Supreme Court of Ohio Clerk of Court - Filed July 12, 2018 - Case No. 2018-0213

IN THE SUPREME COURT OF OHIO

NEW RIEGEL LOCAL SCHOOL BOARD OF EDUCATION

Appellee

v.

THE BUEHRER GROUP ARCHITECHTIRE & ENGINEERING, INC. et al.

Appellant

Case No. 2018-0189 (consolidated with Case No. 2018-0213)

On Appeal from the Third Appellate District, Seneca County, Ohio (C.A. Case No. 13-17-04)

MERIT BRIEF OF AMICI CURIAE OHIO INSURANCE INSTITUTE OHIO MANUFACTURERS' ASSOCIATION, OHIO CHAMBER OF COMMERCE, OHIO CHAPTER OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE SURETY & FIDELITY ASSOCIATION OF AMERICA IN SUPPORT OF APPELLANT THE BUEHRER GROUP ARCITECTURE & ENGINEERING INC.

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INTRODUCTION

In its opinion, the court below recognized that the current Statute of Repose, R.C. 2305.131 applies to any type of civil action and is not limited to tort claims only. The court stated "**[t]hus, it would appear that the statute specifically denies the claims in this case**." *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng. Inc.*¸ 3rd Dist. Seneca No. 13-17-04, 2017-Ohio-8522, ¶8. In that conclusion, it was correct.

But then the Third District Court of Appeals went on to negate that conclusion by finding that only the legislature or the Supreme Court could negate its prior holding in *Kocisko*, *Kocisko v. Charles Shtrump & Sons Co.*, 21 Ohio St. 3d 98, 99, 488 N.E.2d 171 (1986), which found 30 years ago, based on a very different version of R.C. 2305.131, that the Statute of Repose then in effect only applied to tort claims.

Without any analysis of the major changes that the legislature clearly DID make in the statute, the Third District Court of Appeals said only this court, the Ohio Supreme Court, could modify *Kocisko*.

Because the Third District will clearly only follow the new law if the Supreme Court gives it permission to do so, and because the Fifth District had no such issue with following the new statute, thereby creating conflicts among the appellate courts, **it is important for this court to clarify that *Kocisko* does NOT apply** and the statute is clear on its face; it covers both contract and tort claims.

The decision in this case is of extreme importance to *amici curiae*. Ohio Insurance Institute ("OII") represents insurers covering thousands of Ohio designers, architects and builders who still risk long exposure to stale contract-based claims if this decision is left to stand. The other *amici* advise surety and fidelity industry, state and federal agencies, and legislators and

represent Ohio businesses involved in the construction industry or work towards promoting a more favorable business climate and job creation in Ohio, all of which are impacted by the Third District's decision.

The current Statute of Repose has key differences from the old version.

- The old version was one paragraph. The new is nine paragraphs.
- The old version used "shall be brought," a term more related to statutes of limitations. The new uses "shall accrue."
- The old uses "no action." The new uses "no cause of action," a more encompassing term.
- The old version was very general. The new version uses contract-specific language and clauses that only make sense if the statue applies to contracts.
- The new statute is codified outside of the tort-specific limitations section.

The language of the Statute of Repose plainly provides for its application to any claim, whether based in tort or contract

The Statute of Repose states in plain terms that absent certain exceptions, **"no cause of action" seeking damages** resulting from a construction defect can be brought against a designer, architect, or builder more than ten years after construction is substantially completed per the governing contracts. The General Assembly that enacted the Statute of Repose **knew how to use the specific tort cause of action definition and chose not to use it in this instance**, instead introducing a number of **contract-law-specific terminologies** into the language of the statute. The only reasonable interpretation of the Statute of Repose is that it applies to any cause of action, whether styled as a tort or contract-based claim.

New Riegel's claim for the alleged design and construction defects asserted 13 years after construction completed is precisely the type of stale claim the Legislature aimed to prevent by enacting the Statute of Repose

In enacting the Statute of Repose, the Legislature explained in very clear terms that this enactment was intended to **alleviate the risk of construction industry professionals' exposure**

to stale claims—claims asserted long after the real estate at issue has been out of their control, relevant documents have been lost, and memories have faded. This concern would not vary with the type of a stale claim; it would be the same whether such claim were brought in tort or in contract.

