
In the Supreme Court of Ohio

DOUGLAS GROCH, et al.,

Petitioners

v.

GENERAL MOTORS CORPORATION,

Respondents.

ON ORDER CERTIFYING QUESTIONS OF STATE LAW FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
CASE No 3:06-CV-1604

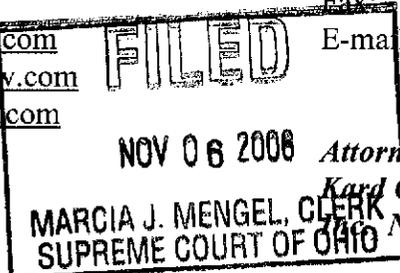
**PRELIMINARY MEMORANDUM OF RESPONDENTS,
KARD CORPORATION AND RACINE FEDERATED, INC., NATIONAL / KARD
DIVISION**

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I.

STATEMENT OF THE CASE AND FACTS

On June 6, 2006, Petitioners, Douglas and Chloe Groch, commenced this action in the Lucas County Court of Common Pleas against Respondents, General Motors Corporation, Kard Corporation and Racine Federated, Inc., National/Kard Division. Petitioners alleged product liability claims against Respondents, Kard Corporation (“Kard”) and Racine Federated, Inc., National/Kard Division (“Racine”) as a result of injuries sustained by Douglas Groch while he was operating a trim process on March 3, 2005.

On July 21, 2006, this case was subsequently removed to the United States District Court for the Northern District of Ohio, Western Division. Petitioners initial Complaint, did not assert allegations concerning Ohio’s statute of repose, R.C. 2305.10, enacted on April 7, 2005.

However, Petitioners amended their Complaint to allege the following with regard to Ohio’s statute of repose, “[t]o the extent that the provision contained within R.C. 2305.10 as amended by S.B. 80, apply to this action the statute violated the Constitution of the State of Ohio.”

Petitioners also asserted that R.C. 4123.93 and 4123.931 are unconstitutional. Ohio Attorney General Jim Petro was named as a party-defendant in the Amended Complaint.

On September 20, 2006, Petitioners, Kard, Racine and the Ohio Attorney General filed a joint motion asking the federal district court to certify questions to this Court. On October 16, 2006, the federal district court certified the following questions applicable to Petitioners claim against Kard and Racine,¹ for this Court’s review and consideration:

¹As this Court is aware, the federal district court also certified questions pertaining to R.C. 4123.93 and 4123.931. However, because these statutes do not pertain to Petitioners claims against Kard and Racine, these issues will not be addressed herein. Kard and Racine do not oppose this Court’s acceptance for review of the certified questions relating to R.C. 4123.93 and 4123.931.

Certified Question No. 10: Do R.C. 2305.10 (C) and (F) violate the open courts provision of the Ohio Constitution, Article I, Section 16?

Certified Question No. 11: Do R.C. 2305.10 (C) and (F) violate the takings clause, Article I, Section 19, of the Ohio Constitution?

Certified Question No. 12: Do R.C. 2305.10 (C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution?

Certified Question No. 13: Do R.C. 2305.10 (C) and (F) violate the equal protection clause, Article I, Section 2, of the Ohio Constitution?

Certified Question No. 14: Do R.C. 2305.10 (C) and (F) violate the ban on retroactive laws, Article II, Section 28 of the Ohio Constitution?

The certified questions presented for this Court's review and consideration are questions of Ohio law that are determinative of the Petitioners claims against Kard and Racine which are currently pending in United States District Court, Northern District of Ohio, Western Division, Case No. 3:06-CV-1604. There is no controlling precedent in the decisions of this Court with respect to R.C. 2305.10 (C) and (F). Should this Court accept these questions for review, Kard and Racine respectfully request that this Court answer each of these questions in the negative.

III.

CERTIFIED QUESTIONS FOR THIS COURT'S REVIEW AND CONSIDERATION

R.C. 2305.10 (C) (1) provides that no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product. R.C. 2305.10 (F) provides definitions of the terms used within R.C. 2305.10.

Petitioners maintain that R.C. 2305.10 (C) and (F) violate Article II, Section 28 of the

Ohio Constitution which bans retroactive laws. Petitioners further allege that R.C. 2305.10 (C) and (F) are unconstitutional because the statute of repose violates the due process clause, and the open courts and right to remedy provisions of Section 16, Article I of the Ohio Constitution, the takings clause of Article I, Section 19, of the Ohio Constitution, and the equal protection guarantees of Section 2, Article I of the Ohio Constitution.

