

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF AMICUS CURIAE PAMELA J. LAWRENTZ
IN SUPPORT OF APPELLEE JOHN L. REINHOLD**

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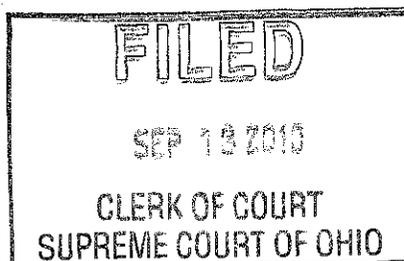
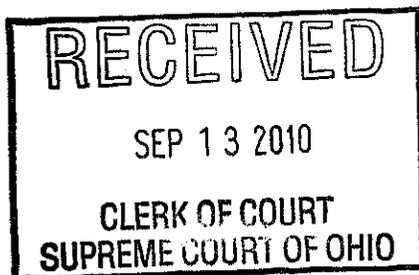


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I. IDENTIFICATION OF AMICUS CURIAE

Pamela Lawrentz d/b/a/ Allgood Appraisers (“Ms. Lawrentz”) is an Ohio real estate appraiser who was named in a lawsuit by Plaintiff-Appellant Flagstar Bank, FSB in regard to her appraisal of a residential real estate property. She respectfully submits this Amicus Brief as the resolution of this matter may, as a practical matter, dictate the outcome in her claim as well.

The circumstance of the suit involving Ms. Lawrentz and Flagstar Bank are quite similar to the suit involving John Reinhold and Flagstar Bank. Ms. Lawrentz conducted a real estate appraisal of a residence in Warren, Ohio in March of 2001. A borrower purchased this property one month later, with funds provided by a lender and secured by a mortgage. The lender sold the loan to Flagstar within a few days. The borrower defaulted on the loan, and the property was eventually sold in foreclosure in July of 2004. Nonetheless, Flagstar did not file suit against Ms. Lawrentz for more than six years after she had conducted her appraisal and over three years after the property had been sold in foreclosure.

The Court of Common Pleas for Portage County concluded Flagstar had waited too long to file suit and dismissed its claim. Flagstar appealed to the Eleventh District Court of Appeals.¹ Upon Flagstar’s request, this appeal was stayed pending the outcome of this matter.

¹ The appeal involving Ms. Lawrentz and Flagstar Bank is captioned *Flagstar Bank v. Lawrentz* and has been assigned Case No. 2008-P-0110.

II. LAW AND ARGUMENT

CERTIFIED CONFLICT ISSUE

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

A. Absent Unusual Circumstances, A Claim Accrues When The Wrongful Act Occurs.

Under long standing Ohio law, “a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed.”² Both this Court³, and lower courts throughout the State of Ohio⁴, have consistently applied this principle to claims of professional negligence and concluded that such claims accrue at the time of the negligent act. The cases presently before this Court furnish no basis to abandon this rule or make an exception for these claims. On the contrary, the absence of a discovery rule in R.C.

2 *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 508, 693 N.E.2d 581; *Squire v. Guardian Trust Co.* (1947), 79 Ohio App. 371, 383, 72 N.E.2d. 137 (“The cause of action accrues, in the case of torts, when the wrongful act is committed”).

3 *Investors REIT One v. v. Jacobs* (1989), 46 Ohio St.3d 176 , 180, 546 N.E.2d 206 (“The four-year statute of limitations governing such claims in [professional] negligence commenced to run when the allegedly negligent act was committed.”)

4 *Hater v. Gradison, Division of McDonald & Company Securities, Inc.* (1995), 101 Ohio App.3d 99, 101, 655 N.E.2d 189 (“the four-year statute of limitations for [professional] negligence under R.C. 2305.09(D) begins to run ‘when the allegedly negligent act was committed.’)(quoting *REIT One, supra*); *Jim Brown Chevrolet, Inc. v. Snodgrass* (2001), 141 Ohio App.3d 583, 588, 752 N.E.2d 335 (“the Supreme Court has explained that ‘the four-year statute of limitations governing such claims [of professional] negligence commence[s] to run when the allegedly negligent act [i]s committed.’)(quoting *REIT One, supra*).

2305.09(C) strongly favors making no such exception to this rule for professional negligence claims.

B. The General Assembly Elected Not To Include A Discovery Rule For Professional Negligence Claims In R.C. 2305.09.

In *Investors REIT One v. Jacobs*, this Court dismissed a professional negligence claim against an accountant as barred by the four-year limitations period of R.C. 2305.09. In reaching this conclusion, this Court first noted the discovery rule set forth in R.C. 2305.09 applied only to claims of underground trespass, the taking of personal property, and fraud:

R.C. 2305.09(D) expressly includes its own limited discovery rule: “If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.”⁵

Applying the statutory construction of *expressio unius est exclusio alterius*, this Court held “the General Assembly’s express inclusion of a discovery rule for certain torts arising under R.C. 2305.09 . . . implies the exclusion of other torts arising under the statute, including negligence.”⁶

The practical result of this Court’s determination in *REIT One* was exceedingly simple. Negligence claims that fell within R.C. 2305.09 accrue on the day of the wrongful act. The rule of *REIT One* not only remains good law, it was specifically affirmed by this

5 *REIT One*, 46 Ohio St.3d at 182, 546 N.E.2d 206.

