

Does the Savings Statute Rescue My Claim? The Bullet Point: Volume 2, Issue 18

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By: [Richik Sarkar](#) , [James W. Sandy](#)

The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation.

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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

Ervest 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 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."

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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."