

FILED: February 27, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

TODD DOUGHTON
and BELLE AMIE DOUGHTON,
Plaintiffs-Appellants,

v.

TROY MORROW, et al.,
Defendants,

and

ERIKA RINDERKNECHT,
Defendant-Respondent.

TROY MORROW
and BRENDA MORROW,
Counterclaim Plaintiffs,

and

TODD DOUGHTON
and BELLE AMIE DOUGHTON,
Counterclaim Defendants.

Jackson County Circuit Court
073221E7

A148460

Ronald D. Grensky, Judge.

Argued and submitted on July 09, 2012.

Robert E. Bluth argued the cause and filed the briefs for appellants.

Dominic M. Campanella argued the cause for respondent. On the brief were Mark R. Weaver, and Brophy, Schmor, Brophy, Paradis, Maddox & Weaver, LLP.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Reversed and remanded on plaintiffs' original negligence claim; otherwise affirmed.

1 SCHUMAN, P. J.

2 Plaintiffs brought this action against defendant, the developer who sold
3 them the lot on which they built their home. To service the home, plaintiffs drilled a well
4 on what they believed--based on the location of an access road and cul-de-sac--to be the
5 northwest corner of their property. However, because the cul-de-sac had been
6 constructed in a location that differed from its location as established by a recorded
7 easement, plaintiffs' well and driveway were on a neighbor's property, not their own. In
8 their original complaint, plaintiffs alleged that defendant was negligent in not
9 constructing the cul-de-sac "in conformity with" the legal description in the easement.
10 They subsequently filed an amended complaint alleging that defendant was negligent not
11 only for constructing the cul-de-sac in a place that differed from the place in its legal
12 description, but also for failing to build it in compliance with county construction
13 standards. In the amended complaint, plaintiffs also alleged a breach of contract.
14 Defendant successfully moved for summary judgment, arguing that plaintiffs' claims
15 were time barred by the applicable statutes of limitation. On appeal, plaintiffs argue that
16 the trial court erred in granting summary judgment on the original negligence claim
17 regarding the location of the cul-de-sac, because there is a disputed issue of material fact
18 as to the date when that claim accrued. We agree. However, we conclude that the trial
19 court did not err in concluding that plaintiffs' negligence and breach of contract claims in
20 the amended complaint were time barred. Therefore, we reverse in part and affirm in
21 part.

1 Because this case comes to us on summary judgment, we state the facts and
2 all reasonable inferences that can be drawn from them in the light most favorable to the
3 nonmoving party, in this case plaintiffs, to determine whether there are any genuine
4 issues of material fact and whether defendant is entitled to judgment as a matter of law.
5 ORCP 47 C; *Jones v. General Motors Corp.*, 325 Or 404, 408, 939 P2d 608 (1997).
6 Defendant¹ owned and developed a parcel of 11 lots in rural Jackson County. In 2002,
7 defendant recorded a Private Road Maintenance and Access Declaration/Easement (Road
8 Easement) describing an easement for a u-shaped private road to provide access from the
9 lots to a public highway. The Road Easement provided, in part:

10 "The private road shall be constructed to county standards, as
11 required for use by eleven (11) residentially developed parcels; and shall be
12 maintained and repaired in similar condition for such purpose.

13 "The expenses of maintaining, repairing, and constructing the private
14 road and easement shall be paid equally by the owners of those eleven (11)
15 parcels which utilize same for residential purposes."

16 At some time in 2003, defendant decided that the road should dead-end in a
17 cul-de-sac instead of reconnecting to the public highway in a u-shape. In December
18 2003, defendant rerecorded the Road Easement to reflect that change. Also in 2003,
19 defendant hired a contractor to construct the road. In early 2004, the contractor
20 encountered a rock shelf while excavating the cul-de-sac portion of the road, requiring
21 him to excavate approximately 60 feet west of the planned location. The Road Easement

¹ All references to "defendant" refer to Rinderknecht, the only defendant that is a party to this appeal.

