

**ORIGINAL**

IN THE COURT OF CLAIMS OF OHIO

FILED  
COURT OF CLAIMS  
OF OHIO

2014 SEP 16 PM 3: 23

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

Plaintiffs, )

vs. )

BUEHRER GROUP ARCHITECTURE & )  
ENGINEERING. INC. et al. )

Defendants, )

Case No. 2014-00469-PR

Judge Patrick M. McGrath

**MEMORANDUM IN OPPOSITION OF PLAINTIFFS/COUNTERCLAIM  
DEFENDANTS OHIO SCHOOL FACILITIES COMMISSION AND GRAND VALLEY  
LOCAL SCHOOL DISTRICT TO THE "RENEWED" MOTION FOR JUDGMENT ON  
THE PLEADINGS OF DEFENDANT BUEHRER GROUP ARCHITECTURE &  
ENGINEERING, INC.**

Now comes the Plaintiffs/Counterclaim Defendants the Ohio School Facilities Commission ("OSFC") and Grand Valley Local School District Board of Education ("Grand Valley" or "School District") (collectively "Plaintiffs" or "Co-owners"), by and through counsel, and file this Memorandum in Opposition to the "Renewed" Motion for Judgment on the Pleadings ("Motion") of Defendant Buehrer Group Architecture & Engineering, Inc. ("Buehrer").

Defendant Buehrer previously filed a similar Motion for Judgment on the Pleadings which this Court has denied. There is neither a provision for a "Renewed" motion, nor for a motion for reconsideration, which essentially is the substance of this "Renewed" Motion.<sup>1</sup> However, once again, Plaintiffs Grand Valley and OSFC hereby respond to the Buehrer's "Renewed" Motion of Buehrer.

The sole argument made in the Motion is that the statute of limitations has expired for an

<sup>1</sup> Nor did Buehrer request leave of Court to exceed the page limitation of this Court's Rules.

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action based upon professional negligence. Initially, the arguments made by Buehrer do not accurately represent the law, because a statute of limitations is inapplicable to the State of Ohio. Additionally, as against Plaintiff Grand Valley, this action was filed within four years of discovery of the negligence of Defendant Buehrer. Furthermore, contrary to Buehrer's representation of the *Investors REIT One* case, the Ohio Supreme Court has not abrogated the discovery rule for action of professional negligence committed by a *design professional*. Finally, even if no action for negligence exists, Plaintiffs still possess contract claims against Buehrer.

## I. INTRODUCTION AND SUMMARY

This action, by Plaintiffs as against Buehrer, stems from a contract for professional design and construction administration services entered into on or about April 22, 2002, for the design *and* construction administration of a new Pre-Kindergarten through Grade 12 school facility ("Project") being funded and built jointly by Plaintiffs. Amended Complaint at ¶s 5,6, 9 and 12. Defendant Buehrer had responsibility not only for the design of the Project, but also for the construction administration of the Project. *Id.* at ¶ 9. The Project was occupied in late 2005. *Id.* at ¶ 6.

Defendant Buehrer failed to perform and otherwise breached terms under its contract, breached expressed and implied warranties, and breached their respective standard of care. Buehrer's failures directly and proximately caused the Co-owners to incur additional costs and damages, including without limitation repairing and replacing defective work, placing the buildings in the condition contemplated by the parties, and a diminution in the fair market value of the buildings. *Id.* at ¶ 19.

Plaintiffs neither possessed reasonable notice, nor discovered, Buehrer's design deficiencies with respect to the Project's roads and parking lots, until receiving a consultant's

report in June of 2011. *Id.* at ¶ 56. Further, Plaintiffs neither possessed reasonable notice, nor discovered, Buehrer's design deficiencies with respect to the Project's exterior envelope, until receiving a consultant's report in October of 2011. *Id.* at ¶ 57. The Plaintiffs are currently in the process of repairing and replacing the defective and non-complying work, with the amount of damages not yet final, but in excess of \$6,000,000.00. *Id.* at ¶ 19.

Defendant Buehrer previously filed a Motion for Judgment on the Pleadings which was denied by this Court as moot on June 30, 2014. The original Motion also alleged an expiration of the statute of limitations, as does the "Renewed" Motion. The "Renewed" Motion should also be denied by this Court.

