Mazanec, Raskin, Ryder & Keller

Insurance Law Update

Presentation for Frankenmuth Mutual Insurance Company

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INTENTIONAL ACT PRECLUDES COVERAGE FOR SHOOTING

Torres v. Gentry, 2007-Ohio-4781 (Fifth Appellate District).

A 14 year old, Matthew Gentry, modified shotgun shells by removing the pellets and replacing them with fertilizer. The purpose was to make a loud bang that could be used to scare animals away. He did this with the knowledge of his mother, who approved it because she had witnessed her dogs being attacked by the neighbor's dogs. Four months later, Matthew heard a banging noise outside. He went and loaded the shotgun with a "fertilizer shell." He then went outside, yelled "get off my property," and then proceeded to shoot in the direction of the noise. One of the shotgun shells, which apparently contained pellets instead of fertilizer, struck Emmanuel Torres, a ten year old, in the head. He had been riding his bicycle in the lane between the Gentry's property and their neighbor's property.

The Torres' family brought suit against Matthew Gentry and his parents, alleging willful and malicious behavior, negligence against the shooter, and negligence against his parents. The defendants' homeowner's insurer, Grange Mutual, intervened in the lawsuit, seeking a declaration that it owed no duty to defend or to indemnify the Gentrys. Grange maintained that it owed no coverage because the minor's conduct did not constitute an "occurrence" and/or because its policy's "intentional act" exclusion precluded coverage.

Matthew Gentry was adjudicated delinquent by the Ashland County Juvenile Court by reason of committing a criminal act, which, if committed by an adult, would be punishable as a felonious assault. A conviction of felonious assault involves *a scienter* requirement. In other words, it must be shown that the accused's mental state involved an action done "knowingly."

The trial court granted Grange summary judgment and specifically found that Matthew Gentry's adjudication of delinquency precluded a conclusion that his conduct was "accidental" and, therefore, his conduct could not constitute a policy "occurrence," necessary to trigger the Grange Mutual policy's liability coverage. Moreover, the trial court had found that Matthew Gentry's adjudication of delinquency established the applicability of the "intentional act" exclusion, as well as the exclusion for "personal injury arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge of or consent of an insured person." The Court of Appeals affirmed the trial court order granting Grange Mutual summary judgment.

Regarding the Torres' negligence claims against Matthew Gentry's parents, the Court of Appeals ruled that those negligent supervision and negligent entrustment claims did not state "occurrences" separate and apart

from the underlying intentional tort. The Court characterized those claims as "derivative claims arising out of the intentional acts." Thus, the Court of Appeals found inapplicable the Ohio Supreme Court's decision in *Doe v. Schaffer,* 2000-Ohio-186, limiting that Ohio Supreme Court case to situations involving "* * *incidents of sexual molestation insurance coverage for non-molester's negligence."

CLAIMS BARRED BY ASSAULT AND BATTERY EXCLUSION

Carter v. Adams, 173 Ohio App.3d 195 (First Appellate District 2007)

This case was handled by Robert H. Stoffers of the Mazanec, Raskin, Ryder & Keller Columbus office.

Robert Carter was a patron at The Queen Ann Grill and Bar when he was shot six times by another patron. Carter sued The Queen Ann for claims based on negligent security, negligent hiring and failure to warn. The Queen Ann then filed a declaratory judgment action against its insurance carrier asserting breach of contract and bad faith, based on the carrier's refusal to defend and/or indemnify Queen Ann for the claims asserted by Carter. The trial court granted summary judgment for the insurance carrier, pursuant to the policy's Assault and Battery Exclusion.

The applicable Assault and Battery Exclusion specifically excluded the following:

1. Assault and Battery committed by any insured, any employee of any insured, or any other person;
2. The failure to suppress or prevent Assault and/or Battery by any person in 1. above;
3. The selling, serving or furnishing of alcoholic beverages which result in an Assault and/or Battery.
4. The negligent:
    a. Employment;
    b. Investigation;
    c. Supervision;
    d. Reporting to proper authorities, or failure to so report; or
    e. Retention by a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by paragraphs 1, 2, or 3 above.

