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The Elements of Ohio's Liability Provisions for Contemporary Design-Build Architects—An Unwillingness to Expand the Plan

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COMMENTS

THE ELEMENTS OF OHIO'S LIABILITY PROVISIONS FOR CONTEMPORARY DESIGN-BUILD ARCHITECTS - AN UNWILLINGNESS TO EXPAND THE PLAN[1]

I. INTRODUCTION

Buildings are more than mere shells for various human activities. "[A]rchitecture has proven to be the most permanent and illuminating of all unwritten records because architecture has always been the best nonliterary expression of its time."[2] Although the average person can enjoy and appreciate architecture, the architect[3] must be attuned to more than aesthetics. The architect is a professional[4] who must be familiar with all aspects of the construction industry.

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1. This article addresses current liability issues for design-build architects. A design-build architect is a professional architect who is responsible for both the design and the construction of a building. *See infra* text accompanying notes 54-55. The design-build architect is distinguished from the traditional professional architect. In the traditional model, an architect performs design services and exerts only limited control over the construction of a project. *See infra* text accompanying notes 40-45.

2. Hal G. Block, *As The Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting*, 17 J. MARSHALL L. REV. 1, 1 (1984).

3. In the state of Ohio, an architect or registered architect is a person holding a certificate under Ohio Revised Code § 4703.06 and registered pursuant to Ohio Revised Code §§ 4703.01 to 4703.19. OHIO ADMIN. CODE § 4101:2-1-02 (1991). Section 4703.06 of Ohio Revised Code states in pertinent part:

> Any person shall, before engaging in the practice of architecture or before being styled or known as an architect, secure from the state board of examiners of architects a certificate of his qualifications to practice under the title of "architect," and be registered with the board.
>
> Any person holding such certificate and being registered pursuant to section 4703.01 to 4703.19 of the Revised Code may be styled or known as an architect or as a registered architect.
>
> No other person shall assume such title or use any abbreviation, or any words, letters, or figures, to indicate or imply that he is an architect or registered architect.

OHIO REV. CODE ANN. § 4703.06 (Anderson Supp. 1990).

4. Though the history of architecture shows an early development of the architect as a professional, today the term "professional architect" normally refers to an architect who is registered as provided by the state in which the architect practices and/or the American Institute of Architects ("AIA"). The AIA is a national society founded in 1857. Mardirosian v. AIA, 474 F. Supp.

The professional architect must recognize and deal with both technical and legal complexities. One interesting and expanding area of legal concern for a professional architect is liability for defective work.[5] This comment will survey and analyze the status of Ohio law governing a design-build architect's[6] liability for defective work,[7] resulting economic loss, property damage and personal injury.

In early history, the architect was a design builder.[8] The architect, or "master builder," exercised control over the entire construction project.[9] Consequently, early history shows the architect saddled with the strictest of liability throughout the construction process.[10] Later history shows that the practice of architecture became more specialized; the architect controlled only the design and supervision of construction projects.[11] Soon, the architect acquired professional status.[12] Because the architect was deemed a professional, his once strict liability became controlled by principles such as professional negligence and privity of

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628, 633 (D.C. Cir. 1979). The AIA's membership is made up of registered architects and affiliated members. *Id.* The AIA is the primary American professional society for architects. *Id.* The AIA carries on various activities including: devising and publishing handbooks, forms, codes and guidelines for the practice of architecture. *Id.* at 634. Most importantly, the AIA prepares and updates standard form contracts used by attorneys when working with design professionals. *Id.* Although membership in the AIA is not a mandatory requirement for the practice of architecture in the United States, the "AIA" initials after an architects name are a sign of prestige — a symbol of reputation and ability. *Id.* A suspension by the AIA also can hinder the architect's ability to obtain projects and other employment. *Id.* at 633-34.

5. Work, within the context of traditional construction contracts is defined as follows:

> The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the project.

AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION § 1.1.3 (1987).

6. For an explanation of the design-build model of architecture, see *infra* text accompanying notes 50-64.

7. Note that liability may arise out of both defective plans and defective construction. Since a design-build architect functions as both the designer and the contractor, this comment uses the term "work" to apply generically to both the design phase and the construction phase of a project. Work, within the context of the design-build model of architecture is defined as follows: "[t]he Work comprises the completed construction designed under the Project and includes labor necessary to produce such construction, and materials and equipment incorporated or to be incorporated in such construction." AIA DOCUMENT A191, STANDARD FORM OF AGREEMENTS BETWEEN OWNER AND DESIGN/BUILDER § 1.1.2 (1st ed. 1985). "The Project is the total design and construction for which the Design/Builder is responsible . . . , including all professional design services and all labor, materials and equipment used or incorporated in such design and construction." *Id.* at § 1.1.1.

8. For an explanation of the historical design-build architect, see *infra* text accompanying notes 17-18.

9. *Id.*

10. *See infra* text accompanying notes 19-23.

11. *See infra* text accompanying notes 27-28.

12. *See infra* text accompanying note 29.

contract.[13] In short, the evolution of architectural practice into a specialized profession brought with it a shift away from the architect's historically strict liability.

In contemporary times, the practice of design-build architecture mimics the role of the old "master builder." The contemporary architect is authorized to enter design-build ventures that allow for control over design, construction and supervision of a project.[14] As a result, some jurisdictions are moving back toward the historically stricter liability for architects practicing in the design-build model.[15] Although Ohio applies certain principles of liability to non-professional ventures with design-build features, Ohio has not expanded such principles to the professional design-build architects.[16]

This comment analyzes the present status of Ohio law applicable to both professional and non-professional design-build ventures. Both contractual liability and tort liability are addressed. This comment shows that Ohio has not shifted toward a stricter liability for a design-build architect. Rather, Ohio has maintained traditional notions of "professionalism." These notions of "professionalism" shield a contemporary design-build architect from liability that other jurisdictions may impose.

In order to understand the evolving concepts of liability which affect design-build architects, it is first necessary to understand the genesis of the "architect," the evolution of the architect to professional status and the distinction between the practice of traditional architectural services and the contemporary practice of design-build architecture.

A. The Historical Development of the Professional Architect and Architectural Liability

Today's modern architect evolved from the historical master builder.[17] The master builder exercised dominion over all areas of design, engineering and construction.[18] Since the master builder was responsible for all areas of the project, it is not surprising that absolute liability was also vested in the master builder.[19] The first codification

13. *See infra* text accompanying notes 30-35.

14. *See infra* text accompanying notes 57-60.

15. *See infra* text accompanying notes 158, 167-8, 238-42.

16. *See, e.g. infra* text accompanying note 139-41.

17. Block, *supra* note 2, at 2 (citing Rohald H. Kahn, *The Changing Role of the Architect*, 23 ST. LOUIS U. L.J. 216 (1979)).

18. *Id.*

19. *Id.*

for architectural liability, the ancient Babylonian Code of Hammurabi,[20] dealt with the historical master builder. Hammurabi's Code provided severe remedies for both personal injury[21] and economic loss[22] that resulted from design or construction defects. The master builder's liability for defective work, under Hammurabi's Code, has been described as strict liability at its ultimate.[23]

The draconian liability provisions of Hammurabi soon changed. Roman law required privity of contract between the master builder and the party bringing suit.[24] Privity was rigidly applied in Roman courts, often precluding recovery by parties that brought suit against a master builder, even if the suing party suffered physical or monetary damages.[25] Although Roman law limited the number of potential litigants against a master builder, the master builder was still potentially liable for damages resulting from *both* the design *and* the construction of the project.[26]

Over time, the master builder's liability continued to change. "Increased specialization [of the master builder's function] resulted in a decrease in . . . potential liability."[27] This increased specialization began to establish the master builder as a professional, akin to the contemporary architect, concerned and responsible only for the design and

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20. For a history and exploration of Hammurabi's Code, see RENE A. WORMSER, THE STORY OF THE LAW AND THE MEN WHO MADE IT FROM THE EARLIEST TIMES TO THE PRESENT (Rev. ed. 1962).

21. For personal injury, Hammurabi's Code provided:

> If a builder has built a house for a man, and his work is not strong, and if the house he has built falls in and kills the householder, that builder shall be slain.
>
> If the child of the householder be killed, the child of that builder shall be slain.

Block, *supra* note 2, at 1 (citing C. EDWARDS, THE HAMMURABI CODE AND THE SINAITIC LEGISLATION 65-66 (2d ed. 1971)).

22. For economic loss, Hammurabi's Code provided:

> If the slave of the householder be killed, he [the builder] shall give slave for slave to the householder.
>
> If the goods have been destroyed, he [the builder] shall replace all that has been destroyed; and because the house that he built was not made, and it has been fallen in, he shall restore the fallen house out of his personal property.
>
> If a builder has built a house for a man and his work is not done properly, and a wall shifts; then that builder shall make that wall good with his own silver.

Id.

23. Block, *supra* note 2, at 3.

24. *See generally* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW (6th ed. 1977).

25. *Id.*

26. Block, *supra* note 2, at 3. *Contra* Barry J. Miller, Comment, *The Architect in the Design-Build Model: Designing and Building the Case for Strict Liability in Tort*, 33 CASE W. L. REV. 116, 117 (1982). The author states that "[t]he ancient cultures of Egypt, Greece, and Rome viewed the architect as a professional whose responsibilities extended only to the design and general supervision of the construction process." *Id.* (citing SPIRO KOSTOF, THE ARCHITECT: CHAPTERS IN THE HISTORY OF THE PROFESSION 30 (1977)).

27. Block, *supra* note 2, at 4. Block attributes the increased specialization of architects to changes that occurred in the Renaissance. Time constraints and new complexities in building con-

supervision of the construction.[28] The Renaissance period established this separation and was the genesis of the European concept of the "architect" as a distinct professional in the construction process.[29] This concept of the architect as a professional carried over to the American colonies, even though most colonial construction was performed by design-builders who resembled the old master builder.[30]

During the 1800s, two major developments in the law affected the architect's liability. First, courts began to adopt the Roman concept of privity of contract. An injured party could only recover in an action against an architect if privity of contract existed between the architect and the injured party. Second, courts began to require negligence as a requisite element in an action against an architect.

The English courts adopted the Roman's concept of privity in *Winterbottom v. Wright*.[31] The *Winterbottom* court embraced privity as a requirement for bringing a cause of action for two reasons. Without privity, the court feared excessive and unlimited liability and the corollary problem of determining cause and effect.[32] In addition, the

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struction forced the "master builder" to specialize and reduced the function of the architect to "designing and planning of buildings and only supervisory control of the construction process." *Id.* at 3. Note, however, that the increased technology of the construction industry created a dichotomy of needs. Those "master builders" that enjoyed the actual field work chose to specialize in the engineering and supervision of the building process. Those "master builders" that were concerned primarily with aesthetics chose to concentrate on design. This polarization did not reduce the architect to designing only, but provided a chance for a builder to refine his role in the construction process to an area that suited his preference. This specialization was a choice made by the individual, rather than a reduction in the role of the architect. One commentator states that the guild system of the Middle Ages destroyed the architect's privileged professional standing and that the Renaissance reestablished the separation of design and supervision duties from the other construction related functions. SPIRO KOSTOF, THE ARCHITECT: CHAPTERS IN THE HISTORY OF THE PROFESSION 61 (1977).

28. Miller, *supra* note 26, at 118.

29. *Id.*

30. R. MCLAUGHLIN, ARCHITECT 79 (1967). The author notes that "[w]hat made him a professional architect was his method of preparing plans and taking bids from builders. Before that, the practice was for an owner to secure competitive packages from designer-craftsman, who submitted a design and a price together." *Id.*

31. 152 Eng. Rep. 402 (Ex. Ch. 1842) (though *Winterbottom* was more along the lines of a products liability case, involving a defective mail carriage, the case adopted the Roman concept of privity that would later be applied to all contracts, including those between an architect and client).

32. *Id.* at 405. The court of Exchequer Chamber stated:

> If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go a step beyond that, there is no reason why we should not go fifty.

Id.

court feared that a failure to impose a privity requirement would saddle a party with extra-contractual liabilities.[33]

The second and more important development in the area of architectural liability was the introduction of negligence as a standard for liability. During the Industrial Revolution, the English courts began to require proof of negligence as a requisite element of recovery in a suit against an architect.[34] The requirements of negligence and privity shielded an architect from some potential liability. First, privity determined whether an injured party had a right to bring suit. Second, the requirement of negligence imposed a burden of proof on the injured party to show a *prima facie* case before there could be any recovery.

Early American courts strictly adhered to the requirement of privity until *MacPherson v. Buick Motor Co.*[35] *MacPherson* established liability for injury to remote users - users without the formerly requisite privity to file suit. Although *MacPherson* was a manufacturing defect case involving personal injury, the rejection of the element of privity was soon extended to cases that involved only economic loss.[36] The abandonment of privity in cases against an architect began with *Inman v. Binghamton Housing Authority.*[37]

Privity is no longer a defense available to architects in suits seeking damages for physical injury or economic loss that are brought by the surety, the primary contractor, the subcontractors or third parties.[38] In most jurisdictions, however, negligence is still a required element in a suit against an architect.[39]

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33. *Id.*

34. Block, *supra* note 2, at 4. Negligence will be more fully addressed in a following section. *See infra* text accompanying notes 180-84.

