

IN THE SUPREME COURT OF THE STATE OF OREGON

MELISSA SHELL, an individual,

Plaintiff-Appellant,
Petitioner on Review,

v.

THE SCHOLLANDER COMPANIES,
INC., dba Schollander Development
Company, an Oregon corporation,

Defendant-Respondent,
Respondent on Review.

THE SCHOLLANDER COMPANIES,
INC., dba Schollander Development
Company, an Oregon corporation,

Third-Party Plaintiff-Appellant,

v.

KUSTOM BUILT CONSTRUCTION,
LLC, an Oregon limited liability company;
HL STUCCO SYSTEMS, INC., an Oregon
corporation; NEWSIDE, INC., an Oregon
corporation; WESTURN CEDAR, INC., an
Oregon corporation; and J&R GUTTER
SERVICES, INC., an Oregon corporation,

Third-Party Defendants-Respondents

Supreme Court No.

Court of Appeals No. A150509

Washington County Circuit Court
No. C106480C

**BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS
ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW**

Brief in support of petition for review of the decision of the Court of Appeals on appeal from the judgment of the Circuit Court for Washington County, Honorable Donald R. Letourneau, Judge.

Christine N. Moore, OSB #060270
Landye Bennett Blumstein LLP
1300 SW 5th Avenue, Suite 3500
Portland, OR 97201
(503) 224-4100

Jakob Lutkavage-Dvorscak OSB #054915
Smith Freed & Eberhard PC
111 SW 5th Avenue, Suite 4300
Portland, OR 97204
(503) 227-2424

Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association

Attorney for Respondent The Schollander
Companies, Inc.

Kevin A. Eike, OSB #012500
Christopher C. Grady, OSB #052694
Aldrich Eike, P.C.
621 SW Morrison St., Suite 1050
Portland, OR 97205
(503) 226-7045

Attorneys for Petitioner Melissa Shell

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. PRAYER FOR REVIEW	1
II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW	1
III. REASONS FOR REVIEW	1
A. The Court of Appeals decision contradicts the plain meaning of ORS 12.135 and legislative intent.	2
B. The holding in <i>Shell</i> will result in confusion and misapplication of the statute of repose contained within ORS 12.135.	5
IV. CONCLUSION	7

TABLE OF AUTHORITIES

Cases

<i>Cortez v. Nacco Material Handling Group, Inc.</i> , 356 Or 254, 337 P3d 111 (2014).....	5
<i>Securities-Intermountain v. Sunset Fuel</i> , 289 Or 243, 611 P2d 1158 (1980)	4,5
<i>Shell v. The Schollander Companies, Inc.</i> , 265 Or App 624, 336 P3d 569 (2014).....	1, 3-7

Statutes

ORS 12.115	4-7
ORS 12.115(1).....	4
ORS 12.135(1)(b).....	2
ORS 12.135(4)(b).....	3
ORS 174.010	4

Other Authorities

<i>Black's Law Dictionary</i> 1546 (9th ed 2009).....	2
---	---

I. PRAYER FOR REVIEW

The Oregon Trial Lawyers Association (“OTLA”) offers this brief as *amicus curiae* in support of Petitioner on Review Melissa Shell in *Shell v. The Schollander Companies, Inc.*, 265 Or App 624, 336 P3d 569 (2014). OTLA intends to file a brief on the merits if review is granted.

II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

OTLA adopts the questions presented and the proposed rules of law as stated in the Amended Petition for Review of Melissa Shell (“Shell Petition”), page 2.

III. REASONS FOR REVIEW

This case presents an issue of first impression to this court: whether the statute of repose contained in ORS 12.135 applies to all actions arising from a person having performed construction to any improvement or whether ORS 12.135 applies only to actions derived from construction contracts. Guidance from this court is necessary to address the Court of Appeals’ failure to properly analyze ORS 12.135, resulting in an incorrect interpretation and creating inconsistency between Court of Appeals opinions (as established in the Shell Petition, pages 3-7). Moreover, the *Shell* decision will result in confusion and misapplication of ORS 12.135 and affect a large number of Oregonians who purchase homes and commercial buildings from contractors.

