

The Construction Conversation

Ohio's Legislative, Administrative, and Judicial Two-Way Newsletter

March, 2023

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Judicial: Statute of Repose Enforced

A Court of Appeals reversed a trial court that refused to dismiss a trades contractor who completed work in 2004, but was sued by a taxpayer and County for a failed waterline in 2016, more than ten years later. (Cont'd p. 2.)

Legislative: Construction Funding at Risk

Senate Joint Resolution 2, sponsored by Senators Robert McColley (R, Napoleon) and Theresa Gavarone (R, Bowling Green) would put on the ballot an Ohio Constitutional amendment to increase the vote to at least 60% to approve any future amendment. (Cont'd p. 2.)

Administrative: ODOT Projects, Budget

As the Ohio Department of Transportation announced \$2.5 billion for more than 1,000 projects to start in 2023, the General Assembly sent House Bill 23 to Conference Committee to work out differences in the \$13 billion appropriation. (Cont'd p. 2.)

Administrative: Appalachian Community Grants

The Ohio Department of Development awarded \$50 million in local grants in the first round of a \$500 million program to help local initiatives in Ohio's 32 Appalachian counties. (Cont'd p. 3.)

Judicial: Expert Required in

Workmanship Lawsuit

A Court of Appeals upheld dismissal of a contractor sued by a commercial developer for poor workmanship, when the developer failed to provide expert testimony to establish the contractor's standard of care. (Cont'd p. 3.)

Administrative: New Mega-Projects

In an economy with mega-projects such as Intel and the Brent Spence Bridge, public agencies and instrumentalities continue to fund projects with over-size budgets across Ohio, providing prime and specialty trades opportunities. (Cont'd p. 3.)

Judicial: Mechanics' Lien Litigation Warranted Attorney Fees

A Court of Appeals affirmed an award of attorney fees of \$22,511.22 to a homeowner when sued by a subcontractor to foreclose an invalid mechanics' lien for \$7,035.63 for driveway construction. (Cont'd p. 4.)

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Judicial: Statute of Repose Enforced **(Cont'd)**

Revised Code 2305.131 is Ohio's Statute of Repose, which holds that no cause of action accrues ten years after substantial completion of design or construction work. The applicable statute of limitations at the time was 15 years (now 6 years), creating a dilemma between the two statutory provisions.

Citing the Supreme Court precedent of *New Riegel Local School Dist. Bd. of Education v. Buehrer Group Architecture and Eng., Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, 133 N.E.3d 482, the Court of Appeals dismissed the contractor.

The taxpayer unsuccessfully argued that the injuries occurred within ten years, and therefore ought to be actionable. But, the Court of Appeals noted that, "A statute of repose ... bars any suit that is brought after a specified time since the defendant acted... even if this period ends before the plaintiff has suffered a resulting injury."

The Court resolved the issue with the statute of limitations by clarifying that "A statute of limitations is a time limit for suing ... based on the date when the claim accrued." "A statute of repose places an absolute outer limit on the right to bring a civil action measured from the date specified in the statute, not the date when the claim accrues."

The contractor's "substantial completion" began the ten-year countdown, after which no cause of action could accrue.

State ex rel. Betton v Burgess & Niple, Inc.,
6th Dist. Erie, 2023-Ohio-740

Legislative: Construction Funding at Risk **(Cont'd)**

The true purpose of the legislation is to prevent popular petitioning to amend the Ohio Constitution for controversial rights such as abortion or marijuana.

But, construction financing through state debt requires constitutional authorization. Historically, two-thirds of bond issues since 1980 passed only below the proposed 60% threshold. Prior infrastructure, housing, and the Third Frontier programs would not have passed with that super majority requirement.

Senate President Matt Huffman (R, Lima) suggested the possibility of an August election in part to get ahead of a likely November ballot initiative that would expand abortion access in Ohio.

"Frankly, if I'd known that the House wasn't going to pass this by the end of the year or in January, the Senate would have just gone ahead and done it," Huffman said Tuesday.

Companion bill House Joint Resolution 1 (Representative Brian Steward, R, Asheville) had its first hearing on March 22, 2023 in the new House Constitutional Resolutions Committee, the only bill assigned there.