The Third District Court of Appeals misapplies *stare decisis* principles to reach a conclusion contrary to what it even recognizes is the new language

To support its argument that the current Statute of Repose is limited in its application only to tort-based claims, the Third District Court of Appeals relies on interpretation by the Court of a different enactment – a statute of limitations that has **long-ago been declared unconstitutional and replaced by the current and entirely different Statute of Repose**. This Court of Appeals even recognized that the Legislature can change a statute, and did, but then confusingly concluded that only the Ohio Supreme Court can find that a 30-year-old case on a different statute no longer applies.

STATEMENT OF INTEREST OF AMICUS CURIAE

This case provides the Court with an opportunity to provide thousands of Ohio businesses with clarity and consistency in the application of the Statute of Repose codified at R.C. 2305.131. R.C. 2305.131 represents the General Assembly's directive that no architect, designer, builder, or another professional involved in real property improvement **bear the uninsurable risk that a claim may be brought against them at an indeterminate time in the future**. In this case, however, the Third District Court of Appeals **disregarded both the plain language of the statute and the General Assembly's clear expression of intent**. Instead, it applied an irrelevant interpretation of the **long-repealed statute of limitations** that used to be R.C. 2305.131 to find that Ohio companies and individuals involved in real property construction may be subjected to **indefinite liability based purely on how a legal claim arising out of a**

construction project may be worded—as tort or a contract claim. This interpretation by the Third District Court of Appeals is in **conflict with the Fifth District Court of Appeals'** proper reading of the Statute of Repose that found no difference in its applicability regardless of how a claim is presented – as a breach of contract or a tort.

The ***amici curiae***, described individually in more detail below, share in common a recognition that the future viability of many Ohio companies engaged in real estate planning and construction, and in turn the livelihoods of their employees, **depends upon the correct application of Ohio's Statute of Repose.** *Amici* have each worked to support clear and predictable limits on liability exposure for their constituents and educate Ohio legislators and the public about vital importance of such limits.

- **This Court needs to provide clear guidance that R.C. 2305.131 supplies Ohio architects, designers, and contractors with a definite time limit for any potential litigation against them over a construction project, whether those claims arise in tort or in contract**

The undersigned *amicus curiae* represent members constituting every facet of business that touches upon construction industry in the State of Ohio, from manufacturing to insurance. These *amici* all have in common an interest in ensuring that Ohio's law governing construction litigation is fair and efficient. As explained above, the Third Circuit's decision causes substantial concern for *amici* because it adopts a rule that will increase litigation and **randomly expose businesses to unpredictable litigation risks based on nothing more than a plaintiff's choice to word a claim as breach of contract rather than tort**. It is critical to the businesses of Ohio that they can predict and insure their legal risks. The Third Circuit's decision casts serious doubt on this proposition because no insurer will provide coverage for a business with liability exposure that is **potentially unlimited in time** simply because the business performs its services pursuant to a contract, and that decision should be reversed by this Court.

- **Construction industry is a vital part of Ohio economy**

The construction industry is a major part of the U.S. and Ohio economies. Nationally, in 2016, construction contributed $793 billion (4.3%) of national gross domestic product ("GDP"), and in Ohio that share was $24 billion (3.8%) of the state's GDP.[1] Of the approximately 669,000 construction firms nationally, 92% are small businesses with 20 or less employees, and in Ohio that percentage is approximately 91%. (*Id.*) As of March 2018, the construction industry employed 7.2 million workers, with 219,200 individuals employed in Ohio. (*Id.*)

All public construction projects in Ohio require payment and performance bonds, and so do many private and public/private projects as well. In fact, The Surety & Fidelity Association of America ("SFAA") reports that over the last several years, some of the most significant increases in the use of surety bonds were observed in private construction.[2] As SFAA's President explained, "[r]equiring surety bonds in private construction protects companies and shareholders from the enormous costs of contractor failure." In 2016, the surety industry wrote premiums of $5.8 billion with a loss ratio of 15.5%[3]. The overall favorable surety loss ratio has been attributed to adherence to strict underwriting criteria and proper prequalification of risk.[4]

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[1] Associated General Contractors of America, *The Economic Impact of Construction in the United States and Ohio* (May 1, 2018), https://files.agc.org/files/economic_state_facts/OHstim.pdf (accessed June 21, 2018).
[2] The Surety and Fidelity Association of America, *Statistical Information*, https://www.surety.org/page/StatisticalPublic? (accessed June 21, 2018)
[3] Willis Towers Watson, *Marketplace Realities 2018: Surety*, https://www.willistowerswatson.com/en-US/insights/2017/11/marketplace-realities-2018-surety (accessed June 21, 2018)
[4] The Surety and Fidelity Association of America, *Statistical Information*, https://www.surety.org/page/StatisticalPublic? (accessed June 21, 2018)

