

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0511

FLAGSTAR BANK, FSB,

Plaintiff-Appellant,

v.

AIRLINE UNION'S MORTGAGE
COMPANY, et al.,

Defendants-Appellees.

On Appeal From Hamilton Court of
Appeals, First Appellate District

Court of Appeals
Case No. C 0900166

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
FLAGSTAR BANK FSB

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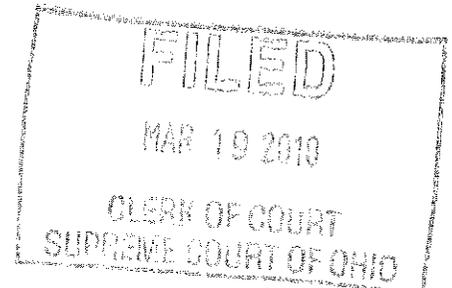


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

As the First Appellate District Court of Appeals has certified,¹ this case presents an important but unresolved question for the Court: “Under R.C. 2305.09(D), does a cause of action for professional negligence accrue on the date that the negligent act is committed, or on the date that the negligent act causes actual damages?”

The First District and the Third District hold that because R.C. 2305.09(D) and this Court’s decision in *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206 do not provide for a “discovery rule,” a cause of action for professional negligence accrues upon the occurrence of the negligent act, regardless of when actual damages occur. In contrast, the Fifth District and Sixth District hold that a claim for professional negligence does not “accrue” until actual damages have occurred.

The First and Third District respond that the “actual damages” rule is only a “repackaged” form of a discovery rule precluded by *Investors REIT One*. The Fifth District and Sixth District address this by holding that a cause of action for negligence is comprised of duty, breach of duty, proximate cause *and* damages, and that a cause of action cannot accrue until all are present, *i.e.*, until there are actual damages, there is no claim. By itself, the conflict certified by the First District shows that this case is of great general and public interest.

Even without the certified conflict, this case is one of public importance. While the profession here is licensed real estate appraising, the issue of statutory interpretation affects a variety of professions, including accountants, contractors, investment advisors, insurance

¹ On March 3, 2009, the First District Court of Appeals certified its Decision in this matter to be in conflict with those of the Fifth and Sixth District. That certification is pending as Case No. 2010-0508.

brokers, surveyors, builders, title agencies, architects and countless others.² The distinction at issue impacts not only R.C. 2305.09, but other statute of limitations where this Court or the General Assembly has determined that a “discovery rule” does not apply.³

The question also has substantial impact on the administration of justice in our State. If, as the First and Third Districts hold, plaintiffs seeking to protect their rights must bring suit before they have actual damages, they may flood our courts with prophylactic lawsuits against professionals before any damages have occurred, filing them only to prevent a statute of limitations from expiring before any right to recovery actually exists. These premature suits will be defended on the grounds that because no recoverable damages exist, the suits should be dismissed, putting Ohio citizens in the Catch-22 of having brought their claims either too early or too late.

The question also has substantial constitutional implications. If the First and Third Districts are correct, and the statute of limitations begins to run prior to a plaintiff’s ability to recover any actual damages, then R.C. 2305.09 could be construed as barring recovery in violation of Article I, Section 16 of the Ohio Constitution, as well as the Due Process Clauses of the Ohio Constitution and Fourteenth Amendment to the U.S. Constitution.

The Court should accept jurisdiction, resolve the conflict which the First District has certified, and clarify how R.C. 2305.09 applies to claims against appraisers and other professions.

² R.C. 2305.09 applies to all of these professionals. *Elizabeth Gamble Deaconess Home Ass’n v. Turner Constr. Co.* (1984), 14 Ohio App. 3d 281, 470 N.E.2d 950 (architects); *Ferritto v. Alejandro* (2000), 139 Ohio App. 3d 363, 743 N.E.2d 978 (investment advisors); *Point East Condo. Owners’ Ass’n v. Cedar House Assocs. Co.* (1995), 104 Ohio App. 3d 704, 663 N.E.2d 343 (builders/contractors); *James v. Partin*, 12th Dist. App. No. CA2001-11-086, 2002-Ohio-2602 (surveyors).

