Construction Bar

Gets a Common Sense Answer

By Katrina R. Atkins

The Ohio General Assembly enacted Senate Bill 80 as part of its effort to implement tort reform, adding a 10-year statute of repose to claims involving improvements to real property. Section 2305.131 essentially abolishes claims against construction professionals for injuries occurring more than 10 years after completion of work on the improvement that gave rise to the injury.

A prior, similar provision was held unconstitutional by the Ohio Supreme Court in *Brennaman v. R.M.I. Co.,*[1] because it "closed the courthouse doors" to injured persons before they even knew of their injuries, violating the Ohio Constitution's Right to a Remedy clause. As a result, the usefulness of § 2305.131 to protect builders, engineers, and architects has been in question.

The construction bar awaited the Ohio Supreme Court's decision in *Groch v. Gen. Motors Corp.*[2] for a prediction (or perhaps an outright answer) regarding the constitutionality of § 2305.131. In *Groch,* the Court was asked, upon certified questions of law from the United States District Court for the Northern District of Ohio, to review the constitutionality of Ohio's 10-year *products liability* statute of repose, R.C. § 2305.10(C)(1). Since *Brennaman* was the primary basis for the *Groch* plaintiff's argument against the products liability statute's constitutionality, the Court in *Groch* might give an indication of whether § 2305.131 would be upheld, or whether *Brennaman* would likely be applied to strike it down. But the Court's *Groch* opinion left open this question. While criticizing *Brennaman*, the Court expressly declined to overrule it.

Subsequently, however, in *McClure v. Alexander*,[3] the Ohio Court of Appeals, following the Supreme Court's lead in *Groch*, has resolved the constitutionality of the improvement statute. This article concludes that, despite the Supreme Court's refusal to expressly overrule *Brennaman*, the Court will, if presented with the opportunity, follow *Groch* and *McClure*.

Examining *Sedar* and *Brennaman*

Injured while operating a thirty-year old hydraulic drill press, Groch brought a products liability action against the press manufacturer.[4] Groch argued, based on *Brennaman*, that the statute of repose violated his right to a remedy under the Ohio Constitution, and therefore, did not bar his claims.[5] The *Groch* Court disagreed and held that the new version of the products liability statute of repose was facially constitutional.[6] In doing so, the Court undertook an extensive analysis of two opinions that examined prior versions of the improvement statute: (1) *Sedar*,[7] which previously upheld the state of repose applicable to improvements; and (2) *Brennaman*, which overruled *Sedar* and held the prior improvement statute unconstitutional.

In *Groch*, the Supreme Court first set forth the general principles that (1) the legislature is the "ultimate arbiter of public policy" whose enactments are entitled to a presumption of constitutionality; and (2) *stare decisis* only applies to "substantially similar" legislation. The Court then praised the soundness of the reasoning in *Sedar*, which focused primarily on the differences between statutes of limitation (which bar an action after it accrues) and statutes of repose (which prevent the right of an action from ever vesting).[8] The Court also noted *Sedar's* acknowledgment of the lack of privity between improvement professionals, and the legislature's intent to shift safety responsibility to owners or others actually in control of the premises.[9]

The Supreme Court generally criticized the *Brennaman* opinion, calling it "devoid of any in-depth analysis…"; stating that *Brennaman* "summarily declared that the statute, …deprived the plaintiffs of the right to sue…and failed to accord proper respect to the principle of *stare decisis*";[10] and calling the opinion a "classic example of the 'arbitrary administration of justice…'"[11]

The *Groch* court then analyzed *Brennaman's* specific defects, most notably its "sweeping repudiation of all forms of statutes of repose."[12] The Court noted that *Brennaman* (1) failed to consider the presumption of constitutionality and "accorded no deference to the General Assembly's determination of public policy as expressed in the statute under review;" (2) failed to consider the fundamental differences between a statute of repose and a statute of limitation; (3) failed to explain why the plaintiff's right to a remedy was violated even though other avenues of recovery may have been available; and (4) "ignored the predicament of builders, who have no legal right to enter an owner's property to correct a defect that is discovered after the builder's work is completed and turned

over to the owner."[13]

Based on these deficiencies, *Groch* confined *Brennaman's* precedential value to its holding that the ***prior version*** of § 2305.131 was unconstitutional.[14] The Court held, "[t]o the extent *Brennaman* stands for the proposition that all statutes of repose are repugnant to Section 16, Article I, we expressly reject that conclusion…..we do not overrule *Brennaman*; we simply decline to follow its unreasoned rule in contexts in which it is not directly controlling….we therefore decline respondents' invitation to overrule *Brennaman*."[15]

Applying *Sedar* to the products liability statute of repose, the Supreme Court held that, unlike a statute of limitations, the products liability statute of repose does not deprive a plaintiff of his right to pursue a vested cause of action. Rather, it prevents a cause of action from ever vesting at all.[16]

McClure v. Alexander

Groch's use of the *Sedar* rationale and its strong criticism of *Brennaman* make the likely direction of the Supreme Court on the constitutionality of the improvement statute fairly clear. In *McClure v. Alexander*,[17] the Ohio Court of Appeals for the Second District followed the Court's lead, holding that § 2305.131 is constitutional.