The Court of Appeals specifically found, even though Carter's Complaint contained allegations of negligent hiring, failure to warn, and negligent security, that coverage under the policy was barred because the excluded act of assault and battery was the immediate cause of the injuries that gave rise to the allegations of negligence. Consequently, the insurance carrier had no duty to defend or indemnify Queen Ann for the allegations asserted by Mr. Carter.

Thus, the Court of Appeals affirmed the trial court's order granting the insurance carrier summary judgment, as the gunshot wounds were clearly a

result of an assault and battery, and that the policy unambiguously excluded such claims from coverage.

"DELIBERATE INTENT" INTENTIONAL TORT STATUTE UNCONSTITUTIONAL

Kaminski v. Metal & Wire Products Company, (March 18, 2008), Columbiana App. No. 07-CA-15 (Seventh Appellate District).

The Seventh District Court of Appeals declared the latest version of O.R.C. §2745.01, Ohio's employer "intentional tort" statute, to be unconstitutional. That statute took effect on April 7, 2005 and set forth a higher statutory burden for employees to prove intentional tort claims against employers.

Prior to the enactment of the statute, in order to prove an employer intentional tort, an employee had to prove: (1) that the employer had knowledge of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) the employer knew that if the employee was subjected by his employment to such dangerous process, procedure, instrumentality, or condition, then harm to the employee would be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, paragraph 1 of the Syllabus.

In amending O.R.C. §2745.01, effective April 7, 2005, the Ohio General Assembly heightened the level of proof for intentional tort claims against employers. Specifically, the General Assembly statutorily defined "substantially certain" to mean "that an employer acts with deliberate intent to cause an employee to suffer an injury, disease, condition, or death."

In *Kaminski,* an employee filed an intentional tort claim against her employer as the result of an injury she sustained when a co-employee, moving an 800 pound coil with a forklift, dropped it onto her legs and feet, causing her serious injury. Ms. Kaminski asked the trial court to declare O.R.C. §2745.01, the employer intentional tort statute, to be unconstitutional. The trial court denied her request, enforced the statute, and granted the employer summary judgment.

On appeal, Ms. Kaminski argued that the employer intentional tort statute was unconstitutional. The Court of Appeals agreed. The Court reached its decision by noting that the Ohio Supreme Court had previously declared unconstitutional a nearly identical statute in *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298. Further, the Ohio Supreme Court had declared another version of the employer intentional tort statute to be unconstitutional in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624.

The Court of Appeals concluded that the new employer intentional tort statute is unconstitutional:

> Given the [Ohio Supreme] Court's past holdings regarding R.C. 2745.01's predecessors, it is reasonable to conclude that the General Assembly's latest attempt at codifying employer intentional tort is unconstitutional as well. The Ohio Supreme Court has made it abundantly clear that any statute that codifies the common law employer intentional tort and attempts to limit employers' liability for such intentional torts is unconstitutional under both Sections 34 and 35, Article II of the Ohio Constitution.

Consequently, having declared that O.R.C. §2745.01's "deliberate intent" standard for proving an employer intentional tort is unconstitutional, the Court of Appeals reverted back to the common law *Fyffe v. Jeno's* standard, set forth above, and determined that there were genuine issues of material fact, requiring a reversal of the order granting the employer summary judgment and sent the case back to the trial court for further proceedings.

This issue will most likely go to the Ohio Supreme Court. In the meantime, this decision is only controlling in the counties in the Seventh Appellate District. (Mahoning, Columbiana, Belmont, Carroll, Harrison, Jefferson, Monroe and Noble counties).

AMOUNT MEDICAL PROVIDER ACCEPTS AS PAYMENT IN FULL IS ADMISSIBLE EVIDENCE AT TRIAL

Robinson v. Bates, 112 Ohio St.3d 17 (2006).

The Ohio Supreme Court held that both an original medical bill and documentation of the amount accepted as full payment by a medical provider are admissible regarding the reasonableness and necessity of charges for medical and hospital care. Further, the Court determined that the difference between an original medical bill and the amount acceptable as full payment for the bill is not a benefit under the collateral-source rule.

The collateral source rule is an exception to the general rule, that in a tort action, the measure of damages is that which will compensate and make the plaintiff whole. The rule prevents the jury from considering a payment source, other than the tortfeasor, so that a tortfeasor does not benefit from third-party payments to a plaintiff.