1 was not amended to reflect that the cul-de-sac had been relocated to accommodate the
2 rock shelf.

3 The access road was completed in June or July 2004.² Around that time,
4 plaintiffs agreed to purchase tax lot 309 from defendant. Before closing, however--on
5 July 8, 2004, to be precise--plaintiffs expressed concern to their realtor about "deep ruts
6 in the gravel on the cul-de-sac" and questioned whether "this might create a problem with
7 the county." Plaintiffs' realtor submitted a proposed addendum to the sale agreement,
8 requesting that defendant make repairs. Defendant rejected the proposed addendum, and
9 it did not become part of the sale agreement. On July 13, 2004, plaintiffs' realtor
10 recommended in an e-mail that plaintiffs contact the local fire district to inquire about the
11 condition of the cul-de-sac. They did not do so. Despite the fact that the addendum was
12 rejected, plaintiffs closed on the sale on July 14, 2004. The 2003 rerecorded Road
13 Easement, reflecting the altered shape but not the actual location, was included in the
14 documents at closing. The county subsequently issued plaintiffs a building permit, and
15 plaintiffs built a home, complete with a driveway that connected to the cul-de-sac.

16 Plaintiffs needed a well. In July 2005, after two unsuccessful attempts to
17 drill one, plaintiffs began a third attempt. They drilled in what they believed to be the
18 northwest corner of their lot in a location that they believed to be within the utility

² The parties dispute when construction of the road was completed. Defendant contends that all improvements were completed in 2003. Because we review the record in the light most favorable to plaintiffs, the nonmoving party, we (like the trial court) regard June or July 2004 as the date the road was completed.

1 easement on the cul-de-sac but that was, due to the erroneous location of the cul-de-sac,
2 on their neighbors' property. On July 20, 2005, plaintiffs reached water. That evening,
3 Brenda Morrow, one of the neighbors, called plaintiffs and stated, "Thanks for drilling
4 me another well." The Morrows, with whom plaintiffs had a contentious relationship,
5 explained to plaintiffs that the well was located on their (Morrows') property because the
6 cul-de-sac's location did not match the legal description in the Road Easement. Plaintiffs
7 promptly cancelled installation of the well pump and scheduled a survey to settle the
8 boundary dispute. Sometime after July 20, before the survey was completed, the
9 Morrows offered to sell the well to plaintiffs for \$10,000, but plaintiffs rejected the offer
10 because they wanted to wait until they had the results of the survey. That occurred on
11 October 28, 2005, due to plaintiffs' inability to find a surveyor who was available any
12 earlier. The survey confirmed that the cul-de-sac was not located as described in the
13 Road Easement; rather it was located 60 feet west of where it was supposed to be.
14 Consequently, the newly drilled well was located on the Morrows' lot. The survey also
15 revealed that part of plaintiffs' driveway was on the Morrows' property.

16 On August 10, 2007--significantly, *more* than two years after the Morrows
17 first told plaintiffs that the cul-de-sac was mislocated (July 20, 2005) but *less* than two
18 years after that information was confirmed by the survey (October 28, 2005)--plaintiffs
19 filed suit against defendant.³ Plaintiffs alleged that defendant was negligent in "failing to

³ Plaintiffs' realtor, the title company (Amerititle), and the Morrows were also named as defendants. They are not parties to this appeal.

1 have the cul-de-sac constructed as and at the location set forth in the Road Easement."
2 Plaintiffs sought relief for the cost of moving their driveway and damages for drilling the
3 well on their neighbors' property.

