[Cite as *Oaktree Condominium Assn. v. Hallmark Bldg. Co.*, 2012-Ohio-3891.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

OAKTREE CONDOMINIUM ASSOCIATION, INC.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2012-L-011**
- 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.

Steven M. Ott and *Amanda L. Aquino*, Ott & Associates Co., L.P.A., 55 Public Square, Suite 1400, Cleveland, OH 44113-1901 (For Plaintiff-Appellant).

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."[1] *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. Szwec*, 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 contractural 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).[2] 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:

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."[3]

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:

"* * *

"(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.[4] 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.)

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))[5], 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.

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 rational 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.[6] 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.

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 Oarktree 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.