

IN THE SUPREME COURT OF OHIO

New Riegel Local School District Board of	:	
Education, et al.,	:	
	:	Supreme Court Case No. 2018-0189
Plaintiffs-Appellees,	:	Consolidated 2018-0213
	:	
v.	:	On Appeal from the
	:	Seneca County Court of Appeals,
The Buehrer Group Architecture &	:	Third Appellate District,
Engineering, Inc., et al.,	:	Case No. 13-17-04
	:	
Defendant -Appellants.	:	

AMICUS CURIAE AIA OHIO'S

AND

AMICUS CURIAE OHIO SOCIETY OF PROFESSIONAL ENGINEERS'

MEMORANDUM IN SUPPORT APPELLANTS BUEHRER

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I. Introduction

Unique to the design professions in construction projects, the Statute of Repose provides a hard stop against individual liability when claims-made insurance is not available or a never-ending cost even past retirement. As clear from the express legislative intent, nothing in public policy should create an exception for public owners in public works who enter into contracts as a matter of law with these design professionals.

Amicus Curiae AIA Ohio

AIA Ohio, a society of the American Institute of Architects, represents a membership of approximately 2,000 Ohio licensed architects and architectural interns, working through seven local chapters state-wide, to impact public policy through its government affairs program.

AIA Ohio's program concentrates on helping to produce positive legislative and governmental agency rule changes for the architectural profession by addressing such issues as professional liability, building codes, economic development, architect selection procedures, licensing requirements, and public works appropriations. AIA Ohio establishes priorities each year so that resources are utilized most effectively.

The American Institute of Architects was organized in 1857 as a membership

organization for professional registered architects. The objects of the AIA is to organize and unite in fellowship the membership of the architectural profession; to promote the aesthetic, scientific, and practical efficiency of the profession; to advance the science and art of planning and building by advancing the standards of architectural education, training and practice; to coordinate the building industry and the profession of architecture to ensure the advancement of the living standards of people through their improved environment; and to make the profession of ever-increasing service to society.

#### Amicus Curiae Ohio Society of Professional Engineers

Founded in 1878, the Ohio Society of Professional Engineers is comprised of 1,200 members in 14 chapters serving every county in Ohio. OSPE serves as a recognized and authoritative expert in licensure, ethics, and professional practice, by promoting state licensure and protecting and enhancing the value of licensure and the opportunities for the licensed engineer. OSPE's mission includes protection of the public health, safety, and welfare; promotion of ethical and competent practice of engineering; innovation through the creative application of math, science and engineering; and offering continuous learning for professional growth. Through education, licensure advocacy, leadership training, multidisciplinary networking, and outreach, OSPE enhances the image of its members and their ability to ethically and professionally practice engineering.

OSPE's national affiliate was founded in 1934, when a group of professional engineers met in New York City to establish an organization dedicated to the non-technical concerns of licensed professional engineers. The National Society of Professional Engineers stands today as the only national organization committed to addressing the professional concerns of licensed Professional Engineers across all disciplines.

## II. Statement of the Case and Facts

Amici AIA Ohio and OSPE adopt the Statement of the Case and Facts as stated in Defendants-Appellants Buehrer Groups' Merit Brief.

## III. Argument in Support of the Propositions of Law

Proposition of Law No. I: Ohio's Statute of Repose, R.C. 2305.131, applies to actions sounding both in contract and tort.

Proposition of Law No. II: A court is not required to apply *stare decisis* when the prior version of the statute being applied has been held unconstitutional by the Supreme Court of Ohio.

A. Contract Required. No exception for breach of contract actions, or for public works construction, is warranted under Ohio's current Statute of Repose, R.C. 2305.131. This is of particular impact to Ohio's architects and engineers, all of whom pursue their profession through contract. Such a limitation makes Ohio's latest Statute of Repose a nullity, contrary to express legislative intent to protect design professionals.

State law prohibits an architect from serving an owner without a written

contract. "A registered architect or architectural firm is required to use a written contract when providing professional services. Such contract between the registered architect and the client shall be executed prior to the registered architect commencing work on any project." O.A.C. 4703-3-09(A).

