conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law." *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 17. And "[t]he existence and duration of a statute of limitations for a cause of action constitutes an issue of public policy for resolution by the legislative branch of government as a matter of substantive law." *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶ 29.

{¶ 31} And had the court applied our rules of statutory construction in *Howard*, its analysis would have begun with determining and giving effect to the intent of the General Assembly as expressed in the language it enacted. *See Griffith v. Aultman Hosp.*, 146 Ohio St.3d 196, 2016-Ohio-1138, 54 N.E.3d 1196, ¶ 18; *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶ 20. R.C. 1.42 provided then, and continues to provide now, that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage."

{¶ 32} Former R.C. 2305.19 applied to "an action." "An" is a function word used when the noun it proceeds is "undetermined, unidentified, or unspecified," and it can mean "each." *Webster's Third New International Dictionary* 1, 75 (2002). The phrase "an action" is not limited to any specific actions or to those filed in this state's courts. Therefore, in order to reach its conclusion in *Howard*, the court had to add words to the statute to limit its scope to an "action commenced or attempted to be commenced *in Ohio*" (emphasis added), *Howard* at 135.

{¶ 33} For these reasons, it is my view that *Howard* was wrongly decided.

Amendments to R.C. 2305.19 Have Not Codified *Howard*

{¶ 34} The majority justifies its continued adherence to *Howard* based on the facts that the General Assembly has subsequently amended the saving statute twice and "[t]he amended statute contains no language demonstrating a legislative intent to expand the application of R.C. 2305.19 to actions originally commenced outside of Ohio." Majority opinion at ¶ 13.

{¶ 35} I recognize that generally "[i]t is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment." *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶ 19, quoting *Clark v. Scarpelli*, 91 Ohio St.3d 271, 278, 744 N.E.2d 719 (2001). And we have observed that " ' "the General Assembly has shown no hesitation in acting promptly when it disagrees with appellate rulings involving statutory construction and interpretation." ' " *Id.*, quoting *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, 983 N.E.2d 350, ¶ 11, quoting *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 23.

{¶ 36} But there are two problems with presuming that the General Assembly intended to codify *Howard*'s holding when amending R.C. 2305.19. First, by the time the General Assembly amended the saving statute, we had decided *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 763 N.E.2d 160

(2002). In that case, a majority of the court agreed that the saving statute applied to a class action that had been initially filed in a federal court in another state, so that a member of the class had one year from the denial of class certification in the federal court to refile the action in Ohio. *Id*. at 382-383 (lead opinion); *id*. at 390 (Douglas, J., concurring in part and dissenting in part). Importantly, the majority modified *Howard* "to the extent that it conflicts with this holding." *Id*. at 383 (lead opinion); *id*. at 390 (Douglas, J., concurring in part and dissenting in part). Because the court modified *Howard*'s holding so that the saving statute applies to at least some actions initially brought outside Ohio, it is not possible to presume, as the majority does, that the General Assembly intended to codify *Howard*'s *unmodified* holding when it amended the statute.

{¶ 37} Second, the amended statute *does* contain language indicating that the General Assembly intended the saving statute to apply to actions initially filed in a court outside Ohio. In 2004, the General Assembly enacted the current version of R.C. 2305.19(A):

> In *any action* that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(Emphasis added.) Am.Sub.H.B. No. 161, 150 Ohio Laws, Part III, 3423, 3423-3424 ("H.B. 161").

{¶ 38} The legislature changed "an action" to "any action." R.C. 1.47(B) provides that "[i]n enacting a statute, it is presumed that * * * [t]he entire statute is intended to be effective." Further, R.C. 1.54 states, "A statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, *so far as it is the same as the prior statute.*" (Emphasis added.) We are therefore obliged to presume that the General Assembly intended its substitution of the word "any" for the word "an" to mean something, because in construing a statute, " 'significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible.' " *State ex rel. Nation Bldg. Technical Academy v. Ohio Dept. of Edn.*, 123 Ohio St.3d 35, 2009-Ohio-4084, 913 N.E.2d 977, ¶ 18, quoting *State v. Wilson*, 77 Ohio St.3d 334, 336-337, 673 N.E.2d 1347 (1997).

{¶ 39} Moreover, the General Assembly amended R.C. 2305.19 as part of remedial legislation that *broadened* the scope of the statute. H.B. 161 eliminated the "malpractice trap," in which a plaintiff whose case had been dismissed without prejudice before the original limitations period had run was required to refile the action within that period, regardless of how little time was left. *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 8-9. The amended statute permits filing within the limitations period or within one year from dismissal, whichever period is longer. *Id*. at ¶ 9.

{¶ 40} It is true that stare decisis is most compelling when precedent involves statutory construction, *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 6, 539 N.E.2d 103 (1989), but the amendment of a previously construed statute can make it "sufficiently different from the previous enactments to avoid the blanket application of stare decisis" and "warrant a fresh review," *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 24.

{¶ 41} Any judicial presumption that the legislature intended to codify the outdated holding in *Howard* cannot outweigh the plain meaning of the current version of the statute. Therefore, I would determine and give effect to the intent of the General Assembly as expressed in the language it enacted in amending R.C. 2305.19.

"Any Action" Means Any Action

{¶ 42} The saving statute applies to "any action." This court has noted that " ' "[a]ny" means "one or some indiscriminately of whatever kind." ' " *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17, 734 N.E.2d 775 (2000), quoting *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 340, 673 N.E.2d 1351 (1997), quoting *Webster's Third New International Dictionary* 97 (1971). The word "any" is "inclusive," *The Way Internatl. v. Limbach*, 50 Ohio St.3d 76, 80, 552 N.E.2d 908 (1990), and "is often used as meaning 'all,' " *Wachendorf v. Shaver*, 149 Ohio St. 231, 240, 78 N.E.2d 370 (1948), or "every," *State v. Wells*, 146 Ohio St. 131, 137, 64 N.E.2d 593 (1945). Because any action includes *all* actions and *every* action, it necessarily applies to actions commenced in other states, whether in state or federal court. We would have to add language to the saving statute to limit it to "any action that is commenced, or attempted to be commenced," *in Ohio*, R.C. 2305.19(A). However, a court cannot insert language into a statute under the guise of statutory interpretation. *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶ 29. Instead, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, our role is to apply it as written. *Pelletier v. Campbell*, ___ Ohio St.3d ___, 2018-Ohio-2121, ___ N.E.3d ___, ¶ 14.

{¶ 43} This conclusion accords with recent decisions in other jurisdictions holding that saving statutes that use the phrase "any action" apply to actions initially brought in another state. *E.g., Seaboard Corp. v. Marsh Inc.*, 295 Kan. 384, 405, 284 P.3d 314 (2012) ("grafting restrictions on the words 'any action' or

'commenced,' as would be required if we were to hold that the Kansas saving statute applies only to actions originally filed in a Kansas state court, is contrary to our long-established rules of statutory construction"); *Reid v. Spazio*, 970 A.2d 176 (Del.2009) (an action initially filed in Texas could be refiled in Delaware under Delaware's saving statute).

{¶ 44} Because Ohio's saving statute uses the phrase "any action," it applies to a lawsuit initially commenced in federal court in Indiana. Accordingly, I would affirm the judgment of the court of appeals.

Reminger Co., L.P.A., Brian D. Sullivan, Clifford C. Masch, and Ronald A. Mingus, for appellants.

Schiller Law Offices, L.L.C., and Matthew Schiller; Patton Law Firm, L.L.C., and David V. Patton; and Donald Kotnik, for appellees.

Richard M. Markus, urging affirmance for amicus curiae Ohio Association for Justice.

[Cite as *Clay v. Schriver Allison Courtley Co.*, 2018-Ohio-3371.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

BEVERLY ANN CLAY, et al.,

Plaintiffs-Appellants,

v.

SHRIVER ALLISON COURTLEY CO., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0003

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2015 CV 2906

BEFORE:
Cheryl L. Waite, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed in part. Reversed in part. Remanded in part.

Atty. William Paul McGuire
William Paul McGuire Co., L.P.A., 106 E. Market Street, Suite 705, P.O. Box 1243, Warren, Ohio 44482-1243, for Plaintiffs-Appellants

Atty. Kurt R. Weitendorf, and
Atty. Todd Anthony Mazzola, Roderick Linton Belfance, LLP, 50 S. Main Street, 10th Floor, Akron, Ohio 44308, for Defendant-Appellee Shriver Allison Courtley Company

Atty. Morris L. Hawk, and
Atty. Ronald A. Rispo, Weston Hurd LLP, The Tower at Erieview, 1301 E. Ninth Street, Suite 1900, Cleveland, Ohio 44114-1862, for Defendant-Appellee Funeral Home Services Corp.

Dated: August 16, 2018

WAITE, J.

{¶1} Plaintiffs-Appellants, Estate of Beverly Ann Clay (with Elmer Clay as Administrator), Lilly May Curtis, and Mary Jane Patton (collectively "Appellants"), appeal the trial court's decision to grant summary judgment in favor of Defendants-Appellees, Funeral Home Services Corp. ("FHS") and Shriver Allison Courtley, Company, aka Shriver-Allison-Courtley-Weller-King ("Shriver") in this matter, which is based on intentional infliction of emotional distress and breach of contract.

{¶2} Appellants' lawsuit centers on conduct that occurred during both the preparation and execution of the funeral services for their mother, Rose White. Appellants have not appealed the trial court's judgment in favor of Appellees on their negligent infliction of emotional distress claims or the breach of oral contract claim against FHS.

{¶3} For the following reasons, the judgment of the trial court is affirmed with respect to Appellants' intentional infliction of emotional distress claims against FHS and Shriver. The breach of contract claim against Shriver, to the extent that this claim is based on an obliterated handwritten provision in the parties' contract, is also affirmed. The matter is reversed in part, however, with respect to the remainder of the breach of contract claim against Shriver. We also affirm the trial court's decision to overrule Appellants' motion to amend their verified complaint. This matter is remanded for trial on the breach of contract claim against Appellee Shriver.

Procedural History

{¶4} Originally, Appellants brought suit against three parties defendant: FHS, Shriver and a defendant named and Brian Lozano. Appellants voluntarily dismissed their original complaint after discovery was completed and summary judgment had been entered in favor of FHS and Lozano. When Appellants re-filed this action in common pleas court, Lozano was named but never served.

{¶5} Prior to voluntary dismissal, all three defendants had filed motions for summary judgment and an appeal was pending in this Court. The appeal was prematurely taken, because the trial court had not included the language making its order final and appealable. When the matter was voluntarily dismissed, we dismissed the premature appeal as well.

