IN THE SUPREME COURT OF OHIO

NEW RIEGEL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION Plaintiff-Appellee, v. THE BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC., et al. Defendants-Appellants	Consolidated Case Nos.: 2018-0189 and 2018-0213 Appeal from Seneca County Court of Common Pleas, Third Appellate District, Case Nos. 13-17-03 & 13-17-06

MERIT BRIEF OF AMICUS CURIAE, THE OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE, NEW RIEGEL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION

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IDENTIFICATION OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Ohio Association for Justice ("OAJ") is a statewide association of lawyers whose mission is to preserve Constitutional rights and to protect access to the civil justice system for all Ohioans. OAJ is devoted to strengthening the civil justice system to ensure that deserving parties receive justice and wrongdoers are held accountable.

If this Court were to accept the propositions of law that are presented by the Appellants in this case, it would create the great likelihood that a significant group of innocent property owners would be left with no recourse against breaching construction workers, engineers and designers who admittedly violated the terms of their construction contracts. Historically, aggrieved property owners would proceed for recovery under their contracts. If the propositions of law posed in this matter were accepted, however, the statute of repose, which is intended to prevent the accrual of certain tort claims, could bar actions for breach of contracts for the construction of improvements to the owners' real property. This would create an inequity absolving breaching parties from any liability solely because they dealt with construction while all other professionals would continue be held accountable for their breaches of contracts.

The propositions of law advanced by Appellants are overly broad and cannot be accepted without regard to the specific facts of each case in which the issues may arise. The statutory interpretation suggested by Appellants in regard to the first proposition of law, "Ohio's Statute of Repose, R.C. 2305.131, applies to actions sounding both in contract and in tort," invites this Court to discard one of the "guiding principle[s] of statutory interpretation * * * that the statute must be construed as a whole and each of its parts must be given effect so that they are compatible with each other and related enactments." *Dillon v. Farmers Ins. of Columbus, Inc.*, 145 Ohio St.3d 133, 2015-Ohio-5407, 47 N.E.3d 794 at ¶ 17, quoting *State v. Everette*, 129 Ohio St.3d 317, 2011-Ohio-

2856, 951 N.E.2d 1018, ¶ 25. Appellants seek a declaration from this Court that would disregard important statutory language found in R.C. 2305.131, which describes the specific causes of action that are subject to that statute of repose. Appellants' citations would, in effect, declare that every claim for breach of a contract, regardless of whether it is brought for the causes of action listed in the statute, and regardless of whether it would otherwise be a viable claim timely filed under R.C. 2305.06 (setting the limitations period applicable to written contracts), would be extinguished merely because it dealt with a construction contract. Adopting this proposition of law, without qualification, would be an impermissible judicial expansion of the clearly expressed legislative intent upon the enactment of the statute.

Similarly, the Appellants erroneously argue in their second proposition of law that, "A Court is not Required to Apply *Stare Decisis* When the Prior Version of the Statute Being Applied has been Held Unconstitutional by the Supreme Court of Ohio." Appellants seek the generalized determination of a question that must, by its very nature, be reviewed on an individualized basis in each case to interpret a statute that has since been invalidated. *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948, 800 N.E.2d 420, ¶ 23. Although in 2005, R.C. 2305.131 was amended after having been declared to be unconstitutional in *Kocisko v. Charles Shutrump & Sons Co.,* 21 Ohio St.3d 98, 488 N.E.2d 171 (1986), the description of the causes of action to which the current and former versions of the statute apply are not merely substantially similar. They *are identical.*

Thus, regardless of the substantial differences between the earlier version of R.C. 2305.131 and the version in effect today, *Kocisko* accurately interprets identical language describing the types of claims that were subject to both statutes. Courts should look to the language in *Kocisko* to determine which causes of action being asserted in any current case are barred by R.C. 2305.131

and which are not. Those actions which do not allege an "injury" to person or property arising out of a defective and unsafe improvement to real property, but rather seek recovery for damages which flow from a breach of a construction contract, should not be barred. *Kocisko*, 21 Ohio St.3d at 99, 488 N.E.2d 171. As with the first proposition of law, the second proposition of law cannot be adopted as a general principle, but must depend on the unique facts of each case.

STATEMENT OF FACTS

OAJ expresses no opinion on how any factual disputes should be resolved in this action.

