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,

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.

Washington County Circuit Court Case No. C106480CV

CA A150509

SC S062791

RESPONDENT ON REVIEW'S BRIEF ON THE MERITS ON REVIEW

On appeal from a decision of the Court of Appeals on appeal from a judgment of the Circuit court for Washington County, Honorable Donald R. Letourneau, Judge.

(Counsel listed on following page)

April 2015

Opinion filed: September 24, 2014
Author of Opinion: Schuman, J.
Concurring Judges: Duncan, P.J. and Wollheim, J.

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

This is a construction defect case. The trial court granted Defendant-Respondent-Respondent on Review's, The Schollander Companies, Inc. ("Schollander"), motion for summary judgment on Plaintiff-Appellant-Petitioner on Review Melissa Shell's ("Shell") claims. Schollander argued the statute of repose in ORS 12.115 applied to bar Shell's claims, and Shell argued that the statute of repose in ORS 12.135 applied to her claims. The trial court granted Schollander's motion for summary judgment and entered a General Judgment of Dismissal of Shell's claims. The Court of Appeals affirmed the trial court's grant of summary judgment and dismissal of Shell's claims as untimely. *Shell v. Schollander Companies, Inc.*, 265 Or App 624, 336 P3d 569 (2014). Shell seeks a review of the rulings of the trial court and Court of Appeals decision.[1] *Schollander* argues that the rulings of the trial court and the Court of Appeals are a correct analysis of the law and should be affirmed.

B. Questions Presented on Review

1. Whether the statute of repose found ORS 12.135 applies to claims arising out of the sale of completed "spec" house pursuant to a

[1] Schollander filed third-party claims against several subcontractors involved in the construction of the house. The subcontractors filed motions for summary judgment which were granted. That aspect of the case is not relevant to this appeal.

purchase and sale agreement?

2. If ORS 12.115 applies to the sale of complete "spec" house pursuant to a purchase and sale agreement, did the trial court and the Court of Appeals properly dismiss Shell's claims as untimely asserted?

C. Schollander's Proposed Rules of Law

The statute of repose in ORS 12.135 does not apply to claims arising out of the sale of a "spec" house to a purchaser. The Statute of Repose of General Application stated in ORS 12.115 is correctly applied to a common law claim for negligent injury to real property.

D. Summary of Material Facts

Schollander generally adopts the Statement of Facts as stated in the Opinion of the Court of Appeals with the following additions to the summary. In addition, Schollander objects to several of Shell's description of facts as inaccurate. Those objections are set forth at the end of this section.

a. Schollander's Summary of Material Facts

Don Schollander is the principal of The Schollander Companies, Inc. ("Schollander"). At all times, Schollander typically built "spec" homes meaning that it would acquire buildable lots, then built houses on them which it would then own and offer for sale to the general public. Often a sign would be placed in front of the house before it was completed offering the house for sale. In 1999, Schollander was involved in building houses in the Bauer Oaks

subdivision in Washington County. In late 1999, Schollander started construction of the house that Shell ultimately purchased. The construction sequence proceeded in the typical method with the foundation and structure being built first, followed by the exterior cladding of the house (which in this case consisted of Hardie Plank lap siding, synthetic stucco, vinyl windows and a composite roof). Once the exterior was complete, the interior finishes of the house were installed. Around May 2000, when construction of the house was nearly complete, Melissa Shell saw the house and decided to buy it. Construction of the house was completed no later than June 22, 2000 as evidenced by a Certificate of Completion which was recorded by the lender who provided the construction financing. The components of the house Shell alleges were negligently constructed were completed before she signed the Purchase and Sale Agreement in May, 2000.

