

IN THE SUPREME COURT OF OHIO

FLAGSTAR BANK, FSB

Appellant

vs.

AIRLINE UNION'S MORTGAGE
COMPANY, et al.

Appellees

CASE NOS. 2010-0508

2010-0511

On Appeal from the
Hamilton County Court of Appeals,
First Appellate District,
Case No. C 0900166

**BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION FOR JUSTICE,
IN SUPPORT OF APPELLANT FLAGSTAR BANK, FSB**

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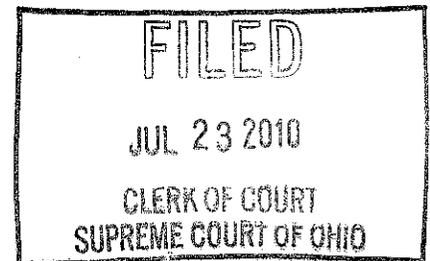
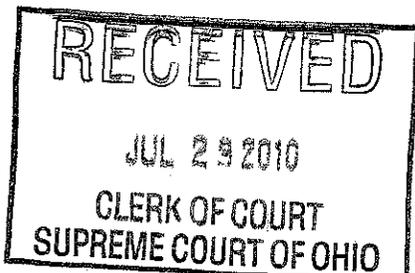


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III. AMICUS CURIAE IDENTIFIED

The Ohio Association for Justice (“OAJ”) is Ohio’s largest victims’ rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable.

IV. LAW AND ARGUMENT

Appellant’s Proposition of Law:

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

In *Flagstar Bank, FSB v. Reinhold*, 1st Dist. No. C-090166 (Feb 10, 2010), *Hater v. Gradison, Division of McDonald & Company Securities, Inc.* (1995), 101 Ohio App. 3d 99, 655 N.E.2d 189, and *Schnippel Construction Inc. v. Jim Proffit*, 3rd Dist. No. 17-09-12, 2009-Ohio-5905, the First and Third Appellate Districts have held that the statute of limitations may accrue even before a prospective claimant suffers injury. See, *Flagstar*. Under the rule adopted by these courts, a person may be foreclosed from pursuing an action against an appraiser, stock broker, architect, or other professional for negligence because the victim’s right to do so expired before the injury occurred.

The decisions of the First and Third Districts defy logic. In considering a similar application of a statute of limitations, the Indiana Supreme Court quoted Justice Jerome

Frank in noting that “[e]xcept in topsy-turvy land, you can’t die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad.” *Martin v. Richey* (Ind. 1999), 711 N.E.2d 1273, 1284 n.2. For the same reason, “a statute of limitations does not begin to run against a cause of action before that cause of action exists * * *.” *Id.*

There can be no doubt that a cause of action does not exist until damages are suffered. “No cause of action generally accrues until the plaintiff has a right to enforce his cause.” *United States v. One 1961 Red Chevrolet Impala Sedan, Serial No. 11837A177369* (5th Cir. 1972), 457 F.2d 1353, 1358 (citations omitted). Otherwise, the cause of action would be illusory. “The right to sue is hollow indeed until the right to succeed accompanies.” *Id.*

In recognition of these principles, this Court has, time and again, held that “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.” *State ex rel. Teamsters Local Union 377 v. City of Youngstown* (1977), 50 Ohio St. 2d 200, 203–204, 364 N.E.2d 18, 20. In many different cases, in many different ways, this Court has expressed the same sentiment. See, e.g. *Children’s Hosp. v. Ohio Dept. of Public Welfare* (1982), 69 Ohio St.2d 523, 526, 433 N.E.2d 187 (“[o]rdinarily, a cause of action does not accrue until actual damage occurs; when one’s conduct

becomes presently injurious, the statute of limitations begins to run.”); *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 379, 433 N.E.2d 147, 150 (“where the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs”); *Oker v. Ameritech Corp.* (2000), 89 Ohio St.3d 223, 224, 729 N.E.2d 1177, 1179 (quoting *Children’s Hosp.*).

The purpose of any statute of limitations is to prevent plaintiffs from sleeping upon their rights. *Adamsky v. Buckeye Local Sch. Dist.* (1995), 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214. The interpretation of R.C. §2305.09(D) by the First and Third Districts does not meet this purpose. A claimant who suffers an immediately apparent act of negligence, but no immediate injury, is not sleeping on his or her rights. Such a claimant cannot, under existing law, bring a claim for damages because damages are have not yet occurred. The claimant is not sleeping on his or her rights because the rights do not yet exist.

Indeed, any tortured construction of a statute of limitations which would require a claimant to bring a cause of action before it exists violates the Ohio Constitution. At Article 1, Section 16, of the Ohio Constitution, citizens are guaranteed that a remedy is available to every person injured by the hand of another. The so-called “Right to a Remedy” provision states in pertinent part that “[a]ll 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.”

In construing this Constitutional provision in *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 47, 512 N.E.2d 626, 628, this Court noted that “[w]hen 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.” Accord *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 60, 514 N.E.2d 709, 716 (“[d]enial of a remedy and denial of a meaningful remedy lead to the same result: an injured plaintiff without legal recourse.”).

Clearly, a nominal right to sue an accountant, contractor, insurance broker, or other professional is meaningless unless a right to recover is also allowed. When a professional’s negligence is instantly apparent, but no damages are suffered for more than four years, there is no meaningful remedy under the First and Third District’s construction of R.C. §2305.09(D). A party seeking to sue before injury is suffered would not only have the case dismissed but that party’s attorney would also be subject to Civil Rule 11 penalties. A party unlucky enough to suffer injury four years after professional negligence occurred is foreclosed from suit. That result does not accord with Article 1, Section 16.

