THIRTY YEARS OF TORT REFORM IN OHIO: WILL SUCCESS IN *GROCH V. GEN. MOTORS CORP.* STAND THE TEST OF TIME?

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I. PAST TORT REFORM EFFORTS IN OHIO

A. Tort Reform in Ohio Pre- *Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 715 N.E. 2d 1062.

1. Ohio Medical Malpractice Act of 1975, Am. Sub H.B. 682: $200,000 cap on general damages without exceptions in medical malpractice injury cases, held unconstitutional in *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, 576 N.E. 2d 765 as a violation of the Ohio Constitution's Due Process clause.

2. Tort Reform Act of 1987, enacted by Am. Sub. H.B. No. 1:

   R.C. 2317.45 altering traditional collateral source rule by requiring mandatory subtraction of collateral benefits from a final compensatory award, held to violate right to jury trial, due process, equal protection and open court provisions of the Ohio Constitution. *Sorrill v. Thevenir* (1994), 69 Ohio St. 3d 415, 633 N.E.2d 504.

   R.C. 2315.21(C)(2) requiring a trial judge to determine the amount of punitive damages in a tort action even where jury is the trier of fact, held unconstitutional as violating right to trial by jury under Article I, Section 5 of the Ohio Constitution. *Zoppo v. Homestead Ins.Co*. (1994), 71 Ohio St. 3d 552, 644 N.E.2d 397.

3. R.C. 2323.57(C) providing that compensatory damage awards for future damages greater than $200,000 in medical malpractice actions may be paid by periodic installments, held unconstitutional in *Galayda v. Lake Hospital Sys., Inc*. (1994), 71 Ohio St. 3d 421, 644 N.E.2d 298.

B. 1997 Ohio Civil Justice Reform Act, Am.Sub. H.B. No. 350, held "unconstitutional in toto" in *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 715 N.E. 2d 1062.

1. H.B. 350 amended, enacted or repealed over 100 sections of the Revised Code "relative to changes in the laws pertaining to tort and other civil actions." The

enactment impacted 18 different Titles, 38 different Chapters of the Revised Code, including interest on judgments, immunity and liability of political subdivisions, security class-action lawsuits, joint and several liability, contributory and comparative fault, assumption of risk and apportionment of damages, statutes of repose, collateral benefits, seatbelt defense, recoverable damages and many others.

a. Modified the Collateral Source rule to permit a jury to consider and set off collateral benefits received by the injured plaintiff

b. Capped punitive damages in tort actions and product liability claims

c. Capped non-economic damages at different levels with higher limits for permanent injuries

2. The Supreme Court of Ohio granted extraordinary relief by writs of prohibition and mandamus against judicial enforcement of any provisions of the Act. Specific holdings are that H.B. 350 improperly invaded the power of the judiciary to declare statutes unconstitutional in violation of the doctrine of separation of powers and the Court's power to regulate court procedure and, due to its multitude of provisions, violated the "One-Subject" rule in Article II, Section15 of the Ohio Constitution.

a. Four member majority consisting of Justices Resnick, Douglas, Sweeney and Pfeiffer.

b. Majority opinion antagonistic to General Assembly's effort to pass comprehensive tort reform legislation:

"Suffice it to say here that the General Assembly....has sought to rework the rules of procedure and evidence, issue judicial mandates, and judge the constitutionality of its own acts even to the point of reenacting legislation which this court has struck down as constitutionally infirm, while proclaiming to respectfully disagree with our holdings and to recognize the legal rationale of a dissenting opinion in the judgment of the Court of Appeals that we reversed. The following are but a few instances of just such legislative overreaching [.]" 86 Ohio St. 3d at 518, FN 7.

c. Chief Justice Moyer and Justices Cook and Stratton dissent. Chief Justice Moyer expresses concern about the conflict between the General Assembly's legislative efforts and the court majority's rhetorical treatment of those efforts:

Moreover, I fear that today's decision will unnecessarily create tension between this court and the General Assembly. The majority acknowledges in footnote 4 that the perception already exists of an " 'ongoing war between the tort policies and power of the judicial branch and those of the legislative and executive branches of state government,' "*** [The majority] disparages the General Assembly with faint praise, declaring that both the General Assembly and this court have "endeavored to comport with the principle of separation of powers and respect the integrity and independence of the other, that is, *until now*." (Emphasis added.) ***In arriving at these conclusions the majority has chosen, unnecessarily, to construe the actions and language of the General Assembly in the most negative light. In so doing, and in referring to the General Assembly with inflammatory and accusatory language, the majority appears to be throwing down the gauntlet to that co-equal legislative branch of government. It is difficult to see how the majority's rhetoric will result in anything but detriment to the citizens of Ohio. It is time to end this war of words.***

d. Majority opinion highlights the asserted unconstitutionality of H.B. 350 through a discussion of its prior holdings in (1) *Sedar v. Knowlton Constr.Co*. (1990), 49 Ohio St. 3d 193, 551 N.E.2d 938 (holding former R.C. 2305.131, a statute of repose barring tort actions against designers and contractors involved in improvements to real property brought more than 10 years after completion of construction services, does not violate the Right to Remedy and Open Courts provisions guaranteed by Section 16, Article I of the Ohio Constitution) and (2) *Brennaman v. R.M.I. Co*. (1994), 70 Ohio St. 3d 460, 639 N.E.2d 425 (overruling *Sedar* and holding that R.C. 2305.131, as a statute of repose "violates the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution.")

> "Nevertheless, Am. Sub. H. B. No. 350 reenacts R.C. 2305.131 as a 15-year statute of repose with certain exceptions, and provides for a 15-year statute of repose for wrongful death actions involving a product liability claim (R.C. 2125.02 [D] [2], a 15-year statute of repose for product liability claims (R.C. 2305.10 [C]), a six-year statute of repose for professional malpractice claims other than medical (R.C. 2305.11[A][2]), and a six-year statute of repose for medical malpractice claims (R.C. 2305.11 [B] [3]). *** In enacting and/or amending these sections, the General Assembly chose to usurp this court's constitutional authority by refusing to recognize our prior holding[] in *Brennaman*... ." 86 Ohio St. at 476-77.

II. ***ARBINO v. JOHNSON & JOHNSON*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (decided December 27, 2007).** With the *Arbino* decision it became clear that with a new make-up of the Supreme Court of Ohio came a new attitude relating to the Ohio General Assembly's tort reform efforts.

A. Facts: The plaintiff in *Arbino* filed a product liability lawsuit seeking damages for medical problems suffered by the plaintiff after using a hormonal birth control product. In the federal district court case, the plaintiff filed a motion for summary judgment asking the court to declare that provisions of S.B. 80 imposing caps on the non-economic and punitive damages were unconstitutional. The federal district court submitted four "certified questions of state law" to the Supreme Court of Ohio so that the Court could decide whether the specific Revised Code sections adopted or amended as part of S.B. 80 were constitutional under the provisions of the Ohio Constitution.

B. Non-economic damages cap: R.C. 2315.18

The Court upheld the challenged provisions in R.C. 2315.18 that limit the amount of "non-economic" damages (damages for intangible injuries such as pain and suffering, loss of consortium, disfigurement, mental anguish, etc.) that may be awarded to a plaintiff in a personal injury lawsuit to the greater of $250,000 or three times the amount of "economic damages" awarded to the same plaintiff based on the same injuries, up to an absolute maximum of $350,000. The statute makes an exception to those limits for plaintiffs who suffer permanent disability or the loss of a limb or bodily organ system.

C. Punitive damages cap: R.C. 2315.21

Another challenged provision, R.C. 2315.21, upheld in *Arbino,* prohibits a plaintiff from recovering punitive damages that exceed the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the defendant's net worth when the tort was committed up to a maximum of $350,000.

III. ***GROCH v. GEN. MOTORS CORP.*, 117 Ohio St. 3d 192, 883 N.E.2d 377(decided February 21, 2008**). *Sedar's* view of statutes of repose resurrected. They are facially constitutional and *Sheward* is rendered a constitutional Dead Letter in Ohio.

