

**IN THE SUPREME COURT OF OHIO**

**OAKTREE CONDOMINIUM  
ASSOCIATION, INC.**

**Appellant,**

**-vs-**

**THE HALLMARK BUILDING  
COMPANY, et al.,**

**Appellees.**

**: CASE NO. 2012-1722**  
**:**  
**:**  
**: On Appeal from the Lake County**  
**: Court of Appeals, Eleventh**  
**: Appellate District**  
**:**  
**: Court of Appeals**  
**: Case No. 2012-L-011**  
**:**  
**:**  
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**MERIT BRIEF OF APPELLANT  
OAKTREE CONDOMINIUM ASSOCIATION, INC.**

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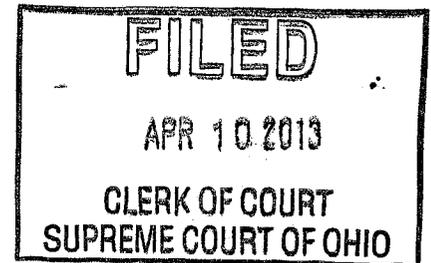
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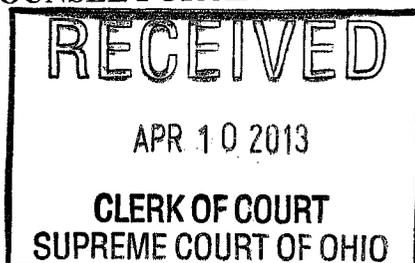
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## STATEMENT OF THE CASE

This appeal arises out of a lawsuit filed by Appellant Oaktree Condominium Association, Inc. (hereinafter “Oaktree”) in the Lake County Court of Common Pleas on December 16, 2005 based on Appellee Hallmark Building Co.’s (hereinafter “Appellee”) failure to perform in a workmanlike manner and negligence in its role as the developer of Oaktree Condominiums. (Brief of Appellant, T.d. 6, p. 1.) The suit was originally dismissed without prejudice and re-filed on August 30, 2007. (*Id.*) On February 29, 2008, Appellee filed a Motion for Summary Judgment based solely on arguments relating to R.C. 2305.131 arguing that Oaktree’s claims were time-barred by the ten-year statute of repose that applies to the construction of real estate. (*Id.*) The trial court issued its order on May 7, 2008 denying Appellee’s motion for summary judgment on the basis that R.C. 2305.131 did not apply to the facts of the case. (*Id.*) On May 14, 2008, Appellee filed a Notice of Appeal. (*Id.*) The Eleventh District Court of Appeals dismissed Appellee’s appeal due to lack of jurisdiction on the basis that the trial court’s order denying the motion for summary judgment was not a final appealable order. (*Id.*)

A jury trial commenced on August 25, 2009 and on August 28, 2009, the jury returned a verdict in favor of Oaktree on its claims against Appellee and awarded damages in the amount of \$210,000.00. (*Id.*) Appellee filed its Notice of Appeal on September 17, 2009. (*Id.*) The Eleventh District Court of Appeals issued its Opinion on December 28, 2010 reversing and remanding the issue back to the trial court to determine the issue of whether R.C. 2305.131 is constitutional as applied to Oaktree’s claims. (*Id.*) This issue had been previously raised by Appellee, but deemed moot by the trial court in its denial of Appellee’s original request for summary judgment when it held that the statute of repose did not apply. (Brief of Appellant, T.d. 6, p. 1.)

After a request by Oaktree, the trial court issued a schedule concerning briefing on the constitutionality of R.C. 2305.131 as applied to Oaktree's claims. (*Id.*) Appellee filed a Motion for Summary Judgment on February 7, 2011. (*Id.*) On the same day, Oaktree filed a Brief on the Constitutionality of Ohio Revised Code 2305.131 as Applied to This Action. (*Id.*) On December 30, 2011, the trial court granted Appellee's Motion for Summary Judgment on the grounds that R.C. 2305.131 was not unconstitutional as applied to Oaktree's particular facts. (*Id.*) Oaktree timely filed its Notice of Appeal on January 27, 2012. (*Id.*) After briefing and oral arguments, the Eleventh District Court of Appeals filed its opinion on August 27, 2012, affirming the decision of the trial court. (Opinion, T.d. 11.)

On October 11, 2012, Oaktree concurrently filed its Notice of Appeal and a Memorandum in Support of Jurisdiction on the grounds that the case raises a substantial question of public or great general interest. (Copy of Notice of Appeal, T.d. 12.) On February 6, 2013 this Court accepted the appeal and ordered the transmittal of the record from the Court of Appeals for Lake County. (Entry from the Supreme Court, T.d. 13.)

### **STATEMENT OF FACTS**

The parties agree that in approximately 1988, construction began on the property known as Oaktree Condominiums. (Brief of Appellant, T.d. 6, p. 2.) After the original developer ceased to exist as an entity, Appellee assumed the development and construction of Oaktree Condominiums. (*Id.* at p. 3.) Appellee completed construction of the seven-unit condominium project in 1990. (Brief of Appellee, T.d. 7, p. 3.)

In 1999, construction problems appeared at Oaktree Condominiums with respect to a single condominium unit when significant drywall cracks, measuring up to a quarter-inch wide, in the walls and ceilings appeared in numerous rooms in the unit. (Brief of Appellant, T.d. 6, p.

3.) Repairs were made to that one unit in late 1999 or early in 2000. (*Id.*) Unfortunately, the problems that Oaktree believed to be isolated to the unit returned in the fall of 2003. (*Id.*) At that time, several other unit owners began to observe symptoms of settling in their units, such as cracks in interior walls, and doors that were becoming misaligned. (*Id.*)

At that time, various investigations and repair work revealed that insufficient reinforcement underneath six of the units was causing the property to be unstable and dangerous, and that the cost of repairs to fix these insufficiencies would be in excess of \$300,000.00. (*Id.* at p. 4.) All seven buildings were inspected and it was determined that the original contractor installed the footer depths of the units in the frost plane, against existing codes and standards of the industry. (*Id.* at p. 4.) Some of the footers had been installed as little as seventeen (17) inches beneath the surface. (*Id.*) This installation was well below the city code requirement of thirty-six (36) inches deep and the developer's requirement of forty-two (42) inches deep. (Brief of Appellee, T.d. 7, p. 3.) The insufficient reinforcement of the footers caused the property to become unstable and dangerous. (Brief of Appellant, T.d. 6, p. 4.)

Expert reports and conclusions were presented to Oaktree at a meeting of the Association in October 2003. (Brief of Appellant, T.d. 6, p. 3.) Pursuant to these findings, the Oaktree Board of Directors authorized repairs to the two units that exhibited the most serious structural cracking of the superstructure. (*Id.* at p. 4.) Exploratory digging in the spring of 2004 revealed additional instability. (*Id.*) Extensive repair work was performed, extending the footers and correcting the foundation problems, but Oaktree lacked monies to completely repair the unstable foundation, which would cost over \$400,000.00. (*Id.*)

### **LAW AND ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1:**

**Ohio's construction statute of repose, codified in R.C. 2305.131, as applied to Oaktree, bars Oaktree from pursuing a substantive, vested right in violation of the Ohio Constitution, Article II, Section 28.**

**A. Oaktree challenges Ohio's construction statute of repose as applied to its particular set of facts.**

A statute may be challenged in two ways, either as unconstitutional on its face or as applied to a particular set of facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶37, citing *Belden v. Union Cent. Life Ins. Co.* 143 Ohio St. 329, 55 N.E.2d 629 (1944). An "as applied" challenge contends that the "application of the statute in a particular context \*\*\* would be unconstitutional." *Yajnok v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶14, quoting *Ada v. Guam Soc. Of Obstetricians & Gynecologists*, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed 2d 564 (1992)(Scalia, J. dissenting). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent future application in a similar context, but not to render it utterly inoperative." *Id.* Unlike a facial challenge to a statute, which would require a showing beyond all reasonable doubt that the statute is not compatible with constitutional provisions, an "as applied" challenge requires presentation of clear and convincing evidence of existing facts that make the statute unconstitutional and void when applied to those facts. *Harrold* at ¶38.

Here, Oaktree challenges the constitutionality of R.C. 2305.131 as it is applied to its particular set of facts. Oaktree's burden is to present clear and convincing evidence that when Ohio's construction statute of repose is applied to its discrete context, the application smothers Oaktree's constitutional rights.

**B. Pursuant to the Ohio Constitution, Article II, Section 28, the General Assembly has no power to enact laws that retroactively impair or abolish substantive, vested rights.**

The construction statute of repose is a substantive law because it takes away the right to sue. As provided for in the Ohio Constitution, Article II, Section 28, “the general assembly shall have no power to pass retroactive laws \*\*\*.” This Court has continually upheld this retroactivity ban on substantive as opposed to remedial laws. *Gregory v. Flowers*, 32 Ohio St.2d 48, 52-53, 290 N.E.2d 181 (1972). A remedial law “prescribes methods of enforcement of rights or obtaining redress.” *State ex rel Holdridge v. Industrial Com*, 11 Ohio St.2d 175, 178, 228 N.E.2d 621 (1967).

A substantive law “impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations or liabilities to a past transaction; creates a new right out of an act which gave no right and imposed no obligation when it occurred; gives rise to or takes away the right to sue or defend actions at law.” *Van Fossen v. Babcock & Wilcox Co.* 36 Ohio St.3d 100, 107, 522 N.E.2d 489 (1988). Any statute that takes away accrued rights under existing law “must be deemed retrospective or retroactive.” *Id.* at 106, quoting *Cincinnati v. Seasingood*, 46 Ohio St. 296, 303, 21 N.E. 630 (1889).

Courts rely on a two-part test to analyze whether a statute is unconstitutionally retroactive. First, this Court must determine whether the General Assembly intended to apply R.C. 2305.131 retroactively. *Van Fossen* at 106. Second, the Court must determine whether, by its terms, the statute contravenes the ban upon retroactive legislation. *Id.*

As to the issue of legislative intent, R.C. 2305.131 provides, in pertinent part:

[E]xcept as otherwise provided \*\*\* no cause of action to recover damages for bodily injury, an 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 performed 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 years from the date of substantial completion of such project.

This section provides for the statute of repose for construction of improvements to real property claims. The statute goes on to provide:

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 the effective date of this section, 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 the effective date of this section.

R.C. 2305.131(F). (Emphasis added.)

Whether a statute is substantive or remedial does not depend on the label the General Assembly placed upon it, but rather depends on its operation. *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶187. A statute is capable of operating as remedial in some aspects and substantial in others. *Id.*

By its terms, section (F) prohibits the application of the statute of repose to any action that had been filed prior to the effective date of the statute—April 7, 2005. A cause of action based on an injury that occurred prior to April 7, 2005 does accrue and vest for purposes of Article II, Section 28. Effectively, section (F) has a retroactive application to any cause of action that had accrued but where no suit had been commenced before enactment of the statute. Such application is in violation of Article II, Section 28.