35. 111 N.E. 1050 (N.Y. 1916) (manufacturer was held liable for injury to a driver of a vehicle where no privity existed between the manufacturer and the driver).

36. *See generally* Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441 (N.Y. 1931) (public accountants were found liable for a negligently made certified balance sheet that plaintiff relied on and suffered monetary loss). Justice Cardozo stated that "[t]he assault upon the citadel of privity is proceeding in these days apace." *Id.* at 445. In regards to the abandonment of privity in architectural malpractice cases, one commentator observed that:

> [l]iability was predicated upon the establishment of the elements of negligence and the existence of a legally recognized relationship or privity with the architect. The duty of the architect was extended so that in the preparation of plans and specifications the exercise of ordinary care in design was for the protection of *any person* who forseeably could be injured by the designer's failure to exercise such care.

Note, *Liability of Design Professionals - The Necessity of Fault*, 58 IOWA L. REV. 1221, 1275 (1973).

37. 143 N.E.2d 895 (N.Y. 1957) (holding that privity of contract was no longer necessary for an injured party to recover for negligent architectural design).

38. Block, *supra* note 2, at 5. A minority of jurisdictions still require privity, but even they limit the applicability of the privity requirement to specific fact situations. *Id.* Note, however, that Ohio still requires privity in certain instances. *See infra* text accompanying notes 186-92.

39. *See infra* text accompanying note 180.

It was this progression through history, from the master builder to the professional architect, that led to the acceptance, if not preference, of the "traditional model" of the professional architect. It is important to understand the traditional model since most contemporary statutory and common law controlling the construction industry developed during the time when the traditional model of architecture dominated the construction industry.

B. The Traditional Model of the Professional Architect

The traditional model of architectural practice involves separate contracts of the owner[40] with both the contractor[41] and the architect.[42] These separate contractual obligations form a triad of responsibilities. Under the terms of the contract between the owner and the architect, the architect creates and coordinates the building design and the construction documents.[43] The architect's responsibilities also include supervisory observation at the building site throughout the construction phase to ensure that the actual construction complies with the construction documents[44] and assisting the owner during the bidding or negotiation phase of the project.[45] Under the terms of the contract between the owner and the contractor, the contractor's responsibilities include building the project in accordance with the architect's contract documents, directing the work at the construction site, and selecting the methods and techniques of construction.[46] The contractor is also

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40. "Owner" is a term that refers to the architects' client, the person who will actually own the finished building. *See generally* AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION (1987).

41. *See generally* AIA DOCUMENT A101, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR—A STIPULATED SUM (1987).

42. *See generally* AIA DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (1987).

43. *See generally* AIA DOCUMENT B141, STANDARD AGREEMENT BETWEEN OWNER AND ARCHITECT §§ 2.2, 2.3, 2.4 (1987) (outlining the architect's basic services in the design phase, design development phase, and the construction documents phase, i.e., the drawings and specifications of the building).

44. *See generally* AIA DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT § 2.6 (1987) (outlining the architect's duties during the construction phase including administration of the construction contract); AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECTS HANDBOOK OF PROFESSIONAL PRACTICE (1969); AMERICAN INSTITUTE OF ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION A201 (1976); *see also* CLINTON H. COWGILL & BEN J. SMALL, ARCHITECTURAL PRACTICE (3d ed. 1959).

45. *See generally* AIA DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT § 2.5 (1987).

46. *See generally* AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION Art. 3 (1987). Note that the A201 document "is intended to be used as one of the Contract Documents forming the Construction Contract". INSTRUCTION SHEET FOR AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION 1 (1987 ed.). Also, AIA documents B141, B161 and B181 specifically incorporate and reference the A201.

responsible for the work on site being performed in a safe manner and providing a safe working environment for the contractor's employees.[47]

This traditional model of architectural services is formalized through the various documents of the American Institute of Architects ("AIA").[48] The traditional model of architecture is the predominant form of architectural practice in modern American society.[49]

C. *The Design-Build Model of the Professional Architect*

The advent of the design-build model of architectural practice in contemporary times has been attributed to increased construction costs which have forced owners and developers to search for ways to consolidate costs.[50] Reduction in architectural budgets caused aesthetics to diminish in importance as more weight was given to the speed and cost efficiency of a project.[51] As a result of the changing economics of construction, many architects began to expand their practice into other profit generating areas.[52] Architects first ventured by acting as "construction managers." Construction management is an expansion of the architect's traditional duties whereby the architect functions outside the realm of the traditional model, often overlapping those responsibilities previously borne by the owner or the contractor.[53]

INSTRUCTION SHEET FOR AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION 1 (1987).

47. *See* AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION §§ 3.5.1, 10.2 (1987) (dealing with the contractor's warranty and contractor's duty for safety on the building site). Though the actual contract used between owner and contractor is *AIA Document A101*, the A101 specifically incorporates the A201 by specific reference. INSTRUCTION SHEET FOR AIA DOCUMENT A101, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR— STIPULATED SUM (1987). Note, however, that in some circumstances the architect may be responsible for ensuring a safe working environment. For a commentary on how the architect becomes liable for safety issues, see Note, *supra* note 36, at 1240.

Note that in the design-build mode, the architect assumes responsibility for the safety of the site. This has wide implications including Workman's Compensation programs and OSHA standards. For more detail on site safety in the design-build model, see Block, *supra* note 2 at 41-44.

48. *See, e.g., supra* notes 40-42 and accompanying text.

49. *See* Ronald H. Kahn, *Introduction: The Changing Role of the Architect*, 23 ST. LOUIS U. L.J. 216, 216 (1979). Kahn states:

> In comparatively recent times this concept [master builder] has been fragmented. No one person is now in charge of the project from conception to completion. While the architect was formerly the builder, it is now the contractor who is in charge of the actual erection of the structure, and the architect is primarily retained to provide the design for a proposed project and to lend his assistance in its implementation.

Id.

50. Block, *supra* note 2, at 7.

51. *Id.*

52. *Id.*

53. Some of the duties that an architect assumes when acting as a construction manager include scheduling, coordinating, inspecting, expediting cash flow of a project, and certifying cash payments. *See generally* John F. Lehman, Comment, *The Roles of Architect and Contractor in*

The next logical expansion for the architect was to assume the duties of the old master builders[54] in order to take control over both the design phase and the construction phase of a project. This is the primary distinction between the traditional model of architecture and the design-build model. The traditional model uses separate contracts for the design and the construction phases of a project, whereas in the design-build model, the only contract is between the owner and the design-builder.[55]

Prior to 1978, the AIA ethically precluded its members from entering into design-build contracts.[56] Under the AIA's rules, the architect could only serve as designer and supervisor of construction in the limited traditional role or by acting as a construction manager. The AIA began to sympathize with the economic realities that faced the construction industry, however, and in 1978, approved an experimental change to the AIA code of ethics which prohibited architects from engaging in design-build ventures.[57] An AIA task force analyzed the results of the experiment.[58] Following this evaluation of the design-build model, in December of 1985, the AIA published standardized contracts to govern the obligations of parties to design-build ventures.[59]

Construction Management, 6 U. MICH. J.L. REF. 447 (1973). The functions of the construction manager overlap the duties of both the architect and the engineer, as well as relieve the owner of numerous responsibilities. *Id.*

54. *See supra* text accompanying notes 17-18.

55. The actual contract between the owner and the design-builder can be arranged in three different ways. First, there is the "competitive bidding" option. Under this approach the design-builder is chosen through a competitive bidding process between various design-builders. Second, there is the "direct selection" approach. Under this method, the owner selects the design-builder through negotiations. The owner maintains an active role throughout the design-build process by adjusting the project to changing costs and through obtaining all the necessary financing for the project. The third method is the "turnkey" method. Under this approach, the owner and design-builder enter into a fixed sum sales contract. The owner provides the project requirements and the design-builder provides the finished project. Under the "turnkey" approach, the architect is responsible for design, construction, acquisition of a site, governmental approval and interim construction financing. *See* AMERICAN INSTITUTE OF ARCHITECTS, PROJECT DELIVERY APPROACHES 22 (1976).

56. *See generally* AIA CODE OF ETHICS AND PROFESSIONAL CONDUCT RULE 407 (1979).

57. *Id.*

58. The results of the AIA task force evaluating design-build were as follows:

> 3,682 member firms returned questionnaires. 10.2% of the firms indicated some experience with the design-build model, and only 21% of those firms present business involved design-build ventures. 21% of the firms returning questionnaires thought that they would be likely to participate in design-build ventures.
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> Yet, a large number of the firms returning questionnaires thought that allowing design-build ventures was a good idea because owners preferred to deal with architects rather than contractors, an increasing amount of owners preferred design-build ventures and an increasing number of owners were in favor of architect control of design-build projects.

AIA, *Design-Build/Contracting Monitoring Task Force Report*, May 1981.

59. *See generally* AIA DOCUMENT A191, STANDARD FORM OF AGREEMENTS BETWEEN

Although the design-build model of architecture is a newly sanctioned approach, it has gained almost immediate acceptance.[60] This is due partly to the economic advantages that the owner derives from the design-build approach.[61] Unlike the linear approach of the traditional model, which requires that each phase of the project be finished before the next may commence,[62] the design-build model allows various stages of a project to occur simultaneously.[63] One commentator has stated that the design-build model of architectural practice removes the internal conflict, waste and clouding of responsibility that occurs among the three separate parties (owner, architect, and contractor) within the traditional model.[64]

With the AIA's change in position, many state legislatures reacted

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OWNER AND DESIGN/BUILDER (1st ed. 1985) (sets out an agreement between the owner and the design-builder); AIA DOCUMENT B901 STANDARD FORM OF AGREEMENTS BETWEEN DESIGN/BUILDER AND ARCHITECT (1st ed. 1985) (used when the design-build entity is not an architect and the design-build entity must hire an architect); AIA DOCUMENT A491, STANDARD FORM OF AGREEMENTS BETWEEN DESIGN/BUILDER AND CONTRACTOR (1st ed. 1985) (used in the common situation where the architect acts as the design-build entity and hires the contractor as an employee during the construction phase).

60. A 1975 survey showed that out of 383 recently built projects valued at $5 million or more, 28% utilized the design-build (single contract) approach. *See Survey Measures Use Of Design-Construct Contracts by Industry*, AM. INST. ARCHITECTS J., Nov. 1975, at 6 (citing FORTUNE, CORPORATE PRACTICES AND ATTITUDES TOWARDS INDUSTRIAL/COMMERCIAL CONSTRUCTION (1975)). For commentary on the future trends in architectural practice, see generally AIA, ARCHITECTS FOR A NEW CENTURY (1989) (findings and deliberations of the national Vision 2000 conference); AIA, THE IMPLICATIONS OF CHANGE: A VISION 2000 SURVEY (1988) (survey of 200 key players in the built environment conducted by Louis Harris & Assocs.); AIA, VISION 2000: THE CHALLENGE OF CHANGE (1988) (deliberations of 12 experts on design and construction); Vision 2000: AIA, TRENDS SHAPING ARCHITECTURE'S FUTURE (1988) (details 27 social, technological, economic, environmental, political, and professional trends likely to shape architecture in the 21st century).

61. In the traditional model, the owner must invest considerable time and money for planning and contracting before the architect even releases the construction documents for bid to perspective contractors. *See generally* AIA DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT art.4 (1987).

62. Time and cost problems are the most serious drawbacks to the traditional model. Construction cannot begin until the design phase is completed, and the design phase cannot begin until the programming phase has been completed. *See generally* AMERICAN INSTITUTE OF ARCHITECTS, PROJECT DELIVERY APPROACHES 6-10 (1976).

63. The design-build approach allows early access to information which in turn reduces the amount of time necessary to modify or change an aspect of the project. This approach, allowing simultaneous design and construction phases, is referred to as "fast track' construction. Under the "fast track" system, basic program requirements are established first. Next, the foundation and structural system are designed and released for bid. While the foundation and structural system are being constructed, the planning and design of the rest of the project is being completed, sent to bid, etc. Thus, all phases of the project—planning, design, and construction—occur simultaneously. For some comments on "fast track" construction, see Kevin B. Lynch, Note, *Design-Build Contracts in Virginia*, 14 U. RICH. L. REV. 791, 798-99 (1980).

64. *See* William E. Merritt, *Up Against the Wall, Master Builder: The Architect's Legal Status*, 32 St. Louis U. L.J. 384, 420 (1979).

by accommodating design-build contracts. Several state legislatures expressly authorize public agencies to contract with design-build architects.[65] Courts also have upheld the validity of design-build contracts in litigation attacking the design-build process.[66] Consequently, the design-build process has acquired wide acceptance through the AIA's position, state legislative action, and various court opinions. As one commentator stated, "[T]he net result is an era of rapid change to accommodate the new-found legal creature. This era is by no means over, but a trend toward acceptance of the design-build process has certainly emerged."[67]

Ohio statutory law does not allow design-build contracts for the construction of public projects. Rather, Ohio statutorily mandates a competitive bidding process consistent with the traditional model of architecture.[68] Ohio courts, however, have recognized the practice of design-build architecture between private owners and architects since

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65. An example of this is the Florida statute which provides:

> Pursuant to the rules of the State Board, the official shall require Boards to employ procedures for the design and construction of new facilities, or major additions to existing facilities, that will include, but not be limited to, the latest developments in construction, in order to ensure that educational facilities are constructed rapidly and economically . . . . The following concepts may be included in the requirements of the office:
>
> . . .
>
> (4) Turnkey Bidding— A method whereby the Contractor agrees to complete construction to the user's specifications and requirements at a previously agreed cost.
>
> (5) Design and Build Bidding— A procedure which requires that an Architect, Contractor, or Engineer bid the entire design and construction of a project and which requires that the Owner hire a single source for the project completion and be responsible for the development of performance specifications and technical criteria.

