IN THE SUPREME COURT OF THE STATE OF OREGON

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

v.

KINGSMEN PLASTERING, INC., a Washington corporation,
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,

Benton County Circuit Court Case No. 11-10128

Supreme Court Case No. S062925

Court of Appeals Case No. A151821

RESPONDENTS' BRIEF ON THE MERITS

Petition for Review by Kingsmen Plastering, Inc. of the Decision of the Oregon Court of Appeals on Appeal from the Limited Judgment of the Benton County Circuit Court dated June 12, 2012
The Honorable Locke A. Williams

(Counsel on following page) Filed June 2015

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I. MATERIAL FACTS

Respondents on Review J. Michael Goodwin and Sheila Goodwin (the "Goodwins") purchased their home in December 2004, which had been originally constructed in 2001. TCF 40.

Petitioner on Review Kingsmen Plastering, Inc. ("KPI") was the subcontractor responsible for installing synthetic stucco siding (aka exterior insulated finish system or "EIFS") when the home was originally constructed in 2001.

After purchasing the home in 2004, the Goodwins diligently performed inspections and maintenance repairs on the EIFS. At no time did anyone ever suggest to the Goodwins that the EIFS was improperly installed and causing property damage. ER-1, ¶¶ 4, 5, 6, 7, 11, 25, 26, 27, 28, 29, 30, 31. The Goodwins had no experience in construction and were not aware any defects in the installation of the EIFS or property damage resulting therefrom until May 2010. ER-1, ¶¶ 3, 33, 3, 36; ER-18, ¶¶ 3-9. In May 2010 and thereafter, the Goodwins discovered that there were numerous construction defects with the EIFS and widespread hidden property damage (rot and water damage) at their home. ER-1, ¶¶33-36; ER-18, ¶¶3, 8.

After compliance with ORS 701.565, *et seq.*[1], the Goodwins filed suit against defendants including KPI and others[2] on March 10, 2011, asserting claims of negligence and negligence *per se*. TCF 1.

II. SUMMARY OF ARGUMENT

ORS 12.080(3) applies to the Goodwins' negligence action to recover for property damage caused by KPI's negligence. Analysis of the text and context reveals that ORS 12.080(3) is unambiguous. ORS 12.080(3) has governed real property torts since its amendment in 1973 (with exceptions). ORS 12.080(3) has governed negligence claims for property damage against contractors since ORS 12.135 was abolished in 1983.

Under ORS 12.010 and ORS 12.080(3), a negligence claim accrues upon discovery. Here, the Goodwins' negligence action accrued in May 2010.

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[1] ORS 701.565 is the "Notices of Defect in Residence" statute. The Goodwins sent Notice of Defect letters to KPI and KCI on May 21, 2010, and to T&M Pipeline, Inc. on September 2, 2010. No responses were received. ORS 701.585 contains a tolling provision, which extends the time for an owner to commence an action until the later of: (a) 120 days after the owner receives a written response from the contractor that received the notice of defect if the response does not contain a written offer to perform remediation or pay monetary compensation for the defects; (b) 120 days after the owner rejects a written offer by the contractor to perform remediation or pay monetary compensation for the defects; or (c) 30 days after the date specified in an accepted offer by which the offering contractor is to complete the remediation or complete payment of monetary compensation for the defects and damage. Since no responses were received, the tolling extended from May 2010. ORS 701.585.

[2] T&M Pipeline, Inc. and KCI.

III. ARGUMENT

A. ORS 12.080(3) Applies to a Negligence Action to Recover for Damage to Real Property

The Goodwins alleged one claim for relief in common law negligence and negligence *per se* against the contractors who built their home in 2001. TCF 1, p. 6, 8. KPI was the subcontractor responsible for installing synthetic stucco siding (aka exterior insulated finish system of "EIFS"). TCF 1, § 2; TCF 40. The Goodwins alleged that KPI and other contractors: (1) failed to perform their work in a reasonable and workmanlike manner; and (2) failed to perform their work in accordance with the building code. TCF 1, §§ 11, 15. The Goodwins alleged that KPI had a duty to install the siding in such a manner as to prevent property damage caused by KPI's work. TCF 1, §§ 2, 15. The contractors' negligent conduct caused foreseeable defects, leaks and hidden property damage to the Goodwins' home. TCF 1, §§ 11, 19-21. The type of negligence claim alleged by the Goodwins is an action for "injury to any interest of another in real property" subject to the six-year statute of limitations in ORS 12.080(3).

1. A Negligence Action Against a Contractor to Recover for Property Damage to a Home is an Action for "Injury to any Interest of Another in Real Property"

The first issue in this case is determining the meaning of "injury to any interest of another in real property" in ORS 12.080(3). The answer is found in the unambiguous text. ORS 12.080(3) governs the precise type of negligence action asserted by the Goodwins and articulated recently in *Abraham* and *Harris*.