- ***Amici curiae* represent members of all facets of construction industry that rely on clarity and predictability of Ohio's laws that govern the industry**

Amicus curiae **Ohio Insurance Institute** ("OII") is uniquely qualified to provide this Court with a broad perspective on the principles of insurance law relevant to this appeal, as well as practical insight into the negative consequences for insurers and insureds alike if the ruling below is upheld. OII is the professional trade association for property and casualty insurance companies in the State of Ohio, and its members include thirty-three domestic property and casualty insurers, fourteen foreign property and casualty insurers and reinsurers, eight insurance trade associations and three insurance-related organizations. Based on 2015 market share data from the Ohio Department of Insurance, OII's member companies represent nearly 83% of the homeowners market and over 44% of the commercial market.

Amicus curiae the **Ohio Manufacturers' Association** ("OMA") is a statewide association of approximately 1,600 manufacturing companies which collectively employ the majority of the roughly 610,000 men and women who work in manufacturing in the State of Ohio. OMA's members have a vital interest in ensuring that Ohio remains a desirable place to do business and believe that for manufacturers to invest and grow in Ohio, and to compete globally, Ohio's civil justice system must be rational, fair and predictable.

Founded in 1893, *amicus curiae* the **Ohio Chamber of Commerce** ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

Amicus curiae **Ohio Chapter of the National Federation of Independent Business** ("NFIB/Ohio") has more than 24,000 members and is the State's largest association dedicated exclusively to the interests of business owners. NFIB/Ohio aggressively promotes and protects the rights of its members to create, operate, and grow their own businesses. NFIB/Ohio supports rules and regulations that will provide an economic climate that attracts new businesses to Ohio and support their growth and development.

Amicus curiae **The Surety & Fidelity Association of America** ("SFAA") is a trade association of companies licensed to write fidelity and surety bonds in the United States. The 411 members of SFAA are the sureties on the vast majority of bonds furnished in Ohio including the bonds required to secure pubic construction contracts. SFAA is licensed by each state insurance department as a rating or advisory organization. SFAA collects statistics on premiums and losses for fidelity and surety bonds, and files such statistics with the state insurance departments. SFAA is licensed by the Ohio Department of Insurance as a Rating Bureau and/or Organization. SFAA also represents the interests of its members before Congress, state legislatures and the Courts.

Amici curiae recognize that Ohio has made great strides in reforming its civil justice system over the past sixteen years and support the Appellant's position in this case to preserve those gains, including the Statute of Repose, which are protecting consumers without unduly burdening businesses, while positioning Ohio as an attractive state for business investment.

- **Applying the Statute of Repose to contractual claims, as intended by the Legislature, will contribute to the stability and predictability of the risk basis analysis for construction insurance coverage and will provide insurance market participants with certainty about time limits for maintaining coverage**

Amici have chosen to participate in this appeal because the importance of legal issues it raises extends far beyond the immediate parties. *Amici* are particularly concerned with

Appellee's argument in favor of limiting the Statute of Repose application only to claims sounding in tort, because it fails to recognize the effect **lack of clarity about what criteria to apply to calculate risks would have on**: (1) availability and affordability of insurance coverage and surety bonds that architects, designers, and builders can obtain in connection with their work and (2) overall climate for business growth in Ohio.

- **Insurance does not cover damages for which no premium has been paid**

Insurance makes modern life possible by spreading risks of losses that an individual or business could not bear alone. If a court expands the coverage of an insurance policy by interpreting time limits within which a claim can accrue in a way that would require coverage of risks that the parties did not intend to cover—such as, in this case, the risk that an insurer will be called upon to cover damages on a contract-based claim (as opposed to tort-based claim) long after the improvement has been out of the insured's controls and all reasonable time for the insured to maintain relevant records has passed—**the premium that the insured paid for the insurance would no longer correspond to the risks of loss** that the insurer is required to indemnify. The resulting uncertainty, inefficiency, and unnecessary costs can be prevented if courts enforce the clear language of the Statute of Repose as intended by the Legislature.

