[Cite as *Martins Ferry City School Dist. Bd. of Edn. v. Colaianni Constr., Inc.*, 2023-Ohio-2285.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

BOARD OF EDUCATION OF MARTINS FERRY CITY SCHOOL DISTRICT,

Plaintiff-Appellant,

v.

COLAIANNI CONSTRUCTION, INC. ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case Nos. 22 BE 0032, 22 BE 0033

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case Nos. 19 CV 0132, 19 CV 0133

BEFORE:
David A. D'Apolito, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Nelson M. Reid, Atty. Tarik M. Kershah, Atty. Benjamin B. Hyden and *Atty. Samuel Lewis,* Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215, for Plaintiff-Appellant and

Atty. Donald W. Gregory, Atty. Michael J. Madigan and *Atty. Nicholas S. Bobb*, Kegler Brown Hill & Ritter Co., 65 East State Street, Suite 1800, Columbus, Ohio 43215, for Defendants-Appellees Colaianni Construction, Inc. and Ohio Farmers Insurance Company and

Atty. Thomas L. Rosenberg, Roetzel & Andress, LPA, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215. *Atty. Rachael L. Russo* and *Atty. Lauryn T. Robinson*, Roetzel & Andress, LPA, 1375 East Ninth Street, One Cleveland Center, 10th Floor, Cleveland, Ohio 44114, for Defendant-Appellee MKC Architects, Inc. and

Atty. Royce R. Remington, Atty. Matthew K. Grashoff, Atty. Christina T. Hassel and *Atty. Aaron S. Evenchik*, Hahn Loeser & Parks LLP, 200 Public Square, Suite 2800, Cleveland, Ohio 44114, for Defendants-Appellees R.A.M.E., Inc.; Cincinnati Insurance Company; The Hartley Company d/b/a Saup-Hartley; and Ohio Farmers Insurance Company (as Surety for Saup-Hartley) and

Atty. John P. Maxwell and *Atty. Matthew P. Mullen*, Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, 405 Chauncey Avenue Northwest, New Philadelphia, Ohio 44663, for Defendant-Appellee R.A.M.E., Inc. and

Atty. Evan J. Palik, Collins, Roche, Utley & Garner, LLC, 520 South Main Street, Suite 2551, Akron, Ohio 44311, for Defendant-Appellee The Hartley Company d/b/a Saup-Hartley.

Dated: June 28, 2023

D'Apolito, P.J.

{¶1} Appellant, Board of Education of Martins Ferry City School District, appeals the entry of summary judgment by the Belmont County Court of Common Pleas in favor of Appellees, Colaianni Construction, Inc. ("Colaianni")(general contractor), MKC Architects, Inc. ("MKC")(architect), R.A.M.E., Inc. ("R.A.M.E.")(roofing contractor), Cincinnati Insurance Company ("CIC")(as surety for R.A.M.E.), Hartley Company d/b/a Saup-Hartley ("Saup-Hartley")(roofing contractor), and Ohio Farmers Insurance Company ("OFIC")(as surety for Colaianni and Saup-Hartley), in this action for breach of construction contracts. The trial court concluded that Appellant's breach of contract and express warranty claims were time-barred based on R.C. 2305.131, a statute of repose that generally forecloses claims against architects and building contractors asserted ten years after the date of substantial completion of a construction project. Having dismissed the claims against the contractors as time-barred, the trial court likewise dismissed the claims against the contractors' sureties.

{¶2} Although Appellant advances two assignments of error, Appellant asserts within the first assignment of error, two statutory interpretation challenges to R.C. 2305.131, as well as a constitutional challenge based on the application of the statute to the architectural design contract in this case, which was executed prior to the enactment of the statute. Appellant further asserts in the first assignment of error that two exceptions to the application of the ten-year statute of repose apply: First, Appellant alleges Appellees engaged in fraud and, second, Appellees provided express warranties beyond ten years. In the second assignment of error, Appellant argues that the trial court erred in dismissing the breach of contract claims against the sureties predicated solely upon dismissal of the same claims against the building contractors.

{¶3} For the following reasons, the judgment of the trial court is affirmed.

STANDARD OF REVIEW

{¶4} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶5} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal

burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Doe v. Skaggs*, 7th Dist. Belmont No. 18 BE 0005, 2018-Ohio-5402, ¶ 11.

{¶6} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

LAW

{¶7} Although a statute of repose and a statute of limitations both limit the time a defendant is required to defend a claim, they have distinct applications. *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 11, citing *CTS Corp. v. Waldburger*, 573 U.S. 1, 7, 134 S.Ct. 2175, 2182, 189 L.Ed.2d 62 (2014). A statute of limitations provides "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Antoon*, 148 Ohio St.3d at 483, 71 N.E.3d 974, quoting *Black's Law Dictionary* 1636 (10th Ed. 2014). See also *CTS Corp*., 573 U.S. at 8, 134 S.Ct. 2175 (a statute of limitations requires the diligent prosecution of known claims). "A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *CTS Corp.*, 573 U.S. at 8, 134 S.Ct. 2175 (a repose provision is equivalent to "a cutoff" or an "absolute bar" representing a legislative judgment that the defendant should be free from liability after a set period has elapsed from a certain act of the defendant).

{¶8} A statute of repose bars any suit that is brought after a specified time since the defendant acted, even if the designated period ends before the plaintiff has suffered a resulting injury. *New Riegel Local School Dist. Bd. of Education v. Buehrer Group Architecture & Eng., Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, ¶ 11, 133 N.E.3d 482,

citing *Black's Law Dictionary* 1637 (10th Ed. 2014). The repose period begins to run when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. *Id.*

{¶9} R.C. 2305.131(A)(1), reads in relevant part:

> [N]o cause of action to recover damages for * * * an injury to real * * * property, * * * that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of * * * an injury to real * * * property, * * * that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.

"Substantial completion" is defined as "the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first." R.C. 2305.131(G).

{¶10} Although the accrual of a cause of action is typically a consideration relevant to the statute of limitations, the General Assembly employed the term "accrue" in the current version of the statute of repose applicable in this appeal. The history of the statute explains the use of the term.

{¶11} With the codification of R.C. 2305.131 in 1963, Ohio joined the many states that had enacted construction statutes in the late 1950s and early 1960s in response to the expansion of the common-law liability of architects and builders to third parties with whom they lacked privity of contract. *Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d 193, 195, 551 N.E.2d 938 (1990), overruled on other grounds, *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 639 N.E.2d 425 (1994). Twenty-three years later, in *Kocisko v. Charles Shutrump & Sons Co.*, 21 Ohio St.3d 98, 99, 488 N.E.2d 171 (1986), the Ohio Supreme

Court concluded that R.C. 2305.131, which addressed injury to real or personal property, bodily injury, or wrongful death "arising out of the defective and unsafe condition of an improvement to real property," applied solely to actions which sound in tort. The *Kocisko* Court predicated its conclusion on the legislature's use of the particular terms – "defective" and "unsafe," which it characterized as language uniformly used to describe tortious conduct. *Kocisko* at 172-173.

{¶12} In 1994, the Ohio Supreme Court held that the 1971 version of R.C. 2305.131 violated the right to a remedy guaranteed by Article I, Section 16 of the Ohio Constitution, because it deprived claimants of the right to sue before they knew or could have known about their injuries. *Brennaman*, 70 Ohio St.3d at 466-467, 639 N.E.2d 425, overruling *Sedar*, 49 Ohio St.3d 193, 551 N.E.2d 938. The 1971 version of the statute read in relevant part:

> No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be *brought* against any person performing services for or furnishing the design, planning, supervision of construction, or construction of such improvement to real property, *more than ten years after the performance or furnishing of such services and construction*.

(Emphasis added).

{¶13} The plaintiffs in *Brennaman* suffered personal injuries more than ten years after the defendants provided design and engineering services relating to the construction of a titanium metal plant. If applicable, the 1971 version of R.C. 2305.131 would have barred the plaintiffs' claims before they suffered an injury. The *Brennaman* Court held, "[a]t a minimum, Section 16, Article I requires that the plaintiffs have a reasonable period of time to enter the courthouse to seek compensation after the accident." *Id.* at 466, 639 N.E.2d 425.

