Supreme Court of Ohio Clerk of Court - Filed February 25, 2020 - Case No. 2020-0152

IN THE SUPREME COURT OF OHIO

Northern Frozen Foods Inc., dba Northern Haserot,	)	CASE NO. 2020-0152
Plaintiff-Appellee/ Cross-Appellant,	)	
v.	)	On Appeal from the Cuyahoga County Court of Appeals Case Nos. CA-19-108269 and CA-19-108466
Ross C. Farro, et al.,	)	
Defendants-Appellants/ Cross-Appellees.	)	

APPELLEE/CROSS-APPELLANT NORTHERN FROZEN FOODS INC.'S COMBINED MEMORANDUM IN RESPONSE TO APPELLANTS/CROSS-APPELLEES' MEMORANDUM AND IN SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL

Clair E. Dickinson (0018198)
Kyle A. Shelton (0092083)
Brouse McDowell LPA
388 South Main Street, Suite 500
Akron, Ohio 44311
Phone: (330) 535-5711
Fax: (330) 253-8601
cdickinson@brouse.com
kshelton@brouse.com

Donald A. Mausar (0065328)
Roy J. Schechter (0034689)
Weltman Weinberg & Reis Co. LPA
323 Lakeside Place, Suite 200
Cleveland, Ohio 44113
Phone: (216) 685-1062
Fax: (216) 363-4033
dmausar@weltman.com
rschechter@weltman.com
Attorneys for Plaintiff

John R. Climaco (0011456)
Scott D. Simpkins (0066775)
Climaco Wilcox Peca
& Garofoli Co., L.P.A.
55 Public Square, Suite 1950
Cleveland, Ohio 44113
Phone: (216) 621-8484
Fax: (216) 771-1632
sdsimp@climacolaw.com

Michael L. Climaco (0011454)
16340 Handies Way
Broomfield, Colorado 80023
Phone: (216) 402-2202
michaelclimaco@gmail.com

Attorneys for Defendants

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DEFENDANTS' PROPOSED PROPOSITIONS OF LAW DO NOT PRESENT ISSUES OF PUBLIC OR GREAT GENERAL INTEREST.

The defendants have asked this Court to exercise jurisdiction in this case to consider the Eighth District Court of Appeal's uncontroversial holding that equitable estoppel can prevent application of the statute of limitations in breach of contract cases based on sales of goods. They have suggested two propositions of law, neither of which raises issues of sufficient public importance or interest to justify this Court's review.

By their first proposition, defendants have argued that the Eighth District's decision conflicts with an unreported decision of the First District Court of Appeals. The First District's decision is distinguishable from the decision in this case, is inconsistent with the general law of Ohio, and was not based on sound public policy. Defendants have already asked the Eighth District to certify a conflict with the First District's decision, that court will determine whether the two decisions conflict, and this Court need not exercise discretionary jurisdiction over their first proposition. By their second proposition, the defendants have conflated the doctrine of equitable estoppel with fraud, even though the principles are separate and distinct. This Court should not exercise jurisdiction over their attempt to materially change Ohio law.

NORTHERN HASEROT'S PROPOSED PROPOSITION OF LAW DOES PRESENT ISSUES OF PUBLIC OR GREAT GENERAL INTEREST.

By its proposition of law, Northern Haserot asks this Court to exercise jurisdiction in order to hold that the statutory and common law doctrine of partial payment determines when a cause of action for breach of contract based on a sale of goods accrues for purposes of the statute of limitations found in Section 1302.98 of the Ohio Revised Code. Ohio law has long recognized that a debtor's acknowledgement of a debt or payment on that debt resets the statute of limitations for a breach of contract claim, causing the limitations period to run from the date of the acknowledgement or payment. This doctrine has been codified by the General Assembly in Section 2305.08 of the Ohio Revised Code.