However, the Court ruled that the collateral source rule does not apply to write-offs of medical expenses that are never paid. The written-off amount of a medical bill differs from the receipt of compensation for services. The collateral source rule excludes only evidence of benefits paid by a collateral source. Because no one pays the write-off, it cannot constitute payment of any benefit from a collateral source.

Accordingly, the Court held that the reasonable value of medical services is a matter for the jury to determine from all of the relevant evidence. Both the original medical bill rendered and documentation of the amount accepted as full payment are admissible regarding the reasonableness and necessity of charges rendered for medical and hospital care.

UM / UIM EXCLUSION FOR "OFF-ROAD" VEHICLES VALID

State Automobile Insurance Company v. Pasquale (2007), 113 Ohio St.3d 11.

The Ohio Supreme Court determined that an exclusion for "off-road" vehicles in an automobile policy is valid. The question presented was whether an express exclusion of off-road vehicles from uninsured/underinsured (UM / UIM) coverage in an automobile liability policy was valid under R.C. §3937.18, as amended by House Bill 261. The Supreme Court concluded that UM coverage under R.C. §3937.18, as amended by House Bill 261, does not apply to motor vehicles designed for off-road use. Therefore, a provision in an insurance policy excluding vehicles "designed for use mainly off public roads while not on public roads" from UM coverage is valid under R.C. §3937.18, as amended by House Bill 261.

Matthew Pasquale, son of Russell and Toni Pasquale, was struck, by a motorcycle driven by Robert Gerston, and later died of the injuries sustained in the collision. Gerston was riding a motocross motorcycle on a dirt track created and owned by Russell Pasquale. The dirt track contained a series of jumps and dirt mounds. Gerston was making a jump when he struck Matthew Pasquale, who was playing on the downhill side of the jump, apparently unbeknownst to Gerston.

The Pasquales had two insurance policies from State Auto: a personal automobile policy and a business automobile policy. The personal automobile policy was issued to named insureds Russell and Toni Pasquale and provided UM / UIM coverage. The business automobile policy was issued to Russell Pasquale dba Pasquale Landscaping and provided UM / UIM coverage. Following the accident, the Pasquales received $12,500 from Gerston's liability insurance carrier with State Auto's consent. The Pasquales submitted an UM / UIM claim to State Auto under both policies. State Auto denied the claims and filed a complaint for a declaratory judgment, seeking a determination as to whether the Pasquales were entitled to UM / UIM coverage under either policy. State Auto relied on the provision in both of the Pasquales' policies precluding recovery: the provision expressly restricted the definition of "uninsured motor vehicle" (defined to include underinsured motor vehicles) to exclude vehicles "designed for use mainly off public roads while not on public roads."

The trial court granted State Auto summary judgment, holding that motor vehicle liability policies need not cover any vehicles, except motor vehicles operated on highways. The trial court, relying upon *Davidson v. Motorist Mutual Insurance Company* (2001), 91 Ohio St.3d 262, determined that the financial responsibility laws and the UM / UIM statute are intended to apply only to policies that insure against liability arising from the ownership or operation of

vehicles that can be used for transportation on the highway. As such, since liability insurance need only cover motor vehicles operated on the highways, and since uninsured motorist coverage is intended to provide the mutual equivalent of automobile liability coverage, and because motor vehicles that are not intended to operate on highways need not be covered by liability insurance, excluding such vehicles from UM / UIM coverage does not violate the public policy behind Ohio's UM / UIM statute.

The Eleventh District Court of Appeals determined that the trial court erred when it relied upon the purpose of the UM statute as articulated in *Davidson,* because the *Davidson* court was interpreting an earlier version of Ohio's UM / UIM statute which was no longer controlling law. The Court of Appeals also held that the motocross bike did not meet the statutory requirements for exclusion under R.C. §3937.18(K). Therefore, the Court of Appeals ruled that because the exclusions found in R.C. §3937.18(J) and (K) did not expressly exclude off road vehicles from UM coverage the exclusion in the State Auto policies was invalid.