## **II. STATUTE OF LIMITATIONS ARE INAPPLICABLE TO THE STATE**

Defendant Buehrer has mischaracterized and misrepresented the law on this issue. Buehrer alleges that Plaintiffs are foreclosed from continuing this lawsuit due to the expiration of the four year statute of limitations as set forth R.C. 2305.09(D). However, it is well settled that the statute of limitations is not applicable to the State absent an express provision that it applies to actions brought by the State. *State, Dept. of Transp. v. Sullivan*, 338 Ohio St. 3d 137, 527 N.E. 2d 798 (1988). The syllabus of the *Sullivan* case ruled:

The state, absent express statutory provisions to the contrary, is exempt from the operation of a generally worded statute of limitations. This rule serves the public policy of preserving public rights, revenues, and property from injury and loss. (*Block v. North Dakota, ex rel. Bd. Of University & School Lands* (1983), 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840, followed.)

*Sullivan* has been followed and continues to be the controlling law of this State. There is no express provision providing that the limitation period contained within R.C. 2305.09(D) can be applied to the State. Therefore, there is no limitation period against the State. For this reason, Defendant Buehrer's argument, as against the State, is without merit and should be denied.

Buehrer was well aware that the school it was designing was co-owned by the State of Ohio acting through the OSFC. The OSFC's address, phone numbers and its contract person are all listed on page one of the contract. The first Whereas clause clearly states that the "Ohio General Assembly has appropriated funds for the Project to the Commission as more fully itemized in the applicable Controlling Board Request and the applicable Office of Budget and Management Encumbrance." Complaint at Exhibit 1. Article 1 of the Contract provides that the "Architect shall obtain a copy of the Ohio School Design Manual ("Design Manual"). *Id.* The Architect shall endeavor to ensure that the plans, specifications and materials proposed for use in the Project comply with the standards established by the Design Manual and Commission Policies. *Id.* The Architect agrees that any Variance Request will be submitted to the Commission 30 days before the completion of the Design Development Phase." *Id.* The ethics provision of its contract is that which is mandated by a contract with the State of Ohio. *See* section 1.1.9. *Id.* Section 1.1.10 states that services shall be performed in Ohio "unless otherwise authorized by the Commission." *Id.* Section 1.1.12 states that the Commission has the right to approve or disapprove of the Architect's work. *Id.* The Conditions to Validity, section 9.5.6, requires certification by the Office of Budget and Management of the State. *Id.*

In addition to the above cited provision, the Contract states that the OSFC "is an intended third party beneficiary of the Agreement, so as to permit the Commission to obtain full performance of the Architect's obligations under this Agreement." *Id.* at pg. 1. This language taken together with other provision of the Agreements, clearly states that the Commission is entitled to full performance of the Architect's obligations under the Agreement. The Agreement and the Architect's past practice with the OSFC, clearly demonstrate that the Architect knew it was contracting with the OSFC and the District.

**III. THE APPROPRIATE LIMITATION PERIOD FOR A WRITTEN CONTRACT IS 15 YEARS PER R.C. 2305.06 AS IN EFFECT IN 2005**

It is disingenuous for Buehrer to assert that no provision of a 30 page contract contains contractual obligations over and above professional design responsibilities. The Ohio Supreme Court has ruled upon the tort-contract distinction as follows:

Torts arise from the breach of certain duties of conduct and are imposed by law for the protection of all persons within range of the harm or injury proximately resulting from such breach. Contractual duties, on the other hand, *arise from the specific agreement of the parties to the contract.* (Emphasis added.)

*Kocisko v. Charles Shutrump & Sons Co.*, 21 Ohio St. 3d 98, 99, 468 N.E. 2d 171 (1986). See also, *Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr*, 14 Ohio App. 3d 281, 284-285 (1<sup>st</sup> Dist. 1984) ("The hazards created by defective and unsafe conditions in real estate improvements fall in the tort category. *Economic losses arising from failure of the architects, engineers and builders to carry out the promises set forth in their contracts with the property owners fall in the contract category.*" (Emphasis added.))