ARGUMENT IN OPPOSITION TO THE PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. 1: OHIO'S STATUTE OF REPOSE, R.C. 2305.131, APPLIES TO ACTIONS SOUNDING BOTH IN CONTRACT AND TORT.

Appellants spend much time and effort attempting to create confusion and to obfuscate what should be and what should have been a relatively simple exercise in statutory interpretation. Of particular note is the fact that there are several words and phrases contained in R.C. 2305.131 that Appellants and their amici never mention, or which they simply gloss over. These, however, cannot be ignored, as they are of extreme importance to give full meaning to the statute as a whole.

A. Interpretation of a Statute

Where a statute's meaning is clear and unambiguous, the statute must be applied as written. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 20. Further construction is required only when a statute is unclear and ambiguous. *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 10, citing *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶ 16. If " 'statutory language is plain and unambiguous, and conveys a clear and definite meaning, [this Court] must rely on what the General Assembly has said.' " *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 23, quoting *Jones v. Action Coupling & Equip.*, 98 Ohio St.3d 330,

2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12. "[T]here is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

Even if it were accepted that there is an ambiguity, and there *is no* ambiguity, when construing an ambiguous statute, a court must give effect to the intent of the legislature. *Family Medicine Found., Inc. v. Bright*, 96 Ohio St.3d 183, 2001-Ohio-4034, 772 N.E.2d 1177, ¶ 9. In determining what was meant, the court " 'must first look to the statutory language and the purpose to be accomplished.' " *Hulsmeyer*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903 at ¶ 21, quoting *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 12. No intent may be imputed to the legislature, other than such as is supported by the actual language of the law itself. Courts may not speculate, apart from the actual words of the statute, as to some probable legislative intent. *Wachendorf v. Shaver*, 149 Ohio St. 231, 236, 78 N.E.2d 370 (1948).

"A guiding principle of statutory interpretation is that the statute must be construed as a whole and each of its parts must be given effect so that they are compatible with each other and related enactments." *Dillon*, 145 Ohio St.3d 133, 2015-Ohio-5407, 47 N.E.3d 794 at ¶ 17, quoting *State v. Everette*, 129 Ohio St.3d 317, 2011-Ohio-2856, 951 N.E.2d 1018, ¶ 25. Further, the Court " 'may not restrict, constrict, qualify, narrow, enlarge, or abridge the General Assembly's wording.' " *Id.*, quoting *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18. " '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*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448 at ¶ 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). This Court must give effect to the words used, refraining from inserting or deleting words. *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19; *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 53-54, 524 N.E.2d 441 (1988).

Under Ohio law, the "words and phrases [in the statute] shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. It is only in the case of "some apparent uncertainty of meaning, some apparent ambiguity of terms, [or] some apparent conflict of provision" that a court has the right to interpret a statute." *Kroff v. Amrhein*, 94 Ohio St. 282, 285, 114 N.E. 267 (1916). "In the absence of a definition of a word or phrase used in a statute, the words are to be given their common, ordinary, and accepted meaning." *In re Foreclosure of Liens for Delinquent Land Taxes v. Parcels of Land Encumbered with Delinquent Tax Liens*, 140 Ohio St.3d 346, 2014-Ohio-3656, 18 N.E.3d 1151, ¶ 12, citing *Wachendorf*, 149 Ohio St. 231, 78 N.E.2d 370, at paragraph five of the syllabus.

B. The Plain Meaning of the Language Used in R.C. 2305.131.

The current version of R.C. 2305.131(A) which went into effect on April 7, 2005 states:

> 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 <u>and</u> 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. (Emphasis added).

Appellants suggested that this Court should determine that the foregoing Statute of Repose would apply to *all causes of action in tort and contract*, if the cause of action wherever application

is sought, arises out of the construction of an improvement to real property. This, however, was not the intent of the drafters when the statute is read in its entirety. To merely adopt this broad interpretation of R.C. 2305.131, as appellants would have this Court do, would necessitate a strained interpretation of the meaning of certain important words used in the statute, and totally disregard other phrases describing the types of claims the statute was intended to cover. This is impermissible.

i. Types of Claims

This repose statute is unambiguous. It requires no further interpretation. We need only to review the language used in the statute itself. Appellants, however, in order to support their strained reading of some intent for the statute, focus on the phrase "no cause of action" and ask this court to totally disregard the rest of the sentence. But, R.C. 2305.131 clearly states that "no cause of action **to recover damages for bodily injury, an injury to real or personal property, or wrongful death**" will "accrue against 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." There can be no legitimate disagreement that the causes of action listed in the statute are for bodily injury, injury to real or personal property or wrongful death.

