IN THE COURT OF APPEALS FOR THE STATE OF OREGON

LIBERTY OAKS HOMEOWNERS ASSOCIATION,
an Oregon non-profit corporation,
Plaintiff-Appellant,

v.

LIBERTY OAKS, LLC an Oregon limited liability company;
J.T. SMITH COMPANIES, an Oregon corporation; and
JEFFREY D. SMITH, an individual,
Defendants-Respondents.

LIBERTY OAKS, LLC an Oregon limited liability company; et al.,
Third-Party Plaintiffs,

v.

A & D PRESTIGE BUILDING, LLC, an Oregon limited liability company, et al.,
Third-Party Defendants,

D.L. LYTSELL CONSTRUCTION, INC., an Oregon corporation
Fourth-Party Plaintiff,

v.

ANGELFIRE, INC., an Oregon corporation,
Fourth-Party Defendant.

Washington County Circuit Court
C096255CV

July 2012

A148972

RESPONDENT'S ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court of the State of Oregon
for the County of Washington Case No. C096255CV
Honorable Thomas W. Kohl, Judge

Skip Winters, OSB No. 944669
Jason A. Gardner, OSB No. 021458
Bodyfelt Mount LLP
707 SW Washington St., Suite 1100
Portland, OR 97205
Tel. 503.243.1022; Fax 503.243-2019

Attorneys for Defendants-Respondents Liberty Oaks, LLC, J.T. Smith Companies and Jeffrey D. Smith

W. Frank Elsasser, OSB No. 943004
Elsasser Law Office
101 SW Main St., Suite 915
Portland, OR 97204
T. 503.477.9116; F. 503.265.8249

Attorneys for Plaintiff Liberty Oaks Homeowners Association

Alexander Wylie, OSB No. 014570
Preg O'Donnell & Gillett
1000 SW Broadway, Suite 960
Portland, OR 97205
T. 503.224.3650; F. 503.224.3649

Attorney for Third-Party Defendant-Respondent A & D Prestige Builders, LLC

Richard Levin, OSB No. 964928
Crystal Lewis, OSB No. 043120
Richard Levin Law Group
2080 NW Everett Street, Suite 101
Portland, OR 97209
T. 503.224.3763; F. 503.222.2104

Attorneys for Plaintiff Liberty Oaks Homeowners Association and Third-Party Defendant Siegner and Company

[Continued on next page.]

Daniel Schanz, OSB No. 961114
James Lawler III, OSB No. 982790
Spooner & Much, PC
530 Center Street, Suite 722
Salem, OR 97301
T. 503.378.7777; F. 503.588.5899

Of Attorneys for Third-Party Defendant-Respondent D.L. Lytsell Construction, Inc.

Thomas M. Christ, OSB No. 834064
Cosgrave Vergeer Kester LLP
888 SW 5th Ave., Suite 500
Portland, OR 97204
T: 503 323-9000; F: 503 323-9019

Attorneys for Third-Party Defendants-Respondents Brian Clopton Excavating and North American Metals, Inc. dba West Coast Gutter Service

Evan M. Smith, OSB No. 075270
Blunck & Walhood
West Linn Law Center
2350 Willamette Falls Drive
West Linn, OR 97068
T. 503.656.1654; F: 503.650.0603

Attorney for Third-Party Defendant-Respondent Unique Designs, Inc.

Paul R. Gary, OSB No. 830390
The Gary Law Group
101 SW Main Street, Suite 2000
Portland, OR 97204
T. 503.227.8424; F. 503.227.8412

Attorney for Third-Party Defendant Insulate Windows fka Insulate, Inc., nka Certainteed Corporation

Michael Kennedy, OSB No. 782707
Pamela J. Paluga, OSB No. 094672
Kennedy Bowles PC
111 SW 5th Ave., Suite 2115
Portland, Oregon 97204
T. 503.228.2373; F. 503.228.2378

Attorneys for Third-Party Defendant-Respondent L.L. Lindberg Co., L.L.C.

Matthew Kalmanson,
OSB No. 041280
Hoffman Hart & Wagner LLP
1000 SW Broadway, Suite 2000
Portland, OR 97205
T. 503.222.4499; F. 503-222-2301

Attorneys for Third-Party Defendant-Respondent Unique Designs, Inc.

[Continued on next page.]

Robin Chisamore, OSB No. 062942
Law Offices of Andersen & Nyberg
P.O. Box 4400
Portland, Oregon 97208-4400
T. 503.736.7420; F. 800.972.3206

Attorney for Third-Party Defendants—Respondents Rex Hill Masonry, Inc., and Rain-Master Roofing Co., Inc.

Christopher J. Drotzmann,
OSB No. 962636
Patrick C. Wylie, OSB No. 085187
Davis Rothwell Earle
& Xóchihua P.C.
111 SW 5th Avenue, Suite 2700
Portland, OR 97204-3650
T. 503.222.4422; F. 503.222.4428

Attorney for Third-Party Defendants Advanced Construction, Home Exteriors Inc. nka Bela Inc. and, Square Deal Concrete Construction Company

Jim Wickwire, OSB No. 804017
Harris, Wyatt & Amala, LLC
333 S. State Street, Suite V322
Lake Oswego, OR 97034
T. 503.742.1990; F. 503.742.9906

Attorney for Third-Party Defendant Angelfire, Inc.

Matt Piwonka, OSB No. 974700
Law Office of Wendy M. Kent
1001 SW Fifth Ave., Suite 1405
Portland, OR 97204
T. 503.274.0424; F. 503.274.0358

Attorney for Third-Party Defendant Angelfire, Inc.

John MacMillan, OSB No. 973194
Blair McCrory, OSB No. 084163
MacMillan, Scholz & Marks, P.C.
900 SW 5th Ave., Suite 1800
Portland OR 97204
T. 503.224.2165; F. 503.224.0348

Attorneys for Third-Party Defendants Just Another Construction Company, Inc. and Angelfire, Inc.

Thomas A Ped, OSB No. 953767
Dave Campbell, OSB No. 032816
Williams Kastner
888 SW 5th Ave., Suite 600
Portland, OR 97204
T. 503.944.6988; F. 503.222.7261

Attorneys for Third-Party Defendant Rain-Master Roofing Co., Inc.

[Continued on next page.]

Michael A. Lehner, OSB No. 741885
Lehner & Rodrigues, PC
1500 SW First Ave.., Suite 1150
Portland, Oregon 97201
T. 503.226.2225; F. 503.226.2418

Of Attorneys for Third-Party Defendant Bizon Landscape Maintenance Company, Inc.

Daniel F Knox, OSB No. 782785
Schwabe Williamson & Wyatt PC
1211 SW 5th Ave., Ste 1900
Portland, OR 97204
T. 503.796.2908; F. 503.796.2900

Attorney for Third-Party Defendant Miller Consulting Engineers, Inc.