{¶6} When the case was re-filed, the trial court entered a stipulated order incorporating the discovery from the original complaint. The prayer for relief in Appellants' verified complaint states claims for intentional infliction of emotional distress and breach of contract, as well as "[s]uch other and additional causes of action, including but not limited to, misrepresentation, fraud, malice, intent, knowledge that the actions did cause or would cause infliction of harm or irreparable psychological effect, and such additional causes of action or equitable relief as may be determined by a jury." (11/4/15 Verified Compl., Prayer for Relief, ¶ 1-3.) In the body of the complaint, Appellants allege that they suffered severe emotional distress as a result of the intentional acts, gross negligence, negligence, and violation of professional standards of FHS and Shriver employees. (11/4/15 Verified Compl., ¶ 14.)

{¶7} Summary judgment motions were immediately re-filed. Because of the interlocutory nature of the summary judgment originally entered in favor of FHS and

Lozano, the trial court re-considered the claims against these parties, despite the fact that Lozano was never properly served.

{¶8} A motion for leave to amend the verified complaint to include a fraud claim and a motion to file surreplies were filed by Appellants after briefing on summary judgment was complete, but neither motion was addressed by the trial court. In fact, in the trial court's entry granting summary judgment in favor of Shriver the court states that no motion to amend was filed.

{¶9} It appears neither judgment entry was actually drafted by the court. Instead, they seem to be proposed entries submitted by FHS and Shriver. The FHS judgment entry is erroneously captioned "PROPOSED FINDINGS OF FACT/STATEMENT OF THE CASE." It is unclear as to the date or dates the proposed entries were submitted to the trial court, but it is probable that they were submitted prior to the filing of the motions to amend and request to file surreplies, which explains the language in one of the entries that no motion to amend the verified complaint had been filed.

Facts

{¶10} The following facts are taken from the written discovery and deposition testimony of the parties, as well as affidavits offered in support of summary judgment.

Rose's death

{¶11} The Appellants' mother, Rose White, suffered a massive stroke while renewing her drivers' license at the ODMV. She was ninety-three years old. After Rose was pronounced brain dead at Northside Hospital in Youngstown, Ohio, her daughters had her transferred by ambulance to the main campus of the Cleveland Clinic.

{¶12} Appellants described their mother as a spry woman, who maintained herself, her home, and her yard without assistance, despite her advanced age. They were shocked by her sudden illness. Physicians at the Cleveland Clinic confirmed Northside's prognosis, and life support was removed on July 24, 2008 at roughly 4:00 p.m.

{¶13} Within one half of an hour of her mother's death, Patton contacted Shriver and spoke to the funeral director, David Courtley. Shriver had conducted the funeral services for several members of Rose's family without incident when the funeral home was under different management.

{¶14} Patton requested that her mother's body be retrieved from the Cleveland Clinic and brought to the funeral home in Youngstown by Shriver. She also asked that she and her sisters be permitted to accompany their mother's body back to Youngstown. She told Courtley that they were unfamiliar with the Cleveland area and needed guidance to return to Youngstown. She did not request a hearse.

FHS and the transportation services

{¶15} Courtley contacted FHS to arrange for the transportation of the body. While the transportation services were provided by FHS, Shriver billed for the services.

{¶16} Lozano, who appears to have been an independent contractor for FHS, retrieved the body on behalf of FHS. He contacted Appellants roughly two and one-half hours after Patton's conversation with Courtley to inform them that he was detained because the vehicle he was driving got a flat tire. Lozano arrived in a family-style, maroon van at approximately 9:00 p.m. (Curtis Depo., p. 35.)

{¶17} Lozano collected Rose's body outside of the view of Appellants and they concede that they never saw the interior of the van. Lozano met Appellants in the parking lot of the Cleveland Clinic, where he asked Patton if she thought she could "keep up" with him on the way to Youngstown. He then traveled to Youngstown, in the rain, between 9:00 and 10:00 p.m. and at an alarmingly high rate of speed, in excess of 85 miles per hour on the interstate, weaving in and out of heavy traffic.

{¶18} Lozano conceded that he expressed surprise to Appellants when they arrived in Youngstown that Patton had been able to follow him. Patton responded that Lozano had missed his calling and should have been a race car driver. According to Patton's testimony, Lozano traveled approximately 76.6 miles in roughly fifty minutes.

{¶19} At Shriver, Lozano asked Appellants if they intended to embalm their mother. He then engaged in a heated conversation with Patton in which he emphatically expressed his opinion that embalming was unnecessary. Shortly afterward, Lozano told them that state law prohibited them from entering the embalming room, so they returned home without viewing Rose's body at the funeral home.

{¶20} Lozano testified that the van contained all of the equipment required for the transportation of a deceased person, and that he followed all of the required protocols. William Schaper, the owner of FHS, testified that all of the vans owned by the company were outfitted with the required equipment for the transportation of deceased persons. However, he testified that all four of the vans owned by FHS at the time were silver. (Schaper Depo., p. 17.)

Shriver and the funeral service

{¶21} When Appellants arrived at the funeral home to make arrangements for the viewing hours and funeral service the following day, Kimberly Romanchuk, Courtley's daughter and a Shriver employee, rushed them through the decision-making process, interjecting several times that she had a thirteen year old daughter who was at home alone. When Appellants could not immediately decide on certain elements of the funeral service, Romanchuk became belligerent. Romanchuk informed them that there would not be sufficient time to print prayer cards. At one point, she asked why they wanted both afternoon and evening calling hours and whether they intended to "stand around and look at each other." (Patton Depo., pp. 115-116.)

{¶22} When Curtis commented about their dangerous and upsetting trip home from Cleveland, Romanchuk told her that Rose's body had been transported in a family van belonging to the driver's mother-in-law because the hearse had a flat tire. (Curtis Depo., pp. 100-102.) However, Romanchuk refused to identify Lozano as the driver.

{¶23} Appellants purchased a Matthews Andover maple coffin with a peach lining and a mahogany exterior. Both the exterior color and lining were important to the family. Romanchuk assured the family that the coffin was similar to the one that Rose selected for their father. They chose a peach lining because Rose disliked pink.

{¶24} When the arrangements were complete, Romanchuk told Appellants that they had only thirty minutes to return with Rose's clothing, otherwise the doors would be locked. She instructed certain family members to collect the clothing while the others went to the florist shop to save time.

{¶25} Some floral deliveries were not able to be made because there was no one at the funeral home to accept delivery. As a consequence, family and friends were forced to bring their arrangements with them to the funeral home.

{¶26} At the viewing, Appellants were shocked at Rose's appearance. Her hair was fanned out six to eight inches around her head on the pillow with a thick layer of hair spray, and there were hair clippings in the casket and on her gown. Family members collected the cut hair and removed it from the casket. Rose had no color and her veins were visible. They noticed visible stitching in her mouth.

{¶27} Rose was not lying flat in the casket; her head and right shoulder were upturned to the left. She was not wearing the bra that the family brought to the funeral home with the gown, so the outline of her breasts and nipples was visible. (Betty June Fischer Depo., p. 35.) When Romanchuk lifted the blanket to put booties on Rose's feet, Appellants discovered bruising and a bloody bandage on her right ankle.

{¶28} No funeral home employee visited them to offer support during calling hours. That evening after the final guests had left and when the family was taking a private moment at their mother's side, Courtley told them that it was time to leave.

{¶29} The following day, during the minister's eulogy at Shriver, Romanchuk began removing the cards from the floral arrangements, which she placed in a bag. She handed the bag and the funeral bill to Patton during the eulogy. She then began removing the floral arrangements. Courtley appeared and could be heard telling Romanchuk, "[d]amn it to hell, get moving, we have another funeral." (Patton Depo., p. 131.) At the conclusion of the eulogy, Courtley slammed the casket lid shut and said, "[c]an I get my damn job done here?" (Patton Depo., p. 133.)

{¶30} There was no final procession before the casket for mourners. Courtley dismissed everyone including the pall bearers to their automobiles. He and another funeral employee put the casket on the gurney and took it to the hearse. After half-heartedly attempting to organize the family vehicles he was heard to say, "[t]he hell with it." He got in the hearse and left. (Patton Depo., p. 138.)

{¶31} There was no organized funeral procession to the cemetery. There were roughly fifteen cars, but several cars were separated from the hearse due to traffic. At the grave site, Courtley announced that he had another funeral and left before the grave-side service was concluded. No guest registry was kept by the funeral home.

Allegations against FHS and Shriver

{¶32} Appellants assert that their mother's body was misshapen as a result of Lozano's failure to properly secure it in a van that was not equipped for the transportation of a deceased person, coupled with the frantic manner in which it was transported to Youngstown. They surmise that Rose's body was left in the van overnight in the funeral home parking lot, although they have offered no evidence to support that allegation. As a consequence, Appellants contend that Lozano and FHS are liable for intentional infliction of emotional distress. They also asserted breach of an oral contract, apparently based on Appellants' request to follow Lozano back to Youngstown, Ohio, but this is not raised on appeal. Due to the behavior of Courtley and Romanchuk, as well as the sub-standard funeral services provided by Shriver, Appellants contend that Shriver is liable for intentional infliction of emotional distress and breach of contract.

{¶33} The contract for funeral services was executed by Beverly Ann, and signed on behalf of the funeral home by "David & Kim." The total cost of the funeral services was $10,633.04. The fee was due within one month following the execution of the contract, with a 12% per annum late fee. There is a handwritten notation at the bottom of the contract that was scratched out by Courtley. The parties stipulate that the handwritten notation stated that the contract price would be paid after Rose's house was sold. The bill was, in fact, paid several years later, after the sale of Rose's house. With the late fee, the bill totaled $13,326.73.

Events following the funeral services

{¶34} After the burial service at the cemetery was complete, Appellants complained that their mother's plot was facing the wrong direction from the rest of the family plots. Appellants decided to return to the burial site later to confirm that the casket was properly repositioned. When they arrived, cemetery workers had already used a backhoe to dig around the casket and turn it, instead of raising and repositioning it. Appellants concede that Shriver was not responsible for the incorrect positioning and repositioning of the casket at the grave site.

{¶35} In order to investigate the allegations in the original complaint, Rose's body was exhumed on July 14, 2014. Both Patton and Curtis were present for the disinterment. Upon exhumation, the parties discovered that the lid had collapsed and water had filled the casket, so it had to be drained before it was opened. The broken casket lid lay atop Rose's remains, which were bloated and unrecognizable because they had been completely submerged in water.

{¶36} Due to the damage to the body caused by the water and broken casket, Appellants' expert, Curtis Robinson, a funeral home director and licensed mortician, was unable to determine Appellants' claim that the face and body had been in a skewed, raised position, but he confirmed that the body had been embalmed. He noted that the funeral gown was sheer and that Rose was not wearing a bra. The wire holding her mouth closed was visible. The embalmer did not use eye caps, which was standard in the industry. Robinson ultimately concluded that the decedent's overall appearance for viewing did not meet the standard of care in the funeral home industry.

