

IN THE SUPREME COURT OF OHIO

NEW RIEGEL LOCAL SCHOOL DIST. BD.	)	Case Nos.: 2018-0213
OF EDN.,	)	& 2018-0189
	)	
Plaintiff-Appellee,	)	Appeal from the Seneca County Court of
	)	Common Pleas, Third Appellate District,
v.	)	Case Nos. 13-17-03 & 13-17-06
	)	
THE BUEHRER GROUP ARCHITECTURE	)	
& ENG., INC., et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

**BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF OHIO
AND ITS AFFILIATED ASSOCIATIONS AND AMICUS CURIAE OHIO CONTRACTORS
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TABLE OF CONTENTS

TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
STATEMENT OF INTEREST OF AMICUS CURIAE	1
INTRODUCTION	2
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT REGARDING PROPOSITIONS OF LAW	4
OHIO FARMERS’ PROPOSITION OF LAW NO. I Ohio’s Statute of Repose, Ohio Revised Code § 2305.131 applies to claims arising under written contracts in addition to claims sounding in tort and/or negligence.....	4
A. The Express Terms Of The Statute Of Repose Clearly Indicate That It Applies To Breach Of Contract Claims As Well As Tort Claims.	5
B. The Legislative Intent Of The Statute Of Repose Clearly Indicates That It Applies To Breach Of Contract Claims As Well As Tort Claims.	6
C. In A Well-Reasoned Opinion, The Fifth Appellate District Recently Concluded That The Statute Of Repose Applies Equally To Breach Of Contract Actions As Well As Tort Actions.....	8
D. Contractors Regularly Face Stale Breach Of Contract Claims Such As Those Asserted Here, And To Serve The Legislature’s Intent In Enacting The Statute Of Repose And The Best Interests Of The Construction Industry, The Statute Of Repose Must Preclude Such Claims.	9
1. The Delayed-Damages Rule May Permit Owners To Assert Breach Of Contract Claims Long After Substantial Completion of the Project, Notwithstanding The Shortened Statute Of Limitations.....	9
a. Contrary to New Riegel’s assertion, courts have commenced the statute of limitations upon the discovery of damages.....	10
b. If the statute of repose does not apply to breach of contract actions, there is nothing to prevent owners from arguing that their breach of contract causes of action are not complete until they suffer, or know that they have suffered, an injury as a result of some alleged design or construction defect.	13
c. The finality intended by the statute of repose is vital to the construction industry.	14
2. If The Statute Of Repose Does Not Apply To Breach Of Contract Claims To Preclude Stale Claims As The Legislature Intended, The Results Become Absurd.	15

3.	The Statute Of Repose Must Preclude Stale Breach Of Contract Claims Because Certain Public Owners Frequently Escape Application Of The Statute Of Limitations; Allowing Them To Assert Stale Claims <i>Indefinitely</i> .	18
4.	The Statute Of Repose Would Preclude Stale Claims By The State Because Nullum Tempus Does Not Apply To The Statute Of Repose.	19
5.	The Application Of The Statute Of Repose To Preclude Stale Breach Of Contract Claims Does Not Present A Hardship To Owners Because The Statute Includes A Two Year Saving Provision.	21
6.	Ohio's Economic Loss Doctrine Does Not Permit An Owner To Pursue Tort Claims But Instead Mandates Breach Of Contract Causes Of Action.	22
	OHIO FARMERS' PROPOSITION OF LAW NO. II This Court is not required to apply <i>stare decisis</i> in cases where the prior statute under which the case was decided has been held unconstitutional by the Supreme Court of Ohio and replaced by the legislature.	23
	CONCLUSION	23
	CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Cases

<i>Brennaman v. R.M.I. Co.</i> , 70 Ohio St. 3d 460, 1994-Ohio-322, 639 N.E.2d 425, amended, 71 Ohio St. 3d 1211, 643 N.E.2d 138 (1994)	15, 16, 17
<i>Chandler v. Schriml</i> , 10th Dist. Franklin No. 99AP-1006, 2000 WL 675123, at *3 (May 25, 2000)	13
<i>Children’s Hospital v. Dept. of Republic Welfare</i> , 69 Ohio St.2d 523, 526, 433 N.E.2d 187, 190 (1982).....	11, 12
<i>Cincinnati Indemn. Co. v. Martin</i> , 85 Ohio St.3d 604, 608, 1999-Ohio-322, 710 N.E.2d 677, 680	5
<i>Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.</i> , 106 Ohio St. 3d 412, 2005-Ohio-5409, 835 N.E.2d 701, ¶ 3	22
<i>Harris v. J.A. Schultz & Son, Inc.</i> , 6th Dist. Wood No. WD-86-81, 1987 WL 14229, at *4 (July 17, 1987).....	18
<i>Heddleston v. Hendricks</i> , 52 Ohio St. 460, 465, 40 N.E. 408, 409 (1895).....	18
<i>Kocisko v. Charles Shutrump & Sons Co.</i> , 21 Ohio St. 3d 98, 99, 488 N.E.2d 171, 173 (1986)..	3, 8, 12
<i>Law v. Lake Metroparks</i> , 2006-Ohio-7010, ¶ 10 (11th Dist.), aff’d, 2007-Ohio-6749, ¶ 10, 116 Ohio St.3d 322, 878 N.E.2d 1046.....	19
<i>Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.</i> , 42 Ohio App.3d 6, 8, 536 N.E.2d 411, 413 (9th Dist.1988), <i>cause dismissed</i> , 39 Ohio St.3d 710, 534 N.E.2d 94.....	10, 11, 12
<i>New Riegel Local Sch. Dist., Bd. of Educ. v. Buehrer Grp. Architecture & Eng’g, Inc.</i> , 3rd Dist. Seneca Nos. 13-17-03, 13-17-06, 2017-Ohio-8521, ¶ 11	2, 3
<i>Oaktree Condo. Assn., Inc. v. Hallmark Bldg. Co.</i> , 139 Ohio St. 3d 264, 2014-Ohio-1937, 11 N.E.3d 266	16, 17
<i>Ohio Dep’t of Human Serv. v. Eastman</i> , 145 Ohio App. 3d 369, 372–73, 763 N.E.2d 193, 196 (2001).....	18
<i>State by & through Wray v. Karl R. Rohrer Assocs., Inc.</i> , 5th Dist. Tuscarawas No. 2017AP030008, 2018-Ohio-65.....	8, 18, 19, 20
<i>State ex rel. Clay v. Cuyahoga Cty. Med. Examiner’s Office</i> , 152 Ohio St. 3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 15	5
<i>State v. Berry</i> , 8 Ohio App. 2d 72, 220 N.E.2d 671 (4th Dist. 1966).....	18
<i>State, ex rel. Local Union 377, v. Youngstown</i> , 50 Ohio St.2d 200, 364 N.E.2d 18 (1977).....	12
<i>Thomas v. Freeman</i> , 79 Ohio St.3d 221, 224-225, 680 N.E.2d 997 (1997).....	5