- **Availability of surety bonds for construction industry will be threatened if the Third District Court of Appeals' ruling is allowed to stand**

Sureties that OII and SFAA represent issue bonds to Ohio contractors to guarantee their contractual performance. A performance bond secures the contractor's obligations to perform the construction contract. The exposure under a performance bond is driven largely by the exposure encountered by the contractor under the construction contract. As a result of a construction contract default, when latent construction defects cause damage, sureties are called upon to remediate that damage. Typically, the bond form is prescribed by the obligee, not the

surety. Therefore, **sureties cannot limit their exposure by placing limitation periods in the bonds themselves**. A statute of repose establishes a fixed end date as to the contractor's contractual liability, thereby establishing a reasonable and certain exposure for the surety. Without an applicable statute of repose, sureties will be deprived of certainty and predictability that allows them to write surety bonds, which increases the surety's risk. A surety typically addresses increased risk by tightening the underwriting parameters. As a result fewer contractors, particularly small contractors, are able to qualify for the bond. Finality and certainty will make surety bonds more accessible in Ohio and will result in reduce the overall construction costs, which in turn will improve Ohio's climate for all business interests and jobs growth.

OII, OMA, Ohio Chamber, NFIB/Ohio, and SFAA therefore support the Appellee in this appeal and ask the Court to reverse the ruling below.

STATEMENT OF FACTS

The few undisputed facts that are relevant to this appeal are not complicated. Amici curiae incorporate here by reference the Statement of Facts set forth in the Merit Brief of Appellants the Buehrer Group Architecture & Engineering, Inc. and Buehrer Group Architecture & Engineering.

Amici curiae OII, OMA, Ohio Chamber, NFIB/Ohio, and SFAA submit this brief in support of Appellee and ask the Court to reverse the Court of Appeals' ruling and reinstate the trial court's ruling.

ARGUMENT

A. Thousands of architects, designers, builders, and other construction industry professionals depend on uniform interpretation of the currently-governing Statute of Repose, which plainly applies to both contract and tort-based causes of action.

In its Memorandum Opposing Jurisdiction ("New Riegel Memo"), New Riegel attempted to minimize the effect the Court's interpretation of the Statute of Repose may have, arguing, **without any evidence**, that "a ruling by this Court will affect few entities." (New Riegel Memo at 6). Nevertheless, it then **suggested that the Court delay** resolving the current conflict between the Fifth and Third District Court of Appeals on the question of Statute of Repose application to contract-based claims until the next case. (*Id.* at 7). Thus, New Riegel has acknowledged that its first proposition is false – there are still many participants in the construction industry with respect to whom the 15-year statute of limitations applicable to contractual claims accruing before the 2012 amendment has yet to pass. Contrary to Appellee's arguments, the 2012 amendment did not apply the written contract 8-year statute of limitations retroactively. For causes of action that accrued prior to the 2012 effective date, the limitations period is either the 15-year pre-amendment period or 8 years from the effective date of the amendment, whichever occurs first. 2011 Ohio SB 224, non-codified law at Section 4. Architects, designers, and builders of long-completed projects depend on uniform application of the existing law to claims that may still be brought against them in the years to come and require clarity that only the Court can provide at this point in time.

The existing law—the Statute of Repose set forth in R.C. 2305.131—is distinct from the statute of limitations in existence in 1986 when the *Kocisko* Court rendered its interpretation. That statute of limitations had since been **declared unconstitutional, repealed, and replaced** by the Legislature and clearly applies to both contractual and tort causes of action.

1. The 1971 statute of limitations which the *Kocisko* Court interpreted is not equivalent to the Statute of Repose in effect since 2005, because the 1971 statute was declared unconstitutional, rewritten and repealed, and, ultimately, entirely rewritten as a different type of limitation.

On July 23, 1971, the General Assembly of the State of Ohio amended section 2305.131 of the Revised Code "to change **the statute of limitations** on actions for damages based on services to improve real property." Am.S.B. No. 307 (1971) (emphasis added). The 1971 version of R.C. 2305.131 stated that "[n]o action to recover damages . . . arising out of defective and unsafe condition of an improved to real property . . . **shall be brought** [against a designer, architect, or construction professional] more than ten years after the performance . . ." (*Id.*) (emphasis added).

In 1986, the *Kocisko* Court determined that the 1971 statute of limitations applied only to actions sounding in tort. *Kocisko*, 21 Ohio St. 3d at 99.

