IN THE SUPREME COURT OF OHIO

New Riegel Local School District Board of Education, et al.,	:	
	:	Supreme Court Case No. 2018-0189
Plaintiffs-Appellees,	:	
	:	On Appeal from the
v.	:	Seneca County Court of Appeals,
	:	Third Appellate District,
The Buehrer Group Architecture & Engineering, Inc., et al.,	:	Case No. 13-17-04
	:	
Defendant -Appellant.	:	

AMICUS CURIAE AIA OHIO MEMORANDUM IN SUPPORT OF JURIDSICTION OF APPELLANTS BUEHRER GROUPS

Luther L. Liggett, Jr. (0004683)
Graff and McGovern, LPA
604 E. Rich Street
Columbus OH 43215
614-228-5800, x-6
614-561-2892, mobile
Luther@GraffLaw.com

Counsel for Amicus AIA Ohio

Brian T. Winchester (0069076)
Patrick J. Gump (0085832)
McNeal Schick Archibald & Biro Co., LPA
123 West Prospect Avenue, Suite 250
Cleveland OH 44115
216-621-9870
Fax: 216-522-1112
btw@msablaw.com
pgump@msablaw.com

Counsel for Defendants/Appellants The Buehrer Group Architecture & Engineering, Inc., Estate of Huber H. Buehrer, and Buehrer Group Architecture & Engineering

AMICUS CURIAE AIA OHIO MEMORANDUM
IN SUPPORT OF JURIDSICTION OF APPELLANTS BUEHRER GROUPS

Table of Contents

AMICUS CURIAE AIA OHIO MEMORANDUM IN SUPPORT OF JURIDSICTION OF APPELLANTS BUEHRER GROUPS

I. Amicus Curiae AIA Ohio

AIA Ohio, a society of the American Institute of Architects, represents a membership of approximately 2,000 Ohio licensed architects and architectural interns, working through seven local chapters state-wide, to impact public policy through its government affairs program.

AIA Ohio's program concentrates on helping to produce positive legislative and governmental agency rule changes for the architectural profession by addressing such issues as professional liability, building codes, economic development, architect selection procedures, licensing requirements, and public works appropriations. AIA Ohio establishes priorities each year so that resources are utilized most effectively.

The American Institute of Architects was organized in 1857 as a membership organization for professional registered architects. The objects of the AIA is to organize and unite in fellowship the membership of the architectural profession; to promote the aesthetic, scientific, and practical efficiency of the profession; to advance the science and art of planning and building by advancing the standards of architectural education, training and practice; to coordinate the building industry and the profession of architecture to ensure the advancement of the living standards of people through their improved environment; and to make the profession of ever-increasing service to society.

II. Explanation of Why This Case is of Public and Great General Interest and Involves a Substantial Constitutional Question

This appeal raises an issue of public and great general interest relating to the application of Ohio's Statute of Repose to design professional contracts, R.C. 2305.131. This statute limits to ten years the accrual of any claim against architects on public works construction projects, at issue in the case below.

Without exception, architects perform their services to public agencies by contract, which is the context for any owner's claim against a design professional. An owner's claim founded in "tort" exclusive of contract does not exist in the owner-architect relationship. Only a rare, hypothetical third-party claim outside of contract privity might be stated exclusively in tort.

Consistently, the Third District Court of Appeals found that the statute of repose limitation applies to claims in contract as well as tort.

But in deference to Supreme Court precedent relating to a prior version of the statute, the Court of Appeals refused to apply the limitation to this action in contract, citing *Kocisko v. Charles Shutrump & Sons Co. et al*., 21 Ohio St.3d 98, 488 N.E.2d 171 (1986). Such a determination makes Ohio's newer Statute of Repose a nullity.

Because of the state-wide significance of this issue, AIA Ohio participated in the legislative process to urge passage of Ohio's current Statute of Repose.

Uniquely, the Ohio General Assembly stated its legislative intent to apply the Statute of Repose to architects in contract with owners, with no exception for public

agencies.

In a separate, recent decision, the Fifth District Court of Appeals found the *Kocisko* precedent outdated, opining, "Therefore, we find *Kocisko* is not binding authority on this Court in interpreting the current version of the statute." *State v. Karl R. Rohrer Assocs., Inc*., Fifth Dist. Case No. 2017 AP 030008, 2018-Ohio-65 (Jan. 8, 2018), para. 26, page 14. The Fifth District then found Ohio's Statute of Repose to bar the public authority's claims against a remote-in-time design professional, citing the legislative intent enacted as part of the more recent statute.