Administrative: ODOT Projects, Budget **(Cont'd)**

County Engineers sought to increase the cap on county workers' self-performance, known as "force account", while highway contractors opposed raising the cap and taking these projects out of the private work sector. The last increase was twenty years ago.

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Railway safety also was a focus given the recent derailments in East Palestine and Springfield.

The bill also raises Ohio's speed limit from 55 miles per hour to 60 mph, although the Governor is opposed and could exercise his line-item veto.

The bill also bans stationery photo-monitoring devices operated by counties or townships, allowing only hand-held devices by law-enforcement officers.

After Conference Committee, both the House and Senate must agree on amendments before sending the legislation to the Governor for signature or line-item vetoes.

Administrative: Appalachian Community Grants (Cont'd)

Among the four projects are:

\$25.8 million to the Survivor Advocacy Outreach Program to establish a mental health drop-in center for Athens, Gallia, and Meigs Counties;

\$17.7 million to rehabilitate six historic downtown buildings in Athens, Coshocton, Logan, and Somerset;

\$4.18 million to the Outdoor Recreation Council for tourism related to nature, heritage and art in Athens, Meigs, and Jackson Counties.

\$2.35 million to the Utica Shale Academy for training in Mahoning, Jefferson, Columbiana and Carroll Counties.

Judicial: Expert Required in Workmanship Lawsuit (Cont'd)

Developer hired a design-build contractor to construct a restaurant, gas station, and mini-mart in Cincinnati. Developer sued over the workmanship of a retaining wall, and the lawsuit proceeded through discovery.

The parties exchanged Expert Reports, but the developer's expert did not provide an opinion on the standard of care or breach of that standard, which differs for design as opposed to construction.

The trial court found that the Developer's Report was merely a cost estimate, and not an opinion of the standard of care. Accordingly, the contractor properly was dismissed on summary judgment.

Riverside Drive Ents. v. Geotechnology, 1st Dist. Hamilton, 2023-Ohio-583

Administrative: New Mega-Projects (Cont'd)

Ohio Exposition Center, Ohio State Fair: \$250 million, Franklin County CM at Risk, Demolition, Design of a new "Town Square", and Construction of two new buildings.

Ohio University, \$67 million, Athens County CM at Risk, College of Osteopathic Medicine, new 81,000 square feet building.

Orient Correctional Institute, \$50 million, Pickaway County CM at Risk, 3 Housing Units.

Miami University, \$47 million, Miami County CM at Risk Chiller Plant Geothermal Conversion.

Finneytown School District, \$30 million, Cincinnati CM at Risk, 72,236

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square feet Middle and High School.

For more information, see Ohio Facilities Construction Commission website, “Opportunities”.

Judicial: Mechanics’ Lien Litigation **Warranted Attorney Fees (Cont’d)**

A subcontractor on a residential project must record its mechanics’ lien affidavit prior to the homeowner paying in full for its prime contract. This avoids a homeowner having to pay twice for the same work.

The trial court found that the homeowner had paid the prime contractor in full before the subcontractor filed its mechanics’ lien. When the homeowner sent this information to the subcontractor with a request to release the lien, instead the subcontractor filed counterclaims for unjust enrichment against the homeowner.

A homeowner is not unjustly enriched after paying for the subcontractor’s work to the prime contractor.

The trial court ordered the subcontractor to release its mechanics’ lien. When the subcontractor failed to do so, the homeowner incurred legal fees to defend.

Accordingly, the court found that the subcontractor acted frivolously, found the subcontractor in contempt, and ordered payment of the homeowner’s legal fees to litigate the proper result.

Almasoodi v. J. Harris Constr., Inc., 5th
Dist. Delaware, 2023-Ohio-895.

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Join us in

The Construction Conversation Call-In

on

Wednesday, April 12, 2023

3:30 p.m.

Luther L Liggett is inviting you to a
scheduled Zoom meeting.

Join Zoom Meeting

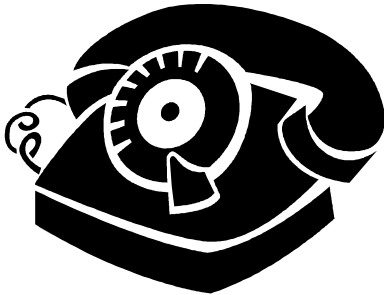
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