4 The case dragged on. Three years later, on August 18, 2010, plaintiffs filed
5 an amended complaint, adding an additional claim of negligence and a breach of contract
6 claim. Where the original negligence claim was based on the cul-de-sac's location, the
7 new negligence claim was based on the cul-de-sac's (and the entire access road's) quality
8 of construction, alleging that defendant was negligent in (1) failing to comply with the
9 county land development ordinance; (2) failing to support a 50,000 pound carrying
10 capacity; (3) failing to provide the minimum cul-de-sac diameter of 90 feet; (4) failing to
11 provide proper grading; (5) failing to provide sufficient drainage and erosion control
12 measures; (6) failing to provide adequate cut and fill excavations and retaining walls; and
13 (7) failing to provide an adequate all-weather surface for emergency vehicles. Adding to
14 the original complaint's request for relief, plaintiffs now also sought compensation for the
15 cost of "hiring * * * an engineering firm to assess the extent of the road and access
16 issues" and "costs to bring the access road into compliance with Jackson County road
17 standards and requirements." The breach of contract claim alleged that defendant
18 breached the Road Easement by failing to construct the access road and cul-de-sac in
19 conformity with Jackson County standards and failing to deliver a completed access road
20 consistent with the recorded legal description.

21 Defendant moved to dismiss the amended complaint or, in the alternative,

1 for summary judgment, alleging that plaintiffs' claims were barred by the relevant statutes
2 of limitation. The trial court agreed, concluding that, as a matter of law, the original
3 negligence claim regarding the location of the cul-de-sac, filed August 10, 2007, was
4 barred by the two-year statute of limitations for negligence claims, ORS 12.110(1),
5 because plaintiffs knew that the cul-de-sac was not constructed at the location described
6 in the Road Easement when they were advised of that fact by the Morrows on July 20,
7 2005. The trial court similarly concluded that the new negligence claim was also time
8 barred, because plaintiffs had knowledge of some of the alleged defects in the road before
9 closing on the property in July 2004, more than two years before they filed the original
10 complaint in August 2007; thus, even if the amended complaint "related back" to the
11 original complaint, ORCP 23 C, it was still time barred.⁴ Additionally, the trial court
12 concluded that the breach of contract claim, filed August 18, 2010, was barred by the six-
13 year statute of limitation for breach of contract claims, ORS 12.080(1), because
14 construction of the road and cul-de-sac was substantially completed no later than June or
15 July 2004, more than six years after the alleged breach. The trial court subsequently
16 entered a limited judgment against plaintiffs on each of their claims against defendant.

17 Plaintiffs appeal, ORS 19.205(1). They first argue that their original claim
18 regarding negligent location of the cul-de-sac did not accrue until the boundary survey

⁴ ORCP 23 C provides, in part: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

1 was completed on October 28, 2005, less than two years before the date that the claim
2 was filed--or that, in any event, the date of accrual depends on resolving issues of fact, so
3 summary judgment was inappropriate. Because the original claim was timely, they
4 argue, their new claims for negligent construction and breach of contract in the amended
5 complaint were also timely because those claims "relate back" to the allegations in the
6 original complaint.

7 The first issue before us, then, is whether there are genuine issues of
8 material fact as to when plaintiffs' original negligence claim regarding the location of the
9 cul-de-sac accrued, so as to preclude summary judgment. ORCP 47 C; *Jones*, 325 Or at
10 408. Under ORS 12.110(1), a negligence claim must be commenced within two years of
11 the date on which the cause of action accrues. ORS 12.110(1) incorporates a "discovery
12 rule." *Berry v. Branner*, 245 Or 307, 309, 315-16, 421 P2d 996 (1966); *Cole v.*
13 *Sunnyside Marketplace, LLC*, 212 Or App 509, 516-18, 160 P3d 1 (2007), *rev den*, 344
14 Or 558 (2008). That rule provides that the statute of limitations begins to run when the
15 plaintiff knew or in the exercise of reasonable care should have known facts that would
16 make a reasonable person aware of a substantial possibility that each of the three
17 following elements exists: harm, causation, and tortious conduct. *Gaston v. Parsons*,
18 318 Or 247, 256, 864 P2d 1319 (1994). The discovery rule applies an objective standard-
19 -how a reasonable person of ordinary prudence would have acted in the same or a similar
20 situation. *Id.* The discovery rule also has a "duty to inquire" aspect. *T. R. v. Boy Scouts*
21 *of America*, 344 Or 282, 296, 181 P3d 758 (2008), *cert den*, 555 US 825. The Supreme

