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OF OHIO

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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>)	
)	<u>DEFENDANT BUEHRER GROUP</u>
Plaintiffs,)	<u>ARCHITECTURE &</u>
)	<u>ENGINEERING, INC.'S MOTION</u>
v.)	<u>FOR LEAVE TO FILE REPLY IN</u>
)	<u>SUPPORT AND REPLY IN</u>
BUEHRER GROUP)	<u>SUPPORT OF RENEWED CIV. R.</u>
ARCHITECTURE &)	<u>12(C) MOTION FOR JUDGMENT</u>
ENGINEERING, INC., <i>et al.</i>)	<u>ON THE PLEADINGS</u>
)	
Defendants.)	

Now comes Defendant, Buehrer Group Architecture & Engineering, Inc. ("Buehrer"), by and through counsel, and hereby submits that its pending Renewed 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") misrepresents the nature of Buehrer's Motion and the applicable case law, warranting the within Reply in Support.

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

ON COMPUTER

A. Buehrer's Renewed Motion For Judgment On The Pleadings Is Proper

Plaintiffs claim that because the Court denied Buehrer's first Motion for Judgment on the Pleadings, Buehrer should not be permitted to file a second. This argument misstates the record in an attempt to prevent the adjudication of Buehrer's entitlement to judgment pursuant to Civ.R. 12(C).

As this Court will recall, Buehrer first filed a Motion for Judgment on the Pleadings on May 29, 2014. (*See* Docket.) Plaintiffs responded to this motion by petitioning the Court for leave to amend its Complaint so as to defeat the motion. (*See* 06/16/2014, Motion to Amend.) In granting Plaintiffs' Motion to Amend, the Court denied Buehrer's Motion "as moot." (*See* 06/30/2014, Order.)

Suggesting that the Court's denial of Buehrer's Motion for Judgment on the Pleadings was on the merits, Plaintiffs now argue that Buehrer should not be permitted to file a Renewed Motion for Judgment on the Pleadings. Such an argument is unfounded. Buehrer's motion was never decided on the merits; it was denied as moot. Thus, there has been no consideration of Buehrer's entitlement to judgment pursuant to Civ.R. 12(C). For all the reasons that follow, as well as those raised in its pending Renewed Motion for Judgment on the Pleadings, Buehrer respectfully submits that it is entitled to judgment as a matter of law.

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

Plaintiffs accuse Buehrer of being disingenuous in demonstrating that their claims against Buehrer are time-barred by insisting that Grand Valley is immune from the application of the statute of limitations in R.C. 2305.09(D). This is not true.

Buehrer entered into a construction contract with Grand Valley, an Ohio school district. (See Amended Complaint at ¶¶ 5, 10, Ex. A.) The Commission, an entity of the state, is not a party to the contract. It is merely identified as an intended third-party beneficiary of the agreement. (*Id.* at ¶ 10.) This fact does not work to impermissibly extend the immunity granted to the state of Ohio to Grand Valley. To do so would be contrary to our established jurisprudence.

As explained by Buehrer's pending Renewed Motion for Judgment on the Pleadings, Ohio's school districts and boards of education, like Grand Valley in this case, are not entitled to the immunity afforded to the state as a matter of law. *Beavercreek Local Schools v. Basic, Inc.*, 71 Ohio App.3d 669, 684-685, 595 N.E.2d 360 (2d Dist.1991), *superseded by statute as stated in Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St.3d 507, 700 N.E.2d 1247 (1988) (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.

Tellingly, Plaintiffs’ opposition to Buehrer’s motion does not attempt to distinguish or even reference this controlling case law. Instead, Plaintiffs stubbornly insist that because Buehrer “was well aware” that the Commission was an intended third party beneficiary of the construction contract; it should have also understood the statutory immunity afforded only to the state would somehow inure to the benefit of Grand Valley. This is a blatant attempt to create new law by turning a blind eye to the Court’s holding in *State, Dept. of Transp. v. Sullivan*, 338 Ohio St.3d 137, 527 N.E. 2d 798 (1988).

