

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**FLAGSTAR BANK, FSB,**  
Plaintiff-Appellant,

v.

**AIRLINE UNION'S MORTGAGE  
COMPANY, et al.,**  
Defendant-Appellees.

Consolidated Case Nos. 2010-0508,  
2010-511

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

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**BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF REALTORS®, IN  
SUPPORT OF DEFENDANT-APPELLEE JOHN L. REINHOLD**

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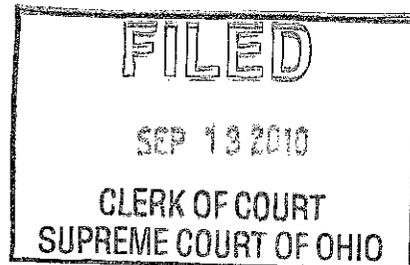
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## STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, the Ohio Association of REALTORS® (“OAR”), submits this brief in support of the Appellee, John L. Reinhold, and respectfully requests that the Court affirm the decision of the First Appellate District of Ohio which affirmed the grant of summary judgment in favor of Mr. Reinhold. OAR is the State’s largest professional trade association. It currently has 29,000 members, who are mostly licensed real estate brokers and salespersons. The practice of real estate is regulated by the Ohio Division of Real Estate and Professional Licensing and real estate brokers and salespersons are governed by R.C. Chapter 4735. The membership of OAR also includes over 1,200 appraisers who are regulated by the State and governed by R.C. Chapter 4763.

OAR was formed in 1910. Its members are also members of the National Association of REALTORS®, which means they have agreed to abide by a Code of Ethics of the National Association of REALTORS®, in addition to meeting the requirements of Ohio law with respect to real estate brokerage, sales, and appraisals.

The statute of limitations for claims of professional negligence that may be brought against real estate professionals is found in R.C. § 2305.09(D). This statute provides that claims of professional negligence must be brought within four years of the time the cause of action accrues. OAR supports the decision of the First Appellate District which rejected the applicability of the discovery rule, in this case,

and held that a cause of action for professional negligence accrues on the date of the negligent act.

### STATEMENT OF FACTS

OAR accepts the statement of the facts submitted by the Appellant and Appellee except that OAR disagrees with Appellant's proposition as to the time at which it suffered actual damages.

### LAW AND ARGUMENT

- A. REVISED CODE SECTION 2305.09(D) PROVIDES THAT THE STATUTE OF LIMITATIONS IN OHIO FOR PROFESSIONAL NEGLIGENCE IS FOUR YEARS AND THE CAUSE OF ACTION ACCRUES ON THE DATE THE NEGLIGENT ACT IS COMMITTED.

Almost twenty-one years ago, this Honorable Court decided *Investors REIT One v. Jacobs* (1989), 46 Ohio St. 3d 176, 179, 546 N.E. 2d 206 which is dispositive of the certified issue in this case. The Court held that claims of professional negligence are governed by the four-year statute of limitations found in R.C. § 2305.09(D) and that the discovery rule is not applicable to claims of professional negligence. *REIT One* still states the law in Ohio and has been reaffirmed on multiple occasions. In *Grant Thorton v. Windsor House* (1991), 57 Ohio St. 3d 158, 566 N.E. 2d 1220, this Court was invited to reverse the holding in *REIT One* and the majority wrote:

Windsor [Appellant] argues that *Investors [REIT One]* is bad law and thus we should reverse it, or, in the alternative, that *Investors* alters vested substantive rights and thus we may not apply it retroactively to Windsor's cause of action. We choose not to reverse *Investors*, and, further, we hold that *Investors* poses no retroactivity problem.

*Id.* at 160.

*REIT One* is still good law and has stood the test of time. It is instructive to recognize that the legislature has not chosen to change the language of R.C. § 2305.09(D) even though it has had twenty-one years to add a discovery rule to the four-year statute of limitations for professional negligence. The fact that it has not done so should be given significant weight.

The ease with which the legislature could have added a discovery rule for claims of professional negligence in R.C. § 2305.09 is apparent from the structure of the statute, which explicitly includes a discovery rule for other causes of action (trespassing under ground or injury to mines, wrongful taking of personal property, and fraud). Conspicuously absent in the statute is any mention of a discovery rule with respect to professional negligence. This Court has frequently recognized that it is not within its province to rewrite a statute to produce a different result than the words of the statute require. *Hubbard v. Canton Board of Education*, 97 Ohio St. 3d 451, 2002-Ohio-6718, at ¶14. The principle of statutory interpretation, *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another), compels a finding that the legislature knowingly omitted the discovery rule from claims for professional negligence – recognizing that it had twenty-one years to change its mind if it chose to do so.

