IN THE SUPREME COURT OF THE STATE OF OREGON

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

v.

KINGSMEN PLASTERING, INC., a Washington corporation;
Defendant-Respondent,
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.

KINGSMEN PLASTERING, INC., a Washington corporation,
Third Party Plaintiff,

v.

UNITED COATINGS MANUFACTURING COMPANY, a Washington corporation,
Third Party Defendant.

Court of Appeals
A151821

S062925

BRIEF ON THE MERITS-ON BEHALF OF *AMICI CURIAE* (ORENCO GARDENS HOMEOWNERS ASSOCIATION; DENNIS HURLBUT; PHIL AND LISA LEHWALDER)

June 2015

On Review of the Decision of the Oregon Court of Appeals
on Appeal from a Limited Judgment of the Circuit Court for Benton County,
The Honorable Locke A. Williams
Opinion Filed: December 10, 2014
Author of Opinion: Devore, J.
Concurring Judges: Ortega and Garrett, C.

Dean E. Aldrich, OSB 962080
Email: dean@aldrich-eike.com
Christopher C. Grady, OSB No. 052694
Email: chris@aldrich-eike.com
Aldrich Eike, PC
319 SW Washington Street, Suite 1200
Portland, OR 97204
Tel: (503) 226-7045
Fax: (503) 226-7046
Of Attorneys for Plaintiffs-Appellants-Respondents on Review, J. Michael Goodwin and Sheila Goodwin

Christopher J. Drotzmann, OSB No. 962636
Email: cdrotzmann@davisrothwell.com
Jonathan W. Henderson, OSB No. 063554
Email: jhenderson@davisrothwell.com
Davis Rothwell Earle & Xochihua P.C.
111 SW 5th Ave., Suite 2700
Portland, OR 97204-3650
Tel: (503) 222-4422
Fax: (503) 222-4428
Of Attorneys for Defendant-Respondent-Petitioner on Review, Kingsmen Plastering, Inc.

Katie L. Smith, OSB No. 034545
Email: ksmith@henriesmith.com
Henrie & Smith, LLP
1915 NW AmberGlen Pkwy Ste. 400
Beaverton, OR 97006
Tel: (503) 593-8548
Fax: (503) 214-8001
Of Attorneys for Defendant-Respondent Kingsmen Plastering, Inc.

Daniel T. Goldstein, OSB No. 012629
Email: dgoldstein@balljanik.com
Adele J. Ridenour, OSB No. 061556
aridenour@balljanik.com
Amy Heverly, OSB No. 093817
aheverly@balljanik.com
Ball Janik, LLP
101 SW Main Street, Suite 1100
Portland, Oregon 97202
Tel: (503) 228-2525
Representing Amici Curiae Orenco Gardens Homeowners Association, Dennis Hurlbut, and Phil and Lisa Lehwalder

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I. INTRODUCTION

Predictability and consistency are integral to the just application of statutes of limitation. "The limitation system is a product of the interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely, on their substantive merits." Ochoa and Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 Pac. L. J. 453, 454-55 (1997). This Court previously indicated the purpose of statutes of limitation is "to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time." *Wilder v. Haworth*, 187 Or 688, 695, 213 P2d 797 (1950) (quoting *Guaranty Trust Co. of New York v. US*, 304 US 126, 58 S Ct 785, 790, 82 L Ed 1224 (1945)). Statutes of limitation avoid the vagaries of laches and provide specific reliable dates upon which affected parties can rely in ordering their affairs. Rather than guessing whether a specific potential claim may be time-barred, statutes of limitations prescribe specific calculable expiration dates.

Effective service of those goals requires predictability; the citizenry must have access to information about the applicable limitations periods for rights they may possess. The plain language of ORS 12.080(3), "interference with or injury to any interest of another in real property," applies to claims for injuries to real property. Potential plaintiffs and defendants alike should be entitled to rely upon

this plain language in determining the applicable dates without need to explore legislative histories of other statutes. Moreover, public policy and relevant legislative history support the plain language reading.

Amici Curiae Orenco Gardens Homeowners Association, Dennis Hurlbut, and Phil and Lisa Lehwalder therefore urge this Court to uphold the ruling of the Court of Appeals that ORS 12.080(3) supplies the appropriate statute of limitations for negligent injury to real property.

II. ARGUMENT

A. *The Plain Language of ORS 12.080(3) and ORS 12.110(1) Supports a Finding that ORS 12.080(3) Supplies the Appropriate Period of Limitation for Negligent Injuries to Real Property.*

A claim for negligent damage to a home is more appropriately characterized as "injury to any interest of another in real property" under ORS 12.080(3) than an "injury to the person or rights of another" under ORS 12.110(1). ORS 12.080(3) supplies the more specific language, which should end the inquiry. Indeed, it appears the parties here do not dispute that ORS 12.080(3) is the more specific statute.

