

**IN THE SUPREME COURT OF OHIO**

OAKTREE CONDOMINIUM  
ASSOCIATION, INC.

Plaintiff-Appellant

-vs-

THE HALLMARK BUILDING  
COMPANY, *et al.*

Defendants-Appellees

**CASE NO. 2012-1722**

On Appeal from the Eleventh District Court  
of Appeals, Lake County

Court of Appeals Case No. 2012-L-011

---

**DEFENDANT-APPELLEE'S MEMORANDUM IN RESPONSE TO  
PLAINTIFF-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

---

STEVEN M. OTT (0003908)  
AMANDA L. AQUINO (0084902)  
**OTT & ASSOCIATES CO., LPA**  
55 Public Square, Suite 1400  
Cleveland, Ohio 44113-1901  
(216) 771-2600/Fax: (216) 830-8939  
email: [Steven.Ott@OttEsq.com](mailto:Steven.Ott@OttEsq.com)  
[AAquino@OttEsq.com](mailto:AAquino@OttEsq.com)  
*Attorneys for Plaintiff-Appellant*

PATRICK F. ROCHE (0025959)  
BEVERLY A. ADAMS (0074958)  
**DAVIS & YOUNG**  
1200 Fifth Third Center  
600 Superior Ave., E  
Cleveland, Ohio 44114  
(216) 348-1700/ Fax: (216) 621-0602  
email: [proche@davisyoung.com](mailto:proche@davisyoung.com)  
[badams@davisyoung.com](mailto:badams@davisyoung.com)  
*Attorneys for Defendant-Appellee*

**RECEIVED**  
NOV 13 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
NOV 13 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

## INTRODUCTION

This appeal arises from the appellate court's holding that R.C. 2305.131, Ohio's construction statute of repose, is constitutional when retroactively applied to Plaintiff-Appellant Oaktree Condominium Association, Inc.'s ("Appellant") claims. Appellant asserts that the appellate court erred in finding that the retroactive application of R.C. 2305.131 is constitutional as applied to its claims and that Appellant should have been given four years, the statute of limitations period for construction claims, in which to bring its cause of action against Defendant-Appellee, The Hallmark Building Company ("Hallmark").

Appellant's assertion is without merit. Nothing in the instant case merits review by this Court. Rather, in holding that the retroactive application of R.C. 2305.131 is constitutional as applied to Appellant's claims, the court of appeals simply followed and applied the criteria previously established by this Court in *Groch et al. v. General Motors, Corp.*, 117 Ohio St.3d 192 (2008), which concerned the retroactive application of R.C. 2305.10, a product liability statute of repose, with the same pertinent language as R.C. 2305.131. The court of appeals found that under the criteria set forth in *Groch*, R.C. 2305.131 was constitutional when retroactively applied to Appellant's claims. The court of appeals further reviewed the limited holding of this Court in *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460 (1994), which concerned the former construction statute of repose that was since repealed, and found that Appellant was only entitled to a "reasonable" time to file its cause of action. The court of appeals found that even under *Brennaman*, the retroactive application was not unconstitutional as applied to Appellant's claims because it did not file its cause of action within a "reasonable" time.

As demonstrated below, the issue presented by Appellant does not qualify as an issue of public or great general interest. The issue is limited to Appellant's claim and the facts of this

case, and, therefore, does not warrant this Court's discretionary review. Accordingly, this Court should decline to entertain the instant appeal.

### **STATEMENT OF CASE AND FACTS**

Hallmark constructed seven condominium units. The condominium units were completed, and Certificates of Occupancy were issued for all seven units on October 9, 1990. There were no complaints or allegations of defective construction made to Hallmark until the fall of 2003—13 years after the Certificates of Occupancy were issued. On December 16, 2005, more than 15 years after the occupancy permits were issued, Appellant filed its initial Complaint against Hallmark asserting claims for, *inter alia*, failure to perform in a workmanlike manner, negligence, *etc.*, due to alleged construction defects in the construction of the condominium units. Appellant voluntarily dismissed its action on August 30, 2006.