Appellants have not, and cannot, assert that a claim for bodily injury or wrongful death is a breach of contract action. They also do not reasonably discuss how a cause of action to recover damages for injury to real or personal property could be considered a breach of contract action. What they confusingly focus on, instead, are causes of action by which an injured party sought to recover damages for defective improvements to the real property because of negligent performance of the contract. Although such a type of claim might involve a construction contract, it is still a

claim that sounds in negligence, not contract. Appellants simply state that, if a construction contract is performed, the cause of action must be a breach of contract action. This is not correct.

Bodily injury and injury to real or personal property are codified as torts. Specifically, R.C. 2305.09(D) requires that claims predicated on damage to real property "be brought within four years after the cause thereof accrued." In *Harris v. Liston*, 86 Ohio St.3d 203, 714 N.E.2d 377 (1999), the claim was that the contractor had *negligently designed* a water management system for a subdivision which negligence caused damage to a home due to standing water. This Court held that the four year statute of limitations of R.C. 2305.09(D) applied, because it was a tort action for damages to real property. *Id.* at 207. It is also uncontroverted that R.C. 2305.09(D) applies to a professional negligence claim and the cause of action accrues when the negligent act is committed, not when it is discovered. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶ 1. A claim that the performance of professional services was not completed with the care and skill ordinarily exercised under similar circumstances by members of the profession is properly construed as professional negligence claim subject to the four-year statute of limitations in R.C. 2305.09(D). *Scott Hutchison Ents., Inc. v. Rhodes, Inc.*, S.D.Ohio No. C-1-01-776, 2005 U.S. Dist. LEXIS 42992 (Aug. 18, 2005). Finally, R.C. 2305.10 addresses bodily injury claims and claims for injury to personal property. These are all listed as torts, for which the statute of repose would apply.

Appellants' assertion that all causes of action arising from improvements to real property must arise in contract because the design and construction of improvements to real property are matters that are uniformly contractual in nature, defies the rational reading of R.C. 2305.131's plain language. Although many improvements to real property are designed, planned, constructed or supervised by professionals who enter into contracts with the owners of the real property, the

existence of a contract is not a mandatory, nor is it a necessary requirement under R.C. 2305.131. There is no reason to read this requirement into the statute for the statute to make sense and have meaning. It is entirely possible for an owner to possess a "tort" claim against someone who designed or constructed an improvement to the owner's real property, with or without a contract. On the other hand, *only* when there is a contractual agreement can an owner bring a claim for breach of contract against the other party, if the construction project was not completed in accordance with the explicit terms of the contract. Such a breach of contract claim could not be for bodily injury, damage to real or personal property, or wrongful death. Appellants are incorrect when they assert that the types of claims that are bared by the construction statute of repose could include breach of contract claims. The fact that a contract existed cannot turn a tort claim into a breach of contract claim. It would also violate stare decisis principles. This the courts should not do.

To accept Appellants' first proposition of law as valid, it will be necessary to disregard that language in the statute that states that the claim must be one for "bodily injury, an injury to real or personal property, or wrongful death." This the courts may not do.

In addition to the clear expression of legislative intent found in the description of the causes of action used in the language of the statute itself, the General Assembly also provided a specific statement of intent adopted in the same Senate Bill in which the Statute was passed. This statement of intent included a declaration that the statute of repose did not "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 the improvement causes an injury to real or personal property, bodily injury, or wrongful death."** (Emphasis added.) 2004 SB 80 § 3, eff. 4-7-05.

By such statement it is made clear that the General Assembly did not contemplate causes of action for breach of contract filed by the property owner against the contractor or designer. Instead, the General Assembly stated their intent that, although third parties would be prohibited from filing their claims for their damages against those who provided services for the improvement, they *would not be barred* from asserting claims against the property owner or others in control of the property.

Another rationale provided for the enactment of R.C. 2305.131 was "to protect architects and builders when the demise of the privity of contract doctrine broadly extended their potential liability **to third parties**." (Emphasis added.) *Kocisko*, 21 Ohio St.3d at 101, 488 N.E.2d 171 (Wright, J., dissenting). *See also Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d 193, 195-97, 551 N.E.2d 938 (1990). Though third parties are often affected by a contract, *only the contracting parties* (those in privity of contract) and intended beneficiaries may enforce a contract. *Norfolk & W. Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir. 1980).

