

ORIGINAL

IN THE SUPREME COURT OF OHIO

FLAGSTAR BANK, FSB,

Plaintiff-Appellant

vs.

**AIRLINE UNION'S MORTGAGE
COMPANY, et al.,**

Defendants-Appellees

Consolidated Case Nos. **2010-0508,**
2010-0511

On Appeal from Hamilton County Court
of Appeals, First Appellate District

Court of Appeals
Case No. C 0900166

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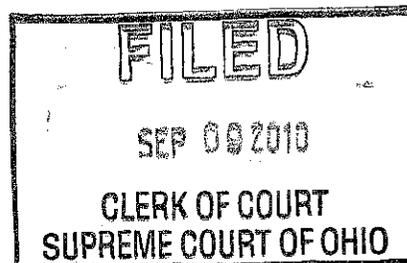


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I. STATEMENT OF THE CASE

A. COMBINED STATEMENT OF FACTS AND PROCEDURAL POSTURE.

The Appraisals And Loans

Appellee John Reinhold (“Appellee” or “Reinhold”) is a retired real estate appraiser. In 2001 and 2002, Reinhold was hired by Airline Union’s Mortgage Company (“AUM”) to perform appraisals for AUM in connection with several pieces of residential real estate. Three of those appraisals are the subject of this appeal. These are the appraisals Reinhold did of the properties located at 1861 State Road 44 West, Connersville, Indiana (on March 10, 2001 in connection with a loan AUM later made to Harold Vandivier), 2017 Woodlawn Avenue, Middletown, Ohio (on June 12, 2002 in connection with a loan AUM later made to Marion Broz), and 134 Cecil Street, Springfield, Ohio (on December 19, 2001 in connection with a loan AUM later made to James Whited).¹ These appraisals will hereinafter be referred to as “the Appraisals.”

Appellant Flagstar’s Purchase Of The Loans And Subsequent Defaults

On May 18, 2001, Appellant Flagstar Bank, FSB, (“Flagstar” or “Appellant”), a mortgage lender, purchased the State Road Loan from AUM. On July 29, 2002, Flagstar purchased the Woodlawn Avenue Loan from AUM. On January 24, 2003, Flagstar purchased the Cecil Street Loan from AUM.² Flagstar alleges that it relied on Reinhold’s Appraisals in connection with each of those purchases.³ However, Flagstar makes no allegation that it at any time hired or had a

¹ T.d. 54 and exhibits attached thereto, T.d. 55 and 56. These loans will hereinafter be referred to as the “State Road Loan,” the “Cecil Street Loan” and the “Woodlawn Avenue Loan.”

² T.d. 60 and exhibits attached thereto. Appellee accepted these allegations as true only for the purpose of the motion for summary judgment he had filed.

³ T.d. 2. Appellee accepted this allegation as true only for the purpose of the motion for summary judgment he had filed.

relationship with Reinhold in connection with those appraisals, properties or loans or that he had anything to do with or knowledge of these purchases by Flagstar.

Flagstar alleges that it sold both the Cecil Street Loan and Woodlawn Avenue Loan on the secondary market, and the borrowers on those loans subsequently defaulted. In connection with those loans, Flagstar also alleges that, after foreclosure sales on those properties were completed (September 3, 2004 for the Cecil Street Loan and March 19, 2005 for the Woodlawn Avenue Loan), the secondary lenders on both loans required Flagstar to pay the deficiency balances and expenses incurred in connection with the foreclosures.⁴

With respect to the State Road Loan, Flagstar alleges that the property securing that loan was destroyed as a result of a fire, and the insurance proceeds it received in connection with the fire left it with a deficiency balance and losses of over \$390,000.00.⁵

The Lawsuit

On April 28, 2008, Flagstar filed suit, and Reinhold and AUM are two of nine the Defendants named in Flagstar's Complaint. Flagstar brought claims of negligent representation and professional negligence against Reinhold based entirely on the Appraisals.⁶

On October 21, 2008, Reinhold filed a motion for summary judgment, asserting that Flagstar's claims against him are barred by the four-year statute of limitations found in R.C. §2305.09(D). On December 12, 2008, the Trial Court, relying on *Hater v. Gradison, Division of*

⁴ T.d. 2 and T.d. 60 and exhibits attached thereto. Appellee accepted these allegations as true only for the purpose of the motion for summary judgment he had filed.

