

ORIGINAL

IN THE SUPREME COURT OF OHIO

OAKTREE CONDOMINIUM  
ASSOCIATION, INC.,

Appellant,

vs.

THE HALLMARK BUILDING  
COMPANY, et al.,

Appellees

Case No. 12-1922-1722

Appeal from the Lake County  
Court of Appeals, Eleventh  
Appellate District  
Case No. CA 2012-L-011

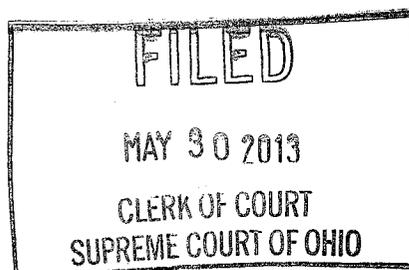
MERIT BRIEF OF AMICUS CURIAE,  
OHIO ALLIANCE FOR CIVIL JUSTICE,  
IN SUPPORT OF APPELLEE

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## **INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE**

The Ohio Alliance for Civil Justice (“OACJ”) is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. OACJ members, large and small, support a balanced civil justice system that will not only award fair compensation to injured persons, but also impose sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ members strongly support stability and predictability in the civil justice system. Ohio’s businesses and professionals must know what risks they assume as they drive commerce in Ohio.

OACJ strongly supported Amended Substitute Senate Bill 80 (“S.B. 80”) when it was being considered by the General Assembly, including the ten-year statute of repose for improvements to real property codified in R.C. 2305.131. This provision, which is designed to strike a rational balance between the rights of prospective claimants and the rights of designers, architects and others involved in the construction industry, is a desirable and necessary component of Ohio tort law. In adopting the statute of repose for improvements to real property, the General Assembly sought to prevent the problems inherent in stale litigation.

In the interest of predictability and stability, the OACJ urges the Court to follow apply the same rule as set forth in *Groch v. General Motors Corp.*, 117 Ohio St.3d, 2008-Ohio-546, and hold that two years is a reasonable period of time to file a claim where the injury occurred after the ten-year statutory period and prior to the effective date of the statute of repose (R.C. 2305.131).

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

The OACJ defers to the Statement of the Case and of the Facts as set forth in Appellee’s Brief.

**ARGUMENT**

**Appellant's Proposition of Law: 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. Background and Legislative History of R.C. 2305.131**

S.B. 80 was enacted by the General Assembly in December 2004 as legislation designed to reform Ohio's tort laws and to strike a balance between tort claimants and defendants. The statute of repose at issue, R.C. 2305.131, was enacted as part of S.B. 80, and became effective on April 7, 2005. S.B. 80 included two statutes of repose — one for product liability claims and one for improvements to real property. Proponents of S.B. 80 considered these statutes of repose as essential provisions of the bill.

During the legislative hearings on S.B. 80, more than 30 persons testified, representing opinions and interests for and against the bill. Based on the testimony and studies presented to it, the General Assembly issued a number of important findings (in uncodified law) that illustrate the public policy behind S.B. 80 and some of its specific provisions, including the statute of repose for improvements to real property. These findings include:

(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 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;

\* \* \* \* \*

(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 the improvement is problematic;

\* \* \* \* \*

(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 \* \* \* 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.

S.B. 80, Section 3(B)(1), (3) and (5).

As the findings set forth above indicate, unlike statutes of limitations which are triggered after a cause of action accrues, statutes of repose are designed to bar suits before the cause of action ever arises. See *Oaktree Condo. Assn., Inc. v. The Hallmark Building Company* (“Opinion”), 11<sup>th</sup> Dist. No. 2012-L-011, 2012-Ohio-3891, ¶ 25 (citing *Sedar v. Knowlton Constr.*, 49 Ohio St.2d 193, 551 N.E.2d 938 (1990)).

In reaching its decision, the Court should be mindful of the General Assembly’s findings and intent to enact a fair and meaningful statute of repose, just as this Court was when rendering its decision in *Groch v. General Motors Corporation*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶¶ 161 - 171 (quoting and relying on the General Assembly’s “statement of findings and intent” applicable to the statute of repose for product liability claims).

