IN THE SUPREME COURT OF THE STATE OF OREGON

J. MICHAEL GOODWIN and SHEILA GOODWIN, husband and wife,
Plaintiffs-Respondents on Review,

v.

KINGSMEN PLASTERING, INC., a Washington corporation,
Defendant-Petitioner on Review,

and

KINGSMEN CONTRACTING, INC., a Washington corporation; and T & M PIPELINE, INC., an Oregon corporation, dba T & M Pipeline Construction, Inc.,
Defendants.

Benton County Circuit Court No. 1110128

Oregon Court of Appeals No. A151821

Supreme Court No. No. S062925

MERITS BRIEF IN SUPPORT OF RESPONDENTS BY AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

Seeking review of the December 10, 2014 decision of the Court of Appeals
On appeal from a Benton County Circuit Court Judgment,
Honorable Locke A. Williams

Judges: Garrett, P.J.; Ortega, J.; DeVore, J.
Opinion by: Devore, J.

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I. Introduction

This case presents this court with an opportunity to clarify, modify, or limit the now well-known "footnote 3" of its opinion in *Abraham v. T. Henry Construction, Inc.*, 350 Or 29, 249 P3d 534 (2011).[1] It further asks this court to clarify for the bench and bar the statute of limitations period applicable to negligence claims arising from construction defect injuries to interests in real property, to construe the effect of statutory claim accrual provisions, and to determine the applicability of the discovery rule on such claims. The Court of Appeals below correctly determined each of those issues under the prevailing law, and this court should affirm that decision.

II. The Road to *Abraham*.[2]

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[1] The court stated in footnote 3:

> "The statute of limitations for contract actions is six years. ORS 12.080(1). *Tort claims arising out of the construction of a house must be brought within two years of the date that the cause of action accrues*, but, in any event, within 10 years of the house being substantially complete. *ORS 12.110;* ORS 12.135. Tort claims ordinarily accrue when the plaintiff discovers or should have discovered the injury. *Berry v. Branner*, 245 Or. 307, 311–12, 421 P.2d 996 (1966)." *Abraham*, 350 Or at 34 n 3 (emphasis added).

[2] As one of the attorneys for the Abrahams on the Supreme Court briefing, and as a long term member of the OTLA amicus committee, the facts pertaining to the work in *Abraham* by petitioners and by amicus are herein presented from direct personal experience and with a commitment towards candor.

In *Abraham*, this court solely addressed the question of "whether a claim for property damage arising from construction defects may lie in tort, in addition to contract, when the homeowner and builder are in a contractual relationship." *Id.* at 33. Expressed another way, "[that] case require[d this court] to examine the circumstances in which harm to a person's property, caused by another, may be the basis for a contract claim or a tort claim—or both." *Id.* at 36.

The *Abraham* court declined to address the question of whether the six-year statute of limitations on contract actions under ORS 12.080(1)[3] incorporates a "discovery rule" when claims arise from defective construction, and when that statute is read in context with ORS 12.010[4] and ORS 12.135.[5]

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[3] ORS 12.080(1) provides, in relevant part:

> An action upon a contract or liability, express or implied, excepting those mentioned in ORS 12.070, 12.110 and 12.135 * * * shall be commenced within six-years.

[4] ORS 12.010 provides:

> Actions shall only be commenced within the periods prescribed in this chapter, *after the cause of action shall have accrued*, except where a different limitation is prescribed by statute. (Emphasis added).

[5] *Former* ORS 12.135(1) (2009), governing "[a]ction[s] for damages from construction, alteration or repair of improvement to real property," provided, in relevant part:

> An action against a person, whether in contract, tort or otherwise,

Id. at 35 n 4. For the court's convenience, the arguments as ultimately briefed to this court[6] are appended herein at App – 1-7.

The *Abraham* court expressly acknowledged in footnote 4 that plaintiffs had asked the court to address the statute of limitation questions respecting their contract claim and that the court had "decline[d] to do so." 350 Or at 35 n. 4. Even without so doing, however, this court set forth in a preceding footnote—footnote 3[7]—the six-year limitations period for contract claims under ORS 12.080(1). *Id.* at 34 n 3. In that same footnote, the court also cited the two-year statute of limitations applicable to negligence claims under ORS 12.110, and the applicable 10-year period of ultimate repose of ORS 12.135 when those claims arise ("whether in contract, tort or otherwise") from allegations of

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> arising from such person having performed the construction, alteration or repair of any improvement to real property * * * shall be commenced within the applicable period of limitation otherwise established by law; but in any event such action shall be commenced within 10 years from substantial completion or abandonment of such construction, alteration or repair of the improvement to real property.

[6] Counsel originally drafted a much longer analysis which not only argued the proper statutory interpretation of the statutes pertaining to the facts of *Abraham*, but also provided a more in-depth analysis of the Court of Appeals decision, arguing, of course, the reasons why that court's analysis was erroneous. What was lost for purposes of brevity, among other things, was largely supplemented by amicus briefing authored by OTLA amicus committee member, Cody Hoesly. That briefing is also contained herein at App 8-19.