⁵ Id. Appellee accepted these allegations as true only for the purpose of the motion for summary judgment he had filed.

⁶ T.d. 2.

*McDonald & Company Securities, Inc.*⁷ and *Investors REIT One v. Jacobs*,⁸ granted Reinhold's motion. Specifically, the Trial Court found that, for each of the Appraisals, Flagstar's cause of action for that Appraisal accrued on the date the appraisal was completed. The Trial Court also found that, because the lawsuit was filed more than four years after each of the Appraisals had been completed, all of Flagstar's claims against Reinhold were time barred.⁹

Flagstar dismissed without prejudice its claims against the other defendants in this lawsuit, and filed an appeal of the Trial Court's grant of summary judgment in favor of Reinhold. The Court of Appeals affirmed the judgment in favor of Reinhold.

II. ARGUMENT

A. **CERTIFIED CONFLICT QUESTION: UNDER R.C. §2305.09(D), DOES A CAUSE OF ACTION FOR PROFESSIONAL NEGLIGENCE ACCRUE ON THE DATE THE NEGLIGENT ACT IS COMMITTED, OR ON THE DATE THAT THE NEGLIGENT ACT CAUSES ACTUAL DAMAGES?**¹⁰

1. **A Claim For Professional Negligence Accrues Under R.C. §2305.09(d) On The Date The Alleged Negligent Act Was Committed, And The Claim Is Time-Barred If It Is Not Brought Within Four Years Of That Date.**

The Rationale For Statutes Of Limitation

This Court has explicitly set forth four reasons why statutes of limitation are important and necessary. They are: first, to insure fairness to the defendant; second, to insure the prompt prosecution of causes of action; third, to suppress stale and fraudulent claims; and fourth, to avoid

⁷ (1995), 101 Ohio App.3d 99, 655 N.E.2d 189, appeal denied, 72 Ohio St.3d 1539.

⁸ (1989), 46 Ohio St.3d 176, 546 N.E.2d 206.

⁹ T.d. 66.

¹⁰ Appellee respectfully submits that the question is inaccurate because its incorrect premise is that the alleged damages did not occur on the dates of the appraisals.

the inconvenience engendered by delay, including the difficulties of proof present in older cases.¹¹ Moreover, the United States Supreme Court has made clear that the enforcement of statutes of limitations is vital to the welfare of society, and they are favored in the law.¹²

**The “Discovery” Rule Is
The Exception To The General Rule.**

Under Ohio law, the general rule is that “a cause of action accrues and the statute of limitation begins to run at the time the [alleged] wrongful act was committed.”¹³ The “discovery” rule is an exception to the general rule.¹⁴ Further, only in the absence of an express statement by the legislature is it “. . . left to the judiciary to determine when a cause of action accrues.”¹⁵

. . . in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of the evenhanded administration of the law.¹⁶

R.C. §2305.09

Professional negligence claims are governed by the four-year statute of limitations set forth in Section D of R.C. §2305.09. That section of the statute provides:

An action for any of the following causes shall be brought within four (4) years after the cause thereof accrued:

* * * * *

(D) for an injury for the right of the plaintiff not arising on contract nor enumerated in Section 1304.35, 2305.10, 2305.12 and 2305.14 of the Revised Code, . . .

¹¹ *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶ 42, quoting *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 10.

¹² *Wood v. Carpenter* (1879), 101 U.S. 135, 25 L.Ed. 807.

¹³ *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 692 N.E.2d 581.

¹⁴ *Id.*

¹⁵ *O’Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 447 N.E.2d 727.

¹⁶ *Mohasco Corp. v. Silver* (1980), 447 U.S. 807, 826, 100 S.Ct. 2486.

Moreover, when it enacted R.C. §2305.09(D), the Ohio legislature made clear that the claims governed by R.C. §2305.09(D) were subject to the general statute of limitations rule because in the statute itself the legislature explicitly identified the few claims covered by the statute that *are* governed by the “discovery” rule.

If the action is for trespassing underground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.¹⁷

REIT One

In 1989, this Court in *REIT One* explicitly addressed and rejected the argument that the “discovery” rule applies to claims of professional negligence covered by R.C. §2305.09.¹⁸ In so ruling, this Court stated that “[t]he legislature’s express inclusion of a discovery rule for certain torts arising under R.C. §2305.09 . . . implies the exclusion of other torts arising under the statute, including negligence.”¹⁹ This Court also made clear that it could not “interpret R.C. §2305.09 to include a discovery rule for professional negligence claims against [professionals] arising under R.C. §2305.09 absent legislative action on the matter.”²⁰ Two years later in *Grant Thornton*,²¹ this Court reaffirmed its holdings in *REIT One*.

