

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. TIMOTHY	)	On Appeal from the Erie County Court of
BETTON, et al	)	Appeals, Sixth Appellate District
Appellee	)	
	)	Court of Appeals Case No. E-19-0064
v.	)	
	)	
BURGESS & NIPLE, INC., et al.,	)	
	)	
Appellants	)	
	)	

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BURGESS & NIPLE, INC.

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## TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW .....	8
Proposition of Law No. I: The denial of a substantial right created by the Statute of Repose, R.C. 2305.131, in a special proceeding brought pursuant to R.C. 309.13 is a final appealable order. ....	8
CONCLUSION.....	14
CERTIFICATE OF SERVICE.....	16
APPENDIX	<u>Appx. Tab</u>
Journal Entry of the Erie County Court of Common Pleas (October 28, 2019).....	A
Decision and Judgment of the Erie County Court of Appeals (May 1, 2020).....	B
Amended Journal Entry of the Erie County Court of Common Pleas (May 20, 2020)..	C
Decision and Judgment of the Erie County Court of Appeals (June 24, 2020).....	D

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This case presents critical issues for the future of the construction industry and all litigants related to the viability of R.C. 2305.131, Ohio’s construction statute of repose. The first issue is procedural and asks whether immediate appellate review is required in statutory taxpayer actions when a trial court refuses to apply the law as pronounced by this Court. The second issue is substantive and will provide the necessary guidance to courts, litigants, consumers, contractors, municipalities, architects, engineers, and others that a claim alleging a defective improvement to real property is subject to Ohio’s statute of repose.

By addressing the proposition of law in this matter, the Court has the opportunity to clearly advise the contours of what constitutes a final, appealable order—specifically whether the denial of a party’s right under a statute of repose in a special taxpayer action falls within the definition of “final order” under R.C. 2505.02. Here, the trial court circumvented this Court’s decision in *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 2019-Ohio-2851 and refused to apply the statute of repose to contract claims brought in a statutory taxpayer complaint. The trial court’s refusal to apply the applicable statute of repose exposes the Appellants to years of additional litigation and the hundreds of thousands of dollars in additional costs without any opportunity for appellate review. The trial court’s decision, if not corrected, will have lasting negative effects on the construction industry that entirely defeats the Legislature’s statute purpose in enacting R.C. 2305.131.

The impact of the construction industry on the economy in the State of Ohio is staggering. The construction industry is one of the vital engines that drives our economy and creates the infrastructure that enables our society to function. The rule of law posited by the Erie County Court of Common Pleas and Sixth District Court of Appeals in this matter prevents the application of a statutorily prohibited window of liability against designers and contractors who create improvements to real property. The construction industry contributed approximately \$24.9 billion to the Ohio Gross State Product in 2018, which equates to approximately 3.8% of the State's Gross State Product of \$676 billion. The Associated General Contractors of America, *The Economic Impact of Construction in the United States and Ohio* at [https://files.agc.org/files/economic\\_state\\_facts/OH%20fact%20sheet.pdf](https://files.agc.org/files/economic_state_facts/OH%20fact%20sheet.pdf) (accessed August 3, 2020). These are the people and companies directly impacted by the Erie County Court of Common Pleas and Sixth District Court of Appeals refusal to apply the statute of repose to Appellee's contract claims.

It is also necessary to note the significance of waterlines to the State of Ohio and the general importance of the subject matter to the public. For example: (1) The City of Dayton maintains approximately 800 miles of waterlines<sup>1</sup>; (2) The City of Akron water distribution system contains approximately 1,225 miles of water mains<sup>2</sup>; (3) Montgomery County operates and maintains approximately 1,400 miles of water main lines<sup>3</sup>; (4) and the City of Cleveland Water's contains nearly 5,300 miles of

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<sup>1</sup> See <https://www.daytonohio.gov/824/Water-Distribution> (accessed August 3, 2020).

<sup>2</sup> See <https://www.akronohio.gov/cms/Water/Distribution/index.html> (accessed August 3, 2020).

<sup>3</sup> See <https://www.mcoho.org/water/> (accessed August 3, 2020).

underground pipes known for water distribution.<sup>4</sup> The United States of America has 1.2 million miles of water supply mains — 26 miles of water mains for every mile of interstate highway.<sup>5</sup>

Moreover, construction wages and salaries in 2018 totaled \$468 billion in the United States of America, including \$14 billion in Ohio. *Id.* The construction industry provided over 217,200 jobs in Ohio in September of 2019. *Id.* Construction workers' pay in Ohio averaged \$62,727, which is 10% more than all private sector employees in the state. More notable, Ohio had 23,076 construction firms in 2016, of which 91% were small businesses (less than 20 employees). *Id.* Thus, it is clear that the construction industry has a significant presence in the State of Ohio making this case of public or great general interest.