Shell and Schollander finalized the terms of the sale on May 30, 2000 using a form Purchase and Sale Agreement. The Purchase and Sale Agreement included an addendum which conditioned the sale on Schollander installing a different bathroom floor, running gas pipes to the washer and dryer area in the utility room and repairing any damage identified in the final walk through. Once the offer with the addendum was accepted by Schollander (the seller). Those changes to the house (which was still owned by Schollander) became conditions of the sale. The sale closed on July 12, 2000. Melissa Shell lived in

the house for the next nine years and 11 months before she served a Notice of Defect pursuant to ORS 701 on June 25, 2010.

b. Schollander's Objections to Shell's Summary of Material Facts

Schollander objects to the following statement in Shell's Summary of Material Facts:

* "Plaintiff notified Schollander of construction defects in the Home on June 25, 2010, consistent with the requirements of ORS 701.565—within 10 years from completion of construction of the Home." (Brief at 3) (Emphasis added)

The record does not support Shell's characterization that the ORS 701.565 notice was sent within 10 years from completion of construction of the house. In fact, it is undisputed that Shell sent her Notice of Defect more than 10 years after all construction work, particularly the parts she complains caused damage were completed. Ms. Shell did send her Notice less than 10 years after Washington County issued the Certificate of Occupancy (by four days) and less than 10 years from the date of the sale closed (by 14 days). Shell's statement that Schollander did not respond to the notice is not relevant to this appeal.

II. SUMMARY OF ARGUMENT

A. ORS 12.115 Applies to Shell's Claim

While Shell repeatedly refers to her claim as one being for "Negligent Construction," her claim is more correctly referred to as a claim of common law negligence (and negligence *per* se) resulting in injury to real property. As such,

it is correctly treated as being controlled by ORS 12.115, which sets forth the time limits within which a claimant must assert her claim for negligent injury to real property.

B. ORS 12.135 Does Not Apply to Shell's Claim

ORS 12.135 bars claims arising from the performance of the "construction, alteration or repair of any improvement to real property" asserted more than 10 years after substantial completion. Substantial completion is defined in ORS 12.135 as occurring when a contractee accepts the work. The statute therefore applies to situations in which there is a concontractor-contractee relationship for the provision of construction services. No such relationship existed between Shell and Schollandar.

The decision in *Lozano v. Schlesinger*, 191 Or App 400, 84 P3d 816 (2004), is instructive. In *Lozano*, the Court Of Appeals determined the definition of substantial completion in ORS 12.135 meant the statute was "intended to apply when the recipient of services under a construction contract accepts in writing the completion of those services." *Id.* at 405. Shell's claims for the negligent construction of the house she purchased did not involve her as a "recipient of services under a construction contract"; therefore, she was not a "contractee" as that term is used under ORS 12.135 and her claims are not subject to ORS 12.135.

Furthermore, the legislative history for ORS 12.135, contrary to Shell's arguments, does not indicate the intent of the statute was to apply to all claims arising out of the construction, alteration, repair, or improvement to real property. Rather the intent was to address the instances where there was a contractor-contractee relationship for construction services. In *PIH Beaverton, LLC v. Super One, Inc.*, 355 Or 267, 284, 323 P3d 961 (2014), the Court's discussion of the legislative history of ORS 12.135 in relation to the term "completion" is instructive as it demonstrates that the contractor-contractee relationship was necessary for completion to be achieved.

Finally, Shell argues in the alternative that if this Court agrees with the Trial Court and Court of Appeals that ORS 12.135 does not apply, then the statute of repose in ORS 12.115, which bars "any action for negligent injury to person or property of another" that is "commenced more than 10 years from the date of the act or omission complained of," does not bar her claim because Schollander provided some important services to Shell within the ten-year period of repose, and Schollander as a contractor had duties which continued until the closing of the home. Shell argues that the "the act or omission complained of" was the failure of Schollander to ensure that the completed house complied with the building code and failure to properly perform walk through inspections. The theory of "negligent inspection" is raised here on brief for the first time and should not be considered. Additionally, Shell's

interpretation of the scope of ORS 12.115 is incorrect; the phrase "acts and omissions" does not refer to the failure to build a house up to code; that phrase refers to the acts and omissions upon which a plaintiff bases his or her claim of failure to satisfy the code.

III. ARGUMENT

A. ORS 12.115 is Correctly Applied to Shell's Claim for Common Law Negligence *per se* Resulting in Injury to Real Property.

