ORIGINAL

IN THE SUPREME COURT OF OHIO

FLAGSTAR BANK, FSB,	:	**Consolidated Case Nos. 2010-0508, 2010-0511**
Plaintiff-Appellant,	:	
v.	:	On Appeal From Hamilton County Court of Appeals, First Appellate District
AIRLINE UNION'S MORTGAGE COMPANY, et al.,	:	Court of Appeals Case No. C 0900166
Defendants-Appellees.	:	

BRIEF OF APPELLANT FLAGSTAR BANK, FSB

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I. STATEMENT OF FACTS

Plaintiff-Appellant, Flagstar Bank, FSB ("Flagstar') is a federally chartered savings bank. T.d. 60, Ex. A, ¶4. Defendant-Appellee, John Reinhold is a licensed appraiser. T.d. 60, Ex. A.1.

On January 24, 2002, Flagstar purchased a mortgage loan from Airline Union's Mortgage Co. ("AUM") secured by property located at 134 Cecil Street, Springfield, Ohio ("Cecil Street Loan"). T.d. 60, Ex. A, ¶5. Reinhold prepared an appraisal ("Cecil Street Appraisal") of that property, signed on December 19, 2001, stating that the property had sufficient value to support the loan. *Id.* Flagstar relied on the Cecil Street Appraisal in purchasing the loan from AUM. T.d. 60, Ex. A, ¶6. Flagstar later sold this loan in the secondary market. *Id.*

On July 29, 2002, Flagstar purchased a mortgage loan from AUM secured by property located at 2017 Wayne Avenue, Middletown, Ohio ("Wayne Avenue Loan"). T.d. 60, Ex. A, ¶7. Reinhold prepared an appraisal ("Wayne Avenue Appraisal") of that property, again stating that the property had sufficient value to support the loan. *Id.* Flagstar relied on the Wayne Avenue Appraisal in purchasing the loan from AUM, which it later sold on the secondary market. T.d. 60, Ex. A, ¶8.

On May 18, 2001, Flagstar purchased a mortgage loan from AUM secured by property located at 1861 State Road 44 West, Connersville, Indiana ("State Road Loan"). Reinhold prepared an appraisal of this property, which he signed on March 10, 2001, stating that the property had sufficient value to support the loan. T.d. 60, Ex. A, ¶9. Flagstar relied on the State Road Appraisal in purchasing the loan. T.d. 60, Ex. A, ¶10. (The appraisals for the Cecil Street, Wayne Avenue and State Road Loans are referred to as the "Appraisals.") Flagstar kept the State Road Loan as part of its portfolio.

The borrowers on the Cecil Street, Wayne Avenue and State Road Loans subsequently

defaulted. T.d. 60, Ex. A, ¶¶6, 8. As a result, the secondary lenders on the Cecil Street and Wayne Avenue Loans initiated foreclosure proceedings. *Id.* The foreclosure sales were completed on September 3, 2004 (on the Cecil Street Loan) and on May 19, 2005 (on the Wayne Avenue Loan), leaving a deficiency balance. *Id.* The secondary lenders on both loans forced Flagstar to pay the deficiency balances and foreclosure-related expenses. *Id.*

The home securing the State Road Loan burned down on September 1, 2003. Flagstar received approximately $471,100.00 from insurance proceeds on June 19, 2007, leaving a deficiency balance and losses on the State Road Loan of over $390,000.00. T.d. 60, Ex. A, ¶10.

On April 28, 2008 (*i.e.*, within four years of the foreclosure sales and the receipt of insurance proceeds that created the deficiency balances on the loans), Flagstar commenced this action against Reinhold for negligent misrepresentation and professional negligence. 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., Sec.* (1995), 101 Ohio App.3d 99, 655 N.E.2d 189, appeal denied, 72 Ohio St.3d 1539, the Trial Court found that under R.C. 2305.09, a claim for negligence against a real estate appraiser accrued upon the issuance of the appraisal, not upon the date that actual damages were incurred. The Trial Court did not address Flagstar's arguments that this construction of R.C. 2305.09 would cause the statute to violate the Right-to-Remedy Clause of Ohio Constitution, Art. I, Sec. 16, and the Due Process Clauses of the Ohio Constitution, Art. I, Sec. 16, and the Fourteenth Amendment of the United States Constitution, and entered summary judgment in favor of Reinhold. After disposing of the claims against the remaining defendants, Flagstar timely appealed to the First District Court of Appeals.

The First District affirmed. Rejecting Flagstar's arguments that the statute of limitations

did not accrue until Flagstar had incurred actual damages, the First District held that under *Investors REIT One* and *Hater*, the statute of limitations accrued for the purposes of R.C. 2305.09(D) at the time of the appraisal. The First District reasoned that Flagstar's arguments that the statute of limitations required actual damages was simply a repackaged version of the discovery rule, which it held does not apply to ordinary negligence claims under R.C. 2305.09. However, the First District acknowledged that the decisions of the Fifth and Sixth Districts in *JP Morgan Chase Bank NA v. Lanning*, 5th Dist. No. 2007CA00223, 2008-Ohio-893; *Fritz v. Cox* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740; and *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 768-69, 656 N.E.2d 729, "arguably conflicted" with its analysis of the accrual. The First District also did not address Flagstar's arguments with respect to the Right-to-Remedy Clause or the Due Process Clauses.

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. The case is currently before the Court on the Certified Conflict question and the proposition of law proposed by Flagstar.

II. ARGUMENT

Certified Conflict 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?

Proposition of Law No. I

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

A. A claim for professional negligence does not "accrue" under R.C. 2305.09(D) until the plaintiff suffers an actual injury.

Professional negligence claims are subject to the 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*." R.C. 2305.09(D) (emphasis added). The first task is to give meaning to that phrase.

1. The usual meaning of "accrued" requires a completion of all the elements of the claim.

The word "accrued" is not defined in R.C. 2305.09. "[I]t is well settled that 'any term left undefined by statute is to be accorded its common, everyday meaning.'" *Am. Fiber Sys. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695, ¶24; *quoting State v. Dorso* (1983), 4 Ohio St.3d 60, 62, 446 N.E.2d 449. For the term "accrued," this maxim does not help:

> R.C. Chapter 4123 does not define "accrued," leaving the term to its "usual, normal, or customary meaning." *State ex rel. Bowman v. Columbiana Cty. Bd. of Commrs.* (1997), 77 Ohio St.3d 398, 400, 1997-Ohio-265, 674 N.E.2d 694. That definition, however, does not advance resolution of the issue, since the term is defined as "to come into existence as an enforceable claim: vest as a right." Webster's Third New International Dictionary (1986) 13. Precisely *when* the interest at issue becomes an enforceable claim or right - the question here - is not answered by the definition.

State ex rel. Estate of McKenney v. Indus. Comm'n, 110 Ohio St.3d 54, 2006-Ohio-3562, 850 N.E.2d 694, ¶8.

Nonetheless, the Court has addressed what is required for a cause of action to accrue for the purposes of the statute of limitations. The Court has held that a cause of action "accrues" only after the tort is complete. *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 437 N.E.2d 1194.[1] 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

[1] Just last year, this Court reaffirmed that the statute of limitations in R.C. 2305.09(E) (which also uses "accrued") begins to run "when all the events which fix the [] alleged liability have occurred and the plaintiff was or should have been aware of their existence." *State ex rel. Nickoli v. Metroparks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588, ¶34; quoting *Hopland Band of Pomo Indians v. United States* (Fed.Cir.1988), 855 F.2d 1573, 1577.

to plaintiff proximately resulting from defendant's breach. *Chambers v. St. Mary's Sch.* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (citations omitted).

This last element is what is at issue here. In addition to duty and breach of duty, "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 limitation [commences] to run." *Kunz*, 1 Ohio St.3d at 81 (internal quotation marks and citation omitted).

In *Kunz*, the plaintiff sued his insurance agent for failing to obtain insurance to cover damage to equipment. *Id.* The trial court held 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 accrued not upon issuance of the policies, but rather upon the damage to the equipment. 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 "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.

In *Kunz*, this Court made clear that there must be an actual—not speculative—injury before a claim to accrue: "[T]here 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 limitation [commences] to run." *Id.* at 81 (internal quotation marks and citation omitted). *See, also, Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d

193, 198, 551 N.E.2d 938 (mere "[p]roof of negligence in the air" is insufficient to support a claim) (overruled on other grounds by *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425);[2] *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");[3] *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").

The *Kunz* rule – that a cause of action does not accrue until an actual injury occurs – has been followed by most of the appellate district courts. In *Fritz v. Cox* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740, the plaintiff brought a negligence claim against an accounting firm for preparing faulty tax returns. The trial court held the complaint was untimely because the returns were prepared outside of the four-year statute of limitations provided by R.C. 2305.09(D). The Fifth District reversed, holding "[s]ince 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). As a result, the plaintiff's cause of action did not accrue for statute of limitations purposes until the I.R.S. assessed penalties, *i.e.*, until the plaintiff had suffered an actual injury. *Id.* The court noted that a contrary rule would violate the principle that statutes of limitation are "to be given a liberal construction in order to allow cases to be decided on the merits" and would potentially "lead to the unconscionable result that the injured party's

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[2] This Court held in *Sedar* that a statute of repose found at R.C. 2305.131 did not violate the Right-to-Remedy Clause of the Ohio Constitution. In *Brennaman*, the Court overruled *Sedar* and concluded that the statute was unconstitutional. *Brennaman* left untouched *Sedar*'s ruling as to when a claim accrues.

[3] This Court reinforced and readopted this analysis in the tax refund statute of limitations context under R.C. 5733.12(B). *Nestle R&D Ctr., Inc. v. Levin*, 122 Ohio St.3d 22, 2009-Ohio-1929, 907 N.E.2d 714, ¶21.

right to recovery can be barred . . . before he is even aware of its existence." *Id.* at 669-670. Or, indeed, before a plaintiff has even suffered an injury.