Nonetheless, both the trial courts and the appellate court held in this case that the doctrine does not apply to the statute of limitations set forth in Section 1302.98. This holding ignores more than a century of Ohio public policy regarding the limitations period for contract claims. It also contradicts several other public policy concerns of this state, including the right of parties to freely enter into, extend, or modify their contractual agreements and the policy of encouraging parties to resolve their disputes without court intervention. Indeed, under the rule adopted by the Eighth District, plaintiffs will have no incentive to resolve cases before filing suit, but must immediately sue for breach of contract in order to protect their rights. This proposition thus presents an issue of public or great

general interest, and this Court should accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

Northern Haserot supplies food and other products to restaurants. The defendants operate seven TGI Fridays restaurants in Northeast Ohio. In 1995, Northern Haserot began supplying food to defendants for their restaurants, and it eventually became their broadline distributor—the distributor for all of the goods and products, food and non-food (except fruits and vegetables), that were necessary for day-to-day operation of their restaurants. This relationship was beneficial to both parties, resulting in Northern Haserot's sale of $3.5 to $4 million in product annually to the defendants.

By 2009, however, the defendants began to fall behind in meeting Northern Haserot's 30-day payment terms. Because of Northern Haserot's long-standing relationship with defendants and repeated assurances from defendant Ross Farro that he had never short-changed anyone, Northern Haserot agreed to extend the payment terms, first to 60 days, then to 75, then to 85 and more. As a result of Northern Haserot's generosity and understanding, defendants were able to keep their Fridays restaurants open through the recession.

Eventually, though, the account grew unacceptably delinquent, prompting Northern Haserot to press defendants to pay down the growing balance. In 2011, Northern Haserot's president, Doug Kern, contacted Ross Farro to obtain the

defendants' agreement to reduce the days outstanding on their account to 85 days by February 1, 2012. This arrangement did not last, however, and, by May 2012, the account had grown to more than $1.8 million that was over 120 days delinquent. In response, Northern Haserot approached defendants with a more stringent payment plan that would require payment of $500,000 within two weeks and the remainder to be paid over the next two years. Northern Haserot also asked that defendants provide some type of security.

On May 29, 2012, Ross Farro informed Doug Kern that defendants were "not financially able to agree to your payment terms" and offered an alternative payment plan by which they would pay the entire balance over three years with four percent interest annually. Specifically, Mr. Farro promised Northern Haserot that the defendants would pay a set amount per month:

> We previously sent to you proposed payment plan that outlined what we reasonably believe the company can afford to pay, as follows:
>
> 7/1/12 through 12/1/12 principal payments @ $15,000 a month
> 1/1/13 through 6/1/13 principal payments @ $30,000 a month
> 7/1/13 through 6/1/14 principal payments @ $60,000 a month
> 7/1/14 through 6/1/15 principal payments @ $75,000 a month

Mr. Farro told Northern Haserot that the defendants could not provide any security for this plan because of other outstanding indebtedness.

For the remainder of 2012, defendants honored their promise by paying Northern Haserot the agreed-upon $15,000 per month. Beginning in 2013,

however, defendants did not increase their monthly payment as promised, but merely continued the $15,000 monthly payment they had begun in 2012 and then, by 2015, reduced the amount to irregular payments of $5,000. Concerned about the lack of performance of the payment plan, Northern Haserot contacted defendants several times in 2013 through 2015 to demand adequate payments or various revisions to the payment plans. But Northern Haserot did not sue the defendants because they were continuing to make payments, and Northern Haserot believed it would receive the entire amount owed based on Ross Farro's continued promises that the defendants would pay their debt in full.

Specifically, on several occasions in 2013 through 2015, Mr. Farro promised Mr. Kern that Northern Haserot would receive a better settlement if it did not file suit and threatened Mr. Kern that filing suit "[w]ould force us into bankruptcy." Relying on these representations and believing that payment would continue as before, Northern Haserot refrained from filing suit in the belief that Mr. Farro would honor his promise. But again, defendants did not honor their promises, ceasing all payments by April 2016, almost 4 years to the day of the last delivery.

Accordingly, on July 3, 2017, Northern Haserot sued the entities with whom it had dealt regarding defendants' purchases for breach of contract and related claims. Northern Haserot voluntarily dismissed that suit on November 27, 2017, and refiled its breach of contract claim (and related claims) against those same

entities plus Ross Farro on January 31, 2018. During the course of discovery in that case, Northern Haserot learned, for the first time in the parties' 20-year relationship, that the entities with whom it had dealt were not the entities actually responsible for operation of the Fridays franchises anymore, including the purchase of goods and products from Northern Haserot, and Defendants had transferred ownership to newly formed limited liability companies. Accordingly, Northern Haserot filed a separate law suit against those additional entities, along with Mr. Farro's co-owners, attorneys John and Michael Climaco, asserting the same claims it had brought against the original defendants.