Of significance here and completely ignored by Appellant is that, when the Court issued its

¹⁷ R.C. §2305.09. “The statute provides a specific exception that the statutory period does not commence until discovery of the injury if the action is for fraud, trespass or taking of personal property. Negligent misrepresentation is not among the enumerated actions to which the discovery exception applies.” *Chandler v. Schriml* (May 25, 2000), Tenth Dist. No. 99AP-1006, 2000 W.L. 675123, *4.

¹⁸ *Investors REIT One* (1989), 46 Ohio St.3d 176, 181, 546 N.E.2d 206.

¹⁹ *Id.*, at 46 Ohio St.3d 182.

²⁰ *Id.*

²¹ *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220, cert. denied (1991), 502 U.S. 822.

decision in *REIT One*, it was very much aware of the same constitutional arguments Appellant makes in this case. Indeed, the dissent in *REIT One* expressly informed the majority of its belief that the majority's holding violated the "open courts" or "right to remedy" provisions of Section 16, Article I of the Ohio Constitution.²² Fully recognizing this argument, the majority chose not to accept it.

***Hater And Other Progeny Of
REIT One***

Hater

In *Hater v. Gradison, supra*, the plaintiff brought claims of negligence against the defendants, who were appraisers, and alleged that the defendants had in a negligent manner performed the appraisals that were the subject of the claims. Like Flagstar in this case, the plaintiff in *Hater* did not bring his claims until more than four years after the last of the appraisals had been performed. The lower court dismissed the claims as time barred, and the Court of Appeals, relying on *REIT One*, affirmed:

Whether the foreclosure in this case constituted injury, however, triggering the running of the statute of limitations is a legal, not a factual issue. Thus, we hold that the trial court did not improperly resolve factual disputes in granting the Defendant-Appellee's summary judgment . . . **[I]t is not the date of the injury but the date that the allegedly negligent act was committed that triggers the running of the statute of limitations in the types of negligent claims with which we are here concerned.**²³

The Court of Appeals in *Hater* also held that appraisers are one of the types of professionals covered by RC §2305.09. ("[W]e believe that the logic of *REIT One* can reasonably be extended to the claims of professional negligence filed against the broker, dealers *and appraisers in this case.*"²⁴)

²² *Investors REIT One*, 46 Ohio St.3d 176, 183-184.

²³ *Id.*, at 101 Ohio App.3d 108, emphasis added.

²⁴ *Id.*, at 110, emphasis added.

Further, the Court of Appeals held that the “discovery” rule does not apply to professional negligence claims against appraisers.

By holding that the statute of limitations began to run ‘when the allegedly negligent act was committed,’ the court in *REIT One*, in our view, meant exactly that: the date upon which the tortfeasor committed the tort, in other words, when the act or omission constituting the alleged professional malpractice occurred.²⁵

Finally, the Court of Appeals held that the “delayed damages” argument that Flagstar attempts to resurrect in this case is nothing more than the “discovery” rule argument “in a different analytical guise.”²⁶

Regardless of its validity or support in the common law of torts, the delayed-damage theory cannot . . . be used to circumvent the clear holding of *REIT One* by resurrecting the discovery rule in a different analytical guise.²⁷

Chandler

In *Chandler v. Schriml*,²⁸ the plaintiff alleged that, in connection with his purchase of a home, he relied on his real estate agent’s inaccurate advice with respect to the zoning of that property. The plaintiff also alleged that he did not discover that the real estate agent’s advice was inaccurate until more than four years after the purchase, and, for that reason, claimed that his cause of action did not accrue until the date he made that discovery. The Tenth Appellate District, citing *REIT One* and *Hater*, held that the plaintiff’s claim was barred by the statute of limitations, and found that, even if the “delayed damages” theory is not a repackaged “discovery” rule argument, that argument was not persuasive because the plaintiff in *Chandler*, like Flagstar and the plaintiffs in

²⁵ *Id.*, at 110.

²⁶ *Id.*, at 110-111.

²⁷ *Id.*

²⁸ *Chandler v. Schriml* (May 25, 2000), Tenth Dist. No. 99AP-1006, 2000 W.L. 675123.