³ See, e.g., R.C. 1345.10(D)

STATEMENT OF THE CASE AND FACTS

Statement of the Case

On April 28, 2008, Flagstar Bank, FSB ("Flagstar") filed suit against a licensed residential appraiser, John Reinhold ("Reinhold") for negligent misrepresentation and professional negligence. On December 12, 2008, the Trial Court entered summary judgment in favor of Reinhold, holding that Flagstar's claims were time barred because the four year statute of limitations for negligence began to run at the time Reinhold issued the appraisals, and not on the date that Flagstar actually suffered damages. On February 10, 2010, the First District Court of Appeals affirmed the Trial Court's order.

On February 17, 2010, Flagstar filed a Motion to Certify Conflict between the First District's Decision and decisions of the Fifth and Sixth Districts. On March 3, 2010, the First District granted that Motion and certified the following question:

Under R.C. 2305.09(D), does a cause of action for professional negligence accrue on the date that the negligent act is committed, or on the date that the negligent act causes actual damages?

Pursuant to S.Ct. Prac. R. 4.1, the certified conflict case is pending as Case No. 2010-0508.

Statement of the Facts

Flagstar is a federally chartered mortgage lender. Reinhold is an individual licensed under R.C. Chapter 4763 to perform residential property appraisals.

Like countless other financial institutions involved in the mortgage credit markets, Flagstar purchases residential mortgage loans, some of which it holds for its own portfolio, and others which it sells into the secondary securitization market. Before agreeing to buy a loan, Flagstar requires an appraisal of the collateral which secures it. When a borrower defaults, the lender (whether it be Flagstar, Fannie Mae, Freddie Mac or another financial institution) will

resort to the collateral (typically through foreclosure proceedings). If the collateral is insufficient to satisfy the balance due, the lender will seek to recover damages from the appraiser.

In this case, Flagstar purchased three mortgage loans from Airline Union's Mortgage Co. ("AUM") secured by residential real property. Prior to purchasing the loans, Reinhold prepared appraisals showing that the properties had sufficient value to support the loans. Flagstar relied on the appraisals, purchased the loans, and later re-sold two of them in the secondary market to another lender, keeping one of the loans for its own portfolio.

In the two loans which it sold, the borrower subsequently defaulted, the secondary lender initiated foreclosure proceedings, and the foreclosure sales left a deficiency balance. Flagstar was forced to pay the secondary lender the deficiency balance.

On the third loan, the collateral burned to the ground, and Flagstar submitted a claim to the fire insurer. The fire insurer only agreed to pay the fair market value of the collateral, an amount substantially less than Reinhold had represented.

Because Flagstar relied on Reinhold's valuations of the collateral when it purchased the loans, Flagstar sued Reinhold for negligent misrepresentation and professional negligence. Flagstar filed its Complaint on April 28, 2008, within four years of resorting to the collateral secured by each of the loans that established the deficiency balances.

Reinhold moved for summary judgment, arguing that while Flagstar had filed suit within four years of the date of the foreclosures, the appraisals had actually been performed more than four years earlier. Flagstar responded that the statute of limitations did not accrue until it incurred actual damages and that its damages did not occur until there was a need to resort to the collateral and it was insufficient. Flagstar also submitted evidence that in prior cases, it has sued appraisers of collateral prior to a foreclosure sale, and that those appraisers (one of whom was

represented by Reinhold's counsel) argued that its claims were premature because the appraisers had only valued collateral, and there was no damages from any inadequacy in the collateral until the borrower defaulted and the proceeds from the collateral were insufficient to satisfy the balance due.