In *JP Morgan Chase Bank NA v. Lanning*, 5th Dist. No. 2007CA00223, 2008-Ohio-893, the Lannings sued a title company for negligently preparing and recording documents related to their purchase of property. Due to the title agency's mistakes, the mortgagee instituted foreclosure proceedings against the Lannings. The title company argued that the Lannings' claim was beyond the four-year statute of limitations because it had recorded the mortgage in July 2000 but the Lannings had not instituted their claim against the title company until March 2007. While the trial court dismissed the complaint, the Fifth District reversed, reasoning that a cause of action does not accrue until all the elements of a claim have taken place, and that a cause of action does not accrue until the plaintiff suffers an injury, *i.e.*, until the plaintiff has suffered an "invasion of a legally protected interest." *Id.*, ¶23 (internal quotation marks and citations omitted). The Lannings had not suffered an injury until the mortgagee instituted foreclosure proceedings in February 2006, well within four years of their March 2007 filing, and the complaint was therefore timely.

The Sixth District has also applied this rule. In *Schnorf v. Society Bank* (6th Dist. Apr. 14, 1995), Case No. L-94-120, 1995 Ohio App. LEXIS 1538, the trial court "erroneously equated appellant's knowledge of the property transfers with knowledge of actual damage to her." *Id.* at *9 (citation omitted). Instead, the Sixth District held that the plaintiff "was not damaged by the property transfers when they occurred because her legal right or interest in these properties was not yet established." *Id.* As a result, the plaintiff "did not have a legally protected interest until the judgment entry of March 11, 1989. Therefore, the statute of limitations did not begin to run

until [plaintiff] attempted to execute on that judgment and discovered the damage done to her by the property transfers." *Id.*

The Sixth District reached the same result in *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729 (no cause of action for negligence against accountants until damages element satisfied through imposition of penalties by I.R.S.). So did the Ninth District in *Sladky v. Lomax* (1988), 43 Ohio App.3d 4, 538 N.E.2d 1089 (claim against accountants for negligent preparation of income tax returns does not accrue until I.R.S. assessed additional taxes and penalties, not when accounting services were performed).

In *Portage Cty. Bd. of Comm'rs v. City of Akron*, 156 Ohio App.3d 657, 2004-Ohio-1665, 808 N.E.2d 444, the Eleventh District ruled that a cause of action based on damage caused by the pattern of retention and release of water from the dam, which was erected in 1912, was a continuing tort that tolls the statute of limitations because "the cause of action requires an element of injury," and therefore, "the statute of limitations does not begin to run until the injury takes place." *Id.* at 692 (citing *Kunz*, 1 Ohio St.3d at 81), *rev'd in part on other grounds*, 109 Ohio St.3d 106.

Finally, federal district courts have interpreted Ohio law the same way. *Casden v. Burns* (N.D. Ohio 2007), 504 F. Supp.2d 272, 281 (explaining that under *Kunz,* a "tort cause of action accrued as of date that damages were incurred, and not earlier date when duty was breached"). *Cheetwood v. Roberts* (N.D. Ohio July 18, 1991), Case No. 90-CV-7432, 1991 U.S. Dist. LEXIS 21709, at *68-69 ("When negligence does not immediately result in damages, the cause of action arising from the negligence does not accrue until actual injury or damages.") (citing *Velotta, supra*).

2. *REIT One* simply does not apply.

Despite the *Kunz* rule and the legion of cases from other appellate districts applying it, the First District thought that both this Court's decision in *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206, and its prior decision in *Hater v. Gradison Div. of McDonald & Co., Sec., Inc.* (1995), 101 Ohio App.3d 99, 655 N.E.2d 189, precluded an actual damages rule. In *Hater*, the First District reasoned:

> [W]e note first that a similar distinction between the discovery rule and the delayed-damage theory was rejected as a distinction without a difference by the court in *Reidel v. Houser* (1992), 79 Ohio App.3d 546, 607 N.E.2d 894. In *Reidel*, the appellant argued, as the investors do here, that notwithstanding the holding of *REIT One*, the statute of limitations should not have commenced to run on a claim that an accountant's preparation of tax returns was negligent until the date upon which damages could be attributed to the faulty returns. The *Reidel* court found this argument to be, in effect, the discovery rule in different guise and thus precluded by the holding of *REIT One* that the discovery rule was not applicable to claims of accountant negligence controlled by R.C. 2305.09(D).

Id. at 110. The Third District reached a similar conclusion using a similar method of analysis. *Schnippel Constr., Inc. v. Proffit*, 3rd Dist. No. 17-09-12, 2009-Ohio-5905.

The First District continued its interpretation of *REIT One* in this case:

> 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 allegedly negligent act was committed." The Ohio Supreme Court affirmed its holding in *Investors REIT One* in *Grant Thornton v. Windsor Homes, Inc.* [(1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220]
>
> 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. 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. 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.
>
> While Flagstar has cited a number of cases, mainly from the Fifth and Sixth Appellate Districts, that arguably conflict with our analysis in *Hater*, we believe that our reasoning in *Hater* is sound.

Opinion, 2-3.

With respect, the First District has confused the issue of when an injury is ***discovered*** with when damages actually occur. In *REIT One*, this Court evaluated whether the four-year statute of limitation set forth in R.C. 2305.09(D) should be tolled until the time that the plaintiff "discovered" he had a professional negligence claim against his accountant. The Court noted that while R.C. 2305.09 includes a discovery rule for fraud and certain causes of action for bodily injury, no such provision was made for professional negligence claims. As a result, the Court found that the statute of limitations began to run "when the allegedly negligent act was committed" and not at the time that the injury was discovered. *REIT One*, 46 Ohio St.3d at 181.

But in *REIT One*, damages occurred *concurrently* within the negligent act, and the delay that was at issue was the *discovery* of the negligence. Flagstar has no quarrel with that rule or with *REIT One*. The problem is that *REIT One* was addressing an entirely different scenario.

Decisions preceding *REIT One* explicitly state that a statute of limitations does not run until a plaintiff suffers an actual injury. *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"); *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.")

REIT One did not overrule these decisions because they presented a different issue—whether actual damages are necessary for a cause of action to accrue. Following its decision in *REIT One*, this Court has continued to affirm that a negligence claim does not accrue – and the statute of limitations does not begin to run – until actual damages are incurred. In *Sedar*, 49 Ohio St.3d at 198 (citations omitted) decided less than four months after *REIT One*, this Court held that "[i]t is axiomatic that negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do." The Court reaffirmed its prior holding from *Velotta* that "where wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs." *Id.* (citing *Velotta*, 69 Ohio St.2d at 379). The Court also clarified that the delayed onset of damages discussed in *Velotta* "is not a discovery rule" – thus, leaving intact its prior ruling that a statute of limitations does not run until the occurrence of an actual injury. *Id.*

The Court has never changed from this position. In *NCR Corp. v. United States Mineral Prods. Co.* (1995), 72 Ohio St.3d 269, 649 N.E.2d 175, the Court confirmed that the mere presence of asbestos is insufficient to trigger a statute of limitations, and instead, there must at least be an actual injury created by airborne release of the particles before the limitations period can begin to run. The Court held that "a potential cause of action is not sufficient to trigger the running of the statute of limitations" because forcing the plaintiff to sue "before they have sustained anything more than a potential or contingent injury . . . could not survive a motion to dismiss." *Id.* at 271-272.

In this case (and in its prior decision in *Hater*), the First District equated the actual damages rule in *Kunz* and its progeny with a "discovery rule." *Hater* went so far as to call the actual damages rule a "discovery rule in different guise." *Hater,* 101 Ohio App. 3d at 110. But these are distinct and different concepts. The discovery rule tolls the statute even though *all* of the elements of the claim (including the occurrence of actual damages) are complete. The actual damages rule of *Velotta* and *Kunz* does not toll accrual until damages are discovered, but rather holds that there is no claim to accrue until actual damages occur. Put another way, discovery is a rule of tolling the statues for a completed cause of action; the actual damages rule recognizes that there is no need for tolling because a cause of action is not complete without actual damages.

Based on the above, it is clear that Fifth, Sixth, Ninth and Eleventh Districts are correct, and that the First District (and the Third District) have simply erred in the analysis of *Kunz*, *REIT One* and the actual damages requirement for a cause of action to accrue. The decision below should be reversed.

3. When the General Assembly intends to base a time bar on the defendant's conduct, it specifically says so.

Finally, were there any doubt as to the meaning of the word "accrued" in R.C. 2305.09 (and based on this Court's precedent, there is not), any issue of interpretation is resolved by the General Assembly's crafting of statutes of repose.

"Unlike a true statute of limitations, which limits the time in which a plaintiff may bring suit *after* the cause of action accrues, a statute of repose, such as R.C. 2305.131, potentially bars a plaintiff's suit before the cause of action arises." *Sedar*, 49 Ohio St.3d at 195. "A statute of repose sets an outer boundary in time beyond which no cause of action may arise for conduct that otherwise would have been actionable, as opposed to a statute of limitation which disturbs a vested substantive right." 66 Ohio Jurisprudence 3d (2010), Limitations and Laches, § 5.

A statute of repose has a different focus than a statute of limitations. "A statute of repose, thus, focuses on the defendant's actions and begins to run upon completion of those actions; a statute of limitations focuses on the plaintiff's injuries and does not begin to run until the cause of action accrues." *Id.* Statutes of repose have a specific history:

> [T]hey were first enacted in the late 1950s and early 1960s as a response to the expansion of common-law liability of architects and builders who historically had not been subject to suit by third parties who lacked privity of contract. Under the privity doctrine, once a contractor's work was completed and accepted by the owner of the property, the responsibility for maintaining the building and protecting third parties from harm shifted to the owner, so that liability was limited to those who were in actual control or possession of the premises. With the demise of the privity doctrine, architects and builders were increasingly subjected to suits brought by third parties long after work on a building had been completed.