Rather, the dispute centers almost exclusively upon an argument that the phrase "interference with or injury to any interest in real property" means only the ability to possess and use real property rather than injury to the property itself. Aside from the fact that the legislature specifically intended the phrase "injury to

any interest of another in real property" to encompass negligence claims (discussed further below), the bare language of ORS 12.080(3) does not support a more limited interpretation.

First, the word "interest" refers to something broader than mere title ownership, including such concepts as desire, and planned potential future. If the legislature had intended the word "interest" in this context to refer exclusively to ownership, it could simply have chosen words such as "ownership" or "use and enjoyment." The Legislature's intentional choice to use the phrase "interest of another" should be honored. This is particularly true when considering nuisance and trespass – both claims regarding interference with use and enjoyment – are separately addressed elsewhere in ORS 12.080. "Interest of another in real property" therefore need not be limited to forms of ownership or use, and ORS 12.080(3) properly applies to all claims concerning damage to title, land, or improvements upon land.

Further, the above analysis is supported by the disjunctive connection between the phrases "interference with" and "injury to" within ORS 12.080(3). This pairing of alternatives suggests application broader than mere title-based claims, referring not only to claims for interference or invasion with an interest in real property, but also claims involving an "injury to" an interest in real property. Although the word injury can include interference with possessory interests in

land, here that category of harms is already covered by the prior phrase "interference with," meaning the words "injury to" must refer to something other than disruption of possessory interest.

Negligent injury to structures upon real property is injury to the owner's interest in that structure, even if that injury does not simultaneously cause an interference with the owner's ability to possess or use that structure. Here, the legislature chose to separate those two types of deprivation with the word "or," resulting in the current phrase: "interference with or injury to any interest of another in real property." This Court should avoid changing that language to require both "interference" *and* "injury." "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[.]" ORS 174.010.

B. *The Legislative Histories Surrounding ORS 12.080 and ORS 12.110 Support Applying 12.080(3) to Property Injury Claims.*

The legislative history dating back all the way to pre-codification of ORS Chapter 12 supports a finding that negligent construction claims involving injury to real property are subject to a six-year statute of limitation. The genesis of ORS 12.080 and 12.110 is found under Title II of the 1862 Civil Code of Oregon. APP-2. That code, which set forth time limits spanning anywhere from one to twenty years, provides Oregon's first attempt to limit the time for commencement of

various types of claims. Sections 6 and 8 separate categories for property/contract claims and personal injury claims respectively, and provide for limitations periods accordingly. Section 6 of Title II deals with actions subject to a six-year statute of limitations and provides as follows:

> "Sec. 6. Within six years:
>
> 1. An action upon a contract or liability, express or implied, excepting those mention in section 5 [actions upon a judgment or decree of any court and actions upon a sealed instrument];
>
> 2. An action upon a liability created by statute, other than a penalty or forfeiture;
>
> 3. An action for waste or trespass upon real property;
>
> 4. An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof;
>
> 5. An action for criminal conversation, or for any other injury to the person or rights of another, nor arising on contract, and not hereinafter enumerated."

APP-4. Section 8 deals with claims subject to a two-year statute of limitation and states as follows:

> "Section 8. Within two years:
>
> 1. An action for libel, slander, assault, battery, or false imprisonment;
>
> 2. An action upon a statute for forfeiture or penalty of the state."

APP-4-5.

Over the years various claims were added and deleted from Sections 6 and 8 of Title II to Oregon's Civil Code (also sometimes referred to as Lord's Oregon Laws and/or the General Laws of Oregon). APP-6-14. However, the nature and type of claims found under these sections remained relatively unchanged; property/contract claims grouped separately from personal injury claims. *Id.*

The 1939 General Laws of Oregon appear to be the last version of Title II of Oregon's Civil Code before the entire scheme was codified into what is now ORS chapter 12 in 1953. APP-16-26. Section 1-204 of the General Laws is nearly identical to section 6 of the 1862 Civil Code with the exception that subsection 5 relating to actions involving "criminal conversation, or for any other injury to the person or rights of another, nor arising on contract" is deleted. *Compare* APP-18-21, *with* APP-5. Section 1-206 (APP-23), which provides for a two-year statute of limitation, states that it applies to:

> "(1) An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein especially enumerated; provided that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from discovery of the fraud or deceit.
>
> "(2) An action upon a statute for forfeiture or penalty to the state or county."