When analyzing the constitutionality of a statute, the statute is presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision. *Beagle v. Walden* (1997), 78 Ohio St. 3d 59, 61; *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 560; *Fabrey v. McDonald Village Police Dept.* (1994) 70 Ohio St. 3d 351, 352. Thus, “before any legislative power, as expressed in a statute, can be held invalid, it must appear that such power is clearly denied by some constitutional provision.” *Williams v. Scudder* (1921) 102 Ohio St. 305, 307. It is well accepted that “[t]he legislature is the primary judge of the needs of public welfare, and this court will not nullify the decision of the legislature except in the case of a clear violation of a state or federal constitutional provision.” *Beagle, supra*, at 61.

R.C. 2305.10 (C) and (F) were enacted by Am. Sub. S. B. No. 80. In enacting Am. Sub. S. B. No. 80, the General Assembly found that the current civil litigation system represents a challenge to the economy of the state of Ohio, which is dependent on business providing essential jobs and creative innovation. See, *Id.* at Section 3 (A)(1). The General Assembly recognized that a fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued. *Id.* at Section 3 (A)(2). It further found that this state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous

lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation. *Id.* at Section 3 (A)(3).

With respect to statutes of repose, the General Assembly determined that statutes of repose are vital instruments that provide time limits, closure, and peace of mind to potential parties of lawsuits. *Id.* at Section 3 (A)(5)(a). Unlimited potential liability forces manufacturers to maintain records in perpetuity, because the manufacturers cannot reasonably predict when a record from fifteen or twenty years earlier may become the subject of a civil action. Further, over the course of many years, purchasers or lessees of the product, or those responsible for its maintenance, could make modifications or other substantial changes that would significantly change the intent or scope of the manufacturer's original design of the product.

In enacting R.C. 2305.10 (C), it was the intent of the General Assembly to recognize that subsequent to the delivery of a product, the manufacturer or supplier lacks control over the product, over the uses made of the product, and over the conditions under which the product is used. Am. Sub. S.B. No. 80, Section 3 (C). The General Assembly found that it is more appropriate for the party or parties who have had control over the product during the intervening time period to be responsible for any harm caused by the product. *Id.* at Section 3 (C) (4). More than ten years after a product has been delivered, it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely disadvantaging manufacturers or suppliers in their efforts to defend actions based on a product liability claim. *Id.* at Section 3 (C) (5). It is inappropriate to apply current legal and technological standards to products manufactured many years prior to the commencement of an action based on a product liability claim. *Id.* at Section 3 (C) (6). R.C. 2305.10 (C) enhances the competitiveness of Ohio manufacturers by reducing their exposure to

disruptive and protracted liability with respect to products long out of their control, increases finality in commercial transactions, and allows manufacturers to conduct their affairs with increased certainty. *Id.* at Section 3 (C) (7).

R.C. 2305.10 (C) strikes a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers. The ten-year period of repose is a rational period of time, which precludes the problems of stale litigation, but does not affect civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death. *Id.* at Section 3 (C) (8). Accordingly, R.C. 2305.10 (C) and (F) should be upheld as constitutional.

**R.C. 2305.10 DOES NOT VIOLATE THE OHIO CONSTITUTION'S BAN ON
RETROACTIVITY**

Section 28, Article II of the Ohio Constitution provides that “[t]he general assembly shall have no power to pass retroactive laws ***.” A law may be applied retroactively if: (1) there is an expressed legislative intent that it do so and (2) it affects a remedial, not substantive, right. *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, ¶11; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100. Thus, when an expressed intent for retroactivity is found, the second part of the test requires a determination as to whether the law is substantive or remedial.

R.C. 2305.10(G) provides:

This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior April 7, 2005.

This section states that the General Assembly intended the statute of repose to apply to all civil actions filed after April 7, 2005 regardless of when the cause of action accrued. By its own terms, the General Assembly intended the statute to be applied retroactively. Accordingly, the first prong of the *Van Fossen* test has been satisfied.

A statute is unconstitutionally retroactive under Section 28, Article II of the Ohio Constitution "if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat v. Bielat*, 87 Ohio St.3d 350,354, 2000-Ohio-451. "[T]he constitutional test for substantive legislation focuses on new laws that reach back in time and create new burdens, deprivation, or impairments of *vested rights*." (Emphasis added.) *Id.* at 359.

Petitioners do not have a vested right which is being impaired by R.C. 2305.10 (C) and (F). As noted in the dissenting opinion set forth in *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, a "vested right" is a right that "so completely and definitely belongs to a person that it cannot be impaired or taken away without that person's consent." *Id.* at ¶20, citing, *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, ¶9, quoting Black's Law Dictionary (7th Ed.1999) 1324. "A right is not regarded as vested in the constitutional sense unless it amounts to something more than a mere expectation or interest based upon an anticipated continuance of existing law." *In re Emery* (1978), 59 Ohio App.2d 7, 11, citing *Moore v. Bur. of Unemp. Comp.* (1943), 73 Ohio App. 362. For example, a judgment usually creates a vested right. See, e.g., *Wright v. Cincinnati Ins. Co.*, 159 Ohio App.3d 154, 2004-Ohio-5932, ¶31.