Groch v. GMC (2008), 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶112; citing *Sedar*, 49 Ohio St.3d at 195-196.

When the General Assembly wants to base a time bar based on the defendant's conduct, it crafts a statute of repose and defines "accrued" to be based on that conduct. For example, R.C. 2305.10(C)(1) (governing product liability for asbestos claims) provides "no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser . . . ." R.C. 2305.13 (governing overcharge claims against common carriers) provides "[t]he cause of action . . . shall, for the purposes of this section, accrue upon the delivery, or tender of delivery thereof, by the carrier." R.C. 2305.131(A)(1) (governing claims against defects in improvements to real estate) provides that "no cause of action . . . shall accrue against a person who performed services . . . later than ten years from the date of substantial completion of such improvement."

In contrast, when the General Assembly leaves the term "accrued" undefined in a statute providing for a time bar, it intends for the common law definition to apply. See *Larkins v.*

Routson (1927), 115 Ohio St. 639, 647, 155 N.E. 227. (A term specifically defined in a statute means the General Assembly intended a different meaning than when the term is used generally.)

Here, in defining the limitations period for professional negligence claims in R.C. 2305.09, the General Assembly used the phrase "accrued" without tying it to the defendant's conduct. By doing so, the General Assembly intended "accrued" to have the common law meaning—that a cause of action does not accrue until the tort is complete, *i.e.*, that all of its elements, including actual damages, to have occurred.

The difference between statutes of repose and statutes of limitations highlights the error in the First District's holding. The First District improperly treated R.C. 2305.09(D) as a statute of repose for professional negligence claims, basing the running of the time bar not on the completion of the elements of a cause of action, but on the defendant's conduct. If the General Assembly had intended "accrued" to have that specialized meaning, then, like it did when it drafted R.C. 2305.10(C)(1), R.C. 2305.13 and R.C. 2305.131(A)(1), the General Assembly would have specifically made that linkage itself. Because the General Assembly did not draft R.C. 2305.09(D) in this manner, the General Assembly intended "accrued" to have its common law meaning, and for R.C. 2305.09(D) to be a statute of limitations, not of repose. The First District's contrary conclusion was simply wrong.

4. <u>A lender's claim against an appraiser of collateral for a loan does not accrue until the lender resorts to the collateral and it is insufficient to satisfy the balance.</u>

That leaves the question of accrual in this case—when does a lender incur actual damages in a claim for professional negligence against an appraiser?

As an initial matter, neither of the lower courts actually reached this question because both believed that the time bar began to run not on the occurrence of actual damages, but on the dates of the defendant's negligent conduct. Nonetheless, the rule of law that applies is clear:

When the appraiser has valued collateral for a loan, the lender's actual damages do not occur—and the lender's claim does not accrue—until the loan defaults, the lender has to resort to the collateral, and the collateral is insufficient to satisfy the balance due.

Reinhold did not appraise the *loan* that Flagstar was purchasing from AUM, but only the collateral that was to secure payment of the loan. Reinhold was not valuing the creditworthiness of the borrower or the marketability of the loan, but rather only the value of the property serving as collateral. Reinhold's limited role meant that Flagstar would have no viable claim against Reinhold unless and until it had to resort to the collateral, and the collateral did not match what Reinhold appraised.

While Reinhold's negligence (*i.e.*, his breach of his duty to use reasonable care) occurred when he issued the appraisals grossly over-valuing the collateral, 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 never have to resort to the collateral, and Reinhold's over-valuation errors would not cause Flagstar any harm. In fact, Reinhold would argue that if he paid Flagstar money damages and the borrower performed the loan, Flagstar would have double recovery.

If Flagstar waited to sue 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 actual damages. Again, Reinhold only appraised collateral, and as long as the collateral sold at a foreclosure sale for more than the balance then due, Reinhold's over-valuation errors would still cause no harm to Flagstar. Once again, Reinhold could claim that if he paid Flagstar money damages at the time of default and the collateral sold at foreclosure for the balance due, Flagstar

would not only have no damages, but would have a double recovery.

Finally, if Flagstar sued Reinhold on the day of the foreclosure sale, Reinhold could still effectively argue that his negligence did not cause Flagstar any damages. Under Ohio law, borrowers are permitted to redeem property from sale by paying the balance then due. R.C. 2329.33. If a borrower redeemed and paid off the loan, Flagstar would still have no damages. There were no damages—and thus no claim for negligence—until Flagstar had to resort to the collateral, and it was insufficient.

These circumstances have led courts to conclude that 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. This is because "the purpose of the appraisal for a lender is that it is intended to demonstrate that the property provided adequate security for the amount of the mortgage loan, rather than to assure the bank that the borrowers would not default." *Tuthill Fin. v. Greenlaw* (2000), 762 A.2d 494, 497, 61 Conn. App. 1. Therefore, "damages should be measured and determined from the time that title vested as determined in the foreclosure proceeding." *Id.* at 498, citing *First Fed. S&L Ass'n v. Charter Appraisal Co.* (1999), 724 A.2d 497, 247 Conn. 597.

Not only is this principle consistent with the actual damages requirement for accrual, it is good policy that promotes judicial economy:

> 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 (Cal. App. 2d Dist. 1993), 18 Cal. App. 4th 1536, 1542.

Besides being consistent with Ohio law on accrual and preventing a multiplicity of suits, the rule prevents a bank from being subjected to the whipsaw of being too early or too late. If Flagstar sued Reinhold prior to the borrowers' default, Reinhold would correctly argue that Flagstar had not suffered an injury yet, any injury which it may suffer in the future is speculative, and therefore its claims were premature. If Flagstar waited to sue Reinhold until the foreclosure was commenced, the appraiser could contend that the borrowers may exercise their equity of redemption, and again that Flagstar could not prove that it had actually been injured. When that actual injury finally did occur, Reinhold completes the whipsaw by arguing that it is now too late for Flagstar to bring the claim.

This is not speculation. Flagstar has been subjected to this whipsaw from appraisers in other matters, one of which involved Reinhold's present counsel. In *Flagstar Bank, FSB v. Credit Fin. Serv., LLC, et al.*, Case No. A0204910 (Hamilton Cty.), Flagstar pursued professional negligence claims against appraisers, just as it is pursuing against Reinhold in this case. Reinhold's counsel sought summary judgment against Flagstar arguing that Flagstar's claims were not ripe because the loans at issue had not gone into default and through foreclosure. T.d. 60, Ex. D. Relying on *Slavin,* the appraiser argued that Flagstar's lawsuit was premature: "Absent any actual damages incurred by a plaintiff, the case is merely a potential controversy." *Id.* The appraiser argued that "[a] secured lender does not suffer actual and appreciable harm from reliance on an over valued appraisal until resort to the inadequate security." *Id.*

Accrual requires actual damages. When an appraiser is valuing collateral for a loan, the lender's claim for professional negligence against the appraiser does not accrue until the lender has to resort to the collateral. Here, Reinhold negligently prepared his appraisals – *i.e.*, breached

the duties he owed to exercise reasonable care – more than four years before Flagstar filed its Complaint. But those breaches did not result in injury to Flagstar until the borrowers defaulted and the properties were foreclosed for the Cecil Street and Wayne Avenue Loans, and the insurance proceeds were paid on the State Road Loan – thus creating a deficiency balance in the loans. T.d. 16, Ex. A, ¶¶6, 8, 10. Because Flagstar filed its Complaint within four years of the completion of the events giving rise to its claims, Flagstar's claims were timely.

B. The First District's interpretation of R.C. 2305.09 would cause it to violate the Ohio and United States 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 and United States Constitutions.

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 that bars recovery for a cause of action before the action has even accrued. *See 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); *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466, 639 N.E.2d 425 (overruling *Sedar* in holding that the statute of repose found at R.C. 2305.131 unconstitutional

because it "deprived the plaintiffs of the right to sue before they knew or could have known about their or their decedents' injuries.").

In *Burgess*, the Supreme Court evaluated a provision from R.C. 2305.10 stating 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. *Burgess*, 66 Ohio St.3d at 61 (emphasis in original). 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 learning about an actual injury:

> 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. *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 statue of limitations problems") (citing *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 82, 437 N.E.2d 1194).

Because the statute reviewed in *Burgess* 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.

Here, the interpretation of R.C. 2305.09(D) urged by Reinhold and adopted by the First District places mortgage lenders in a Morton's fork of bringing a claim before injury occurs (*i.e.*, before the action accrues) – and thereby have its claim dismissed – or bringing a claim after 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 completed until more than four years after the completion of the appraisal – thereby eliminating any window in which the lender could bring a claim. That situation is precisely what the Right-to-Remedy Clause forbids. *Burgess*, 66 Ohio St.3d at 62.

There is yet another problem with the First District's decision—the First District's interpretation ignores the constitutional requirement of "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*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846. Procedural due process imposes constraints on governmental decisions that deprive individuals of property interests. *Mathews*, 424 U.S. at 332. The fundamental requirements of due process are notice and a meaningful opportunity to be heard. *Id.* at 333.

The right to procedural 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). "[P]rocedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected

liberty or property right." *Cowan*, 2004-Ohio-4777, ¶8 (citing *Boddie v. Connecticut* (1971), 401 U.S. 371, 377).

Here, Flagstar purchased the Cecil Street, Wayne Avenue and State Road Loans in reliance on the Appraisals. The Appraisals stated that the properties appraised had sufficient value to support the loans. These Appraisals were negligently completed, causing injury to Flagstar, injury which did not occur until Flagstar was compelled to pay the secondary lender for the balance deficiency on the Cecil Street and Wayne Avenue Loans, or received the insurance proceeds for the State Road Loan. By holding that Flagstar's claims accrued prior to these dates, the First District deprived Flagstar of its procedural due process rights of notice and an opportunity to be heard.