On August 30, 2007, Appellant refiled its claims against Hallmark. Hallmark moved the trial court for summary judgment on the basis that Ohio's statute of repose, R.C. 2305.131, barred Appellant's claims against it. Appellant filed a brief in opposition thereto asserting that R.C. 2305.131 was inapplicable because the foundation and footers of Appellant's property did not constitute "improvements" to real property. The trial court denied Hallmark's motion for summary judgment.

The case proceeded to a jury trial. At trial, the evidence revealed that on October 27, 2003, 1 ½ years, or 18 months, prior to the effective date of R.C. 2305.131, Appellant learned from its engineering expert, who was also an attorney, that there were potential construction issues with the foundations and footers of the condominiums. At that time, Appellant's expert also advised Appellant that it "had a strong lawsuit," that Appellant was on notice of the defect, and that the time for filing suit "starts running." Appellant also called the owner of Hallmark and

told him of the potential defect but refused to allow Hallmark to look at the alleged construction issue. Nonetheless, in 2003 and 2004, Appellant excavated and exposed the foundation and footers and dumped concrete over them without ever giving any notice to Hallmark of any of the excavations or alleged repair work. In addition, Appellant's expert testified that he intentionally destroyed his field notes from the excavations in anticipation of litigation. Further, the evidence established that, as built, the depth of the foundation and footers complied with the municipal building code. However, Appellant and/or the individual owners never maintained the grading at the foundations, did not properly control water runoff from down spouts, *etc.*, over the 13 years prior to their discovery of any alleged foundation issues. Hallmark moved for a directed verdict that R.C. 2305.131 barred Appellant's claims, which was denied. The jury returned a verdict in Appellant's favor.

Hallmark filed an appeal on the basis that the initial installation of foundations and footers were improvements to real property and that R.C. 2305.131 was applicable barring Appellant's claims. The court of appeals issued its opinion on December 28, 2010, holding that the initial construction of foundations and footers were improvements to real property for purposes of R.C. 2305.131, and reversing and remanding the matter to the trial court to determine whether R.C. 2305.131 was constitutional as applied to Appellant's claims.

Hallmark and Appellant briefed the issue of whether the retroactive application of R.C. 2305.131 was constitutional as applied to Appellant's claims. The evidence in Hallmark's Motion for Summary Judgment established that not only was Appellant advised by its expert of the potential defect and a "strong" lawsuit in October 2003, Appellant also retained litigation counsel at that time, 1 ½ years, or 18 months, prior to the effective date of R.C. 2305.131. On December 30, 2011, the trial court issued an order granting Hallmark's Motion for Summary

Judgment holding that the retroactive application of Ohio's statute of repose, R.C. 2305.131 was, *inter alia*, constitutional as applied to the facts of this case, thus, barring Appellant's claims. The trial court held that Appellant had ample time to bring its claims against Hallmark prior to the enactment of R.C. 2305.131 and that Appellant was not denied the right to come to the courthouse by the retroactive application of R.C. 2305.131.

On January 27, 2012, Appellant filed an appeal claiming that the trial court erred in holding that the retroaction application of R.C. 2305.131 is constitutional as applied to the facts of Appellant's case. On August 27, 2012, the court of appeals issued its opinion holding in pertinent part:

The subject multi-unit condominium project was completed in 1990. A crack in the garage wall shared by two units was noticed in September 2003. At an October 27, 2003 condominium association meeting, Daniel Marinucci, *a structural engineering expert*, presented *his opinion that the footers for these two units were of an insufficient depth*, in violation of the building code requirement. The minutes of that meeting, dated October 31, 2003, noted that Mr. Marinucci advised that the "next step" was to investigate the other units. *Further, and importantly, the minutes reflect that Mr. Marinucci cautioned the owners that they were now on notice of a latent defect and that the "time [for filing suit] starts running" from the date the work on the garage wall started. . . .*