A. Addresses the constitutionality of Am Sub. S.B. 80, effective April 7, 2005, as well as the 2003 revision to R.C. 4123.93 and 4123.931 which set forth a new settlement procedure for subrogation claims arising out of the payment of workers compensation benefits. S.B. 80 addresses 9 Revised Code Titles and half as many sections of the

Code as H.B. 350, including abrogation of the Collateral Source rule; caps and procedures on punitive damage awards; immunity from lawsuits based on weight gain; limits on non-economic damages; the definition of "frivolous conduct" under R.C. 2323.51; limitations on asbestos-related liabilities of successor companies; statutes of repose.

B. Intense interest by many *amicus curiae* briefings in the Supreme Court of Ohio, including the Ohio Association for Civil Trial Attorneys, the AFL–CIO, the National Federation of Independent Businesses, the United States and Ohio Chambers of Commerce, the National Association of Manufacturers, the American Tort Reform Association, the Property Casualty Insurers Association of America, the American Chemistry Council, the National Society of Professional Engineers, the National Association of Mutual Insurance Companies, the Ohio Alliance for Civil Justice.

C. Facts: Plaintiff employee of General Motors plant in Toledo, Ohio injured on March 5, 2005 when utilizing a sheer press manufactured 29 years before by defendants Kard Corp./Racine Federated. Plaintiff asserts an employer intentional court claim against General Motors and a product liability claim against Kard/Racine Federated. Plaintiff's injury occurs approximately one month before the effective date of S.B. 80, that includes a 10 year statute of repose in R.C. 2305.10(C). Suit is filed after the effective date of S.B. 80, April 7, 2005.

1. United States District Court for the Northern District of Ohio certifies nine questions concerning the constitutionality of the new settlement procedure for subrogated workers compensation claims in R.C. 4123.93 and 4123.931, the constitutionality of the 10-year statute of repose in R.C. 2305.10(C) as well as whether S.B. 80 violates the One Subject rule in Article II, Section 15 of the Ohio Constitution.

D. The Product Liability Statute of Repose: R.C. 2305.10(C)

1. Exceptions to the application of the ten year statute of repose are found at §2305.10(B) (1)-(5) and (C)(2)-(7) including certain pharmaceutical product liability claims, toxic chemical exposure claims, chromium claims, DES claims, asbestos claims.

2. R.C. 2305.10(C) provides: "No cause of action based upon a product liability claim shall accrue against a manufacturer or supplier of a product later than 10 years from the date that the product was delivered to its first purchaser...."

R.C. 2305.10 (F): "This section shall be considered purely remedial in operation and shall be applied.... in any civil action commenced on or after the effective date of this amendment...."

E. *Groch* holdings with respect to the 10 year statute of repose and challenges to the provisions of S.B. 80. Six member majority consisting of Chief Justice Moyer and Justices O'Connor Stratton, Cupp, O'Donnell and Lanzinger. Justice Pfeifer, the lone remaining Justice from the majority opinion in *Sheward*, dissents.

1. Article I, Section 16 of the Ohio Constitution (Open Courts/Right To Remedy): "All courts shall be open and for every person, for an injury done him in his... person..., shall have a remedy by due course of law..."

2. The 10 year statute of repose in R.C. 2305.10(C) does not violate Ohio's Open Courts/Right to Remedy provisions.

   a. Court's treatment of its prior decisions in *Sedar v. Knowlton Const. Co*. (1990) and *Brennaman v. R.M.I. Co.* (1994) 70 Ohio St. 3d 460, 639 N.E. 2d 425.

      (1) Resurrects *Sedar* as a "thorough and concise opinion."

      (2) Notes the legal differences between a statute of limitation and a statute of repose. A statute of limitation limits the time within which an accrued cause of action must be brought. A statute of repose, on the other hand, potentially bars a cause of action before it accrues.

      (3) Court's reasoning: A statute of repose prevents a cause of action from arising. Thus, an injury occurring more than 10 years after the manufacture and sale of a product "forms no basis for recovering." A statute of repose essentially operates as a substantive definition of what is considered to be a "defective" product. After 10 years, such products are, by law, deemed to be non-defective.

      (4) Article I, Section 16 of the Ohio Constitution applies only to "existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available." 117 Ohio St. 3d 213.