**Proposition of Law No. I:** The denial of a substantial right created by the Statute of Repose, R.C. 2305.131, in a special proceeding brought pursuant to R.C.309.13 is a final appealable order.

The trial court's decision and the Sixth District's decision, if allowed to stand, deprive construction defendants of the Legislature's stated intention to protect them from stale claims under R.C. 2305.131. This Court has the opportunity to provide the necessary guidance on the foregoing issues and provide an unambiguous holding that the denial of a substantial right created by the statute of repose, R.C. 2305.131, in a special proceeding brought under R.C. 309.13 is a final appealable order.

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<sup>4</sup> See <http://www.clevelandwater.com/your-water/water-distribution> (accessed August 3, 2020).

<sup>5</sup>See <https://blog.nationalgeographic.org/2014/08/12/13-things-you-probably-dont-know-about-the-u-s-water-system-but-should/> (accessed August 3, 2020).

In addition to the industry-specific issues related to the statute of repose, the Proposition of Law has universal application to any case, civil or criminal, that involves statutory interpretation as to what constitutes a final appealable order. While the Sixth District in this matter erroneously claimed that the denial of Appellants' motions for summary judgment is not a final appealable order, it did so reluctantly as it stated in its remand order that statute of repose is to be applied to contract claims. Nevertheless, the remand order provided the trial court a "roadmap" to evade review of its incorrect denial of the Appellants' Motion for Summary Judgment as there is no dispute that the statute of repose applies to contract claims.

### **STATEMENT OF THE CASE AND FACTS**

This case presents critical issues related to Ohio's construction statute of repose and when judicial decisions become "final" for purposes of appellate review. The erroneous rule of law posited by the trial court in this matter ignores the Supreme Court of Ohio's decision in *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 2019-Ohio-2851 and the statutorily created limited window of liability against designers and contractors who create improvements to real property. The trial court ignored the Legislature's intent to reestablish a clear demarcation of liability of ten (10) years from the date of substantial completion for both contract and tort claims, which provide the necessary guidance to the construction industry and litigants as to their exposure for damages to real and personal property. Moreover, without the opportunity for immediate appellate review, Appellants are forced to engage in years of costly litigation before it can correct the trial court's erroneous decision thereby defeating the Appellants' rights under R.C. 2305.131.

On September 7, 2016, Plaintiff/Appellee State of Ohio ex. Rel Timothy Betton (“Betton”), purportedly on behalf of the State of Ohio for the alleged benefit of the taxpayers of Erie County, re-filed his taxpayer action against Defendants/Appellants Burgess & Niple, Inc. (“B&N”) and Speer Brothers, Inc. (“Speer”). Betton alleges damages resulting from a series of waterline construction projects completed over 14 years before he filed the taxpayer action. Consequently, on November 8, 2016, Appellants moved to dismiss the Taxpayer Complaint on a variety of grounds including: lack standing under the taxpayer statute, the applicable statute of limitations, the statute of repose, and failure to join an indispensable party pursuant to Civ. R. 12(b)(7). The trial court held a hearing on June 7, 2017 to consider the arguments raised by the respective Appellants, and ultimately denied Appellants’ respective Motions.

Accordingly, the Appellants moved the trial court to stay the instant case pending a decision from the Supreme Court of Ohio in *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 2019-Ohio-2851, as to whether the statute of repose applied to contract claims as well as tort claims. On August 16, 2018, the trial court issued a stay pending the Supreme Court of Ohio’s decision in *New Riegel*. On July 17, 2019, the Supreme Court issued its decision in *New Riegel* holding that Ohio’s construction statute of repose, R.C. 2305.131, applies to *all* civil actions including both tort and contract:

Reading R.C. 2305.131 as a whole and in a manner that gives effect to all provisions of the statute, we conclude that Ohio’s construction statute of repose applies to all causes of action, whether sounding in tort or contract, that seek “to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arise[] out of a defective and unsafe condition of an improvement to real property...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.”

*New Riegel*, 2019-Ohio-2851 (July 17, 2019) at ¶ 30.

Thereafter, the trial court lifted the stay and permitted leave to the respective parties to file their Motions for Summary Judgment pursuant to Civ. R. 56. The Appellants again moved to dismiss Appellee Betton and Appellee/Intervening Plaintiff Erie County Board of Commissioners' ("Erie County") claims as they were barred by Ohio's construction statute of repose pursuant to *New Riegel*.