A. The Court of Appeals decision contradicts the plain meaning of ORS 12.135 and legislative intent.

ORS 12.135 is the statute of repose for those actions “whether in contract, tort or otherwise, arising from the person having performed the construction, alteration or repair of any improvement to real property[.]” That type of action must be brought within “[t]en years after substantial completion * * of the construction, alteration or repair.” ORS 12.135(1)(b). “Substantial completion means the date when the contractee accepts * * * the construction, alteration or repair of the improvement to real property[.]” ORS 12.135(4)(b).

Under the plain language of ORS 12.135, the statute applies to *all* actions that arise from a person having performed construction to an improvement. Separate from the type of action involved in the matter, a court determines when the ten-year statute of repose begins to run by looking at “the date when the contractee accept[ed]” the completed construction of the improvement. Thus, it is the ten-year limitation that requires a contractee, not the action itself.

The legislative history of ORS 12.135 establishes that the statute was meant to apply, as its plain meaning indicates, to all actions “arising from the person having performed the construction, alteration or repair of any improvement to real property.” The purpose of a statute of repose is to bar a suit a fixed number of years after the defendant acts in some way (such as constructing a residence), even if the period ends before the plaintiff suffers any injury. *Black’s Law Dictionary* 1546 (9th ed 2009). Individuals in the

construction business lobbied for a statute of repose because they wanted a definitive deadline on their exposure to liability for construction work that they performed. *See* Shell Petition for Review, pp 9-10 (citing legislative history for ORS 12.135). ORS 12.135 meets that objective by providing an ascertainable date from which the limitation would run for *any* claim arising from a person’s “construction, alteration, or repair of any improvement to real property.”

Rather than focusing on the plain meaning of ORS 12.135 and legislative history, the Court of Appeals decided that the statute does *not* apply to all actions arising from the performance of construction to an improvement. *Shell*, 265 Or App at 631-632. The Court of Appeals reasoned that rather than ORS 12.135(4)(b) being a starting point for when the statute of repose begins to run, ORS 12.135(4)(b) in fact governed the type of action to which ORS 12.135 applies:

“By specifying that the statute of repose for such actions begins at ‘substantial completion,’ and then defining that term to mean ‘when the contractee accepts in writing’ the construction, alteration or repair of premises, the legislature specified that the statute applied to only a subset of action in contract, tort or otherwise—those that derive from a contractor-contractee relationship. Necessarily, those actions are based on a contract.”

Shell, 265 Or App at 631-632. In making that holding, the Court of Appeals inserted a requirement into ORS 12.135 that is contrary to the plain language of the statute: that the action itself must be based on a contract. ORS 12.135 (statute applies to actions “whether in contract, tort or otherwise”); *see also*

ORS 174.010 (the court's role in construing a statute is "to ascertain and declare what is, in terms or in substance, contained there, not to insert what has been omitted").

The Court of Appeals also added a second requirement not found within ORS 12.135. The Court of Appeals concluded that the statute applied only "to actions that derive from *construction* contracts." *Shell*, 265 Or App at 632. The Court of Appeals based its inserted requirement on a one-sentence summary by this court of the legislative history of ORS 12.135. In *Securities-Intermountain v. Sunset Fuel*, 289 Or 243, 250, 611 P2d 1158 (1980), this court stated that ORS 12.135 "began with the objective of fixing a starting date for applying the statutory time limits to actions against construction contractors in contract, tort, or otherwise." Because this court used the phrase "construction contractors" as a means of generally identifying the group to which ORS 12.135 applied, the Court of Appeals erroneously determined that the statute targeted only those actions arising from construction contracts.¹ The Court of Appeals should not have inserted into ORS 12.135 what the legislature omitted based on an "unsupported belief that the legislature meant something other than what it

¹ For all other performance of construction work that did not occur pursuant to a construction contract, the Court of Appeals held that the general statute of repose in ORS 12.115 is applicable. ORS 12.115(1) states: "In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of."

said.” *Cortez v. Nacco Material Handling Group, Inc.*, 356 Or 254, 279, 337 P3d 111 (2014).

