IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 89 MAP 2024

THOMAS ALOIA AND AMY STIMSON,
Plaintiffs-Appellants,

v.

DIAMENT BUILDING CORP.,
Defendant-Appellee

Brief of Amici Curiae American Institute of Architects, American Institute of Architects of Pennsylvania, American Council of Engineering Companies, American Council of Engineering Companies of Pennsylvania, Delaware Valley Association of Structural Engineers, Structural Engineers Association of Pennsylvania, Pennsylvania Society of Professional Engineers, Pennsylvania Society of Land Surveyors, and Pennsylvania-Delaware Chapter of the American Society of Landscape Architects

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On Appeal from the Order of the Superior Court Dated March 11, 2024, No. 1621 EDA 2023, Affirming the Order of the Chester County Court of Common Pleas, Dated April 14, 2023, at No. 2021-01449

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. This Court Reject Plaintiffs' Theory Intertwining a Liability Determination with the Facial Jurisdictional Analysis of the Statute of Repose 8

A. The History of Adoption and Plain Meaning of the Statute of Repose Require Dismissal of Plaintiffs' Lawsuit. 8

i. The plain language of the Statute of Repose compels the conclusion that "lawfully performing or furnishing" means the person is authorized to render services at the time. 13

ii. Plaintiffs' cause of action is abolished by Statute of Repose. 17

B. Applying this Court's Longstanding Three-Part Test Requires Dismissal Because the Contractor Was Authorized to Perform Construction Services. 19

i. This Court's three-part test requires dismissal of Plaintiffs' case. 20

ii. Plaintiffs' misuse of "lawfully performed" rather than "lawfully performing" leads to an incorrect interpretation of the Statute of Repose. 21

iii. Plaintiffs' attempt to inject a factual analysis creates an absurd result that is inconsistent with the text of the Statute of Repose. 26

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Aloia v. Diament Building Corp., Dkt. No. 1621 EDA 2023, 2024 WL 1048248 (Pa. Super. March 11, 2024) 1, 21, 22, 27
Arthur Andersen LLP v. U.S., 544 U.S. 696 (2005) 33
Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454 (2005) 11
Branton v. Nicholas Meat, LLC, 159 A.3d 540, 549-50 (Pa. Super. Ct. 2017) 15, 20, 26
Carroll v. Department of Transportation, Dkt. No. 1-22-cv-00242, 2024 WL 3522020 *1 (M.D. Pa. July 24, 2024) 27, 30, 31
Catanzaro v. Wasco Prod., Inc., 489 A.2d 262 (Pa. Super. 1985) 29
Commonwealth v. Ostrosky, 589 Pa. 437 (2006) 17
Dubose v. Quinlan, 643 Pa. 244 (2017) 10, 13, 27, 35
Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270 (1978) ... 10, 13, 36
Gilbert v. Synagro Cent., LLC, 634 Pa. 651 (2015) 20
Greenwood Gaming & Ent., Inc. v. Dep't of Revenue, 306 A.3d 319, 331 (Pa. 2023) 14
Gustine Uniontown Assoc., Ltd. v. Anthony Crane Rental, Inc., 577 Pa. 14, 32 (2004) 13, 27
Holland v. Marcy, 584 Pa. 195 (2005) 17
Johnson v. Toll Bros., Inc., 302 A.3d 1231 (Pa. Super. 2023) ... 20, 21, 22, 29
Leach v. Phila. Sav. Fund Soc'y, 340 A.2d 491, 493 (Pa. Super. 1975).. 21
McConnaughey v. Bldg. Components, Inc., 536 Pa. 95 (1994) 17, 19
McCormick v. Columbus Conveyor Co., 522 Pa. 520 (1989) .. 12, 14, 19
Metal Green Inc. v. City of Philadelphia, 266 A.3d 495 (Pa. 2021) 13
Misitis v. Steel Piping City Co., 441 Pa. 339 (1971) 12, 13, 35
Nesbitt v. Erie Coach Co., 416 Pa. 89 (1964) 9
Noll v. Harrisburg Area YMCA, 537 Pa. 274 (1994) 13, 19

NVR, Inc. v. Majestic Hills, LLC, 670 F. Supp. 3d 206 (W.D. Pa. 2023) 19, 25, 27, 32
Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80 (1983) 9
Vargo v. Koppers Co., Inc., Eng'g & Constr. Div., 552 Pa. 371 (1998) 12
Venema v. Moser Builders, Inc., 284 A.3d 208 (Pa. Super. 2022) ... 19, 20, 27, 28, 29
Yanakos v. UPMC, 655 Pa. 615 (Pa. 2019) 34

Statutes

1 Pa.C.S. §1921 ..... 13, 17
1 Pa.C.S. §1922 26
12 P.S. §65.1 ..... 9, 13
42 Pa.C.S. §5536 ..... 1, 12, 14, 15
63 P.S. §148, *et seq.* 3, 16
63 P.S. §149 4
63 P.S. §34.101, *et seq.* 2, 16
63 P.S. §901, *et seq.* 5, 16
68 P.S. §491 10
73 P.S. §517.2 16
73 P.S. §517.3 16

Other Authorities

Am. Inst. Architects, *Official Guide to the 2007 AIA Contract Documents*, 127-28 (2009) 24
Black's Law Dictionary (12th ed. 2024). 12
Black's Law Dictionary (4th ed. 1951) 14, 15
Black's Law Dictionary (4thR ed. 1968) 14
H.R. Leg. J. Vol. 1, No. 86, 149th Pa. Gen. Assemb., 1965 Sess. (1965)9, 11
International Residential Code (2003) R105.1 28
Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985) 34