While section A(2) of the statute of repose does allow a claimant with a vested right that accrued within the ten years of completion of a project but less than two years before expiration of the ten years to commence suit, the right to sue is contingent on the cause of action being filed within two years of accrual of the claim. R.C. 2305.131(A)(2). This section does not address Oaktree's circumstance, where its vested right accrued during a time when no statute of repose was effective, but was prohibited to bring its claim on that vested right once R.C. 2305.131 was

enacted—even when the enactment was subsequent to the accrual of Oaktree’s claim—because the ten years from completion of the project had already expired.

**C. Application of Ohio’s construction statute of repose to Oaktree will operate to abolish Oaktree’s substantive, vested rights in violation of the Ohio Constitution, Article II, Section 28.**

R.C. 2305.131 is unconstitutional, as applied to Oaktree, because it extinguishes an accrued right of action without affording Oaktree a reasonable opportunity to have its claim heard. For most plaintiffs, R.C. 2305.131 will affect no substantive right because the statute of repose will extinguish the opportunity for a right to ever vest. Oaktree’s situation, however, is different. For Oaktree, R.C. 2305.131 operates as a true statute of limitation that restricts the time for filing a cause of action that has validly accrued and effectively prevents Oaktree from recovering on a valid cause of action.

Oaktree actually discovered its injury on October 27, 2003. By operation of R.C. 2305.131(A), Oaktree had only 18 months to file a claim before the effective date of the statute of repose—April 7, 2005. The statute of limitations to bring a construction liability claim was four years. R.C. 2305.09; *Velotta v. Leo Petronzio Landscaping Inc.*, 69 Ohio St.2d 376, 379, 422 N.E.2d 147 (1982). Oaktree filed its cause of action, within the four-year limit, on December 16, 2005.

The statute of repose may only extinguish the opportunity for a right to vest, but it may not extinguish one that has already accrued. *Groch* at ¶191. R.C. 2305.131(A) prevents a construction liability claim from accruing after ten years has passed after the completion of the improvement to real property. It cannot also bar a cause of action that has accrued and vested prior to the statute’s effective date. “Once vested, such a cause of action clearly becomes a substantive right for purposes of Section 28, Article II.” *Id.*

A statute “may lawfully shorten the period of time in which the remedy may be realized ‘as long as the claimant is still afforded a reasonable time in which to enforce his right.’” *Groch* at ¶196, quoting *Adams v. Sherk*, 4 Ohio St.3d 37, 39, 446 N.E.2d 165 (1983). To determine what is a reasonable time, the Court should rely on the statute of limitation for injuries occurring before the expiration of the ten-year statute of repose period of R.C. 2305.131(A).

In *Groch*, this Court recognized that once a product liability cause of action accrues, a plaintiff has no less than two years to file a claim. In *Groch*, the plaintiff’s claims vested on March 3, 2005, before the applicable statute of repose became effective on April 7, 2005. By operation of the product liability statute of repose, the plaintiff had only thirty-four (34) days to file a lawsuit before the statute of repose would forever bar his claims. The suit was not commenced until June 2, 2006, over one year after his claims became vested. The *Groch* court held that the Ohio Constitution, Article II, Section 28, prevented the product liability statute of repose from applying to the specific facts of the case and required that the plaintiff be provided with a reasonable time to bring his case. *Groch* at ¶193. Accordingly, the Court determined that a reasonable time to bring a product liability case is two years. *Id.*

Likewise, in *Adams*, the Court determined that a reasonable time to bring a medical malpractice claim was one year after discovery of the malpractice because the general medical malpractice statute of limitations provides one year. *Adams v. Sherk*, 4 Ohio St.3d 37, 39, 446 N.E.2d 165 (1983). The *Groch* court relied on the *Adams*’s analysis to create its rule regarding the reasonable time to bring a claim, which is based on the least amount of time the plaintiff would have had under the applicable statute of limitations.

Based on dicta from the *Groch* court that states that a reasonable amount of time for a medial malpractice case would be one year—because the statute of limitations in such cases is

one year—it is clear that *Groch* does not hold that two years is reasonable, rather that the applicable statute of limitations is the reasonable time frame.

Contrary to the *Groch* court’s reasoning, the Eleventh District Court of Appeals selected the same two-year time limit that was used in *Groch* because there was “nothing in the record \*\*\* that would militate against applying a two-year time period as a measure of reasonableness in this case.” (Opinion, T.d. 11, pg. 20, ¶65.) The Court of Appeals mistook the outcome in *Groch* for the analysis it provided. Instead of conducting its own inquiry into the reasonableness of Oaktree’s time to file a claim based on the applicable statute of limitations for a construction tort claim—and not a product liability claim—it illogically applied the same two-year time limit that was used in *Groch*.

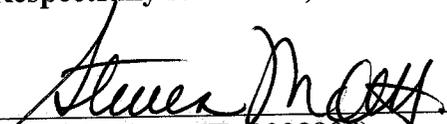
A reasonable time to bring a construction liability claim is four years because the general tort liability statute of limitations provides four years. Accordingly, a reasonable time for Oaktree to commence a suit in this litigation should have been four years from the date of the discovered injury. Because R.C. 2305.131, as applied to Oaktree, provided it with only 18 months to commence its suit, the statute of repose operates to abolish Oaktree’s substantive, vested rights in violation of the Ohio Constitution, Article II, Section 28.

### CONCLUSION

Because R.C. 2305.131 retroactively divests Oaktree of its vested substantive right to relief, Oaktree respectfully requests that this Court find that the statute of repose, as applied to Oaktree, violates the Ohio Constitution, Article II, Section 28.

**Respectfully submitted,**

By:

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel for appellees, Patrick F. Roche and Beverly A. Adams, Davis & Young, L.P.A., 1200 Fifth Third Center, 600 Superior Avenue East, Cleveland, Ohio 44114, on this 9<sup>th</sup> day of April 2013.

  
\_\_\_\_\_  
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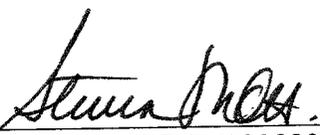


**NOTICE OF APPEAL OF APPELLANT**  
**OAKTREE CONDOMINIUM ASSOCIATION, INC.**

Appellant Oaktree Condominium Association, Inc., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lake County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2012-L-011 on August 27, 2012.

This case raises a substantial question of public or great general interest. Appellant Oaktree Condominium Association, Inc. is concurrently filing with this Notice a *Memorandum in Support of Jurisdiction* with the Court.

**Respectfully submitted,**

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees, Patrick F. Roche and Beverly A. Adams, Davis & Young, L.P.A., 1200 Fifth Third Center, 600 Superior Avenue East, Cleveland, Ohio 44114, on this 10<sup>th</sup> day of October 2012.

  
\_\_\_\_\_  
STEVEN M. OTT (0003908)

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

OAKTREE CONDOMINIUM  
ASSOCIATION, INC.,

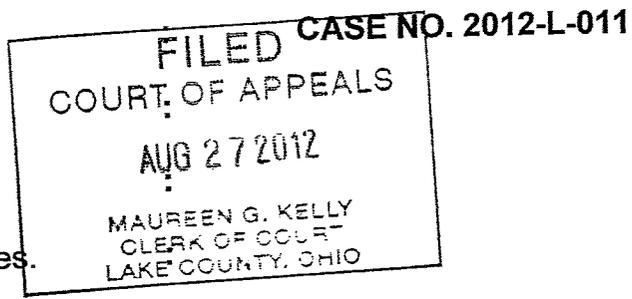
: OPINION  
:

Plaintiff-Appellant,

- vs -

THE HALLMARK BUILDING  
COMPANY, et al.,

Defendants-Appellees.



Civil Appeal from the Lake County Court of Common Pleas, Case No. 07 CV 002615.

Judgment: Affirmed.

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*Patrick F. Roche and Beverly A. Adams, Davis & Young, L.P.A., 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendants-Appellees).*

MARY JANE TRAPP, J.

{¶1} Oaktree Condominium Association, Inc. ("Oaktree) appeals from a judgment of the Lake County Court of Common Pleas, which found Ohio's current statute of repose constitutional as applied to Oaktree. After a careful reading of the Supreme Court of Ohio's decisions regarding the statute of repose, we affirm the decision of the trial court. As the case law from the Supreme Court of Ohio indicates, the current statute of repose cannot be retroactively applied to a plaintiff in Oaktree's situation, where the damage occurred beyond the ten-year statutory period, but before

April 7, 2005, the effective date of the current statute of repose. The Supreme Court of Ohio has decided that that such a plaintiff must be given a "reasonable" time to commence an action. We find that Oaktree untimely commenced its action, more than two years after it was placed on notice of the likely cause of its damage. Therefore, following Supreme Court of Ohio precedent addressing this issue, we must conclude its claim is barred.

### Prior Appeal

{¶2} In 1990, Hallmark Building Company ("Hallmark") completed the construction of a seven-unit condominium. In the fall of 2003, a condo owner noticed a crack in his garage wall. An investigation, which eventually included test digs of all the units, revealed that the footers were not set according to the building code of the city of Willoughby, nor the approved building plans. The plans called for the footers of the foundation to be placed at 42" below ground, five inches more than the 36" minimum mandated by the city code. The footers were of varying depth, some set as low as 27".

{¶3} "Footers for buildings are required to be set at sufficient depth below the 'frost plane' so that the structure is not subjected to the freezing and thawing of the subsoil. Because the foundations and footers of the condominiums were not placed below the frost plane, the structure was unsettled and shifted, creating cracks in the walls." *Oaktree Condo. Assn v. Hallmark Bldg. Co.*, 11th Dist. No. 2009-L-112, 2010-Ohio-6437, ¶7.

{¶4} "Daniel Marinucci, a structural engineer, inspected all seven units at the request of the Oaktree association, finding many of the footers were of an insufficient depth, and six units suffered from some damage because of it. His initial estimate of the cost to repair those six units was \$417,472.90. During a condominium association meeting on [October 27, 2003], Mr. Marinucci gave his opinion that the condition of the

footers appeared to represent 'intentional disregard for the building code requirement.'" *Id.* at ¶8. Repair work was subsequently done to lengthen the footers using a technique called "underpinning."<sup>1</sup> *Id.*

{¶5} On December 16, 2005, Oaktree filed a suit against Hallmark, alleging that Hallmark failed to perform in a workmanlike manner and that it was negligent. The suit was voluntarily dismissed and refiled in August 2007.

{¶6} Hallmark moved for summary judgment, arguing Oaktree's claims were time-barred under R.C. 2305.131, Ohio's statute of repose, as the suit was filed well after the ten-year period provided for in the statute. The court denied the motion, finding the initial construction of the footers did not constitute "improvements to real property," and therefore the statute of repose did not apply. The matter proceeded to a jury trial, and the jury awarded Oaktree \$219,000. Hallmark appealed.