<i>Velotta v. Leo Petronzio Landscaping, Inc.</i> , 69 Ohio St.2d 376, 433 N.E.2d 147 (1982).....	16
<i>Zink v. Harp</i> , 12th Dist. Warren No. CA90-12-089, 1991 WL 214982 (Oct. 21, 1991).....	12

Statutes

Ohio Revised Code. Ann. 2305.131(A)(1) (West) at Section Notes (B)(1)-(5)	7
R.C. 2305.07	12
R.C. 2305.09	8
R.C. 2305.131	passim
R.C. 2305.131(A)(1)	3, 5
R.C. 2305.131(A)(2)	21
R.C. 2305.131(C) and (D).....	5
R.C. 2305.131(F)	5
R.C. 2305.131(G).....	5
R.C. 2307.011(J).....	5

Other Authorities

66 Ohio Jur. 3d Limitations and Laches § 57	13
http://ofcc.ohio.gov/Portals/0/Documents/Resources/Publications/Annual%20Reports/OFCC_FY_2017_Final_111517.pdf at p.4	20
https://www.dot.state.oh.us/policy/Documents/ODOT2017-AnnualReport.pdf at page 5	20

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Associated General Contractors of Ohio and its affiliated associations – Allied Construction Industries (Cincinnati AGC); Associated General Contractors of Ohio, Akron; Builders Association of Eastern Ohio & Western Pennsylvania (AGC Youngstown); Central Ohio AGC; Associated General Contractors, Cleveland; Associated General Contractors of Northwest Ohio (Toledo AGC); West Central Ohio, AGC (Dayton AGC) (collectively, “AGC”) – collectively represent over 2,500 general contractors, specialty contractors, material suppliers and others involved in the commercial and industrial construction industry. The contractors build and renovate schools, office and medical complexes, wastewater treatment plants, manufacturing facilities, and many other types of vertical structures; they employ over 200,000 workers in Ohio’s construction industry. AGC advocates on legislative and regulatory issues impacting builders, represents contractors in labor matters, provides training and guidance on construction topics, as well as performs a variety of other services geared towards the commercial and industrial building industry.

Amicus Curiae Ohio Contractors Association (“OCA”) represents over 500 companies that are involved in the construction of highways, streets, utilities and other public and private improvements. Its members include general contractors, subcontractors, material suppliers, and others, all of who engage in heavy and highway construction projects and related issues throughout the state of Ohio. The OCA member contractors employ approximately 119,000 workers in the heavy/highway construction trades in Ohio. OCA advocates on legislative and infrastructure issues, represents members in union labor matters, and provides training on various heavy/highway construction topics to name just a few of the many services provided to its members.

INTRODUCTION

The sole issue presented for this Court's review is one of great importance that construction contractors face regularly: whether the current version of the statute of repose in R.C. 2305.131 applies—as the legislature drafted and intended—to breach of contract actions as well as tort actions. Contractors throughout the industry, and indeed the industry as a whole, will benefit greatly from this Court's applying finality and certainty to the issue by reversing the Third Appellate District and holding that R.C. 2305.131 applies to causes of action sounding either in tort or contract. That holding is dictated by the express terms of the statute, the legislative intent, and the absurdity of the potential real world results if this Court holds otherwise.

Indeed, even in the very case before this Court, the Third Appellate District expressly recognized as follows:

A **clear reading** of the [ten-year] statute [of repose] **does not support th[e] conclusion [that the statute does not apply to contract claims.]** 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.** The **statute does not limit it to claims for torts** only.

(Emphasis added.) *New Riegel Local Sch. Dist., Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 3rd Dist. Seneca Nos. 13-17-03, 13-17-06, 2017-Ohio-8521, ¶ 11.

Here, the school district did not bring its claims alleging design and construction defects (and resulting moisture intrusion) until nearly 14 years after the contractor was hired and 13 years after the project was substantially completed and occupied by the district. *Id.* at ¶2-3. The trial court properly granted judgment against the district as to the district's breach of contract claims against Appellees (the general contractor, the general contractor's surety, the roofing

contractor, and the designer) based upon the applicable statute of repose, R.C. 2305.131, which provides, in relevant part, as follows:

Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, **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** and no cause of action for contribution or indemnity for damages sustained as a result of 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.