{¶37} Photographs revealed that a plate on the casket read, "York Northern Maple." (Sterling Williams Aff., ¶ 3.) In their motion to amend and also in their opposition to Shriver's motion for summary judgment, Appellants contend that Shriver defrauded them by replacing the Andover Maple casket with the peach interior they had ordered and paid for with a casket of lesser quality having a pink lining. According to Courtley's affidavit, York is a wholly-owned subsidiary of Matthews International, the marketers of the Andover Maple casket purchased by Beverly Ann. He attests that the casket in which Rose was buried is the same model number as the casket identified in the contract. (David Courtley Aff., ¶ 3-7.)

{¶38} Patton and Curtis were required to re-inter Rose's body the same day it was exhumed. Consequently, Rose was buried in a metal casket. Appellants filed a separate lawsuit against the vault manufacturer and the cemetery association in 2015. That case was voluntarily dismissed in 2016 and re-filed in 2017. Summary judgment is pending in the matter.

Appellants' evidence of serious emotional distress

{¶39} Beverly Ann died on February 26, 2012, roughly three and one-half years after her mother's death and five months before depositions were taken in the original case. Curtis and Patton both testified that the circumstances surrounding their mother's funeral haunted Beverly Ann for the remainder of her life and hastened her death at the age of 64.

{¶40} Beverly Ann had promised her mother that she would oversee the funeral, and she was plagued with guilt over the manner in which her mother's remains were handled. After the funeral, she could hardly function and no longer prepared meals or performed any housekeeping chores. She frequently wept over the fear that she had disappointed Rose. The night before Beverly Ann died, she cried about her mother's funeral. (Curtis Depo., pp. 137-138.)

{¶41} Medical records from Beverly Ann's primary physician, M.C. Dougherty, M.D. were offered to oppose summary judgment. Notes dated November 31, 2008 indicate that she contacted Dr. Dougherty's office due to health problems following her mother's death and she was told to take Xanax twice a day, which had been previously prescribed. (Opp. Brf. to FHS Mot. For S.J. in 11 CV 2151, Exh. 9.) Notes dated October 9, 2009 indicate that Beverly Ann exhibited stress following the deaths of her mother the previous summer and her brother within the previous year. Notes captioned "History of Present Illness" from her visit to Dr. Dougherty on July 27, 2011 read, in pertinent part:

> The patient comes in today for follow-up. She has [sic] under a lot of stress. Her mother and brother died and her son committed suicide. She and her husband are raising their 12-year-old grandson. Overall she has

> been doing okay. She denies chest pain or shortness of breath. She has no medical insurance at this point. Her husband was recently called back to work. She sleeps okay at night. She doesn't know if [prescribed heart medication] is making her tired.

(Opposition Brf. to Shriver Mot. For S.J., Exh. 3.) The notes indicate that she was prescribed Xanax for situational stress.

{¶42} Elmer Clay, Beverly Ann's husband, testified that she cried on a daily basis, had difficulty performing household chores, would rarely dress for the day, and that she was treated for heart problems, hypertension, anxiety, and depression. However, he conceded that Beverly Ann never sought psychiatric treatment for her emotional problems. (Elmer Clay Depo., pp. 32, 64.)

{¶43} Curtis testified at her deposition on July 16, 2012 that she was hospitalized after her mother's death due to uncontrollable blood pressure spikes. She was prescribed medication to treat hypertension and anxiety. Curtis testified that she struggles with sleeplessness and lack of concentration, which she attributes to daily triggers that remind her of her mother's funeral. She no longer listens to music because it frequently makes her cry and she no longer wants to have a funeral when she dies. (Curtis Depo., pp. 67-70, 126-133.)

{¶44} Patton testified at her deposition on July 17, 2012 that she suffers from numbness in her face, which was attributed to nervousness and anxiety in 2011. She experiences anxiety, depression, nervousness, sleeplessness, and stress. She was prescribed an anti-anxiety medication. (Patton Depo., pp. 64-70.)

{¶45} Both Patton and Curtis sought psychiatric treatment in April and May of 2015, respectively, roughly nine months after their mother's disinterment. They treated with Jessica Hart, Ph.D., who diagnosed them with posttraumatic stress disorder and depressive disorder. Dr. Hart characterized their symptoms as moderately impairing their daily functioning. Medical records reflect that both sisters saw Dr. Hart weekly or bi-weekly for roughly five months.

{¶46} Patton and Curtis described depressed moods, crying spells, feelings of anger, guilt, and loss, racing thoughts, anxiety, and difficulty sleeping after their mother's funeral, as well as an inability to stop the reoccurring image of their mother's remains following her disinterment. Dr. Hart noted that both women were tearful and emotional in recounting the funeral experience, despite the fact that seven years had passed.

{¶47} Dr. Hart attributed the sisters' PTSD and depression to "the events and experiences in the aftermath of [their] mother's passing, specifically how the family was treated by the funeral home and cemetery workers, the moving of [their] mother's body after it was placed improperly, the disinterment, and conditions of [their] mother's body due to the hole in the vault." (Emphasis deleted.) (12/13/16 J.E. (FHS), p. 6.) Dr. Hart observed that neither woman could overcome the feelings of guilt and anger stemming from their mother's funeral, or erase their final image of Rose's remains.

Standard of Review

{¶48} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R.

56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶49} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶50} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that

have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

Law

{¶51} The elements required to recover in a claim for intentional infliction of emotional distress are:

> (1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it can be considered as "utterly intolerable in a civilized community," Restatement of Torts 2d (1965) 73, Section 46, comment d; (3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and (4) that the mental anguish suffered by plaintiff is serious and of a nature that "no reasonable man could be expected to endure it," Restatement of Torts 2d 77, Section 46, comment j.

Martin v. Wills, 7th Dist. No. 16 MA 0091, 2017-Ohio-9382, ¶ 29, citing *Pyle v. Pyle*, 11 Ohio App.3d 31, 34, 463 N.E.2d 98 (1983).

{¶52} A defendant's conduct is not "extreme and outrageous" merely because it is " 'tortious or * * * criminal.' " *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374, 453 N.E.2d 666 (1983), quoting Restatement of the Law 2d, Torts 73, Section 46, comment *d* (1965). It also is not "extreme and outrageous" simply because the defendant " 'intended to inflict emotional distress,' " or acted with malice. *Id.* at 374-375, quoting Restatement, *supra*.

{¶53} In other words, " 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities' " do not constitute "extreme and outrageous" conduct. *Id.*, quoting Restatement, *supra*. The *Yeager* Court explained:

> The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, Mental and Emotional Disturbance in the Law of Torts, [49] Harvard Law Review 1033, 1053 (1936).

Id., quoting Restatement, *supra*. Several Ohio intermediate courts have held that the determination that conduct is "extreme and outrageous" is a question of law. *Krlich v. Clemente,* 11th Dist. No. 2015-T-0089, 2017-Ohio-7945, ¶ 26; *Jones v. Wheelersburg Local School Dist.,* 4th Dist. No. 12CA3513, 2013-Ohio-3685, ¶ 41*,* citing *Sturdevant v. Likely,* 9th Dist. No. 12CA0024-M, 2013-Ohio-987, ¶ 23; and *Morrow v. Reminger & Reminger Co. L.P.A*., 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 48 (10th Dist.) (Citations omitted.)

{¶54} Absent an actual, contemporary physical injury, plaintiffs must establish that defendant intentionally or recklessly caused them "serious" emotional distress for plaintiffs to sustain a claim for tortious infliction of emotional distress. *Schultz v.*

Barberton Glass Co., 4 Ohio St.3d 131, 136, 447 N.E.2d 109 (1983) (negligent infliction of emotional distress); *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983), paragraphs one and two of the syllabus (negligent infliction of emotional distress); *Yeager*, *supra* (adopting for intentional infliction of serious emotional distress the standard established in *Paugh* that emotional injury be serious). The Supreme Court in *Paugh* explained the standard of "serious" emotional distress as follows:

> By the term "serious," we of course go beyond trifling mental disturbance, mere upset or hurt feelings. We believe that serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.

Id. at 78. "A non-exhaustive litany of some examples of serious emotional distress should include traumatically induced neurosis, psychosis, chronic depression, or phobia." *Id.*

{¶55} The Ohio Supreme Court has stated the need for some "guarantee of genuineness" that "insures that the mental injury is serious enough to be rendered compensable." *Id*. at 76. "[A] plaintiff in a case for intentional infliction of emotional distress must present some evidence beyond the plaintiff's own testimony that he or she has experienced emotional distress due to the defendant's actions." *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 2004-Ohio-6074, 822 N.E.2d 830, ¶ 56.

{¶56} Expert opinion is helpful in proving the genuineness of a plaintiff's claim. As the Supreme Court has observed, in a case involving the tortious infliction of

emotional distress, "expert medical testimony can assist the judicial process in determining whether the emotional injury is indeed, serious," *Paugh* at 80, and "[i]n most instances, expert medical testimony will help establish the validity of the claim of serious emotional distress." *Schultz*, *supra*, at 135.

{¶57} Nonetheless, expert medical testimony is not indispensable to a claim of serious emotional distress. *Uebelacker v. Cincom Sys., Inc.*, 48 Ohio App.3d 268, 276, 549 N.E.2d 1210 (5th Dist.1988). As an alternative to expert testimony, a plaintiff may submit the testimony of lay witnesses who are acquainted with the plaintiff about any "marked changes in the emotional or habitual makeup" of the plaintiff following a defendant's allegedly culpable conduct. *Paugh* at 80, see also *Barker v. Netcare Corp.*, 147 Ohio App.3d 1, 768 N.E.2d 698 (10th Dist.2001) (determining a lay witness was competent to testify regarding emotional distress damages where plaintiff's husband testified to significant changes in the plaintiff's emotions and personality after alleged tortious conduct by defendants.)

{¶58} A court may decide whether a plaintiff has stated a cause of action for tortious infliction of emotional distress by ruling whether the emotional injury alleged is "serious" as a matter of law. *Paugh*, *supra*. The "seriousness" of the emotional distress is decided on a case-by-case basis. *Id.* at 80.

{¶59} Also, a plaintiff claiming severe emotional distress must establish a "substantial causal relationship" between the cause alleged (as distinguished from other possible causes), and the claimed emotional injury suffered by the plaintiff. *Ryan v. Connor*, 28 Ohio St.3d 406, 503 N.E.2d 1379 (1986). At least one Ohio appellate court has held that expert testimony is necessary to establish causality where an emotional

distress claim is based on events following the death of another. In *Powell v. Grant Med. Ctr.*, 10th Dist. No. 01AP-754, 148 Ohio App.3d 1, 2002-Ohio-443, 771 N.E.2d 874, the Tenth District reasoned that expert testimony was required to determine whether the emotional injury alleged was the result of the postmortem injuries to the decedent's body, or from the death of the decedent. *Id.* at ¶ 20.