Appellee Betton alleged that from 2001 through 2004 Erie County entered into a series of contracts with the Appellants for the design and installation of new water lines to serve the residents of Erie County known as "District B". See Betton's Complaint at ¶3. Betton alleged that the waterlines failed and that breaks have occurred intermittently from 2004 through 2013. *Id.* at ¶¶4-5. Betton specifically asserts Erie County was on notice of the supposed improperly installed waterlines as a result of breaks that occurred in 2004, 2008, and 2013.

More precisely, Betton contends a break occurred on or about May 4, 2004 at Strecker Road where the pipe was found to be resting on a sharp rock and another break on Strecker Road on September 19, 2008 because purportedly there was no stone backfilling the trench around the pipe. *Id.* at ¶¶4-6. Further, Betton alleges that Erie County will incur costs to repair the alleged improperly installed sections of waterlines by Speer and costs to "minimize contamination risks". *Id.* at ¶¶49-50.

The Certificate of Substantial Completion for Contract No. 3, the payments from the Ohio Water Development Authority as to Contract No. 4 and the affidavit of Mark Hutson, P.E., confirmed all of the work performed by B&N and Speer as to Contract Nos. 3-4 was



completed in 2005. *See* B&N's Motion for Summary Judgment, Exhibits A-D. More importantly, Erie County used the improvement to the real property, i.e. the waterlines, from Contract Nos. 1-4 in 2005. *Id.* This use of the waterlines from Contract Nos. 1-4 is the very definition of "substantial completion" as applied by the General Assembly to define substantial completion for application of R.C.2305.131. *See* R.C.2305.131(G).

On October 28, 2019, the trial court held "that the claims of Plaintiff against both Defendants are for breach of contract and subject to the fifteen-year statute of limitations under R.C.2305.06. The motions for summary judgment filed by Defendant Burgess and Niple, Inc. and Defendant Speer Bros., Inc. are hereby DENIED." *See* October 28, 2019 Journal Entry attached hereto as Tab A of the Appendix.

On November 26, 2019, Appellant B&N filed a timely appeal with the Sixth District Court of Appeals, as the trial court erred in finding that the statute of repose does not apply to the claims of Appellees pursuant to *New Riegel*. On January 13, 2020, the respective Appellants filed their Appellant Briefs. On January 15, 2020, Appellee filed his Motion to Dismiss the Appellants' appeal arguing that the October 28, 2019 Order is not a final appealable order. The Appellants opposed the Appellee's Motion to Dismiss.

On May 1, 2020, the Sixth District Court of Appeals issued a remand order to the trial court to clarify its October 28, 2019 Journal Entry as the appellate court could not determine whether the trial court's ruling was a final appealable order. *See* May 1, 2020 Decision and Judgment of the Erie County Court of Appeals attached hereto as Tab B of the Appendix. In doing so, the Sixth District provided the trial court a "roadmap" to try and evade appellate review of its denial of the Motions for Summary Judgment.

On May 20, 2020, following the guidance of the Sixth District, the trial court stated that Appellee's claims did not meet the requirements of the statute of repose and that the statute of limitations set forth in R.C. 2306.05 applies. *See* May 20, 2020 Amended Journal Entry attached hereto as Tab C of the Appendix. Yet, the trial court failed to provide any explanation as to how the contract claims 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 complete.

On June 24, 2020, the Sixth District dismissed the appeal of Appellants for lack of a final appealable order in light of the trial court's May 20, 2020 Amended Journal Entry claiming that the claims do not fall within the statute of repose. *See* June 24, 2020 Decision and Judgment of the Erie County Court of Appeals attached hereto as Tab D of the Appendix. The trial court's refusal to apply the statute of repose and *New Riegel* affected the Appellants' respective substantial rights, in this special proceeding created by statute, to have a limited window of liability for improvements to real property.

#### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law No. I: The denial of a substantial right created by the Statute of Repose, R.C. 2305.131, in a special proceeding brought pursuant to R.C. 309.13 is a final appealable order.**

The Ohio General Assembly enacted a statute of repose that places a strict limitation on the accrual of any claim alleging deficient design or construction causing damage to real property. *See generally* R.C. 2305.131. R.C. 2305.131(A)(1) mandates, in pertinent part, "no cause of action to recover damages for an injury to real property shall accrue against a person who performed services for 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.” A clear reading provides no exception to its application to contract claims.