Thus, from 1862 leading up all the way to 1953 (when ORS Chapter 12 was adopted), Oregon has recognized a six-year statute of limitation for claims

involving injury to real property. A two-year time limit has always been reserved for claims involving personal injury and/or fraud. Therefore, when the legislature subsequently amended ORS 12.080(3) in 1973 to add "interference with or injury to any interest of another in real property," it was keeping with Oregon's tradition of providing a six-year statute of limitation for claims involving injury to real property.

The legislative history related to the 1973 amendments confirms that understanding. The language "or for interference with or injury to any interest of another in real property" was added to ORS 12.080(3) in 1973 as part of Senate Bill 341. Mr. J.R. Jordan, a representative of the Oregon State Bar Law Improvement Committee, presented the bill to both the House and Senate Judiciary Committees. Mr. Jordan noted as follows:

> "[Senate Bill] 341 provides to—to clarify the statute of limitations as to grounds for damage to real property. There is a conflict, and this also arose out of a Supreme Court decision as to whether a particular claim for damage to real property should be classed as a trespass bill on land with a six-year statute or should be classed as negligence with a two-year statute. A statute with provision to damage to personal property regardless of the cause provides for a six-year statute; *it's the intent of this bill to provide a similar six-year statute for all claims* * * of real property regardless of the cause.*"

Tape Recording, Sen. Judiciary Committee, SB 341, March 26, 1973, Tape 14, Side 1 (statement of Mr. Jordan) (emphasis added).

Steven Hawes of the office of legislative counsel also submitted a written memorandum in support of the bill. According to Mr. Hawes, Senate Bill 341 arose out of an issue raised in *Martin v. Union Pacific Railroad*, 256 Or 563, 474 P2d 739 (1973). Testimony, Sen. Judiciary Committee, SB 341, March 29, 1973, Ex M (Memorandum to Law Improvement Committee from Mr. Hawes). *Martin* involved an action to recover damages to the plaintiff's real property caused by a fire that spread from the defendant's railroad right of way due to the defendant's negligence. The issue in the case was whether the plaintiff's claim was subject to a six-year statute of limitation under ORS 12.080(3) or a two-year statute of limitation under ORS 12.110(1). The Court in *Martin* held that the claim was subject to the six-year statute of limitation, but noted the possible need for clarification by the legislature as to the types of claims subject to ORS 12.080(3). According to the Court,

> "There would appear to be no reason for providing different limitation periods in actions for invasion of interests in land, whether the action is in trespass or nuisance and whether the conduct causing the invasion is intentional, negligent, reckless or ultrahazardous."

Martin, 256 Or at 567.

Mr. Hawes' memorandum went on to include his staff's recommendations for passage of Senate Bill 341, stating as follows:

> "The attached amendment would include within the six-year statute of limitation under subsection (3) of ORS

> 12.080 *all actions for injury to or interference with any interest of another person in real property,* as well as actions for waste or trespass currently included therein.
>
> "* * *
>
> "Staff feels that it is not necessary to amend subsection (1) of 12.110, since that statute only applies its two-year statute of limitation to actions for which a period of limitation is not otherwise enumerated in ORS chapter 12."

Testimony, Sen. Judiciary Committee, SB 341, March 29, 1973, Ex M (Memorandum to Law Improvement Committee from Mr. Hawes) (emphasis added) (APP-32).

As demonstrated by the testimony quoted above, the purpose and intent of Senate Bill 341 was to clarify that all claims involving injury to real property, regardless of the nature or cause of the claim, are subject to the six-year statute of limitation under ORS 12.080(3). And importantly, the legislature was specifically considering claims for negligent injury to real property when amending ORS 12.080(3).

As the plain language suggests, "interference with or injury to any interest of another in real property" must refer to claims other than waste and/or trespass. The logical assumption is that this phrase refers to negligence claims involving injury to real property. That assumption is further supported by the legislative record as cited above, including the original bill's proponent's comments that the language

was intended to provide a six-year time statute of limitation for any claim involving injury to real property and the comments regarding the 1973 amendments relating to the *Martin* case.

Based upon the above, this Court should find, consistent with Oregon tradition and long-standing legislative history, claims involving injury to real property, whatever the cause, are subject to a six-year statute of limitation under ORS 12.080(3).

C. *Public Policy Supports a Six-Year Statute of Limitation.*

As a matter of public policy, property injury claims (ORS 12.080) should be subject to a longer statute of limitation than personal injury claims (ORS 12.110). While a party may immediately feel the physical effects of an assault, battery, and/or botched medical procedure, defects and/or damage stemming from negligent construction may not always be readily apparent. Furthermore, the comparative impact of a personal injury versus a property damage claim is significant. People are far more likely to act quickly in deciding whether to file a claim involving their physical health then where the only damage involved is to their personal assets and/or real property. It makes sense that the legislature would give additional time to plaintiffs facing an injury to property to decide whether or not the nature of their injury is serious enough to merit a full-blown claim and/or litigation.