Margaret A. Cotter, *Limitation of Action Statutes for Architects and Builders – Blueprints for Non-Action*, 18 Catholic Univ. L. Rev. 361 (1969).....8, 9, 34, 36
Nancy Hadley, *Records Management for Architecture Firms: A Resource Guide*, AIA (July 10, 2018) 33
Richard P. Gilardi, *The Unsettled Foundation of the Pennsylvania Construction Projects Statute of Repose*, 30 Duq. L. Rev. 681 (1992) 8, 9
S.B. 336, Pa. Senate, 2023 Reg. Sess. (Pa. 2023) 34

Regulations

25 Pa. Code §102.5 28
34 Pa. Code §401.1 28
34 Pa. Code §403.42 28
34 Pa. Code §403.46 24
34 Pa. Code §403.62 28
34 Pa. Code §403.64 28
34 Pa. Code §403.65 .....24, 28
40 Pa. B. 4866 (2010).....28
Regs. Conn. §38a-327-3 34

STATEMENT OF INTEREST OF AMICI CURIAE

The American Institute of Architects ("AIA"), AIA Pennsylvania, the American Council of Engineering Companies ("ACEC"), ACEC of Pennsylvania, the Delaware Valley Association of Structural Engineers, the Structural Engineers Association of Pennsylvania, the Pennsylvania Society of Professional Engineers, the Pennsylvania Society of Land Surveyors, and the Pennsylvania-Delaware Chapter of the American Society of Landscape Architects jointly submit this *amici curiae* brief seeking an order affirming the dismissal of Plaintiffs' action based upon the applicable construction statute of repose ("Statute of Repose"). *See* 42 Pa.C.S. §5536. Amici seek affirmation of the lower courts' decisions properly finding that the 12-year Statute of Repose abolished Plaintiffs' cause of action. *Aloia v. Diament Building Corp.*, Dkt. No. 1621 EDA 2023, 2024 WL 1048248 *1 (Pa. Super. March 11, 2024).

AIA is a national professional association representing over 100,000 licensed architects and design professionals. Founded in 1857, AIA is committed to advancing the architectural profession by

providing its members with resources, advocacy, and professional development opportunities to support successful practice in the built environment. Founded in 1909, as the statewide component of AIA, AIA Pennsylvania ("AIA PA") currently has over 3,000 members engaged in the practice of architecture. Under Pennsylvania's Architects Licensure Law, individuals and architectural firms offering to perform or performing architectural services within the Commonwealth must be licensed. 63 P.S. §34.101, *et seq.*

ACEC is the national trade association of the engineering industry. Founded in 1909, ACEC now represents nearly 6,000 firms throughout the country. ACEC is dedicated to advancing America's prosperity, health, safety, and welfare through legislative advocacy and business education services on behalf of the engineering industry. ACEC Member Firms directly employ more than 600,000 engineers, architects, surveyors, scientists, and other specialists, contributing to more than $251 billion of private and public works annually. ACEC/PA, now in its 57th year, works to enhance public understanding of the critical work performed by consulting

engineers and the importance of quality engineering to a construction project's success. ACEC/PA members have a particular focus on infrastructure projects that drive quality of life and economic growth in Pennsylvania. ACEC/PA represents more than 120 independent consulting engineering firms with over 11,000 engineers, land surveyors, and other licensed professionals engaged in the practice of engineering under Pennsylvania's Engineer, Land Surveyor and Geologist Registration Law. 63 P.S. §148, *et seq.*

The Delaware Valley Association of Structural Engineers ("DVASE"), established in 1991, is an organization of structural engineers operating in southeastern Pennsylvania. DVASE arose from a small group of local consultants growing to represent over 300 members from more than 75 firms. DVASE members focus on improving structural engineering services. As a further contribution to Pennsylvania's design professional community, the Structural Engineers Association of Pennsylvania ("SEAoP"), established in 2009 as an outgrowth of DVASE, offers a statewide organization to consulting structural engineers with the goal of advancing the practice

of structural engineering in Pennsylvania.

The Pennsylvania Society of Professional Engineers (PSPE) was established in 1933, in tandem with the National Society of Professional Engineers, to unify the network of engineers to protect the profession's standards of excellence. PSPE has over 1,000 members, including presidents, owners, and consultants of engineering firms with a significant impact in the professional advancements and societal impacts of engineering services in Pennsylvania.

The Pennsylvania Society of Land Surveyors ("PSLS"), established in 1969, is a professional society of approximately 750 members statewide. PSLS strives to improve the profession of land surveying through a focus on the promulgation of ethics within the profession. As defined by Pennsylvania Engineer, Land Surveyor and Geologist Law, land surveying is a branch of engineering, requiring individual registration of surveyors. 63 P.S. §149.

The Pennsylvania-Delaware Chapter of the American Society of Landscape Architects ("PA-DE ASLA") was established 85 years ago as the pre-eminent professional association of registered landscape architects. PA-DE ASLA represents nearly 600 landscape architects

individually registered in accordance with the Pennsylvania Landscape Architect's Registration Law. 63 P.S. §901, *et seq.* PA-DE ASLA strives to advance the practice of landscape architecture by encouraging members to be leaders in the construction industry.

Together, the Amici support the application of a uniform and rational judicial test that comports with the plain language, historical background, and the legislative intent associated with adoption of the Statute of Repose. Consistent application of the statute in conformity with this Court's longstanding precedent is crucial to all participants involved in residential, commercial, industrial, institutional, and infrastructure projects. The Statute of Repose is critically important to licensed design professionals who have created business policies in reliance upon the unambiguous language, including record retention and insurance maintenance policies. Here, the decisions below appropriately barred Plaintiffs' stale lawsuit under Pennsylvania's Statute of Repose.