In *Smith*, three justices of this Court did not believe that a vested right had been created even though a judgment had been rendered. *Id.* at ¶21 (in which the dissent noted that child-support orders are distinguishable from other judgments to the extent that courts have continuing

jurisdiction to modify such orders.) Here, Petitioners have much less than a judgment upon which to rely in support of their contention that a vested right will be impaired by the statute of repose. In fact, the Complaint at issue had not yet even been filed at the time that R.C. 2305.10 (C) and (F) was enacted. Thus, no vested right will be impaired by application of R.C. 2305.10 (C) and (F) in this action.

Further, R.C. 2305.10(G) states that this section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, the date on which the statute of repose was enacted. The instant suit was commenced on June 6, 2006, after April 7, 2005. Thus, R.C. 2305 (C) and (F) are to be applied in a remedial fashion. A statute that is purely remedial does not violate Section 28, Article II of the Ohio Constitution. *Van Fossen* at 107. Therefore, should this Court accept certified question number fourteen for review, Respondents seek a determination from this Court that R.C. 2305.10 (C) and (F) are not unconstitutionally retroactive.

R.C. 2305.10 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OR THE RIGHT TO REMEDY AND OPEN COURT PROVISIONS OF THE OHIO CONSTITUTION

Certified questions numbers ten and twelve ask this Court to consider whether R.C. 2305.10 (C) and (F) violate the due process clause, and the right to remedy and open courts provisions of Article I, Section 16, of the Ohio Constitution. Section 16, Article I of the Ohio Constitution provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

In *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St. 3d 460, this Court declared that former R.C. 2305.131, a statute of repose, violates the right to a remedy guaranteed by Section 16,

Article I of the Ohio Constitution, and was, thus, unconstitutional. *Id.* at 466. In making this declaration, this Court overruled its prior decision in *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193. The Ohio General Assembly expressly requested that this Court reconsider its holding on statutes of repose in *Brennaman*. Am. Sub. S. B. No. 80, Section 3 (E). This case presents this Court with the opportunity to do so. The time has come to revisit *Brennaman's* broad prohibition of statutes of repose. Forty-seven other states have adopted statutes of repose in other contexts, such as the protection of architects, engineers, and constructors of improvements to real property from lawsuits arising after a specific number of years after completion of an improvement to real property. Am. Sub. S. B. No. 80, Section 3 (A)(5)(b). Ohio should join in this majority, and uphold R.C. 2305.10 (C) and (F).

In *Sedar*, this Court determined that the statute of repose did not take away an existing cause of action. This Court reasoned that the statute of repose's effect is to prevent what might otherwise be a cause of action from ever arising. *Sedar*, at 201. "Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action." *Id.* at 202, citing, *Rosenberg v. North Bergen* (1972), 61 N.J. 190, 199, 293 A.2d 662, 667. Causes of action, as they existed at common law or the rules that govern such causes, are not immune from legislative attention. See, *id.*, citing, *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45, 49. As this Court said in *Fassig v. State, ex rel. Turner* (1917), 95 Ohio St. 232, 248, "no one has a vested right in rules of the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances. *Id.* See also, *Sedar*,

Hardy.

Societal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day. *Sedar*. As stated in *Sedar*:

This Court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the common law and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such a result would offend our notion of the checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law.

Id. at 202, citing with approval, *Klein v. Catalano* (1982), 386 Mass. 701, 712, 437 N.E. 2d at 522, quoting *Freezer Storage, Inc. v. Armstrong Cork Co.* (1978), 476 Pa. 270, 280-281, 382 A. 2d 715, 721.

The right-to-a-remedy provision of Section 16, Article I applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available. Thus, in *Sedar*, this Court determined that statutes of repose, which bar claims when an injury occurs well after the expiration of the statute of repose, does not violate Section 16, Article I of the Ohio Constitution. *Sedar*, at 202.

This Court's reasoning on this issue in *Sedar* is sound and is based upon long-standing precedent of this Court. Given the indefinite group of potential claimants and the lengthy anticipated useful life of products, manufacturers are confronted with the threat of defending claims when evidence is no longer available. R.C. 2305.10 attempts to mitigate this situation by limiting the duration of liability and the attendant risks of stale litigation, a public purpose recognized as permissible under due process analysis. See, *Sedar*, citing, *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy* (C.A. 6, 1984), 740 F. 2d 1362, 1368.

