

IN THE SUPREME COURT OF OHIO

PORTAGE ROOFING, INC.,	)	On Appeal from the
	)	
Appellant,	)	Mahoning County Court
	)	of Appeals, Seventh
v.	)	Appellate District
	)	
MIKE COATES CONSTRUCTION CO.,	)	Court of Appeals
INC., ET AL.,	)	Case No. 15 MA 0175
	)	
Appellees	)	

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT PORTAGE ROOFING, INC.**

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MIKE COATES CONSTRUCTION CO., INC., ET AL.

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**I. EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST**

This case is one of public and great general interest because it involves a conflict between common pleas courts of different Ohio counties each claiming jurisdiction over the same breach of contract case and how the jurisdictional priority rule must be applied to prevent forum shopping.

**II. STATEMENT OF THE CASE AND FACTS**

Appellant, Portage Roofing, Inc. (“Portage”), a roofing subcontractor, entered into two construction contracts with Appellee, Mike Coates Construction, Inc. (“Coates”), a general contractor, one for each of two different projects in two different counties. One contract was for work on a school named “Hyre” in Summit County. The other contract was for work on a YWCA building in Mahoning County.

Coates did not pay Portage for work on the Hyre project in Summit County and Portage was late paying one of its material suppliers. The material supplier filed suit against Coates in Summit County Common Pleas Court. In turn, Coates sued Portage for contractual indemnification pursuant to a provision in the Hyre subcontract. Portage sued Coates for breach of the Hyre subcontract and for conversion of Portage’s supplies stored at the site of the Hyre project.

Ultimately, Coates did not pay Portage for work on the YWCA project in Mahoning County. Portage filed a lien in Mahoning County and, after receiving a demand to file suit on the lien from Coates, Portage sued Coates for breach of the YWCA subcontract in Mahoning County Common Pleas Court. In an apparent attempt to set up an offset, Coates sued Portage for breach of the Hyre subcontract in the Mahoning County Common Pleas Court. Portage moved the

Mahoning County Common Pleas Court to dismiss the Coates' claim under the Hyre subcontract arguing the jurisdictional priority rule placed jurisdiction of all claims under the Hyre subcontract in Summit County. The Mahoning County Common Pleas court ignored Portage's motion and granted Coates summary judgment against Portage on Coates' claims under the Hyre subcontract.

Portage appealed to the Seventh District. The trial scheduled in the Summit County Common Pleas Court was continued and the case has been administratively stayed pending the outcome of Portage's appeals ever since.

The court of appeals acknowledged that Coates' first claim made against Portage with respect to the Hyre subcontract was for indemnification and that claim was made in Summit County Common Pleas Court. App. A, ¶4. The court of appeals did not, however, note that the source of the indemnification claim was a provision in the Hyre subcontract. The court of appeals summarized the claims brought by Coates in Mahoning County: "[r]elative to the Hyre project, Coates argued breach of contract and that Portage filed an unlawful attested account." App. A, ¶5. The court of appeals denied application of the jurisdictional priority rule by concluding that "[n]one of these [Coates] claims were at issue in the Summit County action." App. A, ¶13.

To ensure that the court of appeals had fully considered the fact that Coates was pursuing claims in both counties based on the same Hyre subcontract, Portage filed its motion for reconsideration hoping to illustrate the point that Coates' indemnification claim in Summit itself arose by virtue of the Hyre subcontract and so Coates was litigating different breaches of the same Hyre subcontract in two different courts. Citing its own holding in another case for the

proposition that “dissatisfaction with the logic used” (App. B, ¶3) is an insufficient basis for a motion for reconsideration, the motion was denied.

Alternatively, in the event the court of appeals had fully considered the fact that Coates’ was pressing claims that were all contractual in nature and that all arose under the same Hyre subcontract, Portage filed its motion to certify a conflict with other courts of appeals that have held that claims arising out of the same contract are subject to the jurisdictional priority rule. Acknowledging that at least three of the cases from other courts presenting different claims arising out of the same contract required application of the jurisdictional priority rule, the court reiterated its decision that “the jurisdictional priority rule was not applicable to the present matter as different claims were being litigated in Summit and Mahoning Counties” (App. C., ¶4) and the motion was denied.