The trial court found that Flagstar's claims were time barred. Citing *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206 and *Hater v. Gradison Div. of McDonald & Co.* (1995), 101 Ohio App.3d 99, 655 N.E.2d 189, appeal denied, 72 Ohio St.3d 1539, the trial court found that a claim for negligence against a real estate appraiser accrued under R.C. 2305.09 upon the occurrence of the negligent act, which in this instance was the issuance of the appraisals. Because the appraisals were issued more than four years prior to the commencement of this action, the trial court entered summary judgment in favor of Reinhold.

On appeal, the First District affirmed relying on *Investors REIT One* and *Hater*. The First District held that under both the plain terms of R.C. 2305.09 and *Investors REIT One*, there is no discovery rule. Moreover, the First District believed that the proposition that Flagstar asserted—"no actionable injury can be held to have occurred so as to set in motion the running of the statute of limitations until damage has resulted from that negligent act"—was "nothing more than an attempt to circumvent the unavailability of the discovery rule for these types of claims." Decision, 3.

In the Decision, the First District noted that its rationale "arguably conflicted" with that employed by the Fifth and Sixth Appellate Districts. Decision, 3; citing *JP Morgan Chase Bank NA v. Lanning*, 5th Dist. No. 2007CA00223, 2008-Ohio-893; *Fritz v. Brunner Cox, L.L.P.* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740; *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729. Nonetheless, the First District noted that the Third District had adopted its

approach in *Schnippel Construction Inc. v. Jim Proffit*, 3rd Dist. No. 17-09-12, 2009-Ohio-5905, and that believed that its position was “consistent” with the “majority of Ohio appellate districts.” Decision, 3.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1

A cause of action for negligence under R.C. 2305.09(D) does not accrue until the plaintiff has incurred actual damages.

The First District’s opinion in this case (and its reliance on *Investors REIT One* and *Hater*) was premised on a misinterpretation of the word “accrued” in R.C. 2305.09(D). Flagstar contends that the better view is that for the purposes of the statute of limitations, a claim does not accrue until all (and not merely some) of its elements are present. Because a claim for professional negligence cannot exist without damages, a claim for negligence cannot accrue until the negligence actually causes recoverable damages.

A. The Statute of Limitations for Professional Negligence Claims.

Professional negligence claims are subject to a four-year statute of limitations found in R.C. 2305.09(D). This statute provides that actions for injuries not arising on contract shall be brought “within four years after the cause thereof *accrued*.” *Id.* (emphasis added).

This Court has made it clear that for the purposes of the statute of limitations a cause of action in tort accrues only after the tort is complete. *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 437 N.E.2d 1194. The tort of negligence is not complete until (1) there was a duty owed by defendant to plaintiff; (2) there was a breach of that duty by defendant; and (3) there is an injury to plaintiff proximately caused by defendant’s breach. *Chambers v. St. Mary’s Sch.* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (citations omitted). Accordingly, in addition to the elements of duty and breach, “there must be an injury or harm to [plaintiff] as a

consequence of [the defendant's] negligence to serve as a basis for recovery of damages before the tort [becomes] actionable and before the period of limitations [commences] to run.” *Kunz*, 1 Ohio St.3d at 81 (internal quotation marks and citation omitted).

In *Kunz*, plaintiffs sued an insurer for failing to provide insurance to cover damage to the plaintiffs’ equipment. *Id.* The trial court found the complaint was untimely because it was filed more than four years after the policies were issued. *Id.*

This Court reversed, holding that the negligence claim did not accrue upon issuance of the policies, but rather upon the damage to the plaintiff’s property. The Court reasoned that “there was no invasion, or infringement upon or impairment of such interest until there had been a loss to [plaintiffs’] equipment because until that event occurred such protection could avail appellants nothing[,]” and therefore, that the plaintiffs’ claim did not accrue until the plaintiffs’ interest had been infringed. *Id.* at 81-82. To rule otherwise, the Court noted, “would in essence require an insured to consult legal counsel whenever he consolidated or renewed an insurance policy so as to avoid statute of limitations problems when a claim eventually arises.” *Id.* at 82.