Thomas W. Brown, OSB No. 801779
Andrew Cicerrella, OSB No. 093136
Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, OR 97205
T. 503.323.9000 ; F. 503.323.9019

Attorneys for Third-Party Defendant AVR Construction

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STATEMENT OF THE CASE

A. Nature of the action and relief sought.

Plaintiff-Appellant Liberty Oaks Homeowners Association ("Appellant") filed this action against Defendants-Respondents Liberty Oaks, LLC, J.T. Smith Companies, and Jeffrey D. Smith ("Respondents") alleging claims for nuisance, negligence and breach of fiduciary duty arising out of the construction of the Liberty Oaks Townhomes. In the underlying matter defendants filed third-party complaints against various subcontractors alleging claims for contribution and indemnity in the event defendants were found liable to plaintiff.

Defendants moved for partial summary judgment seeking to dismiss defendant Jeffrey D. Smith because he was immune from liability, and to dismiss plaintiff's nuisance claims. (OJIN Docket No. 169). The trial court granted defendants' motion for partial summary judgment. (ER 49-52, ER 53-55).[1]

In addition, third-party defendants Advanced Construction, Vasily Sharabarin, Home Exteriors, Inc., and Square Deal Construction Inc.,

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[1] Appellant initially appealed the judgment in favor of defendant Jeffrey D. Smith. However, Appellant did not include an assignment of error or brief any issues relating to defendant Jeffry D. Smith as an individual. Therefore, Appellant has abandoned this issue and defendant Jeffrey D. Smith is not a party to this appeal.

(collectively "Advanced Construction") moved for summary judgment on the grounds that defendants/third-party plaintiffs' claims for contribution and indemnity were untimely because plaintiff's claims were barred by the statute of limitations. (OJIN Docket No. 177). Respondents filed a supplemental motion for summary judgment seeking dismissal of plaintiff's negligence and breach of fiduciary duty claims as being barred by the statute of limitations. (OJIN Docket No. 198). The trial court granted these motions as well. (ER 49-52, ER 53-55). All judgments should be affirmed.

B. Nature of the judgment sought to be reviewed.

Respondents accept that Appellant is seeking review of the trial court's entry of judgment dismissing Appellant as not being timely commenced within the statute of limitations.

C. Statutory basis of appellate jurisdiction.

Respondents accept this aspect of Appellant's statement of the case.

D. Timeliness of appeal.

Respondents accept this aspect of Appellant's statement of the case.

E. Questions presented on appeal.

Respondents accept this aspect of Appellant's statement of the case.

F. Summary of arguments.

Appellant's claims are subject to the two-year statute of limitations set forth in ORS 12.110. In *Abraham v. T. Henry Construction, Inc., 350 Or 29, 249 P3d 534 (2011)*, the Oregon Supreme Court recently held that injured parties may bring negligence claims in construction defect cases and confirmed that ORS 12.110 applies to such claims. The application of ORS 12.110 to negligence claims is consistent with Oregon case and statutory law.

The undisputed evidence establishes that Appellant discovered its alleged injury in early 2005. However, Appellant did not file this action until October 15, 2009. The applicable two-year time period expired before Appellant commenced this action. The trial court correctly applied ORS 12.110 in dismissing Appellant's claims.

Abraham simply summarized existing law regarding the applicable statute of limitations; it did not change existing law. The trial court did not err in failing to equitably apply a change in the statutory limitations period prospectively. The trial courts' judgment should be affirmed.

STATEMENT OF FACTS

Liberty Oaks is a residential townhome development, consisting of one hundred and fifty-two (152) homes, located in Washington County,

Oregon. The developer and general contractor for construction was defendant/third-party plaintiff J.T. Smith. Construction of Liberty Oaks took place in approximately 2001 -2002. (Complaint, OJIN Docket No. 1; SER 1-5).

Appellant hired Independent Building Inspectors: Construction Defects & Waterproofing Consultants ("IBI") in 2005 to conduct a comprehensive inspection and analysis of construction conditions and deficiencies at the units. (Sack Dec ¶ 5, OJIN Docket No. 203; SER 6-9). [2] After the inspection, IBI prepared a detailed property condition report of all 152 units. (Sack Dec ¶ 5, Ex 3; SER 8). The report noted numerous construction items that needed to be addressed including missing flashing, improper vegetation, sealant failures, cracking in concrete slabs, damaged siding, and improper sloping of privacy walls. (Sack Dec ¶ 5, Ex 3; SER 8). These issues are all included as allegations against Respondents in Appellant's complaint. (Complaint ¶¶ 10-11, SER 4-5).

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[2] The Declaration of Bryana L. Sack was filed in support of respondent's Supplemental Motion for Summary Judgment. The Declaration is set forth in the Supplemental Excerpt of Record. The exhibits to the Declaration are voluminous and accordingly are not included in the Supplemental Excerpt of Record. The referenced exhibits are also attached to the Declaration of Patrick Wylie in Support of Third-Party Defendants Advanced Construction, Home Exteriors, Inc. and Square Deal Concrete Construction, Inc.'s Motions for Summary Judgment. (OJIN Docket No. 178; ER 1-17).

In response to the IBI report, Appellant contacted Respondents in 2006 regarding a scope of repair, and Respondents submitted three bids. (Sack Dec ¶ 6, SER 8; Boitano Dep, pp 96-98). Also in response to the IBI report, Appellant hired the Tonkon Torp law firm and asked the homeowners to vote to allow Appellant the authority to sue Respondents for construction defects. (Sack Dec ¶ 6, SER 8; Boitano Dep, pp 142-143). Board member Garrick Boitano testified that at a meeting on December 18, 2006: "[W]e were told that IBI had done a full visual inspection and found things that were felt were [sic] issues that needed to be addressed, and a different law firm was brought in to attend that meeting." (Sack Dec ¶ 6, SER 8; Boitano Dep, pp 91, 232). The Joint Written Consent in Lieu of Special Meeting stated:

> "WHEREAS, in April 2005, Independent Building Inspections: Construction Defects & Waterproofing Consultants [IBI] surveyed the Property [Liberty Oaks] for signs of water intrusion and potential construction defects likely to lead to water intrusion and found visual evidence of construction defects.
>
> * * *
>
> WHEREAS, on June 15, 2006, pursuant to ORS 701.565, the Association tendered an offer to repair the water intrusion construction defects to the Property developer JT Smith Co. (the "Developer") and the Developer refused that offer[.]"

(Sack Dec ¶ 7, SER 8).

By September 2006, Appellant had also received a number of complaints from homeowners regarding needed repairs. (Sack Dec ¶ 8, SER 8). The complaints included concerns regarding holes in the siding, missing caulking, mold and water intrusion in the crawl space, leaking and water intrusion around the windows. (Sack Dec ¶ 8, SER 8).

This action was filed on October 15, 2009.

ANSWER TO ASSIGNMENT OF ERROR NO. 1

The trial court correctly concluded that the Appellant's claims were time-barred.

Preservation

Respondents do not dispute that the issue raised in Appellant's assignment of error was timely raised and preserved in the trial court.

Standard of Review

Appellant has correctly identified and recited the appropriate standard of review.

