[Cite as *Clay v. Schriver Allison Courtley Co.*, 2018-Ohio-5406.]

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

Motion to Certify a Conflict; Motion for Reconsideration; Motion for En Banc Consideration

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

JUDGMENT:
Overruled.

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. 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: December 20, 2018

PER CURIAM.

{¶1} On August 16, 2018, we released our decision in *Estate of Beverly Ann Clay, et al. v. Shriver Allison Courtley Co.,* 7th Dist. No. 17 MA 0003, 2018-Ohio-3371. On August 27, 2018, Defendant-Appellee Shriver Allison Courtley Company, aka Shriver-Allison-Courtley-Weller-King ("Shriver") filed an application for reconsideration, and, in the alternative, an application for rehearing en banc, of our decision. That same day Shriver filed a motion to certify a conflict to the Ohio Supreme Court.

{¶2} Shriver argues that Appellants' breach of contract claim is grounded in tort, and, therefore, the claim is governed by the two-year statute of limitations in R.C. 2305.10 and was not timely filed. In the alternative, Shriver argues that damages for emotional disturbance are not available as a result of the breach of contract claim because we have already determined that Appellants cannot prove Shriver was the proximate cause of their emotional injuries.

{¶3} App.R. 26, which provides for the filing of an application for reconsideration in this Court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered. *U.S. Bank, Natl. Assn. v. Smith,* 7th Dist. No. 17 MA 0093, 2018-Ohio-3770, ¶ 3. The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered or not fully considered in the appeal. *Id.*

{¶4} An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an

appellate court. *Id.* ¶ 4. Rather, App.R. 26 provides a mechanism to prevent the possible miscarriage of justice that may arise where an appellate court makes an obvious error or renders an unsupportable decision under the law. *Id.*

{¶5} App.R. 26(A)(2) governs application for en banc consideration. Pursuant to the rule, if a court of appeals determines that two or more of its decisions are in conflict, it may order that an appeal or other proceeding be considered en banc. App.R. 26(A)(2)(a). However, "[c]onsideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." App.R. 26(A)(2)(a). The burden is on the party requesting en banc consideration to "explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary." App.R. 26(A)(2)(b).

{¶6} In this case, we affirmed the entry of summary judgment in favor of Shriver on Appellants' intentional infliction of emotional distress claims, but reversed the trial court's decision entering judgment in favor of Shriver on Appellants' breach of contract claim. We concluded that the essence of Appellants' breach of contract claim was not wrongful injury to person or property, but, instead, a breach of a contract for services. Therefore, the claim was timely filed. Further, based on the nature of the contract and the breach alleged in this case, we held that Appellants may also be able to recover damages for severe emotional disturbance flowing from the breach of contract claim. *Id.* ¶ 106.

{¶7} Shriver contends that our decision here is directly at odds with our 2008 decision in *Shorter v. Neapolitan,* 179 Ohio App.3d 608, 2008-Ohio-6597, 902 N.E.2d 1061 (7th Dist.). Shriver argues that in both cases, we applied the same rule of law,

albeit with contrary results: "[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." *Ressallat v. Burglar & Fire Alarms, Inc.*, 79 Ohio App.3d 43, 49, 606 N.E.2d 1001. We also applied the reasoning articulated by the Eleventh District in *JRC Holdings, Inc. v. Samsel Servs. Co.,* 166 Ohio App.3d 328, 2006-Ohio-2148, 850 N.E.2d 773, that an action sounds in contract when it entitles a plaintiff to different damages than the plaintiff may recover in tort. *Id.* at ¶ 20.

{¶8} In *Shorter*, a residential tenant asserted claims for negligence *per se*, breach of contract, breach of implied warranty of habitability, and violation of statutory duties after an electrical fire damaged her leased home. In her breach of contract claim, Shorter sought damages for the value of personal property that was destroyed by fire, water, and smoke. *Id.* at ¶ 16. Not surprisingly, we concluded that the essence of Shorter's breach of contract claim was wrongful harm to property. Our conclusion was bolstered by the fact that the damages available to Shorter on her breach of contract claim would be the identical damages recoverable in a tort action. *Id.* at ¶ 19.

{¶9} Unlike the personal property damages in *Shorter*, the damages recoverable in Appellants' breach of contract claim are the fees and interest charged for funeral services provided by Shriver. There was no similar contract for services in *Shorter*, and the recovery of the fees for funeral services here would not be recoverable in a tort action. Because our opposing conclusions in *Shorter* and *Estate of Clay* turn on factual distinctions rather than conflicting interpretations of law, Shriver's application for rehearing en banc is not well taken.

{¶10} Next, Shriver contends that in our Opinion we concluded that Appellants cannot prove Shriver was the proximate cause of their emotional injuries, and so, any damages for emotional harm should be precluded under any theory of law. In support of their intentional infliction of emotional distress claims, Appellants alleged that they have suffered ongoing long-term depression and posttraumatic stress disorder as a result of the actions of Shriver's employees. We concluded that events which occurred after the funeral may have caused or exacerbated Appellants' emotional problems. As a result, Appellants could not show that the actions of Shriver's employees were the proximate cause of their ongoing mental problems. However, at trial, Appellants can offer testimony regarding the emotional disturbance they suffered during and after the funeral, prior to the death of their brother and Beverly Ann's son. As we observed in our opinion, "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." *Estate of Clay,* ¶ 106.