The *Kunz* court made it clear that there must be an actual—not speculative—injury before a claim accrues: “There must be an injury or harm . . . as a consequence of [the defendant’s] negligence to serve as a basis for recovery of damages before the tort [becomes] actionable and before the period of limitations [commences] to run.” *Id.* at 81 (internal quotation marks and citation omitted).⁴

In this case, Reinhold appraised collateral for a loan, and Flagstar did not have any actual damages until it had to resort to that collateral and it was insufficient to pay the balance due.

⁴ See, also, *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 379, 433 N.E.2d 147 (“where the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs”); *Point East Condo. Owners’ Ass’n v. Cedar House Assocs. Co.* (1995), 104 Ohio App.3d 704, 713, 663 N.E.2d 343 (“Unless damage is immediate, the cause of action does not accrue until actual injury occurs or damage ensues”).

While Reinhold's negligence occurred when he issued the appraisals, that negligence did not cause Flagstar any immediate damages. If Flagstar sued Reinhold on the day that it bought the loans, Reinhold could effectively argue that his negligence did not cause Flagstar any loss—Reinhold only appraised collateral, and as long as the borrower paid the loan that Flagstar had just purchased, Flagstar would not have to resort to the collateral, and Reinhold's over-valuation errors did not cause Flagstar any harm.

If Flagstar sued Reinhold on the day that the borrower went into default on the loan, Reinhold could still effectively argue that his negligence did not cause Flagstar any damages. Again, Reinhold only appraised collateral, and as long as the collateral sold at foreclosure for more than the balance then due, Reinhold's over-valuation errors would still cause no harm to Flagstar. There were no damages—and thus no claim for negligence—until Flagstar had to resort to the collateral, and it was insufficient. As Reinhold's counsel has argued in previous cases, any suit before then would be premature.

In these circumstances, a bank's claim against an appraiser of collateral does not accrue until the foreclosure sale shows the collateral is insufficient to pay the balance due:

During the substantial period before the lender can acquire the property, circumstances can change so as to render unnecessary the lender's resort to the property or to moot any issue about a prior overappraisal of the property. The borrower may cure the default and reinstate the loan and trust obligations. The borrower may find refinancing which would pay off the entire amount of the obligation. . . . The lender should not be deemed to have a cause of action as soon as the borrower defaults. This could lead to a multiplicity of unnecessary lawsuits against appraisers. It is not unusual for borrowers in financial difficulty to default, to cure the first default, and then to default again. If the cause of action arose upon default, the lender might be required to inefficiently file multiple actions corresponding to each default.

Slavin v. Trout (1993), 18 Cal. App. 4th 1536, 1542.⁵ Flagstar did not have any damages until it had to resort to the collateral for the loans at issue, and its claims did not accrue until then.

B. The First District incorrectly applied *Investors REIT One*.

The First District nonetheless concluded that this Court's decision in *Investors REIT One* required the court to find that a negligence claim subject to R.C. 2305.09 accrues upon the performance of the negligent act, even if that negligence does not immediately cause damages. Decision, 3. Both in this Decision and in *Hater*, the First District thought that a "delayed damages" rule was simply a "re-packaged" discovery rule, which *Investors REIT One* held was precluded. *Id.* at 3; *Hater*, 101 Ohio App. at 110.

The First District (and the Third District) misread *Investors REIT One*. In *Investors REIT One*, the Court held that there was no "discovery rule" in R.C. 2305.09(D). As a consequence, a plaintiff's inability to discover either the defendant's negligence or that the defendant's negligence had caused the plaintiff injury did not toll the statute. Flagstar has no quarrel with either proposition.

But in *Investors REIT One*, actual damages occurred *concurrently* with the negligent act. The delay was not in the existence of the damages, but rather in the plaintiff's failure to discover them. This Court's numerous decisions before *Investors REIT One* make clear that a statute of limitations does not run until a plaintiff suffers an actual injury.⁶ *Investors REIT One* did not overrule these decisions because they presented an entirely different legal issue.

