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OF OHIO

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IN THE COURT OF CLAIMS
STATE OF OHIO

GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*	)	CASE NO.: 2014-00469-PR
	)	JUDGE: PATRICK M. McGRATH
Plaintiffs,	)	**DEFENDANT BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC.'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT AND REPLY IN SUPPORT OF CIV. R. 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS**
v.	)	
BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC., *et al.*	)	
Defendants.	)	

Now comes Defendant, Buehrer Group Architecture & Engineering, Inc. ("Buehrer"), by and through counsel, and hereby submits that its pending Motion for Judgment on the Pleadings is sound and should be granted. The Memorandum in Opposition to this motion filed by Grand Valley Local School District Board of Education ("Grand Valley") and the Ohio School Facilities Commission ("the Commission") violates Civ.R. 12(C) by attaching documents outside of the pleadings, makes new factual claims not found in the Complaint and misrepresents applicable case law, all warranting the within Reply in Support.

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As such, in accordance with Court of Claims Local Rule 4(C), Buehrer respectfully requests leave to file this Reply in Support of Motion for Judgment on the Pleadings.

A. Plaintiffs' Exhibits To Their Memorandum In Opposition Should Be Stricken As They Contain Documents Outside Of The Pleadings And Are Prohibited As A Matter Of Law

As an initial matter, it is respectfully requested that this Court strike the exhibits to Plaintiffs' Memorandum in Opposition as well as any factual allegations or legal argument relying upon or referencing these improper exhibits. Specifically, Exhibits 1-4 should be stricken as they are not part of the pleadings and therefore are not appropriately before the Court on Buehrer's Motion for Judgment on the Pleadings.

Buehrer's motion, in accordance with Civil Rule 12(C), presents only questions of law, and determination of the motion is restricted solely to the allegations in the pleadings. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166, 297 N.E.2d 113 (1973). Buehrer's motion does not rely upon factual allegations outside of the pleadings because a trial court's inquiry is thus restricted to the material allegations in the pleadings and any attachments thereto. Civ.R. 12(C); *Gawloski v. Miller Brewing Co.*, 96 Ohio App.3d 160, 163, 644 N.E.2d 731 (9th Dist.1994).

Plaintiffs' arguments in opposing Buehrer's Motion for Judgment on the Pleadings go well beyond the pleadings and the attachments to the pleadings. For example, Plaintiffs have attached the affidavit of Eric Moser and various miscellaneous correspondence not attached to their Complaint in an effort to

impermissibly introduce new factual allegations for the Court's consideration. Again, these documents and any factual inferences drawn from these documents must be stricken as they are outside of the pleadings. Furthermore, the exhibits are wholly irrelevant in regards to the matter before the Court.

Accordingly, it is respectfully requested that Exhibits 1-4 to Plaintiffs' Memorandum in Opposition and any argument related to these exhibits be stricken from the record and not considered in adjudicating the pending Motion for Judgment on the Pleadings.

B. Plaintiffs Are Not Immune To The Application Of The Statute Of Limitations In R.C. 2305.09(D)

Plaintiffs improperly accuse Buehrer of "mischaracterizing" and "misrepresenting" the law concerning the applicable statute of limitations which renders their claims against Buehrer time-barred. This is not true.

As noted by Plaintiffs in their Complaint, Grand Valley, an Ohio school district, entered into a construction contract with Buehrer on April 22, 2002. (*See* Complaint at ¶¶ 5, 10, Ex. A.) The Commission, however, is not a party to the contract; instead, it is identified only as an intended third-party beneficiary of the agreement. (*Id.*)