**B. In the Interest of Predictability, the Court Should Follow its Precedent in *Groch* and Affirm the Judgment of the Appellate Court.**

In resolving this appeal, this Court must either reinforce or undermine its prior jurisprudence regarding the constitutionality of statutes of repose. OACJ, on behalf of its members and in the interests of justice, urges the Court to choose the former.

The issue before the Court is whether the statute of repose for improvements to real property is unconstitutional as applied to Appellant. In *Groch v. General Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377, this Court addressed a similar “as applied”

constitutional challenge to the ten-year statute of repose for product liability claims (the other statute of repose included in S.B. 80). The statute of repose at issue in *Groch* provided that “no cause of action based on a product liability claim shall accrue against the manufacturer \* \* \* of a product later than ten years from the date that the product was delivered to its first purchaser \* \* \*.” R.C. 2305.10(C)(1). In *Groch*, the trim press at issue had been delivered more than ten years earlier to the first purchaser, so if the statute of repose applied, the claim would have been barred.

After determining that the statute of repose was constitutional on its face, the Court analyzed whether the statute of repose applied to bar the claim of a plaintiff who sustained bodily injury 34 days before the effective date of the statute of repose. As to that plaintiff, the Court held that the statute could not “bar a cause of action that accrued—and therefore vested—*prior* to the statute’s effective date.” *Id.* at ¶ 191. Otherwise, the Court reasoned, the statute would run afoul of Section 28, Article II of the Ohio Constitution, which prohibits retroactive laws that impair or extinguish “vested rights acquired under existing laws.” *Id.* at ¶¶ 178, 185.

The Court held that, under the Ohio Constitution, *Groch* must be given a “reasonable time” to exercise his right and to bring a product liability claim, irrespective of the period of repose. *Id.* at ¶ 199. Critically, the Court determined that “a reasonable time to commence a suit in this situation” was “two years from the date of the injury.” *Id.* at ¶ 198.

In making this determination, the Court “look[ed] to the other provisions” of the statute of repose for guidance. *Id.* at ¶ 198. In particular, the Court noted that the statute:

- “[P]rovides a *two-year limitations period* for commencing a suit for injuries occurring before the expiration of the ten-year repose period . . . but less than two years prior to the expiration of that period.” *Id.* at ¶ 193 (emphasis added).
- “[P]rovides that ‘[i]f a cause of action relative to a product liability claim accrues during the ten-year period . . . and the claimant cannot commence an action during

that period due to [an enumerated] disability . . . an action based on the product liability claim may be commenced *within two years* after the disability is removed.” *Id.* at ¶ 194 (emphasis added).

These provisions, the Court explained, “recognize that once a products-liability cause of action accrues, a plaintiff should have no less than two years in which to commence a suit.” *Id.* at ¶ 195. The Court noted that this recognition was “consistent” with the general two-year statute of limitations for products liability claims. *Id.* at ¶ 195.

In this case, the Court is asked to perform this same analysis under the statute of repose for improvements to real property. Again, the Court is asked to review a ten-year statute of repose. Again, the Court must review the ten-year statute of repose as applied to a plaintiff who sustained an injury (property damage as opposed to bodily injury) prior to the effective date of the statute of repose. Again, the Court must determine the “reasonable time” within which a plaintiff must file suit where the injury occurred beyond the ten-year statutory period but before the effective date of the statute. Again, the Court should look to other provisions of the statute in making this determination.

Here, the statute at issue is nearly identical to the statute analyzed in *Groch*.<sup>1</sup> See R.C. § 2305.131(A)(2). In relevant part, the statute:

- Provides a *two-year limitations period* for commencing a suit for defective and unsafe condition of an improvement to real property discovered during the ten-year period, but less than two years prior to the expiration of that period. R.C. § 2305.131(A)(2).
- Provides that “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 . . . and the plaintiff cannot commence an action during that period due to [an enumerated]

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<sup>1</sup> The ten-year statute of repose for product liability claims was triggered by delivery of the product to the first user. The ten-year statute of repose for improvements to real property is triggered by substantial completion of the improvement. See R.C. 2305.131(A)(1) (“\* \* \* no cause of action to recover damages \* \* \* that arises out of \* \* \* an improvement to real property \* \* \* shall accrue \* \* \* later than ten years from the date of substantial completion of such improvement.”).

disability” the plaintiff may commence a civil action to recover damages *within two years* from the removal of that disability. R.C. § 2305.131(A)(3).