SUMMARY OF ARGUMENT

This appeal turns on the unambiguous meaning of Pennsylvania's Statute of Repose, codified in Section 5536 of the Judicial Code. Since 1965, the Statute of Repose, applicable to design and construction projects, bars lawsuits filed more than 12 years after completion. The enactment of the statute sought to address expanding liability resulting from the elimination of contractual privity requirements for suits against design professionals. Because construction projects have a long-life cycle, the Legislature adopted the statute to cut off liability, limiting individual professional liability and eliminating stale claims.

This Court's three-part test determines whether the Statute of Repose applies. As such, a person must show that (1) the construction is an improvement to real property, (2) 12 years elapsed after completion, and (3) the person falls within the class that the statute protects. Here, an appropriate application of this Court's test requires dismissal.

Almost 60 years after enactment, Plaintiffs urge this Court to abandon its precedent and engraft a merits-based liability determination onto the jurisdictional test. Plaintiffs repeatedly misquote the text as "lawfully performed," seeking to introduce a

liability determination which nullifies the actual text and legislative intent. The Legislature did not intend for a factfinder to analyze the merits and determine liability as part of the threshold jurisdictional repose question.

Even engaging in a fact-based inquiry into "any person lawfully performing design, planning, supervision or observation of construction, or construction," the Superior Court's application of the statute reaches the correct result. To this end, the Court properly consulted *Black's Law Dictionary* to determine the meaning of the phrase "lawfully performing." In a similar fashion, the federal courts apply the phrase to mean "authorized."

This Court should reject Plaintiffs' novel theory of indeterminate liability for design and construction defects. The unambiguous language, the legislative history, and consistent judicial interpretation compels the conclusion that the statute bars Plaintiffs' suit. The phrase "any person lawfully performing," as used in the statute, requires that the person is authorized to perform the listed services – not that every aspect of a completed project complies with all laws, rules, regulations, ordinances, and codes.

ARGUMENT

I. This Court Reject Plaintiffs' Theory Intertwining a Liability Determination with the Facial Jurisdictional Analysis of the Statute of Repose.

A. The History of Adoption and Plain Meaning of the Statute of Repose Require Dismissal of Plaintiffs' Lawsuit.

Unlike most commercial products and services, design professionals and construction services, which improve real estate, are intended to long outlive the client or owner. Because improvements have a long post-construction lifespan, during which owners exclusively control, maintain, and renovate the improvement, there must be a moment after which licensed design professionals and their firms are no longer exposed to liability. *See* Margaret A. Cotter, *Limitation of Action Statutes for Architects and Builders – Blueprints for Non-Action*, 18 Catholic Univ. L. Rev. 361, 361 (1969). At common law, design professionals were protected from indeterminate liability as injured parties were required to be in privity of contract. *See* Richard P. Gilardi, *The Unsettled Foundation of the Pennsylvania Construction Projects Statute of Repose*, 30 Duq. L. Rev. 681, 684 (1992).

As such, the impetus for the adoption of the Statute of Repose

was the erosion of contract privity in the early 1960s, exposing licensed design professionals (architects, engineers, and landscape architects) to claims for defective design of improvements to real property from third parties. *Id.* at 685. The discussions in the legislative journal plainly indicate that the intent was to provide "that suits for improper professional conduct must be initiated within 12 years of completion." H.R. Leg. J. Vol. 1, No. 86, 149th Pa. Gen. Assemb., 1965 Sess. at 2243 (1965) (statement of Rep. Charles F. Mebus on S.B. 307, Act 469 of 1965).[1] The eradication of privity also coincided with the growing trend of judicial adoption of the discovery rule for the accrual of a cause of action. Cotter, *supra* at 364; *see Nesbitt v. Erie Coach Co.*, 416 Pa. 89 (1964); *see also Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80 (1983).

Critically, architects, engineers, and landscape architects who

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[1] The Commonwealth enacted its first construction-related statute of repose 60 years ago. *See* 12 Pa.C.S. §65.1 (repealed). The Statute of Repose curtailed the time within which a plaintiff could sue for injuries arising out of defects relating to construction and improvements to real property. *Id.* It required claimants to bring a suit within 12 years of completion of construction and had the effect of permanently barring any claims not asserted within that period. *Id.* (Act 469 of 1965 was the predecessor to Section 5536 of Judicial Code).

sign and seal projects are exposed to individual liability for design errors or omissions. Moreover, Pennsylvania expressly prohibits design professionals from seeking indemnity for liability arising out of the practice of architecture or engineering. *See* 68 P.S. §491. Together, these developments and changes to the common law spurred the adoption of construction statutes of repose across the country.

This Court's consistent reading of the Statute of Repose "encourage[s] plaintiffs to bring actions in a timely manner[.]" *Dubose v. Quinlan*, 643 Pa. 244, 261 (2017). Tying the start of the Statute of Repose to the completion of construction means that an owner in possession, with an obligation to maintain a property, has the ability to discover and bring potential claims. *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 281 (1978). Knowing that a claim expires 12 years after construction is completed, owners are incentivized to investigate and to commence design and construction-defect causes of action while their claim is ripe.

Here, Plaintiffs ask this Court to revert to a time when architects, engineers, and landscape architects retained individual liability through death and administration of their estate. H.R. Leg. J., *supra*, at

2244. Indeed, the Plaintiffs seek more than a pure reversion to pre-1965, as without the protections of the Statute of Repose, Pennsylvania design professionals are left exposed to even more claims that do not require privity. *See Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa. 454 (2005) (allowing negligent misrepresentation claims under Section 552 Restatement of Torts). Professional liability insurance is already expensive and, in many circumstances, simply not available to retired design professionals.