R.C. 2305.131(A)(1) (emphasis added).

On appeal below, the Third Appellate District noted that “[r]egardless 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*, 2017-Ohio-8521 at ¶ 11 (emphasis added). Nevertheless, the Third Appellate District reversed the trial court for the sole reason that 32 years ago, in *Kocisko v. Charles Shutrump & Sons Co.*, 21 Ohio St. 3d 98, 99, 488 N.E.2d 171, 173 (1986), this Court, interpreting a very different, prior version of the statute of repose (that was subsequently declared unconstitutional), held that the prior version *only* applied to tort claims—not breach of contract claims. The Third Appellate District erroneously believed that it was obligated to apply *stare decisis* and follow *Kocisko* despite the significant differences between the statute at issue in *Kocisko* and the current statute.

The Third Appellate District erred below, and this Court should reverse that holding and apply the statute as the legislature drafted it, which is entirely consistent with the stated

legislative intent of the current version of the statute. In doing so, this Court will bring much needed clarity and finality to construction defect claims against contractors. The very purpose of the statute is to prevent contractors from facing stale claims based upon alleged defects many years after the project is complete because the contractor has no control over maintenance, has no notice of or opportunity to cure any defects that arise, and typically does not maintain records and witnesses for longer than 10 years. Allowing the Third Appellate District's ruling in this case to stand is entirely anathema to those purposes.

Simply put, owners have ten years after a project is complete to raise allegations of construction defects. According to the legislature, it does not matter when the owner *discovers* the alleged defect or whether the owner couches its claim as a tort or breach of contract. The legislature has made a policy decision that after ten years, contractors no longer have to worry about construction defect claims. Such certainty and finality greatly benefits the industry and owners because it lowers the ultimate cost of construction; contractors do not have to pass on the cost of the risk of never-ending liability, and that is exactly what the legislature intended.

STATEMENT OF THE CASE AND FACTS

For a complete recitation of the facts and procedural history of the issues before this Court, AGC and OCA direct the Court to the Statement of the Case and Facts sections of Appellants' Briefs, which are incorporated herein as if fully rewritten.

ARGUMENT REGARDING PROPOSITIONS OF LAW

OHIO FARMERS' PROPOSITION OF LAW NO. I Ohio's Statute of Repose, Ohio Revised Code § 2305.131 applies to claims arising under written contracts in addition to claims sounding in tort and/or negligence.¹

¹ For simplicity, AGC and OCA quote from Ohio Farmers' Propositions of Law; however, each of the Appellants and amicus curiae writing in support of Appellants include essentially the same two Propositions of Law.

A. The Express Terms Of The Statute Of Repose Clearly Indicate That It Applies To Breach Of Contract Claims As Well As Tort Claims.

AGC and OCA incorporate Appellants' arguments that the express terms of the statute of repose clearly indicate that it applies to claims sounding in contract as well as tort as if fully rewritten herein, including the following:

- The statute's language: "no cause of action ... shall accrue" (R.C. 2305.131(A)(1)) is clear and unambiguous, and in the absence of ambiguity, courts must apply the words as written without any statutory construction. *See, e.g., State ex rel. Clay v. Cuyahoga Cty. Med. Examiner's Office*, 152 Ohio St. 3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 15, reconsideration denied, 2018-Ohio-723, 92 N.E.3d 881, ¶ 15.
- The statute expressly states that it applies to "**any** civil action commenced on or after the effective date[.]" and "any civil action" includes breach of contract actions. (Emphasis added.) *See*, R.C. 2305.131(F).
- The statute is "remedial," and courts must construe remedial legislation liberally to give effect to its legislative purpose. *See* R.C. 2305.131(F); *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 608, 1999-Ohio-322, 710 N.E.2d 677, 680 (Citations omitted).
- The statute includes three exemptions (for fraud, express warranty, and express guaranty claims – *see*, R.C. 2305.131(C) and (D)), and a statute that specifies one exception to a general rule is assumed to exclude all other exceptions. *See e.g., Thomas v. Freeman*, 79 Ohio St.3d 221, 224-225, 680 N.E.2d 997 (1997). The legislature clearly knew how to exempt breach of contract claims if it wanted to; it simply chose not to.
- The defined term "tort action" (*see* R.C. 2307.011(J)) is used nearly one hundred times in the same Senate Bill in which this statute of repose was enacted (S.B. 80); however, the term is not mentioned in R.C. 2305.131. The legislature clearly could have limited the application of R.C. 2305.131 to tort actions if it wished, it simply chose not to.
- The legislature used "substantial completion" of the improvement "in accordance with the **contract or agreement**" as the trigger for the start of the 10 year period, clearly indicating that the statute of repose applies to claims sounding in contract as well as tort. (Emphasis added.) *See* R.C. 2305.131(A)(1); 2305.131(G).

R.C. 2305.131 is not ambiguous, and pursuant to the express language selected by the legislature, it applies to actions sounding both in tort and contract.

B. The Legislative Intent Of The Statute Of Repose Clearly Indicates That It Applies To Breach Of Contract Claims As Well As Tort Claims.

The legislature described its purpose in enacting the current version of R.C. 2305.131, intended to strike balance between the rights of claimants and contractors, as follows:

(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.

(Emphasis added.) Ohio Revised Code. Ann. 2305.131(A)(1) (West) at Section Notes (B)(1)-(5).

Essentially, a hard stop of potential claims 10 years after completion is needed because many things happen after a construction project is completed that the contractors have no control over.

