

IN THE SUPREME COURT OF THE STATE OF OREGON

MELISSA SHELL, an individual,

Petitioner on Review,

v.

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

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

**BRIEF OF *AMICUS CURIAE* GERALD AND MELISSA MCKEE IN
SUPPORT OF PETITION FOR REVIEW**

**IF REVIEW IS ALLOWED, *AMICUS CURIAE* INTEND TO FILE A
BRIEF ON THE MERITS**

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

Opinion Filed: September 24, 2014

Author of Opinion: Schuman, J.

Concurring Judges: Duncan, P.J. and Wollheim, J.

Kevin A. Eike, OSB No. 012500

Christopher C. Grady, OSB No. 052694

Aldrich Eike, P.C.

621 SW Morrison St., Suite 1050

Portland, Oregon 97205

Tel: (503) 226-7045

Representing Appellant Melissa Shell

Paul E. Sheely

Smith Freed & Eberhard PC

111 SW Fifth Avenue, Suite 4300

Portland, OR 97204

Tel: (503) 227-2424

Representing Defendant –Respondent

The Schollander Companies, Inc.

INDEX OF CONTENTS

I.	STATEMENT OF THE CASE AND THE COURT OF APPEAL’S OPINION	6
II.	QUESTIONS PRESENTED AND PROPOSED RULE OF LAW	7
III.	REASONS FOR GRANTING REVIEW	7
	A. Many Oregon Homeowners Are Affected by the Decision in this Case.....	7
IV.	CONCLUSION	9

INDEX OF APPENDICES

1. *Webster's New Universal Dictionary* 1749 (unabridged ed 1996)
2. U.S. Census Bureau. Table 2au: New Privately Owned Housing Units Authorized Unadjusted Units for Regions, Divisions, and States. Issued 2013. Available at <http://www.census.gov/construction/bps/txt/tb2u2013.txt>; Accessed 12/10/14.

INDEX OF AUTHORITIES

CASES

<i>Shell v. Schollander Cos.</i> , 265 Or App 624, 336 P3d 569 (2014)	6
-----------------------------------------------------------------------------	---

STATUTORY AUTHORITIES

ORS 12.115	6
ORS 12.135	6

RULES AND REGULATIONS

ORAP 5.05	10
ORAP 5.05(4)(f)	10
ORAP 9.05	10
ORAP 9.05(3)(a)	10

ADDITIONAL AUTHORITIES

<i>Webster's New Universal Dictionary (unabridged ed 1996)</i>	8
----------------------------------------------------------------------	---

I. STATEMENT OF THE CASE AND THE COURT OF APPEAL'S OPINION

For purposes of this *amicus* brief, the relevant facts and procedural history are sufficiently set forth in the Court of Appeal's decision and the petition for review filed by Petitioner, Melissa Shell, on November 26, 2014.

In *Shell v. Schollander Cos.*, 265 Or App 624, 336 P3d 569 (2014), the Court of Appeals found that ORS 12.115 supplies the appropriate ten-year statute of repose for an owner seeking a negligent construction claim against a builder, where the owner purchased the home via a sales agreement. According to the Court of Appeals, because the plaintiff did not have a construction contract with the original builder, ORS 12.135 did not apply to her claim. Instead, ORS 12.115 supplied the appropriate statute of repose for the plaintiff's claim.

ORS 12.115 provides for a ten-year statute of repose, which runs from "the act or omission complained of." Per the Court of Appeals, plaintiff's negligence claim was time-barred ten years from the alleged negligent conduct of the builder. The Court of Appeals went on to find that the alleged negligent conduct was the construction of the outer shell of plaintiff's home. Because the outer shell was completed more than ten years from when plaintiff filed her claim, the Court of Appeals held the negligent construction claim was untimely.

II. QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

For purposes of this *amicus* brief, Gerald and Melissa McKee incorporate the questions presented and proposed rules of law proffered by Melissa Shell in her Petition for Review filed on November 26, 2014.