⁵ But see *Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc.* (1999), 156 N.J. 580, 585 (holding that the *Slavin* rule was incorrect and that the proper analysis is when the mortgagee "knew or should have known" of the negligent appraisal).

⁶ *State ex rel. Teamsters Local Union 377 v. Youngstown* (1977), 50 Ohio St.2d 200, 204, 364 N.E.2d 18 ("when one's conduct is not presently injurious a statute of limitations begins to run against an action for consequential injuries resulting from such act only from the time that actual damage ensues."); *Kunz*, 1 Ohio St.3d at 81 ("there must be an injury or harm . . . to serve as a basis for recovery of damages before the tort [becomes] actionable and before the period of limitations [commences] to run"; ruling that plaintiff's claim for negligence against insurer for failure to obtain proper coverage for plaintiff's equipment did not accrue when the coverage was issued or sold, but

Here, the issue is not that Flagstar failed to discover Reinhold's negligence, but rather that Flagstar did not immediately have any recoverable damages from that negligence. As noted above, even if Flagstar had "discovered" Reinhold's errors and brought suit on the very day that it bought the loans, it had no viable claim because it had no damages from the negligence. The issue is not whether there is a "discovery rule" in R.C. 2305.09(D), but rather does a cause of action "accrue" prior to the existence of actual damages. The First District simply misread *Investors REIT One*, and, in doing so, misconstrued R.C. 2305.09.

C. Other Districts Have Correctly Decided the Issue.

The misinterpretation of both *Investors REIT One* and R.C. 2305.09(D) by the First District and the Third District stands in direct conflict with decisions of the Fifth and Sixth Districts. In *Fritz v. Cox* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740, *appeal not accepted*, 93 Ohio St. 3d 1418, the IRS imposed penalties six years after tax returns were filed, and the plaintiff brought a negligence claim against the accountant who prepared them. The Fifth District reasoned that "since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues . . . until there is an injury to a legally protected interest." *Id.* at 668 (citations omitted). The Sixth District reached the same result for the same reason. *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729 (cause of action for negligence against accountants only accrues when damages occurred though imposition of penalties by the IRS).

The Fifth District applied the same analysis in the real estate context. In *JP Morgan Chase Bank v. Lanning*, 5th Dist. No. 2007CA223, 2008-Ohio-893, a title agency prepared a mortgage referencing the wrong secured property. The mortgagee foreclosed on the incorrect

when the equipment sustained a loss for which the insurance did not provide coverage); *Velotta*, 69 Ohio St.2d at 379 ("where the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs.").

property six years after the mortgage was executed. *Id.* at ¶¶ 4-6. The Fifth District held that the tort was not completed until the damages accrued, and therefore, the statute of limitations could not have begun to run until the foreclosure, not the date of the preparation of the defective mortgage. *Id.* at ¶ 28.

Both the Fifth and Sixth Districts acknowledged this Court's decision in *Investors REIT One*. Unlike the First and Third Districts, these courts had no problem distinguishing a discovery rule from the "actual damages" necessary for a negligence claim to accrue.

It is axiomatic that the proper application of the statute of limitations should not depend on the appellate district in which an Ohio citizen resides. This Court should accept jurisdiction to resolve the conflict between the First and Third Districts and the Fifth and Sixth Districts on how R.C. 2305.09(D) applies.

D. The interpretation given to R.C. 2305.09(D) by the First District would cause it to violate the United States and Ohio Constitutions.