On its face, the Contract, Exhibit 1 to the Amended Complaint, contains numerous provisions classified as construction administration and unrelated to professional design work. Much of this lawsuit is based directly on Defendant Buehrer's failure to perform and its breach of these contractually required duties. Defendant Buehrer not only possessed design responsibility, but also possessed construction administration and quality control responsibilities for the Project. As set forth in Buehrer's Contract, Section 2.7.4 provides:

2.7.4 Site Visits and Inspections. The Architect and appropriate Consultants shall visit the Project at appropriate intervals and, at such intervals as the Architect and the School District Board agree, to review the Work of each Contractor for Defective Work, to become familiar with the progress and quality of the Work on the Project and to determine if the Work is proceeding in conformity with the Contract Documents. Such visits shall specifically include, without limitation, the observation of large excavations, observation of footings during placement of concrete and *observation of masonry work*, structural steel

erection, *roofing work*, and interior finishes. In all events, the Architect or its representative and appropriate Consultants shall be on the site of the Project for such purposes not less than 32 hours per week whenever any Work is in preparation or progress, unless otherwise expressly provided in writing by the School District Board. The School District reserves the right to require the Architect or his representative to be at the Project Site 32 hours per week as part of the Architect's Basic Fee. ***If the Architect shall become aware, either through such visits or otherwise of any Defective Work on the Project, the Architect shall provide a written report of all Defective Work to the School District Board and the Construction Manager, together with recommendation for the correction thereof.*** (Amended Complaint at Exhibit A, page 10, emphasis added.)

Buehrer was, in effect, the watchdog charged with protecting the Co-owners from Defective Work. Buehrer was expected to be on site not less than 32 hours per week. This is a contractual provision that is well beyond the typical of professional design services. The damages incurred by Plaintiffs are currently in excess of \$6 million. Complaint at ¶ 19. Much of those damages are attributable to defective work installed by Defendants Gibson and McMillan for their failure "to construct the Project in compliance with the Construction Documents." *Id.* at ¶s 25, 29. However, per the above ***contractual*** language contained in 2.7.4 of the design contract, Defendant Buehrer had a contractual duty to protect the Co-owners from the Defective Work of Gibson and McMillan, as well as the work of all other contractors and subcontractors on the Project, and to report the Defective Work and the proposed solution for the Defective Work to the Co-owners. This obligation is obviously not related, and is in addition, to the design work for which professional negligence could be alleged. Obviously Buehrer failed to carry out this duty which was clearly spelled out in its contract. Had Buehrer carried out its duty to protect the Co-owners from Defective Work, much of the damage incurred by the Co-owners would have been avoided.

This contractual duty is over and above the negligent design of the Project which Buehrer refers to in its "Renewed" Motion and these duties are purely based on contract. The Defective

Work in the Project was pervasive and systemic and should have been observed by Buehrer in its construction administration duties. In addition Buehrer was required to give notice to the School District of the Defective Work with recommendations on remedying the Defective Work. Buehrer's breach of contract and failure to perform its construction administration duties is clearly a cause of the damage incurred by the Project.

Buehrer's Motion argues that any contractual provisions become "subsumed" into the tort claim for professional negligence. That argument does not take into account the extra contractual requirements for construction administration assumed by Buehrer when they willingly executed the Contract. Additionally, that argument also does not take into account the enhanced standard of care set forth in the Contract. That standard of care in the Contract augments the standard of care normally utilized to judge malpractice of an architect with a timeliness and efficiency clause and also requires that Defendant Buehrer act in the best interests of the Co-owners, i.e. the Contract gave Buehrer a fiduciary duty. Additionally, it provides that the standard of care was what would be expected of an architect *with experience in designing similar school buildings*, as opposed to an architect only exercising care in accordance with generally accepted practices. The language at 1.1.3 of the Contract provides:

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 consistent with professional skill, due care and in the best interests of the Commission and the School District Board. (Amended Complaint at Exhibit A, page 3.)

The "Renewed" Motion fails to point out these additional duties as set forth above.<sup>2</sup>

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<sup>2</sup> Buehrer is still actively seeking work on school construction projects even with its failures to follow the heightened standard of care and construction administration duties on this case and other cases.

Defendant Buehrer relies on the case of *B&B Contrs. & Developers v. Olsavsky Jaminet Architects Inc.*, 7<sup>th</sup> Dist App. No. 12MA-5 984 N. E. 2d 419, 2012-Ohio-5981 in support of its argument. However, Buehrer fails to fully disclose what occurred in that case. The appellant in that case, after oral arguments, withdrew its assignment of error on the contract claim. *Id.* at ¶ 42. In other words, the Court was not truly faced with a justiciable issue on this at that point.