ORS 12.080(3) states:

> "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…12.135. . . shall be commenced within six years." ORS 12.080(3) (emphasis added).

The statute is broad and covers injury to "any" interest in real property. ORS 12.080(3)[3]. *See Beveridge v. King*, 292 Or 771, 643 P3d 332 (1982)(homeowner's claim seeking recovery of money to remedy construction defects governed by ORS 12.080(3)); *See also Suess Builders Co. v. Beaverton*, 294 Or 254, 268, 656 P2d 306 (1982)(takings claims are subject to ORS 12.080(3)). The word "injury" in ORS Chapter 12 means "an invasion of any legally protected interest of another." *Gaston v. Parsons*, 318 Or 247, 253, 864 P2d 1319 (1994). Following *Gaston*, the word "injury" in ORS 12.080(3) means an actionable negligence claim. Freedom from physical harm to real property is a legally protected interest in real property and actionable in negligence. *Harris v. Suniga*, 344 Or 301, 311, 180 P3d 12 (2008); *Abraham v. T. Henry Const., Inc.*, 350 Or 29, 36, 249 P3d 534 (2011). A negligence action for damage to real property in the construction context is governed by ORS 12.080(3) and subject to a six-year statute of limitations.

[3] ORS 12.080(3) excepts actions mentioned in ORS 12.050, ORS 12.060, ORS 12.135, ORS 12.137 and ORS 273.241.

a) "Injury to any Interest of Another in Real Property" Refers to Real Property Torts Including Negligence

"Injury to any interest of another in real property" refers to real property torts including negligence. ORS 12.080(3). At the first-level of statutory analysis, courts apply the maxim *ejusdem generis*. *Gaston*, 318 Or at 253. "[W]here general words follow the enumeration of particular classes of things, the general words are to be construed as applicable to things of the same general nature or class." *Id*. Pursuant to the maxim *ejusdem generis*, the phrase "injury to any interest of another in real property" includes real property torts arising from property damage caused by negligent construction. ORS 12.080(3).

In ORS 12.080(3), the phrase "injury to any interest of another in real property" follows the enumerated real property torts of "waste" and "trespass." A tort in negligence to recover for property damage to a home is of the same general nature or class as the enumerated real property torts of "waste" and "trespass." Furthermore, this analysis is consistent with the undisturbed court of appeals opinion applying ORS 12.080(3) to the tort of nuisance. *Ward v. Jarnport*, 114 Or App 466, 469, 835 P2d 944 (1992), *rev den* 315 Or 313, 846 P2d 1162 (1993).

b) The Word "Injury" in ORS 12.080(3) Means "An Invasion of any Legally Protected Interest of Another"

The word "injury" in ORS 12.080(3) means an actionable negligence claim. When interpreting text, courts consider the "well established" rule of construction that

"words in a statute that have a well-defined legal meaning are to be given that meaning in construing the statute." *Gaston v. Parsons*, 318 Or 247, 253, 864 P2d 1319 (1994). This Court has interpreted the meaning of the word "injury" in the statute of limitations in ORS Chapter 12. *Id*. at 252.

In *Gaston*, the Court defined the word "injury" in ORS Chapter 12 as an "invasion of any legally protected interest of another." *Id*. at 253 (quoting Restatement (Second) of Torts § 7 (1965)). "Injury" means "legally cognizable harm." *Id*. at 253, 260 (a plaintiff has a "right to be free from physical harm resulting from negligence…"); *Prosser & Keeton on the Law of Torts*, § 30, at 165 (5th ed 1984) ("[a]ctual loss or damage resulting to the interests of another" is a necessary element for negligence).

In common law negligence, "an actor is liable only if he invades an interest which the law protects against unintended invasion." *Hall v. Cornett*, 193 Or 634, 643, 240 P2d 231 (1952). Liability for harm resulting from negligent conduct "depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Fazzolari v. Portland School Dist.*, 303 Or 1, 17, 734 P2d 1326 (1987).

The legislature has consistently used the word "injury" in other statutes of limitations in ORS Chapter 12 to describe an invasion of a legally protected interest. ORS 12.080(4)(governing an invasion of a legally protected interest in personal

property); ORS 12.135(3)(a) (governing invasions of legally protected interests in freedom from physical harm to body and property (real and personal) with respect to claims against design professionals); ORS 12.110(4) (governing an invasion of a legally protected interest in freedom from bodily harm with respect to claims against medical professionals); ORS 12.110(1) (actionable claims not specifically enumerated in ORS Chapter 12).