Each and every one of those stated purposes applies equally to breach of contract actions as well as tort actions. Whether the owner asserts a breach of contract claim or a tort claim, the contractors still lack control or an opportunity to maintain the improvement after completion. They have no right to notice of, or the opportunity to evaluate and overcome, outside forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement. The availability of evidence and documentation is problematic whether the claims against the contractor sound in tort or in contract.

Indeed, allowing breach of contract claims to escape application of the statute of repose destroys the very purpose stated in Note (B)(4)—*i.e.*, the burden to maintain records for longer than 10 years. If only tort claims are precluded by the statute of repose, then contractors must maintain records indefinitely because they face the possibility of breach of contract claims, even though a tort claim cannot be asserted more than 10 years after project completion. The contractor cannot pick and choose what documents to dispose of because some are relevant to tort claims while others are relevant to breach of contract claims. If either claim *could be*

asserted, the contractor *must* maintain **all** of its records. Thus, if the statute of repose does not apply to breach of contract claims, the very purpose of the statute is belied.

The legislature clearly intended the statute of repose to apply to **any** civil action, including those sounding in tort and contract. Any other result is a direct contradiction of the legislature's expressly stated intent.

C. In A Well-Reasoned Opinion, The Fifth Appellate District Recently Concluded That The Statute Of Repose Applies Equally To Breach Of Contract Actions As Well As Tort Actions.

In *State by & through Wray v. Karl R. Rohrer Assocs., Inc.*, 5th Dist. Tuscarawas No. 2017AP030008, 2018-Ohio-65, **13 years after** a project was completed, the state ownership entities filed an action against the project's designer for negligence, breach of contract, and declaratory judgment. *Id.* at ¶4. The trial court denied the designer's statute of limitations defense, and the case proceeded to trial. *Id.* at ¶5. Prior to trial, the ownership entities dismissed their negligence and declaratory judgment claims, and the case proceeded solely upon the breach of contract claim. *Id.* at ¶6.

On appeal, the Fifth Appellate District rejected the application of *Kocisko* to the current statute and, based upon the legislative purpose of the current statute, held that the statute applied to both breach of contract and tort claims as follows:

We find the stated concerns underlying enactment of the statute apply to actions brought against design professionals for injury to person or property caused by a defective or unsafe improvement to real property, whether such action sounds in tort or contract.

In addition, the **legislative history** quoted above reflects an **intent to promote a greater interest than** the "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." The inclusion of other statutes of limitations beyond R.C. 2305.09 (certain torts) and R.C. 2305.10 (products

liability) **implies the statute applies to non-tort actions** which allege the type of injury set forth in the statute.

It matters not whether the action is brought in tort or contract, if the resultant damages are injury to property of the type set forth in R.C. 2305.131, the statute applies.

(Emphasis added.) *Id.* at ¶¶28-30.

AGC and OCA urge this Court to apply that same reasoning and hold that the statute of repose, by its express terms and pursuant to its legislative history and purpose, applies equally to breach of contract actions as well as tort actions.

D. Contractors Regularly Face Stale Breach Of Contract Claims Such As Those Asserted Here, And To Serve The Legislature’s Intent In Enacting The Statute Of Repose And The Best Interests Of The Construction Industry, The Statute Of Repose Must Preclude Such Claims.

Let there be no confusion, this case is of great importance to the construction industry because the particular set of facts presented here (*i.e.* an owner asserting breach of contract claims against a contractor more than a decade after substantial completion of the project) occurs regularly in the industry, notwithstanding the reduction of the statute of limitations from 15 years to 8 years. New Riegel contends that “[c]laims like New Riegel’s are not subject to the discovery rule; the statute of limitations provides an absolute limit[,]” and because the statute of limitations is now 8 years, the 10 year statute of repose can never be invoked for breach of contract claims because the statute of limitations would run first. (New Riegel Jurisdictional Brief at 5.) However, that ignores prior case law and the realities of the construction industry, particularly public construction.

1. The Delayed-Damages Rule May Permit Owners To Assert Breach Of Contract Claims Long After Substantial Completion of the Project, Notwithstanding The Shortened Statute Of Limitations.

Project owners certainly do not hesitate to argue that the statute of limitations does not bar their stale claims when there is a perceived problem long after substantial completion and they seek to hold the contractors responsible. Indeed, New Riegel acknowledges the very justification such owners use in raising such claims: “[a] cause of action for breach of contract accrues [1] when the breach occurs **or [2] when the complaining party suffers actual damages.**” (New Riegel Jurisdictional Brief at 6) (Citations omitted.) Project owners frequently argue that they do not suffer actual damages until the perceived defect in construction manifests itself, even if that does not occur until more than a decade after substantial completion.

a. Contrary to New Riegel’s assertion, courts have commenced the statute of limitations upon the discovery of damages.

In *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.*, 42 Ohio App.3d 6, 8, 536 N.E.2d 411, 413 (9th Dist.1988), *cause dismissed*, 39 Ohio St.3d 710, 534 N.E.2d 94, Midwest entered into an oral contract with Firestone, pursuant to which Midwest would provide the required technical data and samples for a Value Engineering Change Proposal (“VECP”), Firestone would test, process and submit the VECP to the government, and if selected by the government, all profits would be shared equally. *Id.* at 412-13.