Plaintiffs' tortured reading of the Statute of Repose removes the cutoff which creates finality with respect to design claims. Indeed, Plaintiffs' attempt to tether the Statute of Repose to an analysis of ever-changing construction codes, statutes, regulations, rules, and standards is inconsistent with the General Assembly's intent in adopting the Statute of Repose. The intent was to provide finality.

In adopting the Statute of Repose, the Legislature established a cutoff for design and construction claims. Section 5536 provides, in relevant part, as follows:

> (a) General rule. Except as provided in subsection (b), a civil action or proceeding brought against *any person lawfully performing or furnishing* the design, planning, supervision or observation of

> construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:
>
> (1) Any deficiency in the design, planning, supervision or observation of construction, or construction of the improvement.

42 Pa.C.S. §5536 (emphasis added). This Court has repeatedly identified Section 5536 and its predecessor as a Statute of Repose, which eliminates, at a certain point, all causes of action arising out of negligence in design or construction of an improvement to real property.[2] *Misitis v. Steel Piping City Co.*, 441 Pa. 339, 343 (1971) (holding the Statute of Repose enacted in 1965 "completely eliminates all causes of action arising out of negligence in construction or design . . . ."); *McCormick v. Columbus Conveyor Co.*, 522 Pa. 520, 522 (1989) (identifying Section 5536 as a statute of repose); *Vargo v. Koppers Co., Inc., Eng'g & Constr. Div.*, 552 Pa. 371, 376 (1998) (holding that Section 5536 "is a statute of repose, not a statute of limitations"); *Noll v. Harrisburg Area YMCA*, 537 Pa.

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[2] As defined in *Black's Law Dictionary*, "repose" means "a statutory period after which an action cannot be brought in court, even if it expires before the plaintiff suffers any injury." *Black's Law Dictionary* (12th ed. 2024).

274, 280 (1994) (identifying Section 5536 as a statute of repose which "completely abolishes and eliminates the cause of action"). This Court, in its interpretation of the Statute of Repose, expressly held that the Legislature could abolish a judicially recognized cause of action before it accrued. *See Freezer Storage*, 476 Pa. at 281 (finding the predecessor Act, 12 P.S. §65.1, constitutional).

i. The plain language of the Statute of Repose compels the conclusion that "lawfully performing or furnishing" means the person is authorized to render services at the time.

The Statute of Repose was adopted in 1965 (and consolidated in 1976 as part of the Judicial Code) as an absolute bar to claims of negligent design and construction. *See, e.g., Misitis*, 441 Pa. at 343; *see also Dubose*, 643 Pa. at 261. Indeed, the objective of statutory construction is to "ascertain and effectuate" the General Assembly's intent. 1 Pa.C.S. §1921(a); *Metal Green Inc. v. City of Philadelphia*, 266 A.3d 495, 507 (Pa. 2021). Generally speaking, the best indication of legislative intent is the plain language of a statute. *Gustine Uniontown Assoc., Ltd. v. Anthony Crane Rental, Inc.*, 577 Pa. 14, 32 (2004).

The Statute of Repose does not define "lawfully," nor does it define "performing." Nevertheless, "the lack of statutory definitions does not

preclude a plain-language analysis." *Greenwood Gaming & Ent., Inc. v. Dep't of Revenue*, 306 A.3d 319, 331 (Pa. 2023). This Court has turned to *Black's Law Dictionary* to define the common meaning of terms used in the Statute of Repose. *See, e.g., McCormick*, 522 Pa. at 909.

The version of *Black's* in existence at the time the Statute of Repose was first enacted (1965) was the 1951 Fourth Edition. [3] *Compare Black's Law Dictionary* (4th ed. 1951) with *Black's Law Dictionary* (4thR ed. 1968). That version defines "lawful" as: "Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law." *Black's Law Dictionary* 1032 (4th ed. 1951). The Superior Court's consistent interpretation of "lawfully performing" in the Statute of Repose accords with the word's ordinary and plain meaning – *authorized.*

As noted by the Superior Court, there is a discussion of lawful versus legal in which *Black's* distinguishes the terms by stating "legal"

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[3] Amici contend that this Court should rely upon the *Black's Law Dictionary* Fourth Edition 1951 because the 1976 adoption of Section 5536 was substantially a reenactment of 12 P.S. §65.1. *See* 42 Pa.C.S. §5536. Nevertheless, there is not a substantive difference in the definitions from the 1951 to the 1968 version of Black's Law Dictionary that change the result reached by the Superior Court.

contemplates the form of law. *Branton v. Nicholas Meat, LLC*, 159 A.3d 540, 549-50 (Pa. Super. Ct. 2017). As such, "legal" implies that conduct is "done or performed in accordance with the forms and usages of law, or in a technical manner." *Black's*, *supra* at 1032. Whereas, "lawful" implies that the conduct is "authorized, sanctioned, or at any rate not forbidden by law." *Id.* Therefore, the person performing must be warranted or authorized at the time of performance, making the question whether the person is warranted or authorized – not if the improvement comports with all rules, regulations, codes, or ordinances.

As is clear on its face, the Statute of Repose unambiguously requires that an action for claims against an architect, engineer, landscape architect, contractor, or builder who improves real property "must be commenced within 12 years after completion of construction of [an] improvement." 42 Pa.C.S. §5536(a). The phrase "12 years after completion of construction of such improvement" is only logical if "lawfully performing" is defined to mean authorized to perform the design, planning, supervision or observation, or construction.