Although those two suits proceeded separately in the trial court, both resulted in the entry of summary judgment in the respective defendants' favor on the grounds that the four-year statute of limitations in Section 1302.98 barred Northern Haserot's breach of contract claim, that the running of the statute of limitations was not reset by operation of Section 2305.08 or the common law doctrine of partial payment, and that equitable estoppel did not apply to the statute of limitations provided by Section 1302.98. Northern Haserot appealed both judgments to the Eighth District Court of Appeals, and that court consolidated the separate appeals. The Eighth District then reversed the trial courts' judgments, holding that the doctrine of equitable estoppel may apply to the statute of limitations found in Section 1302.08 and that genuine issues of material fact

precluded summary judgment. The appellate court, however, affirmed the trial courts' determination that neither Section 2305.08 nor the common law doctrine of partial payment resets the accrual of the cause of action for a breach of contract for sales of goods for purposes of the statute of limitations found in Section 1302.98.

ARGUMENT IN OPPOSITION TO DEFENDANTS' PROPOSED PROPOSITIONS OF LAW

DEFENDANTS' PROPOSITION OF LAW 1: THE DOCTRINE OF EQUITABLE ESTOPPEL MAY NOT APPLY TO EXTEND THE FOUR-YEAR STATUTE OF LIMITATIONS FOR THE SALE OF GOODS SET FORTH IN R.C. 1302.98.

By their first proposition of law, the defendants have argued that the appellate court incorrectly held that the doctrine of equitable estoppel can be applied to prevent a defendant's assertion of the statute of limitations for a breach of contract claim for sales of goods. They have dedicated much of their Memorandum in Support of Jurisdiction to arguing that the Eighth District's holding conflicts with the holding of the First District Court of Appeals in *Beck v. Trane Co.*, 1st Dist. Hamilton Nos. C-890610 and C-890623, 1990 WL 209688 (Dec. 19, 1990). But this argument is squarely addressed in the defendants' Motion to Certify a Conflict, which they filed on January 2, 2020, and which remains pending for decision before the appellate court. This Court need not accept a proposition of law that is duplicative of that motion.

Moreover, defendants' reliance on *Beck* is misplaced. The primary holding

of *Beck* was based on the First District's mistaken belief that there is "no authority in Ohio for the application of … equitable estoppel" to a statute of limitations defense. *Beck* at *2. This assertion was not only wrong at the time *Beck* was decided, but is entirely inconsistent with the current state of Ohio law. *See, e.g., Markese v. Ellis*, 11 Ohio App.2d 160, 163, 229 N.E.2d 70 (1st Dist. 1967) ("[O]ne cannot [un]justly or [in]equitably lull his adversary into a false sense of security, and thereby cause the adversary to subject a claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought."); *see also Green v. Navarre*, 6th Dist. Lucas No. L-81-143, 1981 WL 5826, at *1 (Nov. 20, 1981) (issue of fact regarding whether "defendant is barred by estoppel from asserting that the statute of limitations has run" precluded summary judgment); *Wright v. City of Lorain*, 70 Ohio App. 337, 46 N.E.2d 325 (9th Dist. 1942) ("The doctrine of estoppel may in a proper case be applied to prevent a fraudulent or inequitable [use of] a statute of limitations…").

Although this Court ultimately determined that the facts in *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268 (*Doe I*), were insufficient to support equitable estoppel, its discussion in that case demonstrates that equitable estoppel may, in the appropriate circumstance, prevent a defendant's assertion of the statute of limitations: "A defendant/wrongdoer

cannot take affirmative steps to prevent a plaintiff from bringing a claim and then assert the statute of limitations as a defense." *Doe I* at ¶ 44.

Appellate courts have also acknowledged that equitable estoppel can preclude assertion of a statute of limitations defense. *Gonzalez v. Alcon Industries, Inc.*, 8th Dist. Cuyahoga No. 92274, 2009-Ohio-2587, ¶ 10 ("Equitable estoppel can preclude a defendant from asserting the bar of the statute of limitations where the misrepresentation induced a delay in the filing of the action."); *Kordel v. Occhipinti*, 11th Dist. Lake No. 2007-L-163, 2008-0hio-6770, ¶ 11 ("Under Ohio law, the estoppel doctrine can be employed to prohibit inequitable use of the statute of limitations."); *Walworth v. BP Oil Co.*, 112 Ohio App.3d 340, 345 (8th Dist. 1996). Thus, in rejecting *Beck*, the Eighth District did not adopt a new or controversial proposition of law. Instead, the court merely followed the common sense application of equitable estoppel as it has been applied to statutes of limitations in this state for almost 70 years, as well as its own prior decisions.