{¶7} On appeal, the issue was whether the condominium association's claims were time-barred by the statute of repose, R.C. 2305.131. More specifically, the issue was whether initial construction of a structure falls under "improvements to real property" referred to in the statute of repose. The trial court held that the phrase excluded the initial construction of a structure, and, thus, R.C. 2305.131 was not applicable. We reversed the trial court, holding that "improvement to real property" encompasses the initial installation of the foundation and footers, and therefore, R.C. 2305.31 is not inapplicable in this case on that ground. We, however, declined to review the issue of whether the statute is constitutional, either facially or as applied in this case. Instead, we remanded for the trial court to address that issue. *Oaktree, supra.*

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1. In our opinion in the first appeal, the date of this meeting was inadvertently stated as "December 31." The condominium association meeting in fact took place on October 27, 2003, the minutes of which were dated October 31, 2003.

{¶8} On remand, the trial court held that R.C. 2305.131 is not unconstitutional on its face or as applied in this case and, therefore, the plaintiff's claims were time-barred under the statute.

{¶9} On appeal, Oaktree assigns the following errors for our review:

{¶10} “[1.] The trial court erred when it failed to consider the affidavit of Daniel Marinucci in its determination of the constitutionality of R.C. 2305.131, an Ohio statute of repose, as applied to the facts concerning plaintiff-appellant's claims.”

{¶11} “[2.] The trial court erred in finding that the retroactive application of R.C. 2305.131 is not unconstitutional as applied to the facts concerning plaintiff-appellant's claim.”

{¶12} We address the second assignment of error, the main contention in this appeal, first.

#### **Review of a Constitutional Challenge to a Statute**

{¶13} We review a trial court's decision regarding the constitutionality of a statute de novo. *Medina v. Szvec*, 157 Ohio App.3d 101, 2004-Ohio-2245, ¶4.

{¶14} “Any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation, and the understanding that it is not [a] court's duty to assess the wisdom of a particular statute.” *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶141. “The only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 456 (1999), quoting *State ex rel. Bowman v. Allen Cty. Bd. of Commrs.*, 124 Ohio St. 174, 196 (1931). “It is axiomatic that all legislative enactments enjoy a presumption of constitutionality.” *State v. Dorso*, 4 Ohio St.3d 60, 61 (1983).

{¶15} Because enactments of the General Assembly are presumed constitutional, “before a court may declare [one] unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *Woods v. Telb*, 89 Ohio St.3d 504, 510-11 (2000), quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus. Therefore, “the party challenging the constitutionality of a statute bears the burden of proving the unconstitutionality of the statute beyond a reasonable doubt.” *Woods* at 511.

### **Facial Challenge and As-applied Challenge**

{¶16} A statute may be challenged as unconstitutional on its face or as applied to a particular set of facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶37. The party who makes an as-applied constitutional challenge “bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute \* \* \* unconstitutional and void when applied to those facts.” *Harrold* at ¶38. “In an as applied challenge, the party challenging the constitutionality of the statute contends that the ‘application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative.’” *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶14, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011, 113 S.Ct. 633, 121 L. Ed. 2d 564 (1992) (Scalia, J. dissenting).

### **R.C. 2305.131: Ohio’s Construction Statute of Repose**

{¶17} Having the foregoing framework of constitutional review in mind, we now consider Ohio’s construction statute of repose, R.C. 2305.131 (“Statute of repose for

claims based on unsafe conditions of real property”). The statute bars tort actions against designers and engineers of improvements to real property brought more than ten years after completion of the construction service. *Sedar v. Knowlton Constr.* 49 Ohio St.3d 193 (1990).

{¶18} The statute of repose had a tortured history in Ohio law regarding its constitutionality. The constitutional section implicated by the statute of repose is Section 16, Article I of the Ohio Constitution, which protects the right to seek redress in Ohio’s courts when one is injured by another. That section states, “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” This is often referred to as the “open-court” or “right-to-a-remedy” provision.

{¶19} In 1990, the Supreme Court of Ohio upheld a prior version of the statute as constitutional, in *Sedar, supra*, but four years later reversed itself in *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466 (1994). At issue is whether the statute violates Section 16, Article I of the Ohio Constitution by depriving plaintiffs of a right to a remedy.

{¶20} Since *Brennaman*, the General Assembly has enacted a different version of the statute, effective April 7, 2005, as part of the tort reforms contained in S.B. 80. Thus, the issue presented by this construction case is made even more complicated by the fact that the defects of the footers were discovered when the prior version of the statute was in effect, but was declared unconstitutional by *Brennaman*, and the lawsuit was not brought until December 2005, after the current version had gone into effect.

{¶21} We begin with a review of the prior version of the statute and explain how the Supreme Court of Ohio had assessed its constitutionality in *Sedar* and *Brennaman*.

#### **Prior Version of R.C. 2305.131**

{¶22} The prior version of R.C. 2305.131 stated, in pertinent part:

{¶23} “*No action* to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, \* \* \* *shall be brought* against any person performing services for or furnishing the design, planning, supervision of construction, or construction of such improvement to real property, more than ten years after the performance or furnishing of such services and construction. \* \* \*.” (Emphasis added.)

**A. Sedar**

{¶24} In *Sedar*, a college student was injured when he put his hand and arm through a defectively constructed glass panel in a door of his dormitory, 18 years after the completion of the construction of the dorm. He argued the statute of repose violated the right-to-a-remedy provision of Section 16, Article 1 of the Ohio Constitution. The question to be answered by the Supreme Court of Ohio was “whether R.C. 2305.131 may constitutionally prevent the accrual of actions sounding in tort against architects, construction contractors and others who perform services related to the design and construction of improvements to real property, where such action arises more than ten years following the completion of such services.” *Id.* at 194.

{¶25} The Supreme Court of Ohio began its analysis by observing a key difference between a statute of limitations and a statute of repose: the former “limits the time in which a plaintiff may bring suit after the cause of action accrues,” while the latter, such as R.C. 2305.131, “potentially bars a plaintiff’s suit *before* the cause of action arises.” (Emphasis added.) *Id.* at 941. The court observed that the construction statutes of repose were enacted by several states in the 1950s and 1960s to counter the expansion of common-law liability of builders to third parties who lacked privity of contract. *Id.* at 941. “R.C. 2305.131 was enacted in response to the general demise of

the privity requirement and the extension of the liability of an architect or builder to third parties injured by design and construction defects with whom the architects or builders have no contractual relationship.” *Id.* at 199-200.

{¶26} “Given this expanded group of potential claimants and the lengthy anticipated useful life of an improvement to real property, designers and builders were confronted with the threat of defending claims when evidence was no longer available. \* \* \* [R.C. 2305.131] attempt[s] to mitigate this situation by limiting the duration of liability and the attendant risks of stale litigation \* \* \*.” (Citation omitted.) *Id.* at 200. “Because extended liability engenders faded memories, lost evidence, the disappearance of witnesses, and the increased likelihood of intervening negligence, the General Assembly, as a matter of policy, limited architects’ and builders’ exposure to liability by barring suits brought more than ten years after the performance of their services in the design or construction of improvements to real property.” (Citations omitted.) *Id.* The court concluded “the legislature’s choice of ten years to achieving its valid goal of limiting liability was neither unreasonable nor arbitrary.” *Id.* Recognizing R.C. 2305.131 barred all claims after ten years, the court nonetheless held it to be constitutional, emphasizing the court “do[es] not sit in judgment of the wisdom of legislative enactments.” *Id.* at 201.

{¶27} Appellant Sedar argued that the discovery rule applied in the context of R.C. 2305.131, the medical malpractice statute of repose, should also apply to someone in his situation in construction cases, where the injury was caused by a “static condition.” Under the discovery rule, the time was tolled until the patient discovered, or should have discovered the negligent act. *Id.* at 198. He argued an application of the discovery rule in his case would allow him to seek remedy and he would not have his cause of action extinguished before it even arose.

{¶28} The court refused to apply the discovery rule in the construction statute of repose. The court explained that in construction cases the cause of action often did not arise when the negligent act occurred; rather, the breach of duty and the resulting injury were often separated by several years. Thus, R.C. 2305.131 [did] not take away an existing cause of action, as applied in [Sedar's] case." *Id.* at 201. The statute's effect, "rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action." (Citation omitted.) *Id.* at 201-202. "The right-to-a-remedy provision of Section 16, Article I applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available. R.C. 2305.131, as applied to bar the claims of appellant here, whose injury occurred over eight years after the expiration of the statute of repose, does not violate Section 16, Article I of the Ohio Constitution." *Id.* at 202.

### **B. Brennaman**

{¶29} Four years later, the Supreme Court of Ohio reversed its position on the constitutionality of the construction statute of repose in *Brennaman*. In *Brennaman*, the defendant corporation converted an existing facility into a titanium metals plant, where liquid sodium was piped from railroad cars to storage tanks; the defendant completed its project in 1958. In 1986, a stream of sodium escaped from the piping system and ignited; two plant employees were killed and another was injured while trying to replace the valve.

{¶30} In a short opinion, the court revisited its holding in *Sedar* and concluded the statute was unconstitutional, on the ground that R.C. 2305.131 "deprived the

plaintiffs of the right to sue before they knew or could have known about their or their decedents' injuries." *Id.* at 466.

{¶31} The court stated that R.C. 2305.131 effectively "closes the courthouse" to the claimant in contravention of the express language of Section 16, Article I by precluding claimants from seeking a remedy against negligent tortfeasors once ten years have elapsed since the tortfeasor rendered the flawed service. The court proclaimed that, "[t]oday we reopen the courthouse doors by declaring that R.C. 2305.131, a statute of repose, violates the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution, and is, thus, unconstitutional." *Id.* at 467. The court specifically overruled *Sedar*.

{¶32} Moreover, the court held that a plaintiff must have a reasonable period of time to seek compensation under the right-to-a-remedy provision, and former R.C. 2305.131 conflicted with this right. *Brennaman* at 466. The *Brennaman* plaintiffs filed their complaints within one year after their causes of action arose (when they were injured), and the court held the filing was within a reasonable time and, therefore, not barred by the statute of repose.

{¶33} Justice Moyer dissented in *Brennaman*, stating that at common law the plaintiffs' actions against the construction company "would have been strictly barred by the doctrine of privity. The statute of repose strikes a rational balance between the rights of injured parties and the rights of architects and engineers who design and build improvements to real property. The majority's opinion exposes designers and builders to unlimited liability for the life of a structure that quite possibly will extend beyond the life of the builder. Successors in interest may very well be called upon to defend against suits after the actual designer has died. The statute of repose guards against this risk of stale litigation." *Id.* at 469.