Plaintiffs attempt to defeat Buehrer's Motion for Judgment on the Pleadings by arguing that because the State of Ohio is not subject to the general requirements of statutes of limitations, Ohio's four-year statute of limitations in R.C. 2305.09(D) does not apply to their lawsuit against Buehrer. (*See* Plaintiffs' Memorandum in Opposition at 3-4.) As a matter of well-established law, however, **this exemption**

from statutes of limitations does not extend to school districts or boards of education. *Beavercreek Local Schools v. Basic, Inc.*, 71 Ohio App.3d 669, 684-685, 595 N.E.2d 360 (2d Dist.1991) (holding that a school district plaintiff was not immune for purposes of the four-year statute of limitations in R.C. 2305.09(D)); *see also Ohio Dept. of Transp. v. Sullivan*, 38 Ohio St.3d 137, 139, 527 N.E.2d 798 (1988). "A board of education or school district, clothed with the capacity to sue and be sued, is thereby rendered amenable to the laws governing litigants, including the plea of the statute of limitations." *Id.* quoting *State ex rel. Bd. of Edn. v. Gibson*, 130 Ohio St. 318, 199 N.E. 185 (1935), paragraph two of the syllabus.[1]

Based upon this established law, Grand Valley is not immune to the application of the four-year statute of limitations in R.C. 2305.09(D). Moreover, it is impermissible for the Commission to argue, as a mere third-party beneficiary to the contract, that its presence in this lawsuit negates Ohio law and resurrects Grand Valley's untimely claims against Buehrer. Such an argument flies in the face of our established jurisprudence which holds Grand Valley responsible for bringing its claims against Buehrer in a timely manner, and in this case, no later than four years after its cause of action accrues in accordance with R.C. 2305.09(D).

Plaintiffs' Complaint is clear; they are seeking recovery for property damage occurring between 2001 and 2005. (*See* Compl. at ¶ 6.) Thus, based upon the four corners of the Complaint, Grand Valley was required to bring its negligence claim against Buehrer within four years of the events which Plaintiffs allege give rise to

[1] Remarkably, Plaintiffs fail to draw this important distinction to the Court's attention and instead choose to accuse Buehrer of impropriety.

this action, or no later than 2009. *See JRC Holdings, Inc. v. Samsel Serv. Co.*, 166 Ohio App.3d 328, 2006-Ohio-2148, 850 N.E.2d 773, ¶¶ 30-31. As Plaintiffs are not immune for purposes of this statute of limitations, their claims against Buehrer are time-barred as a matter of law.

C. Plaintiffs' Breach of Contract Claim Is Not Independent Of Their Professional Negligence Claim As A Matter Of Law

It is axiomatic that an action against an architect or engineer for breach of duty is an action that sounds in tort, even when the duty to perform the professional services arose by contract. *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 433 N.E.2d 147 (1982), paragraph one of the syllabus. "The obligation to perform in a workmanlike manner using ordinary care may arise from or out of a contract, i.e., from the purchase agreement, **but the cause of action is not based on contract; rather it is based on a duty imposed by law**." (Emphasis added.) *Id.* at 378-379.

In an effort to extend the four-year statute of limitations applicable to such tort claims, litigants often try to revive otherwise stale claims by arguing that the claims raised against professionals sound in breach of contract, not just tort, and are therefore subject to a longer, fifteen-year statute of limitations. This is exactly the tactic taken by Plaintiffs in this case. Such tactics however, are repeatedly rejected by our trial and appellate courts.

In reality, claimants are only permitted to pursue a breach of contract claim where "a special agreement" exists which outlines duties *different* than those already existing under tort law. *Crowninshield/Old Town Cmty. Urban*

Redevelopment Corp. v. Campeon Roofing and Waterproofing, Inc., 1st Dist. Hamilton Nos. C-940731, C-940748, 1996 WL 181374, *4 (Apr. 17, 1996). No such special agreement exists in this case.

In this case, the standard construction contract at issue is a form agreement titled "Agreement for Professional Design Services (Construction Manager Involved). (*See* Compl. at Ex. A.) Determinative of this dispute, the agreement actually defines the exact standard of care applicable to Buehrer as follows:

> **1.1 <u>Architect's Services</u>**
>
> **<u>1.1.1 Scope of Services: Applicable Law</u>**. The Architect shall provide professional design services as defined in Section 153.65(c)[2] 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.

(See Compl. at Ex. A.)

This same standard is mirrored in the Complaint which alleges that Buehrer "failed to meet the standard of care as the Architect and Engineer of Record on the

[2] 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."