ARGUMENT

1. The Oregon Supreme Court Confirmed in *Abraham* that the Applicable Limitations Period for Tort Claims in Construction Cases is the Two-Year Limitation Period Set Forth in ORS 12.110.

This appeal arises, in part, from the recent decision of the Oregon Supreme Court in *Abraham v. T. Henry Construction, Inc.*, 350 Or 29, 249

P3d 534 (2011). In *Abraham,* the court addressed whether a claim for property damage arising from construction defects may lie in tort, in addition to contract, when the homeowner and builder are in a contractual relationship. In specifically holding that the plaintiffs could bring a tort claim in a construction defect case, the Supreme Court clearly confirmed the applicable statute of limitations for such claim:

> "The statute of limitations for contract actions is six years. ORS 12.080(1). **Tort claims arising out of the construction of a house must be brought within two years of the date that the cause of action accrues, but, in any event, within 10 years of the house being substantially complete.** ORS 12.110; ORS 12.135. Tort claims ordinarily accrue when the plaintiff discovers or should have discovered the injury. *Berry v. Branner,* 245 Or 307, 311-12, 421 P2d 996 (1966)." (emphasis added).

Abraham, 350 Or at 34, fn. 3.

In *Abraham,* the plaintiffs discovered water damage more than six years after their house was substantially completed. Since the Court of Appeals had previously held that plaintiffs' contract claims were barred by the six-year statute of limitations and no discovery rule applied, the court necessarily addressed the statute of limitations issue for the tort claim. *See Abraham v. T. Henry Construction, Inc.,* 230 Or App 564, 567, 217 P3d 212

(2009).[3] Otherwise, if the plaintiffs did not have a viable negligence claim subject to a discovery rule, plaintiffs' claims would have been completely barred, and not before the Supreme Court. Thus, the summary of the applicable statute of limitations was a necessary prelude for the court's discussion of the tort claim.

a. *Abraham* is Consistent with Prior Oregon Case Law Interpreting ORS 12.110 in the Context of Construction Claims.

Prior to the *Abraham* decision, the Oregon Supreme Court recognized the concept of dual tort and contract claims in the context of construction claims, and explicitly held that such claims are subject to different statutes of limitations. There was no question that the two-year statute of limitations set forth in ORS 12.110 applied to a tort claim in a construction defect case.

In *Securities-Intermountain v. Sunset Fuel Company,* 289 Or 243, 259, 611 P2d 1158 (1980), the court addressed the nature of an alleged construction claim – tort or contract – and which limitations period applied. Plaintiff sued the architect and the heating contractor for costs incurred in redesigning and completing a defective heating system. The plaintiff argued for the six-year contract limitation period; defendant argued that the claims

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[3] Despite plaintiffs' request, the Supreme Court declined to review the Court of Appeals' decision that plaintiffs' contract claims were barred by the statute of limitations. *Abraham,* 350 Or at 34, fn 4.

were for negligence and subject to the expired two-year limitations period. The court analyzed whether the following statutes applied: The six-year statute of limitations for contract claims, ORS 12.080(1); the general two-year statute of limitations, ORS 12.110(1); and the two-year statute relating to actions for damages "for injuries to a person or to property arising from another person having performed the construction, alteration, or repair of any improvement to real property," ORS 12.135. *Id.* at 245.

The court first reviewed ORS 12.135 and concluded that the statute only applied to physical damage to existing property. Actions to recover financial losses remained within statutes of limitation other that ORS 12.135. *Id.* at 251. Accordingly, ORS 12.135 did not apply to bar plaintiff's claims to recover financial loss. The court then proceeded to determine whether a contract, or tort, statute of limitations applied to plaintiff's claims.

Significantly, the court summarized the development of statutory and case law dating back to 1870 and concluded:

> "The foregoing line of development may be summarized as follows. Originally all actions upon any contract or liability, express or implied, as well as all actions not otherwise provided for could be commenced within six years, and only a few enumerated tort actions were limited to two years, but after 1870 the unenumerated actions "not arising on contract" were transferred to the

> two-year statute. When plaintiff chose to bring actions for personal or property damage caused by the negligence of defendants whose duty toward plaintiff arose from some agreed undertaking, the plaintiffs were entitled to plead the contract as the "inducement" showing defendant's duty and to invoke tort law for the standard of care and damages. * * * **A plaintiff who proceeded in this fashion had to sue within the two-year limitation on actions 'not arising on contract.'** " (emphasis added)

Id. at 258 (citations omitted).

The court went on to announce the following rule:

> "Thus the statutes and the precedents leave us with several variations when an action for damages against one engaged to provide professional or other independent services is commenced after two years and is pleaded as a breach of contract. **If the alleged contract merely incorporates by reference or by implication a general standard of skill and care to which the defendant would be bound independent of the contract, and the alleged breach would also be a breach of this noncontractual duty, then ORS 12.110 [the tort limitations period] applies.** *Dowell v. Mossberg, supra* [226 Or 173, 355 P2d 624, 359 P2d 541 (1961)]. Conversely, the parties may have spelled out the performance expected by the plaintiff and promised by the defendant in terms that commit the defendant to this performance without reference to and irrespective of any general standard. Such a defendant would be liable on the contract * * *. In such cases, there is no reason

> why an action upon the contract may not be commenced for the six years allowed by ORS 12.080." (emphasis added).

Id. at 259-60.

The court concluded that plaintiff alleged a breach of contract action within the six-year time period set forth in ORS 12.080(1). *Id.* at 262, 264.

Subsequently, in *Cabal v. Donnelly,* 302 Or 115, 727 P2d 111 (1986), the Supreme Court again addressed the dual nature of tort and contract claims in a defect claim alleging breach of an implied warranty of habitation. The court reviewed Oregon case law, cited to its *Securities-Intermountain* decision and specifically reiterated that the applicable statute of limitations for tort claims is two-years. 302 Or at 121.

In *Abraham v. T. Henry Construction, Inc.,* 350 Or 29, 249 P3d 534 (2011), the Supreme Court once again faced the tort-contract dichotomy in a construction defect case. At the outset of its opinion, the court stated that it was addressing the issue left open in *Harris v. Suniga,* 344 Or 301, 313, 180 P3d 12 (2008): Whether a claim for property damage arising from construction defects may lie in tort, in addition to contract, when the homeowner and builder are in a contractual relationship. *Abraham,* 350 Or at 33. The court carefully reviewed the development of tort liability under Oregon law and discussed its decision in *Harris,* where it concluded that

physical injury to a building caused by construction defects was property damage, rather than purely economic loss, and thus actionable in negligence. *Abraham,* 350 Or at 37. The court went on to address its decision in *Georgetown Realty v. The Home Ins., Co.,* 313 Or 97, 831 P2d 7 (1992), summarizing the choice between tort and contract remedies as follows:

> "When the relationship involved is between contracting parties, and the gravamen of the complaint is that one party caused damage to the other by negligently performing its obligations under the contract, then, and even though the relationship between the parties arises out of the contract, the injured party may bring a claim for negligence if the other party is subject to a standard of care independent of the terms of the contract. *If the plaintiff's claim is based solely on a breach of a provision in the contract, which itself spells out the party's obligation, then the remedy normally will be only in contract, with contract measure of damages and contract statute of limitations.* That is so whether the breach of contract was negligent, intentional, or otherwise."

