

Appellate court holds Ohio's construction statute of repose applies to breach of contract and tort claims



Peter D. Welin, John Gambill | Monday, May 13, 2019

On May 6, 2019, the Fifth District Court of Appeals issued a decision in *Board of Education of Tuslaw School District. v. CT Taylor Co.*, 2019-Ohio-1731 (5th Dist.), concluding that both tort and contract claims are time-barred by Ohio's statute of repose, which bars property damage and personal injury claims against architects and builders more than 10 years after substantial completion of the project. This decision comes despite the fact that the Ohio Supreme Court is still deliberating the issue, having just heard oral argument on March 5, 2019, in *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng. Inc.*

In *Tuslaw*, the school board filed breach of contract claims against the architect and contractor in 2018 for alleged defects within a school that was completed no later than 2005. The court dismissed the claims, following its own recent holding in *State by and through Wray v. Karl R. Rohrer Associates, Inc.*, 2018-Ohio-65 (5th Dist.), where the court held that Ohio's statute of repose applied to breach of contract claims. The court again confirmed that the plain language of the statute and the legislature's intent in enacting the statute support its holding. Specifically, the statute expressly states that it applies to "**any** civil action." Also, the statute lists the reasons for its enactment, and those reasons (e.g., the inability of the builder to control and maintain the structure after completion, the difficulty in locating witnesses and evidence more than 10 years after a project is completed, and the fact that parties should not have to maintain records indefinitely) apply equally to tort and breach of contract claims.

The school board did offer a new argument not present in *New Riegel* or *Karl R. Rohrer*. Specifically, the school board noted that the Ohio Facilities Construction Commission's Ohio School Design Manual (OSDM) provides that "building structures and exterior enclosures shall be designed and constructed of materials which will perform satisfactorily for 40 years with only minor maintenance and repairs, and for 100 years before major repairs or replacement of primary structural or exterior enclosure elements is required."

The school board argued that the OSDM created a 40 year warranty and that the school board's claims for breach of that supposed 40 year warranty survived longer than 10 years under the express warranty exception within the statute of repose. The court ultimately did not address that argument, holding that the school board had not asserted breach of warranty claims and had not made the argument in the trial court and had therefore waived it on appeal.

Industry participants should stay tuned for the Ohio Supreme Court's decision in *New Riegel*, ultimately answering the statute of repose question, and other future cases, where courts may be called on to determine if the OSDM imposes a 40 year warranty upon architects and contractors.

For more information on this issue, contact one of the attorneys below.

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