{¶14} In response to *Brennaman*, the General Assembly repealed the 1971 version of R.C. 2305.131 in 1996 and enacted a new version of the statute, which read in relevant part:

> (A)(1) * * * no cause of action to recover damages for an injury to real or personal property, bodily injury, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property * * * shall *accrue* against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property *later than fifteen years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction*.

(Emphasis added) Am.Sub.H.B. No. 350 ("H.B. 350"), 146 Ohio Laws, Part II, 3867, 3917.

{¶15} Whereas the 1971 version of R.C. 2305.131 foreclosed the *commencement* of an action, the H.B. 350 version of R.C. 2305.131 foreclosed the *accrual* of a cause of action. The General Assembly observed the H.B. 350 version of R.C. 2305.131 would not violate the right to a remedy, because it did not deny a remedy to a claimant with a vested cause of action, but instead prevented a cause of action from vesting. *Id.* at Section 5(E)(5), 146 Ohio Laws, Part II, at 4022.

{¶16} After the Ohio Supreme Court held that H.B. 350 violated the Ohio Constitution's single-subject rule, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), paragraph three of the syllabus, the General Assembly repealed R.C. 2305.131, "both as it results from and as it existed prior to its repeal and re-enactment by" H.B. 350. Sub.S.B. No. 108, Section 2.02(E), 149 Ohio Laws, Part I, 382, 499. The repeal took effect on July 6, 2001. *Id.* at Section 9, 149 Ohio Laws, Part I, at 511.

{¶17} In 2004, the General Assembly enacted the current version of R.C. 2305.131. The legislature recognized the availability of evidence pertaining to an improvement to real property more than ten years after completion is problematic, and

concluded that it is an unacceptable burden to require the maintenance of records and documentation for more than ten years following the completion of a real estate project. *Id.* at Section 3(B)(3) and (4), 150 Ohio Laws, Part V, at 8029. The current version of R.C. 2305.131 is intended "to preclude the pitfalls of stale litigation." *Id.* at Section 3(B)(5), 150 Ohio Laws, Part V, at 8029.

{¶18} In *New Riegel Local School Dist. Bd. of Education v. Buehrer Group Architecture & Eng., Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, 133 N.E.3d 482, the Ohio Supreme Court held that the current version of R.C. 2305.131 was sufficiently distinct from its unconstitutional predecessor such that stare decisis did not foreclose its application to breach of contract claims. The *New Riegel* Court further found that the statute of repose applies with equal force to breach of contract and tort claims.

{¶19} However, the Ohio Supreme Court declined to consider an argument similar, albeit broader in scope, to the argument advanced here in the first assignment of error, that the statute of repose requires that the claim must accrue within the ten-year period in order to avoid the statute's procedural bar. The *New Riegel* Court observed:

> In an argument that goes beyond either proposition of law that this court accepted, New Riegel argues that even if R.C. 2305.131 is applicable, the statute does not bar its claims, which accrued within ten years after substantial completion of the Project, because R.C. 2305.131(A)(1) does not limit commencement of an action once a claim has accrued. According to New Riegel, the 15-year statute of limitations for contract actions begins to run once a cause of action accrues within the repose period and R.C. 2305.131(A)(1) does not shorten the time to file an action on an accrued claim. In the court of appeals, New Riegel argued that R.C. 2305.131 will never bar a breach-of-contract claim because such a claim accrues, necessarily within the repose period, when the breach occurs, i.e., when an architect publishes a defective design or when defective construction is performed. But the court of appeals did not address that argument.
>
> We do not decide the effect on [the cases cited by New Riegel] of our holding that R.C. 2305.131 applies to any cause of action, including a

> contract claim, that falls within the scope of R.C. 2305.131(A)(1), because that issue is beyond the scope of the propositions of law that we accepted and because neither the trial court nor the court of appeals addressed it.

Id. at ¶ 31-32.

{¶20} However, now-Chief Justice Kennedy, joined by Justice DeWine, penned a dissent in which she squarely rejected the accrual argument advanced by the school district regarding the application of the statute of repose to breach of contract claims:

> According to the school board, a breach-of-contract claim can *never* be limited by the construction statute of repose because such a claim will always accrue before the ten-year period expires, and for this reason, the school board maintains that "[i]t makes no sense to say that the General Assembly intended" R.C. 2305.131(A)(1) to apply to breach-of-contract claims.
>
> Contrary to the majority's analysis, this statutory-construction argument responds directly to the propositions of law that we accepted for review. We cannot decide the issue presented in this case without addressing the school board's argument. Moreover, an appellee such as the school board can defend a judgment of the court of appeals with arguments that were not passed on by that court, see *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 94, and "'[r]eviewing courts are not authorized to reverse a correct judgment on the basis that some or all of the lower court's reasons are erroneous,'" *Goudlock v. Voorhies*, 119 Ohio St.3d 398, 2008-Ohio-4787, 894 N.E.2d 692, ¶ 12, quoting *State ex rel. McGrath v. Ohio Adult Parole Auth.*, 100 Ohio St.3d 72, 2003-Ohio-5062, 796 N.E.2d 526, ¶ 8. The school board's argument is therefore properly before this court, and reaching it is necessary to decide this case. This court's remand of the case does nothing more than add further delay in resolving this matter.

In *Oaktree Condominium Assn., Inc. v. Hallmark Bldg. Co.*, 139 Ohio St.3d 264, 2014-Ohio-1937, 11 N.E.3d 266, we considered whether the application of R.C. 2305.131 to the plaintiff violated the Ohio Constitution's prohibition on retroactive laws. The cause of action had accrued prior to the enactment of the statute but was commenced more than ten years after construction had been completed. We recognized that R.C. 2305.131 was a statutory bar to the claim, because "[b]y its plain language, the real-property-construction statute of repose, which became effective on April 7, 2005, applies to civil actions commenced after the effective date of the statute *regardless of when the cause of action accrued*." (Emphasis added.) *Id.* at ¶ 8. And we noted that "[b]ecause [the plaintiff's] cause of action accrued and vested before the April 7, 2005 effective date of R.C. 2305.131, the retroactive application of the statute of repose would take away [its] substantive right and conflict with Article II, Section 28 of the Ohio Constitution." *Id.* at ¶ 12. We therefore understood that the statute of repose bars causes of action that had accrued but were not commenced prior to the running of the ten-year period.

The school board nonetheless asks us to construe the phrase "no cause of action * * * shall accrue," R.C. 2305.131(A)(1), to exempt causes of actions that did in fact accrue during the ten-year repose period. It reasons that had the General Assembly intended R.C. 2305.131 to be a true statute of repose, it would have provided that no cause of action "shall be commenced" after ten years.

However, we may not read individual words of a statute in isolation; rather, we are obligated "to evaluate a statute 'as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.' " *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21, quoting *State ex rel. Myers v.*

Spencer Twp. Rural School Dist. Bd. of Edn., 95 Ohio St. 367, 373, 116 N.E. 516 (1917). "'"[S]ignificance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act."'" *Id.*, quoting *Weaver v. Edwin Shaw Hosp*., 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 13, quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus.

Construing R.C. 2305.131 as applying only to causes of action that accrue after the ten-year repose period has expired would render large swaths of the statute wholly superfluous. For example, R.C. 2305.131(A)(2) creates a discovery-rule exception to the statute of repose:

Notwithstanding any otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, a claimant who discovers a defective and unsafe condition of an improvement to real property during the ten-year period specified in division (A)(1) of this section but less than two years prior to the expiration of that period may commence a civil action to recover damages as described in that division within two years from the date of the discovery of that defective and unsafe condition.

