

**ORIGINAL**

COURT OF CLAIMS  
OF OHIO

2014 MAY 29 AM 10: 50

IN THE COURT OF CLAIMS  
STATE OF OHIO

GRAND VALLEY LOCAL SCHOOL  
DISTRICT BOARD OF  
EDUCATION,  
*et al.*

Plaintiffs,

v.

BUEHRER GROUP  
ARCHITECTURE &  
ENGINEERING, INC., *et al.*

Defendants.

) CASE NO.: 2014-00469-PR  
)  
) JUDGE:  
)  
) **DEFENDANT BUEHRER GROUP**  
) **ARCHITECTURE &**  
) **ENGINEERING, INC.'S CIV. R.**  
) **12(C) MOTION FOR JUDGMENT**  
) **ON THE PLEADINGS**  
)

Now comes Defendant, Buehrer Group Architecture & Engineering, Inc. ("Buehrer"), by and through counsel, and hereby respectfully moves this Honorable Court to dismiss Plaintiffs' claims against Buehrer, pursuant to Civ. R. 12(C), for failure to state a claim upon which relief may be granted. The basis for this Motion is that Plaintiffs' claims are time-barred as a matter of law. Accordingly, Buehrer requests this Court dismiss Plaintiffs' claims against Buehrer, with prejudice.

A Brief in Support is attached hereto and incorporated herein by reference.

**ON COMPUTER**

Respectfully submitted,



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## **BRIEF IN SUPPORT**

### **I. INTRODUCTION**

This case concerns the design and construction of a school building for the Grand Valley Local School District Board of Education (“the Project”). In particular, Plaintiffs allege faulty design and workmanship caused property damage to the building. As a result of this alleged conduct, Plaintiffs have filed the case at bar against numerous entities involved in the construction of the Project.

### **II. RELEVANT FACTS**

Among the many Defendants in this case, Buehrer was the professional architect that designed the Project. (*Id.*, ¶9). In their Complaint, Plaintiffs allege that Buehrer “failed to meet the standard of care as the Architect and Engineer of Record on the Project.” (*Id.*, ¶53). As a result of this purported conduct, Plaintiffs allege two causes of action: (1) Breach of Contract (Count VII) and (2) Negligence (Count VIII).

Supporting Plaintiffs’ claims of breach of contract, the Complaint alleges that Buehrer “failed to properly design the Project” and “failed to meet the standard of care as the Architect and Engineer of Record on the Project.” (*Id.*, ¶ 53). Supporting the negligence claim, Plaintiffs allege that Buehrer “failed to properly perform its

duties as Architect and Engineer of Record within the professional standard of care.” (*Id.*, ¶ 56).

As to the contract claim, Plaintiff and Buehrer entered into an “Agreement for Professional Design Services” which is attached to the Complaint as Exhibit A.<sup>1</sup> The contract defines Buehrer’s responsibilities on the Project as abiding by the generally accepted standard of care for an architect as follows:

### 1.1 Architect’s Services

**1.1.1 Scope of Services: Applicable Law.** The Architect shall provide professional design services as defined in Section 153.65(c)<sup>2</sup> of the Ohio Revised Code, including without limitation, services customarily furnished in accordance with generally accepted architectural and engineering practices, for the Project in accordance with the terms of this Agreement. The Architect shall provide such services in accordance with the applicable Sections of the Ohio Revised Code, any applicable state rules and regulations, any applicable federal and local statutes, ordinances, rules, building codes and regulations, and the School District Board’s program of Requirements (compromised of, without limitation, the Master Plan, Bracketing Forms and Summary of Renovations, Project Budget and Cost Estimates) as incorporated by reference herein. The Architect shall cooperate with the Construction manager in performing its services hereunder.

\* \* \*

**1.1.3 Timeliness; Standard of Care.** The Architect shall perform services hereunder in an efficient and timely manner in accordance with professionals standards of skill, care and due and reasonable

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<sup>1</sup> As the contract was attached to Plaintiffs’ Complaint, it is properly deemed part of the pleadings pursuant to Civ.R. 10(D).