[7] This author has exercised some small amount of self-restraint in not putting "footnote 3" in all bolded capital letters throughout.

defective construction, among other things. *Id.* Without citing specifically to ORS 12.010, this court also noted that the period of limitations for negligence claims begins to run from "the date that the cause of action accrues," and then cited to *Berry v. Branner*, 245 Or 307, 311-12, 421 P2d 996 (1966), for its final statement that "[t]ort claims ordinarily accrue when the plaintiff discovers or should have discovered the injury." *Id.* at 34 n 3.

Because footnote 3 neither resulted from any judicial interpretation of the cited statutes, nor was it necessary to the court's determination of the issues before it, the statements contained therein were *dicta*, not binding precedent. *Halperin v. Pitts*, 352 Or 482, 492, 287 P3d 1069 (In judicial opinions '*obiter dictum,*' or 'something said in passing,' refers to a statement not necessary to the decision which is, therefore, not binding). As mentioned, the court had declined to address any statute of limitations arguments concerning the plaintiffs' contract claim. And arguments were not raised by any of the parties respecting the statute of limitations applicable to the plaintiffs' negligent construction claims.

Standing alone, footnote 3, arguably, asserted no flagrantly incorrect statement of the law,[8] and each statutory citation might merely be read to

[8] As will be discussed later in this brief, it may have been more "legally correct" to have stated that "ordinary negligence claims must be brought within the two-year limitation period of ORS 12.110" rather than that "tort claims arising out of the construction of a house *must* be brought within [that statute's] two-year[]" period.

support each of the respective statements preceding it. However, there was immediate concern about the potential impact of footnote 3 soon after this court released the *Abraham* opinion; plaintiffs' counsel were contacted by numerous plaintiff-side construction defect firms and organizations fearing that the footnote could be construed (by the defense bar and trial judges alike) as restricting the time period for bringing construction defect claims under Oregon law.

Indeed, the footnote could be read (and has since been the basis of arguments similar to those presented here) as a pronouncement by this court that (a) ORS 12.080(1) sets an unwavering six-year limitations period on contract claims irrespective of the claim accrual rule of ORS 12.010 and the 10-year repose period of ORS 12.135; and (b) that the only applicable limitations period for negligent construction claims was the more general two-year period of ORS 12.110 for claims involving "any injury to the person or rights of another, not arising on contract," rather than the six-year limitations period of ORS 12.080(3),[9] applying more specifically to claims arising from an "injury to any interest of another in real property."

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[9] ORS 12.080(3) provides:

> An action for waste or trespass upon or for interference with or *injury to any interest of another in real property*, excepting those mentioned in ORS 12.050, 12.060, 12.135, 12.137 and 273.241; * * * shall be commenced within six-years.

Responsive to those concerns, the Abrahams' counsel submitted a petition for reconsideration carefully and concisely asking this court to modify footnote 3. App 20-23. In that petition, counsel asked only that the court omit the second sentence in the footnote, which appeared to assert that the six-year limitation period of ORS 12.080(3), applicable to claims arising from injuries to interests in real property, does not apply to construction defect claims. Id. Counsel expressly argued:

> Defendants did not challenge the timeliness of plaintiffs' negligence claim, only its viability. Plaintiffs did not ask the court to interpret ORS 12.080 in the context of their negligence claim, nor has this court done so. However, this court's statement in footnote 3 * * * suggests to some a more sweeping analysis than the court actually engaged in. App 22-23.

Although counsel asked the court for "modified language consistent with the issues decided on this appeal, and consistent with the text where the footnote appears," counsel did not seek any further modifications, including any to the first sentence, citing a six-year limitations period for construction defect contract actions without having addressed plaintiffs' arguments that such limitation periods were subject to claim accrual and the discovery rule. App 23.

This court denied reconsideration on May 5, 2011. *Abraham*, 350 Or at 29 (caption).

III. The Road to *Rice*.

Although the court declined to construe ORS 12.080(1) in *Abraham*, it decisively and favorably construed ORS 12.080(4)[10] in *Rice v. Rabb*, 354 Or 721, 320 P3d 554 (2014), under many of the same arguments presented in *Abraham*. App 24-39. Indeed, the amicus briefing in *Abraham* and the plaintiff's merits brief in *Rice*, were authored by the same attorney, Cody Hoesly. App 8 and 24.

The plaintiff argued in *Rice*, as amicus had argued in *Abraham*, that:

(1) The respective actions under ORS 12.080 were subject to the claim accrual provisions of ORS 12.010, providing that, unless expressly stated otherwise, a statutory time limitation set forth in Chapter 12 commences to run on a claim "after the cause of action shall have accrued;" App 9.