{¶60} Turning to the breach of contract claims, "[t]o prove the existence of a contract, a party must establish the essential elements of a contract: an offer, an acceptance, a meeting of the minds, an exchange of consideration, and certainty as to the essential terms of the contract." *Schambach v. Afford-A-Pool & Spa*, 7th Dist. No. 08 BE 15, 2009-Ohio-6809, ¶ 8, quoting *Juhasz v. Costanzo*, 144 Ohio App.3d 756, 762, 761 N.E.2d 679 (7th Dist.2001). "In order to recover on a claim of breach of contract, the plaintiff must prove (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damage or loss to the plaintiff." *Price v. Dillon*, 7th Dist. Nos. 07-MA-75, 07-MA-76, 2008-Ohio-1178, ¶ 44.

{¶61} Damages for emotional distress from a breach of contract may be recovered if the contract or the breach is of such a kind that "serious emotional disturbance" was a particularly likely result. *Kishmarton v. William Bailey Constr., Inc.*, 93 Ohio St.3d 226, 230, 754 N.E.2d 785 (2001) (emotional damages available resulting from breach of vendee and builder-vendor contract); *Stockdale v. Baba*, 10th Dist. No. 02AP-402, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, ¶ 105 (emotional damages available from breach of settlement agreement based on stalking charges); *Allen v. Lee*, 43 Ohio App.3d 31, 34, 538 N.E.2d 1073 (8th Dist.1987) (residential lease lacks special emotional significance to recover emotional damages); *Brown Deer*

Restaurant v. New Market Corp., 8th Dist. No. 48910, 1985 WL 9802 (Mar. 28, 1985); 3 Restatement of the Law 2d, Contracts (1981) 149, Section 353.

{¶62} Comment *a* to Section 353 of the Restatement explains that, although damages for emotional disturbance are not ordinarily allowed, and difficult to prove even when they are foreseeable, there are two exceptional situations where such damages are recoverable: (1) when an emotional disturbance accompanies a bodily injury, and (2) when the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. *Kishmarton* at 230, citing 3 Restatement of the Law 2d Contracts (1981), 149, Section 353. The comment provides that a contract for the proper disposition of dead bodies is an example of a contract where recovery of serious emotional distress damages is allowed. *Stockdale* at 104, citing 3 Restatement of the Law 2d Contracts (1981), 149, Section 353.

{¶63} In adopting the Restatement, the Ohio Supreme Court cited Section 16, Article I of the Ohio Constitution, which reads, in pertinent part, "every person, for an injury done him * * * shall have remedy by due course of law." *Kishmarton* at 229. Because emotional distress injuries are injuries for which the Ohio Constitution guarantees a right to a remedy, the Court recognized that it is reasonable to allow emotional distress damages caused by a breach of contract. The *Kishmarton* Court observed:

> To continue to disallow emotional distress damages unfairly exposes innocent persons to harm that a wrongdoer has no incentive to avoid or mitigate. As one commentator put it, "the breaching party to a contract intentionally assumed must bear the full burden of the harm caused, and

> there should be no exception for emotional distress damages * * *." Whaley, Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions (1992), Suffolk U.L.Rev. 935, 948.

Id.

Summary Judgment Entries

{¶64} With respect to Appellants' claims for intentional infliction of emotional distress, the trial court found as a matter of law that the allegations against FHS and Shriver did not constitute extreme or outrageous conduct. The trial court characterized the actions of Lozano and Shriver's employees as rude and unprofessional, rather than outrageous and extreme.

{¶65} The trial court further concluded that Appellants failed to demonstrate any genuine issue of material fact regarding the element of serious emotional distress. Because Patton and Curtis did not seek mental health treatment until several years after the funeral and Beverly Ann never sought such treatment, the trial court found that they did not suffer serious emotional distress.

{¶66} Because Dr. Hart attributed the mental conditions suffered by Patton and Curtis to the circumstances surrounding not only Rose's funeral but also her disinterment, the trial court held that Appellants had failed to establish a genuine issue of material fact regarding the element of causation. The trial court reasoned that the same was true for Beverly Ann. The medical notes attributed her stress not only to the loss of her mother, but the loss of her brother, as well as her son's suicide and the pressure of raising his young son.

{¶67} The trial court determined that the decision by Patton and Curtis to view their mother's disinterred remains was not the natural or probable consequence of any of the alleged conduct of the employees of FHS or Shriver. The court stated that "[i]t defies logic that [Appellants], who claim to be so deeply affected by what they claim to be an unprofessional presentation of their mother for viewing at the funeral, would expose themselves to the predictably unpleasant experience of her exhumation." (12/13/16 J.E. (Shriver), p. 30.)

{¶68} The court also held that Appellants' claims for negligent infliction of emotional distress and breach of contract claims were barred by the two-year statute of limitations for negligence claims in Ohio. Whether the non-intentional acts were alleged in the context of a claim of infliction of emotional distress or a claim for breach of contract, the court determined that the actual nature of the allegations sounded in negligence.

{¶69} Assuming arguendo that the breach of contract claims against Shriver were timely filed, the trial court held that the handwritten clause on the contract (which read that the bill would be paid after Rose's house was sold) would not have prevented the penalty provision from taking effect had it not been obliterated. The plain language of the clause established only that the bill would not be paid until after the sale of Rose's house, not that the penalty provision would be suspended until the house was sold. Also, because the contract did not specify the color of the lining of the casket, the trial court concluded that no breach had occurred in that regard.

{¶70} The trial court held that Appellants' breach of oral contract claim against FHS failed as a matter of law because there was no evidence of an offer by FHS, acceptance by Appellants, or consideration exchanged between the parties.

{¶71} Finally, the trial court held that the fraud claim, raised for the first time by Appellants in their opposition to summary judgment, was not asserted in the complaint, nor had Appellants filed a motion to amend the complaint. As previously stated, a motion to amend was pending when the summary judgment entries were entered.

Analysis

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ERRED IN ITS FAILURE TO VIEW THE EVIDENCE (EVEN CONTROVERTED) IN THE MOST FAVORABLE LIGHT OF THE PLAINTIFF PERMITS [SIC] INCLUSION OF EVIDENCE OF INTENTIONAL CAUSATION OF SEVERE EMOTIONAL DISTRESS AND OTHER MATERIAL PROBATIVE AND DISPOSITIVE EVIDENCE.

{¶72} Appellants contend that the trial court erred when it did not consider every act alleged by Appellants and conclude that Appellees should have known that those acts would cause severe emotional distress. Rather than undertaking any independent analysis or making any independent findings, Appellants complain that the trial court adopted the findings of fact and conclusions of law proposed by Appellees in their entirety. Appellees' proposed findings of fact omitted virtually every fact advanced by Appellants. As a result, the judgment entries contain a sanitized version of the events, rather than a recitation of the facts as alleged by Appellants, which should have been credited as true on summary judgment.

Intentional Infliction of Emotional Distress - FHS

{¶73} Again, Lozano was never served with the re-filed complaint. Hence, the only remaining defendants were FHS and Shriver. Appellants alleged the following facts in support of their intentional infliction of emotional distress claim against FHS:

{¶74} Lozano, who may have been an independent contractor for FHS and not an employee, arrived in a family-style van. According to Curtis, the van was maroon. (Curtis Depo., p. 35.) Appellants never saw the interior of the van. Romanchuk told her that Rose's body had been transported in a family van belonging to the driver's mother-in-law because the hearse had a flat tire. (Curtis Depo., pp. 100-102.) Schaper testified that all four of the vans owned by FHS at the time were silver. (Schaper Depo., p. 17.)

{¶75} Lozano met Appellants in the parking lot of the Cleveland Clinic, where he asked Patton if she thought she could "keep up" with him on the way to Youngstown. He traveled to Youngstown, in the rain, between 9:00 and 10:00 p.m. at an alarmingly high rate of speed, in excess of 85 miles per hour on the interstate, weaving in and out of heavy traffic. Lozano expressed surprise to Appellants when they arrived in Youngstown that Patton was able to follow him. Patton told Lozano he had missed his calling and should have been a race car driver. According to Patton's testimony, Lozano traveled approximately 76.6 miles in roughly fifty minutes.

{¶76} At Shriver, Lozano asked Appellants if they intended to embalm their mother. He then engaged in a heated conversation with Patton in which he emphatically expressed his opinion that embalming was unnecessary. Following this, Lozano told them that state law prohibited them from entering the embalming room, and they returned home without viewing the body at the funeral home.

{¶77} With respect to FHS, we find that the trial court did not err in entering summary judgment on Appellants' intentional infliction of emotional distress claim. It appears that Lozano may have been an independent contractor for FHS, not an employee, meaning that FHS may not be answerable for his behavior. Regardless, resolving facts in favor of Appellants, we review this matter under the assumption that Lozano was an FHS employee. For purposes of summary judgment, we must, then, accept that Lozano transported Rose's body in his mother-in-law's van, that he violated speed limits from Cleveland to Youngstown in a rain storm while Appellants were trying to follow him, and that he engaged in a heated debate with Patton about embalming and did not allow Appellants inside the funeral home to view their mother's body.

{¶78} The trial court did not consider the allegation that Lozano transported Rose in his mother-in-law's van because the trial court characterized it as speculation. However, Curtis testified that the van that transported Rose was maroon, but Schaper testified that all four of FHS's vans were silver. Moreover, the trial court ignored Curtis's testimony that Romanchuk told her that Lozano drove his mother-in-law's van because the hearse had a flat tire. The trial court should have assumed for the purposes of summary judgment that Appellants' allegation was true. On the other hand, Appellants' contention that Rose's body was left in the van overnight and that her body was misshapen because it was jostled around the van are not supported by any evidence. Lozano collected Rose's body outside the view of Appellants. They concede that they never saw the interior of the van and they left Shriver without seeing the body. Therefore, the trial court correctly found that these allegations made by Appellants mere speculation.

{¶79} Viewing the evidence in a light most favorable to Appellants, we cannot conclude that FHS's conduct meets the standard necessary to prove intentional infliction of emotional distress. In order to meet their burden, Appellants must offer evidence of conduct "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Restatement of Torts 2d, *supra*. Although Lozano's behavior was incredibly rude and thoughtless, it was not unendurable. Further, the record reflects that Lozano did not know that his behavior would cause severe emotional distress, as that term is defined in Ohio for the purpose of intentional infliction of emotional distress.