6 *Id.* at 181; *see also Herbert v. Banc One Brokerage Corp.* (1994), 93 Ohio App.3d 271, 274; 638 N.E.2d 161 (“The General Assembly’s failure to include general negligence claims under the discovery rule set out in R.C. 2305.09 argues strongly that it was not the legislature’s intent to apply the discovery rule to such claims.”)

Court in *Grant Thornton v. Windsor House, Inc.*: “Windsor [the plaintiff] argues that *Investors* is bad law and thus we should reverse it We choose not to reverse *Investors*.”⁷

In the twenty-plus years since it was decided, numerous courts have relied on *REIT One* to dismiss professional negligence claims brought more than four years after the alleged negligent act.⁸ These decisions include claims against both real estate appraisers and other professionals in the real estate business.⁹ Accordingly, as a long-standing rule that has frequently been relied on, the rule of *REIT One* is entitled to protection under the doctrine of *stare decisis*.

C. **The Delayed Damages Theory Is Little More Than The Discovery Rule With A New Name.**

Flagstar Bank and other parties have routinely urged lower courts in Ohio to effectively graft a discovery rule onto R.C. 2305.09 by recasting the discovery rule as the “delayed damages” theory. This effort has been largely unsuccessful for an obvious reason – this Court rejected the argument theory in the clearest possible terms: “Delayed damage is

7 (1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220.

8 *E.g. Wooten v. Republic Sav. Bank* (2007), 2007-Ohio-3804, ¶ 40, 172 Ohio App.3d 722, 876 N.E.2d 1260 (dismissing negligence claim against bank filed more than four years after alleged negligence as “the [*REIT One*] court found that the ‘discovery rule’ is not available to negligence claims brought under R.C. 2305.09(D)”).

9 *See Hater, supra* (dismissing claims against real estate appraisers as untimely); *James v. Partin*, 2002-Ohio-2602 (dismissing claims against real estate surveyors as untimely); *Chandler v. Schriml*, 2000 Ohio App. LEXIS 2209 (dismissing claims against real estate agents as untimely).

ineffective to delay the accrual of a cause of action predicated upon a wrongful act.”¹⁰ Additionally, numerous courts have rejected the delayed damages theory as no more than a restatement of the discovery rule.¹¹

The case of *Hater v. Gradison Div. of McDonald* is particularly instructive in regard to this dispute. In *Hater*, the investors in a rental property filed suit against several persons when the investment went badly. This included a claim against an appraiser, Anthony Mollica, for negligently overestimating the value of the rental property.¹² Mollica moved for summary judgment, arguing the claim was untimely as his appraisal was conducted more than four years before suit was filed. In affirming the trial court’s dismissal, the First Appellate District first described the trial court’s reasoning as follows:

. . . the trial court found the four-year statute of limitations contained in R.C. 2305.09 to be applicable. Moreover, the trial court relied upon the Ohio Supreme Court’s decision in *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206, to reject application of the discovery rule to toll the statute of limitations. As to those negligence claims [against the appraiser], the trial court found that these claims were time-barred, since the [appraisal] was issued on

10 *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 81, 437 N.E.2d 1194 (internal citation omitted); see also *Fronczak v. Arthur Andersen, L.L.P.* (1997), 124 Ohio App.3d 240, 244, 705 N.E.2d 1283 (“While neither syllabi of *Investors REIT One* nor *Grant Thornton* specifically address the applicability of the delayed damages theory . . . , we believe that the Supreme Court implicitly rejected the theory”).

11 *James v. Partin*, 2002-Ohio-2602, ¶ 8 (“The delayed damages theory . . . has been rejected on the basis that it is a distinction without a difference of the discovery rule.”); see also *Jim Brown Chevrolet*, 141 Ohio App.3d at 587, 752 N.E.2d 335 (“It is our view that the “delayed damages” theory advanced in this matter by appellants is a version of the discovery rule.”)

12 *Hater*, 101 Ohio App.3d 99, 101, 655 N.E.2d 189.