This Court must hear Appellants’ Appeal because Betton’s taxpayer action is a “special proceeding” under R.C. 2505.02 and the trial court’s order affects Appellants’ “substantial right,” which qualifies as a final order under R.C. 2505.02(B)(2). The question of whether an order is final and appealable is jurisdictional. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 87, 541 N.E.2d 64 (1989); *State ex rel. White v. Cuyahoga Metro. Housing Auth.*, 79 Ohio St.3d 543, 544, 1997 Ohio 366, 684 N.E.2d 72 (1997).

Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, appellate jurisdiction is limited to the review of final orders of lower courts. The entire concept of ‘final orders’ is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. Judgments are to be construed like other written instruments by giving the language of the instrument its ordinary meaning. *Shaver v. Std. Oil Co.*, 135 Ohio App.3d 242, 248, 733 N.E.2d 645 (6th Dist. 1999), citing *Elling v. Witt*, 6th Dist. Ottawa No. 94OT032, 1995 Ohio App. LEXIS 475 (Feb. 10, 1995).

The legal effect, rather than the language used, should control. *Boyle v. Stroman*, 56 Ohio Law Abs. 451, 92 N.E.2d 693 (8th Dist. 1950). While “[a] decision announces what the judgment will be[,] [t]he judgment entry unequivocally orders the relief.” *In re R.A.W.*, 10th Dist. No. 11AP-1072, 2012-Ohio-4832, ¶ 15, quoting *Holdren v. Garrett*, 10th Dist. No. 09AP-1153, 2011-Ohio-1095, ¶ 11, quoting *Harkai v. Scherba Industries, Inc.*, 136 Ohio App.3d 211, 216, 736 N.E.2d 101 (9th Dist.2000). While the trial court has labeled its judgment

entry to try and evade appellate review, it does not change the legal effect of the trial court's ruling, which clearly interferes with a substantial right of the Appellants.

R.C. 2505.02 outlines the circumstances that constitute a final, appealable order. Relevant here, an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
- [...]
- (6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code.

As used in R.C. 2505.02, "substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect. "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

In *Polikoff v. Adam*, 67 Ohio St. 3d 100, 108, 616 N.E.2d 213 (1993), the Supreme Court of Ohio noted that in considering whether a particular order affected a substantial right in a special proceeding, the reviewing court's analysis first focuses on the special proceeding portion of the inquiry. Only if it is first determined that an order was entered in

a special proceeding is it necessary to go on to consider whether the order affected a substantial right.

In this instance, the taxpayer suit filed pursuant to R.C. 309.13 is a special proceeding as defined by the General Assembly. In other words, it is an action that was specially created by statute and was not denoted as an action at law or suit in equity. Indeed, R.C. 309.13 was not enacted until October 1, 1953. *See* R.C. 309.13. Appellee likely will argue that the underlying action is nothing more than a typical breach of contract action. However, this is simply wrong as Betton has no standing to assert a breach of contract claim against Appellants. Betton's lawsuit only survives, arguably, as an action under R.C. 309.13, and his claim for attorney fees would be unavailable at common law.

The Sixth District Court of Appeals entirely ignored this analysis and failed to address whether a statutory taxpayer suit is a special proceeding under Ohio law. The applicable "underlying action" is not an ordinary civil suit for damages, which was known at common law. As stated above, Appellee Betton would not have standing to assert contractual claims against B&N or Speer as he lacked any privity with the Appellants. R.C. 309.13 provides Betton a special right to sue entities he would not otherwise have a right to sue. This is further evidenced in the statutory requirements of written demand and denial that are jurisdictional and procedural prerequisites to a R.C. 309.13 taxpayer's action. *U.S. Corrections Corp. v. Ohio Dept. Indus. Relations*, 73 Ohio St.3d 210, 217, 652 N.E.2d 766 (1995). Such requirements are not necessary or part of an ordinary action rendering this action a "special proceeding."

As stated by the Sixth District in *Leber v. Buckeye Union Ins. Co.*, 125 Ohio App.3d 321, 334, 708 N.E.2d 726 (6th Dist.1997), "R.C. 309.13 does not provide for recovery of

attorney fees from a non-governmental entity. Neither the statute nor the case law provides for such a recovery." *Id.* at 334. "A taxpayer brings an action on 'behalf of a municipality.' A taxpayer's right to bring an action is conferred by statute." *Id.* at 333. The underlying action is not an ordinary civil suit for damages. This is a special proceeding created by statute, as otherwise Betton would not have standing to assert this claim or seek the recovery he is seeking.