Although the majority opinion in *Kocisko* held a prior version of R.C. 2305.131 applied to tort actions only, the dissenting justice further stated, "I find unpersuasive the argument that the legislature would have passed such legislation intending it to apply only to tort claims but not to contract claims that allege *the same type of injury*." (Emphasis sic.) *Kocisko*, 21 Ohio St.3d at 101, 488 N.E.2d 171 (Wright, J., dissenting). Thus, even a dissenting justice paid heed to the descriptions of the types of actions that must be brought before the statute could be applied.

ii. Causation of Damages

Under R.C. 2305.131 the injury for which the damages are sought must arise out of the "defective **and** unsafe" condition of an improvement to real property. The use of the word "and" is important. The improvement to real property must be both defective **and** unsafe, and these

attributes of the improvement must **cause** bodily injury or death, or the defective and unsafe condition must be the cause of the injury to personal or real property. The plain meaning of the words used in the statute do not include damages sought for breach of contract when that contract breach simply created a defective or unsafe condition of the improvement itself.

Furthermore, to boldly assert that **all** claims arising from a construction project must be asserted within ten years of substantial completion of the project, when the contract for that project is governed by a 15 year statute of limitations[1], would render the phrase "defective and unsafe" meaningless. For example, assume that a property owner sought to recover for a breach of contract claim against a contractor after discovering that the contractor had not installed insulation in the walls of an addition to his home as required in the construction contract. By accepting Appellants' first proposition of law, this Court would prevent the aggrieved homeowner from enforcing his contractual rights. This interpretation could prevent or foreclose a breach of contract claim against an engineer who had contracted to obtain certain licenses or permits for the construction, if he did not. In neither of these examples would the injury arise out of a defective and unsafe condition of the improvement to the real property. The injury arises out of the failure of one party to a contract to perform in accordance with the terms of the contract. These examples would be true breach of contract claims that should not be barred by the statute of repose simply because the claims to be made arise in the context of a construction project for an improvement to real property.

iii. Accrual of Causes of Action

R.C. 2305.131 prevents a cause of action from **accruing** "against a person who performed services for the improvement to real property or a person who furnished the design, planning,

[1] Although RC 2305.06 has imposed only an 8-year statute of limitations upon written contract claims since 2012, many contracts will still be governed by the 15-year statute of limitations imposed by the former version.

supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement." This cause of action accrues, if at all, at the time the "defective and unsafe condition of the improvement to real property" causes the "bodily injury, an injury to real or personal property, or wrongful death." Pursuant to these parameters, it is possible for a defective and unsafe condition of an improvement to real property to cause these injuries listed more than 10 years after the substantial completion of the improvement. If more than ten years has elapsed, the statute states that the cause of action does not accrue and no claim can be filed by the injured party against the person or persons providing the services for the construction of that improvement to real property.

In contrast, a cause of action for breach of contract accrues at the time the breach occurs. The presence of a defect in the design or construction of a structure causes immediate damage as a reduction of the structure's economic value, whereas an injured third-party occupant has no damage to discover until she or he is physically injured by the defect. *Sedar*, 49 Ohio St.3d at 198, 551 N.E.2d 938. Accordingly, the ten-year period described in R.C. 2305.131 has no application to a breach of contract claim that has already accrued. The statute of limitations in R.C. 2305.06 governs the time during which a property owner may sue on the written contract, alleging that the person or persons providing the services for the construction of the improvement to real property which was contracted for, did breach the terms of that contract.

C. Damages Available In Tort and Contract

It is a given principle that, in pleading a cause of action, the essence of the cause of action that is alleged controls the elements of the claim that need to be proven; and the time frame in which it must be commenced. The label given to the complaint's cause of action by a plaintiff does *not necessarily* govern. Simply because there is a contract between two parties does not mean

that every action filed must be for a breach of contract. In Appellants' briefs, they use such terms as "professional malpractice," "negligent maintenance," "negligent construction," and "negligent performance" to describe causes of action that are what Appellants allege to be contractual in nature. Yet such nomenclature really describes a tort no matter how the claims are labeled.

II. PROPOSITION OF LAW NO. 2: A COURT IS NOT REQUIRED TO APPLY *STARE DECISIS* WHEN THE PRIOR VERSION OF THE STATUTE BEING APPLIED HAS BEEN HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF OHIO.