Without exception, architects and engineers perform their services to public agencies by contract, which is the context for any owner's claim against a design professional. An owner's claim founded in "tort" exclusive of contract does not exist in the owner-architect relationship. Only a rare, hypothetical third-party claim outside of contract privity might be stated exclusively in tort.

Public authorities do not benefit from sovereignty when entering into a contract relationship. The Ohio Court of Claims recognized that, as the fundamental law of Ohio, government cannot claim a privileged status in equity outside of the terms bargained in a contract:

As to whether estoppel will lie against the state, the court concludes that it does for several reasons. Foremost among them is that the state is here suing a private vendor upon a contract (lease) for the supply of goods. The law has always been to the effect that when the state

"appears as a suitor in her courts, to enforce her rights of property, she comes shorn of her attributes of sovereignty, and as a body politic, capable of contracting, suing, and holding property, is subject to those rules of, justice and right, which, in her sovereign character, she has prescribed for the government of her people." \*\*\*

*State v. Exr. of Buttles* (1854), 3 Ohio St. 309, 319. As a matter of justice, every other litigant in an action upon a contract is able to assert the

affirmative defense that the other party is estopped by its own actions to deny the reasonable implications thereof. The state as a defendant might, under particular circumstances, be immune from the consequences of its own actions. However, when the state brings an action to nullify an agreement that it has freely entered into, then the defense of estoppel is not only available to the defendant, it will often be the crucial focus of analysis in determining the rights of the parties.

*St. ex rel. Celebrezze v. Tele-Communications, Inc.*, (Ct. Cl. 1990), 62 Ohio Misc.2d 405, 601 N.E.2d 234. No public exception to the Statute of Repose is warranted.

B. Current Law Differs from Prior Precedent. The Third District Court of Appeals below found consistently with applying the current statutory merits but-for the *Kocisko v. Charles Shutrump & Sons Co.*, 21 Ohio St.3d 98, 488 N.E.2d 171 (1986) precedent:

The statute specifies that NO cause of action for damages to real property, resulting from the improvement to that real property, can be brought after 10 years from the time the improvements were substantially completed. R.C. 2305.131. The statute does not limit it to claims for torts only. Regardless of what the School labels this claim, the School is trying to collect damages resulting from an improvement, i.e. the Project, to real property. The statute specifically prohibits this. Thus, it would appear that the statute specifically denies the claims in this case.

*New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng. Inc.*, 2017-Ohio-8522, Opinion, pp. 7-8.

Ohio's current construction Statute of Repose was enacted nineteen years after the *Kocisko* case decision, incorporating numerous changes. 2004 Senate Bill 80 § 3, eff 4-7-05.

The *Kocisko* Court decision expressly turns on the specific wording of the



repealed statute: “The language selected by the General Assembly is uniformly used to describe tortious conduct.” This distinction has been criticized by other courts. See, e.g.: *Hagerstown Elderly Assoc. v. Hagerstown Elderly Bldg. Assoc.*, 368 Md. 351, 793 A.2d 579 (Ct. App. Md. 2002).

The Supreme Court previously upheld the constitutionality of Ohio’s latest Statute of Repose, only limiting application from retroactive effect. *Oaktree Condo. Ass’n v. Hallmark Bldg. Co.*, 139 Ohio St.3d 264, 2014-Ohio-1937, 11 N.E.3d 266. See also, *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291 [Medical Statute of Repose constitutional].

A Statute of Repose differs substantially from a statute of limitations.

R.C. 2305.131 does not take away an existing cause of action, as applied in this case. " \* \* \* [I]ts effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action.

*Sedar v. Knowlton Const. Co.*, 49 Ohio St.3d 193, 551 N.E.2d 938 (1990).

A statute of limitations is procedural and designed for other interests.