FLA. STAT. ANN.. § 235.211 (West 1990 & Supp. 1991). Florida also allows design-build contracts for Department of Transportation work. FLA. STAT. ANN. § 337.11(5)(a) (West 1987). Other states have chosen to statutorily authorize the design-build model for public contracts. *See, e.g.* ALASKA STAT. § 36.30.200 (1990) (expressly authorizing design-build contracts); CAL. PUB. CONT. CODE §§ 10503, 10708 (West 1990) (expressly allowing design-build contracts in the California State University system); IDAHO CODE § 67-5711(a) (1987) (expressly allowing public officials to utilize design-build contracts for the construction, repair, or improvement of public works, public buildings, public places or other work); KY. REV. STAT. ANN. § 180.050 (Baldwin 1991); N.C. GEN. STAT. § 83A-13 (1985); OHIO REV. CODE ANN. § 2305.131 (Anderson 1991); VA. CODE ANN. § 11-41.2 (Michie 1988) (the Commonwealth may enter into design-build contracts).

66. *See, e.g.*, Berck v. Ulmer, 745 P.2d 66 (Alaska 1987) (finding that the actions of city assembly members were immune from prosecution as the use of design-build contracts did not violate any clearly established law); Charlebois v. J.M. Weller Assoc., Inc., 531 N.E.2d 1288 (N.Y. App. 1988) (the New York Court of Appeals found, by a four to three vote, that design-build contracts do not violate public policy); J.F. Ahearn Co. v. Wisconsin State Pub. Bldg. Comm., 336 N.W.2d 679 (Wis. App. 1983) (finding that the state of Wisconsin had properly waived the competitive bidding requirement and properly entered design-build contracts for the construction of several state office buildings).

67. Robert H. Buesing, *Design/Build Contract Management: The Law Struggles to Keep Pace with the Design/Build Trend*, 10 THE CONSTRUCTION LAWYER 14, 14 (Jan. 1990).

68. *See, e.g.*, OHIO REV. CODE ANN. §§ 101.50-101.67, 123.01, 123.77, 153.01, 153.011, 153.012, 153.05-153.07 (Anderson 1990); OHIO REV. CODE ANN. §§ 713.23, 2305.13 (Anderson

1980, shortly after the AIA accepted the design-build concept.[69]

II. ACCRUAL OF A CAUSE OF ACTION IN A CONSTRUCTION CASE

Ohio has rules to determine when a negligence action accrues. Once the elements of negligence are shown,[70] a party must bring the action within the statute of limitations. In medical malpractice cases, an injury can remain undiscovered, and Ohio tolls the statute of limitations until the patient discovers, or should discover, the negligent act.[71] This is often coined the date of "discovery rule." As in medical malpractice cases, a breach of duty and resulting damages in a construction case may often be separated by several years.[72] In *Velotta v. Leo Petronzio Landscaping, Inc.*,[73] the Ohio Supreme Court stated "where the wrongful conduct complained of [in a construction case] is not presently harmful, the cause of action does not accrue until actual damage occurs."[74] A later decision by the Ohio Supreme Court, *Sedar v. Knowlton Construction Co.*,[75] explained that the *Velotta* holding did not establish a "discovery rule."[76] The *Sedar* court stated that construction cases deal with the delayed occurrence of damages, not with the discovery of injury.[77]

Under *Velotta*, a cause of action accrues and the statute of limitations begins to run when damage actually occurs. The applicable statute of limitations period depends upon whether the action arises in tort[78] or contract.[79] *Sedar*, on the other hand, brought into issue Ohio's

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1991); *see also* OHIO ADMIN. CODE, §§ 123:2-14, 123:5-1 (1991); OHIO FORMS, BUILDING AND CONSTRUCTION CONTRACTS, §§ 6:11-6:26.

69. *See, e.g.*, State of Ohio, Bd. of Examiners of Architects v. Design Collective, Inc., No. 80AP-425, (Franklin County Dec. 11, 1980) (LEXIS, States library, Ohio file). Though this case involved an action by the state board of examiners to sanction a non-registered "architect" for engaging in unauthorized architectural practices, the court opinion illustrates the legitimacy of design-build contracts in Ohio. In this case, the contract provided: "Scope of Work: to construct on a design/build basis in total a new two (2) story, 11,400 sq. ft. masonry building. . ." *Id.*

70. In order to establish actionable negligence, three elements must be shown:

1) a duty to protect another from foreseeable injury;

2) a breach or failure to discharge such a duty;

3) an injury to such other person proximately caused by the failure or breach of duty to protect.

Wellman v. East Ohio Gas Co., 113 N.E.2d 629, 632 (Ohio 1953).

71. Melnyk v. Cleveland Clinic, 290 N.E.2d 916 (Ohio 1972); Oliver v. Kaiser Community Health Found., 449 N.E.2d 438 (Ohio 1983).

72. Sedar v. Knowlton Const. Co., 551 N.E.2d 938, 943 (Ohio 1990).

73. 433 N.E.2d 147 (Ohio 1982) (construction case alleging failure to construct in a workmanlike manner using ordinary care, which proximately caused damage).

74. *Id.* at 150.

75. 551 N.E.2d 938 (Ohio 1990).

76. *Id.* at 943.

77. *Id.*

78. *See infra* text accompanying note 145.

statute of repose.[80] In a case involving Ohio's statute of repose, the ten year period barring an action begins to run upon the completion of performance of the construction services.[81] Ohio's statute of repose applies only to tort claims.[82] Therefore, a cause of action in tort arising out of a construction defect, may not be barred by the applicable statute of limitations, but it may be barred by Ohio's statute of repose.

III. LIABILITY FOR DESIGN-BUILD ARCHITECTS (CONTRACTUAL NATURE)

There are two primary liability provisions in a design-build construction contract: guarantees and warranties. Warranties can either be implied or express contract provisions. Most authorities include guarantees within the purview of warranties.[83] Other commentators separate guarantees from warranties.[84] For purposes of clarity, the concepts of guarantees and warranties will be addressed separately.

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79. *See infra* text accompanying note 111.

80. Section 2305.131 of the Ohio Revised Code provides:

> No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought against any person performing services for or furnishing the design, planning, supervision of construction, or construction of such improvement to real property, more than ten years after the performance or furnishing of such services and construction. This limitation does not apply to actions against any person in actual possession and control as owner, tenant, or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

OHIO REV. CODE ANN. § 2305.131 (Anderson 1987).

Section 2305.131 was enacted in response to the general demise of the privity requirement and the extension of the architect or builder's liability to third parties with whom the architect had no contractual relationship. *Sedar*, 551 N.E.2d at 945.

81. *Sedar*, 551 N.E.2d at 942.

82. Elizabeth Gamble Deaconess Home Assoc. v. Turner Constr. Co., 470 N.E.2d 950, 954 (Ohio Ct. App. 1984) (Ohio Revised Code § 2305.131 applies only to tort claims).

83. *See, e.g.*, MCNEILL STOKES, CONSTRUCTION LAW IN CONTRACTORS' LANGUAGE, 238-39 (2d ed. 1990).

84. Joseph G. Wagman & Judy H. Chen, *Liability for Defective Work- Drafting Contract Provisions from the General Contractor's Perspective*, 10 THE CONSTRUCTION LAWYER 1, 1 (May 1990).

A. Guarantees

In a construction contract, a "guarantee" clause[85] requires a contractor to return to a building site and correct, through repair or replacement, defective work that appears within a specified period.[86] The period during which a guarantee must be honored can be subsequent to substantial completion, final acceptance of the building by the owner, or some other agreed upon event.[87] In general, guarantees are accepted construction contract provisions. Ohio courts accept the validity of a contractor's guarantees.[88] In the design-build context, guarantee provisions are normally identical to those imposed on the contractor in the traditional tri-partite construction contract, but it is the architect, not the contractor, who guarantees the work.

Within the context of architectural services, Ohio courts require a special agreement for the enforcement of a guarantee provision. The architect is liable only for failure to exercise reasonable care unless the construction contract requires the architect to promise a specific result.[89]

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85. An example of a typical guaranty clause in the context of the traditional model of architecture is where the contractor guarantees as follows:

> If within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. . . .

AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION § 12.2.2 (1987).

Within the context of the design-build model of architecture, the design-build architect guarantees as follows:

> The Design/Builder shall promptly correct Work rejected by the Owner or known by the Design/Builder to be defective or failing to conform to the Construction Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct Work under this Part 2 found to be defective or nonconforming within a period of one year from the date of Substantial Completion of the Work or designated portion thereof, or within such longer period provided by any applicable special warranty in the Contract Documents.

AIA DOCUMENT A191, STANDARD FORM OF AGREEMENTS BETWEEN OWNER AND DESIGN/BUILDER § 9.1 (1st ed. 1985).

86. Wagman & Chen, *supra* note 84, at 1.

87. *Id.* at 31.

88. *See, e.g.*, Ohio Historical Soc'y v. General Maintenance & Eng'g Co., No. 89AP-104, 1989 Ohio App. LEXIS 4063, at *4 (Franklin County Oct. 24, 1989) (the contract provided that " '[t]he Contractor shall guarantee his workmanship and materials for a period of one (1) year from the date of acceptance by the Architect, and shall leave the work in perfect order at completion. Should defects develop, within the guaranteed period, the Contractor shall, upon written notice of the same, remedy the defects and reimburse The Ohio Historical Society . . . .' ").

89. Phillips v. J.W. Colburn & Assoc., Inc., No. 6148, (Montgomery County Nov. 21, 1979) (LEXIS, States library, Ohio file). "The architect's undertaking, however, in the absence of a

B. *Express Warranty*

A warranty is a contractual obligation, the breach of which entitles the injured party to bring a suit for contract damages, within the applicable statute of limitations for written agreements.[90] This may be distinguished from a guarantee in a construction contract which requires the party in breach to return to the construction site and remedy defective work within the specified time frame.[91] Some courts hold that a properly worded guarantee provision in the construction contract is in addition to any other warranty that work performed will be free of defects.[92]

Express warranties are generally enforceable under applicable contract principles. Any owner in the state of Ohio, using an AIA form contract may likely hold a contractor to an express warranty.[93] This express warranty provision normally provides that the contractor warrants to the owner and the architect that materials and equipment used will be new unless otherwise permitted and the work will conform to the requirements of the contract documents.[94]

The general rule is that a contractor will be free from liability for a less than perfect construction result so long as he performs in accordance with this express warranty of workmanlike manner.[95] The only exception to this rule is that a contractor cannot escape liability when the defect in the plans is so obvious that the contractor has a duty to report the problem to the architect or owner and does not do so.[96]

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special [express] agreement, does not imply or guarantee a perfect plan or satisfactory result, but [the architect] is liable only for failure to exercise reasonable care and skill." *Id.*

90. Wagman & Chen, *supra* note 84, at 2.

91. *Id.* (this distinction seems to imply an automatic remedy of specific performance).

92. *See, e.g.*, Burton-Dixie Corp. v. Timothy McCarthy Constr. Corp., 436 F.2d 405, 410 (5th Cir. 1971).

93. *See* AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION § 3.5.1 (1987) which provides:

> The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. . . .

Id.

94. *Id.* Construction contracts have also included express warranties as to:

1) the contractor's financial solvency,
2) the contractor's level of expertise,
3) the contractor's authorization to do business,
4) that the contractor possesses the requisite license,
5) familiarity with the construction site.

Wagman & Chen, *supra* note 84, at 3-4.

95. Block, *supra* note 2, at 15.

96. It is now almost a universal rule that the contractor is liable to all those who may [illegible] injured by [illegible] work when he fails to disclose dangerous conditions known to him.

In the design-build mode, assuming the design-build entity is not a joint venture or partnership,[97] the architect is also the contractor. Therefore, any express warranties pertaining to the contractor, are the responsibility of the design-build architect. The AIA contracts address this transfer of express warranty by incorporating the contractor's express warranty[98] into the architect's design-build construction contract.[99]

The design-build process has two distinct phases. First, there is the design phase.[100] Second, there is the construction phase.[101] Under Ohio law, the architect is not held to guarantee perfect plans or a perfect

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Jackson v. City of Franklin, 554 N.E.2d 932, 935 (Ohio App. 1988) (citing Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3rd Cir. 1948), *cert. denied* 334 U.S. 846 (1948)). This duty to report also applies to supervising architects and engineers as well. *Id.* (citing Paxton v. Alameda Cty., 259 P.2d 934 (Cal. App. 1953)).

The rule to be applied is that in the absence of anything to show that the plans and specifications were so obviously defective that a contractor of ordinary prudence and average skill would not have attempted to build according to the plans, a builder or contractor is justified in relying on the plans and specifications provided to him. *Id.* at 936.