REIT One and *Hater*, suffered “immediate economic damages” when the alleged misrepresentations were made. (“... [W]e find that the distinction between the ‘delayed damage’ theory and the ‘discovery’ rule is irrelevant because *Chandler* did not suffer ‘delayed damages.’”²⁹)

Bell And Accelerated Systems Integrated, Inc.

In *Bell v. Holden Surveying, Inc.*,³⁰ the plaintiff brought a claim against a surveyor more than four years after the defendant had performed the survey at issue in the lawsuit. The plaintiff, relying on the “discovery” rule and “delayed damages” theory, argued that his claim was not barred by the four-year statute of limitations. The trial court granted summary judgment holding that the claims were time barred. The Seventh Appellate District Court of Appeals, relying on *REIT One* and *Hater*, affirmed the trial court’s grant of summary judgment in favor of the surveyor, and rejected the plaintiff’s reliance on the “discovery” rule and “delayed damage” theory.

More recently, in *Accelerated Systems Integrated, Inc. v. Hausser & Taylor*,³¹ the Eighth District Court of Appeals rejected yet another attempt by a plaintiff to carve a “delayed damages” exception to the four-year statute of limitations for professional negligence claims covered by R.C. §2305.09. Further, this Court denied review of the decision in *Accelerated Systems Integrated, Inc.*, finding that no conflict existed between the appellate courts with respect to this issue.³²

**Flagstar’s Alleged Injuries Occurred On The
Dates Of The Alleged Negligent Acts.**

In this case, Flagstar asserts that it did not suffer any damages until it discovered that there

²⁹ *Id.*, at * 3.

³⁰ (Sept. 29, 2002), Seventh Dist. No. 01 AP 0766, 2002-Ohio-5018.

³¹ (May 3, 2007), Eighth Dist. No. 88207, 2007-Ohio-2113, appeal denied, 114 Ohio St.3d 1502.

³² *Id.*

was insufficient collateral for the properties appraised by Reinhold, and, for that reason, the statute of limitations on its claims against Reinhold did not begin to run until those discoveries. Flagstar is wrong.

When Flagstar purchased the loans relying on Reinhold's allegedly negligent appraisals, it received less collateral for the properties than it believed it had received. As such, Flagstar, like the plaintiff in *Chandler* ("Chandler suffered damages at the time he purchased his home and his cause of action arose at the time of . . . the allegedly negligent acts. . ." ³³) and *James v. Partin* (" . . . the alleged injury [caused by a surveyor's negligence] occurred when the surveys were concluded . . ." ³⁴), suffered its damages, if any, on the dates Reinhold performed his appraisals. In short, when Flagstar purchased the loans relying on Reinhold's allegedly negligent Appraisals, it received less collateral than it believed it was receiving in connection with the Appraisals. Thus, Flagstar's damages, if any, were suffered on the dates of the Appraisals, and the underlying premise of its argument, that it did not suffer any damages until it discovered the allegedly negligent act, is not supported by the facts nor by the law.

R.C. §2305.09(D) Is To Be Enforced As Written.

This Court has clearly and unequivocally long held that the statutes enacted by the Ohio legislature must be enforced as written. First, this Court has repeatedly admonished lower courts to enforce statutes "as written" and not "recast the language" to "accommodate some unstated meaning

³³ *Chandler* at *4. ("The fact that Chandler did not realize his injury until a date much later does not change the fact that the financial injury occurred at the closing." *Id.*)

³⁴ (May 22, 2002), 12th Dist. No. CA2001-11-086, 2002 Ohio 2602, ¶14. Also see, *Schnippel Const. Co. v. Proffit* (Nov. 9, 2009), 3d Dist. No. 17-09-12, 2009 Ohio 5909, ¶25.

or purpose.”³⁵

Second, this Court has held that it may not circumvent the intent of the Ohio legislature and include a provision which the court or party may believe the Ohio legislature left out: “Had the General Assembly intended to include such a provision, it could have done so.”³⁶ Indeed, courts are prohibited from “read[ing] into a statute language that the General Assembly has decided not to specifically include,”³⁷ and “it is the duty of the court to give effect to the words used and not insert words not used.”³⁸