The appropriate test for "any person lawfully performing or furnishing" must be that the person is authorized to perform the work

at the time the services are rendered. In the case of a design professional, authorization derives from the licensing of the design professional who contracts for professional services in compliance with the applicable licensing law. *See* 63 P.S. §34.101, *et. seq.* (Architects Licensure Law); 63 P.S. §148, *et seq.* (Engineer, Land Surveyor and Geologist Registration Law); 63 P.S. §901, *et seq.* (Landscape Architects' Registration Law). As to construction managers, general contractors, and subcontractors, however, the question of authorization relates to whether or not the person is authorized by contract (not licensure) to perform "construction supervision or observation, or construction" when improving real property. Simply stated, authorization is determined by contract because there is no license for construction managers, general contractors, or subcontractors in Pennsylvania.[4]

Reading "lawfully performing" any other way than the person is

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[4] Contractors are required to register under the Home Improvement Consumer Protection Act when performing a home improvement as defined by the Act. 73 P.S. §§517.2, 517.3. This Act does not include the construction of new homes. *Id.* Further, the registration under the Act is a consumer protection act and not a licensure law. Moreover, contractors in commercial construction whether built environment or infrastructure, are not required to register or be licensed. *Id.*

"authorized" at the time of rendering design or construction services means there is no commencement of the repose. Indeed, it reads "12 years after completion of construction of such improvement" out of the Statute of Repose, rendering the phrase mere surplusage. 1 Pa.C.S. §1921(a); *see Commonwealth v. Ostrosky*, 589 Pa. 437, 450 (2006); *Holland v. Marcy*, 584 Pa. 195, 206 (2005).

ii. Plaintiffs' cause of action is abolished by Statute of Repose.

Plaintiffs, as a subsequent purchaser, are correct that they are left without a remedy against the builder. However, this is the precise result intended by the Legislature. As repeatedly stated by this Court, the intent of the Statute of Repose is to abolish and eliminate a cause of action associated with negligent design or construction 12 years after completion of the improvement. *See, e.g., McConnaughey v. Bldg. Components, Inc.*, 536 Pa. 95, 97 n.1 (1994) (stating "statutes of repose potentially bar a plaintiff's suit before the cause of action arises").

Plaintiffs seek a judicial amendment to the Statute of Repose, which would only allow repose to apply if a design professional can prove that no cause of action exists. In sum, the Plaintiffs demand that the design professional demonstrate that the design and construction

comply with all statutes, rules, regulations, and ordinances, including local, state, and international building codes, as a condition precedent to invoking the Statute of Repose.

If this is the standard, there is no purpose whatsoever for the Statute of Repose, as the design professional would have already prevailed on the merits by proving that every single aspect of the project comports with all requirements. This is neither consistent with the Statute of Repose nor the common law professional standard of care.

Plaintiffs' interpretation of "lawfully performing" renders the Statute of Repose in design defect cases a nullity. Given the ease with which a violation of any rule, regulation, ordinance, standard, or code can be alleged, such a reading eviscerates the legislative intent. In such circumstances, a purchaser of a property only needs to allege defects or violations to be entitled to prosecute a lawsuit until it can be determined with finality whether or not design or construction errors occurred. This is inconsistent with the Legislature's intent to set a clear cutoff, extinguishing design and construction claims after the 12-year repose period.

B. Applying this Court's Longstanding Three-Part Test Requires Dismissal Because the Contractor Was Authorized to Perform Construction Services.

This Court's precedent instructs lower courts to apply a three-part test to determine whether the Statute of Repose applies. As such, this Court should apply its longstanding three-part test to determine whether the Statute of Repose eliminates Plaintiffs' cause of action. In so doing, the Court should affirm both the Trial Court and Superior Court's holding that Plaintiffs' claims are extinguished.

The party moving for protection under the Statute of Repose must show: (1) what is supplied is an improvement to real property; (2) more than 12 years have elapsed between the completion of the improvements to the real estate and the injury; and (3) the activity of the moving party must be within the class which is protected by the statute. *McCormick*, 522 Pa. at 523-25; *see, e.g. Noll*, 537 Pa. at 281; *McConnaughey*, 536 Pa. at 99; *NVR, Inc. v. Majestic Hills, LLC*, 670 F. Supp. 3d 206, 215 (W.D. Pa. 2023), *reconsideration denied,* No. 2:18-CV-1335-NR, 2023 WL 3726895 (W.D. Pa. May 30, 2023); *Venema v. Moser Builders, Inc.*, 284 A.3d 208, 212 (Pa. Super. 2022). Application of this threshold jurisdictional test presents a legal question, which requires

the dismissal of Plaintiffs' claims. *See Gilbert v. Synagro Cent., LLC*, 634 Pa. 651, 675 (2015) (holding "statutes of repose are jurisdictional and their scope is a question of law for courts to determine."); *see also Branton*, 159 A.3d at 546; *Venema*, 284 A.3d at 212; *Johnson v. Toll Bros., Inc.*, 302 A.3d 1231, 1234 (Pa. Super. 2023) *rearg. denied*, Oct. 18, 2023.

i. This Court's three-part test requires dismissal of Plaintiffs' case.

In this case, all three parts of the test are satisfied. First, Plaintiffs' complaint alleges construction deficiencies in the construction of a single-family home, which is an improvement to real property. Second, 12 years elapsed between the issuance of the certificate of occupancy and the filing of Plaintiffs' lawsuit. Third, the Plaintiffs allege that Defendant was a contractor or subcontractor engaged by the original owner to construct the façade of the home. Under this Court's longstanding test, both lower courts properly dismissed the suit.

The Superior Court, while reaching the correct result, incorrectly applies this Court's test. At Plaintiffs' urging, the court incorrectly applied a "lawful" analysis to the first prong stating: "(1) the project involved a *lawful* improvement to real property." *Aloia*, 2024 WL

1048248 at *2 (emphasis added); *Johnson*, 302 A.3d at 1234. The use of the term "lawful" to modify "an improvement" is inconsistent with the text of the statute and prior decisions. *See Leach v. Phila. Sav. Fund Soc'y,* 340 A.2d 491, 493 (Pa. Super. 1975) (finding that the relevant test is whether the person lawfully furnished or performed the listed services). This error appears to be rooted in Plaintiffs' consistent misquotation of the statute.

ii. Plaintiffs' misuse of "lawfully performed" rather than "lawfully performing" leads to an incorrect interpretation of the Statute of Repose.