By May 1979, Midwest had completed its contract performance by providing all of the necessary back-up material to Firestone. *Id.* at 413. Midwest believed that Firestone would submit the proposal and complete its performance within a few weeks. *Id.* On March 4, 1980, a government engineer notified Midwest that Firestone had not submitted a VECP. *Id.* Firestone did not submit the VECP until March 11, 1980. *Id.* On May 1, 1980, the government accepted an alternative proposal from a government employee, and on February 23, 1981, the government rejected the Firestone VECP. *Id.* On March 7, 1986, **7 years after** Midwest’s performance,

Midwest filed a breach of contract claim against Firestone, and the jury ultimately awarded Midwest \$402,000 in damages. *Id.*

On appeal, Firestone argued that Midwest's claims were barred by the (then applicable) six year statute of limitations for an oral contract. *Id.* "Firestone argued that the cause of action accrued at the time of the breach, which it contends was November 20, 1979, when a government employee submitted a VECF before Firestone did." *Id.* Midwest argued that the cause of action did not accrue until some actual damages were suffered, which was on March 11, 1980, the date Firestone submitted its proposal, almost five months after the government employee submitted his VECF proposal. *Id.*

The court first recognized that "[o]rdinarily, a cause of action does not accrue **until actual damage occurs**; when one's conduct becomes presently injurious, the statute of limitations begins to run." (Emphasis added.) *Id.* at 414 quoting *Children's Hospital v. Dept. of Republic Welfare*, 69 Ohio St.2d 523, 526, 433 N.E.2d 187, 190 (1982). The appellate court ultimately rejected Firestone's statute of limitations defense as follows:

The record reflects that even though the government employee's proposal was submitted on November 20, 1979, the plaintiff was not even aware of this fact until March 4, 1980. [Midwest's president] did not know whether or not [the government employee's] proposal would be accepted, and Firestone worked quickly to submit the proposal on March 11, 1980. **Up to this point, no actual damages had occurred.** On May 1, 1980, the government accepted [the government employee's] proposal, and it was not until February 23, 1981, that the government rejected Firestone's VECF. Looking at the evidence, it is clear that there is no genuine issue of material fact to be determined which would affect the statute-of-limitations defense. The **earliest that actual damages accrued was on May 1, 1980, when the government accepted another proposal.** While the parties may entertain a discussion as to the date of the actual breach, or even the date of the accrual of the action, which could be later than May 1, 1980, there exists no genuine issue of a fact that is material to the question of the statute of limitations. The plaintiff's claim was timely filed. ***

(Emphasis added.) *Id.* at 414-15. Thus, Midwest was able to assert a breach of contract claim more than six years after its own contract performance, when New Riegel now contends the statute of limitations would have precluded its claim. In other words, the reduction of the statute of limitations does not render the issue before this Court moot as New Riegel contends. The issue is certainly capable of repetition based upon this so-called delayed-damages rule.

Similarly, in *Zink v. Harp*, 12th Dist. Warren No. CA90-12-089, 1991 WL 214982 (Oct. 21, 1991), the parties entered into an oral contract in March 1976, pursuant to which Harp agreed to remove underground storage tanks from Zink’s property. *Id.* at *1. Both parties believed that Harp completed the work at that time; however, in January 1990, nearly **14 years later**, Zink discovered that an underground storage tank still remained on the property. *Id.* Zink filed a breach of oral contract complaint against Harp in August 1990—more than **14 years after** substantial completion of the work. *Id.*

The major question was when the cause of action accrued. The appellate court first noted that other “[c]ourts interpreting R.C. 2305.07 have stated that a cause of action does not accrue until actual damage occurs.” *Id.* at *3 citing *State, ex rel. Local Union 377, v. Youngstown*, 50 Ohio St.2d 200, 364 N.E.2d 18 (1977); *Midwest Specialties, supra*, at 8-9. The court then applied the “delayed damages” rule from *Midwest Specialties* such that “while the breach may have actually occurred in 1976, Zink **was not able to sue** for breach of the contract **until he was aware that it was breached**, and his damages did not occur until 1990 when he was forced to pay for the removal of the tank.” *Id.* at *4.² Again, the owner was able to assert a breach of

² The *Zink* court also held that the (very different) prior version of the statute of repose did not apply to bar Zink’s claim against Harp because, under this Court’s holding in *Kocisko v. Charles Shutrump & Sons Co.*, 21 Ohio St.3d 98 (1986), that prior version of the statute only applied to tort claims. As discussed herein and in the other Appellants and amicus briefs, *Kocisko* has no application here.

contract claim after the statute of limitations would have run under New Riegel's theory of the issues before this Court. *See also, Chandler v. Schriml*, 10th Dist. Franklin No. 99AP-1006, 2000 WL 675123, at *3 (May 25, 2000), ("Construction cases often give rise to delayed damages because the plaintiffs do not suffer immediate injury as a result of the breach of duty.") (Citations omitted.); 66 Ohio Jur. 3d Limitations and Laches § 57 ("Likewise, a cause of action for breach of contract does not accrue until the complaining party suffers actual damages as a result of the alleged breach.") (Citations omitted.).

- b. If the statute of repose does not apply to breach of contract actions, there is nothing to prevent owners from arguing that their breach of contract causes of action are not complete until they suffer, or know that they have suffered, an injury as a result of some alleged design or construction defect.**

For instance, an improperly designed and/or installed roofing system may not actually experience leaks for many years after construction is completed. Further delaying things, the owner may not discover those leaks until many years after the leaks begin. Under those circumstances, the owner will argue that its cause of action did not accrue until the leaks commenced, or perhaps even as late as when the owner discovered the leaks. Under the delayed-damages rule, the statute of limitations may not begin to run until the leaks begin or the owner discovers the leaks. Regardless of how many years have passed since project completion, the owner would then have an additional eight years to assert a breach of contract claim before the statute of limitations bars such a claim. That may not be until 20 years or more after the substantial completion of the project. Such a result, which is not out of the ordinary in the industry, produces an absurd result.