In 1994, this Court declared the R.C. 2305.131 statute of limitations unconstitutional as violating a right to a remedy guaranteed by the Ohio Constitution. *Brennaman v. R.M.I. Co.*, 70 Ohio St. 3d 460, 466-67, 639 N.E.2d 425 (1994).

In October 1995, the General Assembly enacted a "new" R.C. 2305.131 that was closer in content to the current R.C. 2305.131. 1995 Ohio H.B. 350.

The 1995 version of R.C. 2305.131 was declared unconstitutional in 1999. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999).

In July 2001, the General Assembly repealed R.C. 2305.131 "both as it results from and as it existed prior to its repeal and re-enactment by" HB 350. 2001 Ohio S.B. 108.

In 2005, the 125th General Assembly issued an Act to, among other things, "**establish a statute of repose** for certain . . . claims based on unsafe conditions of real property improvements . . ." 2003 Ohio SB 80 at Synopsis (emphasis added). The new R.C. 2305.131

made clear that its provisions **governed regardless of any "otherwise applicable period of limitations specified in this chapter**[5]" and **it was a true statute of repose in establishing that "no cause of action to recover damages . . .** [arising] out of a defective and unsafe condition of an improvement to real property . . . **shall accrue** . . . later than ten years." (emphasis added). As this Court has explained, a true statute of repose – the current version of R.C. 2305.131—bars the action before it may accrue, as opposed to a statute of limitations—the 1971 version of R.C. 2305.131 at issue in *Kocisko* – that limits the time for asserting a claim after it has accrued. *Sedar v. Knowlton Contr. Co.*, 49 Ohio St. 3d 193, 195, 201, 551 N.E.2d 938 (1990), *overruled on other grounds in Brennaman*, 70 Ohio St. 3d at 467.

2. The 2005 Statute of Repose is far from identical to the repealed 1971 statute of limitations, employs broad terminology to identify covered claims and specific references to contracts law concepts, and is placed in the overall legislative scheme outside of specific limitations applicable to tort claims

New Riegel has argued that the 1971 and 2005 enactments are identical in all material respects and that the Court thus need not concern itself with the clear conflict between the Third and the Fifth Appellate Districts and with providing clarity to construction industry professionals who seek insurance and business guidance from the undersigned *amici curiae*. However, **even a cursory glance at the texts** of the two enactments and the Statute of Repose's placement in the overall scheme for regulating Common Pleas Courts' jurisdiction **belies this assertion**. "The ultimate inquiry in the interpretation of statutes is to ascertain the legislative intent." *Caldwell v. State*, 115 Ohio St. 458, 466, 4 Ohio Law Abs. 605, 4 Ohio Law Abs. 835, 154 N.E. 792 (1926). The Legislature **took extra care to remove all doubt** that the Statute of Repose applied to any

[5] Including R.C. 2305.06 containing statute of limitations applicable to written contracts and R.C. 2305.09-116 applicable to various torts.

cause of action for damages arising out of poor design or construction of improvements to real property, including contractual claims.

i. The Legislature did not use the specific "tort claim" term, instead opting for the general "cause of action"

As already indicated above, **the one-paragraph 1971 statute** of limitations addressed when an "action [could be] brought," while **the current nine-paragraph Statute of Repose speaks to when a "cause of action [may] accrue**." If the Legislature intended to limit applicability of the Statute of Repose to tort actions only, it certainly knew how to do that.

The Legislature is presumed to "know[] the existing condition of the law, whether common law . . . or statute law." *Wachendorf v. Shaver*, 149 Ohio St. 231, 248, 78 N.E.2d 370 (1948), citing *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 90 N.E. 146, 7 Ohio L. Rep. 408 (1909); *see also State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419, ¶ 63 (existence of a specific definition in one part of the code and not in the other indicates the Legislature's deliberate choice). And, the Legislature "'is not presumed to do a vain or useless thing, and . . . when language is inserted in a statute it is inserted to accomplish some definite purpose.'" *State v. Wilson*, 77 Ohio St.3d 334, 336, 1997 Ohio 35, 673 N.E.2d 1347 (1997), quoting *State ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959). The Legislature did not use a "tort action" definition and instead used the all-encompassing "cause of action" term, and the Court cannot read into the statute that what has not been said. *Davis v. Davis*, 115 Ohio St.3d 180, 2007 Ohio 5049, 873 N.E.2d 1305, ¶13-15.

ii. The Legislature referenced specific contracts law concepts in the Statute of Repose to effectuate its intended broad application of the Statute of Repose

"[I]n reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting

body." *Wilson* at 336. *See also* R.C. 1.42. Yet, in arguing that the Court should consider only that part of the Statute of Repose that speaks about the damage that can give rise to a claim—"bodily injury, an injury to real or personal property, or wrongful death", which is strictly a tort-type damage in New Riegel's opinion—New Riegel is improperly asking the Court to ignore the other 98% of the statute and its **undeniable intent to apply to any claim, including a breach of contract claim**, that can be brought to recover such damages.