The Statute of Repose provides "*any person lawfully performing or furnishing* the design, planning, supervision or observation of construction, or construction of any improvement to real property...." The phrase "lawfully performing" clearly modifies "any person" (e.g. an architect, engineer, landscape architect, or contractor). To this end, the phrase "lawfully performing or furnishing" is tied to the person performing the design or construction services at the time of design and construction, *not* the completed improvement.

In their appeal to this Court, Plaintiffs repeatedly misquote the statutory text as "lawfully performed." To this end, Plaintiffs' questions

presented in the Petition for Allocatur and Appellants' Brief all repeatedly refer to "lawfully performed." *See, e.g.,* Appellants' Br at 11. The Plaintiffs' material alteration of the statutory text completely changes the meaning of the statute by altering the tense of "lawfully performing or furnishing" to "lawfully performed." This cannot be countenanced by this Court.[5]

In responding to Plaintiffs' confusing argument conflating the merits of liability in a construction defect claim with the jurisdictional analysis of whether the Statute of Repose eliminates and abolishes the cause of action, the Superior Court appears to latch onto Plaintiffs' substitution of "lawfully performed." *See Aloia,* 2024 WL 1048248 at *3 (citing *Johnson*, 302 A.3d at 1234). Nevertheless, an appropriate application of this Court's test mandates that "lawfully performing" must be applied to the person (i.e. architect, engineer, landscape architect, or contractor) in the third prong.

In applying this prong of the test, this Court should make an

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[5] The Court should dismiss this appeal as improvidently granted based upon Plaintiffs' misquotation of the statutory text in the Petition for Allocatur and questions presented for appeal.

initial determination if the licensed design professional or contractor is authorized to perform the design or construction services. If appropriately licensed and authorized by contract, the person is "lawfully performing" the design services and, therefore, within the class of person that is protected. Accordingly, the protected class includes licensed architects, engineers, landscape architects, land surveyors, and design professional firms.

The second prong of this Court's test is the sole prong focusing on timing. Here, the certificate of occupancy is indicia of completion of construction. This is similar to a certificate of substantial completion, a final application for payment, release of retainage, or release of a bond. All the foregoing indicia relate to the trigger of the 12-year Statute of Repose, not whether the construction of the improvement is lawful. The issuance of a certificate of occupancy (or substantial completion) indicates completeness, but does not definitively establish compliance with all laws, regulations, rules, permits, building codes, or even the contract documents.

Certificates of Occupancy and Certificates of Substantial Completion both expressly recognize that latent defects and errors may

be present in an improvement. *See* 34 Pa. Code §403.46(d) (indicating a Commercial Certificate of Occupancy may be suspended or revoked based upon an issuance error or violation of the Uniform Construction Code); 34 Pa. Code §403.65(d) (indicating a Residential Certificate Occupancy may be suspended or revoked); *see generally* Am. Inst. Architects, *Official Guide to the 2007 AIA Contract Documents*, 127-28 (2009) (indicating substantial completion is a construction concept derived from the legal doctrine of substantial performance and is the stage in the progress of work when the work is sufficiently complete so that the owner can occupy). Indeed, certificates of substantial completion, certificates of occupancy, and applications for final payment routinely contain disclaimers refusing to release contractors from latent defects.

Certificates of substantial completion and certificates of occupancy represent that the building is fit for its intended purpose – human occupancy. These indicators of completion align with the improvement being turned over to the owner. As such, a certificate of occupancy triggers the running of repose. It is inconsistent with the statutory structure to interpret the Statute of Repose to allow a plaintiff to

circumvent repose protections by merely alleging a violation of any building code. *See NVR,* 670 F.Supp. 3d at 221 n.9 (stating "it would seem to run counter to the purpose of the statute of repose to allow a plaintiff to cite only a deviation from a permit as a basis to revive an 'abolished' and 'eliminated' claim . . . effectively gut[ting] the statute; after all, any deficiency in the performance of construction can very likely be linked to some permit condition").

Plaintiffs assert, without any support whatsoever, that the General Assembly intended for the local codes of one of Pennsylvania's 2,560 municipalities to dictate whether a statewide Statute of Repose applies. *See* Appellants' Br. at 20, 42. Plaintiffs go so far as to opine that *all* building codes—be they local, state, or international—control. *See, e.g.*, Appellants' Br. at 40. Yet, Plaintiffs do not acknowledge that the changes to the building codes since the enactment of the Statute of Repose in 1965 are legion. Indeed, the Pennsylvania Uniform Construction Code did not come into existence until 2004. Nor do Plaintiffs reconcile their theory with the reality that municipalities adopt different codes at different times. Requiring that the Statute of Repose be subject to municipal amendments haphazardly results in

uncertainty, absurdity, and unreasonableness. 1 Pa.C.S. §1922 (1), (2).

The plain and unambiguous meaning of the statutory terms must be ascribed when interpreting the Statute of Repose. Requiring a design professional who seeks to invoke the Statute of Repose to prove that the final design and construction comply with all statutes, rules, regulations, ordinances, and building codes (state, local, and international) is inconsistent with the overall intent to abolish a cause of action. Plaintiffs' argument of "lawfully performed," suggesting the finished improvement must comply with all laws, rules, regulations, codes, and ordinances, conflates the Statute of Repose with a statute of limitations that may be tolled.

iii. Plaintiffs' attempt to inject a factual analysis creates an absurd result that is inconsistent with the text of the Statute of Repose.