Project" and "failed to properly perform its duties as Architect and Engineer of Record within the professional standard of care." (*See*, Compl., ¶¶ 53 and 56.)

There is no "special agreement" between the parties which expands the scope of this contractually agreed-upon duty or that requires Buehrer to perform at a standard different than those already existing under tort law. In fact, the Agreement between the parties limits Buehrer's duties to those "**services customarily furnished in accordance with generally accepted architectural and engineering practices to perform...**" (Emphasis added.) (*Id.*) Thus, the plain language of the Agreement defeats Plaintiffs' claims that the Agreement subjected Buehrer to a heightened duty separate and apart from that expected of any other architect and/or engineer under Ohio law.

In an effort to manufacture a duty separate and apart from what was already required by Ohio law, Plaintiffs impermissibly rely upon documents outside the pleadings, specifically correspondence authored by one of the experts in this case. (*See* Plaintiffs' Memorandum in Opposition at Ex. 2.) As explained above, however, such exhibits and any factual argument relying upon these exhibits are impermissible in accordance with Civ.R. 12(C).

Also telling is Plaintiffs' failure to set forth a single case where a court refused to merge breach of contract and tort claims in a negligent design/construction dispute. That is because such relief is extraordinary. Instead, as discussed by the court in *Crowninshield*, where allegations in a complaint concerning roofing-related problems in a large construction project allege both

breach of contract and professional negligence against an architect, the breach of contract claim is subsumed by the professional negligence claim. *Crowninsheld*, 1996 WL 181374, at *6. These are the exact factual allegations before this Court.

Instead of providing the Court with any case law refuting these time-tested principals, Plaintiffs merely attempt to call into question a single case cited by Buehrer in its Motion for Judgment on the Pleadings - *B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 7th Dist. Mahoning No. 12 MA 5, 2012-Ohio-5981. In this case, the court correctly noted 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." *Id.* at ¶ 40.

Plaintiffs attempt to distinguish the legal reasoning of this case by arguing that because the appellant in the case ultimately withdrew its assignment of error on the contract claim after oral argument, the extensive analysis of the issue performed by the appellate court in its Opinion is meaningless to this dispute. Such an argument is nonsensical.

In Ohio, it is the substance of a claim, not the form of the complaint, that determines the appropriate statute of limitations. *Hunter v. Shenango Furnace Co.*, 38 Ohio St.3d 235, 237, 527 N.E.2d 871 (1988); *see also Esposito v. Caputo,* 11th Dist. No. 2002-L-099, 2003-Ohio-1590, ¶ 17. "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." *Kay v. Cleveland,* 8th Dist. No. 81099, 2003-Ohio-171, ¶ 17.

In the instant case, the damages allegedly suffered by Plaintiffs are not contractual: they do not depend upon the loss of the benefit of Grand Valley's bargain with Buehrer, whatever that bargain included. A finding that this action sounds in contract would not entitle Grand Valley to different damages than it might recover in tort. Such a finding would only extend the limitations period for bringing the action. All of Plaintiffs' causes of action allege exactly the same thing: that Buehrer failed to perform its duties in accordance with the applicable standard of care applied to architects and engineers in the state of Ohio. (*See* Compl. at ¶¶ 53, 56.)

As Buehrer is a professional architectural and design firm, each of Plaintiffs' causes of action must be considered as alleging tortious conduct resulting in damage to real property. Thus, the four-year limitations period prescribed by R.C. 2305.09(D) controls. *See JRC Holdings, Inc. v. Samsel Servs. Co.*, 166 Ohio App.3d 328, 2006-Ohio-2148, 850 N.E.2d 773, ¶ 20 (11th Dist.) (rejecting breach of contract claim against professional environmental remediation firm in case where plaintiff's complaint alleged property damage as a result of negligence in the drilling process.)