\* \* \*

*. . . [P]ursuant to both Brennaman [v. R.M.I. Co., 70 Ohio St. 3d 460, 467 (1994)] and Groch, Oaktree failed to file its action within a reasonable time, or two years, from the date it was placed on notice of the likely cause of its injury. We can find nothing in the record before us that would militate against applying a two-year time period as a measure of reasonableness in this case, that is, two years from the date of the October 27, 2003 meeting with the expert. After this meeting the owners had sufficient information upon which to believe they had good grounds to institute a lawsuit against the builder.*

(Emphasis added).<sup>1</sup> Accordingly, the appellate court held that the retroactive application of R.C. 2305.131 is constitutional as applied to Appellant's claims because, whether analyzed under

---

<sup>1</sup> *Oaktree Condo. Ass'n v. Hallmark Bldg. Co.*, 2012 Ohio 3891 (Lake County, Aug. 27, 2012), at P59, P65.

the criteria in *Brennaman* or *Groch*, Appellant failed to file its action either within a reasonable time or within two years from the date that it had sufficient information upon which to believe there were grounds to initiate a lawsuit.<sup>2</sup> Appellant filed the instant appeal.

### **THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

The Court should decline review because the court of appeals followed and applied the criteria previously delineated by this Court relating to the retroactive application of a similar statute of repose and found that R.C. 2305.131 is constitutional when retroactively applied to Appellant's claims. Accordingly, the issue presented by Appellant is limited to its claim and does not qualify as an issue of public or great general interest and, therefore, does not warrant this Court's discretionary review. Thus, a review of the same should be declined.

### **LAW AND ARGUMENT**

#### **Argument Against Propositions of Law I: The retroactive application of R.C. 2305.131, Ohio's construction statute of repose, is constitutional as applied to Appellant's claims.**

Appellant's proposition of law has no merit. Appellant contends that the retroactive application of R.C. 2305.131 is unconstitutional as applied to its claims. To the contrary, the court of appeals simply followed and applied this Court's criteria delineated in *Groch et al. v. General Motors, Corp.*, 117 Ohio St.3d 192 (2008) as well as *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460 (1994), and correctly determined that the retroactive application of R.C. 2305.131 was constitutional as applied to Appellant's claims. Accordingly, there is nothing of public or great general interest for this Court to review.

Foremost, Ohio's statute of repose, R.C. 2305.131, effective April 7, 2005, bars construction defect claims when such claims are not brought within 10 years after substantial

---

<sup>2</sup> *Id.* at P65.

completion of the project that improved real property. *Id.* Revised Code 2305.131, provides in part:

(A)(1) notwithstanding otherwise applicable of limitations specified in this Chapter or in Section 2125.02 of the Revised Code, and except as otherwise provided in divisions (A)(2), (A)(3), (C) and (D) of this section, *no cause of action to recover damages for bodily injury, and injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, and injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performs services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten (10) years from the date of substantial completion of such improvement.*

(Emphasis added). *Id.* Importantly, the Legislature specifically delineated that R.C. 2305.131 “shall be applied in a remedial manner” to “any civil action commenced on or after the effective date of this section . . . regardless of when the cause of action accrued,” which provision was duly noted by the court of appeals in its analysis below.<sup>3</sup> (Emphasis added); R.C. 2305.131(F).

In this case, Appellant discovered and was on notice of a potential claim as of October 27, 2003. At a meeting on October 27, 2003, Appellant’s expert engineer, who was also an attorney, advised Appellant that it “had a strong lawsuit.” Thus, Appellant’s cause of action accrued more than 1 ½ years, or 18 months, prior to the effective date of R.C. 2305.131, *i.e.*, April 7, 2005. Pertinently, Appellant also retained litigation counsel at that time. Nonetheless, Appellant did not file its claim until December 16, 2005—more than eight months after R.C. 2305.131 was enacted, 15 years after the occupancy permits were issued, and more than two years after it was advised of a potential lawsuit.

---

<sup>3</sup> *Id.* at P37-38.