September 1, 1988, and the suit was not filed until February 3, 1993.¹³

As in this case, the plaintiffs argued the rule of *Investors* should be set aside by the delayed damages theory, as they did not become aware of the appraiser's negligence until the investments went south. The First District Court of Appeals was not persuaded:

The controlling law on this issue is, we believe, set forth in *REIT One*. By holding that the statute of limitations began to run "when the allegedly negligent act was committed," the court in *REIT One*, in our view, meant exactly that: the date upon which the tortfeasor committed the tort, in other words, when the act or omission constituting the alleged professional malpractice occurred. . . . the delayed-damage theory cannot, we believe, be used to circumvent the clear holding of *REIT One* by resurrecting the discovery rule in a different analytical guise.¹⁴

In summary, this Court should affirm its rejection of the delayed damages rule by reaffirming its long standing interpretation of R.C. 2305.09(D) that professional negligence claims accrue on the date that the negligent act is committed.

D. The General Assembly Made A Clear Policy Choice Not To Include A Discovery Rule For Claims of Professional Negligence.

In rejecting the discovery rule for claims of professional negligence, Ohio's General Assembly made a clear policy choice to impose a definite time limit for the filing of such claims.¹⁵ And this policy choice appears to be sound, particularly in light of the appraiser

13 *Id.* at 104-05, 655 N.E.2d 189.

14 *Id.* at 110-11, 655 N.E.2d 189.

15 *See Wyler v. Tripi* (1971), 25 Ohio St.2d 164, 172, 267 N.E.2d 419 ("statutes of limitation are a legislative prerogative and are based upon important legislative policy"); *see also Doe v. Archdiocese of Cincinnati*, 2006-Ohio-2625, ¶ 10, 109 Ohio St.3d 491, 849

cases presently before this Court. A real estate appraisal is an estimate of the value of a property at a particular point in time. As time goes by, many of the factors that affect the value of that property change. This may include the condition of the property itself; the character of the neighborhood; the housing market in general; the local job market; and even general economic conditions. Without a definite time limit, appraisers could be forced to defend the estimate of a property's value performed decades earlier amid wildly different circumstances.

In Ms. Lawrentz's case, she appraised a residential property located in Warren, Ohio in March of 2001. The purchaser defaulted on the mortgage, and the property was sold at foreclosure in July of 2004. Under the existing interpretation of R.C. 2305.09, Flagstar Bank still had nearly a year to file an action against Ms. Lawrentz for professional negligence in regard to her appraisal. Yet, Flagstar elected not to do so for over three years – until November of 2007. At that point, it had been over six years since Ms. Lawrentz had conducted her appraisal.

The recent collapse of the housing market, which has been particularly severe in Northeast Ohio, further illustrates the soundness of imposing a firm deadline for filing professional negligence claims against appraisers. There is little question that an appraisal conducted of a property in Warren, Ohio in 2001 would be markedly different than an

N.E.2d 268 (“Through statutes of limitation, the General Assembly limits the time within which various claims may be asserted”); *Vitantonio, Inc. v. Baxter*, 2007-Ohio-6052, ¶ 14, 116 Ohio St.3d 195, 877 N.E.2d 663 (“The exceedingly short statute of limitations period . . . demonstrate the legislature's intent that these matters be resolved with finality in a relatively short period”).

appraisal of that same property in 2007 – or even later, if Flagstar were permitted to file suit indefinitely. While Flagstar has complained of the difficulty of having to challenge the accuracy of an appraisal within four years, Ms. Lawrentz could raise similar complaints if she were forced to defend the accuracy of an appraisal for the entire span of a typical thirty-year mortgage.

E. The Lack of a More Extensive Discovery Rule in R.C. 2305.09 Does Not Render the Statute Unconstitutional.

Flagstar also contends that the lack of a more extensive discovery period or delayed damages provision in R.C. 2305.09 renders the statute unconstitutional, largely on the basis of *Burgess v. Lilly*¹⁶. In *Burgess*, this Court held R.C. 2305.10 was unconstitutional insofar as it contained no discovery rule for asbestos exposure claims. From a factual standpoint, the distinguishing difference between *Burgess* and this case is that, in *Burgess*, this Court recognized it would be impossible for individuals to assert claims from exposure to asbestos within a two-year limitations period without the benefit of a discovery rule.

There is no comparable impossibility that prevents a sophisticated commercial enterprise such as Flagstar – a federally chartered mortgage lender – from ascertaining whether a real estate appraisal has been performed with reasonable skill within four years of the appraisal. On the contrary, such a review is both customary and prudent for a financial institution that is contemplating whether to lend substantial funds to be secured by the appraiser’s estimate of the value of the property.

16 (1993), 66 Ohio St.3d 59, 609 N.E.2d 140.