Following *Gaston* and well established common law negligence principles, the word "injury" in ORS 12.080(3) means an invasion of any legally protected interest. ORS 12.080(3) governs common law negligence claims.

c) Freedom From Physical Harm to Real Property is a Legally Protected "Interest of Another in Real Property" in ORS 12.080(3)

The next issue is determining what types of negligence claims are governed by ORS 12.080(3). The statute is broad and covers injury to "any[4]" legally protected interest in real property. Freedom from physical harm to real property is a legally protected interest in real property for negligence claims. *Harris*, 344 Or at 311; *Abraham*, 350 Or at 36; *Newman v. Tualatin Development Co., Inc.*, 287 Or 47, 50, 597 P2d 800 (1979) (deteriorated water pipes constitute property damage sufficient to state a negligence claim in the construction context); *Beri, Inc. v. Salishan Properties,*

[4] "Any" is defined as "1: one indifferently out of more than two: one or some indiscriminately of whatever kind***2: one, some, or all indiscriminately of whatever

Inc., 282 Or 569, 580 P2d 173 (1978) (ocean front lots subject to, and being destroyed by, erosion is actionable property damage in negligence); *Edwards v. Talent Irrigation Dist.*, 280 Or 307, 309, 570 P2d 1169 (1977) ("defendant's negligence has interfered with plaintiffs' interest in the use and enjoyment of their land" in negligence claim involving water damaged real property); *Hall v. Cornett*, 193 Or 634, 643, 240 P2d 231 (1952)("Damage is the gravamen" in a negligence action); Restatement (Second) of Torts §§ 7, 497 (1965)(describing actionable negligence claims for property damage as "invasions of another's interest in the physical condition of land and chattels…").

In *Harris* and *Abraham*, this Court held that a homeowner's claim for property damage caused by a contractor's negligent conduct is actionable in negligence. *Harris*, 344 Or at 311("[p]laintiffs here seek recovery for physical damage to their real property, and this court's cases generally permit a property owner to recover in negligence for damages of that kind."); *Abraham*, 350 Or at 29 ("…we conclude that plaintiffs' allegations of property damage against defendants state a claim for negligence.").

Interpreting ORS 12.080(3) as governing property damage claims is consistent with the Court's prior cases in the context of inverse condemnation claims, which are also governed by the statute. *Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 30, 56 P3d 396 (2002)(drainage system constructed by city causing landslide and damage to a

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quantity***3 a: great, unmeasured, or unlimited in amount, quantity, number, time, or

deck and dog run actionable as an inverse condemnation claim); *Suess Builders Co. v. Beaverton*, 294 Or 254, 268, 656 P2d 306 (1982)(inverse condemnation claim is an action for interference with an interest in real property under ORS 12.080(3)).

Following *Gaston, Harris, Abraham*, and other well established law on actionable negligence claims, ORS 12.080(3) governs a negligence action to recover for property damage caused by a contractor's negligence. This is precisely the type of claim alleged by the Goodwins. ORS 12.080(3) is the statute of limitations applicable to the Goodwins' claims.

d) The More Specific ORS 12.080(3) Governs Over the More General ORS 12.110(1)

Finally, to the extent ORS 12.080(3) and ORS 12.110(1) can overlap regarding construction defect actions, Oregon courts will apply the more specific statute over the more general. *Kambury v. DaimlerChrysler Corp.*, 334 Or 367, 374, 50 P3d 1163 (2002) (en banc)("As part of the first level of a *PGE* analysis, we adhere to the rule of statutory construction that a specific statute controls over a general statute").

Here, ORS 12.080 is more specific. ORS 12.080(3) specifically enumerates its application to torts involving "real property." On the other hand, ORS 12.110(1) is the statute of limitations governing "any injury to the…rights of another, not arising on contract, and not especially enumerated in this chapter…" (emphasis added).

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extent…." WEBSTER'S THIRD INT'L DICTIONARY 97 (unabridged ed. 2002)

ORS 12.110(1) is a "catchall" statute of limitations. *Coe v. Statesman-Journal Co.*, 277 Or 117, 120, 560 P2d 254 (1977).

2. Changes in the Text of ORS 12.080(3) Demonstrate the Legislature Intended the Statute to Govern Construction Defect Claims (Except for Design Professionals)

Context is first-level analysis in statutory interpretation. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Examining prior versions of a statute is considered context and qualifies as first-level analysis. *See Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 908 P2d 300 (1995), *modified*, 325 Or 46 (1997).

Changes in the text of prior versions of ORS 12.080(3) and ORS 12.135, and the timing of those changes, reveal that ORS 12.080(3) is unambiguous and governs construction defect claims[5]. Between 1973 and 1991, the legislature removed and added "excepting" language in ORS 12.080(3). Examining how and when the "excepting" language was used by the legislature shows intent to include real property tort claims against a contractor in ORS 12.080(3). Furthermore, the legislature's deliberate acts of either using or not using the term "excepting" in the various versions of ORS 12.080(3) is more probative of intent that the legislative history proffered by KPI.