(2) ORS 12.080 and ORS 12.010 date back to the Deady Code and must be read together, with ORS 12.010 providing context for ORS 12.080; App 15-16, 32-35;

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[10] ORS 12.080(4) provides:

> An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof, excepting an action mentioned in ORS 12.137 * * * shall be commenced within six years.

(3) A claim under ORS 12.080 does not "accrue" within the meaning of ORS 12.010 until a plaintiff discovers, or should have discovered, all necessary elements of her claim pursuant to an extensive line of cases following and applying the discovery rule analysis in *Berry v. Branner*; App 35-37, 25.

In *Rice*, this court ultimately agreed with the plaintiff and determined that a discovery rule applies to conversion and replevin claims under the six-year period of limitation set forth in ORS 12.080(4); that was so because such claims "fall[] under the purview of ORS 12.010." *Rice*, 354 Or at 728. Applying the analysis set forth in *Berry v. Branner*, this court concluded that the time period for bringing that plaintiff's claims of conversion and replevin "accrued" and commenced running when "plaintiff obtained knowledge, or reasonably should have obtained knowledge of the tort committed upon her person by [the] defendant." *Id.* (citation omitted).

The *Rice* court rejected arguments that (1) a discovery rule cannot apply to a claim unless the applicable time limitations statute expressly contains that rule; *Id.* at 730; and that (2) the discovery rule articulated in *Berry* is limited to medical malpractice cases or otherwise cannot be applied to "other tort actions that are normally immediately ascertainable upon commission of the wrong." *Id.* at 732-33. This court observed, however, that when the legislature

"use[s] terms other than 'accrue' for designating when the cause of action may be maintained," the discovery rule does not apply. *Id*. at 730.

In other words, claims brought under the provisions of ORS 12.080, unless expressly stating the contrary, are subject to the claim accrual provisions of ORS 12.010 for which the discovery rule articulated in *Berry v. Branner* applies.

IV. The Court of Appeals decision in Goodwin is correct.

Based on the analysis articulated in *Rice,* and under the facts of this case, the Court of Appeals correctly decided this case. *Goodwin v. Kingsmen Plastering, Inc.*, 276 Or App 506, 340 P3d 169 (2014). Under the reasoning of that court's more lengthy and detailed opinion in *Riverview Condo. Assn. v. Cypress Ventures,* 266 Or App 574, 339 P3d 447 (2014), the *Goodwin* court correctly determined the following:

(1) Footnote 3 in *Abraham*, citing to the two-year statute of limitations of ORS 12.110 as governing "tort claims arising out of the construction of a house" was *dictum*. *Riverview Condo Assn.*, 266 Or App at 559 (footnote has no precedential value and is "unquestionably *dictum*, considering that the statute of limitations was not one of the issues before the court.")

(2) In drafting footnote 3 in *Abraham*, "it is highly unlikely that the Supreme Court intended to implicitly disavow the reasoning of * * *

Beveridge [*v. King*, 292 Or 771, 778-79, 643 P2d 332 (1982) (holding that ORS 12.080(3) applies to construction defect negligence claims)] * * * by way *of dictum* in a footnote that does not acknowledge any [of the] case law [it would further serve to disavow]." *Id.*

(3) Under *Beveridge*, and subsequent Court of Appeals cases decided under *Beveridge*, the applicable statute of limitations applying to negligence claims in construction defect cases is set forth in ORS 12.080(3), providing six years for bringing claims arising from injuries to "any interest of another in real property." *Id.; Goodwin*, 267 Or App at 510.

(4) Applying the analysis from *Rice v. Rabb*, claims under ORS 12.080(3) accrue within the meaning of ORS 12.010 upon discovery. *Goodwin*, 267 Or App at 510-11.

V. Conclusion

Based on the forgoing, this court should either clarify that footnote 3 in *Abraham* was *dicta*, or, in the very least, correct the statement that negligence claims *in construction defect cases* are limited to the standard two-year limitation period (from the time the claim accrues) of ORS 12.110. While ORS 12.110 governs negligence claims more generally, ORS 12.080(3), providing a six-year limitation period for injuries to "any interest of another in real property," applies more specifically to negligence claims in construction defect

cases. In turn, the six-year limitation period commences running under ORS 12.010 when the claim accrues, which further incorporates the discovery rule announced in *Berry v. Branner.*

Respectfully submitted on this 4th day of June, 2015.

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CERTIFICATE OF COMPLIANCE

Brief length: I certify that, although I have a program capable of counting the words of the substantive brief and that the word count complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), at **2,382** words, I do not have a program that can count the words of the appended material. However, the brief length together with the appended materials (less the dividing caption pages), is 46 pages in compliance with the page count limitation of ORAP 5.05(2)(c).

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CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **MERITS BRIEF IN SUPPORT OF RESPONDENTS BY AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION** with the State Court Administrator and by so doing either caused a true copy to be served electronically on the following parties or served them by conventional email should the system have failed to provide such service:

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