All Ohio public agencies employ architects as designers for public works construction. Such employment is performed through contracts. When a public agency sues, its action is for contract breach. Therefore, the impact of the court decision below completely nullifies Ohio's current Statute of Repose for architects who performed design work for public agencies, in the past or in the future.

As one example supporting the legislative intent, professional malpractice insurance for architects typically is "claims-made," such that an architect does not maintain coverage after retirement. Thus, the Statute of Repose is of direct impact to all architects, as it prevents remote claims from arising in a distant time.

Yet, given the "shotgun" approach of litigating plaintiffs upon discovery of an injury, even a retired architect can be brought into litigation decades after ceasing practice. This leaves an architect exposed for an unlimited time after completing a

construction design. Such are the case facts below, where the State brought suit against an architect for design work completed thirteen-years prior.

The Third District case precedent conflicts with the Fifth District, and opens up unlimited, uninsurable exposure to Ohio's architects, as they perform design work for public construction. If this Third District precedent stands, when damages occur on public property, any public agency can trace back over decades to sue the original, remote designer along with the proximate parties, as occurred in this case.

As the case law stands today, both the Third and Fifth District Courts of Appeals agree that the *Kocisko* precedent is incorrect. So that architects may rely on common application of Ohio's current Statute of Repose, the Ohio Supreme Court should accept jurisdiction of this appeal.

III. Statement of the Case and Facts

Amicus AIA Ohio adopts the Statement of the Case and Facts as in Defendants-Appellants Buehrer Groups' Memorandum in Support of Jurisdiction.

IV. Argument in Support of the Propositions of Law

Proposition of Law No. I: Ohio's Statute of Repose, R.C. 2305.131, applies to actions sounding both in contract and tort.

Proposition of Law No. II: A court is not required to apply *stare decisis* when the prior version of the statute being applied has been held unconstitutional by the Supreme Court of Ohio.

Ohio's current construction Statute of Repose was enacted nineteen years after the *Kocisko* case decision, incorporating numerous changes. 2004 Senate Bill 80 § 3, eff 4-7-05.

The *Kocisko* Court decision expressly turns on the specific wording of the repealed statute: "The language selected by the General Assembly is uniformly used to describe tortious conduct." This distinction has been criticized by other courts. See, e.g.: *Hagerstown Elderly Assoc. v. Hagerstown Elderly Bldg. Assoc.*, 368 Md. 351, 793 A.2d 579 (Ct. App. Md. 2002).

The Supreme Court previously upheld the constitutionality of Ohio's latest Statute of Repose, only limiting application from retroactive effect. *Oaktree Condo. Ass'n v. Hallmark Bldg. Co.*, 139 Ohio St.3d 264, 2014-Ohio-1937, 11 N.E.3d 266. See also,

Ruther v. Kaiser, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291 [Medical Statute of Repose constitutional].

The Third District Court of Appeals below found consistently with applying the current statutory merits but-for the *Kocisko* precedent:

> The statute specifies that NO cause of action for damages to real property, resulting from the improvement to that real property, can be brought after 10 years from the time the improvements were substantially completed. R.C. 2305.131. The statute does not limit it to claims for torts only. Regardless of what the School labels this claim, the School is trying to collect damages resulting from an improvement, i.e. the Project, to real property. The statute specifically prohibits this. Thus, it would appear that the statute specifically denies the claims in this case.

New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng. Inc., 2017-Ohio-8522, Opinion, pp. 7-8.

A Statute of Repose differs substantially from a statute of limitations.

> R.C. 2305.131 does not take away an existing cause of action, as applied in this case. " * * * [I]ts effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action.

Sedar v. Knowlton Const. Co., 49 Ohio St.3d 193, 551 N.E.2d 938 (1990).