Similarly, the dicta in *Beck* on which the defendants rely—that Section 1302.98(D) precludes application of equitable estoppel—is neither "sound reasoning" nor sound public policy. Section 1302.98(D) incorporates the provisions relating to tolling of the statute of limitations provided in Sections 2305.15 and 2305.16. R.C. 1302.98(D). According to defendants, this language indicates the Ohio Legislature's explicit rejection of any other "tolling" doctrine

because it is not mentioned in subsection (D). This is not the case.

The doctrine of equitable estoppel is a creation of equity. *See Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538 , 2008-Ohio-67, 880 N.E.2d 892, ¶ 7 (*Doe II*) ("An estoppel arises when one is concerned in or does an act which in equity will preclude him from averring anything to the contrary, as where another has been innocently misled into some injurious change of position.") (citation omitted). Thus, it exists separate and distinct from any statutory authorization and applies even though the General Assembly has never officially sanctioned its use. Were it otherwise, equitable estoppel could never apply to a statute of limitations, as all such rules are predicated on an express statute, while equitable estoppel has never been codified. Yet, as discussed above, Ohio courts have repeatedly recognized the validity of the doctrine and its effect on statutes of limitation. This includes the Eleventh District's decision in *Kordel*, which defendants previously admitted "merely stands for the uncontroversial proposition that, in the proper circumstances, equitable estoppel can be applied to prevent application of an otherwise legitimate statute of limitations defense." (*See* Appellee's Br. at p. 20.)

Moreover, equitable estoppel is not synonymous with tolling. Tolling suspends running of the statute of limitations while some circumstance makes it difficult or impossible for a plaintiff to timely sue or serve process (e.g., concealment of the defendant, imprisonment or disability of plaintiff). Tolling thus

focuses on the plaintiff's ability to pursue her legal rights. Equitable estoppel, however, precludes the defendant from asserting the statute of limitations when that party, by its conduct, has induced the plaintiff to delay filing suit until the limitations period has run. *Compare* Black's Law Dictionary (9th Ed.) *at* Estoppel ("A bar that prevents one from asserting a claim or right that contradicts what one has said or done before…") *with* Toll ("(Of a time period, esp. a statutory one) to stop the running of; to abate."). Equitable estoppel thus focuses on the defendant's affirmative conduct in trying to prevent the filing of a suit. Accordingly, tolling and equitable estoppel are not only distinct in terms of their effect (suspension of the limitations period vs. prohibiting the assertion of the defense) but also in their focus. Defendants' attempt to equate tolling and estoppel must fail.

Whatever effect Section 1302.98(D) may have in regards to limiting the circumstances that might "toll[]," or suspend, the running of the statute of limitations for a breach of contract action based on the sale of good, it does not "preclude" the application of equitable estoppel to prevent defendants from raising the statute of limitations defense altogether. And, as the *Beck* case Defendants have relied on only addresses tolling of the statute of limitations during warranty repair efforts, not equitable estoppel, it is not applicable to this instant dispute. The Eighth District did not err in rejecting *Beck*; rather, it engaged in the very analysis of equitable estoppel that the First District failed to perform.

This unremarkable and "uncontroversial proposition" by the Eighth District does not introduce uncertainty into sales of goods, nor does it announce a new rule of law that is unique to Ohio. Therefore, it does not create an issue of public or great general interest, and this Court should not exercise jurisdiction over defendants' first proposition of law.

DEFENDANTS' PROPOSITION OF LAW 2: STATEMENTS REGARDING FUTURE CONDUCT CANNOT MEET THE MISREPRESENTATION ELEMENT OF THE EQUITABLE ESTOPPEL DOCTRINE TO EXTEND THE FOUR-YEAR STATUTE OF LIMITATIONS FOR THE SALE OF GOODS SET FORTH IN R.C. 1302.98

By their second proposition of law, defendants have sought to have this Court hold that equitable estoppel cannot be based on statements of future conduct to the same extent that a claim for fraud cannot be based on statements of future conduct. In support, they have misconstrued the focus of this Court's holding in *Doe I* and seek to use inapplicable case law to effectively merge the doctrine of equitable estoppel into a claim of fraud. This result is not supported by Ohio law.