### III. ARGUMENT

**SOLE PROPOSITION OF LAW: A PARTY CANNOT FILE A BREACH OF CONTRACT CLAIM IN ONE COUNTY AND THEN FILE OTHER CLAIMS FOR BREACH OF THE SAME CONTRACT IN ANOTHER COUNTY WHILE THE FIRST CLAIM IS STILL PENDING.**

As this court has stated the "jurisdictional priority rule", the Summit County Common Pleas Court had exclusive jurisdiction over the entire Hyre subcontract controversy.

"The jurisdictional priority rule provides that '[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'" *State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St.3d 391, 393, 678 N.E.2d 549, 552.

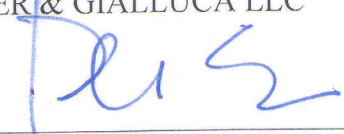
Other Ohio courts of appeals have consistently applied the jurisdictional priority rule to different claims arising out of the same contract. *State ex rel. Phillips v. Polcar*, 51 Ohio App.2d 97 (8<sup>th</sup> Dist. 1976), affirmed by this court in 50 Ohio St.2d 279 (1977), applying jurisdictional priority rule to claims in different courts related to same land contract; *Stratton v. Robey*, 70 Ohio App.2d 4 (10<sup>th</sup> Dist. 1980), applying jurisdictional priority rule to claims in different courts related to same land contract; *Glidden Company v. HM Holdings, Inc.*, 109 Ohio App.3d 721 (8<sup>th</sup> Dist. 1996) applying jurisdictional priority rule to claims in different courts related to contractual indemnity claims arising from same purchase agreement; and, *Tri State Group, Inc. v. Metcalf & Eddy of Ohio, Inc.*, 2009-Ohio-3902 (8<sup>th</sup> Dist.) applying jurisdictional priority rule to claims in different courts related to same engineering and consulting services contract.

#### IV. CONCLUSION

For the reasons discussed above, this case involves matters of fundamental legal principles of public and great general interest. The Appellant requests that this Court accept jurisdiction so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has on this 17<sup>th</sup> day of October, 2017, been served, by email transmission, upon counsel for Appellee, Richard P. Goddard.



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Dean S. Hoover (0003691)  
Attorney for Appellant

**APPENDIX A**

**OPINION**



CLERK OF COURTS  
MAHONING COUNTY, OHIO  
JUN 21 2017  
FILED  
ANTHONY VIVO, CLERK

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

PORTAGE ROOFING, INC. )  
 )  
PLAINTIFF-APPELLANT )  
 )  
VS. )  
 )  
COATES CONSTRUCTION, INC., et al. )  
 )  
DEFENDANTS-APPELLEES )

CASE NO. 15 MA 0175

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 11 CV 1539

JUDGMENT:

Affirmed.

APPEARANCES:

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For Defendants-Appellees

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JUDGES:

Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Carol Ann Robb

Dated: June 21, 2017



2015 MA  
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00097181640  
MEMO

DeGENARO, J.

{¶1} Plaintiff-Appellant, Portage Roofing Inc., appeals the Mahoning County Court of Common Pleas judgment granting summary judgment and awarding attorney's fees to Defendants-Appellees, Mike Coates Construction, et al. As these arguments are meritless, the trial court's judgment is affirmed.

{¶2} This appeal involves a construction contract dispute between Coates, a general contractor, and Portage, a roofing subcontractor, regarding two separate projects: The Robert G. Hyre Community Learning Center in Summit County and the YWCA in Mahoning County.

{¶3} Relative to this appeal, on January 5, 2011, American Builders & Contractors Supply Co. (ABC) filed suit in Summit County regarding the Hyre project against four defendants including Coates, which was the general contractor on that project and Portage a subcontractor. The claim against Portage alleged that Portage ordered roofing materials from ABC and never paid for them. The claim against Coates alleged it was jointly liable for the amount owed by Portage for those materials.

{¶4} Coates filed a cross-claim against Portage for indemnification. On May 2, 2011, Coates sought leave to amend its cross-claim against Portage so that all disputes between Coates and Portage regarding the Hyre and YWCA projects "can be resolved in a single hearing," which Portage opposed on May 9, 2011. As to the Hyre project, Coates sought to assert claims for Portage's failure to comply with the project specifications and the costs Coates incurred to replace the defective work and complete the project. On May 26, 2011, the trial court in the Summit County action denied this request.