As a claim based in Common Law Negligence resulting in injury to real property, ORS 12.115 is properly applied to Shell's claim. As a result of the development of the law over the past several years, there is a great deal of overlap in contract law and tort law as it relates to claims for defective construction. In 2008, the court issued its ruling in *Harris et al v. Suniga et al.*, 344 Or 301, 180 P3d 12 (2008) in which the Supreme Court affirmed the Court of Appeals determination that a claim for damage to a building caused by defectively installed exterior building components is property damage, for purposes of application of the "Economic Loss Rule" and that damages flowing therefrom are recoverable in tort. With that ruling, parties claiming to have suffered damages to internal wall components did not need to rely on claims based in contract. Consequently, second and third owners of a building may bring claims against builders without the need for privity of contract. Similarly,

building owners may bring claims in tort and directly against subcontractors with which they had no privity of contract.

Also in 2008, the Court of Appeals issued its ruling *Waxman v. Waxman Associates*, 224 Or App 499 (2008) holding that the six year statute of limitations in ORS 12.080(1) (for breach of contract) runs from the breach and that no discovery rule applies to Shell's claims.

Given this legal landscape in June 2010, nine years and 11 months after purchasing her house from Schollander, Shell's contract claims, to the extent she had any expired well before she served her notice of defects. When she filed her lawsuit she therefore asserted claims only in negligence – more specifically – negligent injury to her real property. She claimed that improper installation of siding, windows and roof (all installed in 1999, prior to the date the parties signed the purchase and sale agreement) had damaged the other wall components of her house. As such, her claim is exactly the claim described in ORS 12.115.

B. The Plain Language of ORS 12.135 Does Not Apply When a Spec House Builder Conveys Real Property to a Purchaser Under a Purchase and Sale Agreement

The primary issue in this matter is whether ORS 12.135 applies to claims a purchaser of a spec home asserts against the builder of the spec home. This issue entails statutory interpretation, for which the Court's goal is the determination of the legislature's intent. *State v. Gaines,* 346 Or 160, 171, 206

P3d 1042 (2009). Intent is to be determined primarily from the text and context, relevant legislative history, and (if necessary) maxims of statutory construction. *Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

Although no Oregon appellate court previously addressed this issue, the Court of Appeals in this matter, relying upon the case of *Lozano v. Schlesinger*, 191 Or App 400, 405-06 (2004), determined ORS 12.135 does not apply to such claims because there was no contractual relationship for construction services from which this claim derives, as required by ORS 12.135. Shell's contract was for the purchase of real property not for the provision of construction services on property she owned. Shell's argument completely avoids any analysis of the definition of "substantial completion" in ORS 12.135, which provides the statutory requirement of the contractor-contractee for construction services relationship.

In *Lozano*, a builder constructed a house for his own use, lived in the house, and sold it to persons who subsequently sold it to others who later filed a complaint against the builder for negligent construction of the house. The issue for the *Lozano* court was whether plaintiff was a "contractee" as that term was used in the statute because the statute required an acceptance by a "contractee." *Id.* at 404. The court explained that "in specifying that a 'contractee' must 'accept' the construction, alteration or repair, the phrasing of the statute suggests that some other person is involved." *Id.* at 405. The court further

stated: "[t]he phrasing of the statute thus suggests that, consistently with the common usage of the term 'contractee,' the statute was intended to apply when the recipient of services under a construction contract accepts in writing the completion of those services." *Id.* (Emphasis added). Finally, the court asserts: "Plainly, the targets of the statute are claims that arise out of negligent performance of construction contracts." *Id.* at 405.

ORS 12.135[2] provides, in pertinent part, as follows:

> (1) An action against a person by a plaintiff who is not a public body, whether in contract, tort or otherwise, arising from the person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection

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[2]The prior version of ORS 12.135 is substantially similar to the current version and provides in pertinent part as follows:

> (1) An action against a person by a plaintiff, whether in contract, tort or otherwise, arising from such person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from such person having furnished design, planning, surveying, architectural or engineering services for such improvement, 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.
>
> ***
>
> (3) For purposes of this section, "substantial completion" means the date when the contractee accepts in writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended

> thereof, or from the person having furnished design, planning, surveying, architectural or engineering services for the improvement, must be commenced before the earliest of:
>
> (a) The applicable period of limitation otherwise established by law; [or]
> (b) Ten years after substantial completion or abandonment of the construction, alteration or repair of ... a residential structure, as defined in ORS 701.005 . . .;
>
> * * *
>
> (4) For purposes of this section:
>
> * * *
>
> (b) "Substantial completion" means the date when the contractee accepts in writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such written acceptance, the date of acceptance of the completed construction, alteration or repair of such improvement by the contractee.