The *Shell* holding contradicts the plain meaning of ORS 12.135 and the legislative objective of providing a definitive time frame during which contractors are liable. The decision cuts out a broad swath of cases that the legislature intended to be included. For example, builders construct a large number of homes in Oregon on a speculative basis. The contractor builds the structure without a specific buyer in mind. After completion, the contractor sells the structure to a buyer, not via a construction contract but through a sales contract. Pursuant to *Shell*, those “spec” homes would not fall under ORS 12.135. This court should accept review to clarify its summary of legislative history in *Securities-Intermountain v. Sunset Fuel* and provide guidance on the type of actions to which ORS 12.135 applies.

B. The holding in *Shell* will result in confusion and misapplication of the statute of repose contained within ORS 12.135.

The Court of Appeals decided in *Shell* that if the action did not derive from a construction contract, ORS 12.115 was the applicable statute of repose. By doing so, the Court of Appeals created uncertainty as to the date from which the ten-year time frame runs. Under ORS 12.135, the ten-year limitation runs from the date of substantial completion of the improvement. Thus, for example, if a plaintiff purchases a home and later sues for multiple defects in that home,

the statute of repose for all those defects commences from the date of substantial completion of the entire home.

In comparison, the ten-year period under ORS 12.115 commences “from the date of the act or omission complained of.” For purposes of a construction defect case, “the act or omission complained of” in ORS 12.115 refers to the alleged defect. As a result of *Shell* and its application of ORS 12.115, a plaintiff who purchases a home built by a contractor, via a *sales* contract, endures a different starting date on the ten-year limitation for each construction defect in the property. The ten-year time period for a flooring defect would differ from a window defect versus an exterior defect because each component containing the defect, *i.e.*, “the act or omission,” was built on a different date. The contractor may finish the exterior of a home months before he installs its windows, while the windows may be installed weeks before he completes the flooring. In effect, the courts, the plaintiff, and the contractor would be forced to undergo a lengthy exercise in order to determine the timeliness of each claim of defect for one single home by ascertaining on which date each “act or omission complained of” occurred. That is the type of uncertainty the legislature wanted to avoid with the enactment of ORS 12.135.

To add even more confusion to the application of ORS 12.135, in *Shell*, the contractor and plaintiff entered into both a sales contract and a construction contract. As noted, the Court of Appeals held that ORS 12.135 only applied to

construction contracts. However, because the defects at issue in the plaintiff's claims were not the construction contracted for in the construction contract, the Court of Appeals held that ORS 12.135 was not applicable. As a result of *Shell*, a plaintiff could have a lawsuit that requires the application of both statutes of repose. Accordingly, a plaintiff will need to decipher what defects fall squarely under the construction contract for application of ORS 12.135 and, for all other defects, determine the date each defective building component was installed for ORS 12.115. This is unworkable.

IV. CONCLUSION

For the reasons stated in this brief and in the Shell Petition, OTLA urges this court to grant review.

DATED this 10th day of December, 2014.

LANDYE BENNETT BLUMSTEIN LLP

By: /s/ Christine N. Moore
Christine N. Moore, OSB #060270
Of Attorneys for *Amicus Curiae* OTLA

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing BRIEF OF *AMICUS CURIAE* OTLA IN SUPPORT OF PETITION FOR REVIEW to be electronically filed with the State Court Administrator via the CM/ECF eFiling system, on December 10, 2014.

I certify that all participants in the case are registered CM/ECF users and that service to the following will be accomplished by the appellate CM/ECF system.

Kevin A. Eike, OSB #012500
Christopher C. Grady, OSB #052694
Aldrich Eike, P.C.
621 SW Morrison St., Suite 1050
Portland, OR 97205
(503) 226-7045

Jakob Lutkavage-Dvorscak OSB #054915
Smith Freed & Eberhard PC
111 SW 5th Avenue, Suite 4300
Portland, OR 97204
(503) 227-2424

/s/ Christine N. Moore
Christine N. Moore, OSB No. 060270
Attorney for *Amicus Curiae* OTLA