In analyzing whether the retroactive application of R.C. 2305.131 is constitutional as applied Appellant's claims, the court of appeals correctly noted that Appellant was required to prove by clear and convincing evidence that R.C. 2305.131 was unconstitutional as applied to its claims.<sup>4</sup> Further, the court of appeals extensively analyzed the issue pursuant the holding and criteria previously established by this Court in *Groch et al. v. General Motors, Corp.*, 117 Ohio St.3d 192 (2008), which relates to R.C. 2305.10, the product liability statute of repose, and that has the same pertinent language as R.C. 2305.131.<sup>5</sup>

In *Groch*, this Court considered the retroactive application of R.C. 2305.10, which is a product liability statute of repose. The current version of R.C. 2305.10, which became effective on the same date as R.C. 2305.131, April 7, 2005, contains the same language as R.C. 2305.131, both of which provide that "no cause of action . . . shall accrue" after a specified ten-year time frame. Further, both R.C. 2305.10 and R.C. 2305.131, have provisions that allow a plaintiff "two years" to (1) commence an action for injuries that occur before the expiration of the ten-year repose period but less than two years prior to the expiration of that period or (2) to commence an action once a disability is removed provided that the cause of action accrues during the ten-year period. *See*, R.C. 2305.10(C)(4) and (5); R.C. 2305.131(A)(2) and (3).

This Court held in *Groch* that the retroactive application of R.C. 2305.10 was constitutional in general. However, the Court further held that if a plaintiff's injury occurred prior to effective date of the S.B. 80 amendment to R.C. 2305.10, *i.e.*, April 7, 2005, and the cause of action therefore accrued, certain plaintiffs' substantive right may be violated if they were provided an "*unreasonably short*" period of time in which to file suit prior to the effective

---

<sup>4</sup> *Id.* at P16, citing, *Harrold v. Collier*, 107 Ohio St. 3d 44, ¶ 38 (2005).

<sup>5</sup> *Id.* at P39.

date of the enactment, *i.e.*, April 7, 2005. (Emphasis added). *Id.* at 225. Since the plaintiff in *Groch* was injured on March 3, 2005, he had only *thirty-four (34) days prior to the effective date R.C. 2305.10, i.e.*, April 7, 2005, to file his cause of action. *Id.* at 225. The Court held that thirty-four (34) days was an unreasonable amount of time for plaintiff to file his cause of action and, thus, R.C. 2305.10, could not be constitutionally applied to plaintiff's cause of action. *Id.* at 227. Pertinently, *Groch* held that, in such a situation, the plaintiff should be given "reasonable time" from the date of accrual to commence the action. *Id.* at 226, *citing Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54 (1987). In determining what a "reasonable time" would be, *Groch* looked to the other provisions of the statute and held:

*To determine what is a reasonable time, we note that R.C. 2305.10(C)(4) provides a two-year limitations period for commencing a suit for injuries occurring before the expiration of the ten-year repose period of R.C. 2305.10(C)(1), "but less than two years prior to the expiration of that period." For example, under R.C. 2305.10(C)(4), if the product was delivered to the end user nine years prior to the injury, the injured plaintiff would still have two years in which to file suit.*

*Similarly, R.C. 2305.10(C)(5) provides that "[i]f a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code [i.e., minority or unsound mind], an action based on the product liability claim may be commenced within two years after the disability is removed."*

\* \* \*

*When we look to the other provisions of R.C. 2305.10 referred to above [R.C. 2305.10(C)(4) and (5)], we determine that a reasonable time to commence a suit in this situation should have been two years from the date of the injury.*

(Emphasis added). *Id.* 225-226.