Similarly, R.C. 2305.131(A)(3) includes an exception to the statute of repose for plaintiffs "within the age of minority or of unsound mind" pursuant to R.C. 2305.16:

Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during the ten-year period specified in division (A)(1) of this section and the plaintiff cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, the plaintiff may commence a civil action to recover damages as described in that division within two years from the removal of that disability.

Construing the statute of repose as not applying to causes of action that accrued within the ten-year repose period renders these two exceptions meaningless and inoperative. As the Fifth District Court of Appeals has explained, under that interpretation, R.C. 2305.131(A)(2) "would have no effect on any claimant because once a claimant's cause of action accrued, the statute of repose would no longer apply and the statute of limitations would apply." *Tuslaw Local School Dist. Bd. of Edn. v. CT Taylor Co., Inc.*, 2019-Ohio-1731, 135 N.E.3d 1162, ¶ 25 (5th Dist.). The same reasoning applies to R.C. 2305.131(A)(3).

Moreover, in uncodified law, the General Assembly repeatedly described R.C. 2305.131 as a statute of repose. It explained that although "[s]tatutes of repose are vital instruments that provide time limits, closure, and peace of mind to potential parties of lawsuits," Ohio had stood virtually alone in failing to "adopt[ ] statutes of repose to protect architects, engineers, and constructors of improvements to real property from lawsuits arising after a specific number of years after completion of an improvement to real property." Am.Sub.S.B. No. 80, Section 3(A), 150 Ohio Laws, Part V, 7915, 8026-8027. The legislature acted to remedy that failing and eliminate the "unacceptable burden" of requiring architects, engineers, and constructors of improvements to real property to maintain insurance against liability, retain documents and records, and preserve evidence throughout the useful life of the improvement, explaining that "the ten-year statute of repose prescribed in [R.C. 2305.131(A)(1)] is a rational period of repose intended to preclude the pitfalls of stale litigation." *Id.* at 8027-8029. And it declared that R.C. 2305.131 was intended "to promote a greater interest than the interest underlying * * * other general statutes of limitation prescribed by the Revised Code." *Id.* at 8028-8029.

It is therefore manifest that the General Assembly understood R.C. 2305.131 to be a true statute of repose, i.e., one that bars accrued claims as well as those that have not yet vested. See *Antoon v. Cleveland Clinic*

> *Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 16. As the United States Supreme Court has explained, a statute of repose is akin to a discharge in bankruptcy; because it is a "cutoff" or absolute bar to liability that "puts an outer limit on the right to bring a civil action," application of a statute of repose does not depend on whether the cause of action has accrued. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8-9, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014). It extinguishes liability regardless. *Id.*
>
> The plain language of R.C. 2305.131(A), read in its entirety, extinguishes liability for injuries arising out of a defective and unsafe condition of an improvement brought against a person who designed, planned, supervised, or constructed that improvement after ten years from its substantial completion, subject to the time extensions established in subdivisions (A)(2) and (A)(3) of that statute. Uncodified law and our caselaw support this conclusion. Because the school board brought this breach-of-contract action more than ten years after the substantial completion of its school building, the trial court correctly dismissed the breach-of-contract claims as time-barred. For this reason, I would reverse the judgments of the court of appeals and reinstate the judgments of the trial court.

Id. at ¶ 35-44.

{¶21} With the foregoing case law in mind, we turn to the facts in this case. As the trial court dismissed the breach of contract claims by way of summary judgment, we recount the relevant facts in a light most favorable to Appellant.

FACTS AND PROCEDURAL HISTORY

{¶22} Appellant participated in the State of Ohio's Classroom Facilities Assistance Program ("CFAP"), in order to construct two new school buildings, an elementary school and a middle/high school ("school project"). CFAP is a program in which school districts partner with the state for the funding, design, and construction of school facilities. CFAP is administered by the Ohio Facilities Construction Commission ("Commission").

{¶23} On December 14, 2004,[1] Appellant entered into an Agreement for Professional Design Services with MKC, wherein MKC agreed to act as the design professional for the school projects ("design contract"). In turn, the Commission engaged Project Construction Services, Inc. to serve as the construction manager for the school projects. Project Construction Services, Inc. is not a defendant to this action.

{¶24} In 2006, Colaianni was contracted to act as the general contractor for the school projects. OFIC provided a surety bond on behalf of Colaianni. R.A.M.E. was contracted to construct the roof for the middle/high school. CIC provided a surety bond on behalf of R.A.M.E. Saup-Hartley was contracted to construct the roof for the elementary school. OFIC provided surety bonds on behalf of Saup-Hartley.

{¶25} As a result of the contracting parties' participation in CFAP, the design contract includes a reference to the Ohio School Design Manual ("OSDM") published by the Commission. The OSDM specifies function, materials and the actual construction systems to be used in projects. [2]

{¶26} Section 1.0 of the design contract, captioned "Responsibilities of the Architect," reads in its entirety:

> The Architect shall obtain a copy of the [OSDM]. The Architect shall *endeavor to ensure* that the plans, specifications and materials proposed for use in the [school project] comply with the standards established by the [OSDM] and Commission policies with the exception of any variance approved by the Commission. The Architect agrees that any Variance Request will be submitted to the Commission 30 days before the completion of the Design Development Phase.

(Emphasis added.) The design contract is the only contract that includes a reference to the OSDM.

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[1] Although the statute of repose was codified in 2004, it became effective on April 7, 2005 after the contract for architectural design services was executed between Appellant and MKC.

[2] The second amended complaint states that the OSDM is "voluminous" and a copy is available upon request. Although portions of the OSDM are cited (pages 8210-2 through 8210-12 are attached to the second amended complaint), a complete copy of the OSDM is not in the record.

{¶27} The contract executed with Colaianni (through the president and treasurer of the school board) is an Ohio School Facilities Commission form contract and reads in pertinent part, "[t]he Contract Documents embody the entire understanding of the parties and form the basis of the Contract between the School District Board and the Contractor. The Contract Documents shall be considered to be incorporated by reference into this Contract Form as if fully rewritten herein."

{¶28} The form construction contract contains definitions and general conditions issued by the Commission. The definition section for the school projects defines "contract" as the "agreement between a Contractor and Appellant approved by the Commission, for performance of Work as set forth in the Contract Documents." The term "Contract Documents" is defined as:

> Collectively, the Drawings, Specifications, Addenda, Notice to Bidders, Instructions to Bidders, Definitions, Bid Form, Bid Guaranty, Contract Form and Attachments, Bond, Bulletins, Shop Drawings, Change Orders, Standard Conditions of the Contract and Special Conditions, if any.

{¶29} The definition section further defines "defective" as "work that does not conform to the Contract Documents, or does not meet the requirements of any applicable statute, rule, regulation, inspection, reference standard, test or approval***" The definition section defines the term "warranty" as a "legally enforceable assurance of the quality and performance of materials and equipment." The definition section defines the term "guarantee" as a "legally enforceable assurance, for a period of one year from Contract Completion, of quality or performance of Contractor's workmanship."

{¶30} In order to be paid for its work on the school project, each contractor submitted an application and certificate for payment, which reads, in relevant part:

> The Contractor certified that the work covered by this pay request has been completed in accordance with the Contract Documents and that all progress payments previously paid by the State have been applied by the Contractor to discharge in full all of Contractor's obligations incurred in connection with the work covered by all prior pay requests.

{¶31} Additionally, following completion of a contractual scope of work such as roofing, MKC signed a certification, which reads in relevant part:

> We, the undersigned, together with a representative of the Contractor employed for the execution of the Work, have inspected the Work included in the captioned Contract, prior to the date of this certificate, and hereby certify that all Work on the Contract has been completed in accordance with the requirements of the Contract Documents recommend the Work be accepted.

{¶32} The school buildings opened to the public in January of 2008. Appellant concedes that the school project was substantially completed in 2008.

{¶33} Water leaks, which caused damage to the interior of the buildings, began in the middle school/high school almost immediately after the schools were opened, and similar leaks developed in the elementary school shortly thereafter. The head of maintenance operations for the school district, Todd Yoder, repeatedly contacted R.A.M.E. and Saup-Hartley to perform repairs to the roofs of each of the buildings. According to Appellant, the purported repairs did not address the significant underlying deficiencies with the roofing systems.