It is true that this Court has previously stated that the purpose of equitable estoppel is "to prevent actual or constructive fraud and to promote the ends of justice." *See Doe I*, 2006-Ohio-2625 at ¶ 43. But, in outlining what is necessary to prove equitable estoppel, this Court has stopped short of requiring the same type of misrepresentation necessary for fraud. Instead, the Court has acknowledged that "subsequent and specific actions" or "misstatements" may be sufficient so long as

they effectively "prevent a plaintiff from bringing a claim." *See id.* at ¶¶ 44–48; *see also Kordel*, 2008-Ohio-6770 at ¶ 10 ("It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that specific actions by defendants somehow kept them from timely bringing suit.") (citing *Doe I* at ¶ 45).

Critically, *Doe I* addressed equitable estoppel in circumstances very different from those present in this case. In *Doe I*, the plaintiff argued that equitable estoppel should apply because the defendant affirmatively concealed facts that would have alerted the plaintiff to the existence of a cause of action against it. *See Doe I* at ¶ 42. This Court rejected that argument because there were no facts to support it. Specifically, the Court stated that "Doe's cause of action was not concealed from him" because "he at all times knew the identity of his alleged perpetrator and knew the employer of his alleged perpetrator." *Id.* at ¶ 47. Thus, "[Doe] had all of the facts necessary to investigate and prosecute his potential causes of action." *Id.*

Equitable estoppel, however, is not solely limited to circumstances in which a defendant's conduct is designed to conceal the existence of a cause of action. Indeed, in *Doe II*, this Court acknowledged that equitable estoppel may arise when a party has engaged in conduct that "reflect[s] or impl[ies] an effort to discourage [the plaintiff] from filing a lawsuit." *Doe II*, 2008-Ohio-67 at ¶ 9. Although the Court held that the facts of that case did not give rise to estoppel—in part because

there was no evidence of any contact between the plaintiffs and defendants after the cause of action accrued—the Court's opinion does not foreclose application of estoppel if an affirmative act exists to support equitable relief.

Ohio appellate courts have recognized that a defendant's misrepresentation of the statutory period or promise to make a better settlement of the claim if a plaintiff does not bring a threatened suit is just such an affirmative act. *See Livingston v. Diocese of Cleveland*, 126 Ohio App.3d 299, 315, 710 N.E.2d 330 (8th Dist. 1998); *see also Estate of Greenawalt v. Estate of Freed*, 10th Dist. Franklin No. 17AP-62, 2018-Ohio-2603, ¶ 35. This rule is consistent with both *Doe I and II* as it requires some "affirmative act" or misstatement by the defendant (a circumstance that was lacking in both *Doe I and II*) and fosters the purpose of equitable estoppel—preventing a party from exploiting misleading words or conduct that have caused another party to alter its position in reasonable reliance on those statements. *See Doe II* at ¶ 7. Thus, in recognizing that Northern Haserot may be able to proceed to trial based on defendants' conduct, the Eighth District did not contravene this Court's opinions in *Doe I* or *II*.

Defendants' proposed rule, however, would contravene both *Doe I* and *II* by prohibiting a plaintiff from proving the very type of affirmative act that would "prevent [the plaintiff] from filing a lawsuit." Indeed, defendants are apparently requesting this Court to limit equitable estoppel in a manner that would eliminate

use of the doctrine even for a promise that the defendant would not raise the statute of limitations as a defense if suit was not immediately filed. This is not supported by Ohio law, and notably, defendants have not pointed to a single authority that has construed equitable estoppel in this narrow manner. The cases they have cited barring reliance on promises of future conduct are directed towards affirmative claims of fraud, not equitable estoppel.

Defendants' proposition of law is inconsistent with this Court's prior precedent and with the purposes of equitable estoppel. This Court should not exercise jurisdiction over it.