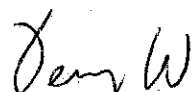
Fortunately, there is another path. This Court has held that "[a] statute will be given a constitutional interpretation if one is reasonably available." *State. v. Thompson* (2001), 92 Ohio St.3d 584, 586, 752 N.E.2d 276. The operative phrase in the statute is that a claim must be brought within four years of the date in which the claim *accrued.* Under *Teamsters Local Union 377*, *Kunz*, and *Velotta,* this term was interpreted to mean that all of the elements of the claim were present, including actual damages. By construing "accrued" to require actual damages, the constitutional problem can be avoided. In fact, construing the word "accrued" to include the requirement that actual damages have occurred makes the statute not only consistent with the Ohio Constitution, it is consistent with this Court's precedent. The First District's contrary conclusion was wrong.

III. <u>CONCLUSION</u>

The use of "accrued" in R.C. 2305.09(D) has been consistently construed by this Court to require the presence of not only negligent conduct, but actual damages. That interpretation is

not only consistent with precedent, but is harmonious both with other statutes which the General Assembly has enacted, as well as the Ohio and United States Constitutions. The First District's holding that the professional negligence context requires a different definition of "accrued," based solely on the defendant's conduct, is wrong. Because Flagstar brought its claims within four years of when it sustained actual damages from Reinhold's negligence, this action was timely. This court should clarify that the definition of "accrued" in R.C. 2305.09 (D) requires actual damages in all contexts, and reverse the decision of the First District Court of Appeals.

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 23 day of July, 2010.

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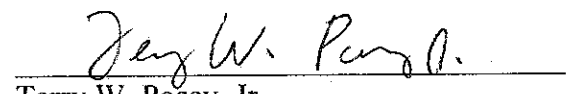

Terry W. Posey, Jr.

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IN THE SUPREME COURT OF OHIO

FLAGSTAR BANK, FSB,	*	
	*	
Plaintiff-Appellant,	*	On Appeal from the Hamilton County
	*	Court of Appeals, First Appellate District
vs.	*	
	*	Court of Appeals
AIRLINE UNION'S MORTGAGE COMPANY, et al.,	*	Case No. C 0900166
	*	
	*	
Defendants-Appellees.	*	10-0511
	*	
	*	

NOTICE OF APPEAL OF APPELLANT FLAGSTAR BANK, FSB

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FILED
MAR 19 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant Flagstar Bank, FSB

Appellant Flagstar Bank, FSB hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C 0900166 on February 10, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

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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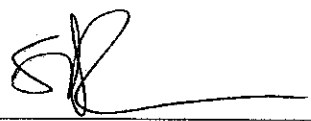

Samir Dahman

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IN THE SUPREME COURT OF OHIO

FLAGSTAR BANK, FSB,	*	10-0508
	*	
Plaintiff-Appellant,	*	On Appeal from the Hamilton County
	*	Court of Appeals, First Appellate District
vs.	*	
	*	Court of Appeals
AIRLINE UNION'S MORTGAGE COMPANY, et al.,	*	Case No. C 0900166
	*	
	*	
Defendants-Appellees.	*	
	*	
	*	

NOTICE OF CERTIFIED CONFLICT OF APPELLANT FLAGSTAR BANK, FSB

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John L. Reinhold

FILED
MAR 19 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict of Appellant Flagstar Bank, FSB

Appellant Flagstar Bank, FSB gives notice that on March 3, 2010, the Hamilton County Court of Appeals, First Appellate District, entered in Case No. C 0900166 an Entry Granting Motion to Certify Conflict (attached as "Exhibit A"). The First District Court of Appeals 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?

The First District certified the conflict based on its decision in *Flagstar Bank, FSB v. John L. Reinhold, et al.*, First Appellate District Case No. C-090166, Judgment Entry filed February 10, 2010 ("Exhibit B"). The conflict cases are:

1. *JP Morgan Chase Bank v. Lanning*, Fifth District Case No. 2007CA223, 2008-Ohio-893 ("Exhibit C");

2. *Fritz v. Brunner Cox, L.L.P.* (2001), 142 Ohio App. 3d 664, 756 N.E.2d 740 ("Exhibit D"); and

3. *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729 ("Exhibit E").

Pursuant to S. Ct. Prac. R. 4.1, a copy of the Entry certifying the conflict, the underlying decision, and the conflict cases are all attached as the respectively designated exhibits.

Respectfully submitted,

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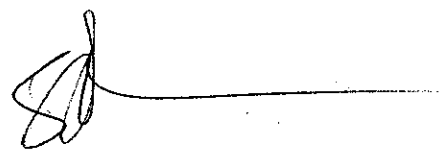
Counsel for Plaintiff-Appellant,
Flagstar Bank, FSB

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.

Robert J. Gehring
Brian E. Hurley
CRABBE, BROWN & JAMES LLP
30 Garfield Place
Suite 740
Cincinnati, Ohio 45202



Samir Dahman

608335v1

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

FLAGSTAR BANK, FSB,

Appellant,

vs.

AIRLINE UNION'S MORTGAGE COMPANY, et al.,

Appellees.

APPEAL NO. C-090166

ENTERED
MAR - 3 2010

ENTRY GRANTING MOTION TO CERTIFY CONFLICT

EXHIBIT
A

This cause came on to be considered upon the motion of the appellant to certify this appeal to the Ohio Supreme Court as being in conflict with *JP Morgan Chase Bank v. Lanning*,[1] *Fritz v. Brunner Cox, L.L.P.*,[2] and *Gray v. Estate of Barry*.[3]

The Court finds that the motion to certify is well taken and is granted.

This appeal is certified to the Ohio Supreme Court as being in conflict with the above cases. The certified issue is as follows:

> "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?"

To The Clerk:

Enter upon the Journal of the Court on MAR - 3 2010 **per order of the Court.**

By _____ **Presiding Judge**

(Copies sent to all counsel)

[1] 5th Dist. No. 2007CA223, 2008-Ohio-893.
[2] (2001), 142 Ohio App.3d 664, 756 N.E.2d 740
[3] (1995), 101 Ohio App.3d 764, 768-769, 656 N.E.2d 729.

D87278555

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

FLAGSTAR BANK, FSB,	:	APPEAL NO. C-090166 TRIAL NO. A-0804164
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
JOHN L. REINHOLD,	:	
Defendant-Appellee,	:	
and	:	
JAMES WHITED, ET AL.		
Defendants.		

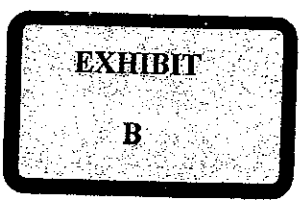
D86974863

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.



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

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[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).

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

ENTERED
FEB 10 2010

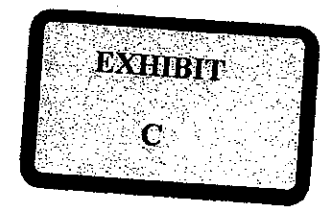
LEXSEE

Caution
As of: Mar 19, 2010

JP MORGAN CHASE BANK NA, Plaintiff-Appellee -vs- RODGER B. LANNING II, ET AL., Defendants-Third Party Plaintiffs-Appellants -vs- CMEA TITLE AGENCY, INC., ET AL., Third-Party Defendants-Appellees

Case No. 2007CA00223

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK COUNTY



2008 Ohio 893; 2008 Ohio App. LEXIS 755

March 3, 2008, Date of Judgment Entry

PRIOR HISTORY: [**1]
CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Civil Case No. 2006CV00625.

DISPOSITION: Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant mortgagors sought review of a judgment from the Stark County Court of Common Pleas (Ohio), which granted a motion by appellees, a mortgagee, a title company, and others, to dismiss the mortgagors' claims of negligence and willful and wanton misconduct due to the vacatur of tenants from property that was not foreclosed. The dismissal was based on the limitations bar under R.C. 2305.09(D).

OVERVIEW: The mortgagors executed a note and mortgage on their property. The title company recorded an altered mortgage document. The mortgagee commenced the foreclosure action against the mortgagors, and attempts at negotiation of a forbearance failed. Accordingly, the mortgagee obtained a foreclosure judgment and the property was sold at a sheriff's sale. That sale was subsequently vacated. In the interim, the mortgagee's loan servicer had informed tenants of another property owned by the mortgagors to vacate due to the foreclosure, which was error. Thereafter, the mortgagors filed a third-party action against the mortgagee, the servicer, and others, which was dismissed by the trial court upon a determination that the claims were barred by the limitations period under R.C. 2305.09(D). On appeal, the court held that the trial court erred in determining that the claim accrued when an altered mortgage was recorded. Rather, the delayed damages theory and the discovery rule were applicable to the circumstances. Accordingly, the action did not accrue until the date when the foreclosure action was filed, as the mortgagors did not suffer an actual injury until that time.

OUTCOME: The court reversed the judgment of the trial court and remanded the matter for further proceedings.

CORE TERMS: statute of limitations, accountant, accrue, cause of action, mortgage, sheriff's sale, negligence claims, tax return, foreclosure, assignment of error, de novo, suffered damages, actual injury, protected interest, delayed-damages, negligently, preparation, discovery, recorded, altered, accrued, property located, wanton misconduct, time-barred, recording, willful

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]An appellate court's standard of review on a Civ. R. 12(B)(6) motion to dismiss is de novo. A motion to

dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of a complaint. Under a de novo analysis, the appellate court must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party.

Governments > Legislation > Statutes of Limitations > Time Limitations
[HN2]See R.C. 2305.09(D).

Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule
[HN3]Pursuant to the discovery rule, a cause of action accrues, for statute of limitations purposes, at the time a plaintiff discovers, or, in the exercise of reasonable care, should have discovered, the injury.

Torts > Negligence > Proof > Burdens of Proof
Torts > Negligence > Proof > Elements
[HN4]To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom.

Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule
[HN5]For purposes of the accrual of a claim, 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.

COUNSEL: For Third-Party Defendants-Appellees: CMEA Title Agency, Inc., et al., MARC S. BLUBAUGH, Columbus, Ohio; CAMILLE A. MILLER, Cleveland, Ohio.

For Third-Party Plaintiffs-Appellants: Rodger and Shelley Lanning, PHILLIP D. SCHANDEL, Canton, Ohio; TIMOTHY B. SAYLOR, Canton, Ohio.

JUDGES: Hon. William B. Hoffman, P.J., Hon. John W. Wise, J., Hon. Julie A. Edwards, J. Wise, J. and Edwards, J. concur.

OPINION BY: William B. Hoffman

OPINION

Hoffman, P.J.

[*P1] Third-party plaintiffs/appellants Rodger B. Lanning, II, et al. appeal the July 17, 2007 Judgment Entry entered by the Stark County Court of Common Pleas, which granted the motion to dismiss filed by third-party defendants/appellees CMEA Title Agency, Inc.

STATEMENT OF THE FACTS AND CASE

[*P2] As the trial court set forth a thorough rendition of the factual background of this matter in its July 17, 2007 Judgment Entry, we shall incorporate the majority of such herein. The Lannings own real property located at 2181 Brumbaugh Street, N.W., North Canton, Ohio ("Stark County property") and real property located at 653 East Washington Ave., Barberton, Ohio ("Summit [**2] County property"). On July 26, 2000, the Lannings executed a promissory note to JP Morgan for $ 75,000, and secured the note with a mortgage on the Summit County property. CMEA was the title company involved in closing the loan and responsible for recording the documents.

[*P3] In late February, 2006, JP Morgan filed a Complaint in Foreclosure against the Lannings in the Stark County Court of Common Pleas in Case No. 2006CV00625. Attached to the Complaint was a copy of the mortgage on the Summit County property with the address of the property redacted and the words "Stark County" hand written in its place. The legal description attached to the mortgage on the Summit County property referenced the Stark County property. JP Morgan and the Lannings attempted to negotiate a forbearance agreement through Ocwen, JP Morgan's loan servicer. The attempts were unsuccessful, and JP Morgan foreclosed on the Stark County property, which was subsequently sold at a sheriff's sale. The sheriff's sale of the Stark County property was eventually vacated.

[*P4] In the meantime, Cutler and Associates, Inc., through its agent, Jonathan Caiazza, at the request of Ocwen, contacted the tenants residing in the Lannings' [**3] Summit County property, and instructed them to vacate the residence as it had been sold at a sheriff's sale. The Summit County property had, in reality, never been sold at a sheriff's sale, but the Stark County property had been erroneously sold.

[*P5] On March 5, 2007, the Lannings filed a Third-Party Complaint against JP Morgan, Ocwen, CMEA, Cutler and Associates, Inc., and Jonathan Caiazza. The Lannings filed an Amended Third-Party Complaint on June 22, 2007, asserting negligence and willful and wanton misconduct claims against CMEA. JP Morgan and Ocwen filed negligence cross-claims against CMEA. CMEA filed a Motion to Dismiss the Amended Third-Party Complaint, maintaining the Lannings' claims for negligence/willful and wanton misconduct were barred by the statute of limitations.

[*P6] Via Judgment Entry filed July 17, 2007, the trial court granted CMEA's motion to dismiss. The trial court found the four year statute of limitations for general negligence claims governed, and the Lannings, having failed to file their Complaint at the time of the injury, to wit: the date of the recording of the mortgage, were barred from recovery.

[*P7] It is from this judgment entry the Lannings appeal, raising as [**4] their sole assignment of error:

[*P8] "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS UPON THE BASIS THAT APPELLANT'S CLAIMS WERE BARRED BY A FOUR-YEAR STATUTE OF LIMITATIONS."

I

[*P9] In their sole assignment of error, the Lannings maintain the trial court erred in granting CMEA's motion to dismiss upon a finding their claims were barred by the four year statute of limitations for general negligence claims.

[*P10] [HN1]Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 1992 Ohio 73, 605 N.E.2d 378. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd. v. Faber* (1991), 57 Ohio St. 3d 56, 565 N.E.2d 584.

[*P11] The issue before this Court is when the Lannings' cause of action against CMEA arose. The trial court found the date of the resulting injury was on or about August 9, 2000, when CMEA altered and recorded [**5] the mortgage. The Lannings contend their cause of action did not accrue until they suffered the actual injury, the foreclosure proceedings instituted on or about February 22, 2006.

[*P12] In support of its decision dismissing the Lannings' Third-Party Complaint, the trial court relied upon the Ohio Supreme Court's opinion in *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206. Therein, the Ohio Supreme Court held claims of accountant negligence are governed by the four-year statute of limitations for general negligence claims set forth in R.C. 2305.09(D). Id. at paragraph one of the syllabus.

[*P13] R.C. 2305.09 provides, in pertinent part:

[*P14] [HN2]"An action for any of the following causes shall be brought within four years after the cause thereof accrued:

[*P15] "* * *

[*P16] "(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35 of the Revised Code." R.C. 2305.09.

[*P17] The *Investors REIT One* Court also held the "discovery rule" does not apply to claims of professional negligence brought against accountants. Id. at paragraph two of the syllabus. [HN3]Pursuant to that rule, a cause of action accrues, for statute of limitations purposes, at [**6] the time the plaintiff discovers, or, in the exercise of reasonable care, should have discovered, the injury. Id. at 179. The Ohio Supreme Court reaffirmed its decision in *Investors REIT One* in *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 566 N.E.2d 1220.

[*P18] As stated supra, the trial court in this matter found the Lannings' Complaint against CMEA for negligence was barred by the four-year statute of limitations set forth in R.C. 2305.09(D). The trial court noted, pursuant to *Investors REIT One*, the four-year statute of limitations period began to run when the negligent act was committed. The trial court determined, because CMEA recorded the altered mortgage on or about August 9, 2000, the Lannings' should have filed their Complaint on or before August 9, 2004. We do not agree.

[*P19] [HN4]"To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 270. The Lannings, citing this general proposition, argue their cause of action for negligence against CMEA did not accrue until February 22, 2006, the date on which JP [**7] Morgan filed its foreclosure action, as they did not suffer an actual injury until that time. The Lannings ask this Court to follow our holding in *Fritz v. Bruner Cox, L.L.P.* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740, and apply a "delayed damages" theory. We find, in the interest of justice, such theory should be recognized in this matter.

[*P20] In *Fritz*, this Court noted:

[*P21] "Neither the syllabus of *Investors REIT One* nor the syllabus of *Grant Thornton* specifically address the applicability of the "delayed-damages" theory advocated by appellants. However, after considering *Investors REIT One*, the court in *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729, held as follows:

[*P22] [HN5]"'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. * * * *In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the I.R.S. determines to levy a penalty assessment. Until that time, no claim upon which relief can be granted exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation* [**8] *begins to run.'* (Emphasis added and footnote omitted.) Id. at 768-769, 656 N.E.2d at 731." (Footnote omitted). Id. at 668.

[*P23] This Court in Fritz, supra, found the court in *Gray* "applied a delayed-damages theory in holding that the four-year statute of limitations set forth in R.C. 2305.09(D) for bringing an accountant negligence action based on negligent preparation of a tax return did not begin to run until the Internal Revenue Service assessed a penalty for negligent preparation. * * * it was not until then that appellants suffered an 'invasion of a legally protected interest'. See id. at 768, 656 N.E.2d at 731, citing Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St.3d 79, 1 OBR 117, 437 N.E.2d 1194." Id. at 668-669 (Footnote omitted).

[*P24] The *Fritz* Court continued:

> [*P25] "Based on the foregoing, we find that the trial court erred in holding that appellants' complaint against appellees for accountant negligence was barred by the four-year statute of limitations contained in R.C. 2305.09(D). We find that appellants' cause of action against appellees for accountant negligence did not accrue until appellants suffered actual damages. * * * the date the tax deficiencies were assessed. * * *
>
> [*P26] "We [**9] are cognizant of the fact that other courts, in interpreting and applying *Investors REIT One*, would find that appellants' complaint against appellees for accountant negligence was time-barred, since it was not filed within four years after the alleged negligent act was committed, which, in this case, was the filing of appellants' 1994 federal income tax return on September 14, 1995. However, that interpretation of *Investors REIT One* would lead to an illogical and inequitable result, namely, that appellants' claims against appellees would be time-barred *before* appellants' damages even manifested themselves. * * *
>
> [*P27] "* * * we find *Investors REIT One* distinguishable from the case *sub judice*, since the issue in this matter is when appellants' cause of action accrued, *not* the discovery of appellants' injury. In short, we find that appellants' complaint was not barred by the four-year statute of limitations set forth in R.C. 2305.09(D), since appellants' cause of action for accountant negligence did not accrue until appellants suffered damages on August 13, 1998."

[*P28] Id. at 669 - 670. (Citations and footnotes omitted). Based upon our analysis and disposition in Fritz, supra, we find the Lannings' [**10] cause of action did not accrue until they suffered damages on or about February 22, 2006. Accordingly, the Lannings' Third-Party Complaint is not barred by the four year statute of limitations for general negligence, and the trial court erred in granting CMEA's motion to dismiss.

[*P29] The Lannings' sole assignment of error is sustained.

[*P30] The matter is reversed and remanded to the trial court for further proceedings consistent with this opinion and the law.