{¶80} Even assuming for the purposes of this analysis that Lozano's actions constituted extreme and outrageous conduct, Appellants cannot establish that they actually suffered severe emotional distress stemming solely from his behavior or that it was the proximate result of FHS's actions. Taking the facts alleged against FHS in isolation, Appellants have not alleged a fact pattern under which a reasonable person, normally constituted, would be unable to cope. Further, it is clear from their arguments Appellants do not isolate FHS's behavior in this regard. Appellants describe Lozano's conduct as the first in a series of events that caused them to suffer depression and PTSD. Despite the temporal proximity of Lozano's conduct to the conduct of the Shriver employees, Appellants have offered no evidence to distinguish any emotional distress suffered by them as a result of FHS's actions from any emotional distress caused by the actions of the Shriver employees. In other words, they cannot establish causation as it relates to FHS.

{¶81} Accordingly, Appellants have failed to demonstrate extreme and outrageous behavior on the part of Lozano and FHS and have failed to offer sufficient evidence of severe emotional distress or a substantial causal relationship to such conduct to survive summary judgment. The trial court did not err in entering summary judgment in favor of FHS on Appellants' intentional infliction of emotional distress claim.

Intentional Infliction of Emotional Distress - Shriver

{¶82} Appellants alleged the following facts in support of their intentional infliction of emotional distress and breach of contract claims against Shriver:

{¶83} When Rose's family arrived at the funeral home to make arrangements for the viewing hours and funeral service the following day, Kimberly Romanchuk, Courtley's daughter and a Shriver employee, rushed them through the decision-making process because her daughter was home alone. When they could not immediately decide on certain elements of the funeral service, Romanchuk became belligerent. She told them there would not be sufficient time to print prayer cards. She argued about their desire for both afternoon and evening calling hours and asked if they intended to "stand around and look at each other." (Patton Depo., pp. 115-116.)

{¶84} When the arrangements were complete, Romanchuk told Rose's family that they had only thirty minutes to return with Rose's clothing, otherwise the doors would be locked, and ordered some family members to collect the clothing while others were told to go to the florist shop, to save time.

{¶85} Some floral deliveries were not able to be made because there was no one at Shriver to accept delivery. Hence, family and friends were forced to bring their arrangements with them to the funeral.

{¶86} At the viewing, Appellants were shocked at Rose's appearance. Her hair was fanned out around her head with a thick layer of hair spray, and there were hair clippings in the casket and on her gown. Family members themselves collected the cut hair and removed it from the casket. Rose had no color and her veins were visible. They noticed visible stitching in her mouth.

{¶87} Rose was not lying flat in the casket; her head and right shoulder were upturned to the left. She was not wearing the bra that the family brought to the funeral home with the gown, so the outlines of her breasts and nipples were visible. (Betty June Fischer Depo., p. 35.) When Romanchuk lifted the blanket to put booties on her feet, Appellants saw bruising and a bloody bandage on her right ankle. Appellants later discovered that the body had not been furnished "eye caps" as is standard in the industry.

{¶88} After the final guests had left, the family was trying to take a private moment at their mother's side when Courtley told them to leave.

{¶89} During the minister's eulogy the next day, Romanchuk removed the cards from the floral arrangements, handing them to Patton during the eulogy, along with the bill. She began removing the floral arrangements during the eulogy.

{¶90} Courtley told Romanchuk during the eulogy, "[d]amn it to hell, get moving, we have another funeral." (Patton Depo., p. 131.) At the conclusion of the eulogy, Courtley slammed the casket lid shut and said, "[c]an I get my damn job done here?" (Patton Depo., p. 133.) Both of these statements were overheard by others.

{¶91} There was no final viewing before the casket for mourners. Courtley sent everyone, including the pall bearers, to their automobiles where he and another funeral employee put the casket on the gurney and took it to the hearse.

{¶92} After half-heartedly attempting to organize the family vehicles, Courtley said, "[t]he hell with it," and got in the hearse and left. (Patton Depo., p. 138.)

{¶93} There was no organized funeral procession to the cemetery and several cars were separated from the hearse due to traffic.

{¶94} At the grave site, Courtley announced that he had another funeral and left before the side service was concluded. No guest registry was kept by Shriver.

{¶95} Despite the grossly unprofessional and insensitive behavior of Courtley and Romanchuk alleged by Appellants, we cannot conclude their behavior was so egregious that it could not be endured by a reasonable person. Even assuming for the purposes of this analysis that Shriver employees' actions constituted extreme and outrageous conduct, Appellants cannot establish that they suffered severe emotional distress or that it was the proximate result of Shriver employees' actions, alone. Despite the sensitive nature of bereavement, they have not alleged a fact pattern under which a reasonable person, normally constituted, would be unable to cope. The record shows that with the possible exception of Beverly Ann, Appellants' mental problems were not debilitating. However, Beverly Ann's medical notes do not distinguish the emotional distress she suffered as a result of the funeral services from the emotional distress resulting from the death of her brother and her son's suicide. Once again, their allegations against Shriver are seen by them as a continuum of bad events which culminated, based on their entirety, in actionable behavior. This is not the standard in

Ohio. In other words, Appellants cannot establish in Shriver's action alone the severity of the injury required for intentional infliction of emotional distress, or the causal relationship to Shriver's employees' conduct necessary to survive summary judgment.

{¶96} In the Shriver judgment entry, the trial court determined that the emotional distress suffered by Curtis and Patton as a result of their decision to witness Rose's disinterment was not attributable to Shriver. The court opined that as Curtis and Patton chose to view their mother's remains, Shriver should not be liable for any damages resulting from that decision. To the contrary, because the decision to disinter their mother and view Rose's remains was solely in furtherance of the claims asserted in this case (including their breach of contract claims), Curtis and Patton's distress is attributable in some measure to Shriver. However, this does not alter the fact that the trial court reached the correct conclusion regarding the intentional infliction of emotional distress claim against Shriver.

{¶97} In Ohio, claims of intentional infliction of emotional distress demand a virtually insurmountable burden of proof, imposing liability solely for conduct that goes beyond all possible bounds of decency, and that is atrocious and utterly intolerable in a civilized community. The resulting emotional damages must be unendurable to a normally-constituted reasonable person and there must be a substantial causal connection to the conduct of the defendant. Even with the facts taken in a light most favorable to Appellants, they have not met that burden of proof in this case. While Appellants were party to an escalating series of extremely distressing events, even they do not attribute their emotional upheaval to the action of one or the other of the individual defendants, but rather, to the combined effects of all defendants when taken

in a continuum. This is not the standard in Ohio. Accordingly, we affirm the entries of summary judgment in favor of FHS and Shriver on Appellants' intentional infliction of emotional distress claims. Appellants' first assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN ITS OPINION BY CONCLUDING THE ACTIONS OF SHRIVER EMPLOYEES ARE NOT INTENTIONAL NOR EXTREME AND OUTRAGEOUS.

{¶98} While Appellants seem to focus on the behavior of Shriver employees in this assignment, they partially again attack certain portions of the trial court's decision to grant summary judgment on their intentional infliction of emotional distress claim: (1) failure to properly construe Dr. Hart's expert opinion; (2) imputation of liability on Appellants for attending their mother's disinterment; (3) application of the statute of limitations in R.C. 2305.10 resulting in the dismissal of the breach of contract claim against Shriver; (4) misrepresentation regarding the color of the casket lining and the obliteration of the contract provision resulting, and (5) the conclusion that the fraud claim was raised for the first time in Appellants' opposition to summary judgment. Because the elements of the intentional infliction of emotional distress claims were addressed in their entirely in the first assignment of error, only those allegations and arguments regarding their breach of contract and fraud claims will be addressed, here.

Breach of Contract - Shriver

{¶99} The trial court concluded that both Appellants' negligent infliction of emotional distress and breach of contract claims against Shriver were time barred. This is because the trial court held that the Appellants' allegations regarding breach actually

were claims of negligence, and so the longer limitations period for contract actions did not apply. R.C. 2305.10 provides, in pertinent part:

> (A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs.

{¶100} Rose's body was transported from the Cleveland Clinic to Shriver on July 24, 2008. The funeral preparations and services occurred over the next few days. The original complaint was filed on June 30, 2011. Although Appellants concede that, standing alone, their negligent infliction of emotional distress claims were not timely filed, they assert that the trial court erred in dismissing the breach of contract claim against Shriver as time barred.

{¶101} The statute of limitations that applies in a particular case does not depend on the form of the pleadings or the headings in the complaint, but on the actual nature of the subject matter of the complaint. *Shorter v. Neapolitan*, 179 Ohio App.3d 608, 2008-Ohio-6597, 902 N.E.2d 1061, ¶ 17 (7th Dist.), citing *Hunter v. Shenango Furnace Co.*, 38 Ohio St.3d 235, 237, 527 N.E.2d 871 (3d Dist.1988). "[W]hether a suit is brought in contract or tort, when the 'essence' of an action is wrongful harm to person or personal property, the R.C. 2305.10 statute of limitations is the appropriate one to apply." *Shorter* at ¶ 19, quoting *Ressallat v. Burglar & Fire Alarms, Inc.*, 79 Ohio App.3d 43, 49, 606 N.E.2d 1001 (1992).

{¶102} Shriver contends that this case is on all fours with *JRC Holdings, Inc. v. Samsel Servs. Co.,* 166 Ohio App.3d 328, 2006-Ohio-2148, 850 N.E.2d 773 (11th Dist.). JRC, a rubber parts manufacturer, contracted with Samsel, an environmental remediation firm, to determine the extent of pollution resulting from JRC's use of trichloroethylene ("TCE"), an industrial degreaser, and to formulate a remediation plan acceptable to the Ohio EPA. Samsel submitted recommendations for certain measures, by letter or report, and JRC issued its standard purchase orders in reply. Samsel would then submit its standard invoice form and receive checks in payment.

{¶103} Samsel drilled several wells for the purpose of monitoring ground water contamination. In this process, it contaminated deep water on JRC's property. JRC filed an action for negligence, breach of contract, and breach of warranty based on the chemical contamination of the deep water zone. The Eleventh District held that JRC's claims were barred by the two-year statute of limitations for property damage:

> [T]he damages allegedly suffered by JRC are not contractual: they do not depend upon the loss of the benefit of JRC's bargain with Samsel, whatever that bargain included. A finding that this action sounds in contract would not entitle JRC to different damages than it might recover in tort. Such a finding would only extend the limitations period for bringing the action. All of JRC's causes of action allege exactly the same thing: that Samsel damaged JRC's real property by introducing TCE contamination into the deep-water zone through its drilling processes.

Id. at ¶ 20.