## Current Version of R.C. 2305.11

{¶34} After *Brennaman*, the General Assembly revised R.C. 2305.131 in S.B. 80. R.C. 2305.131(A), effective April 7, 2005, now reads, in relevant part:

{¶35} “(A)(1) Notwithstanding an otherwise applicable period of limitations \* \* \* no cause of action to recover damages for \* \* \* an injury to real \* \* \* property, \* \* \* 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 \* \* \* an injury to real \* \* \* property shall accrue against a person who performed 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 years from the date of substantial completion of such improvement.”  
(Emphasis added.)

{¶36} In addition to changing the wording of R.C. 2305.131(A), S.B. 80 added section (A)(2), providing that if an alleged defect is discovered during the ten-year period but less than two years before the expiration thereof, the plaintiff may still bring a claim within two years of discovery of the defect. R.C. 2305.131(A)(2).<sup>2</sup> In addition, the statute now provides exceptions if the defendant engages in fraud, or if there is an express warranty beyond the ten year statute of repose. R.C. 2305.131(C) and (D).

{¶37} Moreover, under Section (F), the statute is expressly made retroactive; it is to apply retroactively to any action commenced after the effective date of the statute. Section (F) of R.C. 2305.131 states:

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2. Paragraph (A)(2) states: “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.”

{¶38} “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 the effective date of this section, 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 the effective date of this section.”<sup>3</sup>

### Groch

3. Section 3(B) of S.B. 80 provides the following legislative intent:

“The General Assembly makes the following statement of findings and intent:

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“(B) In enacting section 2305.131 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

“(1) To declare that the ten-year statute of repose prescribed by section 2305.131 of the Revised Code, as enacted by this act, is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the Revised Code, the general two-year statute of limitations prescribed by section 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;

“(2) To recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for the improvement or who furnished the design, planning, supervision of construction, or construction of the improvement:

“(a) They lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement.

“(b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.

“(c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in division (E)(5)(b) of this section.

“(3) To recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;

“(4) To recognize that maintaining records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion;

“(5) To declare that section 2305.131 of the Revised Code, as enacted by this act, strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation but not to affect civil actions against those in actual control and possession of an improvement to real property at the time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death.”

{¶39} After the current version of R.C. 2305.131 came into effect on April 7, 2005, the Supreme Court of Ohio revisited the statute in 2008, in *Groch, supra*. *Groch* itself concerned a different statute of repose, but the Supreme Court of Ohio took the opportunity to express its disapproval of *Brennaman*.

{¶40} In *Groch*, the plaintiff was injured in March 2005, by a trim press, while working at a General Motors plant. He sought damages from its manufactures based on alleged product defects. The manufacturers argued Ohio's ten-year product liability statute of repose, R.C. 2305.10(C)(1), barred the suit, because the trim press was delivered to General Motors more than ten years before plaintiff's injury. The plaintiff argued R.C. 2305.10 violates the constitutional right-to-remedy guarantee.

{¶41} Ohio's product-liability statute of repose (R.C. 2305.10(C)(1)) was enacted by S.B. 80.<sup>4</sup> The statute is worded very similarly to the current R.C. 2305.131(A)(1), the construction statute of repose. *Groch* provides some guidance in our analysis of the case *sub judice* because the Supreme Court of Ohio, in addressing the constitutionality of the product liability statute of repose, also discussed at great length the construction statute of repose.

{¶42} The product liability statute of repose, R.C. 2305.10(C)(1), provides in relevant part: “\* \* \* *no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser \* \* \**” (Emphasis added.)

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4. Unlike the construction statute of repose, the wording of which was changed by S.B. 80, this statute or repose provision was added by S.B. 80 for the first time.

{¶43} Furthermore, the statute contains a section (former R.C. 2305.10(F) now R.C. 2305.10(G))<sup>5</sup>, which is almost identical to the retroactivity provision of R.C. 2305.131(F).

{¶44} Because the Supreme Court of Ohio had not passed on the constitutionality of the product liability statute of repose, the *Groch* court looked to *Sedar* and *Brennanman* for its constitutional analysis of R.C. 2305.131.

{¶45} The court quoted with approval *Sedar's* interpretation of former R.C. 2305.131, emphasizing that the statute did not take away an existing cause of action; rather, its effect was to prevent what might otherwise be a cause of action from ever arising. When an injury occurred more than ten years after the negligent act, the injury forms no basis for recovering. *Id.* at ¶116. The court stressed that the constitutional right-to-a-remedy provision only applies to “existing, vested rights” and “it is state law which determines what injuries are recognized and what remedies are available.” *Id.* at ¶119, citing *Sedar* at 202.

{¶46} The *Groch* court was highly critical of *Brennaman*, chastised it for “cavalierly overrul[ing] *Sedar* with virtually no analysis.” *Id.* at ¶137. The *Groch* court stated that while “*Sedar* was a thorough and concise opinion that fully sustained each of its specific conclusions with extensive reasoning, *Brennaman* is the classic example of the ‘arbitrary administrative of justice’ that [*Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849] cautions against.” *Id.* at ¶136. The *Groch* court, however, refrained from overruling *Brennaman*, stating *Brennaman* was confined to its particular holding that former R.C. 2305.131 was unconstitutional. *Id.* at ¶146.

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5. This section was R.C. 2305.10(F) in the version enacted by S.B. 80. Since then, the section was relabeled as R.C. 2305.10(G) in S.B. 17, effective August 3, 2006.

{¶47} The *Groch* court then went on to consider the constitutionality of R.C. 2305.10(C)(1), adopting *Sedar's* rationale. *Id.* at ¶148. It noted the product liability statute of repose is similar to the statute of repose considered by *Sedar* and *Brennaman* (former R.C. 2305.131) in one key aspect: R.C. 2305.10(C) similarly “operates to potentially bar a plaintiff’s suit before a cause of action arises.” *Id.* at ¶149. “Thus, the statute can prevent claims from ever vesting if the product that allegedly caused an injury was delivered to an end user more than ten years before the injury occurred. This feature of the statute triggers the portion of *Sedar's* fundamental analysis concerning Section 16, Article I that is dispositive of our inquiry here. Because such an injured party’s cause of action never accrues against the manufacturer or supplier of the product, it never becomes a vested right.” *Id.*

{¶48} Adopting *Sedar's* rationale that the right-to-a-remedy clause only applies to an *existing, vested* right, and emphasizing it is “state law which determines what injuries are recognized,” the *Groch* court concluded R.C. 2305.10(C), which does not recognize a right to remedy after the ten-year statutory period, does not violate the constitutional clause.

{¶49} However, the court concluded now R.C. 2305.10(G), the retroactive application provision, violates Section 28, Article II of the Ohio Constitution, as applied to the plaintiff in the case. That section provides, “The general assembly shall have no power to pass retroactive laws.”

{¶50} R.C. 2305.10(G) – identical to Section (F) of R.C. 2305.131 – expressly provides that the statute of repose applies to all actions commenced after the effective date of the statute, April 7, 2005, *regardless of whether the cause of action accrues*, although it does not apply to actions pending prior to the statute’s effective date.

{¶51} As the *Groch* court reasoned, Mr. *Groch* suffered injury on March 3, 2005, before the effective date of the statute. If he were to file the action before April 7, 2005, that is, before the statute (which prevents a cause of action from accruing after ten years of the delivery of the defective product) came into effect, his cause of action would have *accrued*, and the statute of repose would not have applied to him. This means that in order to avoid the bar of R.C. 2305.10(C), he had only 34 days to file his lawsuit to avoid the time bar. The *Groch* court determined R.C. 2305.10(G) and R.C. 2305.10(C), *if valid*, would combine to prevent Mr. *Groch*, and other plaintiffs in a similar position, from recovering on his *accrued* cause of action. *Id.* at ¶179. Therefore, the inquiry became whether the statute can be validly applied, *retroactively*, to Mr. *Groch*.

***Groch: The Statute of Repose is Unconstitutionally Retroactive As Applied to a Plaintiff Whose Cause of Action Accrued Before Effective Date of the Statute***

{¶52} In answering the first part of the retroactivity question, that is, whether the General Assembly intended the statute's enactment to apply retroactively, the court noted the General Assembly's clear intent expressed in former R.C. 2305.10(F) (current R.C. 2305.10(G)) that the statute of repose is to apply retrospectively to plaintiffs in Mr. *Groch*'s position, i.e., those who were injured beyond the ten-year period, but before April 7, 2005. *Id.* at ¶224.

{¶53} Turning to the second part of the retroactivity inquiry, the court stated that in order to determine whether a statute is unconstitutionally retroactive, it must be decided whether the statute is substantive or merely remedial. *Id.* at ¶186, citing *Van Fossen*, 36 Ohio St.3d 100, paragraph three of the syllabus. A statute is substantive if it "impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation[s], or liabilities as to a past transaction, or creates a new right." *Id.*, citing *Van Fossen* at 107. Conversely, "remedial laws are

those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *Id.*, citing *Van Fossen* at 107. “A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively.” *Id.*, citing *Van Fossen* at 107.

{¶54} Despite the General Assembly’s express statement in R.C. 2305.10(G) that the R.C. 2305.10(C)(1) is “purely remedial”, the *Groch* court noted that whether a statute is remedial depends upon its operation, and not upon a label placed by the General Assembly, and it further noted that a statute may be remedial in some contexts but not in all. *Id.* at ¶187.

{¶55} The court reasoned that R.C. 2305.10(C) prevents a cause of action from accruing if the defective product was delivered ten years before the injury occurred. Because the cause of action never accrues, it never becomes a vested right. Therefore, for most plaintiffs, there is no “substantive right” affected by R.C. 2305.10(C), and that statute on its face does not violate Section 28, Article II. *Id.* at ¶188.

{¶56} Mr. Groch’s situation, however, was different. As the court reasoned, pursuant to R.C. 2305.10(G), R.C. 2305.10(C) by its own terms does not apply to bar actions that were already pending before April 7, 2005. Thus, a cause of action based on an injury that occurred prior to April 7, 2005, *does* accrue. Therefore, Mr. Groch’s cause of action *did* vest for purposes of Section 28, Article II. *Id.* at ¶189. For plaintiffs in Mr. Groch’s situation, R.C. 2305.10(G) restricts the time for filing a cause of action that has validly accrued. *Id.* Mr. Groch’s injury occurred on March 3, 2005. By operation of R.C. 2305.10(G), he had only 34 days to commence his suit before the effective date of R.C. 2305.10(C) and former R.C. 2305.10(F) (April 7, 2005), or his cause of action would be barred by R.C. 2305.10(C)(1). Mr. Groch essentially had only

34 days to assert an already accrued right. He missed the date, commencing his suit on June 2, 2006.

{¶57} Based on this reasoning, the court held that Section 28, Article II of the Ohio Constitution, which bans retroactive laws, prevents R.C. 2305.10(C) and former 2305.10(F) from applying to the specific facts of the case, and thus, the court upheld Mr. Groch's as-applied challenge. *Id.* at ¶1.

#### **The Constitutionality of R.C. 2305.131 As Applied to Oaktree's Claims**

{¶58} With the foregoing in mind, we are now ready to address Oaktree's contention under the second assignment of error that R.C. 2503.131(A)(1) is unconstitutional as applied to Oaktree's claims.