<sup>2</sup> R.C. 153.65(C) defines “Professional design services” as “services within the scope of practice of an architect or landscape architect registered under Chapter 4703 of the Revised Code or a professional engineer or surveyor registered under Chapter 4733 of the Revised Code.”

diligence in a timely manner expected of architects with experience in designing school buildings similar in design and function to the Project in accordance with the Project Schedule and so that the Project shall be completed as expeditiously and economically as possible within the Construction Budget and as is consistent with professional skill, due care and in the best interests of the Commission and the School District Board.

Despite the fact that all of the events giving rise to this action admittedly occurred 9-13 years ago, Plaintiffs did not file their Complaint until February 25, 2014. (See Docket, generally). Under well-established Ohio law, however, Plaintiffs' claims against Buehrer are subject to a four-year statute of limitations. As such, Plaintiffs were required to bring their lawsuit against Buehrer, at the very latest, by the end of 2009. Thus, Plaintiffs' claims are time-barred and should be dismissed as a matter of law.

## **II. LAW AND ARGUMENT**

### **A. Standard For Motion For Judgment On The Pleadings**

Ohio Civil Rule 12(C) governs a motion for judgment on the pleadings. It provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The standard of review on a motion for judgment on the pleadings is the same as the standard of review for a Civ.R. 12(B)(6) motion. See *Gawloski v. Miller Brewing Co.*, 96 Ohio App.3d 160, 163 (9th Dist.1994); *McMullian v. Borean*, 167 Ohio App.3d 777, 780 (6th Dist.2006).

Until recently, Ohio courts have followed the test articulated by the United States Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 45 (1957), which states that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove “no set of facts” in support of his claim which would entitle him to relief. *See, e.g., O’Brien v. University Community Tenants Union*, 42 Ohio St.2d 242, 245 (1975).

The U.S. Supreme Court, however, has recently retired the “no set of facts” standard articulated in *Conley* because it had been consistently misunderstood and has puzzled courts and lawyers alike for far too long. *See, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-64 (2007). Rather, the U.S. Supreme Court has clarified that:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations ... a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief **requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level....**

(Emphasis added.)(Citations omitted.) *Id.*, at 555. Accordingly, a plaintiff cannot merely rely upon bare assertions and legal conclusions to survive a motion to dismiss for failure to state a claim. Instead, a plaintiff has a mandatory duty to set forth enough factual matter “to raise a right to relief above the speculative level.” *Id.* A claimant must show that the allegations “possess enough heft” to establish legitimate entitlement to relief. *Id.*, at 557.

This new standard has been adopted by the Ohio Court of Appeals, including the Eleventh District Court of Appeals. *See, Hoffman v. Frasser*, 11th Dist. Geauga No. 2010-G-2975, 2011-Ohio-2200, at ¶ 21 (May 6, 2011) (“While a complaint attacked by a Civ.R. 12(B)(6) motion to dismiss does not need detailed factual allegations, the plaintiff’s obligation to provide the grounds for his entitlement to relief requires more than conclusions, and a mere recitation of the elements of a cause of action without factual enhancement will not suffice.”); *Williams v. Ohio Edison*, 8th Dist. Cuyahoga No. 92840, 2009-Ohio-5702, at ¶ 15 (Oct. 29, 2009) (“the claims set forth in the complaint must be plausible, rather than conceivable”); *Vagas v. City of Hudson*, 9th Dist. Summit No. 24713, 2009–Ohio–6794 (Dec. 23, 2009) (citing *Twombly* for the proposition that complaints must contain more than mere “labels and conclusions.”)

In applying Civ.R.12(C) and the fundamental requirement that a complaint assert a cause of action for which relief may plausibly be granted, judgment on the pleadings is particularly appropriate in this instance where a review of the Complaint demonstrates that Plaintiffs cannot establish a legitimate entitlement to relief as to their claims against Buehrer.

**B. Plaintiffs’ negligence claim against Buehrer is time-barred pursuant to the four-year statute of limitations in R.C. 2305.09(D)**

It is well-settled that “[t]ort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D).” *Harris v.*

*Liston*, 86 Ohio St.3d 203, at syllabus ¶ 1 (1999). See also *Crowninshield/Old Town Community Urban Redevelopment Corp. v. Campeon Roofing and Waterproofing, Inc.*, 1st Dist. Hamilton Nos. C-940731 and C-940748, 1996 WL 181374, at \*3 (Apr. 17, 1996) (holding that a claim against an architect for negligence is governed by a four-year statute of limitations).