In *Sullivan*, the Court specifically contradicts the immunity claim argued by Plaintiffs in this case, stating that “**as the rule is an attribute of sovereignty only, it does not extend to townships, counties, school districts or boards of education, and other subdivisions of the state, nor, at least in some cases, to municipalities.**” (Emphasis added) *Id.* at 139, 527 N.E.2d 798. Thus, Grand Valley may not be treated as a governmental agency entitled to immunity. A board of education is not an “entire sovereignty” unto itself and is to be treated as a private litigant rather than a governmental one. *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 19, 615 N.E.2d 1022 (1993), *overruled in part on other grounds by Fidelholtz v. Peller*, 81 Ohio St.3d 197, 690 N.E.2d 502 (1998); *State ex rel. Tavenner v. Indian Lake Local School Dist. Bd. of Edn.*, 62 Ohio St.3d 88, 90,

578 N.E.2d 464 (1991), *abrogated in part on other grounds by State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 71 Ohio St.3d 26, 641 N.E.2d 188 (1994).

It is undisputed that the contract before this Court is only between Grand Valley and Buehrer. (See Am. Compl., Ex. A.) Plaintiffs have presented no case law supporting their claim that because the Commission is afforded third party beneficiary status under the contract, the immunity afforded to the Commission extends to Grand Valley.¹ That is because the law of Ohio is clear on this issue and does not afford Grand Valley immunity for purposes of this claim.

Plaintiffs' Complaint seeks recovery for property damage occurring between 2001 and 2005. (See Am. Compl. at ¶¶ 6, 19.) 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 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 (11th Dist.). 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

The Supreme Court of Ohio holds that an action against an architect or engineer for breach of duty is an action that sounds in tort, even when the duty to

¹ Nor is there any contractual support for Grand Valley's claims that the state of Ohio is a "co-owner" of the building.

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. Plaintiffs ask this Court to contradict this well-established authority and hold that their claim sounds in contract, rather than tort, so that they can impermissibly extend the four-year statute of limitations applicable to such tort claims.

In attempting to circumvent the controlling nature of *Velotta*, Plaintiffs point this Court to a single decision from the First District Court of Appeals in *Elizabeth Gamble Deaconess Home Assn. v. Turner Constr. Co.*, 14 Ohio App.3d 281, 283, 470 N.E.2d 950 (1st Dist.1984). In *Turner*, the First District concluded that “[e]conomic 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.” *Id.* at 285, 470 N.E.2d 950.

This holding is inapplicable to the dispute between Buehrer and Plaintiffs in this case because the losses allegedly borne by Plaintiffs do not arise from any warranty, either express or implied, that might be gleaned from the contract at issue in this case; they arise from the allegedly damaged real property. “In the instant case, one sophisticated commercial entity is suing another for real-property damage arising from the allegedly negligent provision of a professional service. R.C. 2305.09(D) controls, either as regards the property damage, or the professional service.” *JRC Holdings, Inc. v. Samsel Servs. Co.*, 166 Ohio App.3d 328, 334, 2006-

Ohio-2148, 850 N.E.2d 773, ¶ 24 (11th Dist.); *see also Esposito v. Caputo*, 11th Dist. Lake No. 2002-L-099, 2003-Ohio-1590, ¶ 22 (finding that negligence claims alleging damage to real property are subject to a four-year statute of limitations under R.C. 2305.09(D)).

The law of Ohio holds that claimants are only permitted to pursue a breach of contract claim under limited circumstances where “a special agreement” exists and outlines duties *different* than those already existing under tort law. *See Crowninshield/Old Town Cmty. Urban Redevelopment Corp. v. Campeon Roofing & Waterproofing, Inc.*, 1st Dist. Hamilton Nos. C-940731, C-940748, 1996 WL 181374, at *4 (Apr. 17, 1996). No such special agreement exists in this case.

In this case, as demonstrated by Buehrer’s pending Motion for Judgment on the Pleadings, the standard construction contract at issue is a *form agreement* titled “Agreement for Professional Design Services (Construction Manager Involved)” which 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)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

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.”

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.

(Am. Compl. at Ex. A, p. 2.)

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 Project" and "failed to properly perform its duties as Architect and Engineer of Record within the professional standard of care." (See Am. Compl. at ¶¶ 53, 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 form Agreement between the parties limits Buehrer's duties to those "services customarily furnished in accordance with generally accepted architectural and engineering practices * * *." (*Id.* at Ex. A, p. 2.) 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.

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. See *Crowninshield*, 1996 WL 181374, at *3-4. 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 the *B & B Contrs. & Developers* case by arguing that the contract in the case before this Court provides for an atypical standard of care. (See Memorandum in Opposition, p. 8, “an ordinary malpractice claim would not utilize a standard of care such as the one set forth in 1.1.3 of the Contract.”) This claim is flatly contradicted by the language of the contract, which limits Buehrer’s duties to those “**services customarily furnished**

in accordance with generally accepted architectural and engineering practices * * *.” (Emphasis added) (Am. Compl. at Ex. A., p. 2.)