Contrary to a statute of limitations dictating how long a claimant can wait to file suit after a cause of accrues, the statute of repose provides a hard stop after which no cause of action may

accrue *at all*. In particular, R.C. 2305.131 dictates that no cause of action can accrue more than 10 years after substantial completion of the project. That is true *even if* the cause of action has not yet accrued (*e.g.*, the owner has not experienced and/or has not discovered that it has experienced an injury). Simply put, whether an injury has occurred or not, if more than 10 years have passed since substantial completion, the owner cannot assert a claim. That was the legislature's express purpose in enacting R.C. 2305.131—creating a hard stop to defect claims.

c. The finality intended by the statute of repose is vital to the construction industry.

Throughout the construction industries, parties constantly assess and allocate risks and purchase insurance/surety bonds to help absorb the costs associated with those risks. There are myriad examples of cases where owners, particularly public owners, claim that they did not become aware of an alleged defect until many years after substantial completion of the project, and such owners do not hesitate to argue the applicable statute of limitations does not begin to run until they are aware of the alleged breach to avoid a statute of limitations defense. Courts are littered with such stale defect claims sounding in contract.

If the contractors and their insurers and sureties face potential liability that theoretically never ends, they will eventually adjust by developing and purchasing long term insurance options to cover such risks. However, the costs of those insurance products, whether used or not, will eventually flow down to the bid prices that contractors submit to owners, and the cost of all construction will unnecessarily rise. Such unintended consequences are precisely why the legislature enacted R.C. 2305.131: to attempt to bring a measure of predictability and certainty to an industry with more than its share of risk.

Moreover, in the absence of a bright line rule as the legislature intended (*i.e.*, potential liability ends after 10 years), each claim becomes a case-by-case analysis and determination

based upon laches and other time-based defenses. If that is the case, costs similarly rise across the board even if no claims ultimately proceed because the parties must account for the possibility that such stale claims may be allowed. That is in addition to the tremendous outlay of judicial and party resources every time such a claim is asserted because, in the absence of a bright line rule as the legislature intended, the parties simply will not know whether the claims are stale or timely until the Court tells them in each individual instance. That is not good for the parties, the industry, or the judicial system. The better solution—the one the legislature clearly intended—is that potential liability for **any** claims asserting the type of damages specified in R.C. 2305.131 is cut off 10 years after substantial completion.

2. **If The Statute Of Repose Does Not Apply To Breach Of Contract Claims To Preclude Stale Claims As The Legislature Intended, The Results Become Absurd.**

As discussed herein and throughout Appellants' briefing, the legislature enacted the statute of repose to protect contractors and designers from stale claims. Ohio courts have seen examples of how absurdly stale claims can become in the absence of such protections.

One of the most egregious examples of stale claims against contractors came in *Brennaman v. R.M.I. Co.*, 70 Ohio St. 3d 460, 1994-Ohio-322, 639 N.E.2d 425, amended, 71 Ohio St. 3d 1211, 643 N.E.2d 138 (1994). In *Brennaman*, the owner hired Bechtel to perform engineering and construction services for a titanium metal plant **in 1956**. *Id.* at 461. The project was completed and turned over to the owner **in 1958**. *Id.* In August 1986, **28 years later**, a valve began to leak. *Id.* When the owner's employees attempted to repair the valve, one was seriously injured and two were killed when a stream of sodium escaped from the system and ignited. *Id.* at 462.

In 1987, **29 years after** the project was turned over to the owner, the injured employee and the estates of the deceased employees filed suit against the contractor, the valve manufacturer, and the valve distributor. *Id.* Plaintiffs asserted claims for negligence, products liability and breach of warranty. *Id.* The trial court and court of appeals held that the (then applicable) statute of repose barred plaintiffs' claims against Bechtel. *Id.* However, this Court ultimately declared the prior version of R.C. 2305.131 unconstitutional and permitted plaintiffs' claims to proceed against Bechtel **36 years after** Bechtel turned the project over to the owner. *Id.* at 466. The mere idea of locating evidence and witnesses to litigate claims about a project almost four decades old is absurd.

Oaktree Condo. Assn., Inc. v. Hallmark Bldg. Co., 139 Ohio St. 3d 264, 2014-Ohio-1937, 11 N.E.3d 266, presented similarly stale construction claims. In *Oaktree*, construction of a seven-unit condominium development was completed in 1990. *Id.* at ¶2. In 2003, **13 years later**, one of the residents noticed a crack in his garage wall. *Id.* The condominium association did not file its complaint against the contractor until 2005, 15 years after construction was completed and subsequently dismissed and refiled its complaint in August 2007, **17 years after** the contractor completed construction. *Id.* at ¶¶3-4.

On appeal, this Court first noted that “[w]hen considering when a cause of action accrues in construction cases, we have used the delayed-damages rule. *Id.* at ¶11 citing *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 433 N.E.2d 147 (1982).³ This Court then held

³ As a relevant aside, while the ultimate issue here was not before the Court in *Oaktree*, the *Oaktree* Court noted that “By 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.” *Id.* at ¶ 8. This Court did not write that the statute applied to **tort** actions; it wrote that it applied to civil actions. “Civil actions” includes breach of contract actions. Thus, it certainly appears that as recently as 2014,

that under the delayed-damages rule, the condominium association’s cause of action did not arise until its “board was informed of the construction problems on October 31, 2003[.]” *Id.* at ¶12. The then applicable version of R.C. 2305.131 was not enacted until April 7, 2005—after the condominium association’s claim accrued—and therefore, the retroactive application of the statute to the condominium association’s claim was unconstitutional as applied to the condominium association’s claim. *Id.* (The statute of repose was not held unconstitutional on its face.). Therefore, in 2014—**24 years after** construction was complete—the condominium association’s claims were remanded and the case proceeded against the contractor. Again, litigating such stale claims presents a number of problems that the legislature intended to avoid by enacting R.C. 2305.131.

