**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| OAKTREE CONDOMINIUM ASSOCIATION, INC., | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2009-L-112** |
| - vs - | : | |
| THE HALLMARK BUILDING COMPANY, et al., | : | |
| Defendants-Appellants. | : | |

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 filing, 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 ¶33, 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. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.