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IN THE COURT OF CLAIMS
STATE OF OHIO

GRAND VALLEY LOCAL SCHOOL)	CASE NO.: 2014-00469-PR
DISTRICT BOARD OF)	
EDUCATION,)	JUDGE: PATRICK M. McGRATH
<i>et al.</i>)	
)	
Plaintiffs,)	<u>DEFENDANT BUEHRER GROUP</u>
)	<u>ARCHITECTURE &</u>
v.)	<u>ENGINEERING, INC.'S</u>
)	<u>RENEWED CIV. R. 12(C)</u>
BUEHRER GROUP)	<u>MOTION FOR JUDGMENT ON</u>
ARCHITECTURE &)	<u>THE PLEADINGS</u>
ENGINEERING, INC., <i>et al.</i>)	
)	
Defendants.)	

Defendant, Buehrer Group Architecture & Engineering, Inc. ("Buehrer"), by and through counsel, 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. PROCEDURAL HISTORY

Among the many Defendants in this case, Buehrer was the professional architect that designed the Project. (*See* Amended Complaint, ¶ 9). 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 filed an original complaint alleging two causes of action against Buehrer: (1) Breach of Contract (Count VII) and (2) Negligence (Count VIII). (*See* Complaint.)

On May 29, 2014, Buehrer filed a Motion for Judgment on the Pleadings demonstrating that both of Plaintiffs’ causes of action were legally deficient, warranting the dismissal of this action as to Buehrer. (*See* Motion for Judgment on the Pleadings.) The Motion demonstrates that Plaintiffs’ breach of contract claims are subsumed, as a matter of law, by their professional negligence claim. (*Id.*, pp. 9-13.) The motion also establishes that Plaintiffs’ professional negligence claims are time-barred. (*Id.*, pp. 7-9.)

In response to Buehrer's motion, Plaintiffs petitioned the Court for leave to amend their complaint to add new allegations against Buehrer. (See 06/12/2014, Memorandum Contra in Opposition and 06/16/2014, Motion for Leave.) The Amended Complaint adds two new allegations against Buehrer. These allegations concerned the claim that Plaintiffs did not "become aware" of Buehrer's alleged negligence until informed by expert consultants in writing on June 13, 2011 and October 17, 2011. (See Motion for Leave, p. 3 and Amended Complaint, ¶¶ 57 and 58.)

Despite Plaintiffs' recent amendment, for all the reasons that follow, their claims against Buehrer still fail as a matter of well-established law.

III. RELEVANT FACTS

Supporting Plaintiffs' claims of breach of contract, the Amended 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 Amended Complaint as

Exhibit A.¹ 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)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 (comprised 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 professional standards of skill, care and due and reasonable 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,

¹ As the contract was attached to Plaintiffs' Amended Complaint, it is properly deemed part of the pleadings pursuant to Civ.R. 10(D).

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."

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. The fact that Plaintiffs allege they did not become aware of Buehrer's alleged negligence until 2011 does not change this point. 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.

IV. 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 Amended 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 Amended 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' Amended 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.

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

As noted by Plaintiffs in their Amended Complaint, Grand Valley, an Ohio school district, entered into a construction contract with Buehrer on April 22, 2002. (See Amended 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 attempted to defeat Buehrer's original 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.

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' Amended Complaint is clear; they are seeking recovery for property damage occurring between 2001 and 2005. (See Amended Compl. at ¶ 6.) Thus, based upon the four corners of the pleading, Grand Valley was required to bring its 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, 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.

2. The Discovery Rule Is Not Applicable To Plaintiffs' Allegations Of Professional Negligence Against Buehrer

Plaintiffs amended their original Complaint to add the allegation that they did not learn of Buehrer's alleged negligence until 2011 in a futile effort to toll the four-year statute of limitations which controls their claims against Buehrer.

As demonstrated by Plaintiffs' response to Buehrer's first Motion for Judgment on the Pleadings, Plaintiffs will likely argue that their discovery defense is supported by the Ohio 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.

In opposing Buehrer's original Motion for Judgment on the Pleadings, Plaintiffs, 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), argued 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. 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 raise, 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 Amended Complaint, we know that this alleged negligence occurred between 2001 and 2005. (*See* Amended 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.

C. Plaintiffs’ Breach of Contract Claim Is Subsumed By Their Professional Malpractice 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 contract at issue is a form agreement titled “Agreement for Professional Design Services (Construction Manager Involved). (See Amended Compl. at Ex. A.) Determinative of this dispute, the agreement actually defines the exact standard of care applicable to Buehrer 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)³ 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

³ 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.”

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 Am. Compl. at Ex. A.)

This same standard is mirrored in the Amended Complaint which alleges that Buehrer "failed to meet the standard of care as the Architect and Engineer of Record on the Project" and "failed to properly perform its duties as Architect and Engineer of Record within the professional standard of care." (See, Am. 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.

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.*

During the pendency of Buehrer's original Motion for Judgment on the Pleadings, Plaintiffs were unable to provide the Court with any case law refuting these time-tested principals. Instead, they attempted 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 Amended 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.)

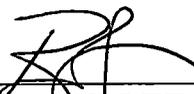
Plaintiffs' Amended Complaint alleges that Buehrer is liable for breach of contract for "failing to meet the standard of care as the Architect and Engineer of Record on the Project." (*See Amended Compl. at ¶ 53*). There is no "special agreement" alleged between the parties. Moreover, as discussed above,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

Plaintiffs' breach of contract claim is, in fact, a malpractice claim. As such, this claim should be dismissed as a matter of law since it is subsumed by the time-barred malpractice claim.

V. 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 5th day of September 2014:

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