Fifteen years after the construction of an addition to his home, McClure brought claims against the building contractor's estate for faulty construction.[18] Relying on *Brennaman*, McClure claimed that current § 2305.131 violated his right to a remedy.[19]

At the outset, the Court of Appeals rejected the automatic application of *Brennaman* to § 2305.131; it quoted *Groch*: "We will not apply stare decisis to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that we have deemed unconstitutional."[20] It then went on to hold that the current version of R.C. § 2305.131 "recognizes that a true statute of repose prevents a cause of action from accruing rather than preventing a plaintiff from bringing an action after accrual, like a statute of limitation," and that the legislature is free to abolish actions in which the plaintiff does not have a vested right.[21] The *McClure* court wrote that the General Assembly had tailored the wording in § 2305.131 to address the holding of *Brennaman*. The prior version provided, "no action…shall be brought," while the current version, "like the constitutional statute of repose in *Groch*, provides instead that 'no cause of action…shall accrue.'"[22] Thus, the current statute is sufficiently different from the *Brennaman* statute such that *Brennaman* is not controlling.[23]

In addition, the *McClure* court held that the exceptions[24] to the improvement statute and the availability of alternative remedies removed *McClure* from the prohibitions of the Right to a Remedy clause.[25] The Court also quoted the comments to § 2305.131, which spell out the intent of the statute to strike a balance between the rights of claimants against those who improve real property, and to limit the risks inherent with stale litigation.[26]

In its final comment, the Court of Appeals noted that, "[w]hile the *Groch* Court expressly declined to overrule *Brennaman*,… the majority in effect

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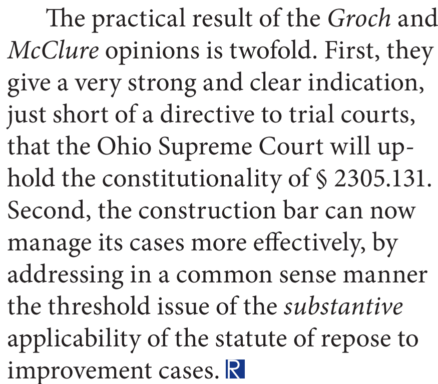
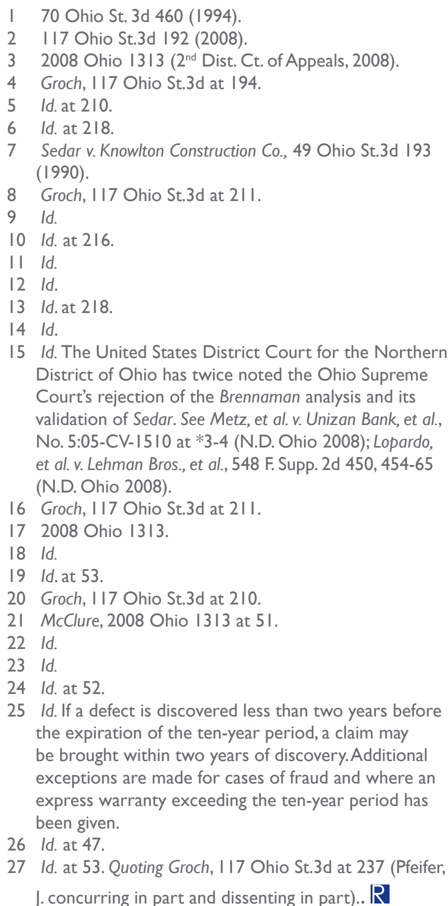


accomplished a 'de facto overruling' of a decision which 'has morphed from a case worthy of citation as part of this court's well settled jurisprudence to an object of derision…"[27] In short, *McClure* answered questions not conclusively answered by *Groch*.

The practical result of the *Groch* and *McClure* opinions is twofold. First, they give a very strong and clear indication, just short of a directive to trial courts, that the Ohio Supreme Court will uphold the constitutionality of § 2305.131. Second, the construction bar can now manage its cases more effectively, by addressing in a common sense manner the threshold issue of the *substantive* applicability of the statute of repose to improvement cases.



1 70 Ohio St. 3d 460 (1994).
2 117 Ohio St.3d 192 (2008).
3 2008 Ohio 1313 (2nd Dist. Ct. of Appeals, 2008).
4 *Groch*, 117 Ohio St.3d at 194.
5 *Id.* at 210.
6 *Id.* at 218.
7 *Sedar v. Knowlton Construction Co.,* 49 Ohio St.3d 193 (1990).
8 *Groch*, 117 Ohio St.3d at 211.
9 *Id.*
10 *Id.* at 216.
11 *Id.*
12 *Id.*
13 *Id.* at 218.
14 *Id.*
15 *Id.* The United States District Court for the Northern District of Ohio has twice noted the Ohio Supreme Court's rejection of the *Brennaman* analysis and its validation of *Sedar*. *See Metz, et al. v. Unizan Bank, et al.*, No. 5:05-CV-1510 at *3-4 (N.D. Ohio 2008); *Lopardo, et al. v. Lehman Bros., et al.*, 548 F. Supp. 2d 450, 454-65 (N.D. Ohio 2008).
16 *Groch*, 117 Ohio St.3d at 211.
17 2008 Ohio 1313.
18 *Id.*
19 *Id.* at 53.
20 *Groch*, 117 Ohio St.3d at 210.
21 *McClure*, 2008 Ohio 1313 at 51.
22 *Id.*
23 *Id.*
24 *Id.* at 52.
25 *Id.* If a defect is discovered less than two years before the expiration of the ten-year period, a claim may be brought within two years of discovery. Additional exceptions are made for cases of fraud and where an express warranty exceeding the ten-year period has been given.
26 *Id.* at 47.
27 *Id.* at 53. *Quoting Groch*, 117 Ohio St.3d at 237 (Pfeifer, J. concurring in part and dissenting in part)..

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