{¶104} Despite Shriver's contention to the contrary, the same is not true here. In addition to the emotional distress suffered by Appellants, the Appellants allege contractual damages for the loss of the benefit of Beverly Ann's bargain with Shriver for the provision of funeral services. The itemized contract contains charges for services of the funeral home director and staff in the amount of $1,825.00, plus charges for use of the facilities and merchandise. Like JRC*,* where the damages remain the same whether the action is contractual or tortious, the damages claimed by Appellants for emotional distress are an unintended consequence of the negligent performance of a contractual service. Unlike JRC, where the damages were in no way tied to the "benefit of the bargain" between JRC and Samsel, Appellants seek damages independent of the emotional damages suffered as a result of the Shriver employees' performance under the contract.

{¶105} Despite our conclusion that Appellants' breach of contract claim is not based on negligence and is not subject to the statute of limitations for tortious conduct, we nonetheless conclude that the Estate may attempt to additionally prove emotional damages that logically arose from this breach of contract claim. Although the Ohio Supreme Court has recognized that emotional damages flowing from a breach of contract are difficult to prove, even when foreseeable, they are available when the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. *Kishmarton*, *supra*. Further, unlike the burden of proof for intentional infliction of emotional distress claims, the emotional damages resulting from a breach of contract need not be severe.

{¶106} Accordingly, this record reflects that the Estate's breach of contract claim is not grounded in tort. Hence, this claim is not barred by the statute of limitations found in R.C. 2305.10. This record also reflects that genuine issues of material fact exist with respect to the breach of contract claim. As earlier discussed, Appellants have alleged a plethora of facts that, if true, tend to show that they did not receive the benefit of their bargain and did not receive the goods or services for which they contracted. While the trial court ruled otherwise, it appears that the exhumation, done in preparation for suit, also revealed facts pertinent to the breach of contract claims. Further, the loss of their contractual bargain and the ensuing preparation for lawsuit may have consequently caused serious emotional disturbance, and the standard for proving this emotional damage is lower than that utilized in reviewing Appellants' intentional infliction of emotional distress claims. Therefore, summary judgment on this claim should not have been entered.

{¶107} Not all of Appellants' contractual claims are valid, however. Turning to the specific issue of the obliterated handwritten clause in the contract, the construction of written contracts is a matter of law. *Alexander v. Buckeye Pipe Line Co*., 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. The purpose of contract construction is to discover and give effect to the parties' intent, which is presumed to reside in the contractual language they chose to use. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996). Common words in a written contract will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clearly evidenced from the face or overall content of the contract. *Alexander*, paragraph two of the syllabus. If language in a contract is clear

and unambiguous, the court cannot create a new contract by finding an intent not expressed in the clear language employed by the parties. *Id.* at 246. If the contract is clear and unambiguous, its interpretation is a matter of law, and there is no issue of fact to determine. *Inland Refuse Transfer Co. v. Browning–Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 322, 474 N.E.2d 271 (1984), citing *Alexander*. However, where the contract language is reasonably susceptible of more than one interpretation, the meaning of the ambiguous language becomes a question of fact. *Ohio Historical Soc. v. Gen. Maint. & Eng. Co.*, 65 Ohio App.3d 139, 146, 583 N.E.2d 340 (10th Dist.1989).

{¶108} There is no dispute that the executed contract contained a handwritten clause and that it was later obliterated by Courtley. It is also undisputed that this clause stated that payment of Rose's funeral bill would be made after the sale of her house. However, and regardless of Courtley's actions, the plain and unambiguous language of the clause did not suspend application of the penalty provision in the contract. Instead, it merely explained the condition precedent to payment. Because the handwritten clause did not suspend the penalty provision, Appellants' breach of contract claim, to the extent that it was based on the handwritten clause, was properly dismissed as a matter of law.

Motion to Amend to Include a Fraud Claim

{¶109} Appellants contend that their fraud claim was raised in the verified complaint. Fraud must be pled with particularity pursuant to Civ.R. 9(B), which provides:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

{¶110} In the complaint, a plaintiff must state the time, place and content of the false representation, the fact misrepresented, and what was obtained or given as a consequence of the fraud. The plaintiff must allege, at a minimum, the time, place and contents of the misrepresentation on which they relied. Generally, the pleadings must be sufficiently particular to apprise the opposing party of the claim against him or her. *Haddon View Investment Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154, 158-159, 436 N.E.2d 212 (1982). Moreover, failure to plead fraud with particularity results in waiver of that claim. *Allied Erecting & Dismantiling Co. v. Ohio Edison Co.*, 7th Dist. No. 10-MA-25, 2011-Ohio-2627, ¶ 39-42.

{¶111} Fraud is mentioned a single time in the verified complaint, in the final paragraph of the prayer for relief. That paragraph reads, in its entirety, "[s]uch other and additional causes of action, including but not limited to, misrepresentation, fraud, malice, intent, knowledge that the actions did cause or would cause infliction of harm or irreparable psychological effect, and such additional causes of action or equitable relief as may be determined by a jury." (11/4/15 Verified Compl., Prayer for Relief, ¶ 3.) This brief, general statement is insufficient to fulfill the requirements of Civ.R. 9(B) or to put Appellees on proper notice of a fraud claim. Further, the allegations in the verified complaint regarding the casket lining refers specifically to the breach of contract claim. (11/4/15 Verified Compl., ¶ 14-15.) This record shows that Appellants failed to plead fraud with particularity in the verified complaint.

{¶112} Turning to the proposed fraud claim in their motion to amend, motions on which a trial court fails to rule prior to rendering a final judgment are to be deemed overruled on the issuance of that final judgment. *Switka v. City of Youngstown*, 7th Dist. No. 05 MA 74, 2006-Ohio-4617, ¶ 11. In their appellate brief, Appellants allege that Shriver committed fraud when it provided a York Northern Maple casket instead of the Andover Maple casket identified in the contract.

{¶113} Appellants filed a motion for leave to amend the verified complaint to conform to the evidence pursuant to Civ.R. 15(B) on September 8, 2016. Civ.R. 15(B) governs the amendment of pleadings "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties." Appellants relied in error on Civ.R. 15(B) because this matter had not been tried. We have previously observed that the mistaken invocation of Civ.R. 15(B) is reason alone to deny a motion to amend. *Suriano v. NAACP*, 7th Dist. No. 05 JE 30, 2006-Ohio-6131, ¶ 83.

{¶114} Although the language of Civ.R. 15(A) favors a liberal amendment policy, amendment is not proper where there is a showing of bad faith, undue delay or undue prejudice to the opposing party. *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984). Our role is to determine whether the trial judge's decision amounts to an abuse of discretion, not whether we would have reached the same conclusion. *West v. Devendra*, 7th Dist. No. 11 BE 35, 2012-Ohio-6092, 985 N.E.2d 558, ¶ 49. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985).

{¶115} According to the motion to amend, Williams attested that the York casket was of lesser quality than the Andover Northern Maple casket. There is no such averment in Williams' affidavit. Williams simply states that Rose's casket had a plate attached which read "York Northern Maple." In Courtley's affidavit, he explains that York is a wholly-owned subsidiary of Matthews International, the marketers of the Andover Maple casket purchased by Beverly Ann. He attests that the casket in which Rose was buried is the same model number as the casket identified in the contract. Appellants have offered no evidence to call into question the veracity of Courtley's statements.

{¶116} Williams concedes that he took the photograph of the casket on July 14, 2014, the day of Rose's disinterment. More than two years passed between Rose's disinterment and the filing on the motion to amend. The failure to timely file the motion to amend based on evidence in Appellants' possession constitutes undue delay.

{¶117} Finally, because the color of the casket's lining was not identified in the contract, Appellants' proposed fraud claim, to the extent that it was based on the color of the casket lining, has no merit. Appellants were aware of the color of the lining of the casket during the funeral services.

{¶118} Appellants did not plead fraud with particularity in the verified complaint. Further, Appellants engaged in undue delay in seeking to amend the verified complaint, and the evidence in the record does not establish the elements of fraud. Accordingly, it does not appear from this record that the trial court abused its discretion in overruling the motion to amend the verified complaint to add a fraud claim.

{¶119} In summary, the trial court erred in granting summary judgment on the breach of contract claim and in failing to accept facts arising from the exhumation of the deceased, except to the extent that the breach claim was based on the obliterated handwritten clause. Appellants did not plead fraud with particularity in the verified complaint and the trial court did not err in overruling the motion to amend the verified complaint. Accordingly, Appellants' second assignment of error is sustained in part and overruled in part.

Conclusion

{¶120} For the following reasons, the judgment of the trial court is affirmed in part with respect to the intentional infliction of emotional distress claim against FHS and the intentional infliction of emotional distress claim against Shriver. The trial court's determination as to the handwritten provision in the parties' contract is also affirmed, however, the judgment is reversed in part with respect to the remainder of the breach of contract claim against Shriver. The trial court also did not abuse its discretion when it overruled Appellants' motion to amend the verified complaint and this decision is affirmed. This matter is remanded for trial on the breach of contract claim against Shriver.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the Appellants' first assignment of error is overruled and their second assignment is sustained in part and overruled in part. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. We hereby remand this matter to the trial court for trial on the breach of contract claim against Appellee Shriver according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Enervest Operating, L.L.C v. JSMB0912, L.L.C.*, 2018-Ohio-3322.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

ENERVEST OPERATING, L.L.C.,	:	**O P I N I O N**
Plaintiff,	:	
		CASE NO. 2016-P-0080
BRAD CROMES, PORTAGE COUNTY TREASURER,	:	
Intervenor-Appellee,	:	
- vs -	:	
JSMB0912 LLC,	:	
Defendant/Third Party Plaintiff-Appellant,	:	
- vs -	:	
CAG PROPERTY 101, LLC,	:	
Third Party Defendant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2013 CV 00604.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Denise L. Smith*, Chief Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Intervenor-Appellee).

Warner D. Mendenhall, The Law Offices of Warner Mendenhall, 190 North Union Street, Suite 201, Akron, OH 44304 (For Defendant/Third Party Plaintiff-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} JSMB0912, LLC appeals from the grant of summary judgment by the Portage County Court of Common Pleas to Brad Cromes, Portage County Treasurer, on the latter's action for delinquent property taxes. For the reasons that follow, we affirm.

{¶2} This case involves two adjoining pieces of property in Suffield Township, Portage County, Ohio. One evidently contains a manufacturing plant and office building. It was purchased by EnerVest Operating L.L.C. in 2010. The other contains a small sewage treatment plant, servicing the EnerVest facilities. In 2012, EnerVest attempted to purchase the sewage treatment plant from its then owner, CAG Property 101, LLC. The deal fell through, and CAG sold the property to JSMB0912.

{¶3} Evidently, JSMB0912 demanded additional money from EnerVest to use the sewage treatment plant, which EnerVest denied it owed, citing to a 1995 agreement between prior owners of the two properties, which set a perpetual fee running with the land. June 11, 2013, EnerVest filed an action for declaratory judgment and breach of contract against JSMB0912. Eventually, JSMB0912 answered and counterclaimed, and filed a third party action against CAG, the prior owner of the sewage treatment plant, for indemnity and to quiet title.