A. Application of *Kocisko* to the Statutory Interpretation of R.C. 2305.131.

There is no dispute that this Court in *Kocisko* was presented with a question of whether the former 15 year statute of limitations under R.C. 2305.06 applied to an action for breach of contract, or whether the 10 year limitations period under former R.C. 2305.131 barred the claim. The *Kocisko* court held that the version of R.C. 2305.131 in effect at that time applied to tort, not contract actions.

The former version of R.C. 2305.131 which is analyzed in *Kocisko* has been declared unconstitutional; and as well it was subsequently amended. This Court in *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 639 N.E.2d 425 (1994), found that the former version of R.C. 2305.131 was unconstitutional because it violated the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution. There are significant differences in these two versions of R.C. 2305.131. Accordingly, many of the references by the Kocisko court to the language contained in the former version of the statute do not apply to the present statute. That, however, does *not* mean that *Kocisko,* in its entirety, *is simply bad law.* Any case still constitutes a binding precedent for those points of law that were not overruled. "To be covered by the blanket of *stare decisis*, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated." *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-

1029, 927 N.E.2d 1092, ¶ 37; see also *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 5, 539 N.E.2d 103 (1989).

Both versions of R.C. 2305.131 state that the statute applies to causes of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death. Furthermore, both versions of the statute state that these actions must arise out of a defective and unsafe condition of an improvement to real property. These identical words and phrases were defined by this Court in *Kocisko* without any contextual reference to any other part of the version of R.C. 2305.131 which was in effect at that time; and which are the same words and phrases as those found in the current version. As this Court stated in *Kocisko*:

> The language selected by the General Assembly is uniformly used to describe tortious conduct. For example, the statute's use of the terms "defective" *and* "unsafe" to describe the improvements at issue distinguish the actions contemplated within the statute from warranty or other contractual claims. (Emphasis sic.)

Kocisko, 21 Ohio St.3d at 99, 488 N.E.2d 171. Furthermore, once words have acquired a settled meaning, that same meaning will be applied to a subsequent statute on a similar or analogous subject. R.C. 1.42; *Goehring v. Dillard*, 145 Ohio St. 41, 46-47, 60 N.E.2d 704 (1945).

The legislature did not need to use the phrase "tort action" when enacting the amended statute because the words that the legislature used defined what causes of action are included—a "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", i.e., a tort action. This is consistent with the definition of a "tort action" that was reaffirmed contemporaneous with the enactment of R.C. 2305.131. R.C. 2307.011(J) defines a "tort action" as:

> A civil action for **damages for injury, death, or loss to person or property.** (Emphasis added.)

The *Kocisko* Court found that the action was not time barred because "[n]o 'injury' to person or property arising out of a defective and unsafe improvement to real property is alleged; rather, plaintiff seeks recovery for damages which flow from defendants' installation of a leaky roof in breach of their various contracts." *Id*, 21 Ohio St.3d at 99, 488 N.E.2d 171. The proper interpretation of the meaning of the words describing the causes of action to which the statute applies has not changed despite the other changes made by the legislature in the statute itself. When the legislature enacted the current version of R.C. 2305.131, it used the exact same words found in the previous version to describe what causes of action it affected. The established meaning of these specific terms should not change even in light of the fact that other elements of the statute differ.

B. There is no Conflict Between the Decisions from the Third and Fifth District Courts of Appeal.

Appellants point to the decision of *State v. Karl R. Rohrer Assocs., Inc.*, 5th Dist. Tuscarawas No. 2017AP030008, 2018-Ohio-65, and the decision from the Third District in this case, *New Riegel Local School Dist. Bd. of Edn. v. Bucherer Group Architecture & Eng., Inc.*, 3rd Dist. Seneca Nos. 13-17-03, 13-17-06, 2017-Ohio-8521, as examples of a conflict between the appellate courts. However, these cases are not a conflict between appellate districts. Rather they are examples of internal inconsistencies regarding the language used in these individual opinions concerning the interpretation of R.C. 2305.131 itself.