While *Brennaman* and *Oaktree* involved tort claims and the constitutionality of the statute of repose rather than contract claims, the end result is instructive here. Where the statute of repose does not preclude claims after 10 years (whether due to the unconstitutionality of the statute in *Brennaman* and *Oaktree* or because the statute does not apply to breach of contract claims as New Riegel contends here), contractors may be subject to claims **many decades after** they completed the projects at issue. In such circumstances, contractors are forced to maintain project records, maintain memories and contact with staff, subcontractors, and suppliers, and possibly maintain insurance or surety bond coverage, all for decades. That is exactly what the legislature sought to avoid by enacting R.C. 2305.131, and the only way for this Court to avoid those absurd, unintended results is to reverse the Third Appellate District and hold that the statute of repose applies to breach of contract claims as well as tort claims.

this Court believed that the application of the prior version of R.C. 2305.131 was not limited to tort claims.

3. **The Statute Of Repose Must Preclude Stale Breach Of Contract Claims Because Certain Public Owners Frequently Escape Application Of The Statute Of Limitations; Allowing Them To Assert Stale Claims Indefinitely.**

New Riegel contends that the current 8 year statute of limitations for written contract claims renders this entire case academic because, in the future, the statute of limitations will have run before the statute of repose can ever bar a contract claim. That argument also ignores the fact that many public owners employ the doctrine of *nullum tempus occurrit regi* (“time does not run against the king”) to avoid the statute of limitations altogether.

“Based on the doctrine of *nullum tempus*, the state of Ohio is not subject to general requirements of statutes of limitations unless the statute in question has specifically included the government.” *Rohrer, supra*, 2018-Ohio-65, ¶ 35, citing *State, Dep’t of Transp. v. Sullivan*, 38 Ohio St.3d 137, 139, 527 N.E.2d 798, 799 (1988). “The rule is justified on the basis the same active vigilance cannot be expected of the State as characterizes a private person in protecting his or her own rights.” *Id.* citing *Sullivan*, 38 Ohio St.3d at 139; *Heddleston v. Hendricks*, 52 Ohio St. 460, 465, 40 N.E. 408, 409 (1895).

Courts have routinely refused to apply general statutes of limitations against the state. *See, e.g., State, Dep’t of Transp. v. Sullivan*, 38 Ohio St. 3d 137, 140, 527 N.E.2d 798, 801 (1988) (exempting the state from the generally worded negligence statute of limitations); *Ohio Dep’t of Human Serv. v. Eastman*, 145 Ohio App. 3d 369, 372–73, 763 N.E.2d 193, 196 (2001) (exempting the state from the time limits to assert claims against a decedent’s estate); *State v. Berry*, 8 Ohio App. 2d 72, 220 N.E.2d 671 (4th Dist. 1966) (exempting the state from time limits to enforce judgments); *Harris v. J.A. Schultz & Son, Inc.*, 6th Dist. Wood No. WD-86-81, 1987 WL 14229, at *4 (July 17, 1987) (exempting state claims for underpayment of prevailing wages from the statute of limitations); *Law v. Lake Metroparks*, 2006-Ohio-7010, ¶ 10 (11th Dist.),

aff'd, 2007-Ohio-6749, ¶ 10, 116 Ohio St.3d 322, 878 N.E.2d 1046 (citations omitted) (exempting state owned property from adverse possession or prescription claims).

If the statute of repose does not bar stale construction defect claims by those state owners, as Appellants and AGC and OCA strongly urge that it does, those public owners will be able to assert breach of contract claims against contractors indefinitely because the statute of limitations will not bar such claims. Avoiding such stale claims is exactly what the legislature intended when it enacted the statute of repose.

4. The Statute Of Repose Would Preclude Stale Claims By The State Because Nullum Tempus Does Not Apply To The Statute Of Repose.

While courts have routinely refused to apply the general statutes of limitation against the state, the same is not true of the statute of repose. As the Fifth Appellate District recently decided, the doctrine of nullum tempus has no application to the statute of repose. *Rohrer, supra*, 2018-Ohio-65, ¶ 43. Specifically, the Fifth Appellate District held as follows:

Because the statute of repose prevents a cause of action from accruing, application of the doctrine to the statute of repose would not stop time from running against the king, but rather would give the king a cause of action where otherwise one would not exist.

Further, the language of the statute specifically states it applies notwithstanding common law to the contrary:

(F) 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. R.C. 2305.131(F) (emphasis added).

The language of the statute itself suggests the doctrine of *nullum tempus*, a “prior rule of law of this state,” shall not prevent application of the statute.

(Emphasis added.) *Rohrer*, 2018-Ohio-65 at ¶¶39, 41-42. Thus, the Fifth Appellate District held that the statute of repose applied to the state’s breach of contract claim and that the statute of repose applied against the state notwithstanding the doctrine of *nullum tempus*. *Id.*

Therefore, the purpose of the statute of repose (*i.e.*, preventing stale claims, regardless of whether asserted by a private or state party) can be achieved via application of the statute of repose to breach of contract claims, even where *nullum tempus* would prevent the application of the statute of limitations.