{¶34} Despite ongoing problems with the roofs in May of 2016, the Commission and Appellant executed a Certificate of Completion of the Project Agreement. That document transferred all interest and participation of the Commission to Appellant for the school project, and stated that Appellant assumed sole responsibility for property ownership and facilities management, including the responsibility for enforcement of warranties and guarantees associated with the school project. The Certificate further reads that "[a]ll outstanding issues are resolved to the satisfaction of [Appellant] and the Commission."

{¶35} Appellees argued before the trial court that Appellant did not have standing to bring the above-captioned action. The trial court did not address the standing issue. Appellees continue to summarily challenge Appellant's standing in their appellate brief.

{¶36} Appellees cite *Colaianni Constr., Inc. v. Indian Creek Local School Dist.*, 7th Dist. Jefferson No. 16 JE 0009, 2016-Ohio-8156, 75 N.E.3d 887, for the proposition that

the state is the only entity with standing to assert the breach of contract and warranty claims. In that case, Colaianni filed a petition to compel arbitration based on the school district's failure to release escrow funds despite the completion of the construction project. We concluded that the state was the public owner, and pursuant to R.C. 153.63(C), any action had to be filed in the Court of Claims. Our decision was based in part on Article 1.1.3.2. of the general conditions of contract, which read, "[t]he Ohio Court of Claims shall be the exclusive jurisdiction for any action or proceeding by the Contractor or the Contractor's Surety for any money damages concerning any agreement or performance under the Contract Documents or in connection with the Project."

{¶37} Moreover, Section 1.1.6 of the standard conditions provides that the school board has standing to pursue the breach of contract and warranty claims:

> The School District Board, the Commission, or both, may maintain an action in its own name for violations of any law relating to the [school projects] or for any injury to persons or property pertaining to the Work, or for any other cause which is necessary in the performance of the School District Board's and Commission's duties.

{¶38} Appellees deny that any of the work performed was defective or that the work caused the water leaks and resulting damage. However, on May 24, 2018, following a preliminary investigation, Mays Consulting & Evaluation Services, Inc. ("Mays") issued a preliminary report identifying deficiencies with the school project. Thereafter, Mays was engaged by Appellant to perform a more detailed analysis and design a repair for the school project.

{¶39} Mays identified the following defects, which Mays opined were the causes of the failure of the entire roofing system:

> On the middle school/high school and the elementary school building, MKC specified mechanical ventilators rather than gravity ventilators, and MKC failed to obtain a variance for the change from the Commission. MKC further failed to specify the proper locations and a sufficient number of ventilators to properly ventilate the attic spaces leading to a premature failure of the

roof. The mechanical ventilators specified by MKC have a shorter service life and require more maintenance than the gravity ventilators due to an external power source and moving parts.

On the middle school/high school and the elementary school building, MKC designed faulty ply-clips that failed to properly secure the roof sheathing, which allowed the roof sheathing to warp and displace thereby damaging the overlying roofing materials.

On the middle school/high school and the elementary school building, Colaianni used unsuitable fasteners to fasten the roof sheathing to the underlying steel trusses and joists, which resulted in the roof sheathing, upon which the shingles are fastened, to displace over time damaging the overlying roofing materials and allowing exterior water intrusion.

On the middle school/high school and the elementary school building, Colaianni failed to properly install the masonry flashing in multiple areas in violation of the specifications leading to the premature failure of the building envelope systems of the Project.

On the middle school/high school, R.A.M.E. failed to properly install the roof flashing in multiple areas leading to a premature failure of the roof system.

On the middle school/high school, R.A.M.E used smooth shank nails rather than the specified barb-shanked nails resulting in shingle nails backing out of the roof sheathing and puncturing the overlying shingles. This led to extensive exterior water infiltration through holes in the shingles.

On the elementary school building, Saup-Hartley failed to properly install the roof flashing in multiple areas leading to a premature failure of the roof system.

On the elementary school building, Saup-Hartley used smooth shank nails rather than the specified barb-shanked nails, resulting in some shingle nails

> backing out of the roof sheathing and puncturing the overlying shingles. This led to shingles blowing off and extensive exterior water infiltration through holes in the shingles.

(Affidavit of Andy Raile, ¶ 11.)

{¶40} According to Mays, the damage caused by the contractors was the result of the use of improper materials, rather than a defect in the actual materials used in the construction process. In other words, Appellant does not contend that the roofing products failed, but instead that the contractors installed the incorrect products.

{¶41} In order to address the foregoing deficiencies, Appellant, through the statutory competitive bidding process, contracted with N.F. Mansuetto & Sons to repair the school project. The cost to repair the middle/high school building was approximately $4.7 million dollars and the cost to repair the elementary school building was approximately $2.4 million. (*Id*., ¶ 12.)

{¶42} Appellant asserts that the Mays' findings demonstrate violations by the roofing contractors of Subsection 2.1.A.2 of Section 07311 of the specifications, captioned "Fiberglass Shingles," which reads in its entirety:

> Fasteners: Shall be as recommended by the manufacturer for the type of substrate the shingles are to be attached to but not less than Nails, either galvanized or aluminum 11 or 12 gauge, barbed shank, 3/8 inch head, sharp pointed conventional or sufficient length to penetrate sheathing. Staple fasteners are not allowed.

{¶43} Appellant asserts that the Mays' findings demonstrate violations by the general contractor of Subsection 2.1.C.1 of Section 07311 of specifications, captioned "Fiberglass Shingles," which reads in its entirety:

> "Tectum III": Where indicated on the Drawings provide "Tectum III" Roof Decking, as manufactured by Tectum Inc. Decking to be installed using mechanical fasteners per manufacturers [sic] recommendations. Use nails as recommended by Shingle Manufacturer for attachment of shingles and roofing felt to decking. Thickness as indicated on the drawings.

{¶44} Appellant further contends that Appellees provided an express warranty of the roofing materials based on Paragraph 1.5 of Section 07311 of the specifications, captioned "Guarantee," reads in its entirety:

> Provide manufacturer's 40 year transferable warranty with the first five years non-prorated and the remaining time prorated, and a 40 year guarantee for all roofing products installed under this Section.

{¶45} Appellant also contends that MKC provided an express warranty of the construction based on Section A.2. of Chapter 8 of the OSDM, captioned Systems and Materials," which reads in its entirety:

> School building structures and exterior enclosures shall be designed and constructed of materials which will perform satisfactorily for 40 years with only minor maintenance and repairs, and for 100 years before major repairs or replacement of primary structural or exterior enclosure elements is required.

{¶46} Appellant initiated the above-captioned actions on April 5, 2019. The pleadings in both cases are nearly identical and rely on the same general set of facts and contract documents for the school projects. The only distinction relates to the buildings involved and the roofing contractors and their respective sureties.

{¶47} On August 2, 2019, Plaintiff filed its second amended complaints in both cases. The second amended complaints state eight causes of action: (1) breach of contract (Colaianni); (2) breach of express warranty (Colaianni); (3) surety bond; (4) breach of contract (roofer); (5) breach of express warranty (roofer); (6) surety bond; (7) breach of contract (MKC); and (8) breach of express warranty (MKC). No substantive claim for fraud was asserted against Appellees.

{¶48} On December 4, 2019, the trial court issued journal entries in Case Nos. 19CV132 and 19CV133, which due to party and issue similarity, combined the discovery processes between the two cases and limited discovery and fact finding to exceptions and defenses to the statute of repose. Appellant first asserted the fraud exception to the

statute of repose in its opposition brief to MKC's motion to dismiss the second amended complaints on January 13, 2020.