Moreover, there have been no changes in circumstances or instances of fundamental unfairness that should cause this court to deviate from the doctrine of *stare decisis*. In *Westfield Insurance Company v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, the Court wrote:

Stare decisis is the bedrock of the American Judicial System. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.

*Id.* at ¶1. In fact, the court recognized in the syllabus of the *Westfield* case that three conditions must be met before the Court may overrule a prior decision: “(1) the decision was wrongly decided at the time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Id.* at paragraph one of the syllabus. In this case, Appellant does not even argue that *REIT One* was wrongly decided at the time or that there has been a change in circumstances that would justify abandoning the decision. Moreover, the *REIT One* decision is clearly “workable”; in fact, the application of a discovery rule to claims of professional negligence would be unworkable, as more fully discussed below. Finally, professionals have come to rely on the *REIT One* decision in maintaining evidence, keeping track of witnesses, and in creating document retention programs, and a sudden change in the law would work an undue hardship on defendants forced to meet claims of professional negligence brought after four years. The precedent of the *REIT One* case brings stability and predictability to the provision of services by professionals, and there is nothing in this case that suggests that stability and predictability should be abandoned for some greater justice.

**B. THE "DELAYED DAMAGE" THEORY IS NOTHING MORE THAN A "REPACKAGED" DISCOVERY RULE WHICH HAS SOUNDLY BEEN REJECTED IN THE CONTEXT OF PROFESSIONAL NEGLIGENCE CLAIMS.**

The non-applicability of the discovery rule to claims of professional negligence is so well established in the case law and statutory law of Ohio that not even the Appellant argues that the law should be changed and that suddenly a discovery rule should be read into R.C. § 2305.09(D). On the contrary, Appellant argues that this case does not present a discovery issue; but rather a delayed damage issue. At first blush, Appellant's argument seems to make sense. A party should not be required to file a lawsuit before he has been injured. However, Appellant attempts to mold the facts to fit this legal theory instead of recognizing that it is simply advocating the applicability of the discovery rule under the guise of a delayed damage theory. Appellant argues that it was not injured in this case until the foreclosure occurred and a claim was made against it that the collateral was insufficient to satisfy the loan. This is simply incorrect. The injury occurred, if at all, at the time of the negligent appraisal, assuming that the Appellant can prove that the value of the collateral was less than that represented in the appraisal. Overstating the value of the collateral is an injury to the lender at the time of overstatement, presuming the loan was made in reliance upon the appraisal. Appellant, in this case, simply did not discover its claim of insufficient collateral until the subsequent foreclosure and the deficiency claim against it. Therefore, the "delayed damage" theory is simply the discovery rule "in a different analytical

guise.” *Hater v. Gradison Div. of McDonald & Co. Secs. Inc.* (1995), 101 Ohio App. 3d 99, 110-11, 655 N.E. 2d 189, appeal denied, 72 Ohio St. 3d 1539, 650 N.E. 2d 479.

*Hater* simply presents a situation in which a party received something of lesser value than what it believed it was acquiring. *Id.* at 102-03. This “injury” occurred at the time the original lender took its security interest in the collateral. *Id.* Specifically, the claim is made that the inflated appraisal caused Appellant to believe that it was taking an interest in collateral that was sufficient to cover the loan. *Id.* at 103. The harm occurred at the time of the representation, not at the time the party discovered that the collateral was worth less than represented. *Id.*

Courts have repeatedly recognized that there is no distinction between a claim of “delayed damages” and the discovery rule. In *Chandler v. Schriml* (May 25, 2000), 10th Dist. No. 99AP-1006, 2000 WL 675123, the plaintiff claimed that his real estate agent represented to him that the property he eventually purchased was zoned for a two-family unit. *Id.* at \*1. He had made it clear that he wanted to live in one side of the duplex and rent out the other side. *Id.* More than four years later, the plaintiff decided to sell the duplex and he consulted a new real estate agent. *Id.* The new real estate agent checked the zoning and determined that it was zoned for one-family, not two-family. *Id.* Plaintiff incurred expenses in changing the zoning and brought an action against the first real estate agent for misrepresentation more than four years after that representation was made. *Id.* The court rejected the claim because it was barred by the statute of limitations in R.C. § 2305.09(D), *Chandler* at \*1, recognizing that the injury occurred at the time

of the misrepresentation, not when the plaintiff discovered the misrepresentation more than four years later. The court wrote:

In this case, we find that the distinction between the “delayed damage” theory and the “discovery rule” is irrelevant because Chandler did not suffer “delayed damages.” Rather, Chandler suffered damages at the time he purchased his home, and his cause of action arose at the time of King and Waterman’s [first agent’s] allegedly negligent acts. Although he did not discover his injury until later, R.C. 2305.09 has not extended the “discovery rule” to toll the statute of limitations in negligent misrepresentation cases. Therefore, neither rule affects this case.