Id. at 106.

Abraham, 350 at 38-39 (emphasis added) (original emphasis omitted). The court concluded that *Georgetown* and other cases support the conclusion that common law negligence principles apply – notwithstanding a contractual relationship – as long as the property damage for which the plaintiff seeks recovery was a reasonably foreseeable result of the defendant's conduct. *Id.* at 40.

The court then addressed the terms of the contract between the parties:

> "The contract here provides: 'All work shall be completed in a workmanship like manner and in compliance with all building codes and other applicable laws.' The Court of Appeals apparently viewed that promise as implicitly incorporating the common law standard of care into the contract. In rejecting plaintiffs' argument that common law negligence principles provide an 'independent standard of care,' the court stated, 'When a contract expressly or implicitly incorporates the general 'duty' to take reasonable measures to avoid foreseeable risks, that standard of care is not considered to impose an independent tort duty.' *Abraham,* 230 Or App at 568 n 2. *That determination, however, is inconsistent with this court's clear statement that if a contract "merely incorporates by reference or by implication a general standard of skill and care to which the defendant would be bound independent of the contract, and the alleged breach would also be a breach of this noncontractual duty," then a claim for negligence will lie. Securities-Intermountain v. Sunset Fuel Company,* 289 Or 243, 259, 611 P2d 1158 (1980).

Abraham, 350 Or at 42.

In concluding that plaintiffs' allegations of property damage stated a claim for negligence, the *Abraham* confirmed its decision in *Securities-Intermountain v. Sunset Fuel,* 289 Or 243, 259, 611 P2d 1158 (1980). Most significantly, the *Abraham* court described the negligence claim in the precise language of the *Securities-Intermountain* decision that also stated

that ORS 12.110 applies to such claims.[4] The *Abraham* court carefully reviewed Oregon case law, discussed in detail the distinction between tort and contract claims resulting in property damage, and succinctly summarized the applicable statutes of limitations for such claims – two years for tort claims and six years for contract claims –in footnote 3.[5]

b. *Abraham* is Consistent with Oregon Statutory Law.

The statutory context of ORS chapter 12 mandates application of the two-year limitation period set forth in ORS 12.110(1) to Appellant's tort claims. Appellant's reliance on ORS 12.080(3) in the context of the provisions of ORS chapter 12 is misplaced. In an attempt to engraft an additional four years on to the time for commencement of this action, Appellant ignores both the wording and interplay of ORS 12.110, 12.080(3)

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[4] The court also cited with approval its decision in *Cabal v. Donnelly,* 302 Or 115, 727 P2d 111 (1986) (distinguishing tort and contract claims).

[5] Prior to the *Abraham* decision, Oregon courts were grappling with the concept of whether a claimant could bring a construction tort claim under the economic loss doctrine. *See e.g. Harris v. Suniga,* 344 Or 301, 312, 180 P3d 12 (2008); *Jones v. Emerald Pacific Homes, Inc.,* 188 Or App 471, 71 P3d 574, *rev den,* 336 Or 125 (2003). Oregon courts analyzed construction claims in the context of contract actions and the nature of the injury alleged. However, the Oregon courts consistently applied a two year statute of limitations to negligence claims. With the Supreme Court's explicit recognition of construction tort claims, it was only natural for the *Abraham* court to confirm the applicable statute of limitations for such claims. The *Abraham* footnote simply confirmed existing law.

and ORS 12.135. Most significantly, Appellant has completely ignored ORS 12.135 in urging a six year statute of limitations for its tort claims.

In determining the meaning of ORS 12.110, 12.080(3) and ORS 12.135, this court must ascertain the intent of the legislature. *PGE v. Bureau of Labor and Industries,* 317 Or 606, 610, 859 P2d 1143 (1993). The text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. However, the text of a statue should not be read in isolation and the court must also consider the statutory context. *Id.* at 611. In considering context, the court considers other provisions of the same statute and related statutes. *Id.* Statutes must be read as a whole, giving effect to all relevant provisions so that none are rendered meaningless. *Sanders v. Oregon Pacific States Ins. Co.,* 314 Or 521, 527, 840 P2d 87 (1992). Thus, the court must examine the language of each statute in the context of ORS chapter 12.

ORS 12.110(1) provides, in pertinent part:

> "An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, *not arising on contract,* and not especially enumerated in this chapter, shall be commenced within two years[.]" (emphasis added).[6]

[6] The statutes cited herein are those in effect when this lawsuit was filed.

ORS 12.080, provides, in pertinent part:

> "(1) An action upon a contract or liability, expressed or implied, excepting those mentioned in ORS 12.070, 12.110 and ORS 12.135 and except as otherwise provided in ORS 72.750;
>
> * * *
>
> "(3) 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."

ORS 12.080(3) expressly excepts from its six-year limitations period, those claims enunciated in ORS 12.135. ORS 12.135 provides, in pertinent part:

> "**12.135 Action for damages from construction, alteration or repair of improvement to real property; 'substantial completion' defined; application.**
>
> "(1) An action 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* or the supervision or inspection thereof, or from such person having furnished the 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.

> "(2) Notwithstanding subsection (1) of this section, an action against a person for the practice of architecture, as defined in ORS 671.010, the practice of landscape architecture, as defined in ORS 671.310, or the practice of engineering, as defined in ORS 672.005, 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; but in any event the action shall be commenced within 10 years from substantial completion or abandonment or the construction, alteration or repair." (italics added).

Standing alone, the language of ORS 12.135(1) is clear. An action arising from the construction, alteration or repair of any improvement to real property must be brought within the "applicable period of limitation otherwise established by law," which is determined by the type of claim. ORS 12.110(1) applies because Appellant's claims are "not arising on a contract" and are specifically enumerated in ORS 12.135 as a tort. Indeed, the heading of ORS 12.135 specifically refers to damages from the construction of an improvement to real property. This construction was correctly summarized by the *Abraham* court.

In *Waxman v. Waxman & Associates, Inc.*, 224 Or App 499, 198 P3d 445 (2008) the court analyzed this statutory framework in the context of a

contract claim under ORS 12.080(1).[7] At the outset, the court rejected the plaintiffs' argument that, because of the reference to ORS 12.135 in ORS 12.080(1), a 10-year statute of limitations applied to their contract claims. The court held that ORS 12.135 does not provide for a 10-year statute of limitations under any circumstances. Rather, the 10-year period described in ORS 12.135 is a statute of ultimate repose. *Id.* at 506.

The court analyzed the interplay between ORS 12.080(1) and ORS 12.135 and concluded that the legislature intended to except from ORS 12.080(1) only those actions specified in subsection (2) of ORS 12.135. *Id.* at 510. Obviously, Appellant and all construction claimants will contend that this same reasoning applies to the exception listed in ORS 12.080(3). However, it does not.