This Court must reject the Plaintiffs' invitation to intertwine liability on the merits with the threshold jurisdictional test for repose. The Plaintiffs' interpretation of the statute leads to absurd results, which are inconsistent with the statutory text, this Court's decisions, and the historical circumstances leading to its enactment. 1 Pa.C.S. §1922(1); *Branton*, 159 A.3d at 551 (holding that "resetting" the

statutory time period "every time a minor violation occurs is both absurd and unreasonable[]" rationalizing that even the most vigilant parties "may eventually violate federal, state, and local law"). As this Court has stated, the Statute of Repose abolishes a cause of action and "may not be tolled, even in cases of extraordinary circumstances beyond plaintiff's control." *Dubose*, 643 Pa. at 262; *see also Venema,* 284 A.3d at 213; *Carroll v. Department of Transportation,* Dkt. No. 1-22-cv-00242, 2024 WL 3522020 *1, *5 (M.D. Pa. July 24, 2024).

The relevant provisions of the Statute of Repose dictate that the date of "completion" of the improvements to the real property is the trigger. *Venema,* 284 A.3d at 213. The critical triggering element for completion is when the work or a designated portion of the work is sufficiently complete so that it may be occupied or utilized for its intended purpose. *NVR*, 670 F. Supp. 3d at 217-19; s*ee also Gustine Uniontown,* 577 Pa. at 19-21. As the Superior Court noted in this case, and as common sense dictates, a building code official's issuance of a certificate of occupancy is clear and convincing indicia of completion. *Aloia*, 2024 WL 1048248 at *5.

Moreover, under Pennsylvania's Uniform Construction Code, the

building permit and the certificate of occupancy are issued to the Owner.[6] 34 Pa. Code §403.42 (governing issuance of a commercial building permit to an owner or authorized agent); 34 Pa. Code §403.62 (governing issuance of a permit for an owner of residential buildings or authorized agent); IRC (2003) R105.1. The UCC provides that a "[b]uilding code official...manages, supervises and administers building code enforcement duties," including "*authorizing* issuance of certificates of occupancy" and "issuance of building permits." 34 Pa. Code §401.1 (emphasis added).

The certificate of occupancy or a partial certificate of occupancy is a clear indicator from the governmental agency to the owner that the improvement may be occupied, and a satisfactory final inspection of the property has concluded. *Venema*, 284 A.3d at 213 (citing 34 Pa. Code §§403.64(f), 403.65(a), 403.65(b), (Section 403.65(a) provides as follows: "A residential building may not be used or occupied without a certificate of occupancy issued by a building code official;" Section

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[6] In the context of grading permits where the permittee is a person other than the operator, the operator is required to become a co-permittee. 25 Pa. Code §102.5(h). The requirement for the owner and operator to be co-permittee is of recent vintage. 40 Pa. B. 4866 (2010).

403.65(b) reads in relevant part as: "A building code official shall issue a certificate of occupancy after receipt of a final inspection report that indicates compliance with the [UCC];" and Section 403.64(f) reads in relevant part as: "A construction code official shall conduct a final inspection of the completed construction work and file a final inspection report that indicates compliance with the [UCC].")). In this case, the certificates of occupancy were issued to the Owner. *See, e.g.,* R. 293a.

The Superior Court has relied on issuance of a certificate of occupancy finding that it (1) establishes that the builder was authorized to perform construction and (2) triggers the running of the 12-year repose period. *See, e.g.*, *Johnson*, 302 A.3d at 1233 ("[C]onstruction was [] 'lawful' because Toll was authorized under the laws of the Commonwealth to do it."); *Venema*, 284 A.3d at 213 ("There can be no satisfactory result to a final inspection, nor a certificate of occupancy, until construction of the residence is 'completed.'"); *Catanzaro v. Wasco Prod., Inc.*, 489 A.2d 262, 266 n.7 (Pa. Super. 1985) (adopting the principle that "the General Assembly meant to mark the commencement of the repose period at the point when third parties are first exposed to defects in design, planning, or construction").

Clearly, a certificate of occupancy in a residential or commercial building is conclusive evidence of completion. With respect to design and construction of infrastructure projects or other civil engineering projects, other indicia of completion are necessary. Objectively, the local, state, and international building codes do not apply, and no building permit or certificate of occupancy is required for most infrastructure projects.

In their zeal to recover on their own claims, Plaintiffs' proposed test exclusively focuses on residential construction, disregarding even larger segments of the construction industry governed by the Statute of Repose. Plaintiffs' attempt to engraft a municipal building code onto this Court's test for the Statute of Repose misses the mark. There are many sectors of the construction industry where neither the local building codes nor Pennsylvania's Uniform Construction Code apply. Plaintiffs fail to recognize that infrastructure projects (including bridges, dams, earth disturbance, energy facilities, highways, regional transit systems, stormwater, water and wastewater plants) are also covered by the Statute of Repose. *See Carroll,* 2024 WL 3522020 at *5 (attempting to apply the misguided Superior Court test to a guiderail

project on an interstate highway finding that the contractor was authorized when "properly licensed" despite the absence of any Pennsylvania licensing statute for a PennDOT contractor). In these circumstances, the Plaintiffs' proposed test is inapposite.

Infrastructure or horizontal construction projects are *not* subject to building codes. Moreover, in Pennsylvania, there is no licensure mechanism for contractors. *See supra* note 3. Accordingly, Plaintiffs' argument that the General Assembly intended to tether the Statute of Repose to state, local, and international building codes fails.