Likewise, "[a] substantial right involves the idea of a legal right, one which is protected by law." *Id.* at 21. "An order affects a substantial right for the purposes of R.C. 2305.02(B)(2) only if an immediate appeal is necessary to protect the right effectively." *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, ¶ 7. In this instance, the trial court has refused to enforce Appellants' rights under R.C. 2305.131, which is a right protected by law.

It is therefore manifest that the General Assembly understood R.C. 2305.131 to be a true statute of repose, i.e., one that bars accrued claims as well as those that have not yet vested. *See Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, ¶ 16. As the United States Supreme Court has explained, a statute of repose is akin to a discharge in bankruptcy; because it is a "cutoff" or absolute bar to liability that "puts an outer limit on the right to bring a civil action," application of a statute of repose does not depend on whether the cause of action has accrued. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8-9 (2014). It extinguishes liability regardless. *Id.*; *see also New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 2019-Ohio-2851, ¶¶39-44.

In the legislative history for R.C. 2305.131, the General Assembly explained that the law, enacted in 2005, "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 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.” R.C. 2305.131, Editor’s Notes, Pages Ohio Revised Code Annotated (emphasis added)(2014).

The Ohio legislature recognized that the statute of repose was necessary because once a construction project was completed, the persons who provided construction services lose all control over any improvements they made, and subsequent intervening causes may then arise to cause stress, strain, or wear and tear to that improvement. *Id.* at section notes (B)(2)(a) and (b). Furthermore, the Ohio legislature acknowledged that it is an unacceptable burden to require individuals involved in construction to maintain records and other documentation for a period in excess of ten years after the completion of a job. *Id.* at section notes (B)(4). The trial court refused to enforce the substantial right provided by R.C.2305.131.

The Supreme Court of Ohio in *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 540 N.E.2d 266 (1989) determined that the duty to defend in a declaratory judgment action involves a substantial right to both the insured and the insurer. The Court explained:

The duty to defend is of great importance to both the insured and the insurer. If an insurer mistakenly refuses to defend its insured, the adverse consequences can be great. "When an indemnitor wrongfully refuses to defend an action against an indemnitee, the indemnitor is liable for the costs, including attorney fees and expenses, incurred by the indemnitee in defending the initial action and in vindicating its right to indemnity in a third-party action brought against the indemnitor." *Allen v.. Standard Oil Co.*

(1982), 2 Ohio St. 3d 122, 2 OBR 671, 443 N.E. 2d 497, paragraph two of the syllabus. On the other hand, if the [\*\*\*12] insurer is required to defend an insured, "\* \* \* [the insurer] may try an expensive negligence case which a court may later hold is not within the terms of the policy. \* \* \*" Amer, The Declaratory [\*22] Judgments Act of Ohio (1942), 14 Cleve. B. Assn. J. 19, 32.

The duty to defend is equally important to the insured. If the insurance company refuses to defend, then the insured often must choose to settle the suit as quickly as possible in order to avoid costly litigation, bring a declaratory judgment action against the insurer seeking a declaration that there is a duty to defend, or defend the suit without help from the insurer.

*Id.*

The trial court refused to apply the statute of repose to Appellee's claims and instead held that the fifteen-year statute of limitations applies to Appellee's claims interfering with the substantial rights of the Appellants. Moreover, this "flies in the face" of this Court's decision in *New Riegel* and the respective holdings from the Third, Fifth and Seventh Appellate Districts as to the application of the statute of repose to contract claims. The ultimate effect of the trial court's ruling is that the parties will incur exponential unnecessary litigation costs recognized by this Court in *Gen. Acc. Ins. Co.*, and go through the expense of a trial, followed by the inevitable appeal by the non-prevailing party, to determine whether Appellants' substantial right created by R.C. 2305.131 is enforceable to Appellee's claims set forth in this special proceeding created by statute, R.C. 309.13. Accordingly, the decision is affecting a substantial right of the Appellants in this special proceeding and must be heard by this Honorable Court.

### **CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests the Court accept jurisdiction in this case so that the important issues presented can be reviewed on the merits.



Respectfully submitted,

*/s/ Patrick J. Gump, Counsel of Record*

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### **CERTIFICATE OF SERVICE**

A copy of the foregoing has been served via electronic mail this 7<sup>th</sup> day of August

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2019 Oct-28 AM 11:54

LUVADA S WILSON  
CLERK OF COURTS

2016 CV 0593

Tygh M Tone

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

STATE OF OHIO ex rel.  
TIMOTHY BETTON,

Plaintiff

-vs-

BURGESS & NIPLE, INC. et al.

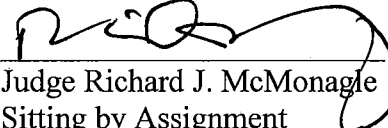
Defendants.

