IN THE SUPREME COURT OF OHIO

STAN DOTY, et al.,	)	
	)	
Appellees,	)	CASE NO.: 08-0859
	)	
v.	)	On Appeal from the Ottawa County Court of Appeals, Sixth Appellate Judicial District.
	)	
INTERMATIC, INC.,	)	
	)	Case No. 07 OT 023E
Appellant.	)	
	)	
	)	
	)	

MEMORANDUM OF APPELLANT INTERMATIC, INC. IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The period of "protracted interbranch tension"[1] between this Court and the General Assembly about tort reform could be extended indefinitely by the Sixth District's decision below. With the decisions in *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377 and *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, this Court addressed two of the major open questions about the General Assembly's ability to enact tort reform within the bounds of the Ohio Constitution. This appeal is a matter of public and great general interest because the decision below improperly limits the scope of *Groch*, and thus threatens the interbranch pax this Court thought it reached in *Groch*.

The Sixth District's decision in this case combines a frustrating misapplication of *Groch* only one month after this Court announced the decision with the potential to undo the General Assembly's explicit desire to treat all product liability claims as statutory claims. The *Groch* error arises because the Sixth District refused to apply R.C. 2305.10(A) to a case filed after April 7, 2005. That alone merits a summary reversal from this Court on the authority of *Groch*, which held that the S.B. 80 amendments to R.C. 2305.10 apply to cases filed after April 7, 2005. The Sixth District's holding also includes a second, more pervasive error, because its ruling that 2305.10 does not apply to some product-liability claims threatens the General Assembly's comprehensive reforms intended to place all product-liability claims within a uniform statutory framework.

The lower court's first error was declining to take 2305.10 at face value. The Sixth District did not apply the limitations in 2305.10(A) to the claims in this case even though the

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[1] *Arbino*, at ¶20.

complaint was filed on December 5, 2005. The Sixth District seized on a false distinction between statutes of repose and statutes of limitation. Essentially, the Sixth District read *Groch* as a case only about statutes of repose. *Groch*—of course—stands for a broader principle. Like all of this Court's decisions, *Groch* not only resolved the controversy between the parties, but also announced a principle that should have guided the appellate court in this very similar case. The Sixth District's pinpoint reading of *Groch* is a matter of public and great general interest because it commends a narrow reading of this Court's pronouncement, threatens to prolong interbranch tension, and will require this Court to cabin certain overbroad statements in *State ex rel. Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062 piece by piece, one isolated proposition at a time.

The second problem with the Sixth District's decision is that it threatens continued interbranch tension that could reach beyond even the final cabining of *Sheward*. Specifically, the Sixth District's decision leaves open a door that the General Assembly has been adamant it shut when it passed S.B. 80 and S.B. 117 and made plain that it intended to create uniformity in product-liability law in Ohio. Indeed, the plaintiffs in this case have already seized on the idea of non-uniformity and declared that the meaning of "product liability claim" in R.C. 2305.10 is limited only to those claims pled as arising under R.C. 2307.71.[2] If either R.C. 2305 or 2307.71 leaves some remnants of the common law intact, the General Assembly's initiative of moving product-liability law into a uniform, manageable statutory framework will have failed and interbranch tension will continue to plague Ohio law.

This Court has not hesitated to review appellate decisions that threaten a statutory framework. In *State v. Anthony*, the Court reversed an appellate interpretation of a license-

[2] Response to Application for Reconsideration (April 9, 2008) (asserting R.C. 2305.10 is "limited to ***statutory*** product liability claims.".

revocation statute because the lower court's interpretation "undermine[d] the legislative intent behind the statute." 96 Ohio St.3d 173, 2002-Ohio-4008, 772 N.E.2d 1167, at ¶15; see also *Callahan v. Class One, Inc.*(1991), 58 Ohio St.3d 76, 77, 567 N.E.2d 1036 (reversing appellate court's construction of securities statute because that interpretation "would only serve to undermine the most fundamental purpose of the statute") (internal quotation marks and citation omitted).

Likewise, in *State ex rel. Miller v. Anthony*, the Court reversed an appellate court's "unnecessarily restrictive" interpretation of the nuisance-abatement statute because that interpretation would "undermine the very purpose for which that statute was created." (1995), 72 Ohio St.3d 132, 140, 647 N.E.2d 1368.