Finally, the legislature expressly rejected a two-year statute of limitations for negligence claims against contractors when amending ORS 12.080(3) and ORS 12.135 in 1991. Legislative history reveals the intent to apply ORS 12.080(3) to tort claims for property damage to real property regardless of the cause.

a) ORS 12.135 Was the More Specific Statute of Limitations for Construction Defect Claims from 1971 Until It Was Abolished in 1983

In 1971, the Oregon legislature enacted ORS 12.135 to create a two-year statute of limitations for actions "to recover damages for injuries to a person or to property" arising from construction. ORS 12.135 would govern the Goodwins' claims but the legislature abolished it in 1983 and moved construction defect claims to ORS 12.080(3).

b) ORS 12.080(3) Was Amended in 1973 to Include Real Property Torts for "Any" Interest in Real Property, Including Negligence

In 1973, the Oregon legislature amended ORS 12.080(3) to clarify that all tort claims for damage to real property are subject to a six-year statute of limitations, regardless of the cause of property damage. Changes in the text of ORS 12.080(3) support the conclusion that negligence claims for property damage to real property are governed by ORS 12.080(3). Furthermore, legislative history is consistent with this conclusion.

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[5] ORS 12.080(3) excepts construction claims against design professionals as those

ORS 12.080(3) was amended as follows:

> 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 and 273.241**….shall be commenced within six years.

Or Laws 1973 Ch. 363 §1.

A first-level contextual analysis of ORS 12.080(3) supports the conclusion that negligence claims for property damage to real property are governed by ORS 12.080(3). When the legislature amended ORS 12.080(3) in 1973 to include all real property torts, ORS 12.135 already governed a more specific subset of real property torts in the construction context. Therefore, the legislature added the "excepting" language to ORS 12.080(3) to carve out negligence claims against contractors covered by the more specific ORS 12.135. The legislature would have no need to carve out construction defect claims from ORS 12.080(3) unless "injury to any interest of another in real property" would otherwise include negligence actions in the construction context.

Legislative history is consistent with this interpretation of ORS 12.080(3). J.R. Jordan, a representative of the Oregon State Bar Law Improvement Committee, presented Senate Bill 341 to both the House and Senate Judiciary Committees. Mr. Jordan testified about the intent of Senate Bill 341 before the House Judiciary Committee on March 26, 1973.

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claims are subject to ORS 12.135.

Senate Bill 341 was drafted "to clarify the statute of limitations as to grounds for damage to real property." Tape Recording, Senate Committee on Judiciary, Committee Meeting, SB 341, March 26, 1973, tape 14, Side 1. Further, Mr. Jordan testified that Senate Bill 341 was modeled after the six-year statute of limitations for damage to personal property and "the intent of this bill [is] to provide a similar six-year statute for all claims… of real property regardless of the cause." *Id.*

Steven Hawes, Oregon legislative counsel, submitted a memorandum to the Law Improvement Committee in support of Senate Bill 341. Exhibit, Senate Judiciary Committee, SB 341, March 29, 1973, Ex. M. According to Mr. Hawes, Senate Bill 341 arose from this Court's opinion in *Martin v. Union P. R. Co.*, 256 Or 563, 474 P2d 739 (1973). The *Martin* Court mentioned the need for the legislature to clarify the types of claims subject to ORS 12.080(3).

Mr. Hawes' memorandum included the legislative counsel's recommendations for passage of Senate Bill 341 as follows:

> The attached amendment would include within the six-year statute of limitation under subsection (3) of ORS 12.080 <u>all actions for injury to or interference with any interest of another person in real property</u>, 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.

Exhibit, Senate Judiciary Committee, SB 341, March 29, 1973, Ex. M (emphasis added).

Changes in the text of ORS 12.080(3) and legislative history support the conclusion that negligence claims for property damage to real property are governed by ORS 12.080(3).

c) When the Legislature Abolished the Two-Year Statute of Limitations in ORS 12.135, ORS 12.080(3) Became the Statute of Limitations for Real Property Torts Arising From Construction Activities in 1983

In 1983, the legislature amended ORS 12.080(3) and ORS 12.135 to move the statute of limitations for construction defect claims against contractors to ORS 12.080(3). ORS 12.080(3) has governed negligence claims for property damage against contractors since these amendments were made.

In 1983, ORS 12.135(1) was amended as follows:

> An action [***to recover damages for injuries to a person or to property arising from another***] **against a person, whether in contract, tort or otherwise, arising from such** person having performed the construction, alteration or repair of any improvement to real property…, shall be commenced within [***two years from the date of such injury to the person or property; provided that***] **the applicable period of limitation otherwise established by law**….

Or Laws1983, Ch. 437, § 1.

ORS 12.080(3) was also amended as follows:

> 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***] and 273.241….shall be commenced within six years.