{¶49} On February 18, 2020, Appellees deposed Yoder. On February 20 and 21, 2020, Appellant deposed David William Wodesky, Ken Weaver, and James Mark Trinone, representatives of Colaianni. On February 24, 2020, Appellant deposed Jack Francis Pottmeyer, a representative of MKC. On February 26, 2020, Appellant deposed Albert Lewis Rush, a representative of R.A.M.E. On May 5, 2020, Appellant deposed Douglas C. Hartley, a representative of Saup-Hartley.

{¶50} On May 15, 2020, Colaianni and OFIC filed a Joint Motion for Summary Judgment in both cases; MKC filed a Supplemental Brief in Support of its previously filed Motion to Dismiss, or in the Alternative, Motion for Summary Judgment in both cases; and R.A.M.E., CIC, Saup-Hartley, and OFIC filed their Joint Motion for Summary Judgment in both cases. On June 26, 2020, Appellant filed its opposition briefs to all of the pending motions. On July 10, 2020, Appellees filed their respective reply briefs.

{¶51} On June 23, 2022, roughly two years after briefing was complete, the trial court issued two entries granting summary judgment in favor of Appellees. Although the trial court acknowledged that "[Appellant] asserts several claims for relief and very cogently argues those claims including various warranty claims," the trial court summarily concluded in both cases that the statute of repose barred all claims against the contractors and architects, and their respective sureties.

{¶52} This timely appeal followed.

ANALYSIS

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANT ON ITS SECOND AMENDED COMPLAINT IN CASE NO. 19CV132 AND IN FAVOR OF APPELLEES, COLAIANNI CONSTRUCTION, INC., MKC ARCHITECTS, INC., AND R.A.M.E., INC., AS SET FORTH IN THE JUDGMENT JOURNAL ENTRY, DATED JUNE 23, 2022; AND AGAINST APPELLANT ON ITS SECOND AMENDED

COMPLAINT IN CASE NO. 19CV133 IN FAVOR OF COLAIANNI CONSTRUCTION, INC., MKC ARCHITECTS, INC., AND THE HARTLEY COMPANY D/B/A SAUP/HARTLEY, AS SET FORTH IN THE JUDGMENT JOURNAL ENTRY, DATED JUNE 23, 2022; BY FINDING THAT R.C. 2305.13 [SIC] (THE STATUTE OF REPOSE) BARRED ALL OF APPELLANT'S CLAIMS.

{¶53} Appellant asserts six arguments under the first assignment of error. The first two arguments are predicated upon statutory construction. "The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9. Words and phrases in a statute are read according to rules of grammar and common usage and in the context of the whole statute. R.C. 1.42; *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 102, 543 N.E.2d 1188 (1989). An interpreting court must presume that the General Assembly intended the entire statute to be effective. R.C. 1.47(B). The court may look beyond the plain statutory language only when a definitive meaning remains elusive despite a thorough, objective examination of the language. *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 23, citing *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 11.

I. DAMAGE TO REAL PROPERTY ONLY

{¶54} Appellants first assert that the statute of repose does not apply to damages to new construction, but instead only to damages to the underlying real property caused by the new construction. Appellants rely on the plain language of the statute, which reads, in relevant part, "no cause of action to recover damages for * * * *an injury to real* * * * *property*, * * * that arises out of a defective and unsafe condition *of an improvement to real property*." (Emphasis added.) Appellant argues that the statute limits the accrual of a cause of action to recover damages for an injury to "real property" arising from a defective "improvement to real property," rather than damages for an injury to an "improvement to real property." Appellant cites no case law to support this novel interpretation of the text of the statute.

{¶55} Appellant's textual argument is at odds with the consistent application of the statute of repose to causes of action to recover damages for injuries to *improvements* to real property, rather than the real property itself, by the Ohio Supreme Court in *Sedar*, *Brennaman*, and *New Riegel*, *supra.* Appellant's argument is likewise at odds with the stated public policy underlying the General Assembly's codification of the statute, that is, to avoid stale litigation and to prevent the imposition of the maintenance of records or other documentation by contractors for greater than ten years. It is unreasonable to suggest that the General Assembly sought to limit the maintenance of construction records for damages to underlying real property, but require ongoing maintenance of those same records for damages to the improvements to real property. Accordingly, we find that Appellant's argument based on its strained reading of the statute of repose has no merit.

II. ACCRUAL OF CLAIMS PRIOR TO EXPIRATION OF TEN-YEAR PERIOD

{¶56} Next, Appellant argues that its claims *accrued* prior to the expiration of the statute of repose, and therefore the date this action was filed need only fall within the application statute of limitations. However, the Ohio Supreme Court plainly stated in *New Riegel, supra,* "the repose period begins to run when a specific event occurs (here, substantial completion), regardless of whether a cause of action has accrued or whether any injury has resulted." *New Riegel*, ¶ 11 (internal citations omitted).

{¶57} We reached the same conclusion on review for plain error in *Union Local School Dist., Bd. of Education v. Grae-Con Construction, Inc.*, 7th Dist. Belmont No. 17 BE 0043, 2019-Ohio-4877, 137 N.E.3d 122. In *Grae-Con*, the board of education raised the accrual argument for the first time on appeal. We opined:

> As the defendants' timely supplemental briefing points out, the appellate court need not reach an argument which was waived by failing to raise it with the trial court. See, e.g., *Wynn v. Waynesburg Rd LLC*, 7th Dist. Carroll No. 17 CA 0921, 2018-Ohio-3858, 2018 WL 4611051, ¶ 11; *Stanton v. Marc's Store*, 7th Dist. Mahoning No. 15 MA 49, 2015-Ohio-5551, 2015 WL

9595146, ¶ 35 (alternate theory not raised in opposition to summary judgment was waived), citing *Schade v. Carnegie Body Co.,* 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982) ("the fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention"). Employment of a plain error review is left to the discretion of the reviewing court. *Paulus v. Beck Energy Corp.*, 7th Dist. Monroe, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 30, citing *Risner v. ODNR*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27. The plain error doctrine in civil cases "is sharply limited to the extremely rare case involving exceptional circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 679 N.E.2d 1099 (1997). This case does not present an obvious error or circumstances that are exceptional. (This also weighs against further staying the case to wait for the Third District to rule on remand in *New Riegel* under an assumption that the case would be accepted once again by the Ohio Supreme Court, as suggested by the school district.)

In any event, this court concludes the argument is without merit. In doing so, we adopt Justice Kennedy's opinion (joined by Justice DeWine) as it persuasively disposes of the argument; this opinion concurred that the statute of repose barred both tort and contract claims but dissented on the majority's refusal to address the contention that a construction contract claim accrues during the ten-year repose period and the statute only bars accrual after the ten-year period. *New Riegel* at ¶ 34-44 (Kennedy, J., concurring in part and dissenting in part). The opinion then addressed and rejected the contention.

Assuming arguendo the school district's cause of action accrued before the expiration of the ten-year period, we find it would still be barred as accrual is not the trigger for the statute of repose. As Justice Kennedy pointed out, the Court already recognized that the statute of repose bars causes of

action that had accrued but were not commenced prior to the end of the ten-year repose period. *Id.* at ¶ 37, citing *Oaktree Condo. Assn. Inc. v. Hallmark Bldg. Co.*, 139 Ohio St.3d 264, 2014-Ohio-1937, 11 N.E.3d 266. The argument of the school district (which the majority in *New Riegel* refused to address) would render parts of the statute of repose meaningless and inoperable, including the discovery and disability exceptions/extensions. See *New Riegel* at ¶ 39-41 (Kennedy, J., concurring in part and dissenting in part), citing R.C. 2305.131(A)(2) (those who discover the condition during the last two years of the ten-year repose period have two years from the discovery to commence their suit) and R.C. 2305.131(A)(3) (if the cause of action "accrues during the ten-year period" and the plaintiff cannot commence an action during that period due to a disability, then the plaintiff may commence the civil action within two years from the removal of that disability). See also *Board of Edn. of Tuslaw Local School Dist. v. CT Taylor Co. Inc*., 5th Dist. Stark, 2019-Ohio-1731, 135 N.E.3d 1162, ¶ 22-25 (rejecting the argument that if a claim accrues within the 10-year period of repose, then a suit can be commenced after the 10-year period, subject to the 15-year contract statute of limitations).

