

STATUS OF OHIO STATUTE OF REPOSE

January 2019

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The following is a summary of the current status of the Ohio Construction Statute of Repose R.C. 2305.131 ("SOR"). Briefs have been filed by parties as well as numerous Amicus briefs filed on behalf of interested parties. The Ohio Supreme Court has set oral argument for **March 5, 2019 at 9:00 a.m.** It is expected a ruling will be made later this year.



BACKGROUND

The case arises from the design and construction of a new K-12 school building for the New Riegel Local School District ("New Riegel"). New Riegel contracted with Buehrer Group Architecture and Engineering, Inc. ("Bueher") on February 14, 2000 to design the school. On August 22, 2001, New Riegel entered into a contract with Studer-Obringer, Inc. ("Studer") to serve as the general trades contractor for the project. On August 20, 2001, Charles Construction Services, Inc. ("Charles") entered into a contract with New Riegel to serve as the roofing contractor for the project. The Ohio Schools Facilities Commission ("OSFC") served as the statutory administrator for the state-sponsored project. The project was substantially complete in December 2002. On April 30, 2015, New Riegel filed suit against Bueher, Studer, Charles, and others alleging breach of contract and warranty. Bueher filed a Motion to Dismiss relying upon Ohio's SOR since the action had been brought more than 10 years after substantial completion. The trial court granted the motion to dismiss. New Riegel appealed and the Third District reversed the trial court finding the SOR did not apply to contract claims. Bueher and the other defendants (collectively "Appellants") filed an appeal to the Ohio Supreme Court who accepted the appeal in May 2018.

APPELLANTS' ARGUMENTS

The Appellants argue that the clear reading of the SOR applies to all actions including those sounding in contract. The Appellants cite to the language in the statute that provides as follows:

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 (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 and indemnity for damages sustained as a result of bodily 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 of the improvement to real property later than ten years from the date of substantial completion of such improvement.

The Appellants point out several reasons why they believe the SOR applies to contract claims:

- The language of the statute states that it applies to all causes of action regardless of a conflicting statute of limitation;
- R.C. 2305.131 (G) defines "substantial completion" as **"when the real property is first available for use"** after having the improvement completed **"in accordance with the contract or agreement"** covering the improvement;
- R.C. 2305.131 (D) includes a carve out for warranty claims that would not be necessary if the statute did not apply to contract claims;
- R.C. 2305.131 (F) states the SOR **"shall be applied in a remedial manner in any civil action commenced"** on or after the effective date of the statute and per R.C. 1.11, which requires remedial laws to be liberally construed;
- Legislative history for the SOR indicates that the General Assembly recognized that designers and contractors have no control over maintenance, wear and tear, or prevention of intervening causes, and are disadvantaged by availability of witness and the lack of records, and that a ten year period strikes a fair balance between potential claimants and designers/contractors;
- If the legislative intent was to limit the SOR to "tort actions" then it would have been stated in the statute, but that term is not used;
- Other statutes of repose with similar legislative histories have been applied to bar claims even when the specific cause of action is not mentioned in the statute, citing the Ohio medical malpractice statute of repose; and
- The vast majority of other states with a similar SOR apply to contract and tort causes of action.

APPELLEE'S ARGUMENTS

Like the Appellants, the Appellee refers to the plain language of the statute to support the argument that the SOR does not apply to contract claims. Appellee asserts that the language **"damages for bodily injury, an injury to real or personal property"** is the governing language of the statute, which is used to describe tortious conduct. Further, Appellee states that the language of the SOR would clearly state that it applies to contract claims, as it does to tort claims, if that was the legislative intent. Appellee relies upon principles of statutory interpretation, such as all words and clauses are to be given effect and to not look for any subjective intent of the General Assembly. Further, Appellee states:

- Prior attempts by General Assembly to create SOR with substantially similar language were held to apply only to tort claims (determined later to be unconstitutional for other reasons);
- SOR applies to causes of action that "accrue" after ten years from substantial completion, whereas contract causes of action accrue at the time of breach, which is when the project is delivered to the owner. Since the contract statute of limitation for this project is 15 years, the SOR would render the statute of limitation meaningless if it applied to contract causes of action as well as tort;
- SOR applies only to causes of action asserting damages arising "out of a defective **and** unsafe condition." If a cause of action does not assert that a design or construction caused an unsafe condition, then SOR does not apply; the use of "unsafe condition" supports the position that SOR only applies to tort claims because it contributes to bodily injury or injury to property;
- Legislative history indicates the intent was to override other statutes of limitation and specifically sets forth statutes which are tort statutes of limitations, indicating intent is to limit SOR to tort causes of action;

- Historical context of SORs is to protect designers and contractors from claims asserted by those not in privity more than ten years after substantial completion;
- The SOR only prevents claims from **accruing** after ten years - in this case the Appellee's cause of action accrued within ten years of substantial completion and is thus not barred since breach accrued upon completion of building whereas a tort claim would accrue over ten years after substantial completion and thus be barred, which is what the General Assembly intended.

CONCLUSION

The current Supreme Court tends to be conservative, but it is still difficult to predict how it will rule because of the wide reaching impact its decision will have on political subdivisions and municipalities, as well as contractors, trades, and designers. If you are interested in watching the oral arguments on March 5, a link to the live stream is provided by the Court at the following link:

<https://www.supremecourt.ohio.gov/>



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