The *Waxman* court's analysis was strictly limited to the contract provisions of ORS 12.080(1) and it did not address the interplay of ORS 12.110 and ORS 12.080(3). The court expressly limited its analysis to the legislative development of contract claims stating:

> "To be sure, the matter would be patent if ORS 12.080(1) referred to 'ORS 12.135(2),' and not 'ORS 12.135.' Nevertheless, to the extent any ambiguity remains, the historical development of

[7] The *Waxman* decision was not cited by Appellant, but was addressed in the *Amicus Curiae* brief submitted by Community Association Institute.

> ORS 12.080(1) and ORS 12.135, and the legislative history associated with that evolution, conclusively corroborate our construction."

Id. at 509.

A close reading of the legislative history discussed by the *Waxman* court reveals that its decision was based on history that was clearly focused on preserving the six-year statute of limitations for contract claims in construction litigation. The court first addressed ORS 12.135, as enacted in 1971, and noted that a main area of dispute in litigation concerned whether the two-year statute applied to contract claims, in addition to tort claims. *Id.* citing *Housing Authority of Portland v. Ash Nat'l.*, 36 Or App 391, 584 P2d 776 (1978). The court went on to address specific amendments to the statute:

> "In 1983, the legislature passed Senate Bill 663, which amended ORS 12.135(1) by eliminating the two-year statute of limitations and clarifying that actions for damages arising from the construction, alteration or repair of real property, 'whether in contract, tort or otherwise, * * * shall be commenced within * * * the applicable period of limitations otherwise established by law[.]' Or Laws 1983, ch 437, ¶ 1. The legislative history of SB 663 includes explicit legislative expressions of the intent that the six-year statute of limitations set forth in ORS 12.080(1) would apply to contract claims arising from the construction, alteration, or repair of real property. *See* Tape Recording, Senate Committee on Judiciary, SB 663, May 18, 1983, Tape 153, Side A (statement of Sen Jan Wyers).

> "In 1991, the legislature passed Senate Bill 722, which added the current version of subsection (2) to ORS 12.135. Or Laws 1991, ch 968, ¶ 1. That provision reinstated the two-year statute of limitations for damages arising from the construction, alteration, or repair, of real property, but only as to claims against architects, landscape architects, and engineers. As part of the same act, the legislature also amended ORS 12.080(1) to add the exception for actions 'mentioned in' ORS 12.135. In the same session, the legislature rejected an earlier version of the bill that would have imposed a two-year statute of limitations for all claims arising from the construction, alteration, or repair of real property 'regardless of legal theory.' *See* Senate Judiciary Committee, SB 722, May 6, 1991, Exs B, C (amendments and hand engrossed bill)."

Waxman, 224 Or App at 509-10.

Based on this legislative history, it is apparent that the legislature was concerned with preserving a six-year limitation period for contract claims. Otherwise, it appears that the legislature was set on enacting a two-year statute of limitations for damages arising from construction claims. If the legislature wished to provide a six-year statute of limitations for any and all construction claims, it would have expressly done so. It did not.

2. Plaintiff's Reliance on the *Beveridge* Trilogy of Contract Cases is Misplaced.

Appellant cites a trilogy of cases in which the plaintiffs specifically alleged breach of contract claims. These cases did not address alleged tort

claims, addressed a former version of ORS 12.135 that did not include claims for economic loss[8], and are readily distinguishable from the facts in this case. This is not a contract case and the cases relied upon by Appellant and have no application to the tort claims currently before the court.

In *Beveridge v. King,* 292 Or 771, 643 P2d 332 (1982) the parties contracted to have defendant build a house and entered into an agreement for the sale and purchase of real property. *Id.* at 776. The Beveridges alleged that an implied term of the written contract was that the defendant would "construct the house in a workmanlike manner" and that he had "failed substantially to perform under said contract in that he failed to construct such residence in a good and workmanlike manner." *Id.* at 773. Significantly, plaintiffs sought damages to remedy the alleged defects. *Id.* In other words, plaintiffs claim was for economic loss, not property damage.

Defendant moved for summary judgment, contending that the case was governed by former ORS 12.135(1) which provided:

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[8] In 1991, ORS 12.135 was amended to the version that is currently before the court in this action. 1991 c.968 ¶1. Following this amendment, ORS 12.135 was no longer limited to actions "to recover damages for injuries to a person or to property", but applied to all construction defect claims "arising from the construction, alteration or repair of an improvement to real property". Thus, claims for economic loss are now included within ORS 12.135.

> "An action to recover damages for injuries to a person or to property arising from another 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; * * * ."

Id. at 774.

The trial court granted defendant's motion. On appeal, defendant relied on *Securities-Intermountain* to argue that ORS 12.110(1) applied to the claims. The Court of Appeals held that ORS 12.080(1) applied and reversed. The Supreme Court allowed review to "consider whether some clarification or refinement of our decision in *Securities-Intermountain* should be undertaken." *Id.* at 775. In addressing *Securities-Intermountain,* the *Beveridge* court stated:

> "Having studied what we there said and held, we are still of the opinion that ORS 12.135(1) is concerned with cases involving bodily injuries and physical injury to existing tangible property and has no application to financial losses resulting from inadequate performance or completion of the work or services described in ORS 12.135(1). The claim in the case at bar is not for bodily injury or physical injury to existing tangible property; therefore, the applicable statute of limitations is other than ORS 12.135(1)."

Id.

Therefore, the exception in ORS 12.080(3) referencing ORS 12.135 was not relevant to the case because ORS 12.135 focused on claims for property damage. *Id.* at 774, fn. 3; 775.

Next the court addressed whether plaintiffs' claim was barred by ORS 12.110(1). The court stated that for ORS 12.110(1) to control disposition of an action, two factors must be present: (1) the action must not be one "arising on contract" and (2) the action must be "not especially enumerated in this chapter [12]." *Id.* at 777.

In *Beveridge,* the plaintiffs argued that a six-year limitation period applied to the action under ORS 12.080(1) and ORS 12.080(3). In analyzing whether ORS 12.080 or ORS 12.110 applied to the claims, the court stated:

> "If we accept, as did the majority of the Court of Appeals, that this is simply an action upon a contract under ORS 12.080(1), the judgment of that court must be affirmed, and the defendant loses. If we assume, as defendant necessarily contends, that it is not an action upon a contract, the defendant can prevail only if this is not an "action * * * for interference with or injury to any interest of another in real property. ORS 12.080(3)."

Id. at 777-78.

The court went on to conclude that the defendant could not prevail on any theory that a two-year statute of limitations was applicable:

> "The two-year period prescribed by ORS 12.135(1) is not applicable because of our construction of that statue in *Securities-Intermountain v. Sunset Fuel, supra.* ORS 12.110(1) is not applicable either because the action does arise on contract or because the injuries here were to the interests of 'another' in real property and the action to recover damages for those injuries is especially enumerated in ORS *12.080(3).*"

Id. at 778-79.

Thus, the court determined that ORS 12.080 was the applicable statute, but did not specify which subsection controlled. However, the plaintiffs' complaint in *Beveridge* clearly alleged a breach of contract claim and the court did not conclude otherwise.