Over the past century, this Court has classified the rights guaranteed by Article I, Section 16 as “fundamental,” *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 422, 633 N.E.2d

504, 510, "paramount," *Hardy*, supra at 46, (quoting *Kintz v. Harriger* (1919), 99 Ohio St. 240, 247, 124 N.E. 168, 170), and "inalienable," *Balt. & O.R. Co. v. Stankard* (1897), 56 Ohio St. 224, 232, 46 N.E. 577, 579. In light of the "paramount" and "fundamental" nature of the remedy guarantee, the courts have jealously guarded the rights conferred thereunder, emphasizing that its "language * * * is clear and leaves little room for maneuvering." *Hardy*, 32 Ohio St.3d at 46. In recognition of these principles, this Court has held repeatedly that a statute of limitations will not begin to run before a claimant knows or should have known of his or her injury. *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 60–61, 609 N.E.2d 140, 141; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 503 N.E.2d 717; *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93 *Hardy*, *Gaines*, supra.

The Ohio Constitution protects not only the right to file a lawsuit, but the right to be awarded damages, "since obtaining damages is the ultimate goal of any tort action." *Sorrell*, 69 Ohio St.3d at 426, 633 N.E.2d 504 at 513. Here, any interpretation of R.C. §2305.09(D) requiring a plaintiff to file suit before suffering damages, thereby resulting in award of \$0, is flawed.

Article 1, Section 5 of the Ohio Constitution also guarantees every citizen the right to trial by jury. This right is inviolate: It has long been held that "[t]he right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree." *Gibbs v. Girard*

(1913), 88 Ohio St. 34, 102 N.E. 299, syl. 2. In *Sorrell*, this Court found that the legislative abrogation of the collateral source rule also violated the petitioner's right to a jury trial, because the statute authorized entering judgment at an amount different than that determined by the jury. *Sorrell* at 422. The application of R.C. §2305.09(D) by the First and Third unconstitutionally limits the evidence that can go to the jury – i.e., the full amount of damages suffered, at some future time, by the claimant.

The inviolate right to a jury trial must not be impaired. The word "inviolate" is a superlative of unique and monumental weight. In his concurring and dissenting opinion in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 702, 576 N.E.2d 765, 779, Justice Sweeney noted that "inviolate" means "free of substantial impairment" pursuant to Black's Law Dictionary (6th ed. 1990), p. 826. The exception written into the jury trial guarantee permits the legislature only one abridgment: it may authorize civil verdicts that are only three-fourths unanimous. The Constitution allows no other abridgments or diminutions of the jury's authority.

"The right to a trial by jury is a fundamental constitutional right which derives from the Magna Carta." *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 556, 644 N.E.2d 397, 401. If the First and Third District's interpretation of R.C. §2305.09(D) is correct, the statute must be struck down as unconstitutional, as it forecloses a claimant's right to a jury trial to recover damages that the claimant has suffered. This has been the rule since the birth of this state. *Reckner v. Warner* (1872), 22 Ohio St. 275, 287, ("If the

legislative discretion has been so far abused as to enact laws, making the right of trial by jury dependent upon conditions which seriously impair that right, the courts will interpose and pronounce such acts unconstitutional and void."); *Work v. State* (1853), 2 Ohio St. 297, ("It is beyond the power of the General Assembly to impair the right [to trial by jury] or materially change its character.").

If possible, the Court should apply all presumptions and rules of construction in a way that holds R.C. §2305.09(D) to be constitutional. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449, 450. Fortunately, in this case, the law can be applied constitutionally. Both the Fifth District and Sixth District have rendered decisions which both uphold the Ohio Constitution and follow the Ohio Revised Code. See *JP Morgan Chase Bank NA v. Lanning*, 5th Dist. No. 2007CA00223, 2008-Ohio-893; *Fritz v. Brunner Cox, L.L.P.* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740; *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729. The holdings of these courts are judicious: Consistent with this Court's long-held tenet that a cause of action cannot accrue until actual damages are suffered, the date for the accrual of a cause of action under R.C. §2305.09(D) is the date that the claimant suffered actual damages.

The careful and balanced application preserves R.C. §2305.09(D) as written and honors the Constitution. The application also serves the goal of a statute of limitations; prohibiting plaintiffs from unfairly neglecting their rights and prejudicing potential defendants by doing so. The rule as interpreted by the Fifth and Sixth Districts allows

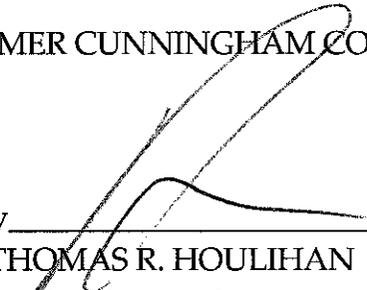
plaintiffs a meaningful amount of time to file suit once the injury is suffered, but still provides defendants with a discernable statute of limitations. The approach taken by the Fifth and Sixth Districts is the better approach, and should be adopted by this Court.

V. CONCLUSION

Based upon the foregoing law and argument, the decision of the First District Court of Appeals in this matter should be OVERTURNED. This Court should announce a rule of law that a cause of action for negligence under R.C. §2305.09(D) does not accrue until the plaintiff has incurred actual damages.

Respectfully submitted,

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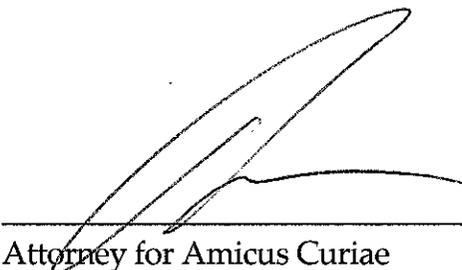
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VI. CERTIFICATE OF SERVICE

THIS CERTIFIES THAT a copy of the foregoing was served on 7/22/2010 upon the following by regular, U.S. Mail:

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