*Id.* at \*3.

A similar result was reached in *James v. Partin*, 12th Dist. No. CA2001-11-1086, 2002-Ohio-2602. In that case, property was advertised as containing approximately ten acres, and the deed based upon a title search recited that the property included 10.087 acres. *Id.* at ¶2. However, it was subsequently determined (more than four years later) that the original survey was erroneous and that one acre of the land was actually owned by a third party. The plaintiff sued the surveyor claiming professional negligence, and the surveyor was awarded summary judgment because the case had been filed more than four years after the representation. *Id.* at ¶3. In affirming summary judgment, the court recognized that the injury occurred when the survey was concluded, not when the purchaser learned that the acreage he had purchased was less than what was represented. *Id.* at ¶9. See also *Bell v. Holden Surveying, Inc.*, 7th Dist. No. 01AP-0766, 2002-Ohio-5018.

Indeed, it is difficult to conceive of a situation in which there is no immediate injury at the time of a professional misrepresentation. If injury is defined as

receiving less than it is represented that one is receiving, then that always happens at the time of the representation, not years later when the party discovers the discrepancy between the representation and the value of the property. To hold otherwise would open the floodgates for litigation against real estate professionals and place them at a significant disadvantage in defending themselves because of the passage of time.

For example, real estate professionals are frequently asked to opine on the condition of real property before a client purchases it. A real estate professional might represent that the roof does not leak or that the basement is dry. If the purchaser purchases the property in reliance on such a representation and the representation proves false, the injury occurs at the time of the representation, not when the purchaser incurs the expenses to fix the leaky roof or the wet basement. Actual injury is not synonymous with incurring out-of-pocket expenses to correct a problem. Indeed, if a party learns of a leaky roof, he does not need to incur the expenses of fixing the roof in order to have a viable claim against the party who represented that the roof did not leak. He simply needs to file the lawsuit within four years of the allegedly erroneous representation and then produce expert opinion as to the decrease in value of the property. Conceivably, plaintiff may have no out-of-pocket expenses and still have a viable claim for professional negligence if the case is brought within four years of the representation. This is the holding in *REIT One* and should be reaffirmed in this case.

The same is true with respect to zoning, taxes, purchase price, school district, neighborhood conditions, lot size, city services, and countless other representations that real estate brokers and salespersons are asked to make in the daily conduct of their business. If these representations are erroneous, the injury occurs at the time of the purchase (assuming reliance), not years later when the fact of misrepresentation is discovered.

This issue is extremely important to real estate professionals, particularly brokers and salespersons who participate in the buying and selling of property. Inherent in the nature of these transactions is the fact that at least one of the parties moves away from the property, and in fact may move out of state or out of the country. The difficulty in producing witnesses with firsthand knowledge of representations more than four years after the fact makes the defense of these types of claims difficult and sometimes impossible.

Moreover, the real estate licensing laws require real estate professionals to maintain records of transactions in which they are involved for three years. R.C. § 4735.18(A)(24). If Appellant's position is accepted in this case, real estate professionals will need to maintain transaction files indefinitely because there is no certainty as to the cutoff date for claims of professional negligence. Without witnesses and without documentation, the real estate professional would have a difficult time defending himself in court.

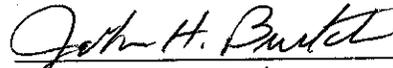
Finally, it is not uncommon for real estate professionals to move from one company to another. In the licensing law scheme for real estate brokers and

salesmen, the documents (transactions files) belong to the broker and most often are left with the broker when the salesperson moves to another company. With brokers coming in and out of the business on a frequent basis, it may be difficult for the salesperson to locate the transaction file for a transaction that he handled more than four years ago. Holding that the discovery rule does not apply to claims of professional negligence adds certainty and predictability to professionals who must decide how long they need to have contact with potential witnesses and how long they need to retain documents. Applying the discovery rule to these kinds of claims, even under the guise of a "delayed damage theory," would deprive professionals of the certainty and predictability necessary for the performance of their services. Appellant's discovery rule/delayed damage theory would permit claims to be brought against professionals at any time without limitation.

## CONCLUSION

For the reasons set forth herein, Amicus Curiae, the Ohio Association of REALTORS®, respectfully requests that the court affirm the decision of the First Appellate District, Hamilton County, Ohio, and decide this case in favor of the Appellee, John R. Reinhold.

Respectfully Submitted,



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The undersigned attorney hereby certifies that the foregoing Brief of Amicus Curiae, Ohio Association of REALTORS®, was served on the following, this 13<sup>th</sup> day of September, 2010, by first-class U.S. Mail, postage prepaid:

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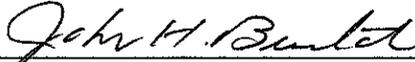
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