{¶5} In the meantime, on May 16, 2011, Portage filed a complaint in Mahoning County against Coates alleging breach of contract, fraud, violation of the Ohio Prompt Pay Act, unjust enrichment and foreclosing on a mechanic's lien filed, all based solely upon the YWCA project. On June 14, 2011, Coates filed an answer

that denied all claims and asserted various affirmative defenses. Further, Coates asserted four counterclaims against Portage. Regarding the YWCA project, Coates asserted breach of contract and unlawful affidavit of mechanic's lien. Relative to the Hyre project, Coates argued breach of contract and that Portage filed an unlawful attested account.

{16} Portage filed an answer to Coates' counterclaim on June 22, 2011, denying the two YWCA project counterclaims and pursuant to the jurisdictional priority rule, moved to dismiss the two Hyre project counterclaims as those claims were being litigated in Summit County. Coates replied, arguing that the specific claims for the Hyre project were not part of the Summit County case; the trial court there having denied Coates' request to amend its cross-claim to assert those claims.

{17} The parties filed reciprocal motions for summary judgment. On April 9, 2012, the magistrate granted Coates motion and entered judgment on the counterclaims in the amount of \$125,384.70, plus reasonable attorney fees. Further, the magistrate granted Portage summary judgment on its complaint in part for work performed regarding the YWCA project in the amount of \$37,081.27. This figure was set off against the money owed to Coates from Portage's breach of contract relating to the Hyre project.

{18} Portage filed objections to the magistrate's decision arguing that the portion awarding Portage judgment should be upheld and that the trial court had no jurisdiction over claims related to the Hyre project; and as such, judgment in Coates' favor should be set aside. Coates opposed the objections and also filed an application for attorney fees.

{19} On June 12, 2012, the trial court overruled Portage's objections and upheld the magistrate's decision in its entirety. Portage appealed. On August 8, 2012, this Court stayed the appeal and remanded the matter for determination of reasonable attorney fees. After a hearing in 2012 and a 2014 motion by Coates requesting a ruling, the magistrate awarded Coates the requested \$42,630.50 in reasonable attorney fees and Portage filed timely objections. On September 9, 2015,

the trial court overruled the objections and upheld and adopted the magistrate's decision in its entirety.

#### **Jurisdictional Priority Rule**

{¶10} In its first of three assignments of error Portage asserts:

The Mahoning County trial court erred as a matter of law in granting summary judgment in favor of Coates when a Summit County trial court with the same case had exclusive jurisdiction under the "jurisdictional priority rule" defined by the Ohio Supreme Court.

{¶11} Regarding the jurisdictional priority rule the Supreme Court of Ohio has stated:

Under the jurisdictional-priority rule, however, " '[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.' " *State ex rel. Racing Guild of Ohio v. Morgan*, 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985), quoting *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus.

To be sure, it is a condition of the jurisdictional-priority rule that the claims and parties be the same in both cases, so "[i]f the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter." *See State ex rel. Judson v. Spahr*, 33 Ohio St.3d 111, 113, 515 N.E.2d 911 (1987).

Nevertheless, we have also recognized that the jurisdictional-priority rule can apply even when the causes of action and relief requested are not exactly the same, as long as the actions present part of the same

"whole issue." *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 29; *State ex rel. Sellers v. Gerken*, 72 Ohio St.3d 115, 117, 647 N.E.2d 807 (1995).

*State ex rel. Dunlap v. Sarko*, 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 9-11.

{¶12} The action in Summit County was initiated by ABC against Coates, Portage, and other defendants. Relative to the claims against Portage and Coates, ABC alleged it was owed money by Portage and Coates for materials supplied to Portage on the Hyre project. Coates attempted to bring in all of its claims against Portage in Summit County, which was opposed by Portage and rejected by the trial court.

{¶13} After Portage filed a complaint against Coates in Mahoning County seeking damages arising from the YWCA project, Coates filed a counterclaim asserting the all claims it had against Portage including those regarding the Hyre project and the YWCA. None of these claims were at issue in the Summit County action. It is disingenuous for Portage to now contend Coates' claims were pending in Summit County when Portage opposed Coates' efforts to amend its answer to include these cross-claims. Thus, the jurisdictional priority rule is not applicable and the trial court did not err in refusing to apply the rule here. Accordingly, Portage's first assignment of error is meritless.