ARGUMENT IN SUPPORT OF NORTHERN HASEROT'S PROPOSED PROPOSITION OF LAW

NORTHERN HASEROT'S PROPOSED PROPOSITION OF LAW: THE STATUTORY AND COMMON LAW DOCTRINE OF PARTIAL PAYMENT APPLIES TO RESET THE STATUTE OF LIMITATIONS FOR A BREACH OF CONTRACT CLAIM GOVERNED BY SECTION 1302.98 OF THE OHIO REVISED CODE.

Section 1302.98 of the Ohio Revised Code provides a four-year statute of limitations that begins to run when the cause of action "accrues," which the statute defines as "when the breach occurs." R.C. 1302.98(A)–(B). The Eighth District held that this limitations period is not reset or otherwise altered by the partial payment doctrine. In support, the court reasoned that Section 1302.98(D), which provides that the statute "does not alter Section 2305.15 and 2305.16 of the

Revised Code on tolling," precludes application of any other doctrine that might also apply to extend or reset the limitations period. In doing so, the Eighth District rejected more than a century of public policy regarding the accrual of statutes of limitations and created a rule that conflicts with public policy promoting the resolution of disputes between parties without court intervention. This Court, therefore, should accept jurisdiction to review the Eighth District's holding.

A. The statutory codification of the partial payment rule applies to reset the statute of limitations on a breach of contract claim, including those governed by Section 1302.98

Ohio law has long recognized that an acknowledgement or partial payment of a debt resets the running of the statute of limitations, even after the limitations period has run. *See In re Butler's Estate*, 137 Ohio St. 96, 112, 28 N.E.2d 186 (1940); *see also DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 151 F.Supp.3d 809, 825 (S.D. Ohio 2015) ("The acknowledgement of a debt rule had an established common law history prior to its codification in the Ohio Revised Code."). The basis of the rule is that the running of the statute of limitations does not discharge the underlying obligation, "it only suspends the remedy on the presumption that the debt is paid." *Turner v. Chrisman*, 20 Ohio 332, 336 (1851). A subsequent acknowledgement or payment towards the debt removes the presumption of payment and acts to restore the remedy. *Id.* Thus, when a party acknowledges the debt or makes payment towards it, that conduct renews the

obligation in the same manner as entering into a new contract. *See, e.g., Feigley v Whitaker*, 22 Ohio St. 606, 613–14 (1872) (the effect of acknowledging a debt is a "new contract springing out of, and supported by, the original consideration" that effectively "create[s] a new cause of action"); *see also* Restatement of Contracts (2d) § 82, comment c (acknowledgment or part payment of a debt creates a new promise to which the statute of limitations reapplies). In other words, the cause of action accrues again and the limitations period is reset.

Section 2305.08 of the Ohio Revised Code is the codification of this common-law rule. Like its common-law predecessor, Section 2305.08 establishes that acknowledgement or partial payment of a debt resets the statute of limitations so that the cause of action accrues again. R.C. 2305.08; *see also DRFP L.L.C.* at 825 ("Indeed, the acknowledgement of debt or a promise to pay after the debt has been barred by the statute of limitations revives the original cause of action and the applicable statute of limitations begins to run again."). This is evident in the language employed by the General Assembly: if payment has been made or the debt has been acknowledged, then "an action may be brought" within the full limitations period running from "after such payment, acknowledgment, or promise." R.C. 2305.08.

In this case, however, the Eighth District rejected the application of this statute for two reasons. First, the appellate court apparently credited defendants'

assertion that Section 1302.98(D) precludes application of "tolling" doctrines other than those specifically set forth in that provision. Second, relying on this Court's decision in *Eastwood v. Capel*, 164 Ohio St. 506, 132 N.E.2d 202 (1956), the appellate court construed Section 2305.08 as applying only to contract actions governed by Sections 2305.06 and 2305.07. Both rationales are erroneous.

As to the first rationale, according to Section 1302.98(B), the limitations period for a breach of contract arising out of a sale of goods accrues when the breach occurs—i.e., when defendants fail to timely make payment. *See* R.C. 1302.98(B). But, as discussed above, Section 2305.08 causes the cause of action to re-accrue following the defendants' acknowledgment and promise to pay the debt and then again after each partial payment. R.C. 2305.08. In this manner, Section 2305.08 does not "toll" the statute of limitations—it affirmatively governs the triggering action from which the limitations period begins to run.