- **"Substantial completion" trigger is a contract term**

Perhaps the clearest indication of the Legislature's intent to remove all doubt that the Statute of Repose should apply to contractual claims is the **addition of the "substantial completion" trigger** that did not exist in the 1971 statute of limitations. While the trigger for the running of the 1971 statute of limitations was "performance or furnishing of [design or construction] services, **the new Statute of Repose's trigger is the "date of substantial completion"** of improvements to real property. (*Cf.* S.B. 307 with today's R.C. 2305.131(A)(1)). The "substantial completion" concept is **purely a creature of contracts law**. The Legislature confirmed this by clearly defining the "substantial completion" trigger by referencing the particular "contract or agreement covering the improvement." R.C. 2305.131(G).

- **Other courts recognize "substantial completion" as a contract term**

Courts around the country recognize that "substantial completion" must invariably be defined by reference to the relevant contract. *See e.g. Poizner v. Golden Eagle Ins. Co.*, App. No. A114081, 2007 Cal. App. Unpub. LEXIS 253, at *33 (Jan. 12, 2007) (interpreting California's Statute of Repose and finding that the "**substantial completion** . . . term is a commonly understood term in construction **contract law** [describing] when the improvement reaches a stage so that the contracting [party] can use and occupy the structure for its intended

purpose.") (emphasis added); *Barnes v. Orange Foundry*, 1982 Mass. App. Div. 266, 268, 1982 Mass. App. Div. LEXIS 71, *7 (substantial completion is "**a fundamental principle of contract law**"); *United States ex rel. Am. Civ. Constr., LLC v. Hirani Eng.*, 263 F.Supp.3d 99, 110 (D.D.C.2017) (the "substantial completion rule" is interpreted according to "**applicable contract law**"); *United States ex rel. Hussmann Corp. v. Fid. & Deposit Co.*, 999 F.Supp. 734, 744 (D.N.J.1998) (same).

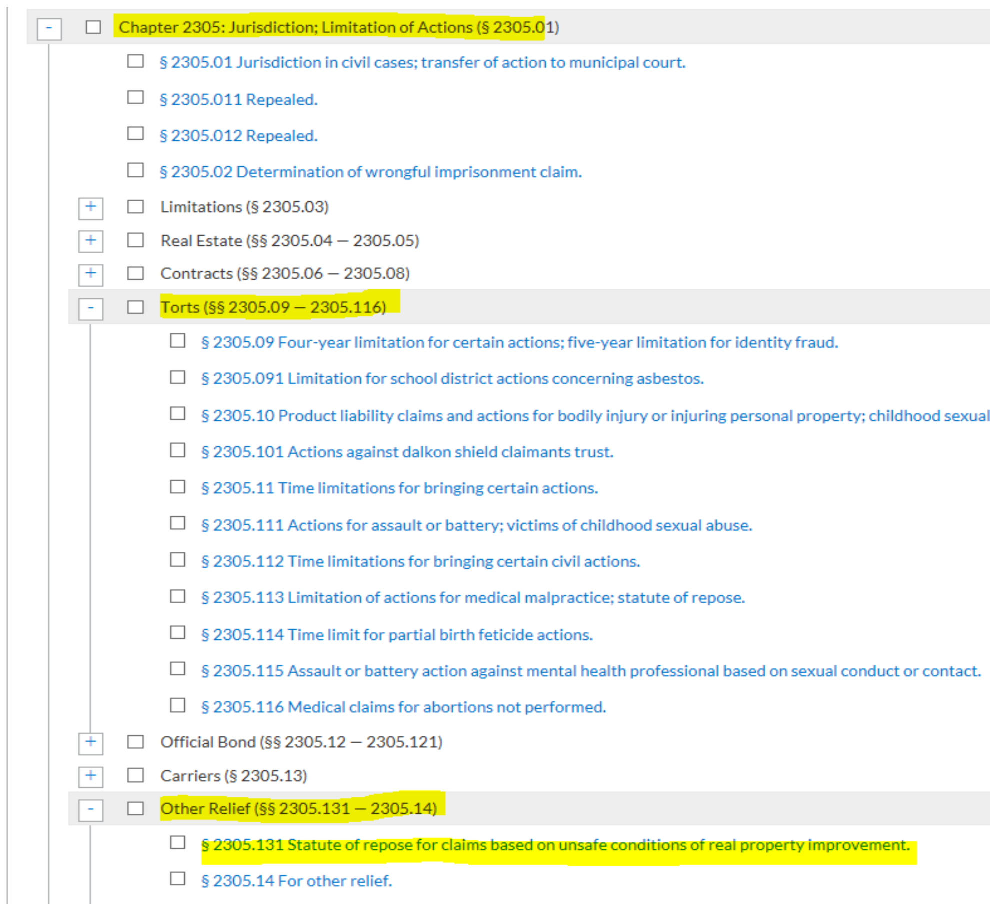
By tying the most critical factor in determining whether a claim is timely to contracts underlying every real improvement design or construction project, **the Legislature made it clear that the Statute of Repose was intended to apply to contractual** and tort claims with equal force.