A statute of limitations is procedural and designed for other interests. In enacting the current Statute of Repose, the Ohio General Assembly stated its intent "to promote a greater interest than the interest underlying the general four-year statute of limitations" as to architects, in non-codified law, 2004 Senate Bill 80 § 3, eff 4-7-05:

"In enacting section 2305.131 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

"(1) To declare that the ten-year statute of repose prescribed by section 2305.131 of the Revised Code, as enacted by this act, is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2309.09 of the Revised Code, the general two-year statute of limitations prescribed by section 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;

"(2) To recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for the improvement or who furnished the design, planning, supervision of construction, or construction of the improvement:

"(a) They lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement;

"(b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.

"(c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in division (E)(5)(b) of this section.

"(3) To recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;

"(4) To recognize that maintaining records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an

> unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion;
>
> "(5) To declare that section 2305.131 of the Revised Code, as enacted by this act, strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation but not to affect civil actions against those in actual control and possession of an improvement to real property at the time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death."

McClure v. Alexander, 2nd Dist Greene, No. 2007 CA 98, 2008-Ohio-1313.

A court may consider legislative intent in statutory interpretation, R.C. 1.49.

Ohio's latest Statute of Repose makes no exception for public agencies as subject to the limitation of "any civil action", including actions brought by the State. Likewise, the Statute expressly disclaims prior "rules," R.C. 2305.131(F):

> This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in <u>any civil action</u> commenced on or after the effective date of this section, in which this section is relevant, regardless of when the cause of action accrued and <u>notwithstanding any</u> other section of the Revised Code or <u>prior rule of law</u> of this state, … [emphasis added].

The Fifth District Court of Appeals recognized this legislative intent in finding that the Statute of Repose applies to contract claims. *State v. Karl R. Rohrer Assocs., Inc.*, supra.

No exception for contract actions, or public works, is warranted.

V. Conclusion

Ohio's long debate over the statute of repose needs to be resolved in uniform application, giving full enforceability to the clear legislative intent. *Kocisko v. Charles Shutrump & Sons Co.*, supra., should be overruled in deference to the new statute and more recent case precedent.

Respectfully submitted,

/s/ Luther L. Liggett, Jr.

_____

Luther L. Liggett, Jr. (0004683)
Graff and McGovern, LPA
604 E. Rich Street
Columbus OH 43215
614-228-5800, x-6
614-561-2892, mobile
Luther@GraffLaw.com

Counsel for Amicus AIA Ohio

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Curiae AIA Ohio Memorandum was served this 5th day of February, 2017 upon all parties appearing of record, by electronic e-mail, upon those individuals indicated below:

Brian T. Winchester
Patrick J. Gump
McNeal Schick Archibald & Biro Co., LPA
123 West Prospect Avenue, Suite 250
Cleveland OH 44115
btw@msablaw.com
pgump@msablaw.com

Counsel for The Buehrer Groups

Christopher L. McCloskey
Tarik M. Kershah
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
cmccloskey@bricker.com
tkershah@bricker.com
Counsel for Plaintiff/Appellee

James Rook
Lee Ann Rabe
Ohio Attorney General
Court of Claims Defense Section
150 East Gay Street, 18th Floor
Columbus, OH 43215
James.rook@ohioattorneygeneral.gov
Leanne.rabe@ohioattorneygeneral.gov
Counsel for State of Ohio

P. Kohl Schneider
Sheila A. McKeon
Robert D. Boroff
Gallagher Sharp
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, OH 44115
pkschneider@gallaghersharp.com
smckeon@gallaghersharp.com
rboroff@gallaghersharp.com
Counsel for Defendant/Appellant Charles Construction Services Inc.

Mark Sanchez
Frantz Ward
200 Public Square, Suite 3000
Cleveland, OH 44144
Msanchez@franztward.com
Counsel for Defendant/ Appellee Ohio Farmers Insurance Company

Shannon J. George
Ritter, Robinson, McCready & James, Ltd.
405 Madison Ave.
Toledo, OH 43604
dedmon@rrmj.com
Counsel for Defendant/ Appellant Studer-Obringer Inc.

David T. Patterson
Frederick T. Bills
Weston Hurd, LLP
10 W. Broad Street, Suite 2400
Columbus, OH 43215
dpatterson@westonhurd.com
fbills@westonhurd.com

Counsel for Defendant/Appellee American Buildings Company d/b/a Architectural Metal Systems

/s/ Luther L. Liggett, Jr.

_____

Luther L. Liggett, Jr. (0004683)