Finally, even if there were some question as to the proper interpretation of the word "accrued" in R.C. 2305.09(D) (and there should not be), the First District chose the interpretation which Ohio law precludes. The First District construed R.C. 2305.09(D) to preclude recovery by an injured party before they suffered damages, an interpretation that causes the statute to violate the Ohio Constitution. Section 16, Article I of the Ohio Constitution provides:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

This provision denies the General Assembly the authority to pass a statute barring an injured party from recovery before the cause of action accrued. *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 512 N.E.2d 626, *cert. denied*, 484 U.S. 1066 (1988) (finding that the provision found in R.C. 2305.11(B) barring malpractice claim before plaintiff even learned of cause of action was

unconstitutional); *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 609 N.E.2d 140, (provision from R.C. 2305.10 relating to the accrual date for certain exposure injuries unconstitutional).

In *Burgess*, this Court evaluated a prior version of R.C. 2305.10 which then provided that a plaintiff must bring a suit for certain exposure-related injuries within two years after the date she learns that she “possibly” has a claim. 66 Ohio St.3d at 61. Because the existence of a *possible* DES-related injury would not survive a motion to dismiss, the Court concluded that it placed plaintiffs in the unfair (if not unethical) position of suing prior to the occurrence of actual damages:

This court has previously identified a practical and essential element of the Constitution’s right-to-remedy clause: When the Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted *at a meaningful time and in a meaningful manner*. [Citations omitted.] The ‘opportunity’ forced upon plaintiffs by R.C. 2305.10 is granted neither at a meaningful time nor in a meaningful manner. First, the statute enunciates a meaningless cause of action. The statute states that it sets the accrual date for ‘a cause of action for bodily injury which may be caused by exposure to [DES] * * *’ ‘No such ‘cause of action’ could even survive Civ. R. 12(B)(6) scrutiny. If a plaintiff were to file a complaint stating that she suffered a bodily injury which might be related to DES, the complaint would be dismissed for failure to state a claim . . .

Because the statute of limitations begins running where there is the slightest evidence that DES may be a possible cause of a plaintiff’s symptoms, an attorney may be forced to file a complaint long before he can believe that there is good ground to support it. The alternative is to file no complaint.

Id. at 62 (emphasis in original). *Cf. Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 64 fn. 2, 543 N.E.2d 488 (“It is not desirable to force a policyholder to retain counsel in order to avoid statute of limitations problems”) (citing *Kunz*). Because the statute imposed an impossible filing dilemma on plaintiffs, the Court concluded that the statute violated the Right-to-Remedy Clause of the Ohio Constitution. *Id.* at 61-63.

The same danger is present here. If Flagstar sued Reinhold prior to the borrowers' default, Reinhold would argue that Flagstar had not yet suffered an injury, any injury which it may suffer in the future is speculative, and therefore its claims were premature. If Flagstar waited until the foreclosure was commenced, Reinhold could contend that the borrowers may exercise their equity of redemption (a possibility discussed in *Slavin*), or the property may bring a price at foreclosure sufficient to pay the balance due, and again that Flagstar still could not prove that it had actually been injured. When Flagstar waits until the foreclosure occurs and the actual injury is realized, Reinhold argues that it is too late to bring the claim because it is more than four years after the issuance of the appraisal.

It is precisely that whipsaw which caused the *Burgess* court to hold that the then effective R.C. 2305.10 violated the Ohio Constitution. The interpretation of R.C. 2305.09(D) which the First District adopted places mortgage lenders in a Hobson's choice of bringing a claim before actual damages occur (*i.e.*, before the action accrues) – and thereby have its claim dismissed – or waiting to bring the claim once actual injury occurs (*i.e.*, after the action accrues) – and thereby risk that the statute of limitations has run. In many circumstances, the foreclosure may not even be commenced until more than four years after the completion of the appraisal – thereby eliminating any window in which the lender could bring a claim.

Fortunately, there is another interpretation. By limiting the phrase “accrued” in R.C. 2305.09 to those cases where all of the elements of a claim exist—including actual damages—courts can avoid the constitutional problem. This is the interpretation which our Constitution requires. *State. v. Thompson* (2001), 92 Ohio St.3d 584, 586, 752 N.E.2d 276 (“[a] statute will be given a constitutional interpretation if one is reasonably available”).