Pertinently, R.C. 2305.131(A)(2) and (3), have the same pertinent language as R.C. 2305.10(C)(4) and (5). Revised Code 2305.131 provides as follows:

(2) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, *a claimant who discovers a defective and unsafe condition of an improvement to real property during the ten-year period specified in division (A)(1) of this section but less than two years prior to the expiration of that period may commence a civil action to recover damages as described in that division within two years from the date of the discovery of that defective and unsafe condition.*

(3) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, *if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during the ten-year period specified in division (A)(1) of this section and the plaintiff cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, the plaintiff may commence a civil action to recover damages as described in that division within two years from the removal of that disability.*

(Emphasis added). *Id.*

In the case *sub judice*, the court of appeals simply followed and applied the well-delineated criteria previously established by this Court in *Groch*. In applying the same to the facts at hand, the court of appeals found that a reasonable amount of time for Appellant to have filed its cause of action pursuant to R.C. 2305.131 and *Groch* was two years. Specifically, it held in pertinent part:

The subject multi-unit condominium project was completed in 1990. A crack in the garage wall shared by two units was noticed in September 2003. At an October 27, 2003 condominium association meeting, Daniel Marinucci, a structural engineering expert, presented his opinion that the footers for these two units were of an insufficient depth, in violation of the building code requirement. *The minutes of that meeting, dated October 31, 2003, noted that Mr. Marinucci advised that the "next step" was to investigate the other units. Further, and importantly, the minutes reflect that Mr. Marinucci cautioned the owners that they were now on notice of a latent defect and that the "time [for filing suit] starts running" from the date the work on the garage wall started. . . .*

*Oaktree filed its suit on December 16, 2005, more than two years after it was on notice of the problems caused by the footers, i.e., after the owners had been advised by an engineer of the likely cause of the problems in the first two units. The question for us to resolve is, therefore: under these facts and under the existing case law, whether R.C. 2305.131 could be constitutionally applied to bar the Oaktree's suit.*

... Although *Groch* reviewed a different statute of repose, that statute is worded very similarly to R.C. 2305.131. . .

*The Groch court provides a bright line rule for R.C. 2305.10(C), stating that a reasonable time for a plaintiff, whose cause of action had accrued before April 7, 2005, would be two years from the date of the injury. Id. at ¶198, citing Adams v. Sherk, 4 Ohio St.3d 37, 4 Ohio B. 82, 446 N.E.2d 165 (1983). If we are to apply, by analogy, the two-year rule, we reach the same conclusion that Oaktree failed to timely file its action. Thus, although we conclude that, pursuant to Groch's reasoning, the current statute of repose cannot retroactively apply to a plaintiff in Oaktree's situation, where the injury occurred and the cause of action "accrued" before April 7, 2005, pursuant to both Brennaman and Groch, Oaktree failed to file its action within a reasonable time, or two years, from the date it was placed on notice of the likely cause of its injury. We can find nothing in the record before us that would militate against applying a two-year time period as a measure of reasonableness in this case, that is, two years from the date of the October 27, 2003 meeting with the expert. After this meeting the owners had sufficient information upon which to believe they had good grounds to institute a lawsuit against the builder.*

*The result is harsh given the earlier jury verdict in this case; however, we cannot ignore a higher court's precedent and the legislative intent underlying that precedent.*

(Emphasis added).<sup>6</sup>

The court of appeals properly analyzed the retroactive application of R.C. 2305.131 and found that it was constitutional as applied to the facts of this case. Since R.C. 2305.10 and R.C. 2305.131 have the same pertinent language allowing certain plaintiff two years to file their claims, the court of appeals found that the two year period set forth in *Groch* was a "reasonable" time period to allow Appellant to file its cause of action from the date Appellant learned of its alleged injury and grounds for a lawsuit. Appellant failed to bring its action within the two years from the date Appellant discovered its injury or by October 27, 2005. Importantly, and unlike the

---

<sup>6</sup> *Id.* at P59, P64-P66.

plaintiff in *Groch*, Appellant had an engineering expert who was also an attorney who advised Appellant that it had “a strong lawsuit” on October 27, 2003, more than 1 ½ years prior to the effective date of R.C. 2305.131. Appellant had also retained litigation counsel at that time. Thus, Appellant had more than “reasonable” time to file its cause of action before the effective date of April 7, 2005.