III. REASONS FOR GRANTING REVIEW

A. Many Oregon Homeowners Are Affected by the Decision in this Case.

This Court should grant review of the Court of Appeal's decision because it has the potential to negatively impact a number of Oregon homeowners. Based upon the holding in *Shell*, anytime a home is built and sold new via use of a sales agreement, the ultimate window of time in which to bring a negligent construction claim is shorted. Instead of having a full ten years from when the home is substantially complete to make a claim, owners will have to engage in a defect-by-defect, component-by-component analysis to determine whether or not they have a timely claim. This analysis would apply regardless of whether the party making the claim is an original or a subsequent owner. In other words, even if the owner has no information about the type of contractual relationship between the original owner and their builder, the current owner could still be facing a shortened timeline in which to make a claim for negligent construction. This puts subsequent owners at a significant disadvantage to being able to properly analyze their rights

and window of time in which to make a claim for negligent construction involving their homes.

Moreover, the type of contractual relationship between the plaintiff and builder in *Shell* is not unique. Larger builder-developers often construct single-family homes on “spec,” in other words, on speculation the home will sell to someone in the general public upon completion. *Webster’s New Universal Dictionary* 1749 (unabridged ed 1996)(APP-1). The U.S. Census Bureau reports that 8,417 single-family homes were newly constructed in Oregon in 2013. (APP-3). Even assuming only 50% of those homes were built and sold on “spec,” that equates to over 4,000 homeowners/year which may be facing a shorter window of time in which to bring a claim for negligent construction. Given the widespread impact this case may have on homeowner rights for Oregon residents, this Court should accept review of the Court of Appeal’s decision.

////

////

////

////

////

IV. CONCLUSION

For the reasons stated above, Gerald and Melissa McKee respectfully request that the Court grant Petitioner Melissa Shell's Petition for Review.

Dated: December 10, 2014.

BALL JANIK, LLP

Phillip E. Joseph, OSB No. 88237
James C. Prichard, OSB No. 99349
Adele J. Ridenour, OSB No. 061556
Counsel for *Amicus Curiae* Gerald and Melissa
McKee

**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)(a)) is 1,340 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 10th day of December, 2014.

BALL JANIK, LLP

Phillip E. Joseph, OSB No. 88237
James C. Prichard, OSB No. 99349
Adele J. Ridenour, OSB No. 061556
Counsel for *Amicus Curiae* Gerald and Melissa
McKee

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014, I served two copies of the foregoing **BRIEF OF *AMICUS CURIAE* GERALD AND MELISSA MCKEE** **IN SUPPORT OF PETITION FOR REVIEW** on the following parties via U.S. Postal Service First Class Mail and delivering two copies to the following:

Paul E. Sheely
Jakob Lutkavage-Dvorscak
Smith Freed & Eberhard PC
111 SW Fifth Avenue, Suite 4300
Portland, OR 97204
Tel: (503) 227-2424
Fax: (503) 227-2535
Representing Defendant –Respondent The Schollander Companies, Inc.

Kevin A. Eike
Christopher C. Grady
Aldrich Eike, P.C.
621 SW Morrison St., Suite 1050
Portland, Oregon 97205
Tel: (503) 226-7045
Representing Plaintiff-Appellant-Petitioner Melissa Shell

BALL JANIK, LLP

Phillip E. Joseph, OSB No. 88237
James C. Prichard, OSB No. 99349
Adele J. Ridenour, OSB No. 061556
Counsel for *Amicus Curiae* Gerald and Melissa
McKee

CERTIFICATE OF FILING

I further certify that on December 10, 2014, I caused to be filed electronically the foregoing **BRIEF OF *AMICUS CURIAE* GERALD AND MELISSA MCKEE IN SUPPORT OF PETITION FOR REVIEW** with the Appellate Court Administrator through the Oregon Appellate Courts' e-Filing system.

BALL JANIK, LLP

Phillip E. Joseph, OSB No. 88237
James C. Prichard, OSB No. 99349
Adele J. Ridenour, OSB No. 061556
Counsel for *Amicus Curiae* Gerald and Melissa
McKee