Like the *Lozano* plaintiff, Shell had no contract for "construction services," instead Shell had a Purchase and Sale Agreement for the purchase of real property from Schollander. As the purchaser of a spec home, Shell was not the "recipient of services under a construction contract." She did not own the land upon which the house was being built and she had no input on the design of the home or the construction process because the house was essentially complete prior to entering into the Purchase and Sale Agreement. Just as the purchaser in *Lozano* was not a "contractee" for the purposes of ORS 12.135 and

could not be subject to its requirements, neither is Shell subject to the provisions of ORS 12.135.

C. The Legislative History of ORS 12.135 Indicates the Statute Applies Only When a Contractor-Contractee Relationship for the Construction Services on Property Owned by the Contractee.

The plain language and legislative history of ORS 12.135 indicates the legislature intended it to apply only when a contractee could accept the performance of construction services from a contractor. The recent ruling in *PIH Beaverton, LLC v. Super One, Inc.*, 355 Or 267, 323 P3d 961 (2014) supports this contention.

In *PIH Beaverton*, the plaintiff bought a hotel from the original owner that had contracted to build the property with the general contractor, Super One, and then later discovered alleged construction defects. Plaintiff sued the general contractor. The trial court granted summary judgment for the defendants who argued that substantial completion had occurred when a notice of completion had been posted pursuant to ORS 87.045. The Court of Appeals reversed and the Oregon Supreme Court affirmed. In discussing the legislative history of the term "substantial completion", the court found repeated statements indicating the intent of the drafters of ORS 12.135 was to apply to relationships where the owner of the property, or contractee, owned the property and contracted with an entity to build an improvement on the property.

J. R. Kalinoski, who appeared on behalf of Associated General Contractors testified that the proposed statute would only begin to run "when the contractor agrees with the owner that the owner may occupy the building." Tape Recording, House Committee on State and Federal Affairs, Financial Affairs Subcommittee, March 3, 1971, HB 1259, Tape 5, Side 1 (statement of J.R. Kalinoski) (emphasis added). Preston Hiefield, counsel for Associated General Contractors, further explained that "the owner's *** acceptance is conditioned on his acknowledgement that [the contractor] has completed [its] work and [has] completed it in accordance with [the owner's] desires and specifications." Tape Recording, House Committee on State and Federal Affairs, Financial Affairs Subcommittee, May 10, 1971, HB 1259, Tape 16, Side 2 (statement of P. Hiefield). These statements indicate the proponents of HB 1259 contemplated the proposed law to apply in instances where the owner of real property (the contractee) contracted with another party (the contractor) to build improvements on land the contractee already owned and not when a potential buyer wanted to purchase an improvement upon completion.

III. THE TRIAL COURT PROPERLY DETERMINED THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHEN THE TEN-YEAR PERIOD OF REPOSE UNDER ORS 12.115 BEGAN TO RUN.

The trial court determined that there was no genuine issue of material fact and as a matter of law, ORS 12.115 barred Shell's claims. In particular, the trial court found that "no reasonable juror could find that 'the acts or omissions

complained of" occurred after June 1, 2000." ER-50.

Shell contends that if ORS 12.115 is the applicable statute of repose, then there is a genuine issue of material fact regarding whether it applies to her claims. Shell's contention in this regard is unfounded. ORS 12.115(1) provides: "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." Shell misapplies the terms "acts or omissions complained of" because Shell does not consider the negligent construction conduct to be the acts and omissions to which ORS 12.115 applies.