97. The distinction between a design-build entity and a design-build joint venture must be made. A design-build partnership or joint venture will require analysis of liability under principles of agency and partnership. For example, the Uniform Partnership Act ("U.P.A") provides:

§15. Nature of Partner's liability

All partners are liable

(b) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

U.P.A. § 15(b) (1914).

Note that section 15 of the U.P.A. holds partners liable for all acts of a partner that are within the ordinary course of the business. U.P.A. § 15 (1914). In a design-build venture, all aspects of design and construction are clearly within the scope of the design-build entity's ordinary course of business. Courts have held that where a joint construction venture is concerned, both design and construction partners are fully liable for defects occurring either in the design or the construction phase of the project. *See, e.g.*, Kishwaukee Community Health Serv. Ctr. v. Hospital Bldg. and Equip. Co., 638 F. Supp. 1492 (N.D. Ill. 1986) (the court held that where a hospital owner sued the contractor and two design professionals, the defendants were all hired as a cohesive group, with each liable under the contract). Consequently, the architect in a joint design-build venture cannot claim as a defense, absent some liability partitioning agreement, that the contractor was the only party liable under a guaranty or warranty clause found in the contract, even if the clause refers specifically to the construction company as the party liable for breach. *See, e.g., Id.* This is because by virtue of the law of agency and partnership, the architect will be held liable for the design and the construction phases of the project that fall into the normal course of the partnership or joint venture's ordinary business.

98. *See supra* note 93 and accompanying text.

99. AIA DOCUMENT A191, STANDARD FORM OF AGREEMENTS BETWEEN OWNER AND DESIGN/BUILDER § 2.2.9 (1st ed. 1985) ("The Design/Builder warrants to the Owner that materials and equipment incorporated in the Work will be new unless otherwise specified, and that the Work will be of good quality, free from faults and defects, and in conformance with the Contract Documents . . . ."). *Id.*

100. *See generally* AIA DOCUMENT A191, STANDARD FORM OF AGREEMENTS BETWEEN OWNER AND DESIGN/BUILDER (1985).

101. *Id.*

result.[102] Under the construction contract, however, a contractor is almost always held only to a contractual express warranty to perform in a workmanlike manner and, in most cases, can escape liability by following the architect's plans.[103] One commentator raises a question concerning this situation: because the design-build model involves an architect who functions as both the designer (architect) and builder (contractor), can a design-builder escape liability by switching in and out of the two roles? In other words, may the design-build architect choose to wear the contractor's cap when faced with an architect's express warranty claim, or wear the architect's cap when faced with a contractor's express warranty claim?[104]

In *First National Bank of Akron v. Cann*,[105] Ohio federal courts fell in line with other state courts that have decided this question in the negative.[106] This refusal to allow a design-build architect to slip in and out of the design and construction roles to avoid liability would ignore the fact that one entity is both the designer and the builder. It has been suggested, however, that this imposes a higher standard on the design-build architect than would be imposed on either the architect or the contractor individually.[107]

To avoid any possible problems with a suit based on express warranty, the design-build architect should carefully define his express warranty liability in the construction contract. If possible, a design-build architect should limit warranties and guarantees to work performed by his own forces.[108] After the design-builder defines what work

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102. *See supra* note 89 and accompanying text. One commentator suggests that some courts have attempted to apply an implied warranty to transactions that involve the rendition of professional services, but what was actually imposed was a warranty that the performer would not act negligently. Block, *supra* note 2, at 18 n.86. Thus, what these courts actually did was impose a negligence standard expressed in warranty language. *Id.*

103. *See supra* text accompanying notes 93-94.

104. Block, *supra* note 2, at 16. It should be noted that this problem of the design-builder switching hats is best described as semantics. In reality, the design-builder does not wear two hats, but one hat that is the sum of the contractor's hat and the architect's hat in the traditional model. It is illogical for one who takes on responsibility for the whole project to later attempt to sever the obligation into two seperate responsibilities.

105. 669 F.2d 415 (6th Cir. 1982) (design-build firm held liable for breach of express warranty that actual work would correspond with plans).

106. *See, e.g.*, Barraque v. Neff, 11 So. 2d 697, 700 (La. 1942) (a contractor who personally draws up the design for a building "cannot escape responsibility for defectiveness of the work by [claiming] that the defect was in the specifications and not in the work"); Louisiana Molasses Co. v. Le Sassier, 28 So. 217 (La. 1900) (defendant, a designer-contractor, raised the defense that when the design was finished and the construction began, he was afforded the independent protection of both architects and contractors); Stevens Constr. Corp. v. Carolina Corp., 217 N.W.2d 291, 297 (Wis. 1974) (rejecting argument that defendant did not have design responsibility when defendant designed and installed an insufficient pre-stressed concrete truss).

107. Block, *supra* note 2, at 17.

108. Wagman & Chen, *supra* note 84, at 35.

he does warrant, he should then determine what he does not warrant.[109] Exclusions to warranties are enforceable under Ohio law.[110]

In Ohio, whether an express warranty is oral or written will determine the applicable statute of limitations.[111] Consequently, when faced with a claim based upon express warranty, a design-build architect's attorney should pay close attention to Ohio's various statutes of limitations and the courts' interpretation of them. Furthermore, should the design-builder breach an express warranty or guarantee, the owner's remedy, as with other suits in contract, will likely be controlled, if not limited, by various principles of contract and equity.[112]

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109. Wagman and Chen suggest the following exclusions:

1) subcontractor or vendor work;

2) subcontractor or vendor work where the subcontractor or vendor has been selected directly by the owner;

3) errors or omissions in the design documents unless the [design-build architect] knew or should have known of the error or omission and failed to disclose same . . .;

4) defects in specified material or equipment if defects are inherent in the quality or nature of the specified material or equipment, or are not discoverable by reasonable inspection.

Id.

110. One Ohio court has stated:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other [sic]; but subject to the provisions of section 1302.05 of the Revised Code on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable.

Ohio Sav. Bank v. H.L. Vokes Co., 560 N.E.2d 1328, 1333 (Ohio App. 1989) (citing OHIO REV. CODE ANN. § 1302.29 (Anderson 1979 & Supp. 1990)).

Note, however that express warranties tend to go to the very essence of the bargain and form the basis of agreement between parties; thus, as a practical matter, express warranties may be hard to avoid. *Id.*

111. If the express warranty is oral, then the appropriate statute of limitations on bringing suit is six years. OHIO REV. CODE ANN. § 2305.07 (Anderson 1991); *see* Board of Educ. of the Cleveland City Sch. Dist. v. URS Co., Inc., No. 56260, 1989 Ohio App. LEXIS 5101, at *9 (Cuyahoga County Dec. 7, 1989). If the express warranty being sued on is found written in the construction contract, then the applicable statute of limitations is fifteen years. OHIO REV. CODE ANN. § 2305.06 (Anderson 1991); *see* Board of Educ. of the Cleveland City Sch. Dist. v. Lesko & Assoc., No. 56592, 1990 Ohio App. LEXIS 1452 (Cuyahoga County Apr. 12, 1990).

112. The general rule of damages is stated in § 347 of *Restatement (Second) of Contracts*:

> Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by:
>
> (a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

RESTATEMENT (SECOND) OF CONTRACTS § 347 (1979). The alternatives set out in § 348 include measures of damages specifically applicable to construction contracts:

> (1) If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.
>
> (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on

C. *Implied Warranty*

The concept of implied warranties is said to have its genesis in the law of sales.[113] Even though the architect provides services, thus putting the architect outside of the Uniform Commercial Code,[114] there are implied warranties that could affect the construction industry, especially design-build architects.

One commentator asserts that an architect, whether traditional or design-build, gives an *inherent express warranty* that the building designed will meet all building code provisions in effect at the time.[115] A breach of this warranty is often referred to as negligence *per se*.[116] This warranty, however, is best described as an implied warranty. When a client approaches an architect, the client seems justified in relying on the design professional's ability to design in accordance with

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(a) the diminution in the market price of the property caused by the breach, or

(b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

RESTATEMENT (SECOND) OF CONTRACTS § 348 (1979). *See, e.g.*, Jacobs & Young v. Kent, 129 N.E. 889 (N.Y. 1921) (residence built with non-conforming pipe). The court, when awarding the remedy, stated that "[i]n the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing." *Id.* Note that the dissent, however, reasoned that the owner of the home was entitled to the benefit of what he contracted for, regardless of the cost of replacement. *Id.* at 892-93. *Contra* O.W. Grun Roofing & Const. Co. v. Cope, 529 S.W.2d 258 (Tex. Civ. App. 1975) (after defendant had installed a new roof, the plaintiff discovered streaks in the conformity of the shingles for which the court awarded the plaintiff damages to compensate for the installation of a new roof). For analogous cases dealing with land, see *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939) (holding that the only measure of remedy for not restoring plaintiff's land was the cost of performing the contract obligation). The court in *Groves* rejected a claim that since the land was of little value, the owner would be unconscionably enriched by forcing the contractor to pay the amount of performance as opposed to the difference in fair market value of the land that resulted from the contractor's breach. *Groves*, 286 N.W. at 236-38. *Contra* Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962) (in a case involving damage to plaintiff's land from defendant's strip mining operations, holding that the measure of damages is normally the cost of performing the remedy, unless the awarding of such cost would be economic waste, in which case the proper award of damages is the diminution of fair market value).

113. *See* William L. Prosser, *The Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960). Dean Prosser characterized the warranty action as a "freak hybrid born of the illicit intercourse of tort and contract." *Id.*

114. Article 2 deals with the "transaction in goods", not services. UCC §§ 2-102, 2-105, 2-719(2) (1981) (scope and definition of goods and contract modification).

115. Block, *supra* note 2, at 14. Note that Ohio's building code is OHIO BASIC BUILDING CODE. This code is basically the same as BOCA (Building Officials and Code Administrators), 1990 National Building Code (1990), with some minor state changes. The BOCA code is used by the majority of states. Ohio uses a residential code resembling the CABO CODE (COUNCIL OF AMERICAN BUILDING OFFICIALS). CABO ONE & TWO FAMILY DWELLING CODE/1989 (1989). Ohio modified CABO into a one, two and three family dwelling code.

116. Block, *supra* note 2, at 14.

the applicable building codes. Therefore, the warranty that the architect will design in conformity with the building codes is best described as implied by virtue of the client's relationship with the architect. An architect should be estopped from denying that such an implied warranty existed.

The majority view is that an architect who knows the location of the proposed building is charged with knowledge of the appropriate building codes.[117] At least one court has found that the architect's duty to know the applicable building codes was non-delegable and could not be escaped by subcontracting out some of the work.[118]

Two other implied warranties could significantly impact a design-build architect. First, there is the implied warranty of performance in a workmanlike manner.[119] This warranty implicates the contractor role that a design-build architect fulfills. Second, there is the implied warranty of fitness for a particular purpose.[120] This warranty implicates the professional designer role that a design-build architect fulfills. The difficulty that courts have had in regard to the application of the implied warranties of workmanlike manner and fitness for a particular purpose to architects and other professionals, involves the distinction between the providing of services, the sale of goods, and situations that involve a combination of services and goods.[121] "[I]t is abundantly clear that the architect performing *traditional 'professional' services* will be held liable only in those situations in which the architect is negligent in the rendering of his 'professional' services."[122]

Ohio does not hold the traditional model architect to implied warranties.[123] Furthermore, Ohio has not affirmatively ruled on the application of implied warranties to a design-build architect. Consequently,

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117. *Id.* (citing Burran v. Dambold, 422 F.2d 133 (10th Cir. 1970) (collapse of a concrete and steel umbrella structure which violated Uniform Building Code); St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E.2d 51 (Ill. App. 1974) (architect and manufacturer liable for failure of plastic laminate paneling to meet Chicago Building Code flame-spread ratings); McDaniel Bros. v. Wilson, 45 S.W.2d 293 (Tex. Civ. App. 1931) (absolute duty imposed by excavation ordinances); Virginia Elec. & Power v. Savoy Constr. Co., 294 S.E.2d 811 (Va. 1982) (construction company liable for explosion and fire because of failure to plug and seal electrical cables in violation of National Electrical Code); Bott v. Moser, 7 S.E.2d 217 (Va. 1940) (architect could not recover fees when plans did not meet set-back requirements); Bebb v. Jordan, 189 P. 553 (Wash. 1920) (architect could not recover fees when plans did not meet city light and air restrictions)).

118. *See* Johnson v. Salem Title, 425 P.2d 519 (Or. 1967) (architect had nondelegable duty to meet building code provisions).

119. *See infra* text accompanying notes 124-50.

120. *See infra* text accompanying notes 151-178.

121. *See* A. Mark Segreti, Jr., Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970).

122. Block, *supra* note 2, at 19 (emphasis added).

123. *See infra* text accompanying notes 152-57; *see, e.g.*, City of Cincinnati v. Stanley Consultants, Inc., No. C-830851 (Hamilton County, Nov. 7, 1984) (LEXIS, States library, Ohio file).

to understand Ohio's probable application of implied warranties to design-build architects, the implied warranties of workmanlike manner and fitness for particular purpose must be addressed separately.