Or Laws1983, Ch. 437, § 2.

The legislature abolished the two-year statute of limitations for construction defect claims in ORS 12.135. Or Laws 1983, Ch. 437, § 1. Importantly, the legislature also amended ORS 12.080(3) to remove the "excepting" language. *Id*. at § 2. The subset of real property torts in the construction context formerly included in ORS 12.135 now became encompassed by the phrase "injury to any interest of another in real property." Torts for bodily injury in the context of construction were moved two the two-year statute of limitations in ORS 12.110(1).

By abolishing the statute of limitations in ORS 12.135 and removing the exception previously located in ORS 12.080(3), the legislature expressly acted to include construction defect claims as actions for "injury to any interest of another in real property." ORS 12.080(3) is the "applicable period of limitation otherwise established by law" as referenced in the 1983 version of ORS 12.135.

d) <u>In 1991, the Legislature Moved Construction Defect Claims Against Design Professionals From ORS 12.080(3) to ORS 12.135(2)</u>

In 1991, the legislature amended ORS 12.080(3) and ORS 12.135 to change the statute of limitations from six years to two years for negligence claims against design professionals in the construction context. Or Laws 1991, Ch. 968, §§ 1, 2.

ORS 12.135(2) was amended as follows:

> **Notwithstanding subsection (1) of this section, an action against a person for the practice of architecture…,the practice of landscape architecture…,or the practice of engineering…, to recover damages for injury to a person, property or to any interest in property, including damages for delay or economic loss, regardless of legal theory, arising from the construction, alteration or repair of any improvement to real property shall be commenced within two years from the date the injury or damage is first discovered or in the exercise of reasonable care should have been discovered…**

Or Laws 1991, Ch. 968, § 1.

ORS 12.080(3) was amended as follows:

> 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.

Or Laws 1991, Ch. 968, § 2.

When the legislature amended ORS 12.135(2) in 1991 to include a two-year statute of limitations for real property torts against design professionals, ORS 12.080(3) already governed such claims. Therefore, it was necessary for the legislature to include the "excepting" language in ORS 12.080(3) to carve out real property torts against design professionals. The legislature would have no need to

carve out construction defect claims against design professionals from ORS 12.080(3) unless "injury to any interest of another in real property" would otherwise include negligence actions in the construction context.

e) The Legislature Expressly Rejected a Two-Year Statute of Limitations for Negligence Claims Against Contractors When Amending ORS 12.080(3) and ORS 12.135 in 1991

When amending ORS 12.135 in 1991, the legislature expressly rejected a two-year statute of limitations for negligence claims against construction contractors. The original version of Senate Bill 722 included a two-year statute of limitations for negligence claims against contractors that was later removed with the consent of Senators Joyce Cohen and Bob Shoemaker.

The original draft of Senate Bill 722 contained the following two-year statute of limitations applicable to negligence claims against contractors:

> 12.135. (1) An action [*against a person, whether in contract, tort or otherwise,*] **to recover damages for injury to a person, property damage or damage to any interest in property, including damages for delay or economic loss, regardless of legal theory of recovery**, arising from [*such*] **another** person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from [*such*] **another** person having furnished the design, planning, **investigation, study,** surveying, architectural, **landscape architectural** or engineering services for such improvement, shall be commenced within [*the applicable period of limitation otherwise established by law*] **two years from the date when such injury or damage is first discovered or in the**

> **exercise of reasonable care should have been discovered**….

SB 722 (original draft dated (2/11/91)).

The above language in the original version of Senate Bill 722 is similar to the two-year statute of limitations in ORS 12.135 that was abolished in 1983. The original bill located the proposed two-year statute of limitations in the same section as it was located between 1971 and 1983 when the statute governed claims against construction contractors. However, the proposed two-year statute of limitations for contractors was quickly rejected after the first committee hearing on April 8, 1991.

Attorney Jim Marvin endorsed the bill and testified before the Senate Judiciary Committee on behalf of trade organizations for design professionals and the OADC. Mr. Marvin testified that the existing statute of limitations for architects and engineers was six years for damage to real property. Tape Recording, Senate Committee on Judiciary, Committee Meeting, SB 722, April 8, 1991, tape 100, Side B.

Senator Jim Hill expressed concern over the proposed two-year statute of limitations. He stated that "two years just seems very—like a very, very short—short period of time for something like real property. And I—I have trouble equating it to personal injury." Tape Recording, Senate Committee on Judiciary, Committee Meeting, SB 722, April 8, 1991, tape 100, Side B, 286-290.

Senator Joyce Cohen, chair of the Senate Judiciary Committee and chief sponsor of the bill, reminded everyone that the original draft of the bill applied to construction

contractors in addition to design professionals. *Id*. at 329-336. Bill Taylor, committee counsel for the Senate Judiciary Committee, stated that the two-year statute of limitations in line 8 of the original draft applied to general contractors, subcontractors and any other professionals involved in construction. *Id*.