Third, this Court has “long recognized the principle of *expressio unius est exclusio alterius* - the expression of one thing implies the exclusion of another.”³⁹ This principle is well-settled in Ohio law, and it prevents a court from reading into a statute “an additional statutory exclusion not expressly incorporated into [the] statute by the legislature.”⁴⁰ Indeed, when the General Assembly limits a statute to a specific situation, this principle applies, and it provides strong support for the assertion “that it was not the legislature’s intention to apply the rule established by the statute to another set of circumstances.”⁴¹

Finally, in *REIT One*, this Court implicitly followed the principle of *expressio unius exclusio alterius* when it rejected the invitation to expand the list of torts covered by R.C. §2305.09 and the

³⁵ *Weaver v. Edwin Shaw Hospital* (2004), 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079; *State of Ohio v. Hairston* (2004), 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471; *Hubbard v. Canton* (2002), 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 20.

³⁶ *Hubbard*, at ¶¶ 13-14.

³⁷ *Weaver*, at ¶¶ 12-17.

³⁸ *In Re Estate Hogel* (1996), 76 Ohio St.3d 476, 668 N.E.2d 474.

³⁹ *State ex rel. Richard v. Bd. of Trustees of the Police & Firemen’s Disability & Pension Fund* (1994), 69 Ohio St.3d 409, 412, 632 N.E.2d 1292.

⁴⁰ *Maggiore v. Kovach* (2004), 101 Ohio St.3d 184, 187, 2004-Ohio-722, 803 N.E.2d 790.

⁴¹ *REIT One* at 46 Ohio St.3d 181, citing *Kirsheman v. Paulin* (1951), 155 Ohio St. 137, 146, 98 N.E.2d 26, 31.

“discovery” rule to include torts that the Ohio legislature had not expressly identified in the statute as being covered by that rule. (“The legislature’s express inclusion of a discovery rule for certain torts arising under R.C. §2305.09 . . . implies the exclusion of other torts arising under the statute, including negligence.”)⁴²

Reinhold respectfully submits that, applying these principles of law and *REIT One*, this Court should reject Flagstar’s position that the “discovery” and/or “delayed damages” rules apply to negligence claims covered by R.C. §2305.09, including negligence claims brought against real estate appraisers such as Reinhold.

**Flagstar Urges The Court To Overturn *REIT One*
And Completely Ignore The Applicability
Of The Doctrine Of *Stare Decisis* To This Case.**

As discussed above, in *REIT One* the Court explicitly held that the statute of limitations for claims of professional negligence governed by R.C. §2305.09 begins to run when the alleged professional negligence occurred, not when it is discovered. Despite this binding precedent, Flagstar invites the Court to, in essence, overturn *REIT One* and *Grant Thornton* and ignore the applicability of the doctrine of *stare decisis* to this case.

In *Westfield Insurance Company v. Galatis*,⁴³ the Court set forth the three-pronged *stare decisis* test to be used when it is analyzing whether it should overturn a decision.⁴⁴ Flagstar has not established even one prong, let alone all three prongs, of this test in connection with its request that this Court overrule, either directly or in effect, *REIT One* and *Grant Thornton*.

⁴² *Id.*
⁴³ (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.
⁴⁴ *Id.*, ¶ 1 of Syllabus. Also see, *Bouler v. Aramak Services, Inc.* (Apr. 3, 2009), First District No. C-080535, 2009-Ohio-1597, ¶ 24.

First, Flagstar has not established that the decisions by this Court in *REIT One* and *Grant Thornton* and the Court of Appeals in *Hater* were wrongly decided. In fact, the clear and logical reasoning used by the courts in those cases establishes that they were correctly decided. Moreover, precisely the same circumstances that existed when those cases were decided exist in this case.

Second, Flagstar cannot seriously argue that the decisions defy practical workability because they have, in fact, worked in the years subsequent to the decisions having been rendered. Indeed, Flagstar's argument is not that the holdings in *REIT One*, *Grant Thornton* and *Hater* are practically unworkable. Rather, Flagstar argues that the cases should be ignored solely because they require the dismissal of its claims. However, a party's failure to bring a claim in a timely manner does not make a statute of limitations practically unworkable.