Plaintiffs' Complaint alleges that Buehrer is liable for breach of contract for "failing to meet the standard of care as the Architect and Engineer of Record on the Project." (*See* Compl. at ¶ 53). There is no "special agreement" alleged between the parties. Moreover, as discussed above, the contract between Plaintiffs and Buehrer

requires only that Buehrer provide professional design services "customarily furnished in accordance with generally accepted architectural and engineering practices..." (Compl. at Ex. A.) Thus, Plaintiffs' breach of contract claim is simply a malpractice claim against Buehrer in its role as "the Architect and Engineer of record for the Project." (*See* Compl. at ¶ 10).

Only now, when facing a motion for judgment on the pleadings, do Plaintiffs attempt to re-word the allegations in their Complaint to support their faulty breach of contract claim. The language of the Complaint, however, is clear and does not identify a single action to constitute a basis for a breach of contract claim that can be considered separate and distinct from the conduct which supports Plaintiffs' professional negligence claim against Buehrer. As such, Plaintiffs' breach of contract claim fails as a matter of law.

D. Recognizing That Their Claims Are Time-Barred, Plaintiffs Impermissibly Seek To Insert New Allegations That They Only Recently "Discovered" The Alleged Negligence Of Buehrer

Plaintiffs argue that their claims against Buehrer are not time-barred because they did not "discover" Buehrer's alleged negligence until 2012. It must be noted that nowhere does the Complaint state, or even suggest, that there was a delay in discovering Buehrer's alleged negligence. Instead, the Complaint seeks recovery for property damage occurring between 2001 and 2005 as follows:

> 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 Located at 111 Grand Valley Ave, West, Orwell Ohio 44076 (the "Project") which occurred between 2001 and 2005.

(*See* Compl. at ¶ 6).

Now, when facing a motion for judgment on the pleadings and the legal certainty that their claims as pled in the Complaint are time-barred, Plaintiffs fundamentally recast their original allegations to assert that Buehrer's negligence was "not reasonably discoverable until a roofing consultant...pointed out numerous latent construction defects" in 2012 and that that Plaintiffs could not discern Buehrer's negligence at an earlier date because Buehrer "hid" its negligence from Grand Valley. (*See* Plaintiffs' Memorandum in Opposition at 8-9.) **These allegations are not found in Plaintiffs' Complaint.**[3] They were impermissibly manufactured for the sole purpose of defeating Buehrer's Motion for Judgment on the Pleadings. Regardless, a court cannot look beyond the face of the complaint when ruling on a motion for judgment on the pleadings under Civ.R. 12(C). *See Schmitt v. Educational Serv. Ctr. Of Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 97623, 2012-Ohio-2210, ¶ 15 (stating that a determination on a Civ.R. 12(C) motion is limited solely to the allegations in the pleadings and any writing attached to those pleadings); *C&K Ind. Serv., Inc. v. McIntyre, Kahn & Kruse Co., L.P.A.*, 8th Dist. Cuyahoga No. 92233, 2009-Ohio-2373, ¶ 12 (finding that the trial court erred in granting Civ.R. 12(C) motion where the ruling was based on evidence attached to the motion); *Ferchill v. Beach Cliff Bd. of Trustees,* 162 Ohio App.3d 144, 2005-Ohio-3475, 832 N.E.2d 1238, ¶ 6 (8th Dist.). As written, Plaintiffs' Complaint fails to establish a legitimate entitlement to relief as to Buehrer and Buehrer is thus entitled to judgment as a matter of law.

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[3] Moreover, as Plaintiffs' Complaint was not filed until 2014, there is no reason why these claims were not part of Plaintiffs' original allegations.

E. Even If Plaintiffs' New Allegations Are Considered, The Discovery Rule Is Not Applicable To Their Allegations Of Professional Negligence Against Buehrer

Plaintiffs argue that a discovery rule applies to their claims against Buehrer. To support this proposition, they draw this Court's attention to the Supreme Court's decision in *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 546 N.E.2d 206 (1989). (*See* Plaintiffs' Memorandum in Opposition at 7.) What Plaintiffs fail to note is that in *Investors REIT One* the Supreme Court of Ohio specifically held that **the discovery rule is not applicable to a claim of professional negligence arising under R.C. 2305.09**. (Emphasis added.) *Id.* at paragraph two of the syllabus. The Ohio Supreme Court has since reaffirmed *Investors REIT One* in *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 160, 566 N.E.2d 1220 (1991).