\*\*\*\*\*

This Court finds that the claims of Plaintiff against both Defendants are for breach of contract and subject to the fifteen year statute of limitations under R.C. 2305.06. The motions for summary judgment filed by Defendant Burgess and Niple, Inc. and Defendant Speer Bros., Inc. are hereby DENIED. The civil trial order filed on August 9, 2019 is binding.

**IT IS SO ORDERED.**

Oct. 24, 2019  
Date

  
Judge Richard J. McMonagle  
Sitting by Assignment

FILED  
COURT OF APPEALS  
ERIE COUNTY, OHIO

2020 MAY -1 AM 10: 07

LUVADA S. WILSON  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio, ex rel. Timothy Betton

Court of Appeals No. E-19-064

Appellee

Trial Court No. 2016-CV-0593

v.

Burgess & Niple, Inc., et al.

**DECISION AND JUDGMENT**

Appellants

Decided:

MAY 01 2020

\* \* \* \* \*

This matter is before the court on the motion of plaintiff-appellee, Timothy Betton, to dismiss the appeal for lack of a final, appealable order. Defendants-appellants, Burgess & Niple, Inc. ("Burgess") and Speer Brothers, Inc. ("Speer"), filed a memorandum in opposition, and Betton has filed a reply. For the following reasons, this court holds appellee's motion in abeyance and remands this appeal to the Erie County Court of Common Pleas.

On November 26, 2019, Burgess and Speer filed separate notices of appeal from the October 28, 2019 judgment of the Erie County Court of Common Pleas that denied

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Tab B

their respective motions for summary judgment. Generally, orders denying motions for summary judgment are not final and appealable. *Klein v. Portage County*, 139 Ohio App.3d 749, 745 N.E.2d 532 (11th Dist.2000), (“The denial of a summary judgment motion generally does not decide the action and prevent a judgment, and thus, does not constitute an appealable final order.”).

### **Relevant Procedural History and Background**

The record sub judice reflects that this matter began as a taxpayer complaint against appellants stemming from the design and installation of new water lines in Erie County that Betton alleged occurred between the years 2001 through 2008. The suit was initially filed in February 2016, but was dismissed in August of that year. The matter was refiled in September 2016, in trial court case No. 2016-CV-0593.

Initially, intervening plaintiff-appellee, the Erie County Board of Commissioners (“Erie County”) declined to represent Betton. However, on October 18, 2017, Erie County filed its complaint in intervention.

Appellants filed a motion to dismiss pursuant to Civ.R. 12(B)(6), in which they argued that Betton lacked standing once Erie County intervened. That motion was denied, and appellants went on to file their respective motions for summary judgment. Burgess argued that the claims were barred by R.C. 2305.131, known as the construction statute of repose, a valid and enforceable settlement agreement, and also by the four-year statute of limitations mandated by R.C. 2305.09(D), because Betton’s claims could be

construed as professional negligence. Speer Brothers made the same arguments except for those related to the limitations period under R.C. 2305.09.

In response, Betton argued that the statute of repose does not apply to the claims, and even if it did, *R.C. 2305.131 is unconstitutionally retroactive* as applied to his breach of contract claims.

In denying the motions for summary judgment, the trial court found that the claims for breach of contract were subject to the statute of limitations under R.C. 2305.06. The entirety of the trial court's decision, the subject of the instant appeal, states:

This Court finds that the claims of Plaintiff against both Defendants are for breach of contract and subject to the fifteen year statute of limitations under R.C. 2305.06. The motions for summary judgment filed by Defendant Burgess and Niple, Inc. and Defendant Speer Bros., Inc. are hereby DENIED. The civil order filed on August 9, 2019 is binding.

IT IS SO ORDERED.

#### **Betton's Motion to Dismiss**

Although the trial court did not make any specific findings with respect to the statute of repose, its holding implicitly determines that either Betton's claims do not meet the requirements of the statute of repose and therefore the statute is not applicable, or that the statute of repose does not apply to any contract claims. Betton argues, on page six of his reply in support of his motion to dismiss, that the trial court's ruling determined that the statute of repose does not apply to written contracts:

The trial court was asked to answer the question whether the ten year statute of repose for construction liability actions or the fifteen year statute of limitations for written contracts applied to the breach of contract action filed by [Betton]. The trial court held that the statute of limitations for written contracts applied and the statute of repose did not. This finding did not declare R.C. 2305.131 unconstitutional. A determination that the statute of repose is not applicable to a certain claim asserted in an action does not automatically require that it be held unconstitutional.