Therefore, as in *Groch*, these statutory provisions recognize that “once a [construction defect] cause of action accrues, a plaintiff should have no less than two years in which to commence a suit.” *Groch*, at ¶ 195.

Despite the similarities in the statutes of repose, Appellant urges the Court to reject its prior reasoning and holding in *Groch*. Instead, Appellant argues that the Court should hold that *four years*—instead of two years—is a reasonable time to commence an action. (*See generally*, Appellant’s Brief). In other words, Appellant in this case poses the *same* question to the Court as the plaintiff in *Groch*, but expects a different answer.

In support of their argument, Appellant seizes on the Court’s dicta in *Groch* that the two-year period was “consistent” with the products liability statute of limitations. *Groch*, 117 Ohio St. 3d 192, ¶ 199. Based on this statement, it argues, “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.” (Appellant’s Brief at 8-9.)

Appellant misconstrues the crux of the Court’s reasoning. The *Groch* Court did not blindly apply the time period from the applicable statute of limitations. Instead, the Court undertook a reasoned consideration into what time period would afford a plaintiff a reasonable time to bring a claim, looking to the statute itself for guidance.

In a similar context, other courts have relied on *Groch* and held that a two-year period of time to bring a claim after enactment of a new statute of limitations or statute of repose satisfies Article II’s constitutional requirements. *See, e.g., Lutz v. Chesapeake Appalachia, L.L.C.*, 2010 U.S. Dist. LEXIS 60429, \*10 (N.D. Ohio June 18, 2010) (applying *Groch* to a newly-enacted statute of limitations for breaches of oil and gas leases); *see also W. and S. Life Ins. Co. v.*

*Countrywide Fin. Corp. (In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.)*, 2012 U.S. Dist. LEXIS 60776, \*\*44-45 (C.D. Cal. Mar. 9, 2012) (applying *Groch* to statute of limitations for state securities claims) (applying Ohio law). Appellant asks the Court to throw this settled, bright-line rule needlessly into flux, but there is no reason to do so.

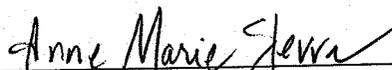
Appellant's argument also ignores the General Assembly's expressed intent in enacting R.C. 2305.131 "to promote a greater interest than the interest underlying the four-year statute of limitations prescribed by section 2305.10 of the Revised Code" and to prevent the litigation of stale claims. S.B. 80, Section 3(B)(1) and (5). The longer the time period to bring a claim, the stronger the likelihood that defendants will be forced to litigate stale claims. Thus, Appellant's argument conflicts with the policy behind the statute of repose.

In the interest of predictability and jurisprudential continuity, OACJ urges the Court to follow its precedent in *Groch* and again hold that two years is a constitutionally sufficient time period to bring a claim. There is no compelling reason for this Court to retreat from its precedent and create disharmony where there need be none. If, in *Groch*, "two years from the date of the injury" was a constitutionally reasonable time period to commence a suit, it should remain a constitutionally reasonable time period today.

### **CONCLUSION**

OACJ respectfully requests that the Court affirm the judgment of the Eleventh District Court of Appeals.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

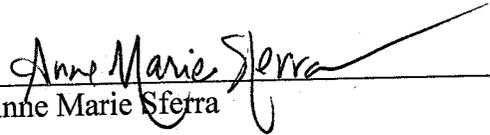
I do hereby certify that a true copy of the foregoing AMICUS CURIAE MEMORANDUM OF THE OHIO ALLIANCE FOR CIVIL JUSTICE IN SUPPORT OF MERIT BRIEF OF APPELLEE was served via regular U.S. mail, postage prepaid, and electronic delivery, this 30th day of May 2013, upon:

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