{¶4} On or about April 25, 2014, EnerVest and JSMB0912 entered a settlement agreement, whereby EnerVest would purchase that portion of the JSMB0912 property containing the sewage treatment plant for $135,000. In September 2014, EnerVest moved the trial court to enforce the settlement. The trial court granted this motion in March 2015. As JSMB0912 continued to balk in fulfilling its obligations under the settlement, the trial court appointed Attorney James Masi as receiver to execute JSMB0912's obligations.

{¶5} October 6, 2015, Attorney Masi filed his first report, in which he informed the trial court that the JSMB0912 property had been partitioned, and EnerVest had paid the purchase price. Attorney Masi had recorded the appropriate deeds on or about September 18, 2015. Attorney Masi reported that, after paying certain expenses, he retained $131, 232.73, and requested an order from the trial court regarding its disbursement. JSMB0912 owed $80,218.80 in delinquent taxes, plus interest, fees and penalties on the property in question. The county treasurer moved to intervene in the case in March 2016. JSMB0912 opposed the motion to intervene, which the trial court granted in May 2016. The county treasurer filed his complaint, which JSMB0912 answered.

{¶6} June 21, 2016, EnerVest and JSMB0912 finally entered an agreed judgment entry, whereby each dismissed, with prejudice any and all claims they possessed against each other. This judgment entry contained appropriate findings and language under Civ.R. 54(B), and was final and appealable when entered. Neither party appealed.

{¶7} July 19, 2016, the country treasurer moved for summary judgment. JSMB0912 did not oppose. November 28, 2016, the trial court granted the motion for summary judgment. JSMB0912 timely appealed, assigning five errors.

{¶8} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66, 1993 Ohio 195, (***) (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds

can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. *See e.g*. Civ.R. 56(C).

{¶9} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121, (* * *) (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, (* * *) (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp.*, 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, (* * *) (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, (* * *) (1996). (Parallel citations omitted.) *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6.

{¶10} We consider JSMB0912's fourth assignment of error first, since it challenges our jurisdiction. It reads: "The court's order granting summary judgment for Brad Cromes did not contain the language required by Civ.R. 54(B)." Ohio courts of appeal only possess jurisdiction over final appealable orders. *Gaydosh v. Trumbull Cty.*, 11th Dist. Trumbull No. 2016-T-0109, 2017-Ohio-5859, ¶15. Civ.R. 54(B) provides:

{¶11} "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter

final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

{¶12} As JSMB0912 points out, the trial court's judgment entry in favor of the treasurer does not contain the findings and language required by Civ.R. 54(B). JSMB0912 contends it should have, since its third party complaint against CAG remains pending.

{¶13} We respectfully disagree. JSMB0912's claims against CAG were for indemnification, in case JSMB0912 was found liable to EnerVest, and to quiet title regarding the property on which the sewage treatment plant stands. However, in the June 21, 2016 agreed judgment entry between EnerVest and JSMB0912, each party dismissed, with prejudice, any claim it had against the other. JSMB0912 did not appeal that judgment entry, which did contain Civ.R. 54(B) findings and language.

{¶14} In *Noll v. Am. Tel. and Tel. Co.*, 63 Ohio App.3d 646, 648 (1st Dist.1989), the court held:

{¶15} "We note the trial court did not expressly dispose of appellant's claim for injunctive relief, and that the judgment entry does not contain a Civ.R. 54(B) certification. Even though all claims are not expressly adjudicated by the trial court, if the effect of the judgment as to some of the claims is to render the remaining claims moot, then

compliance with Civ.R. 54(B), providing for a determination that there is no just reason for delay, is not required to make the judgment final and appealable. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, * * *; *Wise v. Gursky* (1981, 66 Ohio St.2d 241, * * *."

{¶16} In *In re Guardianship of Weller*, 2d Dist. Montgomery No. 24337, 2011-Ohio-5816, ¶7, the court held:

{¶17} "'The doctrine of mootness is rooted in the "case" or "controversy" language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint.' *James A. Keller, Inc. v. Flaherty* (1991, 74 Ohio App.3d 788, 791, * * *. 'While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question.' Id. 'It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.' *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, * * *. In other words, an issue is moot when it has no practical significance, being instead merely hypothetical or academic." (Parallel citations omitted.)

{¶18} By dismissing all of its claim against EnerVest, JSMB0912 rendered its claims against CAG moot, and the judgment entry granting the treasurer summary judgment did not require Civ.R. 54(B) findings or language to be final and appealable.

{¶19} The fourth assignment of error lacks merit.

{¶20} JSMB0912's first assignment of error reads: "The receiver exceeded the scope of his power by settling the claims between EnerVest and JSMB, and the trial court erred by approving this action without a prior order." It's second assignment of error reads: "TheReceiver exceeded the scope of his authority by withholding funds from JSMB, and the trial court erred by continuing the receivership without any cognizable reason to do so." The receiver was appointed by the trial court to carry out JSMB0912's contractual obligations under the settlement agreement with EnerVest. If JSMB0912 wished to contest any aspect of his conduct, it was required to appeal from the June 21, 2016 agreed judgment entry dismissing all claims between EnerVest and JSMB0912. JSMB0912 failed to appeal that judgment entry.

{¶21} The first and second assignments of error lack merit.

{¶22} JSMB0912's fifth assignment of error reads: "The trial court erred by ordering the June 11, 2013 (Dkt. 5) Temporary Restraining Order, which ordered JSMB to continue to provide an illegal service." In conjunction with its complaint, EnerVest requested a temporary restraining order to prevent JSMB0912 from cutting off its use of the sewage treatment plant. The trial court granted the TRO. JSMB0912 objects that no operator of the sewage treatment plant (or EnerVest) had the proper certifications.

{¶23} Again, this assignment of error goes solely to the dispute between EnerVest and JSMB0912, and the latter was required to appeal from the June 21, 2016 agreed judgment entry settling the parties' disputes if it had any objections.

{¶24} The fifth assignment of error lacks merit.

{¶25} JSMB0912's third assignment of error reads: "The trial court erred in allowing Brad Cromes, Portage County Treasurer, to intervene in the action."

{¶26} The treasurer had moved to intervene pursuant to Civ.R. 24(A)(2), "Intervention as of right," which provides:

{¶27} "Upon timely application anyone shall be permitted to intervene in an action: * * *; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

{¶28} In support of its assignment of error, JSMB0912 argues (1) that the treasurer's interest in payment of delinquent taxes would not have been impaired, since JSMB0912 had entered a payment plan with the county; and (2) that the intervention was untimely. JSMB0912 notes that the receiver received payment from EnerVest on or about September 18, 2015, and had filed the necessary deeds regarding partition that same day, but that the treasurer did not move to intervene until March 2, 2016.

{¶29} We review a trial court's decision to grant or deny intervention pursuant to Civ.R. 24(A)(2) for abuse of discretion. *Freedom Mtge. Corp. v. Milhoan*, 7th Dist. Columbiana No. 13 CO 15, 2014-Ohio-881, ¶34. Intervention is to be granted liberally. *Id.* The term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶30} We do not find the trial court abused its discretion by allowing the treasurer to intervene. The treasurer had an interest in the funds in the hands of the receiver, since

JSMB owed years of delinquent taxes. The trial court could reasonably find that the treasurer's interest in those funds might be impaired if the funds went directly to JSMB0912, which had a history of not paying obligations. Neither EnerVest nor JSMB adequately represented the treasurer's interests. The former's sole interest was to obtain control of the sewage treatment facility. The latter had no particular interest in collecting monies for the treasurer.

{¶31} Nor do we find the intervention untimely. The Supreme Court of Ohio set forth the test for whether intervention is timely in *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503 (1998):

{¶32} "Whether a Civ.R. 24 motion to intervene is timely depends on the facts and circumstances of the case. *Norton v. Sanders* (1989), 62 Ohio App.3d 39, 42, * * *; *NAACP v. New York*, 413 U.S. 345, 366, * * *. The following factors are considered in determining timeliness: '(1) the point to which the suit had progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.' *Triax Co. v. TRW, Inc.* (C.A.6, 1984), 724 F.2d 1224, 1228."

{¶33} Consideration of these factors show that the motion to intervene in this case was timely. The underlying lawsuit between EnerVest and JSMB0912 would not settle until June 21, 2016, whereas the treasurer sought intervention March 2, 2016. The intervention was sought for the proper purpose of procuring delinquent taxes. The earliest

the treasurer could have known that the receiver had funds available to satisfy JSMB's tax delinquencies was September 18, 2015: the treasurer sought intervention five and one-half months later. The original parties, EnerVest and JSMB0912 suffered no prejudice due to the intervention. The fact that JSMB0912 had owed taxes for a period of years militated in favor of intervention.

{¶34} At oral argument, JSMB0912 argued that the motion to intervene was untimely, and prejudiced it, because it resulted in a foreclosure action against is property. We have searched the record diligently for evidence of this, but find nothing. If this in happened, JSMB0912 was required to bring it to the notice of the trial court, and place evidence in the record. We are bound by the record, and cannot decide matters not raised in the trial court.

{¶35} JSMB0912 relies on the opinion in *Heiney v. Godwin*, 9th Dist. Summit No. 21784, 2004-Ohio-2117, for the proposition that a four month delay in seeking intervention is unreasonable. *Id.* at ¶2-3, 8. That case is distinguishable: appellants only sought intervention four days prior to trial. *Id.* at ¶8-11.

{¶36} The third assignment of error lacks merit.

{¶37} The judgment of the Portage County court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

[Cite as *Holloway v. Bucher*, 2018-Ohio-3301.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Janet Holloway	Court of Appeals No. WD-18-014
Appellant	Trial Court No. 2017-CV-0115
v.	
Suzanne Bucher, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: August 17, 2018

* * * * *

Cory B. Kuhlman, for appellant.

John C. Filkins, for appellee Suzanne Bucher.

* * * * *

JENSEN, J.

I. Introduction

{¶ 1} This is an accelerated appeal from the judgment of the Wood County Court of Common Pleas, granting summary judgment to appellees, Suzanne and William Bucher, and dismissing appellant's, Janet Holloway, claim for breach of contract.

Because the oral agreement alleged in the complaint is barred by the statute of frauds, we affirm the trial court's grant of summary judgment to appellees.