R.C. 2505.02(B) defines what is a final, appealable order, and states, in relevant part that an order is final if it is:

\* \* \*

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general

assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code[.] (Emphasis added).

Appellants point out that while this case was being litigated, the Supreme Court of Ohio entered a decision in which it held that “R.C. 2305.131, as enacted in Am.Sub.S.B. No. 80, 150 Ohio Laws, Part V, 7915, 7937-7938, applies to any cause of action, whether sounding in tort or contract, so long as the cause of the action meets the requirements of the statute.” *New Riegel Local School Dist. Bd. of Edu. v. Buehrer Group Architecture & Engineering, Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, 133 N.E.3d 482, ¶ 1.

Prior to the decision in *New Riegel*, the Supreme Court had held that the 1971 version of R.C. 2305.131 applied only to tort actions. *Id.* at ¶ 13. In 1996, the General Assembly repealed the 1971 version of R.C. 2305.131, and enacted a new version of the statute. *Id.* at ¶ 15. Eventually, in 2004, the General Assembly enacted the current version of R.C. 2305.131, in which it “recognized that the availability of evidence pertaining to an improvement to real property more than ten years after the completion is problematic and that it is unacceptable burden to require the maintenance of records and documentation pertaining to an improvement to real property for more than ten years after completion.” *Id.* at ¶ 17.

Due to the evolution of R.C. 2305.131, in *New Riegel*, the court determined that the “current version of R.C. 2305.131 is sufficiently different from the 1971 version of the statute” to avoid application of stare decisis and hold that the statute only applies to



tort claims. *Id.* at ¶ 22. Therefore, the statute, in addition to tort claims, is now applicable to contract claims that meet the requirements of the statute. *Id.* at ¶ 26.

In this case, the trial court did not make a determination as to whether Betton's claims met the requirements of the statute of repose. Had the trial court made a determination that the claim did not meet the requirements of the statute, and therefore the statute of limitations set forth in R.C. 2305.06 applies, the order would not be final and appealable. However, if the trial court held that the statute does not apply to contract claims, the order would be final and appealable pursuant to R.C. 2505.02(B)(6), because it would have implicitly determined that the statute of repose is unconstitutional.

Appellants bring our attention to *Flynn v. Fairview Village Retirement Community, Ltd.*, 132 Ohio St.3d 199, 2012-Ohio-2582, 970 N.E.2d 927, ¶ 7, in which the court held that an order denying a motion to bifurcate under R.C. 2315.21(B)(1) is a final, appealable order under R.C. 2505.02(B)(6) because it implicitly determines the statute's constitutionality. Specifically, the court found that the trial court "implicitly determined that the S.B. 80 amendment to the statutory provision is unconstitutional, i.e., that Civ.R. 42(B) prevails over the conflicting statutory provision." Similarly, a judgment by the trial court determining that the statute of repose does not apply to written contracts implicitly determines the constitutionality of R.C. 2305.131, because it finds that the limitations period set forth in R.C. 2305.06 prevails over the conflicting statutory provision.

Based upon the trial court's lack of explanation for its decision, this court is unable to determine whether the order is final and appealable because we are unable to determine whether the court held that Betton's claims do not meet the requirements of the statute of repose, or whether the statute of repose does not apply to contract claims generally.

In cases where a trial court's ruling does not permit a reviewing court to determine jurisdiction, the Supreme Court has held that it is permissible to remand an appeal for the trial court to provide reasons for its judgment so a reviewing court can determine the pertinent issues and whether the order is final. *Burnham v. Cleveland Clinic, et al.*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, ¶ 28.

#### Conclusion

Accordingly, in the interest of judicial economy, the matter is remanded to the Erie County Court of Common Pleas, for a period of 20 days for the trial court to enter a judgment consistent with this decision. All proceedings, including the filing of appellee's brief are stayed. Appellee's motion to dismiss is held in abeyance until the trial court enters its judgment. The clerk of the Erie County Court of Common Pleas shall notify this court when the trial court has entered the judgment.

It is so ordered.

Betton v. Burgess & Niple, Inc.  
C.A. No. E-19-064

Mark L. Pietrykowski, J.

Arlene Singer, J.

Christine E. Mayle, J.  
CONCUR.

*Mark L. Pietrykowski*

JUDGE

*Arlene Singer*

JUDGE

*Christine E. Mayle*

JUDGE

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LUVADA S. WILSON

CLERK OF COURTS

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

2016 CV 0593

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STATE OF OHIO ex rel. : Case No. 2016-CV-0593  
TIMOTHY BETTON, :  
 :  
Plaintiff : Judge Richard J. McMonagle  
 : Sitting by Assignment  
-vs- :  
 : AMENDED JOURNAL ENTRY  
BURGESS & NIPLE, INC. et al. :  
 :

Defendants.