1. Implied Warranty of Workmanlike Manner

Ohio law began to recognize implied warranties in the construction industry in *Mitchem v. Johnson.*[124] In *Mitchem*, the Supreme Court of Ohio held that a builder-vendor[125] impliedly warranted that " '[he would] complete the house in a such a way that . . . the work would be done in a . . . workmanlike manner.' "[126] The *Mitchem* court required privity, however, relying on *caveat emptor,*[127] and refused to extend the implied warranty to cover subsequent purchasers of the building.[128] In *McMillan v. Brune-Harpenau-Torbck Builders, Inc.*,[129] the Supreme Court of Ohio modified *Mitchem's* implied warranty of workmanlike manner to protect the subsequent purchasers of a builder-vendor's building.[130] This modification is subject to Ohio's statute of repose

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When asked to extend the principle of implied warranty to architects and professional engineers, the court stated that "no Ohio case has extended the principle of implied warranty so far." *Id. But see* Broyles v. Brown Eng'g Co., Inc., 151 So. 2d 767 (Ala. 1963) (engineer held to implied warranty of fitness for particular purpose); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 164 A.2d 201 (Pa. 1960); Hall v. Polar Pantries, 64 S.E.2d 885 (S.C. 1951); Prier v. Refrigeration Eng'g Co., 442 P.2d 621 (Wash. 1968). Note also that one commentator states that an architect "impliedly warrants that the work will be done properly, without neglect and with certain exactness of performance." Block, *supra* note 2, at 18.

124. 218 N.E.2d 594 (Ohio 1966).

125. A builder-vendor and a design-build architect must be distinguished. A builder-vendor is an entity that has dominion over a parcel of land, develops that land, and then sells off both the land and the building upon it as one package. A design-build architect, however, does not have dominion over the land. Rather, the design-build architect performs the design and construction on land that is owned or leased by the owner.

126. *Mitchem*, 218 N.E.2d at 599. The court rejected the prior proposition that a builder-vendor "does not generally, in the absence of some express bargain or warranty, undertake any obligation with regard to the condition of the house." *Id.* (rejecting Vanderschrier v. Aaron, 140 N.E.2d 819 (Ohio 1957)).

127. *Caveat Emptor*, or "let the buyer beware", stands for the proposition that a buyer must examine, test and decide for himself as to the sale transaction. BLACK'S LAW DICTIONARY 202 (6th ed. 1990). Note that in some jurisdictions where *caveat emptor* has been abolished, an implied warranty of habitability may be imposed on a builder-vendor. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 680-82 (4th ed. 1971). Some courts require privity of contract for the imposition of an implied warranty of habitability. These courts state that the original purchaser might agree to compromise the quality of the building in exchange for a reduction in price. If such compromises become the substance of an implied warranty, it could create an inequitable burden on the builder-vendor. *See, e.g.* Halliday v. Greene, 53 Cal. Rptr. 267 (1966); Wright v. Creative Corp., 498 P.2d 1179 (Colo. App. 1972); Oliver v. City Builders, Inc., 303 So. 2d 466 (Miss. 1974).

128. *Mitchem*, 218 N.E.2d at 598.

129. 455 N.E.2d 1276 (Ohio 1983).

130. The court stated the following:

> Today's holding does not render the vendor an insurer for all defects, however remote.

which prevents actions arising in tort from being brought after ten years from the completion of the project.[131] Thus, *McMillan* overruled Ohio's strict adherence to the requirement of privity in an action brought by a property owner against a builder-vendor.[132]

In *Velotta v. Leo Petronzio Landscaping, Inc.*,[133] the Supreme Court of Ohio was faced with the question of whether the *Mitchem* implied warranty of workmanlike manner sounded in tort or in contract.[134] The *Velotta* court stated, "[t]he duty implied in the sale between the builder-vendor and the . . . vendee is the duty imposed by

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Nor are 'unforseen ramifications' an important consideration. Rather, vendors of real property will be held liable for damages proximately caused by their negligence in construction, maintaining, or repairing the property sold. The duty spelled out in Mitchem runs now to all vendees, both original and subsequent.

Id. at 1278. Prior to *McMillan*, Ohio required privity of contract as an essential element for a vendee to file suit for a builder-vendor's breach of the implied warranty of workmanlike manner. *See, e.g.*, Insurance Co. of North Am. v. Bonnie Built Homes, 416 N.E.2d 623, 624 (Ohio 1980). *Bonnie Built Homes* required privity based upon time-tested real property principles--primarily that to eliminate the privity requirement would render the builder-vendor an insurer for all defects. *McMillan*, 455 N.E.2d at 1278. The *McMillan* court rejected this reasoning, drawing an analogy between consumer products and real property. *Id.* The *McMillan* court reasoned that since privity of contract is not a valid bar to a products liability claim it should not be a bar to an implied warranty claim against a builder-vendor. *Id.*

131. *See supra* notes 80-82 and accompanying text.

132. The Ohio Supreme Court once held that, "[p]rivity of contract is a necessary element of an action brought by an owner of a real property structure against a builder-vendor of the structure for damages proximately caused by unworkmanlike construction." *Bonnie Built*, 416 N.E.2d at 623 (quoting the syllabus). However, under *McMillan*, "Privity of Contract is not a necessary element of an action in negligence brought by a vendee of real property against the builder-vendor." *McMillan*, 455 N.E.2d at 1277 (quoting the syllabus).

133. 433 N.E.2d 147 (Ohio 1982).

134. *Id.* at 150. Courts have had difficulty in interpreting the basis of implied warranty—contract or tort:

> A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty", either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no contract.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965).

The current codification of warranty law, the Uniform Commercial Code (U.C.C.) does not contain any language dealing with the conflict between tort and contract. The code only looks to the contract between the seller and the immediate buyer. U.C.C. art. 2 (1981) (as modified by § 2-318). The U.C.C. requires timely notice to the seller after the buyer knows or should have known about the breach. *Id.* at § 2-607(3). Also, under the U.C.C., disclaimers can defeat both express and implied warranties. *Id.* at § 2-316. These problems in the U.C.C. tend to make the buyer the victim since the sale is not often negotiable and a disclaimer will often accompany the bill of sale. In the construction industry, this is not the case. An owner is normally on equal footing with the architect and certain warranties tend to go to the heart of the bargain. Absent certain express warranties, it is unlikely that a contract will ever be entered between an architect

law on all persons to exercise ordinary care . . . [t]he action, therefore, arises *ex delicto*" not *ex contractu*.[135] The *Velotta* court also held that the plaintiff must establish negligence in order to recover under the implied warranty of workmanlike manner.[136] The distinction between tort and contract is important as it controls issues of privity and statute of limitations.

Generally, a contract binds and confers rights on only those parties to the contract and those in privity with the contracting parties.[137] Ohio still recognizes the privity requirement in actions based upon contract claims.[138] Recently, the Ohio Supreme Court announced that privity is required in a tort action to recover economic loss from a design professional for defective plans.[139] In other tort actions, however, Ohio has slowly dropped the requirement of privity. Under *Velotta*, an action for breach of the implied warranty of workmanlike manner arises in tort and would not be subject to Ohio's strict requirement of privity in a contract action. Under *McMillan*, there is no privity requirement in an action by a subsequent purchaser against a builder-vendor.[140] Ohio, however, has yet to extend the implied warranty of workmanlike manner and *McMillan's* rejection of privity outside of the builder-vendor model to include the design-build architect.[141]

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and a sophisticated owner.

Some commentators have argued that the U.C.C. should apply to the design-build architect's "product". *See* Miller, *supra* note 26, at 140 n.154.

135. *Velotta*, 433 N.E.2d at 150. There is a definite split in Ohio as to whether the warranty of workmanlike manner arises out of contract or tort when the contract is to complete a building in the future. In *Velotta*, the Supreme Court of Ohio addressed the implied warranty as applied to a completed home, but expressed no opinion as to a future building. *Id.* At least one appellate court has held a contract to complete a building in the future to fall under *Velotta*. Kirk v. Jim Walter Homes, Inc., 554 N.E.2d 1235, 1236 (Ohio App. 1987) (action for breach of implied warranty of workmanlike manner for partial construction sounds in tort). On the other hand, some Ohio appellate courts have held the action to be a breach of contract. *See, e.g.*, Tibbs v. National Homes Const. Corp., 369 N.E.2d 1218 (Ohio Ct. App. 1977) (when the contract is for the future construction of a building, the action for implied remedy of workmanlike manner arises out of contract); Lloyd v. William Fannin Bldrs, 320 N.E.2d 738 (Ohio Ct. App. 1973) (where parties enter into a contract for the sale of a residence that was to be constructed in the future by a builder-vendor, the obligation to perform in a workmanlike manner arises in contract); Chilcote v. Neal, No. 9593, (Franklin County May 5, 1970) (LEXIS, States library, Ohio file); Koth v. Brock, No. 9301, (Montgomery County Oct. 3, 1985) (LEXIS, States library, Ohio file) (court declines to decide the issue as it was unnecessary to the case at hand).

136. *Velotta, 433 N.E.2d at 150.*

137. *E.g.*, H. & D.R. Co. v. Metro Nat'l. Bank, 42 N.E. 700 (Ohio 1896).

138. Mahalsky v. Salem Tool Co., 461 F.2d 581 (6th Cir. 1972) (Ohio has no remedy for and does not recognize an action in contract, absent privity).

139. *See infra* text accompanying notes 186-95.

140. *See supra* text accompanying notes 130-32.

141. *See, e.g.*, Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49, 61 (S.D. Ohio 1986) (the court declined from deciding the issue of whether Ohio's implied warranty of workmanlike manner is limited to the builder-vendor or applicable to other

If the design-build architect uses standard AIA form contracts, it is likely that the contract contains an express warranty for performance in a workmanlike manner.[142] In such a case, whether the design-build architect is subjected to an implied warranty of performance in a workmanlike manner under *Mitchem* and *McMillan* is superfluous because the design-build architect would be held to the express warranty of workmanlike performance which requires privity of contract.[143]

The implied warranty of workmanlike manner is important to a design-build architect, however, because it could affect possible business arrangements. For example, if the design-build architect desires to join into a venture with a real estate developer, where the design-build architect supplies the design and construction of the project in return for a partnership interest in the proceeds from sale, the design-build architect risks a finding that he is part of a builder-vendor venture. Under *Mitchem* and *McMillan*, the design-build architect would then be liable for any injury to the line of buyers who may experience injury from design defects that could be attributed to the lack of performance of the construction in a workmanlike manner. This outcome, however, would not be the result of an increased liability for a design-build architect, but rather of joint and several liability as based upon principles of agency and partnership.[144]

Ohio's holding that a breach of implied warranty of workmanlike manner arises in tort also controls when such an action will be barred by the statute of limitations. Under *Velotta*, a builder-vendor's implied warranty to perform in a workmanlike manner is an obligation in tort, subject to a four year statute of limitations.[145] Under the construction

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construction entities); Sedar v. Knowlton Const. Co., 551 N.E.2d 938, 942 (Ohio 1990) ("this court has not had occasion to recognize a similar cause of action against builders or architects brought by third parties other than vendees"). In *Sedar*, the court declined its chance to decide the issue of extending *Mitchem's* implied warranty of workmanlike manner to other entities besides the builder-vendor. *Sedar*, 551 N.E.2d at 942.

142. *See supra* text accompanying notes 93-96.

143. *See supra* text accompanying notes 136-37. "[U]nder Ohio law, the existence of a contract action generally excludes the opportunity to present the same case as a tort claim." Wolfe v. Continental Casualty Co., 647 F.2d 705, 710 (6th Cir.), *cert. denied*, 454 U.S. 1053 (1981).

144. *See supra* text accompanying note 97.

145. Ohio Revised Code states the following:

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> . . . .
>
> (D) For injury to the rights of the plaintiff *not arising on contract* nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

OHIO REV. CODE ANN. § 2305.09(D) (Anderson 1991) (emphasis added).

provisions for a contractor under the standard AIA form A201,[146] however, the warranty to perform in a workmanlike manner is express and subject to a fifteen year statute of limitations.[147] Thus, by the design-build architect acting as a builder-vendor[148] and eliminating an express warranty of workmanlike manner from the construction contract, a design-build architect can effectively subject himself to an implied warranty to perform in a workmanlike manner and reduce the applicable statute of limitations from fifteen years to four.[149]

Although Ohio accepts an implied warranty of workmanlike manner, no warranty or duty exists for an architect to perform as an expert.[150] Therefore, there is no special duty for a design-build architect to perform work in an expert fashion except as required by express

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146. *See* AIA DOCUMENT A201, *supra* note 93.

147. *See supra* note 111 and accompanying text.

148. Note, that in order to be classified as a builder-vendor, the design-build architect would need dominion over the land in order to be able to convey the building and the land as one package. *See supra* note 125 and accompanying text.

149. This is because by opting out of the normal express liability of the contractor pursuant to the AIA standard form contract, and slipping into the builder-vendor model, the design-build architect escapes the express warranty that AIA form A191 holds the design-builder to and replaces the express warranty with Ohio's builder-vendor implied warranty. Since builder-vendor liability under implied warranty is an action arising out of tort, the four year statute of limitation applies. It should be noted, however, that an owner would be foolish to sign a contract with a design-build architect that did not contain an express warranty that work would be completed in a workmanlike manner. Yet, a design-build architect can, with an unsophisticated owner, draft the construction contract in such a way that there is no express warranty to perform in a workmanlike manner. Should this be the case, an interesting question arises: should the Ohio courts extend *Mitchem* to a design-build architect in order to protect the owner? If the answer is yes, then the design-build architect would be held to an implied warranty sounding in tort. In such case, it is not necessary for the design-build architect to function in the builder-vendor mode, but enough that the implied warranty of workmanlike manner has been extended to the design-build architect.