In reversing the Court of Appeals, the Ohio Supreme Court determined that while off road motorcycles are not specifically enumerated in R.C. §3937.18(K), all four of the specific statutory exclusions found in subsection (K), address only motor vehicles designed for use on public roads. The Ohio Supreme Court commented that the purpose of subsection (K) was to exclude certain motor vehicles that would otherwise be included under UM coverage:

> We conclude that the absence of any off-road vehicles from subsection (K) is consistent with our conclusion that Revised Code Section 3937.18 applies only to vehicles designed for use on public roads: The General Assembly omitted golf carts, go carts and dirt bikes from the exceptions in subsection (K) because these vehicles are not covered by the UM statute. Therefore, the absence of an off-road motorcycle from the list of excluded vehicles in subsection (K) does not require that the off-road motorcycle be included. Rather, the off-road motorcycle need not be expressly excluded because it was not included in Revised Code Section 3937.18.

In conclusion, the Supreme Court reasoned that Revised Code Title 45 definitions of "motor vehicle" and "off-highway motorcycle" are evidence that "off-highway motorcycle" is not included in the general definition of "motor vehicle." Further, given the purpose of the UM / UIM statute, the Court reasoned that the statutory language in R.C. §3937.18 need not expressly exempt off-road vehicles, such as golf carts and dirt bikes, because those

vehicles are not designed for highway use and, therefore, were not contemplated by the statute. For the above reasons, the Court held that an insurance policy may exclude off-road vehicles from UM / UIM coverage under former R.C. §3937.18, as amended by House Bill 261.

UM / UIM DEFINITION OF "INSURED" IS UNAMBIGUOUS

Wohl v. Swinney, 118 Ohio St.3d 277 (2008)

This case arises out of a claim for uninsured/underinsured motorist (UM / UIM) coverage for personal injuries sustained in an automobile accident. James Slattery and Linda Wohl were struck by a vehicle driven by Tyler Swinney. Swinney was insured under a liability policy with a limit of $500,000. Wohl maintained a UM/UIM policy with a per person limit of $250,000. Slattery maintained a separate UM/UIM policy with a limit of $12,500.

Swinney's insurance carrier offered its full $500,000 policy limits. Wohl and Slattery agreed to allocate the settlement proceeds, so that Wohl received $499,999 and Slattery received $1. Because Slattery received only $1 of the settlement, Slattery initiated a claim for UM/UIM coverage under Wohl's policy of insurance. Wohl's insurance carrier denied the claim arguing that he was not considered an "insured" pursuant to the terms and conditions of the policy issued to Wohl.

The applicable policy language defined an "insured" for purposes of UM/UIM coverage as follows:

1. You or any **family member**.

2. Any other person **occupying your covered** auto who is not a named insured or an insured **family member** for uninsured motorist coverage under another policy.

Slattery argued that the above language was ambiguous and asserted that the phrase "for uninsured motorist coverage under another policy" should be interpreted to apply to "an insured family member" and not to any other portion of the definition of an insured.

Following a review of the UM/UIM language defining an "insured," the Ohio Supreme Court rejected Slattery's argument and held that the definition of an "insured" in the UM/UIM section of the policy is intended to narrowly define who is considered an insured under that section of the policy and, therefore, is unambiguous.

Therefore, as Slattery was someone else who was occupying the covered auto, but who was a named insured for uninsured motorists coverage under another policy (his own), Slattery was not an insured for UM coverage under Wohl's policy.

DIMINISHED RESIDUAL VALUE OF REPAIRED VEHICLES IS RECOVERABLE

Rakich v. Anthem Blue Cross & Blue Shield, 172 Ohio App.3d 523 (Tenth Appellate District 2007).

The Tenth District Court of Appeals (Franklin County – Columbus) held that a plaintiff may recover residual diminution in value for damage to an automobile, in addition to the cost of repairs, provided the plaintiff proves that the damage for the cost of repairs did not fully compensate a plaintiff for the loss caused by the defendant's negligence.

The Ohio Supreme Court has recognized that the cost of repairs is a measure of damages to a vehicle, but limited the amount recoverable to the difference in market value immediately before and after the collision, to prevent a plaintiff from benefiting from his/her loss. See: *Falter v. Toledo*, 159 Ohio St. 238 (1959). However, the Court of Appeals in *Rakich* found that the market value calculation of damages is the preferred method of computing damages.