The Court stated that:

[I]f we were to rule in favor of B&B on this issue, we would end up reversing and remanding for a new trial on the entire case. As can be seen from the above analysis, the tort and contract claims are extremely intertwined, and thus, we would not be comfortable remanding for a new trial on only the contract claim. (Footnote omitted) When advised of this at oral argument, B&B effectively withdrew this assignment of error from our consideration as they did not wish to risk losing the tort judgment they already possess. As such, we proceed no further on this matter and leave intact the trial court's judgment precluding the breach of contract claims.

In reality the *B&B* case supports the arguments of Plaintiffs. The Court did say that in this type of situation “a separate claim for a contract can only proceed where the alleged conduct to support that claim is distinct from the conduct underlying the malpractice claim.” *Id.* at ¶ 39. Here the conduct is distinct from a mere malpractice claim. First, a claim for professional design negligence does not include the duties, as provided for in the Contract, such as construction administration as set forth in 2.7.4 of the Contract. Furthermore, an ordinary malpractice claim would not utilize a standard of care such as the one set forth in 1.1.3 of the Contract.

As is apparent from the above, Defendant Buehrer possessed specific duties outside the normal standard of care for design professionals, which were set forth in its Contract. The breach of those specific duties is part and parcel of this suit for which the statute of limitations is 15 years. For that reason this matter is subject to a 15 year statute of limitation in effect at the time.

#### IV. THE DISCOVERY RULE APPLIES TO BUEHRER'S NEGLIGENT DESIGN

##### A. A Cause of Action Accrues Upon Discovery of the Complained Injury

Even if the statute of limitations were applicable in this case, the limitations period has not run due to the fact that the cause of action was not discovered until 2011. The discovery rule provides that an applicable cause of action accrues "at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." *Investors REIT One v. Jacobs* (1989), 72 Ohio St. 3d 176, 179; 546 N.E. 2d 206. *See also, Harris v. Listo* (1999), 86 Ohio St. 3d. 203,205; 714 N.E. 2d 377. The discovery rule is applicable in cases where the injury, such as this case, was latent. *NCR Corp. v. U.S. Mineral Products* (1995), 72 Ohio St. 3d 269, 649 N.E. 2d 175. As the Supreme Court stated in *NCR, supra*, in regard to latent property defects:

[T]he discovery rule is appropriate for the accrual of such a cause of action. Again, we agree. While this court has applied the discovery rule most often in medical malpractice cases (see, e.g., *Melnyk v. Cleveland Clinic*[1972], 32 Ohio St.2d 198, 61 O.O.2d 430, 290 N.E.2d 916), the underlying rationale also fits with latent property-damage actions. The discovery rule is invoked in situations where the injury complained of may not manifest itself immediately and, therefore, fairness necessitates allowing the assertion of a claim when discovery of the injury occurs beyond the statute of limitations. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727. The discovery rule has not previously been applied to property-damage cases decided by this court. However, other jurisdictions have found the discovery rule useful and appropriate in resolving the limitations-of-actions issues in asbestos-removal-litigation cases. See, e.g., *MDU Resources Group v. W.R. Grace & Co.* (C.A.8, 1994), 14 F.3d 1274; *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.* (C.A.8, 1994), 29 F.3d 1283; *Farm Credit Bank of Louisville v. U.S. Mineral Products Co.* (W.D.Ky.1994), 864 F.Supp. 643; *Hebron Pub. School Dist. No. 13 of Morton Cty. v. U.S. Gypsum Co.* (N.D.1991), 475 N.W.2d 120. These courts concluded that statutes of limitations should not bar claimants before they have a reasonable basis for believing they have a claim. *Id.* at 271.

Here the negligence of Buehrer with respect to the Project's roads and parking lot was not reasonably discoverable until an engineering consultant of the Co-owners issued a report in

June of 2012, pointing out numerous latent construction and design defects. Amended Complaint at ¶57. When another report was issued in October of 2012, it listed a number of potential errors attributable to Buehrer in the design of the Project exterior. *Id.* at ¶ 58. Only then did the Plaintiffs realize the potential for a cause of action for negligent design. *Id.* The design errors did not become evident until that point, and the Co-owners had no reasonable basis to believe they had a cause of action until these reports were received. Based on the date of receipt of those reports, Plaintiff Grand Valley would have until sometime in 2016 to file suit on this matter.