When applying this rule of law, it is also well-established that it is the substance of a claim, not the form of the complaint that determines the appropriate statute of limitations. *Esposito v. Caputo*, 11th Dist. No. 2002-L-099, 2003-Ohio-1590, 2003 WL 1633857, at ¶ 17 (Mar. 28, 2003). “In other words, deciding which statute of limitations applies in any given case will depend upon the type of damages allegedly suffered by a plaintiff.” *JRC Holdings, Inc. v. Samsel Servs. Co.*, 166 Ohio App. 3d 328, 2006-Ohio-2148, at ¶ 19 (11th Dist. 2006), citing *Kay v. Cleveland*, 8th Dist. Cuyahoga No. 81099, 2003-Ohio-171, 2003 WL 125280, at ¶ 17 (Jan. 16, 2003).

In this case, it is undisputed that Plaintiffs are seeking recovery for property damage occurring between 2001 and 2005. (See Complaint, ¶6). Thus, Plaintiffs were required to bring their negligence claim against Buehrer within four years of the events which Plaintiffs allege give rise to this action, or no later than 2009. See, *JRC Holdings, Inc. v. Samsel Serv. Co.*, 166 Ohio App.3d 328 (holding that when suit is premised upon real-property damage arising from allegedly negligent provision of a professional service, “R.C. 2305.09(D) controls, either as regards the

property damage, or the professional service.”) *See also, Rosenow v. Shutrump & Assoc.*, 163 Ohio App.3d 500, 2005-Ohio-5313 (7th Dist. 2005) (holding that negligence claim against a contractor for failure to install a roof in a workmanlike manner was governed by the four-year statute of limitations in R.C. 2305.09(D)); *Point East Condominium Owners’ Assn. v. Cedar House Assoc.*, 104 Ohio App.3d 704, (8th Dist. 1995) (holding that in tort action for failure of builder to perform in workmanlike manner, cause of action accrues when actual injury occurs or damage ensues).

In Plaintiffs’ Complaint, they allege that “the events that give rise to this action occurred in connection with the design and construction for Grand Valley of the new PK-12 School Building \* \* \* which occurred between 2001 and 2005.” (See Plaintiffs’ Complaint, ¶6). Thus, in accordance with the plain language of Plaintiffs’ Complaint, they were required to file their claim for negligence no later than the end of 2009. Plaintiffs did not file their Complaint until February 25, 2014. As such, their negligence claim is time barred as a matter of law.

**C. Plaintiffs’ Breach of Contract Claim Is Subsumed By Their Architectural Malpractice Claim As A Matter Of Law**

It is anticipated that Plaintiffs may attempt to argue that their contract claim is distinct from their negligence claim and therefore survives application of the controlling four-year statute of limitations. Such an argument is contrary to our established law because, in Ohio, an action against an architect for breach of duty is an action that sounds in tort, **even though the duty to perform in a**

**workmanlike manner may arise from a contract.** *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376 (1982), paragraph one of the syllabus; *B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 7th Dist. Mahoning No. 12MA5, 2012-Ohio-5981 (Dec. 14, 2012). Thus, Plaintiffs' breach of contract claim against Buehrer for damages resulting from Buehrer's work as the architect of the Project is an action for malpractice, regardless of Plaintiffs' pleading such action as a breach of contract claim.

For example, in *B & B Contrs. & Developers, Inc.*, 7th Dist. Mahoning No.12MA5 at ¶40, the Seventh District upheld the trial court's decision dismissing a breach of contract claim against an architect, by recognizing that "where a breach of contract is also alleged to be a breach of the standard of care, the contract claim is subsumed by a professional negligence action, unless there is distinct conduct to support the contract claim that is not used to support the negligence claim."

This legal reality is also illustrated by the case of *Crowninshield/Old Town Apts. Ltd. v. Campeon Roofing and Waterproofing, Inc.*, *supra*, 1st Dist. Hamilton Nos. C-940731, C-940748, where the court found that claims of architectural negligence, in the absence of a special agreement outlining duties different than those already existing under tort law, is a tort claim, regardless of a plaintiff's claim of concurrent breach of contract. In *Crowninshield*, like the case at bar, the allegations concerned roofing-related problems in a large construction project. The complaint filed in that case alleged that the defendant architect breached

contractual obligations and warranties when designing a building renovation. *Id.*, at \*2. The trial court concluded that the contract claim was actually a tort claim which was barred by the four year statute of limitations for the architect's alleged professional negligence. *Id.*, at \*6.