In *Rakich*, the Plaintiff argued that she was entitled to both the cost of repairs and the diminution of value of the vehicle. The Court of Appeals partially rejected this argument, in that a plaintiff may not recover both the cost of repairs to the vehicle and the difference in the market value immediately before and after the accident. However, the Court recognized that damage may result in a residual diminution of value to the vehicle. The residual diminution in value, which results from a vehicle's involvement in a collision, does not overlap the cost of repairs because it is calculated based on a comparison of the value of the property before the accident and after the repairs are made.

Thus, under the general principle that an injured party should have sufficient compensation for the injuries to make him/her whole, the Court of Appeals found that when a plaintiff proves that the value of his/her automobile after repairs is less than the pre-accident value of the automobile, the plaintiff may recover the residual diminution of value, in addition to the cost of repairs, provided that the plaintiff may not recover damages in excess of the difference between the market value of the automobile immediately before and after the injury.

For example, a car worth $40,000 originally but $25,000 after being damaged, suffers a $15,000 gross diminution in value. If after repairs of $10,000, the car is worth $30,000, the residual diminution in value is $10,000. Although the cost of repairs and residual diminution in value total $20,000, the award is capped at $15,000, the gross diminution in value. As such, the plaintiff will only be able to collect an additional $5,000 above the cost of repairs.

STATUTES LIMITING NONECONOMIC DAMAGES AND PUNITIVE DAMAGES IS CONSTITUTIONAL

Arbino v. Johnson & Johnson, 116 Ohio St.3d 468 (2007).

In *Arbino*, the Ohio Supreme Court was asked to decide whether Ohio's statutes limiting the amount of noneconomic damages (R.C. §2315.18) and punitive damages (R.C. §2315.21) are constitutional. Answering in the affirmative, the Court held that R.C. §2315.18 and R.C. §2315.21 are constitutional, and do not violate the right to trial by jury, the right to a remedy, the right to an open court, the right to due process of law, the right to equal protection of the laws, or the separation of powers.

Noneconomic damages

R.C. §2315.18 provides a procedure for the imposition of damages in certain tort cases. After a verdict has been reached for the plaintiff, the jury will return a general verdict accompanied by answers to interrogatories, which will specify both the total compensatory damages recoverable by the plaintiff and the portion of those damages representing economic and noneconomic losses. Thereafter, the court must enter judgment for plaintiff for the amount of economic damages, without limitation. For noneconomic damages, the court must limit recovery to the greater of $250,000 or three times the economic damages, up to a maximum $350,000 per plaintiff, or $500,000 per occurrence.

However, these limits on noneconomic damages do not apply if the plaintiff suffered a permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or permanent physical functional injury that permanently prevents the injured person from being able to independently care for themselves and perform life-sustaining activities.

In affirming the constitutionality of R.C. §2315.18, the Court found that by limiting noneconomic damages for all but most serious injuries, the General Assembly made a policy choice that noneconomic damages exceeding a set amount are not in the best interests of Ohio. In applying the statute, a court does not reexamine a jury's verdict or impose its own factual determination regarding what a proper award might be. Rather, a court simply implements a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable. Courts must simply apply the damages limits, as a matter of law, to the facts found by the jury; courts do not alter the finding of facts themselves, thus avoiding any constitutional conflicts.

Punitive Damages

R.C. §2315.21 limits punitive damages in tort actions to maximum of two times the total amount of compensatory damages awarded to a plaintiff per defendant. This limitation does not apply if the defendant committed a felony in causing the injury. Punitive damages may be further limited if the defendant is a small employer or an individual. In this situation, punitive damages may not exceed the lesser of two times the amount of compensatory damages or ten percent of the employer's or individual's net worth when the tort was committed, up to a maximum of $350,000.

Additionally, punitive damages may not be awarded more than once against the same defendant for the same act or course of conduct once the maximum amount of punitive damages has been reached. The restriction can be overcome if the plaintiff offers new and substantial evidence of previously undiscovered behaviors for which punitive damages are appropriate or the prior awards against the defendant were totally insufficient to punish the defendant.

In affirming the constitutionality of R.C. §2315.21, the Court applied the same analysis used to validate R.C. §2315.18 regarding limits on non-economic damages. Like R.C. §2315.18, a court does not reexamine the jury's verdict or substitute its judgment of the facts. Rather, the court simply implements a legislative policy and applies the limits as prescribed by the General Assembly as a matter of law.