R.C. 2305.131 prohibits an action after a set amount of time from a certain event (substantial completion), without regard to the date of accrual, and thus it is a statute of repose that eliminates the right to a cause of action after that set amount of time from the named event. See *CTS Corp. v. Waldburger*, 573 U.S. 1, 8-9, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014) ("a statute of repose is a legislative judgment that defendants should be free from liability after a determined amount of time, measured from the date of the defendant's last culpable act" which is defined in the statute). An example of language representing a statute of repose set forth in the *CTS* case was: "no cause of action shall accrue more than ten years from the last act". *Id.* at 16, 134 S.Ct. 2175, 2182. The statute of repose in R.C. 2305.131, similarly states that no cause of action shall accrue later than ten years from the date of substantial completion.

> R.C. 2305.131 is "a true statute of repose, i.e., one that bars accrued claims as well as those that have not yet vested." *New Riegel* at ¶ 43 (Kennedy, J., concurring in part and dissenting in part), citing *Antoon v. Cleveland Clinic Found*., 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 16, quoting CTS, 573 U.S. at 8-9, 134 S.Ct. 2175. The statute of repose in R.C. 2305.131 "extinguishes liability * * * after ten years from its substantial completion * * *." *New Riegel* at ¶ 44 (Kennedy, J., concurring in part and dissenting in part). The statute of repose provides a cutoff date which absolutely bars liability by placing an outer limit on the right to bring a civil action; its application does not depend on whether the cause of action has accrued as "[i]t extinguishes liability regardless" of whether the cause of action accrued or not. Id. at ¶ 43, citing CTS, 573 U.S. at 8-9, 134 S.Ct. 2175. Using this analysis, we conclude the school district's supplemental argument lacks merit.

Grae-Con at ¶ 32-36.

{¶58} Based on the foregoing case law, we find that Appellant's argument based upon the accrual of the breach of contract claims has no merit.

III. IMPAIRMENT OF CONTRACT (MKC CONTRACT ONLY)

{¶59} Next, Appellant argues the statute of repose is unconstitutional as applied to the MKC contract because the statute was enacted after the MKC contract was executed. R.C. 2305.131 is a remedial statute, that is, it applies with equal force to any case filed after its effective date.

{¶60} R.C. 2305.131(F) reads, in its entirety:

> This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action 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 notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be

> construed to apply to any civil action pending prior to the effective date of this section.

{¶61} Both Section 28, Article II of the Ohio Constitution and Section 10, Article I of the United States Constitution forbid the passage of state laws "impairing the obligation of contracts." The Ohio Supreme Court has interpreted Section 28, Article II of the Ohio Constitution by reference to United States Supreme Court precedent. See *Middletown v. Ferguson*, 25 Ohio St.3d 71, 77, 495 N.E.2d 380 (1986). However, the Contract Clause is not an absolute prohibition and does not prevent a state from exercising its police powers to promote the general welfare, even though private contracts between individuals might be adversely affected. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

{¶62} To determine whether a state law violates the Contract Clause, the first step is to determine whether the law has "operated as a substantial impairment of a contractual relationship." *Id.* at 244, 98 S.Ct. 2716, 57 L.Ed.2d 727. This analysis may be further broken down into three components: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992).

{¶63} Some considerations of contract impairment include whether the impaired term was central to the contract, whether settled expectations have been disrupted, and whether the plaintiff reasonably relied on the impaired right. *El Paso v. Simmons*, 379 U.S. 497, 514, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965). Moreover, if an industry is heavily regulated, the parties are considered to have less reasonable expectation that legislation will not alter their contractual arrangements. See *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). In *Middletown*, *supra*, the Ohio Supreme Court found two considerations pertinent in determining whether an impairment was "substantial": the extent to which reasonable expectations in the contract were "disrupted" and whether a party has relied on an obligation that is impaired by legislation, as when the legislation impairs the express terms of a contract. *Id.* at 77.

{¶64} Certain exceptions to the substantial-impairment test exist in cases where the legislative body exercises its power to protect the health and welfare of its citizens. The United States Supreme Court has held that the police power, as "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, is paramount to any rights under contracts between individuals." *Spannaus*, 438 U.S. at 241 "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " *Energy Reserves Group*, *supra*, at 410, quoting *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 434, 54 S.Ct. 231, 238, 78 L.Ed. 413 (1934).

{¶65} However, the accommodation to the police power is not absolute, particularly when a state's action interferes with its own contractual obligations, as opposed to mere private contracts. The United States Supreme Court has made clear that courts are to examine the state's conduct with a higher level of scrutiny when its own contracts are impaired. *United States Trust Co.*, *supra*, at 20-21. Assuming a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 22.

{¶66} Appellant argues that the application of the statute of repose to its claim against MKC reduced the time within which it could file its breach of contract claims by one-third, that is, from fifteen years (referring to the applicable statute of limitations) to ten years. The foregoing calculation appears to be based on the fact that the defects in the roofs revealed themselves either immediately or within the first year following substantial completion of the school projects. In this case, Appellant had at least eight years to assert its claims against MKC without any impairment of those claims. Therefore, we find that the statute of repose as applied in this case did not constitute a substantial impairment of Appellant's contract with MKC.

{¶67} Even assuming that the statute of repose constitutes a substantial impairment of the design contract, we find that the adjustment of the rights of the parties to the contract was reasonable based on the public policy stated by the General Assembly

when the statute of repose was enacted. The legislative history to R.C. 2305.131 established the following public purposes the General Assembly intended to address when enacting R.C. 2305.131:

> (B) 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 2305.09 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.

2004 S 80, § 3, eff. 4-7-05.

{¶68} Accordingly, we find that Appellant's unconstitutional-as-applied argument with respect to the design contract has no merit, because there was no substantial impairment of the contract, and in the alternative, there was a reasonable public policy supporting the substantial impairment.

IV. EXCEPTIONS TO THE APPLICATION OF THE STATUTE OF REPOSE

A. FRAUD EXCEPTION

{¶69} R.C. 2305.131(C) reads in its entirety:

> Division (A)(1) of this section is not available as an affirmative defense to a defendant in a civil action described in that division if the defendant *engages in fraud* in regard to furnishing the design, planning, supervision of construction, or construction of an improvement to real property or in regard to any relevant fact or other information that pertains to the act or omission constituting the alleged basis of the bodily injury, injury to real or personal property, or wrongful death or to the defective and unsafe condition of the improvement to real property.

(Emphasis added.)

{¶70} Appellant's assertion of fraud is predicated upon its allegations that Appellees breached the contracts, then misrepresented their compliance with the contract documents in the payment requests and certifications. To establish a cause of action for fraudulent misrepresentation, a plaintiff must prove:

> (1) a representation or, where there is a duty to disclose exists, concealment of a fact,
>
> (2) Which is material to the transaction at hand,
>
> (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
>
> (4) with the intent of misleading another into relying upon it,
>
> (5) justifiable reliance upon the representation or concealment, and

(6) a resulting injury proximately caused by the reliance.

Burr v. Stark Cty. Bd. of Commrs., 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986), paragraph two of the syllabus.

{¶71} In order to demonstrate fraud by the roofing contractors, Appellant relies on documentation provided following the completion of various phases of the school projects. In the certificates, the roofing contractors warrant that the work had been completed in a manner consistent with the contract requirements. Likewise, the pay applications signed by Colaianni contained a certification, which reads the "work covered by [the] pay requests has been completed in accordance with the Contract Documents."

{¶72} In the Certificate of Contract Completion signed by MKC, MKC recommended that the Work be accepted based on MKC's representation that it had "inspected the Work included in the captioned Contract, prior to the date of this certificate, and [certified] that all Work on the Contract has been completed in accordance with the requirements of the Contract Documents." However, a representative for MKC testified at his deposition that MKC merely "observe[d]" the Work, but did not engage in a "meticulous inspection." (Pottmeyer Depo., p. 32.) Pottmeyer further testified that that MKC representatives "objected" to the term "inspected" in the certificates.