#### **Summary Judgment**

{¶14} Portage asserts in its second of three assignments of error:

The Mahoning County trial court erred as a matter of law in granting summary judgment in favor of Coates even if it had jurisdiction where Portage Roofing's summary judgment evidence raised genuine issues of material fact with respect to Coates' claim.

{¶15} When reviewing a trial court's decision to grant summary judgment, an

appellate court review is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment will be granted when the movant demonstrates, viewing the evidence most strongly in favor of the nonmovant, that reasonable minds can find no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243. A material fact is one that affects the outcome of the suit under the applicable substantive law. *Bank v. Miller*, 7th Dist. No. 13 MA 119, 2015-Ohio-2325, ¶ 26.

{¶16} Coates moved for summary judgment asserting the undisputed evidence established Portage breached the Hyre project contract by installing non-conforming roofing materials. Coates contends the contract required that the fascia was to be fabricated from aluminum .080 inches thick, and Portage installed fascia that measured .040 inches thick.

{¶17} Portage opposed summary judgment asserting, inter alia, there remained genuine issues of material fact demonstrated by the attached affidavit of its president Leroy Devitt. In his affidavit, Devitt acknowledged that Portage installed non-conforming fascia, but stated that the owner's specifications changed several times and the thickness of the fascia used was approved by the owner's representative. Portage further contended that the fascia used was of an adequate thickness and thus, substantially complied with the contract.

{¶18} Days later Coates moved to strike Devitt's affidavit on the basis that Devitt did not have personal knowledge and that the affidavit directly contradicted prior deposition testimony. The magistrate agreed stating:

Averments lacking in personal knowledge will be disregarded. Likewise, Mr. Devitt's averments relating to "the owner's representative" lack specific facts and appear to be substantially in conflict with his deposition testimony, and therefore will not be considered.

{¶19} Without Devitt's affidavit, Portage has failed to create an issue of

material fact precluding summary judgment; further, Portage fails to direct our attention to any surviving portion of the affidavit that demonstrates an issue of fact. Although the parties disagree as to whether the contract was amended to change the thickness of the fascia, this is irrelevant. Portage asserted that the contract was amended to reduce the fascia thickness from .080 to .050 inches thick, but admitted that it installed fascia only .040 inches thick. Regardless of which fascia thickness standard Portage's performance is measured against, Portage still failed to meet the requirement. Accordingly, there is no genuine issue of material fact and Portage's second assignment of error is meritless.

#### **Attorney's Fees**

{¶20} In the third and final assignment of error, Portage asserts:

The Mahoning County trial court erred as a matter of law in granting attorney fees to Coates on Coates' summary judgment even if it had jurisdiction where Coates' attorney admitted that 70% of his fees were incurred in the Summit County case.

{¶21} We review a trial court's decision on whether to award attorney's fees under an abuse of discretion standard. *Bittner v. Tri-Cty. Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991). "An abuse of discretion means the trial court's decision is unreasonable based upon the record; that the appellate court may have reached a different result is not enough to warrant reversal." *Smith v. Smith*, 7th Dist. No. 14 CA 0901, 2016-Ohio-3223, ¶ 13.

{¶22} The scope of Portage's argument merely restates the assigned error; that Coates' attorney testified that 70 percent of the fees were actually from the Summit County case.

{¶23} Coates responds that not only is this an inaccurate representation, Portage also failed to support its argument with any citation to the record. Coates' attorney testified that the Summit County case and this case were separate matters, were assigned different identifying file numbers, and were billed separately from the

beginning; none of the time billed in the Mahoning County case was related to the Summit County case. Further, Coates submitted an itemized billing substantiating this testimony.

{¶24} Portage is attempting to confuse the issue by equating time spent on the Hyre project as time spent on the Summit County case. Two of Coates' counterclaims in the Mahoning County case dealt exclusively with the Hyre project; as such, litigating those counterclaims generated billable time. A review of the record demonstrates that the issues involved with the Hyre project were more time intensive than the YWCA project. Thus, counsel would have expended more time on Coates' claims arising from the Hyre project.