Accordingly, Section 1302.98(D) does not preclude application of Section 2305.08 because subsection (D) applies only to incorporate statutory provisions that "toll"—i.e., suspend—the statute of limitations in particular factual circumstances. *See, e.g.,* R.C. 2305.15(A) (suspending the limitation period when the defendant is out of the state or has concealed himself, or the plaintiff is imprisoned); R.C. 2305.16 (suspending the limitations period when the plaintiff is a minor or of unsound mind). Thus, as a matter of statutory application, Section

1302.98(D) cannot be read as eliminating application of Section 2305.08, or the common law doctrine of partial payment, simply because it does not refer to that statutory provision.

As to the appellate court's second rationale, it is true that this Court, in *Eastwood*, rejected application of Section 2305.08 (formerly General Code Section 11223) on the basis that it is "restricted in its effect to the 15-year limitation in Section 11221 and the 6-year limitation in Section 11222." *Eastwood*, 164 Ohio St. at 508. In *Eastwood*, however, the underlying cause of action was for ejectment, not breach of contract. *Id.* at 506. Thus, in construing Section 2305.08 to apply only to Sections 11221 and 11222 (now Revised Code Sections 2305.06 and 2305.07), this Court naturally limited the scope of Section 2305.08 to the actions "founded on a contract" that are expressly addressed in that statute. *See* R.C. 2305.08 (applying to "any demand founded on a contract").

In relying on *Eastwood*, the Eighth District failed to acknowledge that Section 1302.98 was not enacted until 1962, six years after this Court's decision in *Eastwood* and nine years after the General Assembly enacted Section 2305.08. In other words, when *Eastwood* was decided, either Section 11221 or Section 11222 of the General Code applied to all breach of contract actions in Ohio, including breach of contract actions based on sales of goods. The fact that there is now a separate limitations period for claims based on sales of goods should not preclude

application of Section 2305.08, especially when those claims continue to be based on a "demand founded on a contract" as addressed in that statute. This Court, therefore, should accept jurisdiction of Northern Haserot's proposition of law in order to reverse the Eight District's decision and apply Section 2305.08 to all breach of contract actions in this state.

B. The common law doctrine of partial payment may also be applied to the limitations period provided in Section 1302.98

The common law doctrine of partial payment requires the same result. As set forth above, the doctrine of acknowledgment of a debt or partial payment was well-settled in Ohio common law prior to its codification in the Ohio Revised Code. *See, e.g., In re Butler's Estate*, 137 Ohio St. at 112; *see also DRFP L.L.C.*, 151 F.Supp.3d at 825 ("The acknowledgement of a debt rule had an established common law history prior to its codification in the Ohio Revised Code."). It is also well-settled under Ohio law that the General Assembly is presumed to have intended to preserve the application of the common law unless the language used in the statute clearly establishes an intention to abrogate such rules. *Cunningham v. Testa*, 144 Ohio St.3d 40, 2015-Ohio-2744, 40 N.E.3d 1096, ¶ 18 ("It is well-settled that 'the general assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly supports such intention.'") (quoting *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, ¶ 29).

At least two Ohio courts have recognized that the common law doctrine regarding acknowledgement or partial payment of a debt applies to reset the statute of limitations even if the provisions of Section 2305.08 do not explicitly apply. *See, e.g., DRFP L.L.C.* at 825–26 (acknowledgment of debt reset the statute of limitations under Section 1303.16 of the Revised Code); *Kordel*, 2008-Ohio-6770 at ¶ 15 ("Although R.C. 2305.08 only applies to actions founded on contract, and the trial court correctly found Kordel's claim is not founded on contract, the equitable reasons for extending the statute of limitations based on partial payments apply to the unique circumstances of the present case."). The Southern District's treatment of the issue in *DRFP L.L.C.* is especially important in light of the fact that the claims in that case arose under Ohio's version of Article 3 of the Uniform Commercial Code (commercial paper) and addressed a particular statute of limitations provision that does not incorporate any other provisions of the Revised Code, including Section 2305.08. *See* R.C. 1303.16. Nonetheless, the District Court held that application of the rule in that case would be consistent with "the rule's purpose" as enumerated in Ohio common law. *DRFP L.L.C.* at 825.