Following *Beveridge,* the Court of Appeals decided *Taylor v. Settecase,* 69 Or App 222, 685 P2d 470 (1984), a breach of contract action to recover damages for the installation of a malfunctioning or unsuitable heating and cooling system. The court concluded that plaintiffs' injuries did not differ from the injuries alleged in *Beveridge* and were outside the ambit of 12.110(1). *Id.* at 228. The court did not address the applicable statute of limitations for a tort claim, nor the application of ORS 12.135.

Likewise, in *Sutter v. Bingham Construction, Inc.,* 81 Or App 16, 724 P2d 829 (1986), the court addressed a breach of contract action for the construction of an office building. Plaintiff sought economic damages to repair a leaky roof. Relying on *Beveridge* and *Taylor,* the court concluded that ORS 12.080(3) applied. Again, the court was not addressing a tort claim and did not address the application of ORS 12.135.

Following the *Beveridge* trilogy of cases, the Supreme Court addressed whether an action to recover damages under an implied warranty of habitability was an action on a contract. In *Cabal v. Donnelly,* 302 Or 115, 727 P2d 111 (1986), the court addressed the distinction between contract and tort claims. The court discussed its opinion in *Beveridge* addressing the statute of limitations for implied warranty claims and its holding that "the general two-year statute of limitations did not apply *either* because the action was one in contract *or* because the action was to recover damages for injury to the interests of another in real property." *Id.* at 120-121 (emphasis original). The *Cabal* court specifically noted that *Beveridge* "left open whether an action on an implied warranty of habitability is one in contract or in tort." In addressing this issue, the court noted the "understandable confusion surrounding this area of law" and cited to

Securities-Intermountain v. Sunset Fuel, 289 Or 243, 259, 611 P2d 1158 (1980) to clarify the distinction between the two causes of action:

> "* * * If the alleged contract merely incorporates by reference or by implication a general standard of skill and care to which the defendant would be bound independent of the contract, and the alleged breach would also be a breach of the noncontractual duty, then ORS 12.110 [statute of limitations applicable to tort actions] applies. *Dowell v. Mossberg,* 226 Or 173, 355 P2d 624, 359 P2d 541 (1961). Conversely, the parties may have spelled out the performance expected by the plaintiff and promised by the defendant in terms that commit the defendant to this performance without reference to and irrespective of any general standard. Such a defendant would be liable on the contract whether he was negligent or not, and regardless of facts that might excuse him from tort liability."

Cabal, 302 Or at 121.

The *Cabal* court went on to hold that the plaintiffs' action for breach of warranty was an action on their contract with defendant. *Id.* at 122. Thus, the *Cabal* court clarified that the *Beveridge* decision was specifically premised on a contract claim. In addition, the Supreme Court reiterated that ORS 12.110 applies to construction tort claims. *Abraham* simply confirmed the applicable statute of limitations for construction tort claims, and is not a departure from past case law.

In summary, the *Beveridge* trilogy of cases relied on by Appellant all involved breach of contract claims. These cases did not address tort claims and this was confirmed by the Supreme Court's analysis in *Cabal.* More importantly, these cases addressed claims for economic loss which were not included within the provisions of ORS 12.135 when they were decided.

In any event, even under the court's analysis in *Beveridge,* ORS 12.110(1) applies to bar Appellant's claims in this case. First, Appellant's claims do not arise on a contract. Second, the action is especially enumerated in ORS 12.135 which states that tort claims arising from the construction of real property shall be commenced within the applicable limitation period established by law, in other words ORS 12.110. This is entirely in accord with the *Beveridge* analysis. To the extent there was any question with this approach in applying ORS 12.110, it was certainly confirmed and put to rest by the Supreme Court in *Abraham.*[9]

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[9] Appellant dedicates a substantial portion of its brief to a discussion that the *Abraham* footnote is dictum and has no precedential value. As discussed herein, the *Abraham* footnote was necessary to the court's decision and simply summarizes existing law. To the extent that the footnote may be considered dicta, it is nevertheless not appropriate to disregard it because it is an accurate summary of Oregon case and statutory law. *Cf Coalition for Safe Power v. PUC,* 139 Or App 358, 363, 911 P2d 1272 (1996).

3. The *Abraham* Court Refused to Reconsider its Decision on the Specific Issues Currently before this Court.

In *Abraham,* the plaintiffs filed a Petition for Reconsideration requesting that the Supreme Court modify footnote 3 of its opinion. (Appendix, pp 1-8). Specifically, the *Abraham* plaintiffs requested the court to delete the language stating that "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 * * *." (Appendix, pp 6-7). In addition, the appellant in this action filed an *Amicus Curiae* Brief in Support of Plaintiffs' Petition for Reconsideration briefing the identical issues that it is presenting in this appeal – that ORS 12.080(3) and the *Beveridge* trilogy of cases require application of a six-year statute of limitations for its tort claims. (Appendix, pp 9-22). Although the Supreme Court was specifically asked to reconsider the statute of limitation issues that are currently before this court, it refused to do so. Obviously, the Supreme Court meant what it said.

ANSWER TO ASSIGNMENT OF ERROR NO. 2

The trial court correctly concluded that there was no genuine issue of fact as to whether the Association's claims were timely filed.

Preservation

Respondents do not dispute that the issue raised in Appellant's assignment of error was timely raised and preserved in the trial court.

Standard of Review

This court will affirm the trial court's grant of summary judgment if there is no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *O'Dee v. Tri-Met,* 212 Or App 456, 460, 157 P3d 1272 (2007). No issue of material fact exists if, viewing the evidence in the light most favorable to the non-moving party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. *Id.*; ORCP 47. The non-moving party has the burden of producing substantive evidence creating a genuine issue for a trial on any issue raised in the motion as to which that party would have the burden of persuasion at trial. ORCP 47; *Davis v. County of Clackamas,* 205 Or App 387, 393, 134 P3d 1090, *rev den,* 341 Or 244 (2006). If the non-moving party does not produce such evidence, then the moving party is entitled to judgment as a matter of law. *O'Dee,* 212 Or App at 460-61.

ARGUMENT

The record contains indisputable evidence that in early 2005, Plaintiff had sufficient information to put it on notice of the claimed defects and, therefore, the limitations period began to run at that time.

Under the discovery rule, a plaintiff's claims accrue when it knows, or in the exercise of reasonable care should know, facts that would make a reasonable person aware of a substantial possibility that he or she has suffered an injury. *Gaston v. Parsons,* 318 Or 247, 256, 864 P2d 1319 (1994).[10] The term "injury" comprises the three elements of legally cognizable harm: "harm, causation, and tortious conduct." *Id.* at 255. A plaintiff need not know "to certainty" that each element exists. *Id.* A plaintiff has a duty to use due diligence in the effort to discover the facts underlying the claim. *Branch v. Hensgen,* 90 Or App 528, 531, 752 P2d 1275 (1988). Determining when a reasonable person should have known that harm occurred may be resolved as a matter of law. *Stevens v. Bispham,* 316 Or 221, 228, 851 P2d 556 (1993).