From a legal standpoint, this exact argument was considered and rejected by the Sixth Circuit in a recent case involving a claim of professional negligence against an actuary. *Local 219 Plumbing & Pipefitting Indus. Pension Fund v. Buck Consultants, LLC*.¹⁷ In *Local 219*, the Sixth Circuit refused to impose a discovery rule in R.C. 2305.09 and found the analogy to asbestos exposure cases unpersuasive:

Asbestos tort litigation is a different animal than professional negligence, insofar as federal and state courts have struggled to reconcile the latency of asbestos-related diseases with applicable statutes of limitation. . . . the district court did not err by refusing to apply the discovery rule to plaintiffs' otherwise untimely claims.¹⁸

Lastly, no Ohio court has held that the lack of a more extensive discovery provision in R.C. 2305.09 renders the statute unconstitutional. Such a conclusion would be remarkable as it is well-settled that "the discovery rule . . . is an exception to the general rule."¹⁹ Moreover, R.C. 2305.09 does contain a discovery rule for some torts.²⁰ The absence of a discovery rule for other torts can hardly be deemed a violation of Flagstar's constitutional rights.

In summary, the General Assembly's imposition of definite four-year limitations period for professional negligence claims was not arbitrary or irrational. It reflected a

17 2009 U.S. App. LEXIS 3150 (6th Cir. (Ohio law) 2009).

18 *Id.* at *11.

19 *See Collins v. Sotka* (1998), 81 Ohio St.3d 506, 507, 692 N.E.2d 581.

20 *REIT One*, 46 Ohio St.3d at 182, 546 N.E.2d 206 ("R.C. 2305.09(D) expressly includes its own limited discovery rule").

reasoned judgment based on a balancing of competing considerations. As this Court recognized in *REIT One*, such legislative judgments should not be easily brushed aside:

The General Assembly has not adopted a discovery rule applicable to general negligence claims arising under R.C. 2305.09. This court will not interpret R.C. 2305.09 to include a discovery rule for professional negligence claims . . . arising under R.C. 2305.09 absent legislative action on the matter.²¹

Despite this clear invitation, the General Assembly has elected not to broaden the discovery rule set forth in R.C. 2305.09 to include claims of professional negligence. Such inaction is rightly interpreted as legislative approval of the existing interpretation: “The General Assembly’s failure to include general negligence claims under the discovery rule set out in R.C. 2305.09 argues strongly that it was not the General Assembly’s intent to apply the discovery rule to such claims.”²²

Accordingly, the principle that “a cause of action accrues and the statute of

21 *REIT One*, 46 Ohio St.3d at 182, 546 N.E.2d 206; *see also Squire v. Guardian Trust Co.* (1947), 79 Ohio App. 371, 384, 72 N.E.2d 137 (“If the Legislature had deemed it expedient [to include a discovery rule] it could have so provided, It has not done so, and the relief if it is extended should be furnished by legislative act, not by judicial legislation.”); *Local 219 Plumbing & Pipefitting Indus. Pension Fund v. Buck Consultants, LLC*, 2009 U.S. App. LEXIS 3150 (6th Cir. (Ohio law)) (“Ohio courts have expressly declined to apply the discovery rule to actions sounding in professional negligence under § 2305.09 unless or until the Ohio General Assembly legislates otherwise.”)

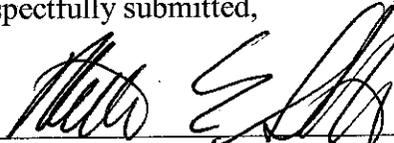
22 *Herbert v. Banc One Brokerage Corp.* (1994), 93 Ohio App.3d 271, 274, 638 N.E.2d 161; *see also In re Application of Marriage License for Nash*, 2003-Ohio-7221, ¶ 34 (“Since the legislature has not changed the pertinent wording of R.C. 3101.01 . . . and has remained silent regarding the issue . . . this court is loath to expand the statutory designation”)

limitations begins to run at the time the wrongful act was committed”²³; is supported by long-standing precedent, the specific decision of this Court in *REIT One*, and the implicit imprimatur of the General Assembly. This Court should not abandon this rule or create an exception to it for professional negligence claims.

III. CONCLUSION

For all of the foregoing reasons, Amicus Curiae Pamela J. Lawrentz d/b/a Allgood Appraisers respectfully requests that this Court re-affirm the long-standing rule that a cause of action for professional negligence accrues on the date of the negligent act.

Respectfully submitted,



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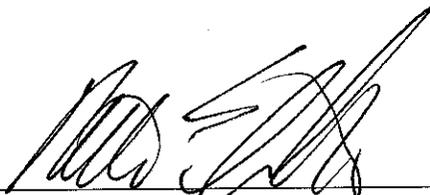
²³ *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 508; *Squire v. Guardian Trust Co.* (1947), 79 Ohio App. 371, 383 (“The cause of action accrues, in the case of torts, when the wrongful act is committed”).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of Amicus Curiae Pamela J. Lawrentz in Support of Appellee John Reinhold was forwarded by regular United States Mail, postage prepaid, on this 11th day of September 2009 to the following:

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