The same is true in this case. Regardless of whether Section 2305.08 applies to Section 1302.98, the long-standing common law in Ohio is that partial payments reset the statute of limitations for a breach of contract claim. The language of Section 1302.98 does not indicate any intent by the General Assembly to abrogate

this long-standing rule for sales of goods claims. Therefore, the presumption remains that the General Assembly intended for the common law rule regarding partial payments to apply to Northern Haserot's breach of contract claim.

The public policy of this state for more than 100 years has been to uphold and affirm the doctrine of partial payment to breach of contract limitations periods. This compelling public policy should apply as strongly to Section 1302.98 as it does other contract claims. This Court, therefore, should accept Northern Haserot's proposition of law.

C. The appellate court's holding contradicts significant public policies that are promoted by the partial payment doctrine.

As this Court recently recognized, "[s]tatutes of limitations serve several important purposes. They ensure fairness to the defendant; encourage prompt prosecution of causes of action; suppress stale and fraudulent claims; and avoid inconveniences caused by delay, including the difficulties of proof in older cases." *Browne v. Artex Oil Co.*, ___ Ohio St.3d ___, 2019-Ohio-4809, ___ N.E.3d ___, ¶ 32. Stated otherwise, statutes of limitation protect the defendant from unjust harm caused by the untimely assertion of a party's right to sue and protect the courts' time and resources from stale and untimely-filed cases that would congest their docket and consume judicial resources.

The partial payment doctrine also furthers these purposes. By acknowledging the existence of a debt or making payment towards it, the

defendant confirms its contractual obligations. Moreover, the defendant also expresses its intent to continue to be bound to those obligations. Thus, the partial payment doctrine removes the need for a statute of limitations because the defendant itself has acknowledged that it will not be harmed by a later assertion of a party's right to sue. And, by permitting the parties to continue performing their contract as intended, the partial payment doctrine relieves the burden on the courts to hear those suits while promoting other important public policies, including the rights of parties to freely enter into or extend their contracts and to resolve their disputes without court intervention.

This is why Ohio courts have applied the partial payment doctrine to breach of contract actions for more than a century. The Eighth District, however, adopted a holding that will impede these public policies. Under the rule adopted by the appellate court, plaintiffs have no incentive to attempt to resolve their dispute with a contracting partner, including, as often happens in commercial contracts, by accepting a payment plan when immediate payment is not feasible. Instead, in order to protect their rights, plaintiffs will now be required to immediately file suit, thus burdening the court system with disputes that may have otherwise been resolved amongst the parties. This not only separates sale of goods cases from every other contract case under Ohio law, but it also contradicts the very policies that Ohio courts regularly and routinely promote. This is not, and should not be,

the public policy of the State of Ohio. This Court should therefore accept jurisdiction over Northern Haserot's proposition of law.

CONCLUSION

Defendants' proposed propositions of law do not present an issue of public or great general interest, and this Court should decline to exercise jurisdiction over them. Northern Haserot's proposed proposition of law, on the other hand, implicates a long-standing public policy of this state and thus presents an issue of public or great general interest. This Court should exercise jurisdiction over it.

Respectfully submitted,

/s/ Kyle A. Shelton
Clair E. Dickinson (0018198)
Kyle A. Shelton (0092083)
Brouse McDowell LPA
388 South Main Street, Suite 500
Akron, Ohio 44311
Phone: (330) 535-5711
Fax: (330) 253-8601
cdickinson@brouse.com
kshelton@brouse.com

Donald A. Mausar (0065328)
Roy J. Schechter (0034689)
Weltman Weinberg & Reis Co. LPA
323 Lakeside Place, Suite 200
Cleveland, Ohio 44113
Phone: (216) 685-1062
Fax: (216) 363-4033
dmausar@weltman.com
rschechter@weltman.com

Attorneys for Northern Haserot, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served this 25th day of February 2020 by regular electronic and U.S. Mail to the following parties:

John R. Climaco (0011456)
Scott D. Simpkins (0066775)
Climaco Wilcox Peca
& Garofoli Co., L.P.A.
55 Public Square, Suite 1950
Cleveland, Ohio 44113
Phone: (216) 621-8484
Fax: (216) 771-1632
sdsimp@climacolaw.com

Michael L. Climaco (0011454)
16340 Handies Way
Broomfield, Colorado 80023
Phone: (216) 402-2202
michaelclimaco@gmail.com

/s/ Kyle A. Shelton
Kyle A. Shelton (0092083)

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