The Sixth District's decision to ignore the General Assembly's command that R.C. 2305.10 apply "in any civil action commenced on or after April 7, 2005"[3] similarly threatens a statutory purpose—uniformity of products-liability law. As the General Assembly explained in S.B. 80, "This state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice * * * ." 2004 Am.Sub.S.B. 80, at § 3. If litigants cannot rely on the plain words of 2305.10(G), the civil litigation system will not be predictable.

The Sixth District's decision also presents a curious contrast with this Court's recent decisions in *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶8 and *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶¶10, 15, emphasizing that the General Assembly must be explicit when it intends that a law have retroactive application. Unlike the statutes in *Hyle* and *Consilio*, the General Assembly's intent

[3] R.C. 2305.10(G).

as to R.C. 2305.10 cannot be doubted. The Sixth District's disregard of that command merits this Court's review.

Finally, the Sixth District's reasoning that the statute of limitations for a "product liability claim" in R.C. 2305.10 does not encompass all product liability claims stands in tension with the General Assembly's reform of product-liability law that eliminated the prior patchwork of legal theories. The General Assembly has expressed its intent that 2307.71 is intended to "abrogate all common law product liability causes of action," See 2004 Am.Sub.S.B. 80 at § 3. In 2006, the General Assembly emphasized that it meant what it said in S.B. 80, clarifying that the abrogation effected by S.B. 80 included not only "mainstream" product liability claims such as negligent design, but also included theories closer to the fringe such as "public nuisance causes of action." 2006 Am.Sub.S.B. 117 § 3.

This is not the only Sixth District decision questionably interpreting product-liability reform. Another decision from the Sixth District addressing the scope of the General Assembly's reforms has also been appealed to this Court. See *Hayward Pool Prods. v. Hertzfeld*, No. 2008-0358. The appellants in that case contend that the Sixth District erred by reading the reforms of S.B. 80 too narrowly.

The Court should accept jurisdiction over this appeal because the Sixth District's decision inappropriately limits the scope of *Groch* and because it threatens the General Assembly's comprehensive plan to bring uniformity to all product-liability claims.

STATEMENT OF THE CASE AND FACTS

The case starts with a fire at the Doty residence on November 11, 2003. The Dotys allege that this fire damaged their real and personal property and that the electrical contractor (not a party to this appeal) and the component manufacturer (Intermatic, Inc., the appellant

here) were at fault for the damage. More than two years after the fire, the Dotys sued the contractor and the manufacturer asserting product-liability theories. A series of unopposed motions and voluntary dismissals left only Intermatic as a defendant and only claims for negligence and breach of implied warranty.

Intermatic moved for judgment on the pleadings, arguing that the remaining claims were barred by the statute of limitations in R.C. 2305.10. The trial court granted Intermatic's motion as to the implied-warranty claim, but denied it as to the negligence claims. Additional motion practice resulted in a Civil Rule 54(B) order that the Dotys appealed and Intermatic cross appealed.

The Sixth District affirmed the trial court's decision that the negligence claims were timely filed, reasoning that R.C. 2305.10 is not retroactive and that the negligence claims were subject to the four-year limit in R.C. 2305.09(D). The Sixth District reversed the trial court's holding that the implied warranty claims were barred by the two-year limit in R.C. 2305.10, again reasoning that this common-law action was subject to R.C. 2305.09(D), not the retroactive provisions of R.C. 2305.10.

Intermatic appeals to this Court because the Sixth District disregarded the General Assembly's plain directive that R.C. 2305.10 apply to cases **filed** after April 7, 2005, regardless of when the claim accrued.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: R.C. 2305.10 applies to all product liability claims filed after April 7, 2005.

The first problem with the Sixth District's decision is straightforward and best understood by looking at the language of 2305.10(G). In enacting R.C. 2305.10, the General Assembly supplied the explicit retroactive command that was lacking in *Consilio* and *Hyle*.

That is what makes the Sixth District's decision difficult to grasp. The Sixth District held that R.C. 2305.10 is not retroactive because it found R.C. 2307.71 (the product-liability statute) not retroactive. The court's stated reason ignores the General Assembly's specific command (which is absent from 2307.71) in that 2305.10 "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 to April 7, 2005." 2305.10(G).

Beyond ignoring the explicit language in 2305.10(G), the Sixth District's holding is inconsistent with this Court's interpretation of R.C. 2305.10 in *Groch*. In that decision, the Court held that 2305.10 applied on its face to product-liability claims filed after April 7, 2005. Id. at ¶179. The claims in *Groch* involved both statutory and common-law claims. Regardless, the Court observed that R.C. 2305.10 applied to all claims filed after April 7, 2005.

Groch's constitutional analysis was necessarily **because** the Court concluded that R.C. 2305.10 has retroactive effect. As this Court emphasized in *Consilio* and *Hyle*, constitutional retroactivity analysis is inappropriate unless the General Assembly has explicitly declared that a statute operates retroactively. See also, *Co-operative Legislative Committee of Transp. Brotherhoods and Broth. of Maintenance of Way Emp. v. Public Utilities Commission* (1964), 177 Ohio St. 101, 103, 202 N.E.2d 699. The Sixth District erred at step one of the *Groch* analysis because it held that 2305.10 does not apply to common-law product-liability claims filed after April 7, 2005.

The Sixth District offered a footnote acknowledging *Groch*, but distinguished *Groch* on the basis that *Groch* dealt with a statute of repose whereas the case before the Sixth District

dealt with a statute of limitations. *Doty v. Fellhauer Elec., Inc.*, 6th Dist. No. OT-07-023, 2008-Ohio-1294, at ¶45 n.2. The Sixth District offered no basis to distinguish statutes of repose from statutes of limitation for purposes of applying the General Assembly's command that both apply to cases filed after April 7, 2005. Indeed, the Sixth District's distinction runs afoul of the well-worn principle that, if a statute is not ambiguous, then courts "need not interpret it; [they] must simply apply it." *Tomasik v. Tomasik*, 111 Ohio St.3d 481, 2006-Ohio-6109, 857 N.E.2d 127, at ¶15 (internal quotation marks and citation omitted).

Long-established rules such as that reiterated in *Tomasik*, and the Court's recent interpretation of 2305.10 in *Groch* both show the error of the Sixth District's holding. The Dotys' claims are subject to 2305.10(A) because they filed them after April 7, 2005. No distinction between statutes of repose and statutes of limitation changes the principles of *Tomasik* and *Groch*. The Court should accept jurisdiction over this appeal and leave no doubt that 2305.10 applies to **all** cases filed after April 7, 2005. That is the General Assembly's explicit command and that is the law of Ohio.

Proposition of Law II: R.C. 2305.10 governs all product-liability claims, including claims that were formerly brought under the common law.

Although the Sixth District's disregard of *Groch* is obvious, the greater significance of the court's holding is its meaning for future product-liability suits. The Sixth District held that some product-liability claims are beyond the scope of 2305.10. Indeed, that is exactly the interpretation the Dotys placed on the Sixth District's holding when they opposed Intermatic's motion for reconsideration. If R.C. 2305.10 does not govern all product claims, the General Assembly's comprehensive reforms to product-liability law will be in vain. The General Assembly's reforms are codified in two sections of the Revised Code—2305.10 and 2307.71-

.80. The lasting, and potentially disruptive, effect of the Sixth District's holding is that it would introduce disunity into the uniform approach the General Assembly intended.

In the short life of S.B. 80, the General Assembly has already found it necessary to clarify the breadth of 2307.71. See 2006 Am.Sub.S.B. 117 (making explicit the preemption of common-law nuisance claims). The Sixth District's decision undercuts the uniformity of 2307.71 and 2305.10 because it holds that 2305.10 does not reach all product-liability claims. It is no stretch to imagine resourceful litigants citing the Sixth District's decision when trying to find the next potential fissure in the General Assembly' reform bulwark. In 2006, that fissure was casting a product claim as a nuisance. In 2008 and beyond, the Sixth District's holding gives litigants alternative paths to avoid the General Assembly's sincere desire to place all product-liability claims in the statutory system enacted in S.B. 80. This may include casting claims as other common-law theories, or even as U.C.C. warranty claims.

The Sixth District's explicit error in misapplying *Groch* violates the directive that courts must apply unambiguous statutes as written. The Sixth District's subtle, but more pervasive, error in failing to recognize the comprehensive product-liability reform of S.B. 80 violates the cannon that "courts interpret statutes to reflect a consistent legislative intent" (*State v. Reynolds*, 10th Dist. No. 06AP-915, 2007-Ohio-4178, at ¶12) and the black-letter principle that—for statutes of limitation—the specific controls over the general. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 524 N.E.2d 166. By holding that the Dotys' negligence and implied-warranty claims are exempt from 2305.10(A), the Sixth District undermines the specific, uniform approach to product-liability claims that the General Assembly has envisioned since 1988.

The Court should exercise jurisdiction over this appeal and leave no doubt that Ohio's courts must apply the General Assembly's unambiguous command that R.C. 2305.10 governs all product-liability claims. The most direct route to achieve that would be a summary reversal on the authority of *Groch*.

CONCLUSION

The legislative task of balancing rules specific enough to govern, but general enough to avoid unmanageable detail, is not easy. By holding that R.C. 2305.10 excludes some product-liability claims, the Sixth District exacerbates the legislative task. If the Sixth District is right, the General Assembly's reform efforts will never end because no law can eliminate all ambiguities. That is not a burden dictated by this Court's precedents and not a suggestion that the Court should countenance. The Court should accept this appeal and reverse the Sixth District's misapplication of *Groch* and the intimation that the General Assembly's comprehensive reforms are not comprehensive.

Respectfully submitted,

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APPENDIX

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MAR 2 1 2008

JENNIFER L. WILKINS, CLERK
OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Stan Doty, et al.

Appellants/Cross-Appellees

v.

Fellhauer Electric, Inc., et al.

Appellee/Cross-Appellant

Court of Appeals No. OT-07-023

Trial Court No. 05-CVB-440

DECISION AND JUDGMENT ENTRY

Decided: MAR 2 1 2008

* * * * *

Randall S. Rabe and Kenneth T. Levine, for appellants/cross-appellees.

Allen L. Rutz and William D. Kloss, Jr., for appellee/cross-appellant Intermatic, Inc.

* * * * *

PIETRYKOWSKI, P.J.

{¶ 1} This case is an interlocutory appeal of the May 15, 2007 and November 20, 2006 judgment entries of the Ottawa County Court of Common Pleas which dismissed appellants/cross-appellees' claims for breach of implied warranty against appellee/cross-appellant, Intermatic, Inc. Because we find that the trial court erroneously dismissed appellants' claim for damages to real property, we reverse.

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{¶ 2} The relevant facts of this case are as follows. On December 15, 2005, appellants, Stan and Lela Doty and Jerome and Catherine Schacht, commenced the instant action against appellee, Intermatic, Inc. ("Intermatic"), and Fellhauer Electric, Inc. ("Fellhauer"). The complaint stemmed from the November 11, 2003 fire at the Doty residence which was caused by the malfunction of an electrical apparatus; the fire also damaged the next-door Schacht residence. Intermatic manufactured the apparatus, and Fellhauer installed the apparatus. The complaint raised the following claims against Intermatic: common law negligent design and manufacture product liability claims; and statutory product liability claims. The statutory product liability claims were ultimately dismissed, without opposition, as being filed beyond the two-year limitations period set forth in R.C. 2305.10.

{¶ 3} On September 13, 2006, appellants filed a voluntary notice of partial dismissal, dismissing Fellhauer from the lawsuit. On September 15, 2006, appellee filed a Civ.R. 12(C) motion for judgment on the pleadings. In its motion, appellee argued that pursuant to S.B. 80, the Tort Reform Act effective April 7, 2005, appellants' common law product liability claims were abrogated by statute. Alternatively, appellee argued that the claims were barred by the two-year statute of limitations period, R.C. 2305.10, applicable to product liability claims.

{¶ 4} In response, appellants asserted that their common law claims accrued prior to the April 7, 2005 effective date and were not abrogated retroactively. Appellants further contended that the two-year product liability statute of limitations, also effective

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April 7, 2005, applied only to statutory product liability causes of action. Appellants argued that their claims were governed by the four-year tort statute of limitations in R.C. 2305.09(D).

{¶ 5} The trial court's November 20, 2006 judgment entry granted appellee's motion, in part, and denied it, in part. The trial court determined that appellants' claims of common law negligent design and breach of implied warranty survived the 1988 Ohio Products Liability Act, R.C. 2307.71, et seq. The court then held that appellants' action for negligent design was not barred by the applicable statute of limitations but that their claim for breach of implied warranty was time-barred.

{¶ 6} In reaching its findings, the trial court relied on the Supreme Court of Ohio's decision in *Carrel v. Allied Products Corp.*, 78 Ohio St.3d 284, 1997-Ohio-12. The *Carrel* court, strictly construing the applicable statutes, held that: [t]he common-law action of negligent design survives the enactment of the Ohio Products Liability Act, R.C. 2307.71 et seq." Id. at paragraph one of the syllabus. In a footnote, the trial court remarked:

{¶ 7} "Plaintiffs also assert that while the Tort Reform Act provides that 'Sections 2307.71 to R.C. 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action,' there is nothing in the statute that expresses any intent by the legislature to apply this abrogation retroactively to causes of action that had already accrued prior to the statute's change. See S.B. 80, Tort Reform Act."

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{¶ 8} The trial court then addressed the issue of whether appellants' claims, negligent design and breach of implied warranty, were barred by the applicable statutes of limitations. Regarding negligent design, the court found that the four-year negligence statute of limitations, R.C. 2305.09, applied. As to breach of implied warranty, the court concluded that because appellants were not in privity of contract with Intermatic, the claim was barred by the two-year statute of limitations in R.C. 2305.10.

{¶ 9} The parties both disputed portions of the trial court's judgment. On April 6, 2007, appellee requested that the trial court modify its judgment to include Civ.R. 54(B) language allowing the parties to appeal. On May 15, 2007, the trial court modified its November 20, 2006 judgment to include Civ.R. 54(B) language; this appeal followed.

{¶ 10} Appellants/cross-appellees now raise the following assignment of error:

{¶ 11} "The trial court erred as a matter of law in dismissing Plaintiffs' common law claim for breach of implied warranty in tort under the two-year statute of limitations set forth in R.C. 2305.10."

{¶ 12} Appellee/cross-appellant raises the following two assignments of error for our consideration:

{¶ 13} "First Assignment of Error

{¶ 14} "The trial court erred as a matter of law in failing to apply the two-year statute of limitations set forth in R.C. 2305.10 to Plaintiffs' common law product liability claim sounding in negligence.

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{¶ 15} "Second Assignment of Error

{¶ 16} "The trial court erred as a matter of law and ignored legislative intent in failing to hold that common law product liability had been abrogated by statute."

{¶ 17} At the outset we note the "[a] Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted." *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 2001-Ohio-1287, citing *Nelson v. Pleasant* (1991), 73 Ohio App.3d 479, 482, and *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163. "In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. The court must presume that all factual allegations in the complaint are true and construe all inferences that may be reasonably drawn therefrom in favor of the non-moving party. *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 1999-Ohio-368. Appellate review of a trial court's decision to dismiss a claim pursuant to Civ.R. 12(B)(6) is de novo. *Hunt v. Marksman Prod., Div. of S/R Industries, Inc.* (1995), 101 Ohio App.3d 760, 762.

{¶ 18} In appellants' sole assignment of error they contend that the trial court erroneously dismissed their breach of implied warranty in tort claim under the two-year statute of limitations period in R.C. 2305.10. Conversely, appellee disputes the trial

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court's failure to apply the two-year product liability statute of limitations, set forth in R.C. 2305.10, to appellants' negligent design claim. Appellee, in its second assignment of error, further argues that the trial court erred by failing to find that appellants' common law product liability claims were abrogated by the April 7, 2005 amendment to R.C. 2307.71.

{¶ 19} The outcome of this appeal hinges on this court's resolution of the following two issues: (1) whether the S.B. 80 amendments to R.C. 2307.71, et seq., retroactively abrogate appellants' common law product liability claims; and (2) whether R.C. 2305.10, setting forth the two-year products liability statute of limitations, applies to bar appellants' claims. We begin by quoting the relevant statutory provisions. R.C. 2307.71, effective April 7, 2005, provides, in part:

{¶ 20} "(A)(13) 'Product liability claim' means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:

{¶ 21} "(a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;

{¶ 22} "(b) Any warning or instruction, or lack of warning or instruction, associated with that product;

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{¶ 23} "(c) Any failure of that product to conform to any relevant representation or warranty.

{¶ 24} "'Product liability claim' also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public."

{¶ 25} "* * *.

{¶ 26} "(B) Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability claims or causes of action."

{¶ 27} R.C. 2305.10, effective April 7, 2005, provides, inter alia, a two-year statute of limitations period for product liability claims and states, in relevant part:

{¶ 28} "(A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs."

{¶ 29} "* * *.

{¶ 30} "(F) [redesignated as section (G) in 2006] 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

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Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to April 7, 2005."

{¶ 31} We must also review the basic tenets of statutory construction. R.C. 1.48, provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." Further, R.C. 1.42 states that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." Further, in construing a statute we must ascertain the intent of the legislature. *In re Guardianship of Lombardo*, 86 Ohio St.3d 600, 604, 1999-Ohio-132.

{¶ 32} Regarding R.C. 2307.71, the General Assembly stated that it is "intended to supersede the holding of the Ohio Supreme Court in *Carrel v. Allied Products* Corp. (1997), 78 Ohio St.3d 284, that the common law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, and to abrogate all common law product liability causes of action."

{¶ 33} This court will first address the general applicability of R.C. 2307.71, et seq., to appellants' claims. Specifically, the issue at hand in appellee/cross-appellant's second assignment of error is whether the S.B. 80 amendments apply to abrogate appellants' common law product liability claims.

{¶ 34} To date, only a small number of Ohio courts have examined whether the S.B. 80 amendments to R.C. 2307.71 apply prospectively or retroactively. In *Hertzfeld v. Hayward Pool Products, Inc.*, 6th Dist. No. L-07-1168, 2007-Ohio-7097, this court

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rejected the appellee's argument that the appellant's common law liability claims had been abrogated by R.C. 2307.71(B). We stated: "That section was added by S.B. 80, and was not effective until April 7, 2005. The instant cause of action arose on June 1, 2003, when appellants were injured. Therefore, the state of products liability law as of the date the cause of action arose applies." Id. at ¶ 56.

{¶ 35} Similarly, in *Luthman v. Minster Supply Co.*, 3d Dist. No. 2-06-43, 2008-Ohio-165, the Third Appellate District found that because the appellant's cause of action arose prior to the April 7, 2005 effective date, even though the complaint was filed on June 5, 2005, the amendment to R.C. 2307.71 did not apply. Id. at ¶ 15.

{¶ 36} As set forth above, the statutory construction rules dictate that a statute is presumed to be prospective. Although R.C. 2307.71 clearly states the intent to abrogate all common law product liability claims, it does not provide that causes of action accruing prior to the effective date would be subject to the amendment. Accordingly, as in *Hertzfeld*, supra, and *Luthman*, supra, we find that the R.C. 2307.71 amendment does not apply to abrogate appellants' claims. Accordingly, appellee/cross-appellant's second assignment of error is not well-taken.

{¶ 37} We will next address the issue raised in appellants' assignment of error and appellee/cross-appellant's first assignment of error. Appellants argue that the trial court erroneously applied the two-year statute of limitations period, R.C. 2305.10(A), to their claim for breach of implied warranty. Appellants contend that R.C. 2305.10 applies only

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to claims brought under the Products Liability Act. Appellants assert that R.C. 2305.09(D), the four-year limitations period for certain undesignated torts, applies.[1]

{¶ 38} Appellee's first assignment of error contends that the two-year limitations period, R.C. 2310.05(A), applies to all product liability claims filed after April 7, 2005. Thus, the trial court erred when it found that appellants' negligent design claim was subject to the four-year statute of limitations period set forth in R.C. 2305.09(D).

{¶ 39} Initially, we note that when determining the applicable statute of limitation period of a particular claim a court must look at the nature of the claim, not the form of the complaint. *Love v. City of Port Clinton* (1988), 37 Ohio St.3d 98, 99, quoting *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183. Further, "'[a] special statutory provision which relates to the specific subject matter involved in litigation is controlling over a general statutory provision which might otherwise be applicable.'" Id., quoting *Andrianos v. Community Traction Co.* (1951), 155 Ohio St. 47, paragraph one of the syllabus.

{¶ 40} We will first address appellants' argument that the trial court erroneously applied the two-year statute of limitations period, R.C. 2305.10(A), to their breach of an implied warranty claim. In its decision, the trial court found that the correct limitations period was two years because appellants were not in privity of contract with appellee. In

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[1]R.C. 2305.09(D) provides that "[a]n action for any of the following causes shall be brought within four years after the cause thereof accrued: * * *; "(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code; * * *."

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support, the trial court relied on *United States Fid. & Guar. Co. v. Truck & Concrete Equip. Co.* (1970), 21 Ohio St.2d 244, and *Lee v. Wright Tool & Forge Co.* (1975), 48 Ohio App.2d 148. The cases involved claims for personal injuries and damages to personal property. In *United States Fid. & Guar. Co.*, the Supreme Court of Ohio held that:

{¶ 41} "An action in tort for damage to personal property, which is based on a breach of a duty assumed by the manufacturer-seller to a product by reason of the manufacturer's implicit representation of good and merchantable quality and fitness of the intended use when he sells the product, is limited to the time in which it shall be brought by the provisions of Section 2305.10, Revised Code, which provides that 'An action for * * * injuring personal property shall be brought within two years after the cause thereof arose.'" Id. at paragraph two of the syllabus.

{¶ 42} Upon review, we find that the cases relied on by the trial court are not applicable to appellants' claim of breach of an implied warranty as it relates to damages to real property. Much like appellants' negligent design claim, such an allegation sounds in tort law, not contract law. See *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 12th Dist. No. CA2006-07-021, 2007-Ohio-1655, citing *White v. DePuy* (1998), 129 Ohio App.3d 472, 478. The Ohio Supreme Court has determined that the four-year statute of limitations found in R.C. 2305.09 governs such claims. *Sun Refining & Marketing Co. v. Crosby Valve & Gage Co.*, 68 Ohio St.3d 397, 1994-Ohio-369, syllabus. See *JRC Holdings, Inc. v. Samsel Servs. Co.*, 166 Ohio App.3d 328, 2006-Ohio-2148.

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{¶ 43} Accordingly, we find that the trial court erroneously dismissed appellants' breach of implied warranty claim for damages to real property as being subject to the two-year statute of limitations period in R.C. 2305.10(A). Therefore, we find that appellants' assignment of error is well-taken.

{¶ 44} Appellee/cross-appellant's first assignment of error contends that the trial court erroneously applied the four-year statue of limitations to appellants' negligent design claim. As set forth above, we agree that R.C. 2305.10(A) was the applicable statute of limitations period for any claims of loss to personal property, regardless of the April 7, 2005 amendment to the statute. However, with regard to the loss to real property, the proper limitations period was R.C. 23005.09(D).

{¶ 45} In conclusion we note that the Tort Reform Act, effective April 7, 2005, amended R.C. 2305.10(A) specifically to include products liability claims. Because we have found that R.C. 2307.71 does not apply retroactively, we likewise conclude that R.C. 2305.10(A) does not retroactively apply to bar appellants' claims.[2] Appellee/cross-appellant's first assignment of error is not well-taken.

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[2]Although we have found that R.C. 2305.10 does not apply to the present case, we note that the Supreme Court of Ohio has recently held that amendments to R.C. 2305.10(C), (F) applied retroactively in that they, as a statute of repose, acted to bar a plaintiff's claims. *Groch v. Gen. Motors Corp.*, ___ Ohio St.3d ___, 2008-Ohio-546. The court distinguished between vested rights with regard to a typical statute of limitations and a statute of repose which "does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises." Id. at ¶ 142. The court further found that, as applied to the plaintiff, the statute was unconstitutional in that it gave him only 34 days following the injury within which to commence his lawsuit. Unlike R.C. 2305.10(C), R.C. 2305.10(A) is not a statute of repose, it is a statute of limitations.

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{¶ 46} On consideration whereof, we find that appellants, as it relates to their breach of implied warranty claim for damages to real property, were prejudiced and prevented from having a fair proceeding and the judgment of the Ottawa County Court of Common Pleas is reversed and the case is remanded for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, the fees allowed by law, and the fee for filing the appeal is awarded to Ottawa County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. — JUDGE

Mark L. Pietrykowski, P.J. — JUDGE

William J. Skow, J. — JUDGE

CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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