{¶59} 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. A written report relative to the defects in the first three units inspected was provided to the owners on January 16, 2004, followed by a written report detailing the defects to the next three units on July 1, 2004. The report relative to the seventh unit was provided after suit had been filed.

{¶60} 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.

{¶61} First of all, we note that although the Supreme Court of Ohio changed its position on the statute of repose, it retained the same view that the effect of the former R.C. 2305.131, although worded differently than its current version, was to prevent a cause of action from "accruing" after ten-year period – just like the current version. *Sedar* at 201-201; *Groch* at ¶116. In that regard, the statute is similar. The current form of the statute, however, adds a provision to allow a plaintiff who discovers a defective condition during the ten-year period, but less than two years prior to the expiration of the ten-year period, to commence an action within two years of the date of discovery. R.C. 2305.131(2). This provision, however, is irrelevant here.

{¶62} The *Groch* court stopped short of overruling *Brennaman*, but instead confined it to its particular holding that former R.C. 2305.131 was unconstitutional. *Groch* at ¶146. Under *Brennaman*, a plaintiff who was injured ten years after the completion of the construction would not be barred from commencing a suit beyond the ten-year period, if the suit was filed within a "reasonable" time. Oaktree discovered the injury caused by the defectively installed footers in the fall of 2003, and therefore, although the injury occurred beyond the ten-year period, it would not be barred from commencing the suit, *if it commenced the suit within a reasonable time*. *Brennaman* did not specify what would be considered a reasonable time. In *Brennaman*, the plaintiff filed the suit within a year, and the court found it to be filed within a reasonable time.

{¶63} Thus, applying *Brennaman* to Oaktree's claims, the pertinent question is whether Oaktree's action, filed on December 16, 2005 and over two years from being

on notice of the problems caused by the defectively installed footers, was filed within a reasonable time. Under *Brennanman*, it would appear Oaktree untimely filed its action.

{¶64} We reach the same conclusion if we apply *Groch* to this case. Although *Groch* reviewed a different statute of repose, that statute is worded very similarly to R.C. 2305.131. Just like Mr. Groch, Oaktree's injury (i.e., cracked walls resulting from the defectively installed footers) occurred beyond the ten-year statutory period, and before S.B. 80 came into effect. For such a plaintiff, the *Groch* court held that the cause of action has accrued and the statute of repose enacted by S.B. 80 on April 7, 2005, cannot apply retroactively to bar the suit, because it would not afford certain plaintiffs a reasonable time to commence a suit – in Mr. Groch's case, he only had 34 days to file the suit after the injury, and therefore R.C. 2305.10(C) would be unconstitutional if applied retroactively to him.

{¶65} 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 (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.

{¶66} 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.

**Summary of Our Constitutional Analysis of the Statute of Repose As Applied to Oaktree**

{¶67} In summary, if the former version of R.C. 2305.131 governs Oaktree's claims, that statute was struck down by *Brennaman* as unconstitutional as applied to a plaintiff such as Oaktree, where the cause of action accrued (i.e., the injury occurred) after the ten-year period. *Brennaman* did not set forth a metric for determining what constitutes a reasonable time for filing an action after the injury occurred, holding only that the one-year action filed by the plaintiff in that case was timely.

{¶68} If the current version of R.C. 2305.131 governs Oaktree's claims, the Supreme Court of Ohio has yet to pass on its constitutionality, but its analysis in *Groch* of a similar statute of repose provides some guidance. Under *Groch*, the statute of repose cannot be retroactively applied to a situation where a plaintiff's cause of action had already accrued before the effective date of the statute, but the plaintiff was not afforded sufficient time to file the action before that date. Applying *Groch*'s two-year rule, we would reach the same conclusion that Oaktree's action was filed untimely.

{¶69} We note that in *McClure v. Alexander*, 2d Dist. No. 2007 CA 98, 2008-Ohio-1313, the Second District also upheld the constitutionality of R.C. 2305.131. The *McClure* plaintiff and Oaktree are in a similar situation: their injuries (in the former's case rotten walls from water damage due to improperly installed siding) occurred

beyond the ten-year period, but before April 7, 2005, yet both did not commence an action until after that date.

{¶70} The Second District upheld the constitutionality of the statute of repose as applied to the plaintiff there on the sole ground that the current version of R.C. 2305.131 is not “substantially the same” as the prior version, and therefore, “*Brennaman* is not directly controlling.” *McClure* at ¶52. The Second District reasoned that the two versions are not “substantially the same” because the current version “actually prevents a cause of action from accruing rather than preventing a plaintiff from bringing an action after accrual.” *Id.* at ¶50. Implicit in this statement is the view that the prior version did not prevent a cause of action from accruing, but only prevented a plaintiff from bringing an action after accrual. Our reading of *Sedar* and *Groch*, however, indicates the Supreme Court of Ohio has consistently interpreted the prior version to mean it *prevents a cause of action from accruing* beyond the ten-year period, just like the current version. *Groch* at ¶116, *Sedar* at 201-202. In this regard, the two statutes are similar, pursuant to *Sedar* and *Groch*’s interpretation of the former version, despite their different wordings.<sup>6</sup> Furthermore, the Second District did not explain why its conclusion that *Brennaman* did not control would automatically lead to the conclusion that the current statute is constitutional. Presumably, it is because it believed *Sedar* still controls, yet, according to the Second District itself, *Sedar* reviewed a “substantially different” statute. Thus, although we agree with the conclusion reached by the Second District, we reach that conclusion by way of a different analysis, based on our own careful reading of *Sedar*, *Brennaman*, and *Groch*.

{¶71} The second assignment of error is overruled.

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6. We note that a difference does exist between the two versions of the statute: the current version permits a plaintiff to commence an action beyond the ten-year period if the claim is discovered within that period, but less than two years before the expiration of the ten-year period. This provision is not applicable in this case (or in *McClure*) because the injury was discovered beyond the ten-year period.

## Expert's Affidavit

{¶72} The first assignment of error concerns whether the trial court should consider the affidavit of the expert, Daniel Marinucci. Oaktree attached the affidavit to the brief it submitted to the trial court regarding the constitutionality of R.C. 2305.131 when the case was remanded. The affidavit states that “[t]he type of failure related to footer movement is a very slow process because the freeze thaw cycle only happens a few months over a year period. It takes years, far beyond contractors’ one year warranty contract provisions to occur.” It also states that “It is very common that the typical signs for structural stress failures in a building’s superstructure caused by footers that are erected in the frost plane will take over a decade to manifest and be noticed.”

{¶73} Oaktree moved to strike the affidavit from the record. The trial court granted the motion, reasoning that at the December 17, 2009 case management conference, a deadline of February 29, 2008 was set for the production of expert reports, and furthermore, the parties had been given opportunities to brief the statute of repose issues. The court refused to allow Oaktree to bring in additional expert testimony now that the deadline had past.

{¶74} “[T]he standard of review of a trial court’s decision in a discovery matter is whether the court abused its discretion.” *Mauzy v. Kelly Servs.*, 75 Ohio St.3d 578, 592 (1996). “The extent to which expert testimony and opinion evidence are received rests largely within the discretion of the trial judge.” *Camden v. Miller*, 34 Ohio App.3d 86, 91 (2d Dist.1986). “It is within the discretion of the trial court to permit either party to introduce evidence after both sides have rested.” *Ketcham v. Miller*, 104 Ohio St. 372 (1922), paragraph three of the syllabus.

{¶75} Oaktree contends it could not have anticipated needing an expert report or an affidavit relating to the constitutionality of the statute of repose before the trial.

However, the record reflects that the constitutionality issue was still pending before the trial court at the deadline for expert reports. Thus, the trial court was well within its discretion not to allow Oaktree to bring in additional expert opinion on remand.

{¶76} In any event, the outcome of this case would not have been different even if the trial court admitted the expert's opinion that the defect relating to footers will take over a decade to manifest itself. The problem with Oaktree's case is not how long it took for the footer defect to finally manifest itself causing injury to the building, but rather the time Oaktree took to file suit once the damage was noticed and Oaktree was fully apprised of the probable cause of the defect.

{¶77} The first assignment of error is without merit.

{¶78} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

STATE OF OHIO  
COUNTY OF LAKE

)  
)SS.  
)

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

OAKTREE CONDOMINIUM  
ASSOCIATION, INC.,

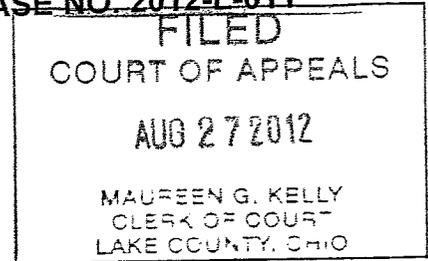
JUDGMENT ENTRY

Plaintiff-Appellant,

CASE NO. 2012-L-011

- vs -

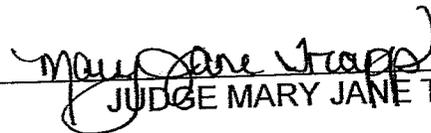
THE HALLMARK BUILDING  
COMPANY, et al.,



Defendants-Appellees.

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.

  
\_\_\_\_\_  
JUDGE MARY JANE TRAPP

FOR THE COURT

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

OAKTREE CONDOMINIUM  
ASSOCIATION, INC.,

Plaintiff-Appellee,

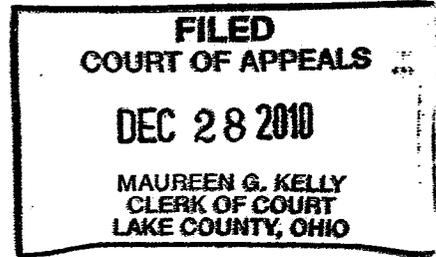
- VS -

THE HALLMARK BUILDING COMPANY,  
et al.,

Defendants-Appellants.

OPINION

CASE NO. 2009-L-112



Civil Appeal from the Court of Common Pleas, Case No. 07 CV 002615.

Judgment: Reversed and remanded.

*Steven M. Ott and Latha M. Srinivasan, Ott & Associates Co., L.P.A., 55 Public Square, #1400, Cleveland, OH 44113-1901 (For Plaintiff-Appellee).*

*Patrick F. Roche and Beverly A. Adams, Davis & Young, L.P.A., 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendants-Appellants The Hallmark Building Company and Fairfax Apartments, Inc.).*

MARY JANE TRAPP, P.J.

{¶1} The Hallmark Building Company appeals from a judgment of the Lake County Court of Common Pleas awarding the Oaktree Condominium Association, Inc., \$210,000 on its claims against Hallmark for the construction of a seven-unit condominium development built in 1990. A condo owner noticed a crack in his garage wall in the fall of 2003, and it was discovered that the footers for the residences were not placed at the proper depth according to the city's building code. After the condo

owners investigated further and received an expert's opinion as to the cause of the problem in October 2003, a suit was filed on December 16, 2005.