- **Additional new language applies to other contract issues**

Additional contracts-law-specific language appears in Section D of the Statute of Repose, where the Legislature specified that the ten-year period of repose may be extended by an **express contractual "warranty or guarantee**." R.C. 2305.131(D). This type of language was entirely absent from the 1971 statute of limitations. It would not be necessary to add it if it were only a tort statute of repose. Thus, the Legislature thoroughly considered the applicability and impact of contracts law on the period of repose and did not prescribe any limitation on the reach of the Statute of Repose to contractual claims. In fact, following that consideration, the Legislature specifically emphasized in Section (F) of the Statute of Repose that it "shall be applied in a remedial manner in **any civil action commenced on or after the effective date of this section."** R.C. 2305.131(F) (emphasis added).

iii. The Statute of Repose is codified outside of Torts limitation section of R.C. 2305

Finally, the Legislature confirmed the broad applicability of the Statute of Repose by **codifying it under the Other Relief section of Chapter 2305, separate and apart from the Torts subsection** (*see* image of R.C. 2305's structure below). If the Legislature intended to limit the Statute of Repose application to tort causes of action, it surely would not have placed it outside of the Torts subsection.



- Chapter 2305: Jurisdiction; Limitation of Actions (§ 2305.01)
  - § 2305.01 Jurisdiction in civil cases; transfer of action to municipal court.
  - § 2305.011 Repealed.
  - § 2305.012 Repealed.
  - § 2305.02 Determination of wrongful imprisonment claim.
  - Limitations (§ 2305.03)
  - Real Estate (§§ 2305.04 – 2305.05)
  - Contracts (§§ 2305.06 – 2305.08)
  - Torts (§§ 2305.09 – 2305.116)
    - § 2305.09 Four-year limitation for certain actions; five-year limitation for identity fraud.
    - § 2305.091 Limitation for school district actions concerning asbestos.
    - § 2305.10 Product liability claims and actions for bodily injury or injuring personal property; childhood sexual
    - § 2305.101 Actions against dalkon shield claimants trust.
    - § 2305.11 Time limitations for bringing certain actions.
    - § 2305.111 Actions for assault or battery; victims of childhood sexual abuse.
    - § 2305.112 Time limitations for bringing certain civil actions.
    - § 2305.113 Limitation of actions for medical malpractice; statute of repose.
    - § 2305.114 Time limit for partial birth feticide actions.
    - § 2305.115 Assault or battery action against mental health professional based on sexual conduct or contact.
    - § 2305.116 Medical claims for abortions not performed.
  - Official Bond (§§ 2305.12 – 2305.121)
  - Carriers (§ 2305.13)
  - Other Relief (§§ 2305.131 – 2305.14)
    - § 2305.131 Statute of repose for claims based on unsafe conditions of real property improvement.
    - § 2305.14 For other relief.

R.C. Title 23, Chapter 2305 (Lexis 2018) (emphasis added).