Third, if *REIT One*, *Grant Thornton* and *Hater* are overruled, an undue hardship will be placed on those who have relied on the four-year statute of limitations clearly set forth in R.C. §2305.09(D) and the inapplicability of the "discovery" rule set forth in those decisions. Since *REIT One* was decided, professionals⁴⁵ and their insurers have made many decisions, including in connection with the type of insurance coverage they purchased, that were in part based on their reliance that claims made against them had to be brought within four years of the date their alleged negligence was committed. It would be unreasonable and unfair to these professionals to abandon the precedent set in *REIT One*, *Grant Thornton* and *Hater* because doing so will open the doors to stale claims against those professionals who materially and reasonably relied on those cases.

Fourth, Flagstar cannot seriously argue that, in connection with the appraisals performed by

⁴⁵ These include accountants, surveyors, real estate agents and appraisers. *REIT One*, supra; *Bell*, supra; *Chandler*, supra and *Hater*, supra.

Reinhold, the application of the holdings in these cases is unfair. Flagstar did not retain Reinhold to perform those appraisals, and, indeed, had absolutely no relationship with him. Further, when Flagstar purchased the subject mortgages from AUM in 2001 and 2002, *REIT One* was already over 10 years old and *Hater* was already 6 years old. As such, Flagstar was fully aware of the four-year statute of limitations on claims against the individuals who had performed the appraisals for AUM on the properties securing those mortgages. With this knowledge and in connection with its due diligence, Flagstar could have had its own appraisals of the properties done, but it chose not to do so. Finally, Flagstar is not left without a remedy. Indeed, Flagstar may pursue claims against both AUM and the individuals who agreed to pay the mortgage loans. Under these circumstances, Flagstar's cry of unreasonableness and unfairness rings hollow.

2. The Application Of The Four-Year Statute Of Limitations Under R.C. §2305.09 That Commences On The Date Of The Negligent Act Is Not Unconstitutional.

Flagstar also argues that, if R.C. §2305.09 cannot be interpreted to mean that the "discovery" rule is to be applied in connection with negligence claims against real estate appraisers, R.C. §2305.09 violates the Open Court or right-to-a-remedy clauses (Section 16, Article I) of the Ohio State Constitution. This argument is also without merit.

Sedar And Brennaman

In *Sedar v. Knowlton Construction Co.*,⁴⁶ the plaintiff, who was severely injured as a result of his hand passing through a glass panel of a door that had been designed more than 10 years earlier, brought suit based on that incident. The defendants moved for summary judgment, asserting that the plaintiff's claims were barred by the 10-year statute of repose under R.C. §2305.131. In

⁴⁶ (1990), 49 Ohio St.3d 193, 551 N.E.2d 930.

response, the plaintiff argued that the “discovery” rule should apply to his claims because his claims were analogous to medical malpractice and construction claims, or, in the alternative, that the application of the 10-year statute of repose to his claims violated his due process or right-to-remedy rights under Section 16, Article I of the Ohio Constitution. The trial court rejected both arguments, and the appellate court and this Court upheld the grant of summary judgment in favor of the defendants.⁴⁷

Just four years after issuing its decision in *Sedar*, the Supreme Court agreed to again consider the argument that the 10-year statute of repose under R.C. §2305.131 was unconstitutional.⁴⁸ In *Brennaman*, this Court overruled *Sedar*, and held that R.C. §2305.131 violated the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution.⁴⁹ Unfortunately for Flagstar, in 2008 this Court in *Groch v. General Motors Corp.*⁵⁰ eviscerated *Brennaman*, finding the analysis used in that case to be “unreasoned” and limiting its holding to the facts of that case and former R.C. §2305.131.

Groch

In *Groch*, the plaintiff was an employee of General Motors Corporation (“GMC”), and his duties included operating a trim press that had been manufactured by Kard Corporation (“Kard”) and Racine Federated, Inc. (“Racine”). The plaintiff was injured while he operated the trim press, and he and his wife brought suit against GMC, Kard and Racine in the United States District Court for the Northern District of Ohio. Because the trim press had been manufactured more than 20 years prior to Mr. Groch’s injury, Kard and Racine asserted that they were immune from liability based

⁴⁷ *Id.*, at 198.

⁴⁸ *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425.

⁴⁹ *Id.*, Syllabus 2.