This Court's three-prong test applies to all improvements to real property – not just construction of residential homes. The Statute of Repose has consistently applied to infrastructure projects where the building code is *not* applicable. *See, e.g., Carroll,* 2024 WL 3522030 at *5 (applying the three-prong test, the court first concludes that guiderails are "improvements to property" as a matter of law; then, following the misguided application of the first prong requiring that the improvement to real property be "lawful," the court finds that "[t]o be 'lawful,' construction must merely be authorized under the law . . . regardless of whether there were violations of federal, state, or local law

during the construction."); *NVR*, 670 F.Supp.3d at 217 (applying the Supreme Court's three-prong test to sidehill embankment construction, the court determines that the statute of repose applies to each "'improver' of real property" and that an excavating contractor's failure to comply with the terms of the grading permit did not make its conduct unlawful; thus, holding "lawfully" to mean "authorized by law to perform," rather than requiring that conduct be absent any violations of federal, state, or local law).

Not only does Plaintiffs' argument ignore entire sectors of the construction industry, but it also disposes of the very protections intended by the statute – eliminating stale claims. To this end, once an improvement to real estate is completed, the design professionals and contractors no longer have control over the improvement. As such, the Statute of Repose shifts liability to the owner, who has an obligation to oversee, maintain, alter, and repair the improvement.

A global shift in the interpretation of the Statute of Repose as proposed by Plaintiffs is deleterious to design professionals. To this end, Pennsylvania design professionals have established business practices including establishing record retention policies and insurance

maintenance policies based upon the Statute of Repose. *See* Nancy Hadley, *Records Management for Architecture Firms: A Resource Guide*, AIA (July 10, 2018) https://communityhub.aia.org/blogs/kathleen-simpson/2018/07/10/records-management-for-architecture-firms. These types of business policies are necessary and have been specifically endorsed by courts. *See Arthur Andersen LLP v. U.S.*, 544 U.S. 696, 704 (2005).

Architects, engineers, and landscape architects also understand that professional liability insurance is one of the highest costs associated with providing professional services. Under the test proposed by Plaintiffs, design professionals face professional liability suits brought by a multitude of third parties for an indefinite period of time. According to Plaintiffs' interpretation of the statute, a design professional may be called into court in perpetuity, so long as a plaintiff alleges some violation of any regulation, rule, ordinance, standard, or code. The defense costs (including expert and attorneys' fees and expenses) of stale cases are a major factor in the high cost of professional liability insurance. *See* Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L.

Rev. 627, 632 (1985). These costs also impact retiring design professionals as maintaining liability insurance after retirement is not only expensive, but in Pennsylvania unlimited extended reporting period insurance (i.e. tail insurance) is not available.[7]

The vast majority of States have adopted construction statutes of repose, which are expressly applicable to design professional liability to address stale claims and professional liability concerns. *See Yanakos v. UPMC*, 655 Pa. 615, 630 (Pa. 2019) (recognizing the reason for a statute of repose is to alleviate insurance and underwriting issues facing the construction industry). Pennsylvania has one of the longest Statutes of Repose in the United States applicable to design liability.[8] *See generally*, Cotter, *supra* at 365-66. Revocation of the Statute of Repose

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[7] In Connecticut, the Insurance Department adopted a statutory regulation compelling insurers issuing claims to professional liability policies to provide unlimited extended reporting period coverage. *See* Regs. Conn. §38a-327-3. However, Pennsylvania has no such requirement.

[8] Plaintiffs point to proposed Senate Bill 336 ("SB 336") as indicating that the statute of Repose is ambiguous. S.B. 336, Pa. Senate, 2023 Reg. Sess. (Pa. 2023). In reality, AIA PA championed SB 336, which sought to shorten the Statute of Repose to six years to bring Pennsylvania in line with the majority of other States. At the same time, AIA PA provided language defining the term "lawfully" to limit defense cost associated with Plaintiffs' counsel's repeated assertions that "lawfully" required a substantive merits analysis of all laws, regulations, rules, ordinances, and codes.

by the courts negatively impacts design professionals, especially those retiring or retired.

Decades after enactment, Plaintiffs urge this Court to treat Section 5536 as a statute of limitations, abandoning longstanding precedent treating Section 5536 as a statute of repose. Indeed, this Court has always treated Section 5536 and its 1965 predecessor as a statute of repose. *See, e.g., Misitis*, 441 Pa. at 343. Plaintiffs' argument seeking to engraft a fact-based liability determination onto the Statute of Repose nullifies the entire purpose of the legislation. In essence, Plaintiffs ask this Court to repeal the Statute of Repose and create a tolling doctrine tied to liability. *Dubose,* 643 Pa. at 261 (stating "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time'").

Plainly, the General Assembly did not intend to require a factfinder to analyze the merits of a case and determine liability for a design error or omission as part of the threshold jurisdictional question. The Legislature intended to set an outer limit on when litigation may be filed against a category of people, including architects, engineers,

landscape architects, and other designers of improvements to real property. *See Freezer Storage*, 476 Pa. at 284; *see also* Cotter, *supra* at 381. This Court should affirm the lower courts' decisions to dismiss Plaintiffs' lawsuit as barred by the Statute of Repose.

CONCLUSION

For the foregoing reasons and the additional reasons set forth in Appellee Diament Builders Corp.'s principal brief, *Amici Curiae* respectfully request that this Court affirm the Trial Court and Superior Court's orders dismissing Plaintiffs' lawsuit through the application of the plain and unambiguous Statute of Repose which deprives the court of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amicus Curiae* Pennsylvania AIA in Support of Appellee Diament Building Corp. complies with the word-count limit set forth in Pa.R.A.P. 531(b)(3). Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required by Pa.R.A.P. 2135 (b) and (d)), contain 6,783 words.

I also certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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PROOF OF SERVICE

I hereby certify that, on this 21st day of March, 2025, I am causing to be served the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121. Service by PACFile as follows:

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