1 Court explained in *Greene v. Legacy Emanuel Hospital*, 335 Or 115, 123, 60 P3d 535
2 (2002):

3 "The period of limitations in [ORS 12.110] commences from the
4 earlier of two possible events: (1) the date of the plaintiff's *actual*
5 *discovery* of injury; or (2) the date when a person exercising reasonable
6 care *should have discovered* the injury, including learning facts that an
7 inquiry would have disclosed. In neither of those circumstances does the
8 period of limitations begin to run from the plaintiff's discovery of facts that
9 serve only to trigger a duty to inquire about whether an injury has
10 occurred."

11 (Emphases in original.) When there is a duty to inquire, the court explained, "the period
12 of limitations would commence at some later point when, after inquiry, the facts
13 reasonably should disclose the existence of an actionable injury." *Id.*

14 Thus, the issue here reduces to this: Reviewing the record in the light most
15 favorable to plaintiffs, do the undisputed facts establish that, as a matter of law, as of
16 August 10, 2005--two years before plaintiffs filed the original complaint--plaintiffs knew
17 or should have known that there was a substantial possibility that they had been harmed,
18 that defendant caused the harm, and that the harm resulted from defendant's tortious
19 conduct? There is no question that, if the cul-de-sac was in the wrong place, plaintiffs
20 were harmed, nor does defendant deny that such harm, if it exists, was arguably the result
21 of her negligence. The dispositive question, then, is whether plaintiffs, as a matter of
22 law, knew or should have known as of August 10, 2005, that there was a substantial
23 possibility that the well was not on their property. We conclude that the facts do not
24 compel that conclusion.

25 Defendant contends that plaintiffs were aware of a substantial possibility of

1 harm when Morrow told them on July 20, 2005, that the well was on the Morrows'
2 property. At that point, defendant reasons, plaintiffs demonstrated their belief by
3 cancelling the installation of the well pump, hiring a surveyor, contacting their other
4 neighbors, contacting the county, and attempting to negotiate with the Morrows for
5 ownership of the well. Defendant argues that "the statute of limitations was not tolled
6 while plaintiffs confirmed, by a survey, what they had been told by the Morrows."

7 We conclude that, as a matter of law, plaintiffs had a duty to make follow-
8 up inquiries as soon as they heard Morrow's assertion that the well was on the Morrows'
9 property. However, a duty to inquire does not trigger a statute of limitations to which the
10 discovery rule applies. *Cole*, 212 Or App at 521. As noted above, "the period of
11 limitations would commence at some later point when, after inquiry, the facts reasonably
12 should disclose the existence of an actionable injury." *Greene*, 335 Or at 123. At the
13 time when the duty to inquire arose, plaintiffs' only indication that the cul-de-sac was not
14 correctly located and, hence, that their well was on the Morrows' property, was a
15 statement by the Morrows--the neighbors with whom plaintiffs had a contentious
16 relationship, and who had a concrete self-interest in claiming that the well was on their
17 property. That information should have triggered--and did trigger--an inquiry, which
18 ultimately produced confirming information. Thus, on this record, we cannot say that
19 every reasonable juror would conclude that, based entirely on the assertion of the not-
20 disinterested neighbors, plaintiffs were aware of or should have been aware of a
21 substantial possibility that the neighbors were correct. The court therefore erred in

1 granting defendant's motion for summary judgment with respect to plaintiffs' negligence
2 claim in the original complaint regarding the cul-de-sac's location.