      (5) Rejects the Court's 1994 reasoning in *Brennaman* as providing "an abbreviated discussion devoid of any in-depth analysis" of the constitutional principles under Article I, Section 16:

"Given all of the deficiencies in *Brennaman*, and the context in which it arose, *Brennaman* cannot control here. Because *Brennaman* did not involve a challenge to a products-liability statute of repose, as the instant case does, that decision is not directly on point and can arguably apply only because of its over expansive language. We confine *Brennaman* to its particular holding that R.C. 2305.131, the prior statute of repose for improvements to real property, was unconstitutional. It is entitled to nothing more. To the extent that *Brennaman* stands for the proposition that all statute of repose are repugnant to Section 16, Article I, we expressly reject that conclusion. In so doing, we find that the fundamental weaknesses of *Brennaman* limits its value. For that reason, we do not overrule *Brennaman*; we simply declined to follow its unreasoned rule in a context in which it is not directly controlling." 117 Ohio St. 3d at 218.

(6) Upholds R.C. 2305.10(C) against Due Process and Equal Protection claims under Section 16, Article I, and Section 2, Article I of the Ohio Constitution.

(7) Declines to apply the statute of repose to bar the particular plaintiff's cause of action because his injury and cause of action arose approximately one month prior to the effective date of Senate Bill 80. The Retroactivity Clause of Section 28, Article II of the Ohio Constitution prohibits the passage of retroactive laws. Since R.C. 2305.10(C) would be applied to destroy a "vested" right in that particular plaintiff, Section 28, Article II of the Ohio Constitution barred its retroactive application.

(8) Rejects the One-Subject rule challenge to R.C. 2305.10(C) under Section 15(D), Article II of the Ohio Constitution. The court's discussion effectively renders the Court's prior decision in *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 715 N.E. 2d 1062 a Dead Letter of Ohio constitutional law.

"In upholding the facial constitutionality of R.C. 2305.10(C) and former 2305.10(F), we join the considerable number of state and federal courts that have upheld the validity of products-liability statutes of repose. We additionally note that many courts have also upheld various other types of statutes of repose as constitutional. [Citations omitted]. It is not this court's role to

establish legislative policies or to second-guess the General Assembly's policy choices. *** Consistent with the foregoing, we hold that R.C. 2305.10(C) and former 2305.10(F) do not violate the Open-Courts provision (Section 16, Article 1), the Takings Clause (Section 19, Article 1), or the One-Subject rule (Section 15 (D.), Article 2) of the Ohio Constitution, and are therefore facially constitutional.

IV. POST *GROCH*

A. R.C. 2305.131's 10-year statute of repose for claims against design professionals and contractors arising from "a defective and unsafe condition of an improvement to real property" is constitutional. *McClure v. Alexander*, 2008 Ohio 1313, 2008 Ohio App. LEXIS 1136 (Second App. Dist., March 21, 2008)(applying *Groch* to uphold virtually identical statute of repose that had been declared unconstitutional in *Brennaman.*)

B. Impact of *Groch* probably will be substantial.

1. *Groch* should accelerate trend of fewer non-asbestos product liability suits filings. Between 1990-2003, it is reported that the number of non-asbestos product liability trials in United States District Court declined by about two-thirds. Bureau of Justice Statistics, U.S. Department of Justice, Federal Tort Trials and Verdicts, 2002-03, NCJ 208713 (August 2005) at 10.

2. A 10-year window for product liability claims will eliminate a substantial number of future filings. Ohio consumers now face a smaller claims window for product liability claims under R.C. 2305.10(C) in S.B. 80 than the 15-year repose period in the former version of R.C. 2305.10(C) held unconstitutional in *Sheward.*
3. Impact on Product Liability Underwriting, financing of sales of companies with substantial product liability exposures.

C. The moral of this Ohio Tort Reform story? It does not pay for a 4 person majority of a 7 member state institution (the Supreme Court of Ohio) to continually poke a stick in the eye of a 132 member state institution (the Ohio General Assembly) and a sitting Governor. The "war of words" (a "war" of term limits and election attrition) has been settled and has a winner: the Ohio General Assembly.[1]

[1] At least until the results of the next three open Supreme Court of Ohio Justice elections.