{¶73} According to the Mays Report, drywall screws intended for interior use were used to secure the roof. Mays opined that the drywall screws were not designed for exterior temperature changes and roof system movement, and are not coated for the corrosions resistance needed with fire treated plywood. Appellant writes, "Colaianni, as a seasoned contractor, knew that using drywall screws to secure a roof deck was not in compliance with the specifications but still misrepresented on the pay application certification that the work had been completed in accordance with the contract documents."

{¶74} Appellees assert procedural challenges to Appellant's fraud claims, including that Appellant's fraud claims were not asserted with particularity in the second amended complaint. Civ.R. 9(B) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In the context of pleading fraud, the word "particularity" means that the pleading must contain

allegations of fact which tend to show each and every element of a cause of action for fraud. *CitiMortgage, Inc. v. Hoge*, 196 Ohio App.3d 40, 2011-Ohio-3839, 962 N.E.2d 327, ¶ 23 (8th Dist.).

{¶75} Appellant did not allege a cause of action for fraud in its second amended complaint. Appellant likewise did not include any allegations of fraud relating to its breach of contract claims. Instead, Appellant raised the fraud exception to the contractors' assertion of the statute of repose for the first time in Appellant's opposition to MKC's motion to dismiss the second amended complaint, and the motions for summary judgment filed by Colaianni and the roofing contractors.

{¶76} Counsel for Appellant conceded at oral argument that fraud was not asserted in the second amended complaint because the pleading was filed prior to the Ohio Supreme Court's decision in *New Reigel, supra.* In other words, the complaint was filed before the Ohio Supreme Court held that the statute of repose applies to both negligence and breach of contract claims. However, after the opinion in *New Reigel* was issued, Appellant made no effort to amend the second amended complaint to include allegations of fraud to prevent Appellees from invoking the statute of repose.

{¶77} Appellant advances two arguments in support of its conclusion that the fraud exception applies to the breach of contract claims. First, Appellant contends that it had no obligation to assert a substantive fraud claim in the second amended complaint in order to prohibit Appellees from invoking the statute of repose. Second, Appellant argues that it was not obligated to include allegations of fraud within its breach of contract claims in the second amended complaint in order to prohibit Appellees from invoking the statute of repose. In other words, Appellant asserts that it need only raise allegations of fraud after Appellees invocation of the statute of repose in their respective motions to dismiss/for summary judgment.

{¶78} Appellant's arguments are predicated upon the plain language of the statute. Appellant asserts that an exception to the statute limited to causes of action based on fraud would have been included in subsection (A) of the statute, which describes the nature of claims to which the statute applies. Next, Appellant cites the reference to a "civil action" in subsection (C), rather than a "tort action." Finally, Appellant argues that a defendant who "engages in fraud" is precluded from asserting the statute of repose as an

affirmative defense, therefore allegations of fraud need only be raised after a defendant invokes the protection of the statute.

{¶79} We disagree. Subsection (A) of the statute describes the entities who may invoke the statute of repose by virtue of their responsibilities on the construction project, rather than the specific causes of action available to a plaintiff. Subsection (C) speaks specifically to a type of claim alleged; fraud, an intentional tort. We are similarly unmoved by the legislature's use of the broad term "civil action," instead of the more specific "tort action."

{¶80} The legislature clearly carved out an exception to the ten-year statute of repose for intentional acts committed by a contractor. However, it is illogical to conclude that a statute enacted to shield contractors from suit would include an exception for allegations of fraud raised for the first time in a dispositive motion. Appellant's interpretation of subsection (C) strips the contractor of the benefit of Civ. R. 9(B), as well as its ability to investigate the claim during discovery. Therefore, we find that only substantive causes of action for fraud plead with particularity render the affirmative defense of the statute of repose unavailable to a defendant.

{¶81} In the absence of any cause of action for fraud in the second amended complaint, we find that the fraud exception to the statute of repose does not apply. Our conclusion is consistent with the Eighth District's interpretation of the fraud exception in subsection (C) in *Minaya v. NVR, Inc.*, 8th Dist. Cuyahoga No. 105445, 2017-Ohio-9019, 103 N.E.3d 160. In that case, a building contractor successfully invoked the statute in a motion to dismiss two claims asserted by residential homeowners, one for fraudulent concealment and the other for negligence.

{¶82} The fraudulent concealment claim was dismissed by the Eighth District because the homeowners failed to assert their fraud claim with particularity in violation of Civ. R. 9(B). The Eighth District opined that the homeowners did not allege any false statements made by the contractor or allege any failure by the contractor to disclose any material fact. The Eighth District further opined the homeowners could not establish fraud based solely on egregious defects concealed by the construction, which revealed themselves over time.

{¶83} Like the plaintiffs in *Minaya, supra*, Appellant also relies on the egregiousness of its breach of contract claims to demonstrate fraudulent intent. In dismissing the fraudulent concealment claim in *Minaya*, supra, the Eighth District opined, "[t]he many defects alleged in the house may have been mere coincidence or gross ineptitude. One cannot infer intent to commit fraud based solely on the assertion that the errors allegedly committed were so numerous as to be intentional." *Id.* at ¶ 15.

{¶84} With respect to the Minayas' negligence claim, the Eighth District held that a tort claim that does not allege fraud will not foreclose a defendant from asserting the application of the statute as an affirmative defense. In dismissing the negligence claim pursuant to Civ. R. 12(B)(6), the Eighth District opined:

> With respect to Count 2, we agree that this claim is barred by the statute of repose *because it does not make any allegation of fraud* that would take it outside the statute of repose. Count 2 alleges that "Defendant Ryan Homes owed plaintiffs a duty to exercise due care and caution and to build and develop the subject property in a prudent and workmanlike manner." Complaint at ¶ 84. The Minayas alleged that Ryan Homes breached this duty by building the house in a "negligent and unworkmanlike manner" that allowed the house to become environmentally contaminated. Complaint at ¶ 86–87.
>
> The allegations in Count 2 are simple negligence claims of a kind that are specifically encompassed by the statute of repose. In fact, the Minayas appear to concede implicitly that Count 2 is subject to the statute of repose because their brief in opposition to Ryan Homes' motion to dismiss does not address this count at all. Given the plain reading of the complaint and the Minayas' failure to make any argument against dismissal, we concluded that the court did not err by dismissing Count 2 as being subject to the statute of repose.

(Emphasis added) *Minaya* at ¶ 8-9.

{¶85} Finally, general statements of contract compliance are commonplace in the construction industry. Appellees correctly argue that Appellant's reliance on boilerplate statements to establish fraud, found in payment requests and MKC's certification, would effectively foreclose every contractor from invoking the statute of repose. In other words, Appellant's argument, if adopted here, would convert every breach of construction contract claim into a fraud claim.

{¶86} Accordingly, we find the fraud exception to the application of the statute of repose does not apply in the absence of a substantive cause of action for fraud, plead with particularity pursuant to Civ.R. 9(B). We further find that the breach of contract claims alleged in the second amended complaint are the type of claims specifically encompassed by the statute of repose.

B. EXPRESS WARRANTY EXCEPTION (OHIO SCHOOL DESIGN MANUAL)

{¶87} A second exception to the invocation of the statute of repose by a building contractor exists where the building contractor provides an express warranty that exceeds ten years. R.C. 2305.131(D) reads in its entirety:

> Division (A)(1) of this section does not prohibit the commencement of a civil action for damages against a person who has *expressly warranted or guaranteed an improvement to real property* for a period longer than the period described in division (A)(1) of this section and whose warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real or personal property, or wrongful death in accordance with the terms of that warranty or guarantee.

(Emphasis added.)