Because extended liability engenders faded memories, lost evidence, the disappearance of witnesses, and the increased likelihood of intervening negligence, the General Assembly, as a matter of policy, limited manufacturer's exposure to liability by barring suits brought more than ten years after the purchase or lease of the product. By finding R.C. 2305.10 (C) and (F) constitutional, this Court will further the goals of the General Assembly. Accordingly, should this Court accept certified questions numbers ten and twelve for review, Respondents ask it to reconsider its ruling in *Brennaman*, and reaffirm the *Sedar* decision which found statutes of repose to be constitutional.

R.C. 2305.10 DOES NOT VIOLATE THE TAKINGS CLAUSE OF THE OHIO CONSTITUTION

Certified question number eleven asks this Court to consider whether R.C. 2305.10 (C) and (F) violate Section 19, Article I of the Ohio Constitution, which provides that "private property shall ever be held inviolate, but subservient to the public welfare * * * and * * *, where private property shall be taken for public use, a compensation therefor shall first be made." At the outset, it is unclear how the takings clause is applicable to R.C. 2305.10 (C) and (F) because no property interest is being taken for the benefit of a governmental entity. However, even assuming for the sake of argument only, that an analysis of the takings clause in this case is warranted, R.C. 2305.10 (C) and (F) are constitutionally valid.

Any legislation affecting private property rights must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property. See, *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 546. As stated by this Court in *Froelich v. City of Cleveland* (1919), 99 Ohio St. 376, 391, the state in the passage of general laws may not make any regulations which are unreasonable. "The means adopted must be

suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.” Id.

R.C. 2305.10 (C) strikes a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers. The ten-year period of repose is a rational period of time, which precludes the problems of stale litigation, but does not disturb civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death. Am. Sub. S.B. No. 80 at Section 3 (C) (8). The findings and intent of the General Assembly in enacting R.C. 2305.10 (C) and (F) establish that the means adopted by the legislature are suitable to the ends in view. Any private rights with which the statute interferes, are not interfered with beyond the necessities of the situation. Accordingly, R.C. 2305.10 (C) and (F) do not violate Article I, Section 19 of the Ohio Constitution.

R.C. 2305.10 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE OHIO CONSTITUTION

Petitioners argue that R.C. 2305.10 (C) and (F) are unconstitutional because the statute of repose violates their rights of equal protection. In reviewing a constitutional challenge to a statute based on a violation of the right to equal protection, this Court must first examine the purported class distinction to decide if a suspect class or fundamental right is involved. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St. 3d 360. In the absence of a suspect class or fundamental right, legislative distinctions are valid if there is a rational basis for the unequal treatment of different groups. *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St. 3d 351, 353.

The limitations placed upon the legislature by the equal protection clause “require the

existence of reasonable grounds for making a distinction between those within and those outside a designated class.”*Beatty v. Akron City Hosp.* (1981), 67 Ohio St. 2d 483, 491. Where, as here, the legislative distinctions do not affect a "suspect class" or infringe upon a fundamental right, and impinge on mere economic interests, courts apply a rational basis test. *Id.* at 492. Unequal treatment of classes of persons by a state is valid only if the state can show that a rational basis exists for the inequality. *Id.* Under this test, statutory distinctions which treat similarly situated individuals in a different manner are constitutionally permissible in the context of equal protection if any rational, nonarbitrary and noncapricious reason can support the distinction. See *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, 711.

The distinction alleged by Petitioners in this case is unclear. Presumably, Petitioners contend that distinguishing between litigants based upon when their cause of action accrue violates the equal protection clause of the Ohio Constitution. As stated above, without the limitations provided for in R.C. 2305.10 (C) and (F), an indefinite group of potential claimants exists. Manufacturers are confronted with the threat of defending claims when evidence is no longer available. R.C. 2305.10 attempts to mitigate this situation by limiting the duration of liability and the attendant risks of stale litigation. Thus, a rational basis supports the statute. Accordingly should this Court accept this issue for review, Respondents ask that it overrule Respondents’ constitutional challenge to R.C. 2305.10 (C) and (F) premised on the equal protection clause.

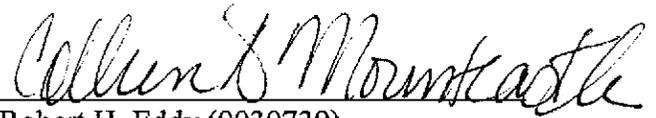
III.

CONCLUSION

WHEREFORE, Respondents, Kard Corporation and Racine Federated, Inc., National/Kard Division, represent to this Court that the certified questions presented for this

Court's review and consideration are questions of Ohio law that are determinative of the Petitioners claims against Kard and Racine which are currently pending in United States District Court, Northern District of Ohio, Western Division, Case No. 3:06-CV-1604. There is no controlling precedent in the decisions of this Court with respect to R.C. 2305.10 (C) and (F). Should this Court accept these questions for review, Kard and Racine respectfully request that this Court answer each of these questions in the negative.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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