{¶2} The threshold issue in this case is whether the condominium association's claims are time-barred pursuant to the statute of repose, R.C. 2305.131. The trial court construed the phrase "improvements to real property" found in the statute of repose, and held that the phrase excludes the initial construction of a structure. Thus, the trial court held R.C. 2305.131 is not applicable.

{¶3} We find this interpretation is contrary to the common definition of an "improvement" on real property. Thus, as a matter of law, Oaktree's claims concerning an "improvement to real property" were filed past the ten-year period set forth in R.C. 2305.131. Accordingly, we must reverse. We remand, however, for the trial court to rule on the remaining issue raised on summary judgment it deemed moot, specifically whether R.C. 2305.131 is constitutional as applied to Oaktree's claims.

**{¶4} Substantive and Procedural History**

{¶5} Hallmark, a general contractor, assumed the Oaktree development project from Fairfax Apartments, Inc., in 1998. Hallmark completed the seven-unit development and the certificates of occupancy were issued on October 9, 1990.

{¶6} In 2003, Franklin Swanson, the owner of unit one, noticed a crack on the wall of his garage that was shared with unit two, owned by the Artinos. An investigation, which included test digs of all the units, revealed the foundations and footers of the buildings were not set according to the building code of the city of Willoughby or the approved building plans drawn by Hallmark's owner. The plans called for the footers of the foundation to be placed at 42" below ground, five inches more than the 36" minimum

mandated by the city code. The footers were of varying depth, some being as low as 27".

{¶7} Footers for buildings are required to be set at sufficient depth below the "frost plane" so that the structure is not subjected to the freezing and thawing of the subsoil. Because the foundations and footers of the condominiums were not placed below the frost plane, the structure was unsettled and shifted, creating cracks in the walls.

{¶8} Mr. Daniel Marinucci, a structural engineer, inspected all seven units at the request of the Oaktree association, finding many of the footers were of an insufficient depth, and that six units suffered from some damage because of it. His initial estimate of the cost to repair those six units was \$417,472.90. During a condominium association meeting on December 31, 2003, Mr. Marinucci gave his opinion that the condition of the footers appeared to represent "intentional disregard for the building code requirement." This opinion was memorialized in the association's minutes of the meeting.

{¶9} R.L. Smith Construction, with Mr. Marinucci as a consulting engineer, repaired the Swanson and Artino units, with the exception of the front walls, which were not completed due to a lack of funds. The footers were lengthened to the required depth by using a repair technique called "underpinning."

{¶10} "Underpinning" is a repair technique that lengthens and deepens shallow footers. First, spaces are dug underneath the existing footers in five foot segments along the wall into which concrete is poured. The added concrete is tied into the

existing footer and the one adjacent, thus lengthening and deepening the original footer to below the frost plane.

{¶11} In December of 2005, Oaktree Condominium Association, Inc., filed suit against Hallmark, alleging that Hallmark failed to perform in a workmanlike manner; that it was negligent; and that it violated the Ohio Consumer Sales Practices Act (CSPA). The suit was voluntarily dismissed and refiled in August of 2007.

{¶12} Hallmark filed a motion for summary judgment, arguing that Oaktree's claims were time-barred as a matter of law under R.C. 2305.131 as the suit was filed well over the ten-year period provided for in the statute. The court denied the motion, finding that the initial construction of the foundations and footers did not constitute "improvements to real property," either as defined by R.C. 5701.02(D), a code section relating to the taxation of real property or as the phrase is commonly used.

{¶13} Hallmark filed another motion for summary judgment, which the court granted, in part, dismissing Oaktree's CSPA claim as having been filed beyond the statute of limitations. Hallmark's motion for reconsideration of the court's decision as to the statute of repose, R.C. 2305.131, was denied, and the case proceeded to a three-day jury trial.

{¶14} During trial, the court denied Hallmark's motions for a directed verdict, which again raised the issue of the statute of repose and asserted that Oaktree had failed to establish its property damage claim. The jury awarded Oaktree \$219,000.

{¶15} Hallmark subsequently appealed, raising five assignments of error for our review:

{¶16} “[1.] The trial court erred in denying Defendant’s Motion for Summary Judgment holding that Ohio’s Statute of Repose, R.C. 2305.131, was inapplicable because the construction of a building’s foundation and footers did not constitute ‘improvements to real property’ under R.C. 2305.131.

{¶17} “[2.] The trial court erred in denying Defendant’s Motion for Directed Verdict based on Ohio’s Statute of Repose, R.C. 2305.131, because the uncontroverted evidence was that the construction of a building’s foundation and footers did constitute ‘improvements to real property.’

{¶18} “[3.] The trial court erred in denying Defendant’s Motion for Directed Verdict at the conclusion of Plaintiff’s case because Plaintiff failed to establish its real property damage claim as a matter of law.

{¶19} “[4.] The trial court committed prejudicial error when it improperly instructed the jury on the determination of property damages.

{¶20} “[5.] The trial court committed prejudicial error when it failed to instruct the jury on spoliation of evidence.”

{¶21} After oral argument, Hallmark filed a motion to withdraw the third and fourth assignments of error, which was granted.

{¶22} **“Improvement” on Real Property**

{¶23} Hallmark first contends the trial court erred in awarding summary judgment to Oaktree, dismissing its argument that Oaktree’s claims were barred as a matter of law under R.C. 2305.131. Thus, Hallmark argues the court erred in finding the initial construction of the foundations and footers were not “improvements to real property.” We agree, and, finding it dispositive of this appeal, reverse and remand.

## **{¶24} Summary Judgment Standard of Review**

**{¶25}** “We review de novo a trial court’s order granting summary judgment.” *Cunningham v. Lukjan Metals Products, Inc.*, 11th Dist. No. 2009-A-0033, 2010-Ohio-822, ¶12, citing *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. “A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.” *Id.*, quoting *Hapgood* at ¶13, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

**{¶26}** “Pursuant to Civ.R. 56(C), summary judgment is proper when (1) the evidence shows ‘that there is no genuine issue as to any material fact’ to be litigated, (2) ‘the moving party is entitled to judgment as a matter of law,’ and (3) ‘it appears from the evidence \*\*\* that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence \*\*\* construed most strongly in the party’s favor.’” *Id.* at ¶13, quoting Civ.R. 56(C).

## **{¶27} The Statute of Repose**

**{¶28}** On summary judgment, Hallmark contended Oaktree’s claims were filed beyond the ten-year period set forth in the statute of repose for injury to real property, R.C. 2305.131.

**{¶29}** In relevant part, R.C. 2305.131 states: “(A)(1) Notwithstanding an otherwise applicable period of limitations \*\*\* no cause of action to recover damages for \*\*\* an injury to real \*\*\* property, \*\*\* 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 \*\*\* an injury to real \*\*\* property shall accrue against a person who performed 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 years from the date of substantial completion of such improvement.”

{¶30} The trial court found that the “foundations and footers of Plaintiff’s property did not constitute an ‘improvement to real property’ either as defined under R.C. 5701.02(D) or when the words are defined according to their ordinary meaning.” Thus, the court found R.C. 2305.131 inapplicable because this case concerns the initial installation of the foundation and footers for a new construction and not just the repair or alteration of an existing building.

{¶31} The Supreme Court of Ohio’s analysis in *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, in determining what is an improvement for purposes of R.C. 2305.131 is insightful. The appellant in *Brennaman* argued that the same definition of “improvement” as used in the law of fixtures should apply.

{¶32} The court explained that “[i]t is a general axiom of statutory construction that once words have acquired a settled meaning, that same meaning will be applied to a subsequent statute on a *similar or analogous subject*. R.C. 1.42; cf. *Goehring v. Dillard* (1945), 145 Ohio St. 41. The rule is premised on the assumption that the General Assembly is aware of the meaning previously ascribed to words when enacting new legislation. *Id.*; R.C. 1.49. This rule of construction is not appropriate here, as the threshold requirement of similarity in purpose and subject between R.C. 2305.131 and

Section 2, Article XII has not been met. \*\*\* R.C. 2305.131 was enacted in response to the expansion of common-law liability of architects and builders to third parties who lacked privity of contract. [*Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 199,] citing *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy* (C.A. 6, 1984), 740 F.2d 1362, 1368. Without similarity of purpose or subject, the law of prior cases should not be interpolated in subsequent cases. Therefore \*\*\* the words of the statute must be read according to their common usage. R.C. 1.42.” *Brennaman* at 464.

{¶33} The definition of “improvement” employed by R.C. 5701.02(D), for purposes of property taxation, and relied upon by the trial court in this case, is not similar in purpose or subject to construction claims under R.C. 2305.131. In *General Electric Co. v. American Mechanical Contractors, Corp.* (Dec. 21, 2001), 11th Dist. No. 2000-L-211, 2001 Ohio App. LEXIS 5845, we held that “the definitions contained in R.C. Chapter 5701, which deal with property taxation, are not applicable to the determination of a statute of limitations.” *Id.* at 7. Similarly, here, the definitions contained in R.C. Chapter 5701, are not applicable to a statute of repose.

{¶34} As defined in common usage, “an improvement ‘includes *everything* that permanently enhances the value of the premises for general uses.’” (Emphasis added.) *Jones v. Ohio Building Co.* (1982), 4 Ohio Misc.2d 10, 12, quoting 41 American Jurisprudence 2d 479, Improvements, Section 1; see, also, Webster’s Third Dictionary 1138 (1971).

{¶35} Or, stated slightly differently, an improvement is “[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to

*more than mere repairs* or replacement of waste, costing labor or capital, and intending to enhance its value, beauty or utility or to adapt it for new or further purposes.” (Emphasis added.) *Id.*, quoting Black’s Law Dictionary 682 (5 Ed. 1979).

{¶36} Thus, by its very nature, the construction of a building, including the initial installation of the foundation and footers, is an “improvement to real property,” as it is a permanent structure intended to add value to real estate via a new use as a residence or a business. See, also, *Lietz v. Northern States Power Co.* (Minn. 2006) 718 N.W.2d 865, (defining an “improvement to real property” using a “common-sense interpretation,” as “[a] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs”); *Liptak v. Diane Apartments, Inc.* (Cal. App. 1980), 109 Cal. App.3d 762, (noting that the word improvement with respect to real property has been described in various manners depending on the context, and as applied to a statute of repose refers “separately to each individual changes or additions to real property \*\*\* irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature”); *Rose v. Fox Pool Corp.* (Md. 1994), 335 Md. 351 (applying the “common-sense ordinary meaning” in defining “improvement to real property” as “a valuable addition made to property \*\*\* amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes;” and that the nature of the addition or betterment, its permanence and relationship to the land and its occupants, and its effect on the value and use of the property should be considered).