STATUTE OF REPOSE FOR IMPROVEMENTS TO REAL PROPERTY IS CONSTITUTIONAL

McClure v. Alexander, Green County App. No.: 2007 CA 98, 2008-Ohio-1313, March 21, 2008 (Second Appellate District).

In June, 1989, Appellee Mike Alexander, doing business as Mike Alexander Construction, completed an addition to Robert McClure's home. In August, 2007, McClure brought suit alleging that Alexander failed to construct the addition in a workmanlike manner. Alexander filed a motion to dismiss on the grounds that McClure's claims were barred by Ohio's ten year statute of repose applicable to improvements to real property. (R.C. §2305.131). In opposition, McClure argued that R.C. §2305.131 violates the right to remedy guaranteed by Section 16, Article I of the Ohio Constitution. McClure's argument was based on the Ohio Supreme Court's prior decision in *Brennaman v. R.M.I. Co.,* 70 Ohio St.3d 460, which found a prior version of R.C. §2305.131 was unconstitutional because the prior version of R.C. §2305.131 deprived plaintiffs of the right to bring a lawsuit before they knew or could have know about their damages. The Court noted that the prior statute precluded tort claims once ten years had elapsed after the alleged tortfeasor rendered the flawed services. The trial Court granted Alexander's motion to dismiss. McClure appealed, again relying on the holding in *Brennaman*.

R.C. §2305.131 provides in relevant part:

> ". . . no cause of action to recover damages for bodily injury, an injury to real property or personal property, or wrongful death 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 bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who has 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."

The Second District Court of Appeals affirmed the trial court's dismissal of McClure's claim. After reviewing the language of the current version of R.C. §2305.131, the Court of Appeals concluded that the current ten year statute of repose is sufficiently different from the previous version. Specifically, the Court held that the change in language from "no action shall be brought" in the previous version of R.C. §2305.131 to the "no causes of action shall accrue" in

the current version recognizes that a true statute of repose that actually prevents a cause of action from accruing, rather than preventing a plaintiff from bringing an action after accrual, like a statute of limitations. Based on this analysis, the Court upheld the constitutionality of the current version of R.C. §2305.131.

STATUTE OF REPOSE FOR PRODUCT LIABILITY IS CONSTITUTIONAL

Groch v. General Motors Corp., 117 Ohio St.3d. 192 (2007).

In *Groch,* the Ohio Supreme Court was asked to determine whether Ohio's ten year statute of repose for product liability claims (R.C. §2305.10(C)) is constitutional. The Court found that R.C. §2305.10(C) does not violate the Ohio Constitution and is, therefore, facially constitutional. However, the Court found that the retroactive effective date of R.C. §2305.10 is unconstitutional.

R.C. §2305.10(C) states 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 or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product."

In affirming the constitutionality of R.C. §2305.10(C), the Court found that the ten year statute of repose does not deny a remedy for a vested cause of action but, rather, bars the action before it arises. No right of action ever accrues to a plaintiff, for which the statute of repose would impact a constitutional right to damages or jury determination. Based on this determination, as to the effect of a statute of repose, R.C. §2305.10(C) does not violate the guarantees in the Ohio Constitution and is facially constitutional.

In terms of the retroactive effective date of R.C. §2305.10, the Court held that to the extent that the statute affects an accrued substantive right by providing an unreasonably short period of time in which to file suit for certain plaintiffs, whose injuries occurred before amendments to R.C. §2315.10 became effective, R.C. §2305.10 is unconstitutionally retroactive. The Court reasoned that R.C. §2305.10(C) cannot operate to bar a cause of action that accrued and vested prior to the statute's effective date. Once vested, such a cause of action clearly becomes a substantive right under Section 28, Article II of the Ohio Constitution.

The Court went on to hold that under the situation present in this case, a reasonable time to commence a lawsuit would be two years from the date of injury. Groch's injury occurred on March 2, 2005. By operation of R.C.§2305.10(C), which became effective on April 7, 2005, Groch only had 34 days to commence his lawsuit before this cause of action would be barred by R.C. §2305.10(C). The Court found that 34 days for Groch to commence his

lawsuit is unreasonable, and ruled that because Groch filed his lawsuit within two years from the date of his injury (June 2, 2006), Groch's lawsuit was timely filed.