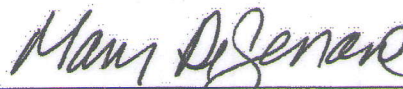
{¶25} Accordingly, the trial court did not abuse its discretion in awarding the requested attorney fees to Coates, and Portage's final assignment of error is meritless.

{¶26} In sum, the judgment of the Mahoning County Court of Common Pleas that granted summary judgment and awarded attorney's fees to Mike Coates Construction is affirmed.

Donofrio, J., concurs.

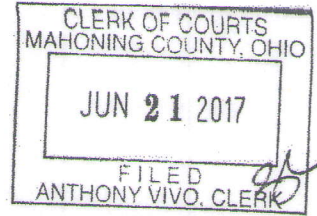
Robb, P. J., concurs.

APPROVED:



Mary DeGenaro, Judge





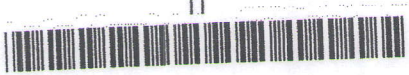
STATE OF OHIO )  
 )  
MAHONING COUNTY ) SS: IN THE COURT OF APPEALS OF OHIO  
 SEVENTH DISTRICT

PORTAGE ROOFING, INC. )  
 )  
 PLAINTIFF-APPELLANT ) CASE NO. 15 MA 0175  
 )  
 -VS- ) JUDGMENT ENTRY  
 )  
 COATES CONSTRUCTION, INC., et al. )  
 )  
 DEFENDANTS-APPELLEES )

For the reasons stated in the opinion rendered herein, Appellant's assignments of error are meritless. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio, is affirmed.

Costs taxed against Appellant.

Mary DeGenaro  
Mary DeGenaro  
Carol Ann Ross  
JUDGES.



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**APPENDIX B**  
**OPINION AND JOURNAL ENTRY**  
**(DENYING RECONSIDERATION)**

CLERK OF COURTS  
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SEP - 7 2017  
FILED  
ANTHONY VIVO, CLERK

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PORTAGE ROOFING, INC.

Plaintiff-Appellant

vs.

MIKE COATES CONSTRUCTION CO.,  
INC., ET AL.

Defendants-Appellees

CASE NO. 15 MA 0175

OPINION  
AND  
JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:

Motion for Reconsideration

JUDGMENT:

Denied

APPEARANCES:

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- Appellant

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For Mike Coates Construction Co.,  
Inc., Et. Al. - Appellees

Attorney Richard Goddard  
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Cleveland, OH 44114

JUDGES:

Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Carol Ann Robb

Dated: September 7, 2017



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PER CURIAM.

{¶1} Plaintiff-Appellant, Portage Roofing, Inc., filed an application for reconsideration of *Portage Roofing, Inc. v. Coates Construction, Inc.*, 7th Dist. No. 15 MA 0175, 2017-Ohio-5710.

{¶2} "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (1987), paragraph one of the syllabus.

{¶3} The purpose of reconsideration is not to reargue one's appeal based on dissatisfaction with the logic used and conclusions reached by an appellate court. *Victory White Metal Co. v. N.P. Motel Syst. Inc.*, 7th Dist. No. 04 MA 0245, 2005-Ohio-3828, ¶ 2. "An application for reconsideration may not be filed simply on the basis that a party disagrees with the prior appellate court decision." *Hampton v. Ahmed*, 7th Dist. No. 02 BE 0066, 2005-Ohio-1766, ¶ 16 (internal citation omitted).

{¶4} On reconsideration, Portage reiterates the same argument it made on direct appeal: that the jurisdictional priority rule precludes the Mahoning County court from exercising jurisdiction over Coates' claims. This is merely a disagreement with the decision reached by this Court. Portage does not call to our attention an obvious error in our opinion.

{¶5} Portage's arguments regarding the jurisdictional priority rule were fully considered by this Court prior to ruling on the matter. The motion for reconsideration

does not call to the attention of this Court an obvious error. Accordingly, Portage's motion for reconsideration is denied.