In *Investors REIT One,* the Ohio Supreme Court explicitly stated that the four-year statute of limitations in R.C. 2305.09(D) which governs professional negligence claims begins to run when the alleged negligent act is committed. *Investors REIT One,* 46 Ohio St.3d at 182, 546 N.E.2d 206. "By holding that the statute of limitations began to run 'when the allegedly negligent act was committed,' the court in [*Investors*] *REIT One* * * * meant exactly that: the date upon which the tortfeasor committed the tort, in other words, when the act or omission constituting the alleged professional malpractice occurred." *Hater v. Gradison Div. of McDonald & Co. Securities, Inc.*, 101 Ohio App.3d 99, 110, 655

N.E.2d 189 (1st Dist.1995). Thus, this controlling case law defeats Plaintiffs' discovery rule argument in its entirety.

Relying upon the decisions in *NCR Corporation v. U.S. Mineral Products Company,* 72 Ohio St.3d 269, 649 N.E.2d 175 (1995), and *Harris v. Liston,* 86 Ohio St.3d 203, 714 N.E.2d 377 (1999), Plaintiffs argue that, contrary to the Ohio Supreme Court's holdings in *Investors REIT One* and *Grant Thornton,* this Court should apply a "discovery rule" to their claims to toll the four-year statute of limitations in R.C. 2305.09. Again, assuming for the sake of argument that the Court were to consider all of Plaintiffs' newly minted claims which are not contained in its Complaint, this is still not a correct statement of the law.

NCR and *Harris* do not concern allegations of professional negligence. The issue presented in *NCR* was when a cause of action accrues for asbestos-removal litigation, and the issue presented in *Harris* was when a cause of action accrues against a property developer for damage to property caused by standing water. Therefore, *NCR* and *Harris* are not applicable to this professional negligence case.

This distinction was recognized by the Twelfth Appellate District in *James v. Partin,* 12th Dist. Clermont No. CA2001-11-086, 2002-Ohio-2602, where the court refused to apply a discovery rule to a professional negligence case where plaintiff alleged property damage. In *Partin,* the court also specifically distinguished the application of the *NCR* and *Harris* cases to a claim for professional negligence by correctly noting that "**the use of the discovery rule or a 'delayed damages'**

theory is not applicable to claims of professional negligence in a property damage case." (Emphasis added.) *Partin* at ¶ 13.

Despite how many times Plaintiffs try to change the allegations in their Complaint, or how many new claims they attempt to insert, one fact remains undisputed – Plaintiffs are suing Buehrer for professional negligence. (*See* Compl. at ¶¶ 10, 53, 56.) In the twenty-plus years since it was decided, our courts have relied on *Investors REIT One* to dismiss professional negligence claims brought more than four years after the alleged negligent act. *See, e.g., Partin, supra; Hater, supra* (dismissing claims against real estate professionals as untimely).

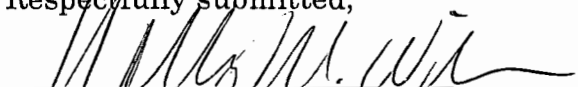
Since the discovery rule or a "delayed damages" theory is not applicable to this case, Plaintiffs' claims of professional negligence commenced to run when the allegedly negligent conduct was complete, not at the time Plaintiffs allegedly discovered the injury. Based upon Plaintiffs' own Complaint, we know that this alleged negligence occurred between 2001 and 2005. (*See* Compl. at ¶ 6.) Therefore, Plaintiffs have failed to assert a cause of action for which relief may plausibly be granted and Buehrer is entitled to judgment on the pleadings.

F. Conclusion

For all the foregoing reasons, as well as those expressed in its Motion For Judgment on the Pleadings, 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 23rd day of June 2014:

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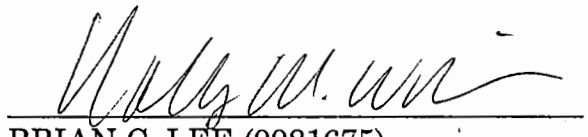

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