⁵⁰ (2008), 117 Ohio St.3d 192, 883 N.E.2d 377, 2008-Ohio-546.

on the statute of repose for products liability claims under R.C. §2305.10, which had become effective in April, 2005. The U.S. District Court recognized that the Ohio Supreme Court had not yet had the opportunity to issue a decision on the constitutionality of R.C. §2305.10, and certified 9 questions to the Ohio Supreme Court. At least two of those questions directly placed in issue the analysis used by the Supreme Court in *Brennaman* relating to the constitutionality of the statute of repose under R.C. §2305.131.⁵¹

In connection with those questions, this Court carefully considered *Sedar* and *Brennman*, and decided to adopt the analysis it had used in *Sedar*. While the Court did not expressly overrule *Brennaman*, its comments make clear that, except in connection with claims governed by former R.C. §2305.131, *Brennaman* has no precedential significance. (“We find that the fundamental weaknesses of *Brennaman* limit its value. For that reason, we do not overrule *Brennaman*, we simply decline to follow its unreasoned rule in contexts it is not controlling . . . We confine *Brennaman* to its particular holding that former R.C. §2305.131 . . . was unconstitutional. It is entitled to nothing more.”⁵²) Indeed, this Court held that it was “specifically adopt[ing] *Sedar*’s rationale here, [and found] that its holding is based on proper construction of the requirements of Section 16, Article I.”⁵³

Relying on *Sedar*, this Court set forth the following as the appropriate analysis of a plaintiff’s argument that the barring of his claim on the basis of the applicable statute of limitations violates his rights under Section 16, Article I of the Ohio Constitution. First, all statutes have a strong presumption of constitutionality, and, for a plaintiff to meet the difficult burden of establishing that

⁵¹ *Id.*, at ¶ 147.

⁵² *Id.*, at ¶ 146.

⁵³ *Id.*, at ¶ 148.

a statute is unconstitutional, he must establish “beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.”⁵⁴

Second, a statute is valid “[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and [2] if it is not unreasonable or arbitrary.”⁵⁵

Third, a party raising a facial challenge to a statute must demonstrate that there is no set of circumstances in which the statute would be valid.⁵⁶

Fourth, a party raising an “as applied” challenge must show that the application of the statute is not related to the health, safety or welfare of the state, and, in analyzing the statute, it is not a court’s role to establish legislative policies or second-guess the General Assembly’s choices.⁵⁷

Pratte v. Stewart

In 2010, this Court in *Pratte v. Stewart*⁵⁸ considered a challenge to R.C. §2305.111(C)’s twelve year statute of limitations for claims of child sexual abuse, a statute that, like R.C. 2305.09, contains a fraud exception to the accrual of the cause of action. Specifically, the plaintiff in *Pratte* argued that she had been deprived of her right-to-a-remedy because her repressed memory precluded her from discovering that she had been abused until after the twelve year statute of limitations had expired. In rejecting Pratte’s argument, this Court held that “. . . if Pratte’s view prevailed, any statute of limitations that does not afford explicit discovery tolling provisions would violate the right-to-a-remedy provision, irrespective of whether it applied retroactively or prospectively.”⁵⁹

⁵⁴ *Groch*, at ¶ 25; *Sedar*, supra, 49 Ohio St.3d 199.

⁵⁵ *Sedar*, at 49 Ohio St.3d 199.

⁵⁶ *Groch*, at ¶ 26.

⁵⁷ *Groch*, ¶ 172-174.

⁵⁸ 125 Ohio St.3d 473, 2010-Ohio-1860.

⁵⁹ *Id.*, at ¶ 42.

Further, this Court, recognizing that R.C. §2305.111(C) contained a fraudulent concealment exception, found that the legislature could have included, but did not include, a tolling provision covering all scenarios encompassed by the “discovery” rule, and, for that reason, it was not permitted to ignore the legislature’s decision in this regard.⁶⁰

**There Has Been No Due Process
Violation.**

A legislative enactment is valid on due process grounds if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.⁶¹ Moreover, this Court has made clear that, when a court is faced with the task of determining whether a statute violates a party’s due process rights, the court must use a rational-basis review and grant “substantial deference to the predictive judgment of the General Assembly.”⁶² In other words, a court does “not sit in judgment of the wisdom of legislative enactments [because it] has nothing to do with the policy or wisdom of a statute.”⁶³ Finally, as this Court made clear in *Sedar*, the legislature’s determination of a reasonable length of time a plaintiff has to bring a cause of action is obviously related to the general welfare “[b]ecause extended liability engenders faded memories, lost evidence, the disappearance of witnesses, and the increased likelihood of intervening negligence.”⁶⁴

When it enacted R.C. §2305.09, the legislature decided that a claim of professional negligence against an appraiser must be brought within four years of the date of the subject appraisal. That decision does not violate the due process protections provided under the Ohio and United

⁶⁰ *Id.*, at ¶ 49.