150. Ohio law is clear that: "A standard of conduct as to what constitutes due care may be established by legislative enactment or judicial decision. In the absence of either, it is established by a consideration of the facts and circumstances of the particular case." Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49, 61 (S.D. Ohio 1986) (quoting Richard v. Staehle, 434 N.E.2d 1379 (Ohio App. 1980); Eisenhuth v. Moneyhon, 119 N.E.2d 440 (Ohio 1954)).

In *Cincinnati Gas & Electric Co.*, the court stated that the only parallel to a separate duty of care as an expert, imposed by statute or courts, was Ohio Revised Code § 2305.11, addressing medical malpractice. *Id.* at 62. The Supreme Court of Ohio refused to apply § 2305.11 to the engineering profession, stating that although the term malpractice is generically used to refer to any profession (e.g. architects and engineers), the term, and thus § 2305.11, is limited to its common law definition which only included members of the medical and legal professions. *Id.*

With no specifically defined standard of care, the Ohio courts apply § 299A of the *Restatement (Second) of Torts. Richard*, 434 N.E.2d at 1379. Section 299A provides:

> Unless [the architect or engineer] represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

RESTATEMENT (SECOND) OF TORTS § 299A (1965).

warranties in the design-build contract, the implied warranty of workmanlike manner resulting from the design-build architect functioning in the builder-vendor mode, or principles of agency and partnership holding the design-build architect liable for acts of partners or agents held to such a warranty in the ordinary course of business.

2. Implied Warranty of Fitness for a Particular Purpose

The *Mitchem* court held the builder-vendor to an implied warranty of performance in a workmanlike manner, and refused to hold the builder-vendor to an implied warranty of fitness for a particular purpose.[151] The majority of courts refuse to hold that traditional architects or engineers impliedly warrant that their plans are fit for a particular purpose.[152] This majority view was accurately summarized as follows:

> With respect to the alleged "implied warranty of fitness," we see no reason for application of this theory in circumstances involving professional liability. . . . [A] professional, does not "warrant" his service or the tangible evidence of his skill to be "merchantable" or "fit for an intended use." These are terms uniquely applicable to goods. Rather, in the preparation of design and specifications as the basis of construction, the . . . architect "warrants" [only] that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this "warranty" occurs [only] if [the architect] is negligent.[153]

City of Mounds View v. Walijarvi[154] is often cited as the majority view for refusing to increase the standard of liability for defective architectural services from negligence to implied warranty of fitness for a particular purpose.[155] In *City of Mounds View*, an architect was hired to design an addition to the city hall building.[156] After construction of

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151. *See* Velotta v. Leo Petronzio Landscaping, Inc., 433 N.E.2d 147, 149 (Ohio 1982). Note also that the burden of proving lack of ordinary care falls on the vendee-plaintiff. *Id.* at 150.

152. *See, e.g.*, Johnson-Voiland-Archuleta v. Roark Assocs., 572 P.2d 1220 (Colo. App. 1977) (implied warranty of fitness for particular purpose not applicable to engineer's services); Borman's Inc. v. Lake State Dev. Co., 230 N.W.2d 363 (Mich. App. 1975) (no implied warranty for design of a drain system); Sears, Roebuck & Co. v. Enco Assocs., Inc., 372 N.E.2d 555 (N.Y. 1977) (no implied warranty for design of snow melting pipes in a ramp that endangered the ramp's structural integrity); Smith v. Goff, 325 P.2d 1061 (Okla. 1958) (supervisory architect not liable for implied warranty when contractor's work was insufficient); Ryan v. Morgan Spear Assocs., Inc., 546 S.W.2d 678 (Tex. Civ. App. 1977) (no implied warranties for the design of a foundation system).

153. Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assocs., Inc., 168 So. 2d 333, 335 (Fla. Dist. Ct. App. 1964), *cert. denied*, 173 So. 2d 146 (Fla. 1965).

154. 263 N.W.2d 420 (Minn. 1978).

155. *Id.* at 424.

156. *Id.* at 421.

the addition was completed, moisture problems arose that required significant repair. The court refused to impose an implied warranty of fitness for particular purpose on the architect stating that "[t]he majority position limits the liability of architects and others rendering professional services to those situations in which the professional is negligent in the provision of his or her services."[157] The *City of Mounds View* court reasoned that it is impossible for an architect to guarantee a result since an architect must weigh many indeterminate factors.

Some jurisdictions, however, do hold traditional model architects and professional engineers to a standard of implied warranty of fitness for a particular purpose.[158] Ohio declines to do so.[159] One commentator asserts that this minority view is based upon a misinterpretation of law.[160]

Commentators have raised justifications for imposing an implied warranty of fitness for a particular purpose on design-build architects.[161] One view is that the architect practicing in the design-build model has both professional status and enhanced ability to control the construction phase of a project.[162] This enhanced control and professional status may be a sufficient representation on which an owner

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157. *Id.* at 424.

158. *See, e.g.*, Broyles v. Brown Eng'g Co., 151 So. 2d 767, 772 (Ala. 1963) (the court held an engineer strictly liable under an implied warranty theory for producing defective plans). In *Broyles*, the court reasoned that since the engineer held himself out as an expert, it was not unreasonable to hold that he impliedly warranted that his drawings and specifications were sufficient for their intended purpose. *Id.*

159. City of Cincinnati v. Stanley Consultants, Inc., No. C-830815, (Hamilton County Nov. 7, 1984) (LEXIS, States library, Ohio file) ("The trial court did not err, in our judgment, in declining to instruct the jury on yet another theory of liability, that of implied warranty of suitability for intended use, a theory for which we find no support in the decisions of this state.").

160. Hal G. Block, a claims attorney for architectural and engineering malpractices states that:

> There have been a few notable exceptions expressing the minority view to this [majority] rule, all of which seemingly stem from the misinterpretation of the law by the court in the case of *Hill v. Polar Pantries* . . . . The mistake in this case was in distinguishing the oft-imposed client's implied warranty of sufficiency of the plans and specification to the contractor, which would estop the client from recovering from the contractor due to defects in the plans if the contractor strictly follows the plans and specifications, from the never imposed architect's implied warranty to the client and the contractor. The client's warranty of sufficiency to the contractor is not one given by the architect in his position as an independent contractor. Unfortunately, this misinterpretation has led to liability in the few minority cases imposing an implied warranty on the architect.

Block, *supra* note 2, at 19-20 (citation omitted).

161. *See, e.g.*, Miller, *supra* note 26, at 138.

162. *Id.*

could rely.[163] Thus, an implicit representation is created that the design-build architect is competent as to the intricacies of the construction industry based on the architect's professional status and the ability to control the construction.[164] Therefore, mere professional status alone should not justify barring the imposition of an implied warranty of fitness for a particular purpose on a design-build architect.[165]

An implied warranty of fitness for a particular purpose has been applied to non-professional design-builders since the late 1800s.[166] Since then, other cases have arisen where a non-professional design-builder has been held to an implied warranty of fitness for particular purpose.[167] Some courts, applying a reliance theory, have even held a *professional* design-builder to an implied warranty of fitness for a particular purpose.[168]

Ohio courts have addressed whether to impose an implied warranty of fitness for a particular purpose on a builder-vendor. In *Heinlein v. Corbin Custom-Built Homes,*[169] the Ohio Court of Appeals for the Tenth Appellate District was asked to abrogate the law announced in *Mitchem*[170] and impose upon a builder-vendor an implied warranty of fitness for a particular purpose.[171] The court stated that if the law of *Mitchem* was to be abrogated, the Supreme Court of Ohio must do

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163. *Id.*

164. *Id.*

165. *Id.*

166. *See, e.g.*, Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884) (holding that insufficient pilings designed and built by a bridge company were impliedly warranted to be fit for a particular purpose). The Court applied an implied warranty standard stating:

> The law therefore implies a warranty that [the defective piling] was reasonably suitable for such use as was contemplated by both parties. [The bridge] was constructed for a particular purpose, and was sold to accomplish that purpose; and it is intrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind . . . should be held [liable] . . . .

Id. at 119.

167. *See, e.g.*, O'Dell v. Custom Builders Corp., 560 S.W.2d 862 (Mo. 1978) (holding that a design-builder impliedly warranted both the sufficiency of the plans furnished and the fitness of the building contemplated by the contracting parties); Kennedy v. Bowling, 4 S.W.2d 438 (Mo. 1928) (holding that a design-builder of a warehouse impliedly warranted that the warehouse was sufficiently suited for the purposes intended).

168. *See, e.g.*, Prier v. Refrigeration Eng. Co., 442 P.2d 621 (Wash. 1968) (an engineering company held to an implied warranty that a refrigeration system for an ice skating rink was fit for the intended purpose). In *Prier*, the court reasoned that the owner's reliance upon the design-builder's holding himself out as qualified created an implied warranty of fitness that the project would be suitable for the purpose intended by the contracting parties. *Id.* at 624.

169. No. 79AP-436, (Franklin County Nov. 1, 1979) (LEXIS, States library, Ohio file).

170. *Id.* In *Iacono v. Concrete Co.*, the court allowed recovery from a contractor on the theory of implied warranty of fitness for a particular purpose. 326 N.E.2d 267, 271 (Ohio 1975). However, in *Iacono* the claim was primarily built on a products liability theory where the plaintiff suffered property damage. *Id.* at 264-70.

171. *Heinlein*, No. 79AP-436.

so.[172] The law as stated in *Mitchem* has not been abrogated by the Supreme Court of Ohio.[173] Under *Mitchem*, an implied warranty that an uncompleted real property structure will be fit for a particular purpose, when completed, will not be imposed upon a builder-vendor who constructed the building and undertook to complete it as part of the real estate contract sale.[174] In *Heinlein*, the vendee attempted to distinguish *Mitchem* on the basis that the property was not deeded to the vendee until after the house was actually completed.[175] The court found this argument unpersuasive, stating that whether the title passed after completion or after partial completion was immaterial.[176] The court stated that, "[h]ere, as in *Mitchem*, the issue is the liability of a contractor for warranties in conjunction with a residence which has been constructed . . . . Thus, the trial court properly ruled that the contractor does not impliedly warrant that the property will be suitable for the purpose intended."[177]

From *Mitchem* and *Heinlien*, it follows that Ohio is in line with the majority of jurisdictions that refuse to extend an implied warranty of fitness for a particular purpose to architects.[178] Because Ohio has refused to extend an implied warranty of fitness for a particular purpose to builder-vendors, there is no base from which to extend such warranty to design-build architects. It makes little sense to hold a professional design-build architect to a standard of implied warranty of fitness for a particular purpose when non-professionals are not so held, especially when professionals theoretically must exercise higher degree of care under the professional negligence standard. This will continue to be Ohio's position on an implied warranty of fitness for a particular purpose until the legislature or the Supreme Court of Ohio alters the law set forth in *Mitchem* and *McMillan* and extends an implied warranty of fitness for a particular purpose to a builder-vendor. If this should occur, an implied warranty of fitness for a particular purpose would probably extend to a design-build architect practicing as a

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172. *Id.* The court stated:

> Appellants [(vendees)] argue that *Mitchem* is "bad law" and that the contractor should have a heavier burden imposed upon him, pointing to other jurisdictions which do impose a more severe burden. That argument must be addressed to the Supreme Court as we are bound by the law stated in *Mitchem*.

Id.

173. Note, however, that *Mitchem* has been modified by the Ohio Supreme court to provide a subsequent vendee with a cause of action against a builder-vendor. *See supra* notes 129-30 and accompanying text.

174. Mitchem v. Johnson, 218 N.E.2d 594, 599 (Ohio 1966).

175. *Heinlein*, No. 79AP-436.

176. *Id.*

177. *Id.*

178. *See supra* text accompanying note 152.

builder-vendor. From there, it is possible that Ohio could extend the implied warranty to design-build architects and fall in line with the minority approach.[179]

IV. LIABILITY OF THE DESIGN-BUILD ARCHITECT (TORT)

A. *Negligence*

Most jurisdictions hold a traditional model architect to a negligence standard to determine liability for defects in the performance of architectural services.[180] In the frequently cited case *Coombs v. Beede,*[181] the Maine Supreme Court stated:

> [t]he undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not warrant a satisfactory result.[182]

Ohio follows this majority view, holding traditional model architects to a negligence standard to determine liability for defective services.[183] Ohio's position is couched in notions of "professionalism." An architect practicing in the design-build model does not remove himself

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179. *See supra* text accompanying note 158.

180. *See, e.g.*, Swett v. Gribaldo, Jones & Assocs., 115 Cal. Rptr. 99 (Ct. App. 1974) (soil engineer only liable for negligent or intentional misconduct); Stuart v. Crestview Mutual Water Co., 110 Cal. Rptr. 543 (Ct. App. 1973) (no action in strict liability against an engineer); City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978) (the nature of a profession will only allow actions based upon negligence); Board of Trustees v. Kennerly, Slomanson & Smith, 400 A.2d 850 (N.J. Super. 1979) (strict liability does not apply to one rendering professional engineering services); Queensbury Union Free Sch. Dist. v. Jim Walter Corp., 398 N.Y.S.2d 832 (1977) (an architect is not liable under strict liability because the cause of action for strict liability only applies to those engaged in the manufacture, distribution or sale of a product); Van Ornum v. Otter Tail Power Co., 210 N.W.2d 188 (N.D. 1978) (an arbitrary standard of care sounding in strict liability for architect was disallowed).