The *Rohrer* court did hold that R.C. 2305.131 applied to both contract and tort claims, yet it based its holding on a finding that "the instant action is an action for damages to property caused by defective design to an improvement to real property." *Id.*, 2018-Ohio-65 at ¶ 34. It was noted that the trial court directed a verdict on the plaintiff's breach of contract claim because "[based]

upon the evidence presented by Plaintiffs' expert, the claims for damage were proximately caused by inadequate design, regarding the standard of care for engineering." *Id.* at ¶ 7. Therefore, the *Rohrer* trial court found that "the evidence presented in support of the breach of contract sounds in tort, and that the Plaintiffs failed to present any evidence that the Defendant breached the contract." *Id*. The appellate decision, that the trial court did not err by entering a directed verdict, dismissing the breach of contract action that was filed more that 10 years after substantial completion of the project, merely recognized that R.C. 2305.131 applied to this action regardless of whether the plaintiff pled the action as a tort or a breach of contract. *Rohrer* states that "the statute applies to non-tort actions *which allege the type of injury set forth in the statute*." *Id.* at ¶ 29. "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 ¶ 30. This holding is consistent with those of appellate courts in other districts.

In the *New Riegel* appellate decision below, the Third District did find that the judgment on the pleadings issued in the trial court was inappropriate because the plaintiff premised its claims as breach of the terms in the contract. *New Riegel*, 2017-Ohio-8521 at ¶ 12. Although the Third District's reading of R.C. 2305.131 did not allege support to the conclusion that the statute of repose applied only to tort claims, the appellate court clearly recognized that the causes of action to be extinguished must still be of the nature of those identified and described in the statute. The Court stated:

> This court does not make any determination as to whether or not this case actually is based upon a breach of contract. The only issue before this court is whether viewing the pleadings in a light most favorable to the plaintiff, a viable cause of action could exist. Since it is arguable that this is a breach of contract case, the granting of judgment on the pleadings was not appropriate.

New Riegel, 2017-Ohio-8521 at ¶ 12, fn. 2.

The Second District Court of Appeals agrees. In *McClure v. Alexander*, 2d Dist. Greene No. 2007 CA 98, 2008-Ohio-1313, that Court in upholding the constitutionality of the current version of R.C. 2305.131, observed:

> We note that R.C. 2305.131 does not in every instance necessarily deprive a plaintiff of a right to a remedy; prior to the expiration of the 15 year statute of limitations, an action on the contract may be available for an owner against an architect or builder with whom he contracted. R.C. 2305.06.

Id. at ¶ 49.

CONCLUSION

All parties who, prior to 2012, entered into written contracts are subject to the fifteen-year statute of limitations found in R.C. 2305.06. Contracts entered into after that date have a limitations period of 8 years in which an action alleging breach of those contracts may be filed. Appellants and their Amici now seek to carve out an exception to these statutes of limitation for contractors, engineers and other design professionals simply because their contracts are specifically to provide services for the construction of improvements to real property. They justify this request by selectively reading R.C. 2305.131, the ten-year statute of repose for certain premises liability actions, a statute that has also been captioned in the Ohio Revised Code as the "Statute of repose for claims based on unsafe conditions of real property."

A standard, garden-variety breach of contract action, which alleged that a contractor provided improvements to real property, but who did not perform in accordance with the terms of the contract, and thus deprived the owner of the property of the benefit of his bargain, is a contract claim and is not the type of claim contemplated in Ohio's statute of repose. This Court should not read R.C. 2305.131 so broadly as to include within its reach, as the legislature might, every cause of action that could possibly be brought against any participant in the construction industry,

regardless of the subject matter of the wrong asserted in that cause of action. R.C. 2305.131 prevents certain, clearly defined causes of action from accruing more than 10 years after the substantial completion of an improvement to real property, the unsafe condition of which is the cause of the injury for which damages are sought.

OAJ urges this Honorable Court to rule that R.C. 2305.131, by its clear and plain meaning, applies to tort actions of the type described in the statute itself, not to actions for breach of contract. To hold otherwise would enable those in the construction industry to avoid the contractual obligations which they undertook when they executed their contracts.

This Court should also rule that the *stare decisis* impact of a precedential decision of this Court may not be disregarded by a lower court on the sole basis that a statute that was reviewed in that opinion has later been ruled unconstitutional. Cases that address many points of law should not be arbitrarily invalidated in their entirety simply because they are no longer considered good law for one of the subjects included or discussed.

This Court should not adopt either proposition of law offered by the Appellants. The holding of the Third District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The forgoing **Merit Brief of Amicus Curiae the Ohio Association for Justice, in Support of Plaintiff-Appellee New Riegel Local School District Board of Education** was sent via e-mail pursuant to S.Ct.Prac.R. 3.11(C) on this 13th day of August, 2018 to:

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