⁶¹ *Sedar*, at 49 Ohio St.3d 199, citations omitted; *Groch*, at ¶ 172.

⁶² *Id.*

⁶³ *Sedar*, at 49 Ohio St.3d 201.

⁶⁴ *Id.*, at 200.

States Constitutions because it is neither unreasonable nor arbitrary. Indeed, requiring that suit be brought against an appraiser within four years of the date of the appraisal provides a party with a reasonable amount of time to bring his claim, and, at the same time, it significantly limits the problems and dangers caused by stale litigation.

The facts of this lawsuit illustrate the legislature's reasonableness in enacting R.C. §2305.09. This lawsuit was not commenced until 6 or 7 years after Reinhold performed his appraisals. Absent the four-year statute of limitations, Reinhold would be faced with the task of attempting to reconstruct what he did 6 or 7 years earlier to arrive at his appraisal figures. Forcing Reinhold to do so would be grossly unfair to him for several reasons: it is likely that much of the supporting documentation no longer exists; neighborhoods and housing near the appraisal properties have changed; there has been a dramatic drop in the past few years in the value of residential property; and one of the properties has been destroyed by fire.

Most residential, real estate mortgages last between 15 to 30 years. As such, if Flagstar's position (i.e. the statute of limitations does not begin to run until after a foreclosure has occurred) is accepted, a claim of professional negligence could in some cases be brought against an appraiser well more than 30 years after he performed an appraisal. It is hardly unreasonable or arbitrary for the legislature to have decided that those professionals covered by R.C. §2305.09 should not be exposed to the possibility that claims of negligence could be brought for that many years after the alleged negligence occurred.

**There Has Been No Violation
Of The Right To A Remedy.**

Flagstar's right to a remedy as guaranteed by Section 16, Article I of the Ohio Constitution has not been violated by the Trial Court's correct application of the four-year statute of limitations

set forth in R.C. §2305.09(D) to Flagstar's claims against Reinhold. First, that section of the Constitution "applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available."⁶⁵ Moreover, Ohio law is clear that causes of action as they existed at common law are not immune from legislative attention.⁶⁶ Here, the Ohio legislature properly exercised its power to recognize claims of negligence against real estate appraisers, and, at the same time, require that those claims be brought within four years of the date the appraiser performed his services. As such, no cause of action has been taken from Flagstar. Flagstar itself destroyed its claim when it did not bring it in a timely manner.

Second, if Flagstar's argument is accepted, any statute of limitations, even one that contains explicit tolling provisions, would violate the right-to-remedy provision if it did not permit the claimant to argue that the statute of limitations was tolled because of the application of the discovery rule.⁶⁷

Third, the fact that Flagstar's claims against Reinhold are time-barred does not mean it has been deprived of a remedy. Indeed, as the Court held in *Groch*, "in many situations, an injured party may be able to seek recovery against other parties,"⁶⁸ and "a plaintiff's right to a remedy is not necessarily extinguished when a particular statute of limitations might apply to foreclose suits by that plaintiff against certain defendants."⁶⁹ Here, Flagstar has claims against and may obtain remedies from AUM and the individuals who agreed to pay the mortgage loans. In fact, it brought claims against AUM in this lawsuit. As such, the application of the four-year statute of limitations to

⁶⁵ *Groch*, at ¶ 119; *Sedar*, at 49 Ohio St.3d 202.

⁶⁶ *Sedar*, at 49 Ohio St.3d 202, quoting *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 49, 512 N.E.2d 626.

⁶⁷ *Pratte*, at ¶ 42.

⁶⁸ *Groch*, at ¶¶ 151-152.

⁶⁹ *Id.*

Flagstar's claims against Reinhold does not deprive Flagstar of a remedy because it has claims and potential remedies against AUM and those individuals.

III. CONCLUSION

For the reasons stated above, this Court should affirm the Court of Appeals' judgment in favor of Appellee John Reinhold.

Respectfully submitted,

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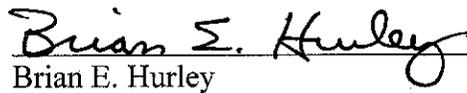
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following, via regular U.S. mail, this 9th day of September, 2010.

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