{¶88} In order to establish a breach of express warranty, a plaintiff must show: (1) a warranty existed; (2) the product failed to perform as warranted; (3) plaintiff provided the defendant with reasonable notice of the defect; and (4) plaintiff suffered injury as a result of the defect. *Bd. of Education of Tuslaw Local School Dist. v. CT Taylor Co., Inc.*, 5th Dist. Stark No. 2018CA00099, 2019-Ohio-1731, 135 N.E.3d 1162, ¶ 29.

{¶89} In order to establish that MKC provided an express warranty for the construction of the school projects, Appellant cites section A.2 of Chapter 8 of the OSDM, captioned "Systems and Materials", which reads in its entirety:

> School building structures and exterior enclosures shall be designed and constructed of materials which will perform satisfactorily for 40 years, with only minor maintenance and repairs, and for 100 years before major repairs or replacement of primary structural or exterior enclosure elements is required.

{¶90} A complete copy of the OSDM is not in the record. Appellant acknowledges in the second amended complaint, however, that the OSDM is voluminous. Nonetheless, Appellant contends that the document in its entirety was incorporated by reference in the design contract.

{¶91} Ohio contract law recognizes the doctrine of incorporation by reference. When a document is incorporated into a contract by reference, that document becomes part of the contract. *Smith v. Collectors Triangle, Ltd*., 7th Dist. Harrison No. 19 HA 0010, 2020-Ohio-6965, ¶ 16, citing *Volovetz v. Tremco Barrier Solutions, Inc.*, 10th Dist. Franklin No. 15AP-1056, 2016-Ohio-7707, ¶ 26. However, mere reference to a document is insufficient to incorporate it. *Volovetz* at ¶ 27. Rather, the contract language must clearly demonstrate that the parties intended to incorporate all or part of the referenced document. *Id.* In other words:

> the language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material begin [sic] incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract * * *.

Capital Real Estate Partners, LLC v. Nelson, 12th Dist. Warren No. CA2018-08-085, 2019-Ohio-2381, ¶ 15, quoting *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed.Cir.2008) (distinguishing instances where the parties merely acknowledge referenced material is relevant to the contract). Whether a contract has

incorporated another document by reference presents a question of law for a court to determine. *Id.*

{¶92} Here, the alleged incorporation by reference in the design contract reads in relevant part, "[MKC] shall endeavor to ensure that the plans, specifications and materials proposed for use in the [school projects] comply with the standards established by the [OSDM]." The foregoing statement does not constitute an integration of every provision of the OSDM into the design contract. The term "endeavor" speaks to an effort or a goal, rather than a promise or a result. Therefore, the design contract does not clearly communicate that the purpose of the reference to the OSDM is to incorporate the referenced material into the contract. Accordingly, we find that the OSDM was not incorporated by reference into the design contract.

{¶93} In order to establish that Colaianni, R.A.M.E., and Saup-Hartley provided an express warranty for the roofing construction, Appellant cites Section 07311 of the specifications, captioned "Fiberglass Shingles." Paragraph 1.5, captioned "Guarantee," which reads in its entirety:

> Provide manufacturer's 40 year transferable warranty with the first five years non-prorated and the remaining time prorated, and a 40 year guarantee for all roofing products installed under this Section.

{¶94} The foregoing guarantee addresses the manufacturer's warranty on roofing products. Appellant does not contend that the materials and products used in the school construction were defective, but instead that the contractors installed the wrong products. To the extent that the guarantee speaks solely to the contractors stepping into the shoes of the manufacturer in the event of a defect in the roofing materials, we find that it does provide a guarantee that the contractors used contractually-compliant roofing materials.

{¶95} Finally, Colaianni cites Section 11.3.1. of the standard conditions, captioned "Guarantee and Warranty," for the proposition that the only express warranty provided by Colaianni had a duration of one year:

> 11.3.1 The Contractor shall provide a Guarantee to the School District Board that all Work is in conformity with the Contract Documents and free

> from defects in workmanship, materials and equipment for a period of one (1) year or such longer period as specified in the Contract Documents. The Bond shall remain in effect until the expiration of that period unless the Contractor shall provide a maintenance bond satisfactory to the School Board District in form and substance.
>
> > 11.3.1.1 The Guarantee time period shall commence on the date of the approval of the certificate of Contract Completion by the School District Board, unless otherwise provided in writing.

{¶96} Appellant argues that the foregoing one-year guarantee cited by Colaianni clearly states that it may be extended "as specified in the contract documents." However, Appellant has failed to identify an extended warranty on defects from workmanship in the contract documents.

{¶97} For the foregoing reasons, we conclude that Colaianni, R.A.M.E., and Saup-Hartley provided no express warranty on the construction of the school projects. As a consequence, the trial court did not err in concluding that the statute of repose applied to Appellant's breach of contract and warranty claims.

{¶98} In summary, we find that Appellant's statutory construction arguments are at odds with Ohio courts' historical interpretation of the statute as well as the legislature's stated public policy when it was enacted. We further find that Appellant has failed to demonstrate a substantial impairment of the design contract. Next, we find that Appellant has failed to assert a cause of action for fraud with particularity, and in the alternative that Appellant has not demonstrated the commission of an intentional tort separate and distinct from the breach of contracts claims. Finally, we find that Appellant cannot rely on the OSDM to establish an express warranty by MKC, and no express warranty for workmanship by the contractors can be found in the contract documents. Accordingly, the first assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANT ON ITS SECOND AMENDED COMPLAINT IN

CASE NO. 19CV132 AND IN FAVOR OF OHIO FARMERS INSURANCE COMPANY, AS SURETY FOR COLAIANNI CONSTRUCTION, INC., AND CINCINNATI INSURANCE COMPANY, AS SURETY FOR R.A.M.E., INC., AS SET FORTH IN THE JUDGMENT JOURNAL ENTRY, DATED JUNE 23, 2022; AND OHIO FARMERS INSURANCE COMPANY, AS SURETY FOR COLAIANNI CONSTRUCTION, INC. AND OHIO FARMERS INSURANCE COMPANY, AS SURETY FOR THE HARTLEY COMPANY D/B/A/ SAUP/HARTLEY, AS SET FORTH IN THE JUDGMENT JOURNAL ENTRY, DATED JUNE 23, 2022; BY FINDING THAT APPELLANT'S SURETY BOND CLAIMS WERE BARRED BY JUDGMENTS IN FAVOR OF THE CONSTRACTORS TO WHOM THE BONDS WERE RELATED.

{¶99} In the second assignment of error, Appellant argues that the sureties are liable for damages resulting from the alleged defective construction regardless of the liability of the contractors. In other words, Appellant asserts that it may recover damages from the sureties despite the fact that the statute of repose forecloses recovery from the contractors.

{¶100} Generally speaking, a surety's liability "is dependent upon, and can be no greater than, that of the principal." *State v. Herbert*, 49 Ohio St.2d 88, 358 N.E.2d 1090 (1976). As a consequence, "a surety can assert the defenses of its principal," and further whatever "amounts to a good defense to the original liability of the principal, is a good defense for the sureties when sued upon the collateral undertaking." *Holben v. Interstate Freight Sys.*, 31 Ohio St.3d 152, 509 N.E.2d 938 (1987).

{¶101} The Tenth District Court of Appeals has held that the surety's liability is derived from that of the principal and therefore the surety may plead defenses available to the principal. *Cain v. Panitch*, 10th Dist. Franklin No. 16AP-758, 2018-Ohio-1595, 2018 WL 1953116. Citing *Cain*, the Fifth District Court of Appeals held in *CT Taylor Co., Inc.*, *supra*, that a surety of a building contract is entitled to assert, on its own behalf, any non-personal defense available to its principal, including the statute of repose. *Id.* at ¶ 33.

{¶102} Insofar as the breach of contract claims against the contractors are procedurally barred, we find that the derivative claims against the sureties are likewise barred. Accordingly, we find the second assignment of error has no merit.

CONCLUSION

{¶103} For the foregoing reasons, the entry of summary judgment in favor of Appellees and against Appellant on Appellant's breach of contract and warranty claims is affirmed.

Robb, J., concurs.

Hanni, J., dissents without dissenting opinion.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.