  
\_\_\_\_\_  
JUDGE MARY DeGENARO

  
\_\_\_\_\_  
JUDGE GENE DONOFRIO

  
\_\_\_\_\_  
JUDGE CAROL ANN ROBB

**APPENDIX C**  
**OPINION AND JOURNAL ENTRY**  
**(DENYING CERTIFICATION OF CONFLICT)**

CLERK OF COURTS  
MAHONING COUNTY, OHIO  
SEP - 7 2017  
FILED  
ANTHONY VIVO, CLERK

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

PORTAGE ROOFING, INC. )  
 )  
Plaintiff-Appellant )  
 )  
vs. )  
 )  
MIKE COATES CONSTRUCTION CO., )  
INC., ET AL. )  
 )  
Defendants-Appellees )

CASE NO. 15 MA 0175

OPINION  
AND  
JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS: Motion to Certify a Conflict

JUDGMENT: Denied

APPEARANCES:  
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For Mike Coates Construction Co., Attorney Richard Goddard  
Inc., Et. Al. - Appellees Calfee, Halter & Griswold LLP  
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Cleveland, OH 44114

JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Carol Ann Robb

Dated: September 7, 2017



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PER CURIAM.

{¶1} On June 29, 2017, Portage Roofing, Inc., Plaintiff-Appellant, filed a motion requesting that we certify a conflict to the Ohio Supreme Court between this Court's June 21, 2017, judgment in the instant case, *Portage Roofing, Inc. v. Coates Construction, Inc.*, 7th Dist. No. 15 MA 0175, 2017-Ohio-5710, and the following cases from the Eighth and Tenth Districts: *State ex. Rel. Phillips v. Polcar*, 51 Ohio App.2d 97, 367 N.E.2d 61 (8th Dist.1976); *Stratton v. Robey*, 70 Ohio App.2d 4, 433 N.E.2d 938 (10th Dist.1980); *Glidden Co. v. HM Holdings, Inc.*, 109 Ohio App.3d 721, 672 N.E.2d 1106 (8th Dist.1996), *Tri-State Group, Inc. v. Metcalf & Eddy of Ohio, Inc.*, 8th Dist. No. 92660, 2009-Ohio-3902. Coates Construction, Inc., Defendants-Appellees, filed a memorandum in opposition.

{¶2} A court of appeals shall certify a conflict when its judgment is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state of Ohio. Section 3(B)(4), Article V, Ohio Constitution. In order to certify a conflict to the Ohio Supreme Court, we must find that three conditions are met:

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.

*Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223, 613 N.E.2d 1032.

{¶3} Portage has set forth the following issue which it contends requires certification to the Ohio Supreme Court:

Does the jurisdictional priority rule require a party to file later contract



claims in the same court as claims under the same contract were first filed?

{¶4} Portage has not met the standard for conflict certification because the certified question is not applicable to this case. This Court specifically held that the jurisdictional priority rule was not applicable to the present matter as different claims were being litigated in Summit and Mahoning Counties. *Portage*, supra, ¶ 13. Three of the four cases cited by Portage involved the same or substantially similar causes of action and identical parties thus necessitating application of the jurisdictional priority rule. *State ex. Rel. Phillips*, supra, 99; *Stratton*, supra, 6; and *Tri-State Group, Inc.*, supra, ¶ 12-15.

{¶5} In the remaining case, *Glidden Co. v. HM Holdings, Inc.*, 109 Ohio App.3d 721, 672 N.E.2d 1106 (8th Dist.1996), Portage asserts that the Eighth District applied the jurisdictional priority rule "to claims in different courts related to the same contract." This is inaccurate. Glidden involved a declaratory judgment action that was dismissed in an Ohio court because the same claim had previously been filed and was pending in a New York court. The Eight District noted that the jurisdictional priority rule was not applicable because the courts were in different states. However, the Court looked to the jurisdictional priority rule for guidance as it expressed "important policy designed to preserve judicial resources and prevent duplicative or piecemeal litigation." *Glidden Co.*, 725.

{¶6} We decline to certify a conflict between the present matter and the cases cited by Portage as those cited cases involved the same or substantially similar causes of action and identical parties. The present matter involved different claims being litigated in Summit County and Mahoning County. As such, this involves a conflict upon facts, not a rule of law and inappropriate for conflict certification.

{17} Portage's motion to certify a conflict is denied.

  
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JUDGE MARY DeGENARO

  
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JUDGE GENE DONOFRIO

  
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JUDGE CAROL ANN ROBB