If this Court does not apply the statute of repose to breach of contract claims as *Rohrer* did, then the state will be free to assert such claims against designers and contractors *indefinitely*. The statute of limitations would have no application against the state under *nullum tempus*. In other words, the state of Ohio can assert claims against the contractors involved in those projects even **many decades** after the projects are complete.⁴ That is exactly what the legislature sought to avoid by enacting the statute of repose.

The construction industry desperately needs the limiting effect of the statute of repose to avoid litigating stale claims decades after projects are complete, when the contractors involved have had no role in maintenance or upkeep during that time, nor have they had the opportunity to evaluate and overcome outside forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement, and when the availability of evidence and documentation is

⁴ This is not an inconsequential issue in the construction industry. For 2017, the Ohio Department of Transportation’s construction program for that year totaled \$2 billion. <https://www.dot.state.oh.us/policy/Documents/ODOT2017-AnnualReport.pdf> at page 5. Also in 2017, the Ohio Facilities Construction Commission managed \$1.3 billion in construction costs for construction projects undertaken by state agencies, higher education institutions, and K-12 schools. http://ofcc.ohio.gov/Portals/0/Documents/Resources/Publications/Annual%20Reports/OFCC_FY2017_Final_111517.pdf at p.4. That \$3.3 billion in state construction does not even include construction by the state universities.

problematic because it would be unduly burdensome to maintain records for more than 10 years after project completion. Those concerns apply to state projects just as they apply to private projects.

5. **The Application Of The Statute Of Repose To Preclude Stale Breach Of Contract Claims Does Not Present A Hardship To Owners Because The Statute Includes A Two Year Saving Provision.**

Owners will surely argue that the 10 year statute of repose period works a hardship on them because it is possible that they will not have enough time to bring claims against the responsible party once they discover an issue.⁵ The legislature directly addressed that very concern. R.C. 2305.131(A)(2) provides as follows:

(2) Notwithstanding an 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.

(Emphasis added.)

Thus, in the unlikely event that an owner discovers an alleged defect 9 years and 364 days after substantial completion, that owner does not have to assert its claims the next day. The statute expressly provides the owner with an **additional two years** to investigate and assert claims, if necessary, against the appropriate party.

Indeed, the statute itself, and particularly the savings provision of the statute, will serve as an impetus for owners to remain vigilant about maintaining and investigating their buildings.

⁵ Ohio's eight year statute of limitations for breach of written contract actions already provides significant time for owners to present claims compared to other states. seven states and the District of Columbia have a 3 year statute of limitations for such claims; three states have a 4 year statute of limitations; seven states have a 5 year statute of limitations; twenty two states have a 6 year statute of limitations; two states have an eight year statute of limitations; and nine states have a 10 year statute of limitations.

If the statute of repose applies to breach of contract and tort claims, then finality is promoted because the owner knows that it must investigate any and all potential issues or claims as the 10 year post-construction deadline approaches. If the statute of repose only applies to tort claims, then owners can wait an undefined period to investigate and assert a breach of contract claim to avoid being time-barred. That is not the purpose of the statute of repose, and it does not serve the construction industry, which only seeks finality and certainty. If potential liability remains open for decades, contractors must maintain documents and records as well as insurance and surety coverage, eventually raising the prices of all projects.

6. Ohio's Economic Loss Doctrine Does Not Permit An Owner To Pursue Tort Claims But Instead Mandates Breach Of Contract Causes Of Action.

In reality, the vast majority of construction defect claims that an owner can assert will be breach of contract claims because of this Court's prior holdings with respect to the economic loss doctrine. Specifically, this Court has held that an owner that incurs economic damages may only assert a breach of contract claim against the party with which it is in privity and may not pursue a tort claim against the responsible subcontractor. *See e.g., Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 2005-Ohio-5409, 835 N.E.2d 701, ¶ 3. Thus, for example, even where an owner knows that the roofing subcontractor caused the damages, the real world effect of the economic loss doctrine is that the owner is limited to asserting claims only against the party with which it has a contract, the general contractor, and then the general contractor that has a contract with the roofing subcontractor must bring the roofing subcontractor into the case. In other words, the vast majority of construction defect cases in Ohio will be breach of contract cases—not tort cases. Thus, for the statute of repose to have any real effect in the industry, it must apply to both breach of contract cases as well as tort cases.

The better approach, urged by Appellants and amici, is that everyone involved knows that any and all potential liability for issues related to the project terminates 10 years after the completion of the project (subject to the two year savings provision). When that is the case, it is in everyone's best interest for the owner, who is in control of the project once it is complete, to stay vigilant about maintenance and giving timely notice as soon as it discovers any potential issue. That also serves everyone involved because issues are discovered earlier, when the issue may be addressed more simply and less expensively than decades later when the defect has caused significant damage throughout the improvement and documents and witnesses have long since disappeared. Thus, the statute of repose should apply to claims sounding in contract as well as in tort.

OHIO FARMERS' PROPOSITION OF LAW NO. II This Court is not required to apply *stare decisis* in cases where the prior statute under which the case was decided has been held unconstitutional by the Supreme Court of Ohio and replaced by the legislature.

AGC and OCA incorporate Appellants' arguments in support of Proposition of Law No. II as if fully rewritten herein.

CONCLUSION

For all the foregoing reasons, and those described more fully in Appellants' and other amici briefs in support of Appellants, AGC and OCA respectfully request that this Court reverse the Third Appellate District and hold that the statute of repose, R.C. 2305.131, applies to claims sounding both in tort and in contract, as the legislature intended and pursuant to the express terms the legislature used.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae Ohio Insurance Institute was served via e-mail pursuant to S.Ct.Prac.R. 3.11(B)(1) this 13th day of July, 2018 to:

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