Stephen Kafoury, representing the Architects and Engineers Legislative Council of Oregon, suggested that contractors could be removed from the bill. *Id*. Senator Cohen and Senator Shoemaker approved. *Id*. The A-engrossed version of Senate Bill 722 removed contractors from the proposed two-year statute of limitations. SB 722 (1991). None of the subsequent proposed amendments to Senate Bill 722 included a two-year statute of limitations for negligence claims against contractors.

As made abundantly clear in 1991, the statute of limitations for a negligence action against a contractor for damage to real property remains in ORS 12.080(3).

f) The Legislature's Actions in Adding and Removing Text in ORS 12.080(3) and ORS 12.135 are More Probative than the Legislative History Proffered by KPI

During the second step of statutory analysis, the Court determines the weight given, if any, to legislative history. *State v. Gaines*, 346 Or 160, 170-171, 206 P3d 1042 (2009) The Court will consider any legislative history proffered "only for whatever it is worth – and what it is worth is for the court to decide." *Id*. at 173. "[W]hether the court will conclude that the *particular* legislative history on which a party relies is of assistance in determining legislative intent will depend on the

substance and probative quality of the legislative history itself." *Id*. at 172 (emphasis in original). "When the text of a statute is truly capable of only one meaning, no weight can be given to legislative history that suggests – or even confirms- that legislators intended something different." *Id*. at 173.

Here, the first-level statutory analysis of text and context is unambiguous and ORS 12.080(3) includes a negligence action for property damage in the construction context. The legislature's actions in adding and removing the "excepting" text to ORS 12.080(3) as described above is first-level analysis not to be disregarded by the Court. In contrast, the legislative history proffered by the parties may be entirely disregarded.

Furthermore, the legislative history proffered by the Goodwins is consistent with the text and context of ORS 12.080(3) and more probative than the legislative history proffered by KPI. Moreover, the legislature expressly acted to reject a two-year statute of limitations in 1991. Finally, the statute of limitations for bodily injury in the construction context is two years, which is consistent with the 1983 legislative history proffered by KPI.

3. *Abraham* Footnote 3 Does Not Mandate Application of ORS 12.110(1)

In *Abraham v. T. Henry Const., Inc.*, 350 Or 29, 43, 249 P3d 534 (2011), this Court noted that the statute of limitations for negligent construction claims is two years under ORS 12.110, subject to a discovery rule:

> "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; 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). n. 3

Abraham, 350 Or. 29 at 34, *recons den* (May 5, 2011).

Abraham did not engage in statutory analysis of either ORS 12.110(1) or ORS 12.080(3) and the Court did not rule on the statute of limitations in that case. As *dictum* with respect to application of ORS 12.110(1), the footnote in *Abraham* has no precedential value and is not authoritative. *Mastriano v. Board of Parole*, 342 Or 684, 692 n.8, 159 P3d 1151 (2007) ("This court has declined to treat a prior interpretation of a statute as authoritative when it is *dictum*").

Abraham footnote three, however, is persuasive *dictum* on the application of a discovery rule to negligence actions to recover for damage to real property. *Halperin v. Pitts*, 352 Or 482, 494, 287 P3d 1069 (2012) (en banc)(while a court is not required to follow *dictum* as precedent, it "could have persuasive force because of the soundness of its reasoning"). The *Abraham* plaintiffs filed contract and negligence claims "[s]ometime" after discovery of damage to the property caused by water leakage, "but more than eight years after the construction was substantially complete…" *Abraham v. T. Henry Const., Inc.*, 230 Or App 564, 567, 217 P3d 212 (2009). Without a discovery rule, plaintiffs' claims would have been barred under both

the six-year statute of limitations of ORS 12.080(3) and the two-year statute of limitations of ORS 12.110(1). Therefore, the Court's opinion on the discovery rule is persuasive *dictum* because it was necessary to the outcome of the case.

Abraham footnote three is not authoritative *dictum* on the application of ORS 12.110(1) to claims for negligent injury to real property. In order for the two-year statute of limitations of ORS 12.110(1) to be necessary to the outcome of *Abraham*, the plaintiffs in *Abraham* must have commenced their negligence action more than two years after discovery of the claims. The amount of time between discovery of plaintiffs' claims and commencement of the negligence action was not addressed by the court of appeals or this Court in *Abraham*. Therefore, application of ORS 12.110(1) was not important to the outcome of *Abraham* because the timeliness of plaintiffs' claims did not hinge upon application of a two-year statute of limitations. Rather, the outcome in *Abraham* depended upon application of a discovery rule.