Additionally, the discovery of the negligent design was directly impeded by the actions of Defendant Buehrer. Pursuant to 1.1.3 of the Contract, *supra*, Buehrer was required to “act in the best interests of the Commission and the School District Board.” The contractual requirement “to act in the best interests” of the Co-owners created a higher standard which Defendant Buehrer was required to meet. However, in the time period between 2005 and 2011, Defendant Buehrer, while aware of the problems being experienced at the Project, did nothing to give any indication to the Co-owners that some of the problems may be due to Buehrer’s own errors and omissions. In essence, Buehrer disregarded its fiduciary responsibility to the Co-owners and hid its actions from the Co-owners. After concealing the truth from the Co-owners to whom Buehrer owed a fiduciary duty, Defendant Buehrer now raises a defense of the statute of limitations. In short, it is unconscionable that Defendant Buehrer is asking the Court to reward it for its concealment of the truth from the Co-owners-parties to which Buehrer owed a fiduciary duty.<sup>3</sup>

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<sup>3</sup> Buehrer’s actions in covering up its errors may support additional claims against Buehrer. Further discovery will determine whether a Motion to Amend the Complaint is appropriate.

## B. The Discovery Rule is Applicable to Design Professionals Such As Architects

Defendant Buehrer's main argument here is that the discovery rule is not applicable to allegations of professional negligence for Buehrer's design work under R.C. 2305.09. Defendant Buehrer relies on the case of *Investors REIT* in making this argument; however, Buehrer misrepresents the holding of *Investors REIT* in its argument. Buehrer references the holding of the syllabus of *Investors REIT*, but interestingly enough fails to quote the syllabus. The actual language of the syllabus of that case, at 2a, states:

2a. The discovery rule is not available for claims of professional negligence brought against **accountants**. (Emphasis added).

As is clear from the syllabus of that case, the Court specified that the holding of *Investors REIT* case applied to accountants and not to architects. Had the Court desired to expand the holding of that case to all professionals it could have, but chose not to.

Nor are the other cases cited to by Defendant Buehrer relevant to design professionals. Buehrer cites to the case of *James v. Partin*, 12th Dist. No. CA2001-11-086, 2002 WL 1058152 (May 28, 2002) also for the proposition of the inapplicability of the discovery rule. Here again, that case was not applicable to architects, but was directed to surveyors. In fact, the language of R.C. 2305.09, effective September of 2014, provides that surveyors are excluded from the discovery rule. It provides:

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud, except when the cause of action is a violation of section 2913.49 of the Revised Code, in which case the action shall be brought within five years after the cause thereof accrued;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code;

(E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

***An action for professional negligence against a registered surveyor shall be commenced within four years after the completion of the engagement on which the cause of action is based.***(Emphasis added.)

As is apparent, if the General Assembly sees fit to legislate the inapplicability of the discovery rule, it will. Conversely, and relevant to this matter, the General Assembly can make clear that the discovery rule does apply to those providing design services, as it has here. R.C. 2305.131 is a ten year statute of repose for injury related to causes of action for design of improvements to real property. It provides, in relevant part:

(A)(1) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, ***no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property*** and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property ***shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.***

Statutory provisions should be construed *in para materia*, or, together and harmoniously to give full effect. *Bobb v. Marchant*, 14 Ohio St. 3d 1, 469 N.E. 2d 847 (1984); *State ex rel.*

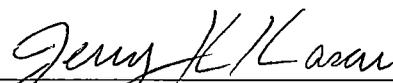
*Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E. 2d 191 (1956). By adopting a 10-year statute of repose for professional design related causes of action, the General Assembly indicated that a professional design related cause of action could be tolled for a number of reasons, but not past ten years. To construe R.C. 2305.09 to prohibit the applicability of the discovery rule would be to render R.C. 2305.131 meaningless.

For the above stated reasons, the discovery rule applies actions for professional design negligence, and this action was filed within four years of the discovery by the Co-owners noticing that they may reasonably possess a cause of action against Defendant Buehrer for its negligence.

## V. CONCLUSION

Plaintiffs OSFC and Grand Valley Local School District Board respectfully request that the Court deny Defendant Buehrer's "Renewed" Motion for Judgment on the Pleadings. The statute of limitations is inapplicable to the State. Additionally, Plaintiff's claims include breaches of specific contractual provisions unrelated to any professional design standard of care. Finally, the discovery rule is applicable to actions concerning professional design negligence.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memo in Opposition to Motion for Judgment on the Pleadings was sent via regular U.S. Mail and email, to the following counsel this 16th day of Sept. 2014:

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