181. 36 A. 104 (Me. 1896).

182. *Id.* at 105.

183. " 'The architect's undertaking, however, in the absence of special agreement, does not imply or guarantee a perfect plan or satisfactory result, but [the architect] is only liable for failure to exercise reasonable care and skill.' " Phillips v. I.W. Colburn & Assocs., Inc., No. 6148, (Montgomery County Nov. 21, 1979) (LEXIS, States library, Ohio file) (citing 11 OHIO JUR. 3d 46, *Business and Occupation* § 104).

The traditional view of the tort liability of an architect and, presumably, an engineer, to his client may be found in the following extract:

> Good faith and loyalty to his employer constitute a primary duty of the architect. And the architect must use the skill and diligence which is exercised ordinarily by architects . . . reasonably and without neglect, his efficiency in this respect being tested by the rule of ordinary and reasonable skill usually exercised by one in his profession.

City of Cincinnati v. Schweitzer Constr. Co., No. C-830815, (Hamilton County Nov. 7, 1984) (LEXIS, States library, Ohio file) (citing 11 OHIO JUR. 3d 46, *Business and Occupation* § 104).

from the status of a professional. Thus, it logically follows that the professional architect, whether practicing in the traditional or design-build model, should be held to a standard of negligence for alleged defective performance of architectural services.

Most jurisdictions originally limited liability for negligence by requiring the injured party to show privity of contract with the architect as a prerequisite to recovery.[184] Privity was eventually abandoned by the majority of states as a requisite element in actions alleging an architect's negligence.[185] Ohio, however, has not totally abrogated privity. Although privity of contract is not required in an action for personal injury or property damage, Ohio requires privity of contract in a third party action for economic loss resulting from a design professional's defective plans and specifications. In *Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Association*,[186] the Supreme Court of Ohio decided whether a contractor may sue an architect for economic injury resulting from defective plans, absent privity of contract.[187] The court considered a previous appellate court case in which a contractor filed a third party claim against an architect for defective plans and specifications.[188] The appellate court had stated:

> Presumably, [the contractor] is proceeding upon a theory similar to that of *Haddon View Investment Co. v. Coopers & Lybrand*. . . . However, assuming that the principle of *Haddon View* applies to [architects and] engineers as well as accountants, the fact situation here differs substantially in that Fry [the contractor] does not seek an independent recovery against Lawrence [the architect], but, instead, seeks only indemnification from Lawrence for any liability that Fry may have to plaintiff [school] board because of negligent design by Lawrence. No such liability can exist in this case . . . . In short, there are [sic] no set of circumstances under which the liability of Fry to plaintiff [school] board could be predicated upon the negligence of Lawrence in designing the building.[189]

The *Floor Craft* court then examined the laws of other jurisdictions in considering whether to rule that a third party, lacking privity of contract, can recover from a design professional for economic loss.[190]

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184. *See supra* text accompanying notes 35-38.

185. *See, e.g.* Inman v. Binghamton Hous. Auth., 143 N.E.2d 895 (N.Y. 1957) (a leading case in the abandonment of privity as a required element in architectural malpractice actions).

186. 560 N.E.2d. 206 (1990).

187. *Id.* at 208 (noting that this is a case of first impression).

188. *See* Columbus City Sch. Dist. Bd. of Edn. v. Fry, Inc., 489 N.E.2d 294, 296 (Ohio App. 1984) (the contractor was sued by the school board and filed a third party complaint against the architect who drew the plans and specifications for a leaking roof).

189. *Id.* (citation omitted).

190. *Floor Craft*, 560 N.E.2d at 209-11.

The court decided that to allow such recovery would encompass liability that "is otherwise best suited for contract negotiation and assignment."[191] The court held that "in the absence of privity of contract, no cause of action exists in tort to recover economic damages against design professionals involved in drafting plans and specifications."[192]

The *Floor Craft* holding will not shield a design-build architect from liability when a contractor suffers economic loss from the design-build architect's deficient plans or specifications. Unlike the traditional model of architectural practice, which consists of two contracts with the owner,[193] the design-build model utilizes only one contract with the owner.[194] Consequently, there will always be privity of contract between the design-build architect and the contractor.[195]

In Ohio, a cause of action in negligence does not accrue until actual damage occurs.[196] Without contractual privity, the two year[197]

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191. *Id.* at 211.

192. *Id.* at 212. For a critique of the *Floor Craft* case, see Michael D. Tarullo, *The Good, The Bad, and Economic Loss Liability of a Design Professional*, 11 THE CONSTRUCTION LAWYER 10 (April 1991).

193. *See supra* text accompanying notes 40-47. If the Contract for Construction is comprised of the AIA documents dealing with the traditional model of architecture, there will not be privity of contract between the contractor and the architect. AIA Document A201 states that "[t]he Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Contractor . . . ." AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION § 1.1.2 (1987)

The AIA Document A201 is specifically incorporated into the AIA Owner-Contractor agreements (A101 and A111). *See supra* note 47.

194. *See generally supra* text accompanying notes 50-69.

195. Should the architect act as both the designer and builder, there is no problem with a third party suit since the architect could not conceivably seek indemnification or damages from himself. Should the design-build architect decide to have a separate entity do the actual construction (which is normally the case), then there will assuredly be some contractual relationship between the builder and the design-build architect. The contractor would be an agent or employee of the design-builder. AIA Document A191 provides that "[t]he Design/Builder shall be responsible to the Owner for acts and omissions of the Design/Builder's employees and parties in privity of contract with the Design/Builder to perform a portion of the Work, including their agents and employees." AIA DOCUMENT A191, STANDARD FORM OF AGREEMENTS BETWEEN OWNER AND DESIGN/BUILDER § 2.1.2 (1st ed. 1985).

Therefore, even if there is no direct privity of contract between the design-build architect and the contractor's employees and subcontractors, the design-build architect will be liable to the owner under section 2.1.2, above.

Furthermore, AIA Document A491 provides:

> To the fullest extent permitted by law, the Design/Builder and the Contractor shall indemnify and hold harmless each other . . . against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work or of professional services for this project.

AIA DOCUMENT A491, STANDARD FORM OF AGREEMENTS BETWEEN DESIGN/BUILDER AND CONTRACTOR § 11.7.1 (1985).

196. Velotta v. Leo Petronzio Landscaping, Inc., 433 N.E.2d 147, 150 (Ohio 1982) (citing State *ex rel.* Teamsters Local Union 377 v. Youngstown, 364 N.E.2d 18, 20 (Ohio 1977)).

197. Section 2305.10 of the Ohio Revised Code states that "[a]n action for bodily injury or

statute of limitations for injuring personal property will govern claims for defects in or damage to property.[198] With contractual privity, the statute of limitations for injuring personal property has no application.[199] In a case of contractual privity, the statute of limitations for contract actions determines the appropriate time frame in which a suit must be brought.[200] This statute of limitations provides that a suit may be brought within fifteen years.[201] Consequently, the design-build architect is subject to a contractor's suit that the traditional model architect can escape under *Floor Craft*, and the suit can be brought within fifteen years by virtue of the privity of contract between the design-build architect and the contractor. Because this would be a contract claim, Ohio's ten-year statute of repose addressing injury to property[202] will not save the design-builder. Like the statute of limitations for injury to property, the statute of repose has no application to contract claims.[203] Because the design-build architect and the contractor will normally have privity of contract, particularly when using standard AIA contracts, the design-build architect is subject to a third party action to recover *purely economic loss* alleging defective performance of services with a fifteen year statute of limitations[204] applicable to the filing of suit.

B. Strict Liability

Strict liability in tort is often applied to manufacturers of mass produced products.[205] The policy behind strict liability is that the man-

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injuring personal property shall be brought within two years after the cause thereof arose." OHIO REV. CODE ANN. § 2305.10 (Anderson 1991).

198. *See* Mahalsky v. Salem Tool Co., 461 F.2d 581, 584-85 (6th Cir. 1972); Board of Educ. of the Parma City Sch. Dist. v. Lesko Assocs., Architects, No. 49781, (Cuyahoga County Jan. 9, 1986) (LEXIS, States library, Ohio file).

199. "The language of Section 2305.10, Revised Code [limitations on actions for 'injury to personal property'] implies a positive injury to the property of the plaintiff, not a negative contractual failure . . . ." Farbach Chem. Co. v. Commercial Chem. Co., 136 N.E.2d 363 (Ohio App. 1956).

200. United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co., 257 N.E.2d 380, 383 (1970).

201. *See supra* note 111 and accompanying text.

202. Section 2305.131 of the Ohio Revised Code provides:

> No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought against any person performing services for or furnishing the design, planning, supervision of construction, or construction of such improvement to real property, more than ten years after the performance or furnishing of such services and construction.

OHIO REV. CODE ANN. § 2305.131 (Anderson 1991).

203. Elizabeth Gamble Deaconess Home Assoc. v. Turner Constr. Co., 470 N.E.2d 950, 954-56 (Ohio Ct. App. 1984) (Ohio Revised Code § 2305.131 applies only to tort claims).

204. *See supra* note 111 and accompanying text.

205. *See* Karl Fulton Lehr, *The Application of Products Liability Principles to Profes-*

ufacturer is in a better position to control and bear the costs incurred by injured customers.[206] The drafting committee for the *Restatement (Second) of Torts* intended section 402A[207] to provide a means for injured consumers to recover from manufacturers that often insulated themselves from liability by means of disclaimers.[208] The *Restatement (Second)* does not require privity of contract between the manufacturer and the injured party.[209] One commentator observes that by eliminating privity of contract as a requirement, section 402A effectively destroyed the contractual doctrine of implied warranty.[210] Under the *Restatement (Second)*, strict liability only applies to physical, not economic injury.[211]

Ohio has adopted the *Restatement (Second)* section 402A as its standard for strict liability.[212] Whether an action lies in strict liability for mere economic loss, however, is not settled. In *Iacono v. Concrete Co.*,[213] the Supreme Court of Ohio addressed the issue of strict liability and purely economic loss.[214] *Iacono* involved concrete that was insufficient for use in an outdoor driveway.[215] When determining whether strict liability allowed recovery for economic loss, the court perceived

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206. *See generally* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (discussing the goals of strict liability and their ability to actually accomplish them by imposing the costs of injury on the manufacturer of a defective product); Thomas A. Cowan, *Some Policy Basis of Products Liability*, 17 STAN. L. REV. 1077 (1965) (the author surveys some reasons why strict liability is replacing negligence in products liability law).

207. Section 402A provides in relevant part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

208. Block, *supra* note 2, at 25.

209. *See supra* note 207.

210. James B. Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 15 (1978).

211. *See supra* note 207.

212. Temple v. Wean United, Inc., 364 N.E.2d 267 (Ohio 1977); *see also* Jackson v. City of Franklin, 554 N.E.2d 932, 937 (Ohio Ct. App. 1988) (citing *Temple*).

213. 326 N.E.2d 267 (Ohio 1975).

214. *Id.* at 270-71.

215. *Id.* at 270.

no rational basis for distinguishing between personal injury and property damage.[216] Although *Iacono* held that an action in tort based on the proper theory of breach of implied warranty can be maintained to recover damage to property,[217] the court's reasoning could be interpreted as allowing recovery for economic loss under a strict liability theory.

Iacono has not been interpreted as permitting strict liability recovery for economic loss when privity exists between the parties. In *Cincinnati Gas & Electric Co. v. General Electric Co.*, the District Court for the Southern District of Ohio, Western Division, addressed the issue of recovery under strict liability for economic loss when privity existed between the parties.[218] The court held that Ohio courts would not permit recovery in such a situation.[219]

An important consideration for design-build architects is whether economic loss can be recovered under the theory of strict liability in cases where privity exists.[220] Since privity of contract will normally exist between a design-build architect and an owner, and between a design-build architect and a contractor, the privity issue is central and could effectively defeat a plaintiff's claim of strict liability where the only remedy sought is for economic loss. Courts, however, have generally refused to extend strict liability to professionals providing *services*, holding that architects and other professionals are not liable in the absence of negligence.[221]

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216. *Id.* The court relied on *Santor v. A. & M. Karagheisian, Inc.*, 207 A.2d 305 (N.J. 1965), quoting the Supreme Court of New Jersey as follows:

> "From the standpoint of principle we perceive no sound reason why the implication of reasonable fitness should be attached to the transaction and be actionable against the manufacturer where the defectively made product has caused personal injury and not actionable when inadequate manufacture has put a worthless article in the hands of an innocent purchaser who has paid the required price for it."

Iacono, 326 N.E.2d at 270-71 (quoting *Santor*, 207 A.2d at 309); *see also* United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co., 257 N.E.2d 380 (Ohio 1970).

217. *Iacono*, 326 N.E.2d at 271.

218. 656 F. Supp. 49, 58 (S.D. Ohio 1986).

219. The court stated:

> We are persuaded that the Ohio courts would not permit recovery under a strict liability theory for purely economic loss, in a case such as this, where the parties are in privity of contract and there is no property damage or personal injury. We base our decision today on that very narrow premise.