By: Hoffman, P.J.

Wise, J. and

Edwards, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ John W. Wise

HON. JOHN W. WISE

s/ Julie A. Edwards

HON. JULIE A. EDWARDS

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, this matter is reversed and remanded to the trial court for further proceedings consistent with our opinion and the law. Costs assessed to appellees.

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ John W. Wise

HON. JOHN W. WISE

s/ Julie A. Edwards

HON. JULIE A. EDWARDS

LEXSEE

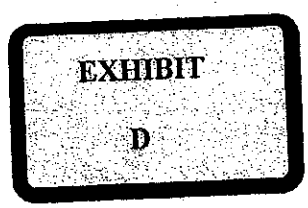
Caution
As of: Mar 19, 2010

MARK C. FRITZ, et al, Plaintiff-Appellants -vs- BRUNER COX, LLP, et al, Defendant-Appellees

Case No. 2000CA00362

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK COUNTY

142 Ohio App. 3d 664; 756 N.E.2d 740; 2001 Ohio App. LEXIS 2402



May 21, 2001, Date of Judgment Entry

PRIOR HISTORY: [***1] CHARACTER OF PROCEEDING: Civil Appeal from Stark County Court of Common Pleas. Case 2000CV00756.

DISPOSITION: Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, business, sought review of an order granting summary judgment in favor of appellee, accountant, by the Stark County Court of Common Pleas (Ohio).

OVERVIEW: Accountant had prepared business's tax returns for six years. In 1998 the IRS audited business's tax returns for 1994 and assessed penalties against business in 1998. Business brought a negligence action against accountant in 2000. Accountant maintained that the action was timed barred pursuant to Ohio Rev. Code Ann. § 2305.09(D), as the negligence had occurred in 1994, more than four years prior to the filling of the action. The cause of action for accountant's negligence was not barred by the four year statute of limitations, as a cause of action had not accrued until business suffered actual injury, which occurred in 1998, the date the IRS assessed a penalty against business.

OUTCOME: The summary judgment ordered of the trial court was reversed.

CORE TERMS: accountant, tax returns, statute of limitations, cause of action, summary judgment, accrue, cause of action, accrued, assignment of error, delayed, discovery rule, statute of limitations, sub judice, actual injury, protected interest..., negligently, preparation, accounting, matter of law, general rule, negligent act, federal income, negligence claims, limitation begins to run, timely filed, begins to run, actual damages, discovery, invasion

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]An appellate court must conduct a de novo review of the trial court's ruling on a summary judgment motion.

Civil Procedure > Discovery > Methods > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
[HN2]See Ohio R. Civ. P. 56(C).

Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Malpractice & Professional Liability > Professional Services

Torts > Procedure > Statutes of Limitations > General Overview
[HN3]Claims of accountant negligence are governed by the four year statute of limitations for general negligence claims set forth in Ohio Rev. Code Ann. § 2305.09(D).

Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Procedure > Statutes of Limitations > General Overview
[HN4]See Ohio Rev. Code Ann. § 2305.09(D).

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Discovery Rule
Governments > Legislation > Statutes of Limitations > General Overview
Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule
[HN5]The discovery rule is not applicable to claims of professional negligence brought against accountants. Pursuant to such rule, a cause of action accrues, for statute of limitations purposes, at the time the plaintiff discovers, or in the exercise of reasonable care, should have discovered the injury.

Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Negligence > Causation > Proximate Cause > Concurrent Causation
Torts > Procedure > Statutes of Limitations > General Overview
[HN6]To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty, and injury resulting proximately therefrom.

Real Property Law > Trusts > Real Estate Investment Trusts (REITs)
Tax Law > Federal Tax Administration & Procedure > Return Preparers (IRC secs. 6060, 6107, 6694-6696, 6713, 7216, 7407, 7427) > General Overview
Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Interest (IRC secs. 6601-6631) > General Overview
[HN7]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. In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the IRS determines to levy a penalty assessment. Until that time, no claim upon which relief can be granted exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation begins to run.

Governments > Legislation > Statutes of Limitations > Time Limitations
Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Interest (IRC secs. 6601-6631) > General Overview
Torts > Procedure > Statutes of Limitations > General Overview
[HN8]Some Ohio courts apply a delayed damages theory by holding that the four year statute of limitations set forth in Ohio Rev. Code Ann. § 2305.09(D) for bringing an accountant negligence action based on negligent preparation of a tax return does not begin to run until the IRS assesses a penalty for such negligent preparation. The delayed damages theory holds that it is not until such time that a party suffers an invasion of a legally protected interest.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Statutes of Limitations > Statutory Construction
Torts > Damages > Compensatory Damages > General Overview
Torts > Procedure > Statutes of Limitations > General Overview
[HN9]A statute of limitations is remedial in nature and is to be given a liberal construction in order to allow cases to be decided upon their merits. Every reasonable presumption will be indulged and every doubt will be resolved in favor of affording rather than denying a plaintiff his day in court. In determining when a cause of action arose, and the statute of limitations begins to run, it is a general rule that a cause of action accrues at the time the wrongful act was committed. It has been noted, however, that in some instances, application of this general rule would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence. Therefore, in such cases, a cause of action for damages does not arise until actual injury or damage ensues. That is, the tort is not deemed complete until there has been invasion of a legally protected interest of the plaintiff.

COUNSEL: For Plaintiff-Appellants: JAMES M. McHUGH, Canton, OH.

For Defendant-Appellees: RICHARD G. WITKOWSKI, Cleveland, OH.

JUDGES: Hon. Julie Edwards, P.J., Hon. William Hoffman, J., Hon. Sheila Farmer, J. Edwards, P.J. Hoffman, J. and Farmer, J. concurs.

OPINION BY: Julie Edwards

OPINION

[*665] [**741] Edwards, J.

Plaintiffs-appellants Mark C. Fritz and MCF Machine Co., Inc. appeal from the November 22, 2000, Judgment Entry of the Stark County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

Appellant Mark C. Fritz is the President and owner of appellant MCF Machine Co. Inc., as well as several other business entities. Appellants retained appellee Bruner Cox, LLP, a certified public accounting firm, to provide professional accounting and tax planning services. Appellee John C. Finnucan is appellee Bruner Cox's managing partner. [*666] As part of their professional accounting services, appellees filed appellants' 1994 federal tax returns on September 14, 1995, appellants' 1995 federal tax returns on September 6, 1996, and appellants' 1996 federal tax returns on September 15, 1997. Appellees [***2] also filed appellants' federal tax returns for 1997 and 1998. Pursuant to a letter dated March 7, 1997, from the Internal Revenue Service, appellants were advised that the federal tax return for appellant MCF Machine Co., Inc. for the 1994 tax year had been assigned for examination and audit. As a result of the same, the Internal Revenue Service made an initial determination and assessment against appellants on August 13, 1998, in the amount of $ 236,803.00 in total tax and penalties net of additional interest due on the assessed tax and penalties. After negotiations between appellants, through counsel, and the Internal Revenue Service, the amount was reduced in December of 1999 to $ 82,098.22 including interest. Thereafter, on or about January 3, 2000, appellants terminated appellees' representation as appellants' certified public accountants. On March 24, 2000, appellants filed a complaint for negligence and breach of fiduciary duty against appellees to which appellees, with leave of court, filed an answer on May 31, 2000. Appellants, in their [**742] complaint, specifically alleged, in part, that appellees had committed accountant malpractice by negligently preparing appellant MCF Machine [***3] Co's 1994 federal income tax return. Subsequently, appellees filed a Motion for Summary Judgment on September 22, 2000, arguing that appellants' claim for accountant negligence was barred by the four year statute of limitations set forth in R.C. 2305.09(D). A brief in opposition to appellees' motion was filed by appellants on November 8, 2000. As memorialized in a Judgment Entry filed on November 22, 2000, the trial court granted appellees' Motion for Summary Judgment, holding that appellants' cause of action for accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09. The trial court, in its entry, indicated that its order was a final appealable order and that there was "no just cause for delay." It is from the trial court's November 22, 2000, Judgment Entry that appellants now prosecute their appeal, raising the following assignment of error:

THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING THE MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANTS/APPELLEES.

I

Appellants, in their sole assignment of error, argue that the trial court erred in granting the Motion for Summary Judgment filed [***4] by appellees. Appellants [*667] specifically contend that the trial court erred in holding that appellants' cause of action for accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09(D). [HN1]An appellate court must conduct a de novo review of the trial court's ruling on a summary judgment motion. Jones v. Shelly Co. (1995), 106 Ohio App. 3d 440, 666 N.E.2d 316. [HN2]We must refer to Civ.R. 56 which provides, in pertinent part: (C) Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary [***5] judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

It is based on this standard that we review appellant's sole assignment of error. As is stated above, at issue in the case sub judice is whether appellants' cause of action for accountant negligence was barred by the applicable statute of limitations. [HN3]Claims of accountant negligence are governed by the four year statute of limitations for general negligence claims set forth in R.C. 2305.09(D). Investors REIT One v. Jacobs (1989), 46 Ohio St. 3d 176, 546 N.E.2d 206, paragraph one of the syllabus. [HN4]Such section states as follows: An action for any of the following causes shall be brought within

four years after the cause thereof accrued: (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35 of the Revised Code.

