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Ohio Supreme Court Holds that Statute of Repose Covers Contract Actions in Certain Instances

On July 17, 2019, the Ohio Supreme Court declined to apply existing precedent in its interpretation of Ohio's construction statute of repose. *New Riegel Local School District Board of Education v. Buehrer Group Architecture & Engineering, Inc., et al.*, Slip Opinion No. 2019-Ohio-2851. The Court explained that R.C. 2305.131 was enacted as a construction statute of repose in response to the expansion of the common-law liability of architects and builders to third-parties with whom they lacked privity of contract ("Almost every state, including Ohio, enacted this type of statute, recognizing that architects and builders were exposed to liability for an indefinite time due to the longevity of buildings" [citation omitted]). Historically, the statute of repose only applied to tort claims. In *New Riegel*, the Court analyzed whether the statute of repose applied to contract actions as well as tort actions and whether *stare decisis* should be applied where the legislature had repealed and replaced the prior version of the statute. The decision focused on the earlier case of *Kocisko v. Charles Shutrump & Sons Co.*, 21 Ohio St. 3d 98 (1986), in which the Court held that the statute of repose did not cover claims arising from contract.

After *Kocisko* was decided, however, the Ohio legislature repealed and replaced the statute of repose. During the relevant period of time examined by *New Riegel*, the former statute of limitations for contract claims had been fifteen years but the statute of repose was only "ten years from the date of substantial completion" Ohio's current statute of repose states that:

... no cause of action to recover damages for bodily injury, an injury to real or personal property, 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 ten years from the date of substantial completion of such improvement.

Ohio Rev. Code § 2305.131 (2004). In *New Riegel*, a claim was brought under contract law more than ten but less than fifteen years after substantial completion of the improvement to real property. The Court analyzed the language of the current statute of repose and found that it contained language which was "sufficiently different" from the statute in effect at the time of *Kocisko*. *New Riegel* at ¶ 22. Therefore, the Court held that it was not constrained by the earlier precedent.

The Court also analyzed the language of the statute in an effort to determine if the current statute of repose applies to both contract and tort claims. In deciding that the statute of repose does indeed apply to contract actions, the Court focused on three items. First, the statute contains internal references which were general in nature, rather than pointing only to those portions of the code which applied to tort claims. *Id.* at ¶ 27. Additionally, the Court quoted language from the statute which refers to "contracts" and "agreements" which may govern the construction of an improvement. *Id.* at ¶ 28. Finally, the Court pointed out that the statute contains a specific exclusion where a party has "expressly warranted or guaranteed an improvement to real property for a period longer than' the ten-year repose period." *Id.* at ¶ 29. The Court stated that such a warranty "is a creature of contract," implying that it would not have been used unless the statute was intended to be applicable to contract actions. *Id.* (internal citations removed).

Application of this ruling appears to bar negligence or tort-based claims styled as breach of contract claims (i.e., the defendant breached the contract for building the school in a negligent manner), if brought *after* the ten-year period governed by the statute of repose, but before the applicable contract statute of limitation runs, and those contract claims otherwise meet the requirements of the repose statute. “Had the General Assembly intended the construction statute of repose to apply only to tort claims, it could have specified those statutes of limitations applicable to tort claims in the introductory phrase of R.C. 2305.131(A)(1).” *Id.* at ¶ 27.

However, not squarely before the Court was this question of whether a contract action may be commenced within the fifteen-year statute of limitations if the action accrued within the ten-year statute of repose timeline. *Id.* at ¶ 32. In other words, if the cause of action accrued within the ten-year statute of repose period, does the injured party have fifteen years from such accrual to bring a contract action or are they barred from bringing the action once the ten years from substantial completion has ended? As the Court remanded the case, we will undoubtedly see this particular question addressed in more detail going forward in new appeals brought under *New Riegel*, or similar cases.



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