ORIGINAL

IN THE SUPREME COURT OF OHIO

OAKTREE CONDOMINIUM ASSOCIATION, INC.	:	**CASE NO. 2012-1722**
Appellant,	:	**On Appeal from the Lake County Court of Appeals, Eleventh Appellate District**
-vs-	:	**Court of Appeals Case No. 2012-L-011**
THE HALLMARK BUILDING COMPANY, *et al.*,	:	
Appellees.	:	

REPLY BRIEF OF APPELLANT OAKTREE CONDOMINIUM ASSOCIATION, INC.

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FILED
JUN 18 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUN 18 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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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. The intent behind or purpose of R.C. 2305.131 does not negate or justify the unconstitutional result of its application to Oaktree.

This Court need not question the wisdom of the General Assembly's policymaking to find an unconstitutional application of a statute of repose. *See State ex rel. Bishop v. Board of Education*, 139 Ohio St. 427, 438, 40 N.E.2d 913 (1942). In fact, Appellee's analysis of legislative intent is better suited for a facial challenge of R.C. 2305.131. For this "as applied" challenge, the Court should continue its inquiry beyond the purpose for enacting the statute to determine whether the application of the statute creates an unconstitutional affect on Oaktree.

The General Assembly's purpose for enacting R.C. 2305.131 is clear: "to promote a greater interest than the interest underlying the general four-year statute of limitation." Ohio's 125th General Assembly, 2004 Ohio Bill Analysis §3(B). (See Appellee's Appendix p. 58-59.) Appellee argues that two years was a reasonable time for Oaktree to file its claim because this case is exactly the type that the General Assembly intended to address in enacting R.C. 2305.131—a case where the general four-year statute would be abrogated in certain situations. While it's true that the General Assembly intended to promote the annihilation of cause of action accruing after ten years, regardless of the applicable statute of limitations, the protections of the Ohio Constitution defeat this intention because even a noble purpose for the enactment of R.C. 2305.131 cannot absolve its unlawful application.

The intent of all statutes of repose is to stop a claim before it ever accrues, which of course has a greater affect than the application of a general statute of limitation. It cannot be

held that all statutes of repose, due to their intended purpose, are pardoned from a constitutional analysis.

B. A reasonable time for Oaktree to bring a claim cannot be based on R.C. 2305.131(A) or (B) because those two-year timeframe provisions were only intended for certain claimants, unlike Oaktree, who discover a claim during the ten-year period but less than two years prior to the expiration of that period.

Appellee relies on the following relevant language in R.C. 2305.131(A)(2) and (A)(3) to support its contention that two years was reasonable time for Oaktree to file its claim:

> (A)(2) *** [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.
>
> (A)(3) *** [I]f 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.

The language in divisions (A)(2) and (A)(3) is unhelpful in this case. Both provisions extend the time for filing claims, but only for claimants who discovered conditions within ten years after an improvement to real property's substantial completion. Division (A)(2) allows a claimant with a vested right that accrued within the ten-year period—but less than two years before expiration of the ten-year period—to commence suit within two years of accrual of the claim. Oaktree did not discover a defective or unsafe condition within ten years after substantial completion. Oaktree discovered the condition in 2003, at a time when no statute of repose—or ten-year measuring period—existed. Division (A)(3) extends the time for filing claims in case

of a disability to commence an action. Oaktree suffered no disability to commence an action and the provision does not apply.

Oaktree is a peculiar "gap claimant" that has been retroactively affected by the enactment of the statute. The General Assembly never contemplated a reasonable period of time for claimants who discovered a defective or unsafe condition greater than ten years after the substantial completion and during a time period when no statute of repose was effective. Hence, why the *Groch* court conducted its "reasonable time" analysis. The same analysis must be used for Oaktree, only applied to its situation.

C. A time period of two years for Oaktree to bring a claim is not reasonable because it is inconsistent with the claim's statute of limitation.