3 We must next determine whether the court also erred in granting summary
4 judgment and dismissing the negligence claim in plaintiffs' amended complaint alleging
5 that the access road and cul-de-sac did not meet county construction standards. Plaintiffs
6 argue that the claim is timely because it relates back to the date of the timely original
7 complaint; both negligence claims, according to plaintiffs, arise out of the same conduct
8 alleged in the original complaint. The trial court, however, did not reach the "relation
9 back" argument with respect to this claim, concluding instead that, even if the new claim
10 related back to the date when plaintiffs filed their original complaint, the claim was
11 untimely. We agree. Before the July 2004 closing, plaintiffs complained to their realtor
12 about "deep ruts in the gravel on the cul-de-sac" and questioned whether "this might
13 create a problem with the county." Plaintiffs' realtor submitted a proposed addendum to
14 the sale agreement, which stated:

15 "Buyers having received necessary approvals from Jackson County
16 are ready to settle escrow, subject to the following concerns:

17 "The Seller provided road 'turn around' adjacent to Buyers' lot
18 having partially collapsed and become heavily rutted apparently does not
19 meet County Fire standards, necessary for issuance of the Buyers' building
20 permit. Buyers request that Seller cause the contractor to repair and finish
21 the 'turnaround,' and have the county inspect the turnaround to ensure that
22 the county will issue the Buyers building permits in a timely fashion after
23 closing."

24 Defendant rejected the proposed addendum, and it did not become part of the sale
25 agreement. The realtor then sent an e-mail to plaintiffs stating:

1 "In order to satisfy your own minds, you might want to call Fire District 3,
2 and have them run out there since they are actually the ones who have to
3 clear the drive for building permits. Just let me know what you would like
4 to do, and I will do what I can to get it for you."

5 Unlike the information that plaintiffs had regarding the location of the cul-de-sac--
6 information from a hostile and self-interested neighbor--the information regarding the
7 condition of the road derived from plaintiffs' first-hand observation and was, for that
8 reason, clearly reliable. The only conclusion that a reasonable juror could reach is that
9 plaintiffs were on notice or should have been on notice in July 2004 that there was a
10 substantial possibility that the road was not constructed in compliance with county
11 standards, and plaintiffs did not file suit within the requisite time thereafter. The trial
12 court did not err in granting summary judgment to defendant on plaintiffs' negligent
13 construction claim in the amended complaint regarding failure to build the road in
14 compliance with county road standards.

15 Finally, we consider whether the court erred in granting summary judgment
16 and dismissing plaintiffs' breach of contract claim. A breach of contract action for
17 damages arising from the construction, alteration or repair of any improvement to real
18 property is subject to a six-year statute of limitations. ORS 12.080(1); *Waxman v.*
19 *Waxman & Associates, Inc.*, 224 Or App 499, 508-10, 198 P3d 445 (2008) (six-year
20 statute of limitations in ORS 12.080(1) applies to real property construction contracts).
21 "[I]t is well settled that a contract claim accrues on breach," and not when that breach is
22 subsequently discovered. *Id.* at 512 (ORS 12.080 does not incorporate a discovery rule).
23 Plaintiffs do not contend that they brought their contract claim within six years of the

1 breach; they concede that the breach occurred when defendant completed construction of
2 the access road and cul-de-sac, in June or July 2004 at the latest, and they brought this
3 breach of contract action more than six years later, on August 18, 2010. They argue,
4 however, that the claim is nonetheless timely because it relates back to the date plaintiffs
5 filed their original complaint on August 10, 2007, and that date is within six years of the
6 date of the breach.