4. Cases Suggesting that ORS 12.110(1) Applies Are Inapplicable

Cases suggesting that ORS 12.110(1) applies to the Goodwins' negligence claim are inapplicable. For example, *Union County School District No. 1 v. Valley Inland Pacific Constructors*, 59 Or App 601, 611, 652 P2d 349 (1982) and *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Or 243, 611 P2d 1158 (1980) are not binding or persuasive because those Courts concluded that a claim for property damage arising from construction was governed by the statute of limitations in former ORS

12.135. *Union County School District No. 1 v. Valley Inland Pacific Constructors*, 59 Or App 601, 611, 652 P2d 349 (1982); *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Or 243, 611 P2d 1158 (1980). In light of the important changes to ORS 12.080(3) and ORS 12.135, those cases do not provide guidance on the present issue before the Court.

Furthermore, *Cabal v. Donnelly*, 302 Or 115, 727 P2d 111 (1986) is not binding or persuasive because it had nothing to do with the statute of limitations for negligence claims. *Cabal* involved a determination of "whether an action on an implied warranty of habitability is one in contract or in tort." *Id*. at 113. *Cabal* held that plaintiffs' breach of warranty claim was an "action on their contract with defendant" and the plaintiffs were entitled to attorney fees. *Id*. at 115. *Cabal* did not engage in any analysis of a statute of limitations. The Goodwins do not assert a claim for breach of implied warranty of habitability. *Cabal* provides no assistance to the determination of which statute applies to the Goodwins' negligence claim for damage to real property.

B. Under ORS 12.010 and ORS 12.080(3), a Negligence Claim for Damage to Real Property Accrues When the Plaintiffs Discover, or Should Discover, the Injury

The recent Oregon Supreme Court decision in *Rice v. Rabb*, 354 Or 721, 320 P3d 554 (2014) makes it clear that ORS 12.080(3) contains a discovery rule. At issue in *Rice* was whether the six-year statute of limitations in ORS 12.080(4) "incorporates a discovery rule to determine when such claims 'accrue' pursuant to ORS 12.010."

Rice, 354 Or at 723. In reversing the court of appeals, the Oregon Supreme Court held that the discovery rule recognized in *Berry v. Branner* applies to conversion and replevin claims under ORS 12.080(4). *Id*.

The Court concluded, "following the reasoning of *Berry*, that a discovery rule applies to ORS 12.080(4) because that statute falls under the purview of ORS 12.010." *Id*. at 728. Because ORS 12.080(4) does not specify when the statute of limitations begins to run, a cause of action under that statute "'accrue[s]' within the meaning of ORS 12.010, 'at the time [a] plaintiff obtained knowledge, or reasonably should have obtained knowledge of the tort committed upon her person by [a] defendant.'" *Id*. (citing *Berry v. Branner*).

Likewise, a discovery rule applies to ORS 12.080(3) because that statute falls under the purview of ORS 12.010. Because ORS 12.080(3) does not specify when that statute of limitations begins to run, a cause of action "accrues" at discovery by way of ORS 12.010. *Rice*, 354 Or at 728. Based upon the plain language of the statute, *Berry v. Branner*, forty-seven years of Oregon Supreme Court decisions applying a discovery rule to negligence claims, and now *Rice v. Rabb*, ORS 12.080(3) incorporates a discovery rule and applies to the Goodwins' negligence claims.

C. <u>The Goodwins Discovered their Injury in May 2010</u>

Because ORS 12.080(3) is subject to a discovery rule, the Goodwins' negligence claims did not accrue until the Goodwins discovered, or reasonably should have

discovered the existence of the claims – that is, when the Goodwins "should have known 'facts which would make a reasonable person aware of a substantial possibility that each of the three elements [of legally cognizable harm] (harm, causation, and tortious conduct) exists.'" *Gaston v. Parsons*, 318 Or 247, 256, 864 P2d 1319 (1994) (parenthesis in original). This is a question of fact for the jury. *Gaston*, 318 Or at 256. See also *T.R. v. Boy Scouts of America*, 344 Or 282, 297, 181 P3d 758 (2008).

In assessing a plaintiff's awareness, the discovery rule includes a "duty to inquire" aspect. *T.R. v. Boy Scouts of America*, 344 Or 282, 296, 181 P3d 758 (2008). Even where a duty to inquire exists, a plaintiff who is alerted to the need for such further investigation is only required to conduct an investigation that a reasonable person in his or her circumstances would conduct. *See Doe v. American Red Cross*, 322 Or 502, 511–13, 910 P2d 364 (1996) (discovery is determined by objective, reasonable person standard). A plaintiff is not necessarily charged with employing experts to uncover facts that a reasonable person in plaintiff's circumstances could not uncover. *T.R. v. Boy Scouts of America*, 344 Or 282, 293, 181 P3d 758 (2008).