{¶37} The Supreme Court of Ohio further explained that: “when determining whether an item is an improvement to real property under R.C. 2305.131, a court must look to the enhanced value created when the item is put to its intended use, the level of integration of the item within any manufacturing system, whether the item is an essential component of the system, and its permanence.” *Bailey v. Smart Papers, LLC*, 2009 U.S. Dist. LEXIS 27619, quoting *Brennaman* at 460.

{¶38} Similarly, “[i]n determining whether there is an ‘improvement to real property,’ as that phrase is used in section 2305.131, the Sixth Circuit has subscribed to a ‘common sense approach.’” *Id.* at 13, citing *Adair v. Koppers Co., Inc.* (6th Cir. 1984), 741 F.2d 111, 113. “The court employs a four factor test: (1) the level of permanence of the improvement, (2) whether it became an integral part of the system, (3) whether it enhances the value of the property, and (4) whether it enhances the use of the property.” *Id.*, citing *Adair* at 114.

{¶39} Applying the Supreme Court of Ohio’s test, as outlined in *Brennaman*, there is no question that the footers, an integral part of the foundation for condominiums, are an “improvement to real property.” The condominiums are permanent in nature, meant to be an integral part of the land, and enhance the value and use of the property.

#### **{¶40} R.C. 2305.131 as Applied to Oaktree**

{¶41} The statute of repose under R.C. 2305.131 begins to run when the improvement is completed. *Cincinnati Ins. Co. v. Wylie* (1988), 48 Ohio App.3d 289, 291, citing *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101; *Bernadini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1 (applying former R.C. 2305.131). Contrary to a statute of

limitations, which begins running upon the accrual of a cause of action, a statute of repose begins running upon the completion of services and construction. *Dreher v. Willard Constr. Co.* (1994), 93 Ohio App.3d 443, 447.

{¶42} The construction of the Oaktree condominiums began in 1988 and was completed when the occupancy permits were issued to Hallmark in October of 1990, as evidenced by the copies of the permits attached to Hallmark's motion for summary judgment.

{¶43} "As occupancy is surely its intended use, a certificate of occupancy not only adds to the value of a home but is essential to it. When the builder is responsible to obtain the certificate, its construction-related services for purposes of R.C. 2305.131 are not concluded until the certificate is issued and the home may be occupied." *Roll v. Reagan* (May 10, 1993), 2d Dist. No. 13527, 1993 Ohio App. LEXIS 2489, 8-9. Therefore, an occupancy permit is necessary for completion of construction because a new home may not be occupied until a permit is issued. *Id.*; see, also, Ohio Admin. Code 4104:2-1-27(A).

**{¶44} The Constitutionality of R.C. 2305.131**

{¶45} Hallmark also strongly urges this court to uphold R.C. 2305.131 as constitutional, both facially and applied. We decline to address this issue, however, as the trial court must have the "first bite at the apple." The trial court declined to address the remaining issues raised on summary judgment as they were deemed moot in light of the court's interpretation of an "improvement to real property."

{¶46} We are mindful that "[i]t is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality." *Groch v.*

*General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶25, quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶25, citing *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 418-419. “Before a court may declare unconstitutional an enactment of the legislative branch, ‘it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.’ *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus.” *Id.*

{¶47} Further, “[a] party seeking constitutional review of a statute may proceed in one of two ways: present a facial challenge to the statute as a whole or challenge as applied to a specific set of facts.” *McClure v. Alexander*, 2d Dist. No. 2007 CA 98, 2008-Ohio-1313, 9, quoting *Arbino*.

{¶48} Statutes of repose have had a tortured history in Ohio law, and R.C. 2305.131 was last struck down as unconstitutional in *Brennaman*, upon the Supreme Court of Ohio’s determination that it violated Section 16, Article I of the Ohio Constitution as depriving plaintiffs of a right to a remedy. *Brennaman* at 466-467. R.C. 2305.131 was since reenacted by S.B. 80, and made effective in April 7, 2005. The Supreme Court revisited *Brennaman* in *Groch*, in which it considered the constitutionality of R.C. 2305.10, a product-liability statute of repose also enacted by S.B. 80, for the first time. As noted below, the Supreme Court has yet to pass on the application on the statute of repose pertaining to construction issues.

{¶49} In *Groch*, the Supreme Court of Ohio limited its holding in *Brennaman* solely to the previous version of R.C. 2305.131, citing the *Brennaman* opinion as deficient in several respects: “*Brennaman* failed to consider the presumption of

constitutionality, and it 'accorded no deference to the General Assembly's determination of public policy as expressed in the statute under review;' *Brennaman* did not consider the 'critical distinction' between a statute of repose and a statute of limitation; *Brennaman* did not explain why the plaintiff's right to a remedy was violated even though other avenues of recovery may have been available; *Brennaman* did not address the concerns at issue subsequent to the demise of the privity doctrine, such as the interests of architects and builders in avoiding stale litigation; *Brennaman* ignored the concerns of builders who may be subject to suit but have no ability to fix a problem that arises long after the completion of a project." *McClure* at ¶133, citing *Groch* at ¶141-145.

{¶50} Thus, in *Groch*, the Supreme Court of Ohio limited its holding - and analysis - in *Brennaman* to apply only to the former version of R.C. 2305.131. The court then went on to distinguish former R.C. 2305.131 from R.C. 2305.10, the product-liability statute of repose at issue. The court determined that R.C. 2305.10 does not violate the open-court and right-to-a-remedy guarantee of Section 16, Article I of the Ohio Constitution, nor does it violate the principles of due process, equal protection or the takings clause. *Id.* at ¶94-177. But, specifically as applied to the petitioners, the court found the statute unconstitutionally retroactive because their cause of action had already accrued prior to the enactment of the statute, leaving them with a substantively accrued vested right that had an unreasonably short period of time in which to file suit. *Id.* at ¶199.

{¶51} At least one appellate court has upheld the new version of R.C. 2305.131 enacted by S.B. 80 as facially constitutional, but the Supreme Court of Ohio has yet to decide the issue. See *McClure*.

{¶52} We reverse and remand for the trial court to resolve the remaining issue raised on summary judgment regarding the constitutionality of R.C. 2305.131 as applied to Oaktree that was raised below but deemed moot.

{¶53} The judgment of the Lake County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

STATE OF OHIO )  
 )SS.  
COUNTY OF LAKE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

OAKTREE CONDOMINIUM  
ASSOCIATION, INC.,

JUDGMENT ENTRY

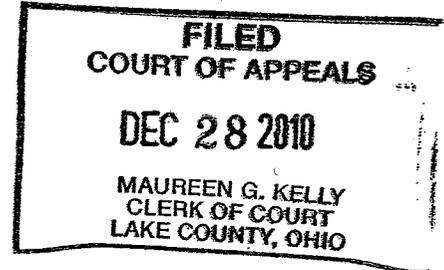
Plaintiff-Appellee,

CASE NO. 2009-L-112

- VS -

THE HALLMARK BUILDING COMPANY,  
et al.,

Defendants-Appellants.



For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Costs to be taxed against appellees.

  
PRESIDING JUDGE MARY JANE TRAPP

FOR THE COURT

FILED

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

2009 AUG 28 P 1:56

MAUREEN G. KELLY  
LAKE CO. CLERK OF COURT

OAKTREE CONDOMINIUM ASSOCIATION )  
INC., )  
Plaintiff )  
vs. )  
THE HALLMARK BUILDING COMPANY, )  
Defendant )

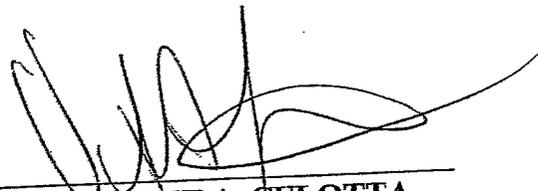
CASE NO. 07CV002615

JUDGE VINCENT A. CULOTTA

JUDGMENT ENTRY

This matter came on for trial by jury on August 25, 2009. In accordance with the jury's verdict returned on August 28, 2009, judgment is rendered in favor of Plaintiff in the amount of \$210,000.00. Costs to Defendant.

**IT IS SO ORDERED.**



JUDGE VINCENT A. CULOTTA  
Judge of the Court of Common Pleas

**COPIES:**

Steven M. Ott, Esq.  
Patrick F. Roche, Esq.

**FINAL  
APPEALABLE  
ORDER**

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

FILED  
2008 MAY -7 P 2:27  
LYNNE L. MAZEIKA  
LAKE COUNTY CLERK OF COURT

OAKTREE CONDOMINIUM  
ASSOCIATION, INC.,

Plaintiff

vs.

THE HALLMARK BUILDING  
COMPANY, et al.,

Defendants

CASE NO. 07CV002615

JUDGE VINCENT A. CULOTTA

JUDGMENT ENTRY

This matter comes before the Court for consideration of the Motion for Summary Judgment, Plaintiff's Brief in Opposition to Defendants the Hallmark Building Company and Fairfax Apartments, Inc.'s Motion for Summary Judgment, and Defendants' Reply Brief in Support of Summary Judgment.

This is a re-filed action<sup>1</sup> by Oaktree Condominium Association, Inc. against the Hallmark Building Company, Fairfax Apartments, Inc. and John Does 1-3. Plaintiff alleges that Hallmark Building Company is the successor of Defendant Fairfax Apartments, Inc., the original developer of the properties located at Oaktree Condominium Association, Inc. Plaintiff further alleges that Defendants failed to perform in a workmanlike manner in constructing the foundation of the property thereby damaging Plaintiff. Plaintiff also alleges negligence in failing to employ good and sound developer and construction practices on Plaintiff's property thereby damaging Plaintiff. Plaintiff makes a claim that Defendants violated the consumer sales practices act by supplying defective workmanship and materials to Plaintiff thereby damaging Plaintiff. Plaintiff seeks compensatory damages, a declaration that Defendants' practices were unfair, deceptive and unconscionable sales practices, an injunction against continuation of Defendants' unfair, deceptive and unconscionable sales practices, three times Plaintiff's actual damages pursuant to R.C. §1345.09, attorney fees and the costs of the action.

At this time, Defendants Hallmark Building Company and Fairfax Apartments, Inc. are seeking an Order granting summary judgment in their favor and against Plaintiff pursuant to Civ.R. 56. Defendants contend that they are entitled to judgment as a matter of law because

<sup>1</sup> This case was originally filed on December 16, 2005, and voluntarily dismissed on August 30, 2006.

Ohio's Statute of Repose related to limitation of actions for damages based on defective and unsafe conditions of improvement to real property, R.C. §2305.131, bars all of Plaintiff's claims.

Plaintiff opposes Defendants' motion arguing that R.C. §2305.131 is inapplicable in this matter because the foundation and footers of Plaintiff's property do not constitute "improvements" to real property. Alternatively, Plaintiff argues that R.C. §2305.131 violates Section 16, Article I of the Ohio Constitution and should not be applied in this matter.