[HN5]Moreover, the "discovery rule" is not applicable to claims of professional [**743] negligence brought against accountants. Id. at paragraph two of the syllabus. Pursuant to such rule, a cause of action accrues, for statute of limitations [***6] purposes, at the time the plaintiff discovers, or in the exercise of reasonable care, should have discovered the injury. Id. at 179. The Ohio Supreme Court, in Grant Thornton v. Windsor House, Inc. (1991), 57 Ohio St. 3d 158, 566 N.E.2d 1220, reaffirmed its decision in Investors REIT One. [*668] The trial court in this matter found that appellants' complaint against appellees for accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09(D). The trial court, in so holding, noted that pursuant to Investors REIT One, the four year statute of limitations period begins to run at the time the negligent act is committed. Since appellees completed work on appellants' 1994 tax return on September 14, 1995, the day the return was filed, the trial court apparently found that appellants' March 24, 2000, complaint in the case sub judice was barred by the four year statute of limitations contained in R.C. 2305.09(D). We, however, do nor concur. At issue in this matter is when appellants' cause of action for accountant negligence against appellees accrued. "[HN6]To establish actionable negligence, [***7] one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." Mussivand v. David (1989), 45 Ohio St. 3d 314, 318, 544 N.E.2d 265. Appellants, citing the above general proposition that a cause of action does not accrue until a plaintiff suffers actual injury, argue that their cause of action for accountant negligence against appellees did not accrue until August 13, 1998, the date of the initial IRS assessment, since appellants did not suffer an actual injury until such time. Pursuant to appellants' "delayed damages" theory, appellants' March 24, 2000, complaint was timely filed within four years after their claims against appellees accrued. Neither the syllabus of Investors REIT One nor the syllabus of Grant Thornton specifically address the applicability of the "delayed damages" theory advocated by appellants. However, after considering Investors REIT One, supra., the court in Gray v. Estate of Barry (1995), 101 Ohio App. 3d 764, 656 N.E.2d 729 held as follows: [HN7]Since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues... until there is an [***8] injury to a legally protected interest... In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the I.R.S. determines to levy a penalty assessment. Until that time, no claim upon which relief can be granted exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation begins to run.

Emphasis added. 101 Ohio App. 3d at 768-769. In essence, the court in Gray [HN8]applied a "delayed damages" theory in holding that the four year statute of limitations set forth in R.C. 2305.09(D) for bringing an accountant negligence action based on negligent preparation of a tax return did not begin to run until the Internal Revenue Service assessed a penalty for such [*669] negligent preparation. The court, in Gray, found that it was not until such time that appellants suffered an "invasion of a legally protected interest". See Gray, supra. at 768, [**744] citing to Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St. 3d 79, 437 N.E.2d 1194. Based on the foregoing, we find that the trial court erred in holding that appellants' complaint against appellees for [***9] accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09(D). We find that appellants' cause of action against appellees for accountant negligence did not accrue until appellants suffered actual damages. In the case sub judice, appellants did not suffer actual damages until August 13, 1998, the date the tax deficiencies were assessed. Since appellants' complaint was filed within four years of such date, we find that the trial court erred in holding that appellants' complaint against appellees for accountant negligence was untimely. We are cognizant of the fact that other courts, in interpreting and applying Investors REIT One, would find that appellants' complaint against appellees for accountant negligence was time barred since it was not filed within four years after the alleged negligent act was committed which, in this case, was the filing of appellants' 1994 federal income tax return on September 14, 1995. However, such an interpretation of Investors REIT One would lead to an illogical and inequitable result, namely, that appellants' claims against appellees would be time barred before appellants' damages even [***10] manifested themselves. As Judge John F. Corrigan noted in his dissent in Philpott v. Ernst & Whinney, 1992 Ohio App. LEXIS 5930 (Nov. 25, 1992), Cuyahoga App. No. 61203, unreported: ... I find plaintiff's claims for negligent tax return preparation to be timely pursuant to R.C. 2305.09, as this tort was not complete until tax deficiencies were subsequently assessed. Accordingly, I respectfully [HN9]dissent. A statute of limitations is remedial in nature and is to be given a liberal construction in order to allow cases to be decided upon their merits. Elliott v. [*670] Fosdick & Hilmer, Inc. (1983), 9 Ohio App. 3d 309, 313, 460 N.E.2d 257. " 'Every reasonable presumption will be indulged and every doubt will be resolved in favor of affording rather than denying a plaintiff his day in court.' " Id., quoting Draher v. Walters (1935), 130 Ohio St. 92, 94, 196 N.E. 884; see, also, Rowe v. Bliss (1980), 68 Ohio App. 2d 247, 249, 429 N.E.2d 450. In

determining when a cause of action "arose," and the statute of limitations begins to run, it is a general rule that a cause of action accrues at the time the wrongful act was committed. See O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St. 3d 84, 87, 447 N.E.2d 727; [**745] [***11] see, also Holsman Neon & Electric Sign Co. v. Kohn (1986), 34 Ohio App. 3d 53, 55, 516 N.E.2d 1284. It has been noted, however, that in some instances, application of this general rule "'would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence.'" O'Stricker v. Jim Walter Corp., supra. Therefore, "In such cases, a cause of action for damages does not arise until actual injury or damage ensues. See Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St. 3d 79, 437 N.E.2d 1194 (cause of action against insurer for failure to obtain coverage accrued at date of loss); Velotta v. Leo Petronzio Landscaping, Inc. (1982), 69 Ohio St. 2d 376 [23 Ohio Op. 3d 346, 433 N.E.2d 147], paragraph two of the syllabus ('actual injury' rule applied in action for negligence brought by vendee against builder-vendor of completed residence)." Id. That is, the tort is not deemed complete until there has been invasion of a legally protected interest of the plaintiff. See Kunz v. Buckeye Union Ins. Co., supra; Sedar v. Knowlton Constr. Co. (1990), 49 Ohio St. 3d 193, 198, 551 N.E.2d 938; [***12] Elliott v. Fosdick & Hilmer, Inc., supra.

In his dissent, Judge Corrigan further noted that while, pursuant to Investors REIT One, the "discovery rule" was not applicable to accountant negligence claims, "this rule is not a 'discovery rule', as it deals with the delayed occurrence of damages, not the discovery of injury." Likewise, we find Investors REIT One distinguishable from the case sub judice since the issue in this matter is when appellants' cause of action accrued, not the discovery of appellants' injury. In short, we find that appellants' complaint was not barred by the four year statute of limitations set forth in R.C. 2305.09(D) since appellants' cause of action for accountant negligence did not accrue until appellants suffered damages on August 13, 1998. [*671] Based on the foregoing, appellants' sole assignment of error is sustained. Accordingly, the judgment of the Stark County Court of Common Pleas is reversed.

This matter is remanded to the Stark County Court of Common Pleas for further proceedings.

By Edwards, P.J. Hoffman, J. and Farmer, J. concurs

LEXSEE

Caution
As of: Mar 19, 2010

GRAY, Appellant, v. ESTATE OF BARRY, Appellee

No. L-94-243

Court of Appeals of Ohio, Sixth Appellate District, Lucas County

101 Ohio App. 3d 764; 656 N.E.2d 729; 1995 Ohio App. LEXIS 1473

April 7, 1995, Decided

PRIOR HISTORY: [***1] Trial Court No. CVE 93-10726.

DISPOSITION: *Judgment reversed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant claimant filed an accountant malpractice suit against appellee estate. The decedent was the claimant's accountant. The Toledo Municipal Court (Ohio) dismissed the action on ground that it was time-barred. The claimant appealed.

OVERVIEW: The claimant alleged that the estate's decedent had negligently failed to file Internal Revenue Service (IRS) form 5500R along with the claimant's income tax return. As a result of the failure, the claimant alleged that it incurred a tax penalty. The estate claimed that the action was barred because it was commenced after the expiration of the statute of limitations, Ohio Rev. Code Ann. § 2305.09(D). The claimant argued that the act of negligence was not complete until after all the elements of the tort were present. Therefore, the claimant contended that the injury was not complete until the IRS assessed a penalty for failure to timely file, and the action was commenced less than 90 days after the assessment which was well within the statute of limitations. The court reversed agreeing with the claimant's argument holding that the cause of action did not accrue until the penalty was assessed.

OUTCOME: The court reversed the dismissal of the claimant's action.

CORE TERMS: accountant, statute of limitations, malpractice, accrue, discovery rule, tax return, cause of action, preparation, assignment of error, begin to run, protected interest, negligently, discovery, audit, failure to file, tax form, penalty assessment, persuasive, responded, initiated, omission, invasion, notified, certify, levied, commencement

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Governments > Legislation > Statutes of Limitations > General Overview
[HN1]The statute of limitation as to torts does not usually begin to run until the tort is complete. A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff.

Torts > Negligence > General Overview
Torts > Procedure > Statutes of Limitations > General Overview
[HN2]In any negligence action, a claim for which relief may be granted cannot be maintained absent the presence of all essential elements. To establish actionable negligence, one must show the existence of a duty, a breach of that duty and injury resulting proximately therefrom. 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.

Governments > Legislation > Statutes of Limitations > General Overview
Tax Law > Federal Tax Administration & Procedure > Return Preparers (IRC secs. 6060, 6107, 6694-6696, 6713, 7216, 7407, 7427) > General Overview
Torts > Negligence > General Overview
[HN3]In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the Internal Revenue Service determines to levy a penalty assessment.

COUNSEL: *Mark A. Robinson*, for appellant.

Nicholas J. Milanich, for appellee.

JUDGES: Sherck, Judge. Melvin L. Resnick and Milligan, JJ., concur. John R. Milligan, J., retired, of the Fifth Appellate District, sitting by assignment.

OPINION BY: SHERCK

OPINION

[*765] [**729] This is an accelerated appeal from a judgment issued by the Toledo Municipal Court which dismissed an accountant malpractice suit for the reason that it was time-barred by a statute of limitations. Because we conclude the trial court erroneously applied the statute, we reverse.

[*766] Appellee is the estate of John E. Barry. John E. Barry was a certified public accountant who, prior to his death, provided accounting and tax preparation services for appellant Joseph W. Gray III, M.D., Inc.