What a plaintiff should have known in the exercise or reasonable care is an objective test; the inquiry is "how a reasonable person of ordinary

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[10] The general policy behind the "discovery rule" is to delay the running of the statute of limitations until the injured party knows or should have known in the exercise of reasonable care that he or she has a cause of action so that the law does not strip the plaintiff of a remedy before he or she could know of the wrong. *See e.g. Frohs v. Greene*, 253 Or 1, 4, 452 P2d 564 (1969). Construction claimants are adequately protected by the discovery rule from being stripped of a remedy. There is no reason to distinguish between construction tort claims, from, arguably more complex medical negligence claims addressed in ORS 12.110(4).

prudence would have acted in the same or similar situation." *Gaston,* 318 Or at 256 (citing *Woolsten v. Wells*, 297 Or 548, 557, 687 P2d 144 (1984). The analysis considers a "plaintiff's failure to make a further inquiry if a reasonable person would have done so." *Id.* A plaintiff cannot avoid the statute of limitations because he or she failed to investigate further, when such investigation would have revealed facts supportive to his or her claim. *Keller v. Armstrong World Industries, Inc.*, 197 Or App 450, 463-464, 107 P3d 29, *modified on reconsideration*, 200 Or App 406, 115 P3d 247 (2005). A cause of action accrues from the date the injury is, or should have been, discovered, not from the time the full extent of damages is ascertained. *Raethke v. Oregon Health Sci. Univ.,* 115 Or App 195, 198, 837 P2d 977 (1992), *rev den,* 315 Or 442, 847 P2d 410 (1993).

In order for Appellant's claims to be timely, its claims must have accrued sometime after October 15, 2007, two years prior to the filing of the filing of the complaint on October 15, 2009. As set forth in the summary judgment record summarized above, the undisputed evidence establishes that Appellant discovered, or in the exercise of reasonable care should have discovered, the existence of its claims well before October 15, 2007:

- April 2005 – IBI was hired to conduct a comprehensive inspection of all 152 homes at the development. Appellant received the IBI report detailing construction and deficiencies

that were ultimately included as allegations in Appellant's complaint. Significantly, Appellant admits that it was made aware of defects more than two years prior to taking legal action, but was not aware of the extent of the damage. (Appellant's brief, pp 30, 34).

- 2006 – In response to the IBI report, Appellant contacted Respondents regarding a scope of repair, and received three bids.

- 2006 – In response to the IBI report, Appellant hires legal counsel, holds a meeting of the homeowners and in the Joint Written Consent in Lieu of Special Meeting notes the findings of the April 2005 IBI report and that on June 15, 2006, the Association tendered an offer to repair the water intrusion construction defects to the Property developer.

- October 15, 2009 – Appellant files its complaint in this action. Significantly, the complaint includes specific allegations as to construction deficiencies that are referenced in the IBI report. For example, the IBI report refers to missing flashing, sealant failures, grading issues and other issues that are alleged deficiencies in the complaint. *See e.g.* Sack Dec, Ex 3, SER 8, HOA 4507, 4519; Complaint, pp 4-5, ¶¶ 10-11, SER 4-5.

In sum, Appellant had every unit inspected in early 2005 and sought to have the defects repaired in 2006. In 2006, Appellant consulted with legal counsel regarding pursuing litigation, but did not file this action until October 15, 2009. These facts clearly demonstrate that Appellant had sufficient notice of its claims well before October 15, 2007. The trial court did not err in granting summary judgment.

ANSWER TO ASSIGNMENT OF ERROR NO. 3

The trial court did not err in failing to equitably apply a change in the statutory limitations period prospectively, but rather correctly concluded that the Appellant's claims are time-barred under existing Oregon law.

Preservation

Respondent does not dispute that the issue raised in Appellant's assignment of error was timely raised and preserved in the trial court.

Standard of Review

Appellant has correctly identified and recited the appropriate standard of review.

ARGUMENT

Appellant requests that, in the event this court determines that *Abraham* signifies a dramatic change in existing law, that the new rule should be applied prospectively only. As discussed above, *Abraham* correctly summarized the applicable statute of limitations for construction defect tort claims; it did not establish a change in the law.

Although Appellant cites a plethora of authority regarding the prospective application of changes in law, these cases have no application to the present case. In *Peterson v. Temple,* 323 Or 322, 918 P2d 413 (1996), the court announced a new rule that required mandatory joinder of claims for

personal injury and for property damage arising from a particular set of facts. Previously, the Oregon Supreme Court had specifically stated that Oregon law permitted a plaintiff to split claims and sue separately on personal injury and property claims. The court concluded that the plaintiff reasonably relied on the court's previous statements that claim splitting was permissible and, therefore, relieved the plaintiff from the application of the new rule. *Id.* at 333-34. However, the Supreme Court subsequently distinguished *Peterson* in a case specifically addressing statute of limitation issues.

In *Kambury v. DaimlerChrysler Corp,* 334 Or 367, 50 P3d 1163 (2002), the court addressed which limitations period applied in a civil action seeking damages for the death of a person killed by a defective product. At issue was whether the three-year statute of limitation period for wrongful death set forth in ORS 30.020, or the two-year limitation period for product liability actions set forth in ORS 30.900, applied to the action. Plaintiff argued that two previous decisions by the Supreme Court "suggest that the three-year limitation period set forth in ORS 30.020 control all wrongful death actions, including those pleaded under ORS 30.900." *Id.* at 372. As in the present case, plaintiff argued that if the court decided that the two-year statute applied, such ruling should only be applied prospectively because it reasonably relied on previous statements by the court supporting a three-year limitations period.

The court held that the two-year statute barred plaintiff's claim and addressed the *Peterson* issue as follows:

> "In this instance, by contrast, this court had made no definitive statements that the three-year wrongful death limitation period trumped the two-year limitation period for product liability actions. As previously noted, *Eldridge* was not a product liability case and *Western Helicopter* declined to address the issue. Plaintiff could not reasonably rely on this court's silence, particularly when the product liability civil action statute on which plaintiff relies explicitly specifies a two-year limitations period for death arising from product defects. Accordingly, we decline to limit our decision to prospective application only." (citations omitted).

334 Or at 367.

Appellant contends that it relied on *Beveridge v. King,* 292 Or 771, 643 P2d 332 (1982); *Sutter v. Bingham Construction, Inc.,* 81 Or App 16, 724 P2d 829 (1986); and, *Taylor v. Settecase,* 69 Or App 222, 685 P2d 470 (1984) as establishing a six- year statute of limitations for "negligent construction claims." As discussed above, Appellant's reliance on these cases is misplaced. Appellant could not reasonably rely on these cases because they did not establish a six-year statute of limitation for "negligent construction claims" as Appellant contends. No Oregon court has previously held that the applicable statute of limitations for a negligent construction claim is six years. The trial

court correctly applied existing Oregon law in granting defendants motion for summary judgment.