Shell's claims all relate to the construction of the exterior of residence by Schollander. Shell asserts that the operative omission with regard to that statute was Schollander's failure to perform its walk-through inspections in a non-negligent manner to ensure the house complied with the building code: "Schollander's failure to identify and correct deficiencies in the construction of the Home and to insure compliance with Oregon's building code was an omission that continued through July 12, 2000" (the date of the closing of the sale).

Shell's arguments do not withstand scrutiny for two reasons. First, Shell never alleged that Schollander negligently inspected the house. This is an entirely new theory raised by Shell only in its petition for review. On appeal, parties are restricted to the "theory upon which the cause was prosecuted or

defended in the court below." *Leiser v. Sparkman*, 281 Or 119, 122, 573 P2d 1247 (1978); *Burgdorf v. Weston*, 259 Or App 755, fn 4, 316 P3d 303 (2013).

Second, Shell's perspective on the application of ORS 12.115 is unduly broad. The acts and omissions to which the statute refers are the negligent construction, not the general failure to satisfy a general duty. The case of *Josephs v. Burns,* 260 Or 493, 491 P2d 203 (1971), overruled in part on other grounds, *Smothers v. Gresham Transfer, Inc.,* 332 Or 83, 23 P.3d 333 (2001) is instructive. In *Joseph*, the Oregon Supreme Court addressed the statute of ultimate repose in ORS 12.115(1) in a construction case involving a collapsed roof. The plaintiffs brought a negligence action following the collapse of a roof, which occurred approximately 17 years after the original construction. The defendant architects and engineers who designed and built the roof demurred to the complaint on the ground that the action had been commenced after the ten-year statute of ultimate repose, ORS 12.115(1) had run. The plaintiffs insisted that the defendants had a continuing duty to warn them of the hazards of a faultily constructed roof.

The court responded:

> If the statute was intended to be one of ultimate repose, regardless of circumstances, it would follow that the legislature did not intend the statute to be circumvented by allegations that subsequent to the fundamental wrong, a continuing duty existed to rectify the results of such wrong. By this statement we do not intend to prejudge a situation in which an active, continuous relationship between plaintiff and defendant exists from the

> time of the negligent acts to a time within the period during which an action is permitted.

Based on this holding from *Joseph,* it is clear that ORS 12.115(1) bars plaintiff's claims of negligent construction of the house. The acts or omissions were not the alleged general failure to provide a house that met the building codes.

Furthermore, there was no active, continuous relationship between Shell and Schollander that existed from the time of the negligent acts to a time within the period during which an action is permitted. In *Rutter v. Neuman,* 188 Or App 128, 136, 71 P3d 76 (2003) (quoting *Cavan v. General Motors,* 280 Or 455, 458, 571 P2d 1249 (1977)), the Court of Appeals explained that the "active, continuous relationship" referred to in *Josephs* is one that "puts a plaintiff in a position in which he or she is not able 'to recognize fairly the existence of a cause of action until the relationship is terminated' "; *e.g.,* a doctor-patient relationship. *See Id.* at 136–37, 71 P.3d 76 (holding that there was no evidence of an "active, continuous relationship" between the plaintiffs and the city defendant because "nothing in the record demonstrate[d] the existence of the sort of relationship of trust and confidence with the defendant that the court said was necessary in *Cavan*"). Shell did not allege a relationship of trust and confidence with Schollander that prevented Shell from being able to recognize fairly the existence of a cause of action.

IV. CONCLUSION

For the foregoing reasons, Defendant-Respondent Schollander respectfully submits that the trial court and Court of Appeals did not err, and this court should affirm the judgment in favor of Schollander.

DATED: April 8, 2015.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,973 words.

Type size

I certify that the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2015, I served the foregoing

RESPONDENT ON REVIEW'S BRIEF ON THE MERITS ON REVIEW

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CERTIFICATE OF FILING

I hereby certify that on April 8, 2015, I caused to be filed electronically the foregoing **RESPONDENT ON REVIEW'S BRIEF ON THE MERITS ON REVIEW** with the Appellate Court Administrator through the Oregon Appellate Courts' efiling system.

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