E. The First District's construction of R.C. 2305.09(D) violates due process.

Both the Ohio and the United States Constitutions guarantee each of us "due process." U.S. Const. Amendment V and XIV; Ohio Const. Article I, Section 16; *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hospital Asso.* (1986), 28 Ohio St.3d 118, 502 N.E.2d 599. Due process includes "procedural" due process. *Mathews v. Eldridge* (1976), 424 U.S. 319, 332; *State v. Cowan* (2004), 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846. The fundamental requirements of due process are notice and a meaningful opportunity to be heard. *Mathews*, 424 U.S. at 333. The rights to due process found in Section 16, Article I of the Ohio Constitution mirrors the protections found in the Fourteenth Amendment to the United States Constitution. *State v. Hayden* (2002), 96 Ohio St.3d 211, 773 N.E.2d 502, *cert. denied*, 537 U.S. 1197 (2003).

Reinhold's appraisals stated that the properties had sufficient value to support the loans, and Flagstar purchased the loans relying on the appraisals. The appraisals were negligently completed, causing Flagstar an injury which did not occur until Flagstar was compelled to resort to the collateral. The law should not deprive Flagstar of its opportunity for redress of its injuries before they actually accrued. The Fourteenth Amendment, the Ohio Constitution and this Court's precedents require nothing less. The Court should accept jurisdiction to address this important constitutional issue.

CONCLUSION

Holding that a claim for professional negligence accrues at the time of the service, and not the time that actual damages come into existence, leaves defendants with the ability to avoid all culpability for their misconduct. If a plaintiff brings suit more than four years after the service, the defendant will argue the statute of limitations bars the action. If the plaintiff brings the action within four years but before damages exist, the defendant argues that the tort is not complete, and therefore not actionable. The claim is either too early or too late.

The Fifth and Sixth Districts have recognized this potential whipsaw, and have properly construed R.C. 2305.09 to prevent it. Unfortunately, the First and Third Districts mistakenly believe that this Court has somehow required it. This conflict makes this case one of great general interest not only to appraisers, but to the variety of plaintiffs whose claims are subject to R.C. 2305.09; the Court should accept jurisdiction for this reason alone.

But there is more—assuming that R.C. 2305.09 could be construed to permit this whipsaw, the statute would be unconstitutional under the Ohio Constitution and the Fourteenth Amendment. The whipsaw directly implicates a substantial constitutional question, yet another reason that this matter is worth of this Court’s review.

Flagstar respectfully requests the Court to accept jurisdiction over this case, and to answer the conflict which the First District has certified.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 19th day of March, 2010.

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**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

FLAGSTAR BANK, FSB,

Plaintiff-Appellant,

vs.

JOHN L. REINHOLD,

Defendant-Appellee,

and

JAMES WHITED, ET AL.

Defendants.

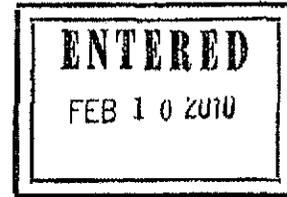
APPEAL NO. C-090166

TRIAL NO. A-0804164

JUDGMENT ENTRY.



D86974863



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellant Flagstar Bank, FSB, appeals from the trial court's entry granting summary judgment to defendant-appellee John L. Reinhold on its claims for negligent misrepresentation and professional negligence.

In April 2001, Flagstar purchased several residential mortgage loans from defendant Airline Union's Mortgage Company ("AUM"). The borrowers on these loans defaulted, leaving insufficient collateral to satisfy the loans. In April 2008,

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

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Flagstar filed suit against AUM, the loan officers involved, and a group of residential property appraisers, including Reinhold, to recover damages. In its complaint, Flagstar alleged that Reinhold had negligently performed real estate appraisals on December 19, 2001, June 12, 2002, and March 10, 2001.