Furthermore, even where an expert is employed to conduct an investigation, a plaintiff may rely upon and trust the assurances provided by that expert. *See Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or 270, 278, 265 P3d 777 (2011) (citing *Gaston*, 318 Or at 257) ("When a potential tortfeasor is in a relationship of trust and confidence to a plaintiff and makes assurances to the plaintiff, those assurances may 'have a

bearing on whether a reasonable person would be aware of a substantial possibility of tortious conduct.'").

The duty to investigate alone is not sufficient to commence the running of the statute of limitations. *T.R. v. Boy Scouts of America*, 344 Or at 293-94 ("The Court of Appeals * * * erroneously concluded that the duty to investigate alone was sufficient to commence the running of the statute of limitations."). In considering this issue, the court imputes to the plaintiff knowledge of all facts reasonably available to him as set forth in the summary judgment record, however, the court may not, on its own, speculate about what else the plaintiff might have learned had he inquired; "that approach has been squarely rejected by the Supreme Court." *Keller v. Armstrong World Industries, Inc.*, 197 Or App 450, 463-64, 107 P3d 29 (2005), *adh'd to on recons*, 200 Or App 406, 115 P3d 247 (2005), *aff'd*, 342 Or 23, 147 P3d 1154 (2006).

Furthermore, awareness of a "substantial possibility" requires more than a "mere suspicion" in order to have "discovered" the element. *Gaston*, 318 Or at 255-56. As such, the only way to rule as a matter of law on the accrual of a claim subject to the discovery rule is where "the **only conclusion** a reasonable jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter." *T.R. v. Boy Scouts of America*, 344 Or 282, 296, 181 P3d 758 (2008) (emphasis added).

This requires courts to examine all facts in the summary judgment record in the light most favorable to the nonmoving party and giving the nonmoving party the benefit of all reasonable inferences. *Jones v. General Motors Corp.,* 325, Or 404, 407-408, 939 P2d 608 (1997).

Here, when viewed in the light most favorable to the Goodwins, their negligence claim is timely. The Goodwins discovered their claim in May 2010 and filed their Complaint in March 2011, ten months after discovery. The Goodwins were not aware of, nor should they have been aware of, any defects in the installation of the EIFS or property damage resulting therefrom until May 2010, when the Goodwins were first informed that the EIFS was defectively installed and causing property damage. ER-1, ¶¶ 3, 33, 3, 36; ER-18, ¶¶ 3-9.

Prior to this time, the Goodwins diligently performed inspections and maintenance repairs on the EIFS, including inspections and maintenance repairs performed by defendants, and at no time did anyone ever suggest to the Goodwins that the issues identified or the repairs were anything other than maintenance or that there were signs of defective construction causing property damage. ER-1, ¶¶ 4, 5, 6, 7, 11, 25, 26, 27, 28, 29, 30, 31.

Likewise, the Goodwins diligently performed inspections and maintenance on the slate tile deck, during which time only two issues were ever identified to the Goodwins by the numerous contractors that inspected the Goodwins' deck:

(1) efflorescence and (2) slate delamination. ER-1, ¶¶ 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 32. Efflorescence and slate delamination are naturally occurring and expected conditions on slate tile decks and these issues are not indicative of defective construction or property damage resulting therefrom. ER-18, ¶¶ 5, 6, 9. Again, at no time did anyone ever suggest to the Goodwins that the issues identified or repairs to the slate tile deck were anything other than maintenance or that there were signs of defective construction causing property damage. ER-1, ¶¶ 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 32.

The Goodwins undertook reasonable investigation and performed follow-up maintenance and repairs as recommended by the contractors who reviewed the Goodwins' home. None of the contractors ever identified construction defects or damage resulting therefrom until May 2010 and as such, the Goodwins were never alerted to any facts which would give rise to a substantial possibility that the respondents' negligently installed the EIFS siding and that their defective construction had caused damage to the Goodwins' home.

As such, because the Goodwins did not know, nor should they have known, of any defects in the installation of the EIFS or property damage resulting therefrom until May 2010, the Goodwins' negligence claim is timely.

IV. CONCLUSION

ORS 12.080(3) is the six-year statute of limitations applicable to the Goodwins' negligence action to recover for damage to real property. ORS 12.080(3) contains a discovery rule. The Goodwins' negligence claim is timely because they did not discover their injury until May 2010.

This Court should affirm the court of appeals, rule that ORS 12.080(3) applies and contains a discovery rule, and remand to the trial court for a jury trial on the merits.

Dated this 4th day of June, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitations in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,550 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 5.05(4)(f).

Dated this 4th day of June, 2015.

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CERTIFICATE OF FILING

I certify that on June 4, 2015, I caused to be filed electronically the foregoing **RESPONDENTS' BRIEF ON THE MERITS** with the Appellate Court Administrator through the Oregon Appellate Courts' eFiling system.

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