C. Legislative Intent is Express. Uniquely, the Ohio General Assembly stated its legislative intent to apply the Statute of Repose to design professionals including architects and engineers in contract for construction design, with no exception for public agencies. In enacting the current Statute of Repose, the Ohio General Assembly stated its intent “to promote a greater interest than the interest underlying the general

four-year statute of limitations“ in non-codified law, 2004 Senate Bill 80 § 3, eff 4-7-05:

"In enacting section 2305.131 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

"(1) To declare that the ten-year statute of repose prescribed by section 2305.131 of the Revised Code, as enacted by this act, is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2309.09 of the Revised Code, the general two-year statute of limitations prescribed by section 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;

"(2) To recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for the improvement or who furnished the design, planning, supervision of construction, or construction of the improvement: [emphasis added]

"(a) They lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement;

"(b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.

"(c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in division (E)(5)(b) of this section.

"(3) To recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;

"(4) To recognize that maintaining records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an

improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion; [emphasis added]

"(5) To declare that section 2305.131 of the Revised Code, as enacted by this act, strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation but not to affect civil actions against those in actual control and possession of an improvement to real property at the time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death." [emphasis added]

*McClure v. Alexander*, 2<sup>nd</sup> Dist Greene, No. 2007 CA 98, 2008-Ohio-1313.

A court may consider legislative intent in statutory interpretation, R.C. 1.49.

D. No Public Works Exception in Law. Ohio's latest Statute of Repose makes no exception for public agencies as subject to the limitation of "any civil action", including actions brought by the State. Likewise, the Statute expressly disclaims prior "rules," R.C. 2305.131(F):

This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after the effective date of this section, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, ... [emphasis added].

In a parallel decision, the Fifth District Court of Appeals recognized this legislative intent in finding that the Statute of Repose applies to public agency contract

claims. The Court found the *Kocisko* precedent outdated, opining, “Therefore, we find *Kocisko* is not binding authority on this Court in interpreting the current version of the statute.” *State v. Karl R. Rohrer Assocs., Inc.*, Fifth Dist. Case No. 2017 AP 030008, 2018-Ohio-65 (Jan. 8, 2018), para. 26, page 14. The Court then found Ohio’s Statute of Repose to bar the public authority’s claims against a remote-in-time design professional, citing the legislative intent enacted as part of the more recent statute.

Fundamentally, all Ohio public agencies by law contract with architects and engineers as designers for public works construction. R.C. 153.65 et seq. Such construction design is performed through contract. When a public agency sues, its action is for breach of contract. Therefore, the impact of the court decision below completely nullifies Ohio’s current Statute of Repose for architects and engineers who performed design work for public agencies, in the past or in the future.

As one example supporting the legislative intent, professional malpractice insurance for architects and engineers typically is “claims-made,” such that a design professional does not maintain coverage after retirement. Thus, the Statute of Repose is of direct impact to all architects and engineers, as it prevents remote claims from arising in a distant future.

Yet, given the “shotgun” approach of litigating plaintiffs upon discovery of an injury, even a retired architect or engineer can be brought into litigation decades after ceasing practice. This leaves the design professional exposed for an unlimited time

after completing a construction design. Such are the case facts below, where the State brought suit against an architect for design work completed thirteen-years prior.

The Third District case precedent conflicts with the Fifth District, and opens up unlimited, uninsurable exposure to Ohio's architects and engineers, as they perform design work for public construction. If this Third District precedent stands, when damages occur on public property, any public agency can trace back over decades to sue the original, remote design professional. As a plaintiff also can sue the proximate parties, as occurred in this case, plaintiff has alternative remedies.

As the case law stands today, both the Third and Fifth District Courts of Appeals agree that the *Kocisko* precedent is incorrect. So that architects and engineers may rely on common application of Ohio's current Statute of Repose, the Ohio Supreme Court should reverse the lower court.

IV. Conclusion. Ohio's long debate over the Statute of Repose needs to be resolved in uniform application, giving full enforceability to the clear legislative intent.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Curiae Memorandum was served this 12th day of July, 2018 upon all parties appearing of record, by electronic e-mail or by U.S. Mail, upon those individuals indicated below:

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