{¶11} Accordingly, our Opinion contains no obvious error or omission, nor is the decision at odds with prior caselaw in this District.

{¶12} Shriver then seeks us to certify the following question: Does the two-year statute of limitations found in R.C. 2305.10 apply to breach of contract claims to the extent that a plaintiff seeks damages for bodily injury based upon the alleged breach of contract? This request is based on Shriver's contention that our decision conflicts with law from the Eleventh District Court of Appeals. Because the Eleventh District decision is not in conflict with the decision of this Court, the motion to certify a conflict to the Ohio Supreme Court is denied.

{¶13} App.R. 25(A) reads, in pertinent part:

> A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order of the court that creates a conflict with a judgment or order of another court of appeals and made note on the docket of the mailing, as required by App. R. 30(A). * * * A motion under this rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

{¶14} Article IV, Section 3(B)(4) of the Ohio Constitution reads:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

{¶15} Hence, the following conditions must be met before and during certification pursuant to Section 3(B)(4), Article IV of the Ohio Constitution:

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis deleted.)

State v. Agee, 7th Dist. No. 14 MA 0094, 2017-Ohio-7750, ¶ 4, quoting *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032, (1993), paragraph one of the syllabus. In addition, the issue proposed for certification must be dispositive of the case. *Agee* at ¶ 4, citing *State ex rel. Davet v. Sutula*, 131 Ohio St.3d 220, 2012–Ohio–759, 963 N.E.2d 811, ¶ 2.

{¶16} Plaintiffs-Appellants, Estate of Beverly Ann Clay (with Elmer Clay as Administrator), Lilly Mae Curtis, and Mary Ann Patton filed their verified complaint alleging breach of contract and intentional and negligent infliction of emotional distress based on the performance of a contract for services by the funeral home. The trial court dismissed Appellants' intentional tort claims on substantive grounds, concluding that the breach of contract and negligence claims were barred by R.C. 2305.10, the two-year statute of limitations governing personal injury. The trial court opined that Appellants' breach of contract claim was, in essence, an action for emotional injury. To the contrary, we concluded that Appellants could recover damages in the form of the contract price and interest paid for Shriver's services. We further found that Appellants' breach of contract claim falls within a narrow category of contractual claims from which serious emotional disturbance was a particularly likely result. *Estate of Clay*, ¶ 104-106.

{¶17} Shriver contends that our decision is in conflict with the Eleventh District Court of Appeals' decision in *Summers v. Max & Erma's Restaurant*, 11th Dist. No. 2008-T-0001, 2008-Ohio-4156. In that case, Summers' teeth were damaged as a result of a foreign object allegedly contained in a Max & Erma's hamburger. Summers' complaint against the restaurant included claims for breach of contract, breach of warranty, intentional and negligent infliction of emotional distress, loss of consortium, and violation of both state and federal statutes governing the sale of food. The majority

of the claims were dismissed by the trial court as untimely, with the exception of the intentional tort and loss of consortium claims, based on R.C. 2305.10.

{¶18} On appeal, the defendant conceded that the transaction at issue constituted a sale of goods, but argued nonetheless that the two-year limitations statute applied. Recognizing that the underlying nature of a cause of action, rather than the form of the complaint, determines the proper statute of limitations, the Eleventh District determined that the underlying nature of Summers' causes of action were for bodily injury. *Id.* at ¶ 30.

{¶19} The same is not true here. If Summers was unable to prove that the injuries she sustained resulted from eating the hamburger, neither her breach of contract claim or her personal injury claim was sustainable. Here, Appellees can prove their breach of contract claim even if they cannot prove that they suffered serious emotional disturbance as a result of the alleged breach. Further, the damages requested in Summers' breach of contract claim were identical to the damages sought in her personal injury claim. Here, the damages for breach of contract are the fees and interest that Appellants' paid to Shriver for the funeral services. They are wholly distinct from any emotional damages that Appellants may possibly recover if the jury returns a verdict in their favor on the breach of contract claim.

{¶20} Finally, the two cases are inapposite, as Summers' damages claims were predicated exclusively on her injuries, while Appellants' claim for emotional damages are based on the failure of Shriver to perform the contracted-for services. As previously stated, Ohio recognizes a closely-circumscribed set of contractual breaches from which damages for emotional distress may also be recovered. See *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*, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, ¶ 105 (10th Dist.) (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. Because the facts in *Summers* fall outside this limited category of breach of contract claims, we find that case is clearly distinguishable from the matter before this Court.

{¶21} On review of the Eleventh District's decision in *Summers*, *supra*, we find no conflict with our decision in this matter. The opposing conclusions are based on factual, not legal, distinctions. Finding no meritorious arguments, we hereby overrule Shrivers' motion for reconsideration, and, in the alternative, Shriver's application for rehearing en banc and motion to certify a conflict.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE KATHLEEN BARTLETT

NOTICE TO COUNSEL

This document constitutes a final judgment entry.