Further, Appellant argues that the *Groch* court gave that plaintiff two years to file his claims because two years was the applicable “statute of limitations” for product liability claims. Appellant then makes this argument that it too should be given the statute of limitations period for construction defect claims, *i.e.*, four years, to bring its claims. Appellant’s assertion is wholly incorrect. Nowhere in *Groch* did this Court hold that a plaintiff whose claim accrued prior to the effective date of the statute of repose had the applicable “statute of limitations” period to file his claim. As set forth above, the *Groch* court clearly stated that:

*[w]hen we look to the other provisions of R.C. 2305.10 referred to above, we determine that a reasonable time to commence a suit in this situation should have been two years from the date of the injury.*

(Emphasis added). *Id.* 225-226. Thus, the *Groch* court looked to the “two year” provisions in R.C. 2305.10(C)(4) and (5) that are identical in substance to R.C. 2305.131(A)(2) and (3). It said nothing about the “reasonable time” being the “statute of limitations” provision.

In addition, Appellant’s assertion that it should have been given four years, the statute of limitations period for construction claims, in which to bring its claims against Hallmark is without merit and there is no basis for the same. Foremost, such a contention would effectively abrogate the language of, and the Legislature’s intent that, R.C. 2305.131 be retroactive. If any party prior to the effective date of such statute was give the requisite period of time pursuant to

the corresponding statute of limitations, the retroactive language of R.C. 2305.131 would be null and void and the intent of the Legislature circumvented.

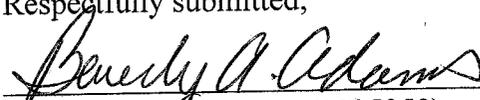
The court of appeals further reviewed the limited holding of this Court in *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460 (1994), which concerned the former construction statute of repose that was since repealed. In *Brennaman*, this Court considered the constitutionality of the former version of R.C. 2305.131. *Id.* Although the *Brennaman* Court ultimately struck down the prior version of R.C. 2305.131 as unconstitutional, it held that the plaintiff was entitled to have “a reasonable period of time” to file a claim. *Id.* at 466. The court of appeals found that even under *Brennaman*, the retroactive application of the current R.C. 2305.131 is constitutional as applied to Appellant’s claims because it did not file its claim within a “reasonable” time.

Nothing in the instant case merits review by this Court. This Court has already considered the same pertinent language of the product liability statute of repose and held that a plaintiff whose claim accrues prior to the effective date of the repose statute has a “reasonable time” consisting of “two years” to file his cause of action. The issue presented by Appellant does not qualify as an issue of public or great general interest and, therefore, does warrant this Court’s discretionary review. The standard for determining Appellant’s proposition of law has already been delineated by this Court in *Groch, supra*, and the court of appeals properly applied the same. The case herein demonstrates an application of well-delineated law by the court below to a specific set of facts, and, thus, a review of the same is unwarranted. Accordingly, this Court should decline to entertain the instant appeal.

### **CONCLUSION**

Based upon the foregoing, Defendant-Appellee respectfully request that this Court decline Plaintiff-Appellant’s request for jurisdiction regarding this matter.

Respectfully submitted,



PATRICK F. ROCHE (0025959)

BEVERLY A. ADAMS (0074958)

**DAVIS & YOUNG**

1200 Fifth Third Center

600 Superior Ave., East

Cleveland, Ohio 44114

(216) 348-1700/ Fax: (216) 621-0602

email: [proche@davisyoung.com](mailto:proche@davisyoung.com)

[badams@davisyoung.com](mailto:badams@davisyoung.com)

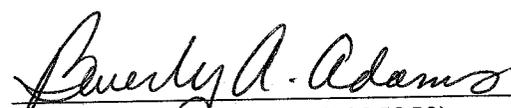
*Attorneys for Defendant-Appellee*

**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served by ordinary U.S. Mail, this 9 day of November

2012, to the following:

STEVEN M. OTT  
AMANDA L. AQUINO  
**OTT & ASSOCIATES CO., LPA**  
55 Public Square, Suite 1400  
Cleveland, Ohio 44113-1901  
*Attorneys for Plaintiff-Appellant*

  
PATRICK F. ROCHE (0025959)  
BEVERLY A. ADAMS (0074958)  
**DAVIS & YOUNG**  
*Attorneys for Defendant-Appellee*