B. **The Legislature modified the 1971 statute of limitations in significant ways, and the court below agreed that the current Statute of Repose applies to <u>any claim</u> for damages resulting from a property improvement, yet it chose to ignore all statutory modifications by the Legislature in favor of erroneously applying *stare decisis* principles.**

The court below acknowledged that the language of the current version of R.C. 2305.131—the Statute of Repose—is clear "that **NO cause of action** for damages to real property . . . can be brought 10 years from the time the improvements were substantially completed . . . **the statute does not limit it to claims for torts only**. . . Thus, it would appear that the statute specifically denies the claims in this case." *New Riegel Local School Dist. Bd. of Edn.*¸ 2017 Ohio 8522, at ¶8 (emphasis added and original). The court below then also correctly noted that it was "**required to follow** [the *Kocisko* interpretation of the statutory language] **unless either the legislature or the Supreme Court chose to modify it."** *Id.*

- **However, the court then ignored the legislative modifications and erroneously applied *Kocisko***

The Ohio Legislature thoroughly modified the language of R.C. 2305.131 from the 1971 version to the 2005 enactment[6], taking great pains to explain its reasoning behind enacting the Statute of Repose – **to prevent any stale action** from accruing against construction industry participants after ten years has passed following construction completion:

  - **The Legislature recognized the particular challenge architects, designers, and builders face in carrying insurance and maintaining records long after a construction project completed**

> (c) . . . unlimited liability forces professionals to maintain records in perpetuity, because those professionals cannot reasonably predict when a record from fifteen or twenty years earlier may become the subject of a civil action. Those actions occur despite the fact that, over the course of many years, owners of the property or those responsible for its maintenance could make modifications or other

[6] In addition to the modifications already addressed above, the revised R.C. 2305.131 adds an exception where a defendant engaged in fraud (R.C. 2305.131(C)) and allows for a plaintiff to bring a claim more than ten years after accrual if the claim is discovered within that period but less than two years before its expiration (R.C. 2305.131(A)(2)).

> substantial changes that would significantly change the intent or scope of the original design of the property designed by an architectural firm. The problem is compounded by the fact that professional liability insurance for architects and engineers is offered by relatively few insurance carriers and is written on what is known as a "claims made basis," meaning a policy must be in effect when the claim is made, not at the time of the service, in order for the claim to be paid. **Without a statute of repose, professional liability insurance must be maintained forever to ensure coverage of any potential claim on previous services**. These minimum annual premiums can add up, averaging between three thousand five hundred dollars and five thousand dollars annually, which is especially burdensome for a retired design professional.

2003 Ohio S.B. 80, Section 3(A) (emphasis added).

- **The Legislature crafted the Statute of Repose to balance the scales for construction industry professionals**

> . . . (5) To declare that section 2305.131 of the Revised Code . . . strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the **ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation** but not to affect civil actions against those in actual control and possession of an improvement to real property at the time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death.

2003 Ohio S.B. 80, Section 3(B). In providing this explanation of its purpose in enacting the Statute of Repose, the Legislature did not limit the explanation to any specific type of a stale claim it planned to guard against. Instead, it made clear that it **acted out of concern about all "stale litigation."**

Yet, ignoring its own admonition, the court below **disregarded the entirely different nature, language, and purpose of the 1971 version of R.C. 2305.131 that was at issue in *Kocisko* and 2005 version of R.C. 2305.131 in effect today**. In applying the inapplicable *Kocisko* decision, the court below created confusion and uncertainty over all construction, at least in the Third District.

The language of the Statute of Repose and the Legislature's reasons for enacting R.C. 2305.131 in its current form are clear and unequivocally indicate that the Statute of Repose applies to any claim against construction industry professionals for damages arising from improvement of real property, regardless of whether the claim is designated in a complaint as a breach of contract or a tort claim.

CONCLUSION

Amici curiae support the Appellant and asks the Court to reverse the ruling below because Ohio law does not support Appellee's theories for limiting application of the Statute of Repose codified at R.C. 2305.131 only to claims sounding in tort.

The decision of the Court of Appeals in this case is inconsistent with the unambiguous language of R.C. 2305.131, the General Assembly's clear indication of intent in enacting R.C. 2305.131, and with the self-evident principle that a stale claim cannot be brought simply because it is stated as a breach of contract as opposed to as a tort claim. The judgment of the Court of Appeals should be reversed and the judgment of the trial court reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae Ohio Insurance Institute was served via e-mail pursuant to S.Ct.Prac.R. 3.11(B)(1) this 12th day of July, 2018 to:

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