A. Facts and Procedural Background

{¶ 2} On February 27, 2017, appellant filed a complaint with the trial court in which she alleged that appellees owed her $60,059.70 stemming from a loan that appellees received on January 1, 2004. According to the complaint, appellant orally agreed to loan appellees a total of $163,800 at an annual interest rate of 1.5 percent. The loan was provided to appellees in two installments. The first installment of $6,800 was provided to appellees on January 15, 2004. The first installment was used to pay off a home equity loan in order to facilitate the sale of appellees' residence (the "old residence"). Two weeks later, appellant loaned appellees the remaining $157,000 to fund appellees' purchase of another residence (the "new residence").

{¶ 3} Pursuant to the terms of the oral agreement, appellees were obligated to make monthly payments in the amount of $300 until they sold their old residence. Once the old residence was sold, the monthly payment was to increase to $500. Pursuant to the agreement, appellees made monthly payments of $300 until they sold the old residence in August 2004. Appellees profited $63,025.50 from the sale of the old residence. This profit was applied to the balance of the loan at issue in this case, and appellees subsequently commenced making monthly payments of $500.

{¶ 4} Beginning in February 2013, appellees ceased making monthly payments. According to the record, appellant granted Suzanne, her daughter, a forbearance from

making monthly payments due to Suzanne's loss of her job. The parties disagree as to the nature of this forbearance. Suzanne understood that the remaining balance of the loan was forgiven. Appellant insists that the forbearance was temporary, and that payments were to resume once Suzanne's financial condition improved.

{¶ 5} According to her deposition testimony, appellant demanded a continuation of monthly payments from appellees once she concluded that Suzanne was not making a good faith effort to secure meaningful employment. When appellees failed to resume monthly payments on the oral agreement, appellant filed the aforementioned complaint with the trial court, alleging one claim for breach of contract.

{¶ 6} Approximately one month after appellant filed her complaint, appellees filed a motion to dismiss, in which they argued that appellant's breach of contract claim should be dismissed because the agreement was unenforceable under R.C. 1335.05, the statute of frauds, because it could not be completed within a period of one year.

{¶ 7} Upon its consideration of the allegations contained in appellant's complaint, the trial court denied appellees' motion to dismiss on April 27, 2017. Because appellant alleged that the $300 and $500 monthly payments were *minimum* payments, the court found that the loan could have been repaid before the expiration of the one-year period and, therefore, the agreement fell outside the statute of frauds.

{¶ 8} The matter then proceeded through discovery until appellees filed a motion for summary judgment on December 7, 2017. Appellant filed her own motion for summary judgment the following day.

{¶ 9} In appellees' motion for summary judgment, they reasserted their statute of frauds argument. In support of their argument, appellees referenced the deposition testimony from appellant and Suzanne that revealed that the monthly payments contemplated by the parties were not minimum payments, and that early payoff of the loan was not a term of the oral agreement. At a rate of $500 per month, appellees noted that the loan would not have been repaid within one year of the date of the oral agreement. As such, appellees contended that the oral agreement was unenforceable under R.C. 1335.05.

{¶ 10} In response, appellant asserted that the agreement could have been completed within one year if appellees repaid the loan early. Appellant pointed to her acceptance of appellees' lump sum payment of $63,025.50 as evidence of the possibility of an early payoff. Further, appellant cited her deposition testimony, in which she stated that she would have accepted payments in excess of the required $500 monthly payments, and would have allowed appellees to pay off the balance of the loan at any time. Additionally, appellant contended that the statute of frauds should not be applied here given the parties' partial performance under the agreement.

{¶ 11} On January 29, 2018, the trial court issued its decision on the foregoing motions for summary judgment. Relevant here, the court found that the parties' oral agreement could not be completed within one year because the parties agreed to monthly payments of $300 and $500, and did not contemplate increasing or decreasing the required monthly payments during the repayment period. Therefore, the court held that

the agreement was unenforceable under R.C. 1335.05. Thus, the court granted appellees' motion for summary judgment and denied appellant's motion for summary judgment.

{¶ 12} Thereafter, appellant filed her timely notice of appeal.

B. Assignments of Error

{¶ 13} On appeal, appellant asserts two assignments of error, as follows:

> Assignment of Error No. 1: The Trial Court erred in its application of O.R.C. Section 1335.05 by failing to grant Plaintiff's Motion for Summary Judgment.
>
> Assignment of Error No. 2: The Trial Court erred in its application of the standards of review when granting the Defendant's Motion for Summary Judgment in favor of Defendant Suzanne Bucher.

II. Analysis

{¶ 14} In appellant's first assignment of error, she argues that the trial court erred in granting appellees' motion for summary judgment upon the conclusion that the parties' oral agreement was unenforceable under the statute of frauds. In her second assignment of error, appellant contends that the trial court misapplied the standard of review governing motions for summary judgment by failing to consider the evidence in a light most favorable to her as the nonmoving party. We will address these assignments of error together.

{¶ 15} A motion for summary judgment is reviewed de novo by an appellate court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "'When

reviewing a trial court's ruling on summary judgment the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.'" *Baker v. Buschman Co.*, 127 Ohio App.3d 561, 566, 713 N.E.2d 487 (12th Dist.1998).

{¶ 16} In order to obtain summary judgment at the trial level,

> [I]t must be determined that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219, 631 N.E.2d 150 (1994), citing *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993); see also Civ.R. 56(C).

{¶ 17} Here, appellant argues that the trial court erred in its application of R.C. 1335.05, which provides, in pertinent part:

> No action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

{¶ 18} The foregoing provision "applies only to agreements which, by their terms, cannot be fully performed within a year; and not to agreements which may possibly be performed within a year." *Sherman v. Haines*, 73 Ohio St.3d 125, 127, 652 N.E.2d 698 (1995). "[T]hus, where the time for performance under an agreement is indefinite, or is dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds." *Id.*

{¶ 19} Appellant urges, as she did before the trial court, that the statute of frauds should not apply here because the oral agreement could have been completed within one year if appellees repaid the loan early. Appellant cites her acceptance of appellees' lump sum payment of $63,025.50, as well as her deposition testimony that she would have accepted monthly payments in excess of $500, as evidence that the oral agreement included the possibility of an early payoff.

{¶ 20} An oral agreement similar to the one at issue here was examined by the Supreme Court of Ohio in *Sherman, supra*. In that case, the agreement required the defendant to pay $3,000 to plaintiff in monthly installments of $25. *Id*. at 125. When defendant failed to make the required monthly payments, plaintiff brought a breach of contract action. Defendant filed a motion to dismiss, which was subsequently granted by the trial court upon the finding that the agreement was subject to the statute of frauds because it could not be completed within one year. *Id*. at 126.

{¶ 21} Eventually, the matter proceeded to the Supreme Court of Ohio on a certified question as to whether "[a]n alleged oral agreement for the payment of

installments is 'an agreement that is not to be performed within one year from the making thereof' pursuant to the R.C. 1335.05 Statute of Frauds when the installment payment obligation exceeds one year." *Id.* In addressing this issue, the court noted:

> Most courts that have been confronted with oral agreements to pay money in installments over a period of time in excess of one year, the terms of which either precluded an early payoff or were silent as whether the defendant could pay the entire debt at an earlier time, have held such agreements to be within the applicable one-year provision of the Statute of Frauds in their respective jurisdictions. Other than a single dissenting opinion in *Hendry v. Bird*, 135 Wash. 174, 185, 237 P. 317, 321 (1925), none of these courts has expressed the opinion that the potential for early payment amounts to a legal possibility of performance within one year sufficient to remove the agreement from the statute. In addition, those courts that have dealt with oral agreements similar to the agreement in the case sub judice, which do not specify the actual number of installment payments to be made but do provide for a periodic payment in such amount as would necessarily require more than a year to pay the entire obligation, have held such agreements subject to the statute. (Citations omitted.) *Sherman*, 73 Ohio St.3d at 127, 652 N.E.2d 698.

{¶ 22} The court in *Sherman* went on to acknowledge the existence of cases in which oral agreements to pay money in installments over a period of time in excess of

one year were held to fall outside the scope of the statute of frauds. *Id.* at 128. However, the court noted that the agreements in these cases provided for the possibility of an early payoff. *Id.*, citing *Steward v. Sirrine*, 34 Ariz. 49, 56, 267 P. 598 (1928). Because the agreement at issue required 120 monthly installment payments, and in light of the absence of any provision for early payoff within the agreement, the court found the agreement could not be completed within one year and was therefore unenforceable under R.C. 1335.05. *Id.* at 129.

{¶ 23} Similarly here, the evidence contained in the record demonstrates that the parties did not contemplate early payoff of the loan when the agreement was reached. Consequently, early payoff was not a term of the oral agreement. The fact that appellant accepted a large lump sum payment sometime after the agreement was reached is not relevant in ascertaining the terms of the agreement at its inception. Likewise, appellant's self-serving testimony that she would have accepted monthly payments that exceeded $500 is unavailing.

{¶ 24} The record demonstrates that the parties' agreement required monthly payments of $300 until appellees sold the old residence, and monthly payments of $500 thereafter. Although the term of the agreement was not specified, the amount of the monthly payments would necessarily require more than one year to pay the entire obligation. Thus, the parties' oral agreement is unenforceable under R.C. 1335.05.

{¶ 25} Notwithstanding the foregoing, appellant contends that the statute of frauds should not be applied here given the parties' partial performance of the oral agreement.

{¶ 26} The doctrine of partial performance precludes the operation of the statute of frauds if the "acts of the parties * * * are such that it is clearly evident that such acts would not have been done in the absence of a contract and * * * there is no other explanation for the performance of such acts except a contract containing the provisions contended for by the plaintiff." *Hughes v. Oberholtzer*, 162 Ohio St. 330, 337-38, 123 N.E.2d 393 (1954). Notably, this doctrine has been limited in its application to "cases involving the sale or leasing of real estate, wherein there has been a delivery of possession of the real estate in question, and in settlements made upon consideration of marriage, followed by actual marriage." *Hodges v. Ettinger*, 127 Ohio St. 460, 189 N.E. 113 (1934), syllabus.

{¶ 27} Here, the agreement involved lending of money from appellant to appellees, not the sale or leasing of real estate or a settlement made upon consideration of marriage. Therefore, we agree with the trial court's conclusion that the doctrine of partial performance is inapplicable in this case. *See Kiser v. Williams*, 9th Dist. Summit No. 24968, 2010-Ohio-3390, ¶ 15 (concluding that although loan proceeds are used to fund the purchase of real estate, the agreement does not involve the sale or leasing of real estate where the borrower does not purchase the real estate from the lender).

{¶ 28} Because the agreement at issue in this case was not in writing and was not capable of being completed within one year, it is unenforceable under R.C. 1335.05. Moreover, the doctrine of partial performance does not preclude the application of the

statute of frauds to the agreement. Therefore, the trial court properly granted summary judgment to appellees' on appellant's claim for breach of contract.

{¶ 29} Accordingly, appellant's assignments of error are found not well-taken.

III. Conclusion

{¶ 30} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE