

IN THE SUPREME COURT OF OHIO

08-0859

Stan Doty, *et al.*,

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On Appeal from the Ottawa County
Court of Appeals, 6th Appellate District

Appellees,

v.

Intermatic, Inc.,

Appellant.

MEMORANDUM IN RESPONSE

FILED BY APPELLEE IN OPPOSITION TO THE MEMORANDUM IN SUPPORT OF
JURISDICTION FILED BY APPELLANT INTERMATIC, INC.

Randall S. Rabe (#0021287) (Counsel of Record)
Nelson Levine de Luca & Horst, LLC
280 North High Street
Suite 920
Columbus, OH 43215
Phone: (614) 228.1398
Fax: (614) 221.7529
RRabe@NLdHLaw.com
COUNSEL FOR APPELLEES, STAN DOTY, *ET AL.*

Allen L. Rutz (#0069388) (Counsel of Record)
William D. Kloss, Jr. (#0040854)
Michael Hendershot (#0081842)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
Phone: (614) 464.6389
Fax: (614) 719.4794
ALRutz@Vorys.com
COUNSEL FOR APPELLANT, INTERMATIC, INC.

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SUPREME COURT OF OHIO

**STATEMENT OF APPELLEE'S POSITION AS TO WHY THIS CASE IS
NOT OF PUBLIC OR GREAT GENERAL INTEREST**

The appeal sought is unjustified and is of limited interest if any to the legal community or the general public. Despite Appellant's misleading averments to the contrary, the sky is not falling on product liability tort reform in the Sixth Judicial District.

The actual legal issue underlying the parties' dispute arises from some relatively unique facts:

(1) a claim presently asserted for damage to only real property (not personal property or personal injury) that had a 4-year statute of limitations when it arose in November 2003;

(2) a real property damage claim that coincidentally accrued approximately 17 months before the effective date of Ohio's tort reform statute (which, moving forward, will act to abrogate all common law causes of action arising from such a loss, and restrict the statute of limitations on the new statutory causes of actions to 2-years even for real property damage claims); and

(3) a real property damage claim where suit was not filed within 2-years from the date of accrual.

In turn, as noted and explained at greater length below, the actual legal dispute between the parties can only effect or impact real property damage claims that accrued prior to April 2005 (after which common law claims would be abrogated), and accrued after April 2001 (before which suit needed to have been filed ahead of April 2005 anyway), and where suit had not been filed before April 2005 (or otherwise within 2 years of the underlying loss).

There is a chance that there is not another case in the entire Ohio court system that is even affected by such legal discussion, and it is almost certain that there would or could be a handful at most. Appellant's hyperbole that this matter "could extend indefinitely ... the period of 'protracted inter-branch tension [between the court system and the

legislature];” or that this matter “threatens the General Assembly’s comprehensive reforms intended to place all product liability claims within a uniform statutory framework” is nothing less than ridiculous. Similarly, the assertion that the resolution of this unique matter is of “public and great general interest” is baseless under the circumstances.

Moreover, the Sixth District was absolutely correct in its ruling, and did not stray from or disagree with any of the recent decisions (or underlying principles) set forth by this Court in the *Groch* and *Arbino* decisions¹ as to the state’s tort reform efforts, addressing both its statutory interpretation and constitutional nature or limitations.

For these reasons, as well as the fact that the appellate court properly applied the law to the facts of this case, this Honorable Tribunal should DECLINE JURISDICTION.

**APPELLEE'S POSITION REGARDING THE PROPOSITIONS OF LAW
RAISED IN MEMORANDUM IN SUPPORT OF JURISDICTION**

At the heart of the legal dispute are two statutes: R.C. 2307.71 and R.C. 2305.10. Appellant inappropriately fails to appreciate the separate nature of what each statute does (or does not do) and how they are to be applied – both statutorily and constitutionally.

As the Sixth District court noted in its review of R.C. 2307.71 in paragraphs 19-26 and 33-36 of its opinion, R.C. 2307.71 does the following:

- (1) defines the term “product liability claims” to be limited to statutory product liability claims asserted under R.C. 2307.71-80, and does not include common law causes of action;
- (2) acts to abrogate all common law causes of action, but does not apply retrospectively to losses that accrued prior to the effective date of S.B. 80 in April 2005.

¹ *Groch v. General Motors* (2008), 117 Ohio St. 3d 192; *Arbino v. Johnson & Johnson* (2007), 116 Ohio St. 3d 468.

As the Sixth District noted in its review of R.C. 2305.10 in paragraphs 27-30 of its opinion, R.C. 2305.10 sets the statute of limitations for only statutory “product liability claims” at 2 years.

Appellant’s arguments have always focused on the desired retroactive application of the latter statute – R.C. 2305.10, but have always failed to appreciate the lack of retroactive abrogation of common law causes of action under R.C. 2307.71.

The Sixth District fully appreciated this, as it set forth its finding that the common law causes of action that had accrued prior to April 2005 were not retrospectively abrogated. The statute does not state that such abrogation was to be retrospective, as required by simple statutory rules, R.C. 148, as well as Ohio’s constitutional analysis as to retroactive interpretation, *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 287-90 (no abrogation unless language used in the statute clearly shows that intent). Thus, the common law causes of action that arose before April 2005 were not abrogated and were therefore not “products liability claims” as defined and limited by the statutes.

Although R.C. 2305.10 did have an expressed intent to act retroactively for statutory “product liability claims,” Plaintiff’s common law causes of action - as noted immediately above - were not included in such definition by R.C. 2307.71 as it did not act retrospectively to abrogate the common law claims and turn them into or replace them with statutory “products liability claims.” This was the precise analysis and holding of the Sixth District as noted in paragraph 45 of its opinion: “Because we have found that R.C. 2307.71 does not act retrospectively, we likewise conclude that R.C. 2305.10(A) does not retrospectively apply to bar appellants’ claims.”

Appellant ignores this point and analysis set forth in the appellate opinion, and instead argues for only the retrospective application of 2305.10 (again ignoring R.C. 2307.71's lack of retrospective abrogation, and barely mentioning this statute in its Memorandum). While it is acknowledged that the amendments to R.C. 2305.10 had an expressed intent to act retrospectively, such statute only applies to statutorily defined "products liability claims," and Appellees' common law causes of action are not included in such definition unless abrogated.

The *Groch* decision - in its portions that were relevant to this dispute – did nothing more than acknowledge the legislative intent that R.C. 2305.10 act retrospectively. As R.C. 2305.10 did not apply to Appellees' causes of action because R.C. 2307.71 did not act retrospectively to abrogate their common law causes of action, the *Groch* decision was and is irrelevant to the dispute between the parties in the present action.

Appellant tries to argue that the Sixth District got it all wrong and that such court's passing acknowledgement of the *Groch* decision (buried in footnote 2 of the court's opinion) was the basis for the decision. Although that court acknowledged the *Groch* decision in such footnote and pointed out certain distinctions (e.g., statute of repose versus statute of limitations), nothing in the footnote acted as a basis for the court's principal decision, highlighted above. Nonetheless, Appellant chooses to dwell on this passing footnote as a basis for review, and to mislead this court that the *Groch* decision was either ignored or contradicted – neither of which is accurate.

The Sixth District never needed to even address the distinctions between statutes of repose and statutes of limitations in passing in resolving this issue, and that such limited relevance is demonstrated by its passing mention in a footnote to the opinion. If the common law causes of action are not abrogated retrospectively, then the claims are not considered under

the definition of “product liability claims” and R.C. 2305.10 would never act to bar anything – statutes of repose or statutes of limitations.

Proposition of Law I: R.C. 2305.10 applies to all product liability claims filed after April 7, 2005.²

In addressing this issue, Appellant misinterprets the actual decision (and reasoning) of the Sixth District for both dramatic effect and to support its otherwise unsupportable argument. The appellate decision, as noted immediately above, specifically states: “Because we have found that R.C. 2307.71 does not act retroactively [(to abrogate Plaintiffs’ common law causes of action)], we likewise conclude that R.C. 2305.10(A) does not retroactively apply to bar appellants’ claims.” Para. 45 (emphasis added). Appellant’s Memorandum (on page 6) describes this decision to instead hold broadly and inaccurately that “R.C. 2305.10 is not retroactive because it found R.C. 2307.71 not retroactive.”

After improperly reading the holding broadly (and not just limited to real property damage common law claims that were not retroactively abrogated and that fall outside the limited statutory definition of “products liability claims”), Appellant then mysteriously uses two pages of its Memorandum trying to champion the retroactive application of R.C. 2305.10 generally. It is all meaningless because R.C. 2305.10 is obviously meant to be retroactive to all statutory “products liability claims,” but the actual issue involves the types of claims that fall under such definition and not the retroactive nature of the statute.

² As broadly written, Appellee does not disagree with this proposition of law – that being that R.C. 2305.10 acts retroactively to apply to all “products liability claims” (as such term is defined and limited in the statute) filed after April 7, 2005. “Products liability claims” is defined though, as noted by the appellate court in paragraph 20 of its opinion, to be limited to statutory product liability claims asserted under R.C. 2307.71-80, and does not include common law causes of action (which are all abrogated prospectively into the future).

As noted in Footnote 2 above, Appellee (and the Sixth District) does not disagree with Proposition of Law as broadly stated here – that being that R.C. 2305.10 acts retroactively to apply to all “products liability claims” as such term is defined and limited in the statute. The Proposition of Law is simply meaningless, though, to the real issue between the parties.

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

While this proposition of law was clearly the intent of the legislature as Ohio law moves forward, the tort reform statute left a short window of time in which common law claims that accrued prior to the effective date of the statutory changes would live on (and not be abrogated retroactively). This is clear by the absence of retroactive wording in R.C. 2307.71, which deals with abrogation of the common law claims.

Appellant again overstates the holding of the Sixth District and overdramatizes its effect. The court did not hold that common law claims will survive and thrive into the future, but that ones that accrued prior to the passage of the statutory changes would not be abrogated. This is a far cry from Appellants’ overstatements: “If R.C. 2305.10 does not govern all product claims, the General Assembly’s comprehensive reforms ... will be in vain,” and the “lasting and potentially disruptive effect ... is that it would introduce disunity into the uniform approach the General Assembly intended.”

Despite Appellants’ assertions, if the legislature intended to abrogate common law claims retroactively it could have attempted to do so by simply stating such retroactive intent explicitly in the statutory changes for R.C. 2307.71, as it did in R.C. 2305.10. Despite this obvious omission, Appellant pretends to speak for the legislature as to its implied intent to do that which it did not do explicitly, and that which the law of Ohio commands be done before expecting

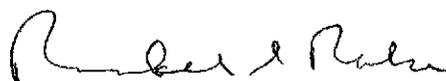
retroactive treatment – explicitly note such intent. *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 287-90.

Proposition of Law II will be the law for all losses and claims that accrue after the effective date of the tort reform statute, but is an overstatement as written – in that it wrongly implies the retroactive abrogation of common law claims. The appellate court properly disposed of this argument, and Appellant has again advanced nothing new to warrant further review by this Court.

CONCLUSION

The appeal sought is unjustified and is of limited interest to the legal community and the general public. Accordingly, Appellant's request should be denied.

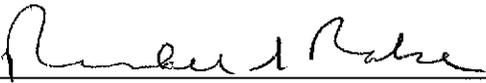
Respectfully submitted,



Randall S. Rabe (#0021287) (Counsel of Record)
Nelson Levine de Luca & Horst, LLC
280 North High Street, Suite 920
Columbus, Ohio 43215
rrabe@nldhlaw.com
Phone: (614) 228-1398
Fax: (614) 221-7529
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MEMORANDUM IN RESPONSE FILED BY APPELLEE IN OPPOSITION TO THE MEMORANDUM IN SUPPORT OF JURISDICTION** has been served by U.S. Mail, postage pre-paid, this 2nd day of June, 2008 upon all counsel of record.



Randall S. Rabe