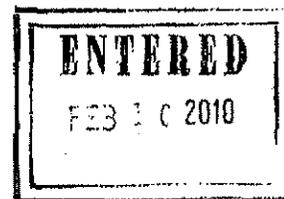
Reinhold subsequently moved for summary judgment, asserting that Flagstar's claims against him for negligent misrepresentation and professional negligence were barred by the four-year statute of limitations found in R.C. 2305.09(D). The trial court, relying upon the Ohio Supreme Court's decision in *Investors REIT One v. Jacobs*² and this court's subsequent decision in *Hater v. Gradison, Division of McDonald & Company Securities, Inc.*,³ granted Reinhold's motion. Flagstar subsequently dismissed without prejudice its claims against the other defendants and filed a timely appeal from the trial court's judgment.

On appeal, Flagstar has raised a single assignment of error, in which it argues that the trial court erred by entering summary judgment for Reinhold on its claims of negligent misrepresentation and professional negligence. Flagstar argues that the trial court erred in holding that its negligence claims against Reinhold accrued for statute-of-limitations purposes on the date his appraisals had been completed, instead of on the date that it had suffered actual damages. We disagree.

In *Investors REIT One*, the Ohio Supreme Court rejected a discovery rule for claims of accountant negligence in the context of R.C. 2305.09(D) and held that the four-year statute of limitations governing those claims commenced to run "when the

² (1989), 46 Ohio St.3d 176, 546 N.E.2d 206.

³ (1995), 101 Ohio App.3d 99, 655 N.E.2d 189.



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allegedly negligent act was committed.”⁴ The Ohio Supreme Court affirmed its holding in *Investors REIT One* in *Grant Thornton v. Windsor Homes, Inc.*⁵

In *Hater v. Gradison, Division of McDonald & Company Securities, Inc.*, this court extended the reasoning of *Investors REIT One* to claims of professional negligence by brokers, dealers, and appraisers.⁶ In so doing, we expressly rejected the argument that Flagstar makes in this appeal: that no actionable injury can be held to have occurred so as to set in motion the running of the statute of limitations until damage has resulted from that negligent act.⁷ In *Hater*, we held that this argument was nothing more than an attempt to circumvent the unavailability of the discovery rule for these types of claims.⁸

While Flagstar has cited a number of cases, mainly from the Fifth and Sixth Appellate Districts, that arguably conflict with our analysis in *Hater*,⁹ we believe that our reasoning in *Hater* is sound.¹⁰ It is consistent not only with the majority of Ohio appellate districts, but also with the broad and explicit language of the Ohio Supreme Court in *Investors REIT One* and *Grant Thornton*.¹¹

Because the record reveals that Reinhold had performed each of the real estate appraisals in 2001 or 2002, which was more than four years before Flagstar filed its claims for professional negligence and negligent misrepresentation against

⁴ *Investors REIT One*, supra, at 182.

⁵ (1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220.

⁶ *Hater*, supra, at 109-111.

⁷ *Id.* at 110.

⁸ *Id.*

⁹ See, e.g., *JP Morgan Chase Bank v. Lanning*, 5th Dist. No. 2007CA00223, 2008-Ohio-893; *Fritz v. Brunner Cox, L.L.P.* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740; *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 768-69, 656 N.E.2d 729.

¹⁰ See *Dancar Properties, Ltd. v. O'Leary-Kientz*, 1st Dist. No. C-030936, 2004-Ohio-6998, at ¶14 (following *Hater* and rejecting the discovery rule for negligent-misrepresentation claims).

¹¹ See *Schnippel Construction Inc. v. Jim Proffit*, 3rd Dist. No. 17-09-12, 2009-Ohio-5905 (summarizing the extensive Ohio appellate case law rejecting the “delayed damages,” “actual injury,” or “actual damage” argument).



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him, the trial court properly entered summary judgment in his favor. As a result, we overrule Flagstar's sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 10, 2010
per order of the Court _____
Presiding Judge