In reply, Defendants assert that Plaintiff's argument that R.C. §2305.131 is inapplicable because the foundation and footers of Plaintiff's real property do not constitute "improvements" to real property lacks merit and is contrary to Ohio law. Defendants further argue that R.C. §2305.131 does not violate Section 16, Article I of the Ohio Constitution and should be applied in this matter.

#### SUMMARY JUDGMENT STANDARD

Pursuant to Civ.R. 56, summary judgment is proper, when, after construing the evidence in a light most favorable to the nonmoving party, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. If the moving party satisfies this burden, then the nonmoving party has the burden pursuant to Civ.R. 56(E) to provide evidence demonstrating a genuine issue of material fact. *Id.* If the nonmoving party does not satisfy this burden then summary judgment is appropriate. *Id.*

#### COURT'S ANALYSIS

R.C. §2305.131, effective April 7, 2005, provides, in relevant part:

Statute of repose for claims based on unsafe conditions of real property improvement

(A) (1) Notwithstanding an otherwise applicable period 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, an 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, an 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 performed 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 years from the date of substantial completion of such improvement.

(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.

\* \* \*

(E) This section does not create a new cause of action or substantive legal right against any person resulting from the design, planning, supervision of construction, or construction of an improvement to real property.

(F) 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 the effective date of this section, 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 the effective date of this section.

(G) As used in this section, "substantial completion" means the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

In this case, the first issue to be addressed is whether or not R.C. §2305.131 is the proper statute to apply in this case. While Defendants contend that it is, Plaintiff maintains that R.C. §2305.131 is inapplicable because the foundation and footers of Plaintiff's property, which are at issue in this case, do not constitute "improvements to real property." Plaintiff argues that because the foundation and footers were constructed at the time the building was originally constructed, they cannot be considered "improvements to real property." Plaintiff relies on R.C.

§5701.02(D)<sup>2</sup> which defines "improvement" as: "with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure." Plaintiff further relies on *Brennamen v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, which recognized the definition of "improvement" as set forth in Black's Law Dictionary (6<sup>th</sup> Ed.1990) as:

a valuable addition made to property (usually real estate) or as an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.

Plaintiff also relies on the definition of "improvement" as set forth in Webster's Third New International Dictionary (1961) 1138 which provides:

a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

In making the argument that R.C. §5701.02(D) should not be utilized by this Court to define "improvement," Defendants rely on *Adair v. The Koppers, Company., Inc.* (1984), 741 F.2d 111, wherein the U.S. Sixth Circuit Court, in applying Ohio law, held that the phrase "improvement to real property" should be construed according to its ordinary meaning, and not as it is used or construed in Article XII, section 2 of the Ohio Constitution which deals with taxes on "land and improvements thereon." The Circuit Court reasoned that to construe the phrase "improvement to real property" as used in Article XII, section 2 of the Ohio Constitution which deals with taxes on "land and improvements thereon" would require the application of Ohio law of fixtures to determine whether something is an improvement since fixture law is generally applied in construing Article XII, section 2. (citations omitted.) The Sixth Circuit Court noted that R.C. §2305.131 and the constitutional provision do not refer to "the same or an analogous subject." The court also noted that the constitution speaks of "land and improvements thereon" in the context of establishing preferential tax treatment for certain categories of property to stimulate production while R.C. §2305.131 extends special protection from stale litigation and extensive liability for the designer or builder of "an improvement to real property." (Citations omitted). The court held that "given the unrelated purposes of these provisions, there is no reason to assume that the legislature meant to refer to judicial construction of 'improvements' in

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<sup>2</sup> This section provides definitions relating to real property in the context of taxation.

the constitution by using the term 'improvement' in section 2305.131." Thus, the court concluded:

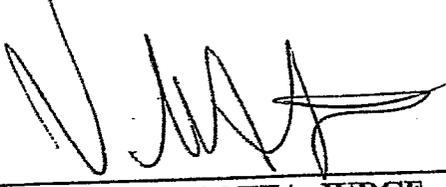
"According to Ohio's rules of construction, when no special meanings are indicated for terms employed in a statute, 'words and phrases shall be read in context and construed according to the rules of grammar and common usage.' Ohio Rev. Code §1.42. Thus 'an improvement to real property' should be construed according to its ordinary meaning."

In this case, the Court finds that the foundation and footers of Plaintiff's property do not constitute an "improvement to real property" either as defined under R.C. §5701.02(D) or when the words are defined according to their ordinary meaning. Clearly, the foundation and footers of a property are the basic components in the construction of a building and cannot be added later after the building is completed because the building cannot be completed without a foundation and footers. While the Court recognizes that a foundation and/or footers can be repaired or altered subsequent to the building of real property, which may constitute an "improvement to real property," the initial installation of a foundation and footers is not an "improvement to real property." The Plaintiff's Complaint makes allegations relative to the initial installation of the foundation and footers which is not an "improvement to real property." Thus, the Court finds that R.C. §2305.131 is not applicable and does not bar Plaintiff's action.

Having deemed that R.C. §2305.131 does not apply in this case, the issue of retroactive or prospective application of the statute is moot. Further, the Court finds that Plaintiff's alternative argument that R.C. §2305.131 is unconstitutional as applied in this case has been rendered moot.

**ACCORDINGLY**, the Motion for Summary Judgment is not well taken and is hereby denied.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
**VINCENT A. CULOTTA, JUDGE**

Copies:

Latha M. Srinivasan, Esq.  
Thomas J. Connick, Esq.

*CONTESTED ELECTIONS.*

§21 The General Assembly shall determine, by law, before what authority, and in what manner elections shall be conducted.

(1851)

*APPROPRIATIONS.*

§22 No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.

(1851)

*IMPEACHMENTS; HOW INSTITUTED AND CONDUCTED.*

§23 The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the senators, when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the senators.

(1851)

*OFFICERS LIABLE TO IMPEACHMENT; CONSEQUENCES.*

§24 The governor, judges, and all state officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office under the authority of this state. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.

(1851)

*REPEALED. WHEN SESSIONS SHALL COMMENCE.*

§25

(1851, rep. 1973)

*LAWS TO HAVE A UNIFORM OPERATION.*

§26 All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.

(1851)

*ELECTION AND APPOINTMENT OF OFFICERS; FILLING VACANCIES.*

§27 The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the General Assembly, except as prescribed in this constitution; and in these cases, the vote shall be taken "viva voce."

(1851, am. 1953)

*RETROACTIVE LAWS.*

§28 The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

(1851)

ORC Ann. 2305.09

Current through Legislation passed by the 130th *Ohio* General Assembly and filed with the Secretary of State through File 1 Annotations current through November 9, 2012

Page's *Ohio Revised Code Annotated* > TITLE 23. > CHAPTER 2305. > TORTS

§ 2305.09. Four-year limitation for certain actions; five-year limitation for identity fraud

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

- (A) For trespassing upon real property;
- (B) For the recovery of personal property, or for taking or detaining it;
- (C) For relief on the ground of fraud, except when the cause of action is a violation of *section 2913.49 of the Revised Code*, in which case the action shall be brought within five 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*;
- (E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground 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.

**History**

RS § 4982; S&S 541; S&C 948; 51 v 57, § 15; 64 v 145; 81 v 210; GC § 11224; 112 v 237; Bureau of *Code* Revision, 10-1-53; 129 v 13(177) (Eff 7-1-62); 145 v S 147. Eff 8-19-94; 150 v H 161, § 1, eff. 5-31-04; *152 v H 46*, § 1, eff. 9-1-08.

**Annotations**

**Notes**

**Section Notes**

Editor's Notes

The effective date is set by § 3 of *152 v H 46*.

The effective date is set by section 6 of H.B. 161 (150 v --).

**EFFECT OF AMENDMENTS**

*152 v H 46*, effective September 1, 2008, added the exception to the beginning of the introductory paragraph; and added the exception to the end of (C).

**Case Notes**

Current through Legislation passed by the 130th Ohio General Assembly and filed with the Secretary of State through File 1 Annotations current through November 9, 2012

Page's Ohio Revised Code Annotated > TITLE 23. > CHAPTER 2305. > OTHER RELIEF

§ 2305.131. Statute of repose for claims based on unsafe conditions of real property improvement

(A)

- (1) Notwithstanding an otherwise applicable period 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, an 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, an 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 performed 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 years from the date of substantial completion of such improvement.
  - (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.
- (B) Division (A) of this section does not apply to a civil action commenced against a person who is an owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement to real property at the time that the defective and unsafe condition of the improvement to real property constitutes the proximate cause of the bodily injury, injury to real or personal property, or wrongful death that is the subject matter of the civil action.
- (C) Division (A)(1) of this section is not available as an affirmative defense to a defendant in a civil action described in that division if the defendant engages in fraud in regard to furnishing the design, planning, supervision of construction, or construction of an improvement to real property or in regard to any relevant fact or other information that pertains to the act or omission constituting the alleged basis of the bodily injury, injury to real or per-

sonal property, or wrongful death or to the defective and unsafe condition of the improvement to real property.

- (D) Division (A)(1) of this section does not prohibit the commencement of a civil action for damages against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than the period described in division (A)(1) of this section and whose warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real or personal property, or wrongful death in accordance with the terms of that warranty or guarantee.
- (E) This section does not create a new cause of action or substantive legal right against any person resulting from the design, planning, supervision of construction, or construction of an improvement to real property.
- (F) 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 the effective date of this section, 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 the effective date of this section.
- (G) As used in this section, substantial completion means the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

#### History

150 v S 80, § 1, eff. 4-7-05.

#### Annotations

#### Notes

#### Section Notes

#### Editor's Notes

*Analogous in part to former RC § 2305.131 (146 v H 350), repealed 149 v S 108, § 2.02(E), eff 7-6-01.*

The provisions of § 3(B) of S.B. 80 (150 v --) read as follows:

SECTION 3. The General Assembly makes the following statement of findings and intent:

\* \* \*

(B) In enacting *section 2305.131* of the *Revised Code* in this act, it is the intent of the General Assembly to do all of the following:

- (1) To declare that the ten-year statute of repose prescribed by *section 2305.131* of the *Revised*

**Code**, as enacted by this act, is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the **Revised Code**, the general two-year statute of limitations prescribed by section 2305.10 of the **Revised Code**, and other general statutes of limitation prescribed by the **Revised Code**;

(2) To recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for the improvement or who furnished the design, planning, supervision of construction, or construction of the improvement:

(a) They lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement.

(b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.

(c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in division (E)(5)(b) of this section.

(3) To recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;

(4) To recognize that maintaining records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion;

(5) To declare that section 2305.131 of the **Revised Code**, as enacted by this act, strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation but not to affect civil actions against those in actual control and possession of an improvement to real property at the time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death.

#### Case Notes

CONSTITUTIONALITY.  
 APPLICABILITY.  
 CONSTRUCTION OF A BUILDING.  
 DISMISSAL.  
 INADEQUATE BRIEF.

Case Notes  
 ANALYSIS

CONSTITUTIONALITY.