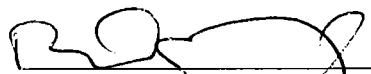
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On October 28, 2019 Erie County Common Pleas Court denied the parties respective motions for summary judgment. On November 26, 2019 Burgess and Speer filed separate notices of appeal from the October 28, 2019 trial court decision. On May 4, 2020 the Sixth District Court of Appeals remanded the matter to the Erie County Common Pleas Court. Court of Appeals No. E-19-064. Pursuant to the decision from the Sixth District Court of Appeals this Court hereby finds that Plaintiff's claims do not meet the requirements of the statute of repose and therefore the statute of limitations set forth in R.C. 2305.06 apply. Therefore, the order October 28, 2019 denying the parties respective motions for summary judgment is not a final appealable order.

All parties shall be served a copy of this amended journal entry and the clerk of Erie County Common Pleas Court shall notify the Sixth District Court of Appeals of said amended journal entry.

IT IS SO ORDERED.

MAY 13, 2020  
Date

  
Judge Richard J. McMonagle  
Sitting by Assignment

FILED  
COURT OF APPEALS  
ERIE COUNTY, OHIO

2020 JUN 24 PM 1:25

LEONARD S. WILSON  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio, ex rel. Timothy Betton

Court of Appeals No. E-19-064

Appellee

Trial Court No. 2016-CV-0593

v.

Burgess & Niple, Inc., et al.

**DECISION AND JUDGMENT**

Appellants

Decided: JUN 24 2020

\* \* \* \* \*

This matter is before the court sua sponte. On May 1, 2020, this court held the motion to dismiss of plaintiff-appellee, Timothy Betton, in abeyance and remanded the appeal to the Erie County Court of Common Pleas for its entry of a modified order which would allow this court to determine whether the October 28, 2019 entry, that is the subject of the instant appeal, is a final, appealable order. On May 20, 2020, the trial court entered an amended entry, and for the following reasons this court grants Betton's motion to dismiss for lack of a final, appealable order.

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Tab D

On January 15, 2020, Betton filed his motion to dismiss for lack of a final, appealable order. Defendants-appellants, Burgess & Niple, Inc. ("Burgess") and Speer Brothers, Inc. ("Speer"), filed a memorandum in opposition, and Betton has filed a reply.

As outlined in this court's May 1, 2020 order, on November 26, 2019, Burgess and Speer filed separate notices of appeal from the October 28, 2019 judgment of the Erie County Court of Common Pleas that denied their respective motions for summary judgment. We noted that, generally, orders denying motions for summary judgment are not final and appealable. *Klein v. Portage County*, 139 Ohio App.3d 749, 745 N.E.2d 532 (11th Dist.2000), ("The denial of a summary judgment motion generally does not decide the action and prevent a judgment, and thus, does not constitute an appealable final order.").

After examining the applicable statutes and the trial court's October 28 entry, we could not determine whether the trial court found that the contract claims met the requirements of the statute of repose as set forth in R.C. 2305.131, or if it found that the statute of repose did not apply to contract claims generally. Specifically, we found that had the trial court made a determination that the contract claims did not meet the requirements of the statute of repose, and therefore the statute of limitations set forth in R.C. 2305.06 applies, the order would not be final and appealable. However, if the trial court held that the statute does not apply to contract claims generally, the order would be final and appealable pursuant to R.C. 2505.02(B)(6), because it would have implicitly

determined that the statute of repose is unconstitutional. Therefore, the motion to dismiss was held in abeyance, and the appeal was remanded for the trial court's clarification.

In its May 20, 2020 amended judgment, the trial court determined that the claims do not meet the requirements of the statute of repose and therefore the statute of limitations set forth in R.C. 2306.05 applies. Therefore, for the reasons set forth in our May 1, 2020 decision, Betton's motion to dismiss is found well-taken and granted. This appeal is dismissed for lack of a final, appealable order. Appellant are ordered to pay the costs of this appeal pursuant to App.R. 24.

It is so ordered.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
*See also 6th Dist.Loc.App.R. 4.*

Mark L. Pietrykowski, J.

Arlene Singer, J.

Christine E. Mayle, J.  
CONCUR.

Mark L. Pietrykowski  
JUDGE

Arlene Singer  
JUDGE

Christine E. Mayle  
JUDGE