In *Groch, et al. v. General Motors, Corp.*, the court dealt with the retroactive application of R.C. 2305.10—the products liability statute of repose. 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377. The *Groch* court held that R.C. 2305.10(F)—substantially similar to the real improvement counterpart in R.C. 2305.131(F)—operated unreasonably as applied to the claimants because they did not have a reasonable time to commence their suit and was, therefore, unconstitutionally retroactive. *Id.* at ¶198-199. A reasonable time in <u>that situation</u> should have been two years from the date of the injury. *Id. citing Adams v. Sherk*, 4 Ohio St.3d 37, 38, 446 N.E.2d 165 (1983). (Emphasis added.) The *Groch* court relied on *Adams* for its reasoning.

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 provided one year. *Id.* In creating its rule regarding the reasonable time to bring a claim for products liability claims, the *Groch* court cited the *Adams* analysis, which determined that a reasonable time is based on the least amount of time the plaintiff would have had under the applicable statute of limitations:

> This Court determined that one year is a reasonable time to bring a medical malpractice action because the general medical malpractice statute of limitations provides one year.

Groch at ¶197. What is a reasonable time is based on the amount of time a claimant would have under the applicable statute of limitations.

Appellee mistakenly contends that *Groch's* reasoning is not based on the general products-liability statute of limitations. To the contrary, the *Groch* court clearly stated that:

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

Groch at ¶198. The other provisions of R.C. 2305.10 included section (A), the general statute of limitations for products liability cases, which was referred to three paragraphs above paragraph 198. When the court looked "to the other provisions of R.C. 2305.10"—including division (A), the two-year statute of limitations—it determined that "a reasonable time to commence a suit in this situation should have been two years from the date of injury." *Id.* at ¶198.

Appellee relies entirely on the outcome of *Groch* and ignores the analysis the court provided to obtain such an outcome. While it is true that the *Groch* court ultimately held that two years was a reasonable time to file a claim after discovery of a products liability injury, it is the analysis that the *Groch* court used in this determination that defeats Appellee's argument that the two-year timeframe holds true for a real improvement to property injury.

Appellee contends that the *Groch* court looked only to R.C. 2305.10(C)(4) and (C)(5)—which are substantially similar to the real improvement counterparts in R.C. 2305.131(A)(2) and (A)(3)—to establish a reasonable time period of two years. As detailed above, the *Groch* court did not entirely rely on R.C. 2305.10(C)(4) and (C)(5) to conclude the two-year timeframe. Instead, it noted: "both R.C. 2305.10(C)(4) and (C)(5) recognize that once a products-liability

cause of action accrues, a plaintiff should have no less than two years in which to commence suit." *Id.* at ¶195. The court did not stop there but continued its analysis by adding: "[t]his recognition is consistent with R.C. 2305.10(A), the general products-liability statute of limitations, which states that *** such a claim shall be brought within two years after the cause of action." *Id.*

In *Groch*, sections R.C. 2305.10(C)(4) and (C)(5) were consistent with R.C. 2305.10(A)—the two-year statute of limitation—and, therefore, the court found that two years was a reasonable time to file suit. Applying that same analysis to the real improvement statute, sections R.C. 2305.131(A)(2) and (A)(3) are inconsistent with R.C. 2305.09—the four-year statute of limitations—and, therefore, the Court should not find that two-years is a reasonable time to file suit. Drawing a correlation between what was reasonable for a products liability case and what should be reasonable in a real improvement case is inconsistent with the *Groch* reasoning.

Rather, this Court should continue with the line of reasoning established by of *Adams* and *Groch*, which is to determine what is a reasonable time for Oaktree to file its claim based on the least amount of time it would have had under the applicable statute of limitations. In 2003, when Oaktree's claim accrued, the applicable statute of limitations was four years. R.C. 2305.09. No statute of repose existed that would have prevented Oaktree's cause of action from accruing before the discovery of the defective condition in 2003. Once accrued, Oaktree must be afforded a reasonable time to file its claim. Consistent with the general statute of limitations, Oaktree should have been given four years to file its claim in order to pursue its accrued substantive right. By not allowing Oaktree a reasonable time—four years—to file its claim, R.C. 2305.131 is unconstitutionally retroactive as applied to Oaktree.

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 Reply 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 17th day of June 2013.

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