CONCLUSION

The trial court did not err in granting Respondents' summary judgment. Appellant's tort claims are time-barred. Further, the trial court did not err when it determined there was no material issue of fact as to when Appellant's claims accrued. The trial court's judgment should be affirmed.

Dated this 16th day of July, 2012.

Skip Winters, OSB No. 944609
Jason A. Gardner, OSB 021458
Tel. 503.243.1022/Fax 503.243.2019

Of Attorneys for Defendants-Respondent

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) the 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 7,363 words.

I further 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).

Skip Winters, OSB No. 944669
Email: winters@bodyfeltmount.com
Jason A. Gardner, OSB No. 021458
Email: gardner@bodyfeltmount.com
Tel. 503.243.1022; Fax 503.243-2019

Attorneys for Defendants-Respondents

CERTIFICATE OF FILING AND SERVICE

I certify that on July 16, 2012, I filed RESPONDENT'S ANSWERING BRIEF electronically with the Appellate Court Administrator.

I further certify that on July 16, 2012, I served two copies of RESPONDENT'S ANSWERING BRIEF by United States Postal Service first-class mail on the following parties at these addresses:

W. Frank Elsasser, OSB No. 943004
Elsasser Law Office
101 SW Main St., Suite 915
Portland, OR 97204
T. 503.477.9116; F. 503.265.8249

Attorneys for Plaintiff Liberty Oaks Homeowners Association

Richard Levin, OSB No. 964928
Crystal Lewis, OSB No. 043120
Richard Levin Law Group
2080 NW Everett Street, Suite 101
Portland, OR 97209
T. 503.224.3763; F. 503.222.2104

Attorneys for Plaintiff Liberty Oaks Homeowners Association and Third-Party Defendant Siegner and Company

Alexander S, Wylie, OSB No. 014570
Preg O'Donnell & Gillett
1000 SW Broadway, Suite 960
Portland, OR 97205
T. 503.224.3650; F. 503.224.3649

Attorney for Third-Party Defendant-Respondent A & D Prestige Builders, LLC

Thomas M. Christ, OSB No. 834064
Cosgrave Vergeer Kester LLP
888 SW 5th Ave., Suite 500
Portland, OR 97204
T: 503 323-9000; F: 503 323-9019

Attorneys for Third-Party Defendants-Respondents Brian Clopton Excavating and North American Metals, Inc. dba West Coast Gutter Service

Daniel Schanz, OSB No. 961114
James F. Lawler III, OSB No. 982790
Spooner & Much, PC
530 Center Street, Suite 722
Salem, OR 97301
T. 503.378.7777; F. 503.588.5899

Of Attorneys for Third-Party Defendant-Respondent D.L. Lytsell Construction, Inc.

Paul R. Gary, OSB No. 830390
The Gary Law Group
101 SW Main Street, Suite 2000
Portland, OR 97204
T. 503.227.8424; F. 503.227.8412

Attorney for Third-Party Defendant Insulate Windows fka Insulate, Inc., nka Certainteed Corporation

Evan M. Smith, OSB No. 075270
Blunck & Walhood
West Linn Law Center
2350 Willamette Falls Drive
West Linn, OR 97068
T. 503.656.1654; F: 503.650.0603

Attorney for Third-Party Defendant-Respondent Unique Designs, Inc.

Matthew J. Kalmanson, OSB No. 041280
Hoffman Hart & Wagner LLP
1000 SW Broadway, Suite 2000
Portland, OR 97205
T. 503.222.4499; F. 503-222-2301

Attorneys for Third-Party Defendant-Respondent Unique Designs, Inc.

Michael D. Kennedy, OSB No. 782707
Pamela J. Paluga, OSB No. 094672
Kennedy Bowles PC
111 SW 5th Ave., Suite 2115
Portland, Oregon 97204
T. 503.228.2373; F. 503.228.2378

Attorneys for Third-Party Defendant-Respondent L.L. Lindberg Co., L.L.C.

Christopher J. Drotzmann
OSB No. 962636
Patrick C. Wylie, OSB No. 085187
Davis Rothwell Earle & Xóchihua P.C.
111 SW 5th Avenue, Suite 2700
Portland, OR 97204-3650
T. 503.222.4422; F. 503.222.4428

Attorney for Third-Party Defendants Advanced Construction, Home Exteriors Inc. nka Bela Inc. and, Square Deal Concrete Construction Company

Robin Chisamore, OSB No. 062942
Law Offices of Andersen & Nyberg
P.O. Box 4400
Portland, Oregon 97208-4400
T. 503.736.7420; F. 800.972.3206

Attorney for Third-Party Defendants—Respondents Rex Hill Masonry, Inc., and Rain-Master Roofing Co., Inc.

Matt Piwonka, OSB No. 974700
Law Office of Wendy M. Kent
1001 SW Fifth Ave., Suite 1405
Portland, OR 97204
T. 503.274.0424; F. 503.274.0358

Attorney for Third-Party Defendant Angelfire, Inc.

Jim Wickwire, OSB No. 804017
Harris, Wyatt & Amala, LLC
333 S. State Street, Suite V322
Lake Oswego, OR 97034
T. 503.742.1990; F. 503.742.9906

Attorney for Third-Party Defendant Angelfire, Inc.

Thomas A Ped, OSB No. 953767
Dave Campbell, OSB No. 032816
Williams Kastner
888 SW 5th Ave., Suite 600
Portland, OR 97204
T. 503.944.6988; F. 503.222.7261

Attorneys for Third-Party Defendant Rain-Master Roofing Co., Inc.

John R. MacMillan, OSB No. 973194
Blair McCrory, OSB No. 084163
MacMillan, Scholz & Marks, P.C.
900 SW 5th Ave., Suite 1800
Portland OR 97204
T. 503.224.2165; F. 503.224.0348

Attorneys for Third-Party Defendants Just Another Construction Company, Inc. and Angelfire, Inc.

Thomas W. Brown, OSB No. 801779
Andrew Cicerrella, OSB No. 093136
Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, OR 97205
T. 503.323.9000 ; F. 503.323.9019

Attorneys for Third-Party Defendant AVR Construction

Michael A. Lehner, OSB No. 741885
Lehner & Rodrigues, PC
1500 SW First Ave.., Suite 1150
Portland, Oregon 97201
T. 503.226.2225; F. 503.226.2418

Of Attorneys for Third-Party Defendant Bizon Landscape Maintenance Company, Inc.

Daniel F Knox, OSB No. 782785
Schwabe Williamson & Wyatt PC
1211 SW 5th Ave., Ste 1900
Portland, OR 97204
T. 503.796.2908; F. 503.796.2900

Attorney for Third-Party Defendant Miller Consulting Engineers, Inc.

Dated this 16th day of July, 2012.

BODYFELT MOUNT LLP

BY: _____

Skip Winters, OSB No. 944669
Email: winters@bodyfeltmount.com
Jason A. Gardner, OSB No. 021458
Email: gardner@bodyfeltmount.com
Tel. 503.243.1022; Fax 503.243-2019

Attorneys for Defendants-Respondents