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), *superseded by statute as stated in Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 707 N.E.2d 1107 (1999); *see also Esposito v. Caputo*, 11th Dist. Lake 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. Cuyahoga 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 Am. 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." (Am. 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 * * *." (*Id.* at Ex. A, p. 2.) 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 id.* at ¶ 10). As such, Plaintiffs' breach of contract claim fails as a matter of law.

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

The Supreme Court of Ohio holds that the discovery rule is not applicable to a claim of professional negligence arising under R.C. 2305.09. *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 546 N.E.2d 206 (1989), paragraph two of the syllabus.³

³ Exempt from this holding are claims of fraud or conversion, neither of which was plead by Plaintiffs in this case.

“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). Despite this fact, Plaintiffs argue that their claims against Buehrer are not time-barred because they did not “discover” Buehrer’s alleged negligence until 2012. Such claims are without merit.

In trying to distinguish this case law, Plaintiffs argue that the “professionals” for whom the discovery rule does not apply are limited to only accountants and surveyors. (See Memorandum in Opposition, p. 11.) Such a claim is nonsensical as courts throughout Ohio have consistently applied this principle of law to claims of professional negligence, regardless of the profession of the defendant, and concluded that such claims accrue at the time of the negligent act. *E.g.*, *Hater v. Gradison, Division of McDonald & Company Securities, Inc.*, 101 Ohio App.3d 99, 109-110, 655 N.E.2d 189 (1995) (rejecting discovery rule in claim against broker-dealers and an appraiser); *Wooten v. Republic Sav. Bank*, 172 Ohio App.3d 722, 2007-Ohio-3804, 876 N.E.2d 1260, ¶ 40 (rejecting discovery rule in claim against a bank filed more than four years after alleged negligence). The case presently before this Court furnishes no basis to abandon this rule or make an exception for these claims. On

the contrary, the absence of a discovery rule in R.C. 2305.09(C) strongly favors making no such exception to this rule for professional negligence claims.

In the absence of case law to support their claim, Plaintiffs next argue that “if the General Assembly sees fit to legislate the inapplicability of the discovery rule, it will.” (Memorandum in Opposition, p. 12.) Such a statement defies common sense as the General Assembly has elected to include a discovery rule, but limits this rule to only certain types of actions.

R.C. 2305.09(D) expressly includes its own limited discovery rule: “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.” Applying the statutory construction of *expressio unius est exclusio alterius*, the *REIT One* Court held “[t]he legislature’s express inclusion of a discovery rule for certain torts arising under R.C. 2305.09 * * * implies the exclusion of other torts arising under the statute, including negligence.” *REIT One*, 46 Ohio St.3d at 181, 546 N.E.2d 206.⁴

⁴ This same rationale defeats Plaintiffs’ claims with respect to the application of the ten-year statute of repose found in R.C. 2305.131. R.C. 2305.131, working in conjunction with the four-year statute of limitations in R.C. 2305.09(D), means that, for the many claims against non-professionals where the discovery rule does apply, such claims must still be brought within ten years or they are time-barred. Thus,

The practical result of the Court's holding in *REIT One* is simple. Negligence claims against professionals that fall within R.C. 2305.09 accrue on the day of the wrongful act. The rule of *REIT One* remains good law, as it was specifically affirmed by the Court in *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 160, 566 N.E.2d 1220 (1991), which stated that "Windsor [the plaintiff] argues that *Investors* is bad law and thus we should reverse it * * *. We choose not to reverse *Investors* * * *." *Id.* at 160, 566 N.E.2d 1220.

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 Am. Compl.* at ¶¶ 10, 53, 56.) 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 id.* 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.

the purpose of R.C. 2305.131 is not to abrogate R.C. 2305.09(D), but to further limit the application of the discovery rule so as not to create a never-expiring claim for property damage to real property.

F. Conclusion

For all the foregoing reasons, as well as those expressed in its Renewed 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 September 2014:

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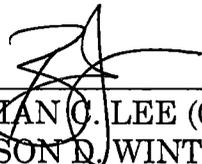
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September 23, 2014

VIA FEDEX

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COURT OF CLAIMS OF OHIO (CLA)
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 the *Defendant Buehrer Group Architecture & Engineering, Inc.'s Motion for Leave to File Reply in Support and Reply in Support of Renewed 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
Enclosure

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