7 ORCP 23 C provides, in part, that, "[w]henever the claim or defense
8 asserted in the amended pleading arose out of the conduct, transaction, or occurrence set
9 forth or attempted to be set forth in the original pleading, the amendment relates back to
10 the date of the original pleading." In applying that rule, the court first must identify the
11 "conduct, transaction, or occurrence set forth or attempted to be set forth in the original
12 pleading"; and second, the court must determine whether the claim or defense alleged in
13 the amended pleading *arose out of* that conduct, transaction, or occurrence. *Griffith v.*
14 *Blatt*, 334 Or 456, 464, 51 P3d 1256 (2002). The presence of different or additional
15 issues in an amended pleading does not necessarily preclude application of the relation-
16 back rule. *Id.* at 465. The essential inquiry under ORCP 23 C is one of notice: An
17 amended complaint filed after the limitations period may relate back "if the defendant
18 would have been able to discern from the earlier pleading a potential for the additional
19 basis of liability." *Walters v. Hobbs*, 176 Or App 194, 208, 30 P3d 1214, *adh'd to as*
20 *modified on recons*, 177 Or App 527, 33 P3d 1067 (2001).

21 Plaintiffs argue that the "conduct, transaction, or occurrence set forth * * *

1 in the original pleading" is defendant's construction of the access road and cul-de-sac
2 sometime in late 2003 or June or July 2004 at the latest. That argument demonstrates an
3 inherent problem in applying ORCP 23 C by focusing exclusively on its terms: Whether
4 the "conduct, transaction, or occurrence" in an original pleading gave rise to the claim
5 subsequently alleged in an amended pleading depends entirely on the level of specificity
6 at which the terms are interpreted. Thus, for example, at the broadest level, the "conduct,
7 transaction, or occurrence" described in the original negligence claim in this case would
8 encompass the entire process of developing the "subject properties":

9 "[Defendant], acting as developer, undertook to develop the subject
10 properties, including plaintiffs' and including the access road. Accordingly,
11 [defendant] owed a duty to the lot owners, and their successors due to the
12 binding nature of the Road Easement, to construct the access road in
13 conformity with the Road Easement. [Defendant] breached that duty by
14 failing to have the cul-de-sac constructed as and at the location set forth in
15 the Road Easement. Such breach has and will cause plaintiffs to suffer
16 damages, including but not limited to costs of moving their driveway,
17 drilling a well on property other than their own, and costs and expenses
18 resulting from such breach, including the costs and expenses of prosecuting
19 this action against the Morrow defendants."

20 At its narrowest, the "conduct, transaction, or occurrence" in the original complaint
21 would consist only of *recording the location* of the access road and cul-de-sac. Nothing
22 in ORCP 23 C indicates which level of specificity to adopt.

23 For that reason, we rely primarily on the judicial gloss on ORCP 23 C set
24 forth in *Walters*, 176 Or App at 208. We examine the totality of the original complaint to
25 determine whether it would provide notice to defendant of an additional basis of liability.
26 Plaintiff relies primarily on the sentences,

1 "[Defendant] owed a duty to the lot owners, and their successors due to the
2 binding nature of the Road Easement, to construct the access road in
3 conformity with the Road Easement. [Defendant] breached that duty by
4 failing to have the cul-de-sac constructed *as and at* the location set forth in
5 the Road Easement."

6 (Emphasis added.) Plaintiffs' theory is that the word "at" notified defendant of the claim
7 regarding location, while the word "as" provided notice of the potential for a claim
8 regarding manner of construction. We find that the phrase "as and at" is ambiguous, in
9 that "as" could refer to location as well as manner. The ambiguity, however, does not
10 survive the rest of the claim, where plaintiffs allege, "Such breach has and will cause
11 plaintiffs to suffer damages, including but not limited to costs of moving their driveway,
12 drilling a well on property other than their own, and costs and expenses resulting from
13 such breach[.]" Read as a whole, the original negligence complaint would not notify a
14 reasonable defendant that it was at risk of being found liable for failing to meet
15 substantive construction standards of the entire access road. We conclude that, although
16 the original negligence claim and the breach of contract claim in the amended complaint
17 both allege culpable conduct involving the access road and cul-de-sac, the original
18 complaint did not notify defendant that she was potentially liable for anything other than
19 the erroneous location. The breach of contract claim did not relate back to the original
20 complaint.

21 Reversed and remanded on plaintiffs' original negligence claim; otherwise
22 affirmed.