Id.

220. This conclusion assumes that the design-build architect is working in a jurisdiction which, unlike Ohio, holds a design-build architect to liability under a strict liability theory. However, should Ohio apply strict liability to architects in the future, then the question of economic loss becomes relevant.

221. *See, e.g.*, Swett v. Gribaldo, Jones & Assocs., 115 Cal. Rptr. 99 (Ct. App. 1974) (soil engineer only liable for negligent or intentional misconduct); Stuart v. Crestview Mutual Water Co., 110 Cal. Rptr. 543 (Ct. App. 1973) (no action in strict liability against an engineer); City of

One hurdle that must be overcome in attempting to apply strict liability to architects is the word "product."[222] The most notable case addressing the distinction between goods and professional services is *LaRossa v. Scientific Design Co.*[223] In ruling that design services are not actionable under the theory of strict liability, the *LaRossa* court stated:

> Professional services do not ordinarily lend themselves to the doctrine of tort liability without fault because they lack the elements which gave rise to the doctrine. There is no mass production of goods or a large body of distant consumers whom it would be unfair to require to trace the article they used along the channels of trade to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even from their ability to inquire. Thus, professional services form a marked contrast to consumer products cases and even in those jurisdictions which have adopted a rule of strict products liability a majority of decisions have declined to apply it to professional services. The reason for the distinction is succinctly stated by Traynor, J., in *Gagne v. Bertran* . . . . "[T]he general rule is applicable that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct . . . . Those who hire [experts] . . . are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance."[224]

At least one Ohio court has accepted *LaRossa*.[225]

One commentator has argued that the policies underlying strict liability justify its application to design-build architects.[226] These policy reasons include: (1) spreading the cost or risk of liability among the

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Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978) (the nature of a profession will only allow actions based upon negligence); Board of Trustees v. Kennerly, Slomanson & Smith, 400 A.2d 850 (N.J. Super. 1979) (strict liability does not apply to one rendering professional engineering services); Queensbury Union Free Sch. Dist. v. Jim Walter Corp., 398 N.Y.S.2d 832 (1977) (an architect is not liable under strict liability because the cause of action for strict liability only applies to those engaged in the manufacture, distribution or sale of a product); Van Ornum v. Otter Tail Power Co., 210 N.W.2d 188 (N.D. 1978) (an arbitrary standard of care sounding in strict liability for architect was disallowed).

222. *See supra* note 207.

223. 402 F.2d 937 (3d Cir. 1968). This case involved a wrongful death suit alleging liability for defective design of a chemical plant where plaintiff's husband was exposed to carcinogenic vanadium dust. *Id.* at 938-39.

224. *Id.* at 942-43 (citation omitted).

225. "The general rule is that strict liability is not applicable . . . to architects because negligence can be proved." Jackson v. City of Franklin, 554 N.E.2d 932 (Ohio 1988) (citing *LaRossa*, 402 F.2d 937; K-Mart Corp. v. Midcon Realty Group of Conn., 489 F. Supp. 813 (D. Conn. 1980)).

226. *See* Miller, *supra* note 26, at 151. "By examining the underlying policy considerations justifying the application of strict liability in tort to a manufacturer it is apparent that the designer-builder should also face a strict liability in tort for defective products." *Id.*

broadest possible base; (2) imposing risk on those most able to pay; and (3) burdening the enterprise that created the risk.[227] In *Jackson v. City of Franklin*,[228] the Court of Appeals of Ohio, Montgomery County, examined the policy underlying strict liability.[229] The court saw the primary policy justification as the difficult burden that the consumer would bear having to trace a defective item back through the manufacturer's distribution and production system.[230] The court found this justification inapplicable when applied to a one of a kind project, such as a building,[231] because the purchaser of a building knows immediately where to go to find the cause of a defect.[232] The court thus held against the application of strict liability to architects as based upon an extremely heavy burden of proof.[233] Thus, Ohio courts tend to stand with the majority of jurisdictions accepting *LaRossa* and refusing to extend strict liability to design professionals.

In order for strict liability under *Restatement (Second)* section 402A to apply to design-build architects, two definitions must be met. First, the design-build architect must qualify as a manufacturer. Second, the building must qualify as a product.

Some jurisdictions have found strict liability applicable to builder-vendors, finding builder-vendors akin to manufacturers.[234] These cases

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227. *Id.* at 139 (citing Calabresi, *supra* note 206) (discussing the difference between these goals and their stated objective through the imposition of liability compensation costs upon the manufacturer of the product)).

As stated by another commentator:

> There appeared to be three justifications for the application of strict liability on the designer in the design-build situation. First, it may be impossible to trace the defective item through the chain of distribution to the source of the defect. Second, what may be catastrophic loss for an individual can be borne by a corporation which is able to redistribute the loss through its entire business. Third, it would deter occurrence of the most common causes of worker injuries.

Block, *supra* note 2, at 29.

228. 554 N.E.2d 932 (Ohio 1988).

229. *Id.* at 940. The court stated that "[i]n determining whether strict liability may or should be applied to design professionals, an examination of the policy arguments justifying its application to manufacturers is critical." *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* (citing Jeffrey L. Hischwitz, Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 OHIO ST. L.J. 217 (1984)).

234. *See* Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965) (deeming a builder-vendor to be a manufacturer and subject to strict liability). The *Schipper* court went so far as to say that when an entity is "the architect, the engineer, the planner, the designer, the builder, and the contractor" in a large scale building operation, it is a manufacturer and subject to strict liability. *Id.* at 320; *see also* Del Mar Beach Club Owners Assoc. v. Imperial Contracting Co., 176 Cal. Rptr. 886 (Ct. App. 1981) (finding no reason why strict liability should not apply to a builder-developer of condominium units but upholding the design professional's dismissal); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (Ct. App. 1969) (Eichler, a builder vendor,

normally involve a builder-vendor who engages in large scale development, i.e. tract homes. Strict liability, however, has been applied to a builder-vendor who was not a mass producer.[235] As of yet, Ohio has not accepted the minority view that builder-vendors are manufacturers and that strict liability attaches to builder-vendors.

Even if a builder-vendor or design-build architect is found to fit the common law definition of manufacturer, the building must still qualify as a product for the imposition of strict liability. At least one jurisdiction has held a "building" to be "product."[236] The majority of jurisdictions, however, reject this proposition.[237]

At least one jurisdiction has extended strict liability to a professional design-builder. In *Abdul Warith v. Arthur G. McKee & Co.*,[238] the District Court for the Eastern District of Pennsylvania held the defendant engineering-construction firm to a strict liability standard.[239] The court interpreted *La Rossa* and *City of Mounds View* as holding that strict liability will attach to a professional design-builder when the professional designs, constructs and supervises the allegedly defective item.[240] This holding has been both criticized[241] and used as justification for imposing strict liability on professional design-build

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had built over 4000 homes using a defective radiant heating system and was found strictly liable); K-Mart Corp. v. Midcon Realty Group Ltd., 489 F. Supp. 813, 818 (D. Conn. 1980) (the doctrine of strict liability could apply to "the design and development of buildings which, like ordinary consumer products, are mass marketed to the public").

235. Avner v. Longridge Estates, 77 Cal. Rptr. 633 (Ct. App. 1969). The court did not draw a distinction between the defendant, a small scale builder-vendor, and other large scale builder vendors. The court stated: "the manufacturer of a lot may be held strictly liable in tort for damages suffered by the owner as a proximate result of any defects in the manufacturing process." *Id.* at 639.

236. Moorman Mfg. Co. v. National Tank Co., 414 N.E.2d 1302 (Ill. App. 1980). The court held that a grain silo did constitute a "product". *Id.* at 1311. "The mere fact that the [silo] has become a part of the real estate is not, of itself, sufficient reason to say that it is not a product. *Id.*

237. *See, e.g.*, Abdul-Warith v. Arthur G. McKee & Co., 488 F. Supp. 306, 312 (E.D. Pa. 1980) (in dicta, the court stated that buildings constitute real property and real property is beyond the purview of *Restatement (Second) of Torts* § 402A); Lowrie v. City of Evanston, 365 N.E.2d 923, 928 (Ill. App. 1977) (distinguishing between contractors who sold defective products within the house, stating that in such cases the house was not determined a product); Cox v. Shaffer, 302 A.2d 456, 457 (Pa. Super. Ct. 1973) (holding that by virtue of restatement section 402A's language, any building attached to the owner's property is not a product).

238. 488 F. Supp. 306 (E.D. Pa. 1980), *aff'd*, 642 F.2d 440 (3d Cir. 1981).

239. *Id.* at 311.

240. *Id.* at 311, n.3.

241. One commentator has stated:

> This "justification" has led to an extremely broad interpretation of the terms "seller," "product" and the mass-production requirement of section 402A. After dismissing each defense argument, however, the court did not decide whether the bridge was a product and upheld summary judgment for the defendant on other issues of defective design. The case is confusing in its reasoning and, therefore, its precedential value is limited.

architects.[242]

Ohio does not hold an architect to a standard of strict liability.[243] When considering the liability of the design-build architect, however, liability of the contractor role must also be addressed. In *Jackson v. City of Franklin*, the Ohio Court of Appeals, Montgomery County, refused to hold a contractor to a strict liability standard.[244] The court reasoned that it would be inconsistent to hold a contractor who merely follows plans, strictly liable when the originator of those plans, the architect, was not held to strict liability.[245] Presently, Ohio holds neither the traditional architect nor the general contractor to a standard of strict liability. When the architect functions in the design-build model, the roles of traditional architect and general contractor are melded into one. Simply put, Ohio holds neither the architect nor the contractor to a strict liability standard. Therefore, there is no basis to hold a design-build architect to such a standard.

V. CONCLUSION

While other jurisdictions continue to saddle the design-build architect with increased tort liability, Ohio refuses to do so. In Ohio, a registered architect is a professional and accorded the requirement of professional negligence as an essential element of liability. Consequently, when suits arise against a professional design-build architect, negligence must be proven. A non-professional design-builder or a professional design-build architect acting as a part of a joint venture or partnership, however, may be held to an implied warranty of workmanlike manner. Yet, even under the theory of implied warranty of workmanlike manner, negligence must be shown. Consequently, in almost all situations, a professional design-build architect will not be held liable for defective work absent a showing of negligence.

Ohio has declined to extend an implied warranty of fitness for a particular purpose to both professional design-build architects and non-professional design-builders. Ohio also has rejected strict liability for

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Block, *supra* note 2, at 30.

242. *See* Miller, *supra* note 26, at 145.

243. "Ordinarily, strict liability is not applied to architects because negligence can be proved." Jackson v. City of Franklin, 554 N.E.2d 932, 940 (Ohio 1990). The court then looked into the policy justification for strict liability and found no justification for holding architects to strict liability. *See supra* notes 83-87 and accompanying text; *see also* Sauder Designare Int'l, Inc. v. Andy Nixon Contractors, Inc., No. C.A. WMS-77-6, (Williams County Sept. 1, 1978) (LEXIS, States library, Ohio file) (strict liability not imposed on a contractor).

244. *Jackson*, 554 N.E.2d at 940.

245. *Id.* "It would seem anomalous that the contractor who merely follows the designs and specifications of another in the construction of a building would be liable in a strict liability in tort action while the person who provided the design and specifications would not." *Id.*

defective work. The rejection of these principles has merit since their application would erode the architect's professional status by hampering the experimentation that is needed to develop new construction materials and methods. Therefore, Ohio is wise in continuing to protect the professional status of design-build architects by requiring a showing of professional negligence.

There are liability provisions in Ohio law that directly affect the practice of design-build architecture. Perhaps the most confusing aspects of Ohio's construction law involve privity, the accrual of a cause of action, and statute of limitations issues.

Within the context of a construction suit, an attorney must pay particular attention to Ohio's confusing position on privity. Privity of contract is required to bring an action in contract against a design professional. Ohio's characterization of the implied warranty of workmanlike manner, an action normally based in contract, as an action in tort does not allow the design-build architect to be sued without privity. Although an action in tort does not normally require privity between the architect and the plaintiff, Ohio courts do not apply the implied warranty of workmanlike manner to architects. Thus, an architect will only be held to an express warranty of workmanlike manner, an action in contract requiring privity between the architect and the plaintiff.

Once the cause of action is identified, the appropriate statute of limitations must be consulted. Ohio's statute of limitations varies according to whether the suit arises in contract or tort. In order to accurately calculate whether a cause of action is time barred, the attorney must determine when the cause of action accrued. In construction cases, Ohio law dictates that a cause of action accrues when damage occurs. Ohio also has a statute of repose, preventing an action for injury from being brought more than ten years after completion of the construction project. Thus, it is possible for an action to be filed within the applicable statute of limitations, but barred by the statute of repose.

In short, Ohio law refuses to breach the wall of professional negligence and hold a design-build architect to a stricter standard of liability other than professional negligence. Yet, there are principles of liability applied to non-professional design-builders that could affect a design-build architect who is not careful about how the construction project is handled. The area of a design-build architect's liability for defective work is in a state of flux in other jurisdictions. This situation could affect Ohio's liability provisions for a design-build architect in the future. As it stands, however, Ohio has maintained the traditional

protection given to a practicing professional architect, even when the architect practices in the design-build model.

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