On July 14, 1993, appellant filed a suit, alleging that appellee's decedent had negligently failed to file, at the close of the 1987 tax year, Internal Revenue Service ("I.R.S.") form 5500R along with the remainder of appellant's 1987 return. As a result of that failure, appellant asserted, it had incurred an I.R.S. tax penalty in the amount of $ 9,000.

Appellee [***2] responded with a motion to dismiss appellant's complaint on the ground that the suit was commenced after the expiration of the four-year statute of limitations which governs accountant malpractice, R.C. [**730] 2305.09(D). According to appellee, any wrongful act committed by John Barry occurred, at the latest, in 1988. Since there is no discovery rule for accountant malpractice, appellee argued that the suit would have had to have been initiated no later than 1992.

Appellant responded that, while it was true that it did not discover Barry's failure to file the tax return until sometime after 1988, its satisfaction of the statute of limitation is not premised on any discovery rule. Rather, appellant maintains that there was a delayed occurrence of damages. Appellant contended that the act of negligence was not complete until all the elements of the tort were present. Therefore, according to appellant, while Barry breached his duty to file the missing tax form in 1988, that breach was not the proximate cause of any injury to appellant until the Internal Revenue Service assessed a penalty for failure to timely file. That penalty assessment did not occur until April 6, 1993: less [***3] than ninety days prior to the commencement of this suit and well within the statute of limitations.

On August 26, 1994, the trial court, relying principally on *Philpott v. Ernst & Whinney* (Nov. 25, 1992), Cuyahoga App. No. 61203, unreported, 1992 WL 357250, granted appellee's motion to dismiss. Appellant now appeals that decision, setting forth the following single assignment of error:

"I. The trial court committed prejudicial error by dismissing Plaintiff's complaint pursuant to the Defendant's Motion to Dismiss.

"1. Appellants [*sic*] cause of action did not accrue until the assessment of damages by the IRS for the failure of appellee to file require tax returns.

"2. Appellants [*sic*] cause of action did not accrue until the discovery of Defendant's/Appellee's mal [*sic*] practice."

Appellant supports its assignment of error with two arguments; we first will address appellants's second argument, which asserts that the failure to apply a discovery rule to accountant malpractice action is simply bad law. Appellant discusses at length the application of the discovery rule to virtually every other [*767] variety of professional malpractice in Ohio and the prudence [***4] of applying the rule to accountant malpractice cases. Appellant also directs our attention to a number of instances where the rule is applied to accountants in other jurisdictions. See, *e.g.*, *Sato v. Van Denburgh* (1979), 123 Ariz. 225, 599 P.2d 181; *Moonie v. Lynch* (1967), 256 Cal.App.2d 361, 64 Cal.Rptr. 55; *Peat, Marwick, Mitchell & Co. v. Lane* (1990 Fla.), 565 So.2d 1323; *Marvel Engineering Co. v. Matson* (1986), 150 Ill.App.3d 787, 103 Ill.Dec. 631, 501 N.E.2d 948; *Brueck v. Krings* (1982), 230 Kan. 466, 638 P.2d 904; *Harvey v. Dixie Graphics* (1992 La.), 593 So.2d 351; *Leonhart v. Atkinson* (1972), 265 Md. 219, 289 A.2d 1; *Frank Cooke, Inc. v. Hurwitz* (1980), 10 Mass.App. 99, 406 N.E.2d 678; *Brower v. Davidson, Deckert, Schutter & Glassman P.C.* (Mo.App.1984) 686 S.W.2d 1; *Chisolm v. Scott* (1974), 86 N.M. 707, 526 P.2d 1300; *Mills v. Garlow* (1989 Wyo.), 768 P.2d 554.

As persuasive as appellant's argument is on this issue, it is simply misdirected to this court. As an interme-

diate court, we are bound to follow the pronouncements of the Supreme Court of Ohio when that court has addressed an issue. In this instance, the Supreme Court has held [***5] that, except for fraud or conversion, no discovery rule applies for accountant malpractice cases. Investors REIT One v. Jacobs (1989), 46 Ohio St.3d 176, 546 N.E.2d 206, paragraph two of the syllabus; Thornton v. Windsor House, Inc. (1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220, 1222-1223. Therefore, appellant's second argument in support of its assignment of error must be rejected.

Appellant's remaining argument is more persuasive. Simply put, appellant asserts that even though Barry's failure to file occurred in 1988, there was no cause of action for which the statute of limitations could commence until the I.R.S. levied a penalty as the result of the omission. This did not occur until 1993.

Appellant directs our attention to Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St.3d 79, 81, 1 OBR 117, 118-119, 437 N.E.2d 1194, 1196 for the proposition that [HN1]"the statute of limitation as to torts does not usually begin to run until the tort is complete. A tort is ordinarily not complete until there has been [**731] an invasion of a legally protected interest of the plaintiff." *Id.* quoting Austin v. Fulton Ins. Co. (Alaska 1968), 444 P.2d 536 at 539. There was, [***6] according to appellant, no invasion of a legally protected interest until the I.R.S. penalized appellant for Barry's omission.

Appellee responds by citing numerous cases; however, the only one directly on point is *Philpott v. Ernst & Whinney, supra.* In that case, a client brought suit against his accountant for, *inter alia*, improper preparation of tax returns. A later I.R.S. audit resulted in a deficiency assessment. Nevertheless, the accountant [*768] prevailed on a motion for summary judgment, since commencement of the suit occurred outside the four-year statute of limitations.

On appeal, Philpott argued that the cause of action did not accrue until receipt of the I.R.S.'s notification of a deficiency. The court of appeals rejected that contention, citing Investors REIT One v. Jacobs, supra, for its holding that the discovery rule is unavailable in accountant malpractice actions and Holsman Neon & Elec. Sign Co. v. Kohn (1986), 34 Ohio App.3d 53, 516 N.E.2d 1284, for the proposition that an accountant's negligence accrues at the time of the negligent conduct.

The *Philpott* decision was not unanimous. Judge John F. Corrigan, in a dissenting opinion, wrote [***7] that the issue was not one of discovery; rather, the issue is when a cause of action accrues. Therefore, according to Judge Corrigan, *Jacobs* is inapposite to the issue. As to *Holsman*, Judge Corrigan factually distinguished that case, as it involved a negligent audit that failed to uncover an employee theft. Therefore, the harm complained of in *Holsman* had already been completed when the accountant failed to detect the loss. In *Philpott* the element of injury was speculative only until the I.R.S. discovered the deficiency and levied its penalty. Judge Corrigan cited Sladky v. Lomax (1988), 43 Ohio App.3d 4, 538 N.E.2d 1089, for the proposition that an action against an accountant for negligent preparation of an income tax return does not accrue until the plaintiff is notified of an I.R.S. assessment.

We agree with the dissent in *Philpott* and the court of appeals opinion in *Sladky. Philpott, Sladky* and the present case are not discovery cases. The issue in each is the time at which the cause of action accrued. [HN2]In any negligence action, a claim for which relief may be granted cannot be maintained absent the presence of all essential elements. "To establish [***8] actionable negligence, one must show * * * the existence of a duty, a breach of that duty and injury resulting proximately therefrom." Mussivand v. David (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 270. Since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues, pursuant to *Holsman*, until there is an injury to a legally protected interest. Kunz v. Buckeye Union Ins. Co., supra. [HN3]In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the I.R.S. determines to levy a penalty assessment. [1] Until that time, no claim upon which relief can be granted [*769] exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation begins to run.

1 There is some dispute as to whether this event is an I.R.S. preliminary audit report or the actual I.R.S. assessment of a penalty. See International Engine Parts, Inc. v. Feddersen & Co. (1995), 9 Cal.4th 606, 38 Cal.Rptr.2d 150, 888 P.2d 1279. While this may be important in a matter in which filing deadlines are narrow, the question is not applicable in this case.

[***9] In the present matter, the time for the statute of limitations did not begin to run until 1993, when appellant was notified by the I.R.S. that a penalty had been assessed. Therefore, the trial court erred in dismissing the case as having been initiated after the statute had run. Appellant's assignment of error is found well taken.

On consideration whereof, the court finds substantial justice has not been done the party complaining, and the judgment of the Toledo Municipal Court is reversed. It is ordered that appellee pay court costs of this appeal.

This court *sua sponte* notes that our holding in this matter is in conflict with the opinion of the court of ap-

peals for Cuyahoga County as stated in *Philpott v. Ernst & Whinney* [**732] (Nov. 25, 1992), Cuyahoga App. No. 61203, unreported, 1992 WL 357250. Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, whenever the judges of a court of appeals find a judgment upon which they have agreed in conflict with that of any other court of appeals, the judges shall certify the record of the case to the Supreme Court for review and final determination. See *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d [***10] 594, 613 N.E.2d 1032, paragraph one of the syllabus. Having found such conflict, we do so hereby certify. [2]

2 Reporter's Note: No appeal has been taken from the decision of the court.

The question presented is whether, in an accountant malpractice action founded in the negligent preparation or filing of tax returns, the four-year statute of limitations for such action begins prior to the assessment of any penalty for faulty preparation or failure to file.

Judgment reversed.

Melvin L. Resnick and Milligan, JJ., concur.

John R. Milligan, J., retired, of the Fifth Appellate District, sitting by assignment.

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

FLAGSTAR BANK, FSB,	:	APPEAL NO. C-090166
Plaintiff-Appellant,	:	TRIAL NO. A-0804164
vs.	:	
JOHN L. REINHOLD,	:	*JUDGMENT ENTRY.*
Defendant-Appellee,	:	
and	:	
JAMES WHITED, ET AL.	:	
Defendants.		

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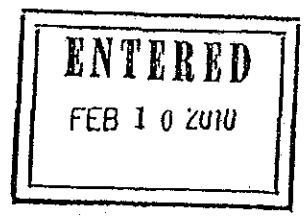

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

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,

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

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

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[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).

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

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