In affirming the trial court's ruling, the appellate court stated that an architect is not liable for unsatisfactory results unless there was a failure to exercise reasonable care and skill or "a special agreement." *Id.*, at \*4. As the architectural contract only generally required the architect to design the project and did not contain special provisions which gave rise to express or implied warranties of workmanship, the court refused to find an implied contractual warranty of workmanship sufficient to support a breach of contract claim. *Id.* The court concluded that the gist of the claims asserted against the architect sounded in tort, as the underlying nature of the claims alleged negligent design and agreed that the action was time-barred. *Id.* Thus, when the gist of a complaint is malpractice, other duplicative claims are subsumed in the malpractice claim and the court should construe the complaint as only presenting a malpractice claim as a matter of law. *Id.*

In this case, Plaintiffs specifically allege that Buehrer is liable for "failing to meet the standard of care as the Architect and Engineer of Record on the Project." (See Plaintiffs' Complaint, ¶ 53). Moreover, as discussed above, the relevant contract between Plaintiffs and Buehrer requires only that Buehrer provide

professional design services “customarily furnished in accordance with generally accepted architectural and engineering practices...” (Complaint, Ex. A.) Thus, Plaintiffs’ breach of contract claim is nothing more than a malpractice claim against Buehrer in its role as, in Plaintiffs’ own allegation, “the Architect and Engineer of record for the Project.” (See Plaintiffs’ Complaint, ¶ 10).

Buehrer’s contractual promise to provide certain design services of satisfactory nature for the construction of the Project is part of the standard of care for architects and engineers. Thus, Plaintiffs cannot argue that the breach of contract claim is separately actionable from what is in fact a claim of malpractice – especially in light of the fact that Plaintiffs support their breach of contract claim with the allegation that Buehrer is liable for “failing to meet the standard of care as the Architect and Engineer of Record on the Project.” (See Plaintiffs’ Complaint, ¶ 10).

While Plaintiffs may attempt to recast their architect negligence claim as one sounding in contract, the contention that the alleged failure to perform in a satisfactory manner caused Plaintiffs damages is nothing more than a malpractice claim against Buehrer in its role as a professional architect and does not give rise to a separate breach of contract claim. Further, Plaintiffs have not identified a single action to constitute a basis for breach of contract that can be considered separate and distinct conduct from that which would constitute a malpractice claim. Plaintiffs’ breach of contract claim is in fact a malpractice claim. As such, Plaintiffs’

breach of contract claim against Buehrer should be dismissed as a matter of law since it is subsumed by the time-barred malpractice claim.

### III. CONCLUSION

Plaintiffs have failed to state a claim upon which relief can be granted. Their negligence claim is time-barred and their breach of contract claim is nothing more than an action for malpractice against Buehrer, which is subsumed by the negligence claim as a matter of law. As such, pursuant to Civ. R. 12(C), this Court should dismiss Plaintiffs' negligence and breach of contract claims against Buehrer, with prejudice.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served upon the following by regular U.S. mail/and or electronic mail this 28<sup>th</sup> day of May 2014:

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May 28, 2014

2014 MAY 29 AM 10:50

COURT OF CLAIMS  
OF OHIO

**VIA FEDEX**

Clerk of the Court  
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The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, Ohio 43215

Re: Grand Valley Local School District Board of Education, et al., v. Buehrer Group Architecture & Engineering, Inc., et al., in the Court of Claims of the State of Ohio; Case No. 2014-00469-PR

To whom it may concern:

Enclosed please find the original and one copy of *Defendant Buehrer Group Architecture & Engineering, Inc.'s Civ. R. 12(C) Motion for Judgment on the Pleadings*. Please file in your usual and customary manner and return a time-stamped copy to the undersigned in the enclosed postage-prepaid envelope. Thank you.

Very truly yours,

Reminger Co., L.P.A.

Brian C. Lee

BCL/ms  
Enclosures



REMINGER CO., LPA