Finally, and notwithstanding any of the above, pursuant to ORS 12.080(4), claims involving negligent injury to *personal* property are subject to a six-year statute of limitation. It would defy logic that a plaintiff facing negligent injury to her home would have less time to file a claim than someone who suffered negligent injury to the furnishings inside her home. For most people, their home is their single-most important and expensive asset they own. As a matter of public policy, a six-year period is the more appropriate statute of limitation for claims involving negligent injury to real property.

III. CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' decision that Plaintiffs' negligent construction claim is subject to a six-year statute of limitation with a discovery rule under ORS 12.080(3).

Dated: June 4, 2015. BALL JANIK, LLP

Daniel T. Goldstein, OSB No. 012629
Amy Heverly, OSB No. 093817
Adele J. Ridenour, OSB No. 061556
Counsel for *Amici Curiae* Orenco Gardens Homeowners Association, Dennis Hurlbut, Phil Lehwalder and Lisa Lehwalder

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and ORAP 9.05 and (2) the word count of this brief (as described in ORAP 9.05(3)(1)) is 3,431 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.50(4)(f).

Dated: June 4, 2015.

BALL JANIK, LLP

Daniel T. Goldstein, OSB No. 012629
Amy Heverly, OSB No. 093817
Adele J. Ridenour, OSB No. 061556
Counsel for *Amici Curiae* Orenco Gardens Homeowners Association, Dennis Hurlbut, Phil Lehwalder and Lisa Lehwalder

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing **BRIEF ON THE MERITS-ON BEHALF OF *AMICI CURIAE* (ORENCO GARDENS HOMEOWNERS ASSOCIATION, DENNIS HURLBUT, PHIL AND LISA LEHWALDER** by electronic filing to:

Appellate Court Administrator
Oregon State Supreme Court
1163 State Street
Salem, OR 97301-2563

I further certify that, on June 4, 2015, I served the foregoing **BRIEF ON THE MERITS-ON BEHALF OF *AMICI CURIAE* (ORENCO GARDENS HOMEOWNERS ASSOCIATION, DENNIS HURLBUT, PHIL AND LISA LEHWALDER** on the following parties at the addresses below by electronic mail, as well as re-served the same on June 5, 2015 when the Brief was re-submitted for electronic filing per the court's order dated June 5, 2015:

Dean E. Aldrich, OSB 962080
Email: dean@aldrich-eike.com
Christopher C. Grady, OSB No. 052694
Email: chris@aldrich-eike.com
Aldrich Eike, PC
319 SW Washington Street, Suite 1200
Portland, OR 97204
Tel: (503) 226-7045
Fax: (503) 226-7046
Of Attorneys for Plaintiffs-Appellants-Respondents on Review, J. Michael Goodwin and Sheila Goodwin

Christopher J. Drotzmann, OSB No. 962636
Email: cdrotzmann@davisrothwell.com
Jonathan W. Henderson, OSB No. 063554
Email: jhenderson@davisrothwell.com
Davis Rothwell Earle & Xochihua P.C.
111 SW 5th Ave., Suite 2700
Portland, OR 97204-3650
Tel: (503) 222-4422
Fax: (503) 222-4428
Of Attorneys for Defendant-Respondent-Petitioner on Review, Kingsmen Plastering, Inc.

Katie L. Smith, OSB No. 034545
Email: ksmith@henriesmith.com
Henrie & Smith, LLP
1915 NW AmberGlen Pkwy Ste. 400
Beaverton, OR 97006
Tel: (503) 593-8548
Fax: (503) 214-8001
Of Attorneys for Defendant-Respondent Kingsmen Plastering, Inc.

BALL JANIK, LLP

Daniel T. Goldstein, OSB No. 012629
Amy Heverly, OSB No. 093817
Adele J. Ridenour, OSB No. 061556
Counsel for *Amici Curiae* Orenco Gardens Homeowners Association, Dennis Hurlbut, Phil Lehwalder and Lisa Lehwalder

CERTIFICATE OF FILING

I further certify that on June 4, 2015, I caused to be filed electronically the foregoing **BRIEF ON THE MERITS-ON BEHALF OF *AMICI CURIAE* (ORENCO GARDENS HOMEOWNERS ASSOCIATION, DENNIS HURLBUT, PHIL AND LISA LEHWALDER)** with the Appellate Court Administrator through the Oregon Appellate Courts' e-Filing system.

BALL JANIK, LLP

Daniel T. Goldstein, OSB No. 012629
Amy Heverly, OSB No. 093817
Adele J. Ridenour, OSB No. 061556
Counsel for *Amici Curiae* Orenco Gardens Homeowners Association, Dennis Hurlbut, Phil Lehwalder and Lisa Lehwalder