

FILED: December 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

J. MICHAEL GOODWIN and SHEILA GOODWIN, husband and wife,
Plaintiffs-Appellants,

v.

KINGSMEN PLASTERING, INC., a Washington corporation;
Defendant-Respondent,

and

KINGSMEN CONTRACTING, INC., a Washington corporation; and T & M PIPELINE,
INC., an Oregon corporation, dba T & M Pipeline Construction, Inc.,
Defendants.

KINGSMEN PLASTERING, INC., a Washington corporation,
Third Party Plaintiff,

v.

UNITED COATINGS MANUFACTURING COMPANY, a Washington corporation,
Third Party Defendant.

Benton County Circuit Court
1110128

A151821

Locke A. Williams, Judge.

Argued and submitted on August 13, 2014.

Christopher C. Grady argued the cause for appellants. With him on the briefs were Dean E. Aldrich and Aldrich Eike, P.C.

Jonathan W. Henderson argued the cause for respondent. With him on the brief were Davis Rothwell Earle & Xochihua, P.C., Katie L. Smith, and Henrie & Smith, LLP.

Before Garrett, Presiding Judge, and Ortega, Judge, and DeVore, Judge.*

DEVORE, J.

Reversed and remanded as to plaintiffs' claim against KPI; otherwise affirmed.

*Ortega, J., *vice* Haselton, C. J.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants

- No costs allowed.
 Costs allowed, payable by Respondent.
 Costs allowed, to abide the outcome on remand, payable by
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1 DEVORE, J.

2 Plaintiffs brought this action against defendants for damages arising out of
3 alleged defects in the construction of their home. The trial court granted defendants'
4 motion for summary judgment on the basis that, in the absence of a discovery rule,
5 plaintiffs' claims were barred by the six-year statute of limitations in ORS 12.080(3),
6 which governs actions for "interference with or injury to any interest of another in real
7 property[.]" Plaintiffs appeal the resulting judgment and argue that ORS 12.080(3)
8 includes a discovery rule. Defendants disagree and, in the alternative, contend that
9 plaintiffs' claims are barred by the two-year statute of limitations in ORS 12.110(1). In
10 two recent cases, discussed below, we have concluded that ORS 12.080(3) governs and
11 contains a discovery rule. Accordingly, we reverse and remand.

12 In reviewing the trial court's grant of defendants' motion for summary
13 judgment, we state the facts in the light most favorable to plaintiffs, the nonmoving party.
14 *Loosli v. City of Salem*, 345 Or 303, 306 n 1, 193 P3d 623 (2008). Plaintiffs, Michael and
15 Sheila Goodwin, purchased their home in December 2004. Defendant Kingsmen
16 Plastering, Inc. (KPI), was the subcontractor responsible for installing the synthetic
17 stucco siding--or exterior insulated finish system (EIFS)--during the construction of the
18 home in 2001. Plaintiffs alleged that in May 2010, they discovered numerous
19 construction defects in the EIFS, which resulted in water intrusion and hidden property
20 damage to the home. On March 10, 2011, plaintiffs filed suit against KPI, Kingsmen
21 Contracting, Inc. (KCI), and T&M Pipeline, Inc., asserting claims of negligence and

1 negligence *per se* in the construction of the home.

2 KPI filed a motion for summary judgment, in which KCI joined, arguing
3 that plaintiffs' claims were time-barred by the two-year statute of limitations for
4 negligence claims in ORS 12.110. Defendants contended that plaintiffs were aware of
5 potential claims more than two years before filing suit against defendants. Defendants'
6 reliance on ORS 12.110 was largely predicated on *dicta* in a footnote in *Abraham v. T.*
7 *Henry Construction Inc.*, 350 Or 29, 249 P3d 534 (2011). The Supreme Court described
8 the facts in that case and the plaintiffs' discovery of water damage in their home more
9 than six years after it was constructed. The court commented:

10 "The statute of limitations for contract actions is six years. ORS
11 12.080(1). *Tort claims arising out of the construction of a house must be*
12 *brought within two years of the date that the cause of action accrues, but,*
13 *in any event, within 10 years of the house being substantially complete.*
14 *ORS 12.110; ORS 12.135. Tort claims ordinarily accrue when the plaintiff*
15 *discovers or should have discovered the injury. Berry v. Branner, 245 Or*
16 *307, 311-12, 421 P2d 996 (1966)."*

17 350 Or at 34 n 3 (emphasis added). Based on that footnote, defendants here urged the
18 trial court to apply ORS 12.110.

19 In the alternative, defendants contended that, if the six-year statute of
20 limitations in ORS 12.080(3) applied to plaintiffs' claims, then the claims were still time-
21 barred because that subsection does not incorporate a "discovery rule." Without a
22 discovery rule, defendants reasoned, the time limitation for commencement of a suit
23 began running when the injury occurred, which could be no later than the date plaintiffs
24 purchased their home in December 2004. In defendants' view, the March 2011 complaint

1 was not timely, either way.

2 Plaintiffs responded that ORS 12.080(3) provides a six-year statute of
3 limitation for their claims and includes a discovery rule. With a discovery rule, the
4 period of limitations would be deemed to commence upon either the date that plaintiff
5 actually discovered the injury or the date that a person exercising reasonable care should
6 have discovered the injury. *Greene v. Legacy Emanuel Hospital*, 335 Or 115, 123, 60
7 P3d 535 (2002). In plaintiffs' view, summary judgment was not appropriate because
8 genuine issues of material fact existed regarding when plaintiffs did discover or
9 reasonably should have discovered the injury.

10 The trial court concluded that ORS 12.080(3) applied, but that it does not
11 incorporate a discovery rule. Thus, an action governed by ORS 12.080(3) must be
12 brought within six years of the date that the injury actually occurs. Because plaintiffs
13 filed their claim on March 10, 2011, and the construction was completed no later than
14 2001, the trial court determined that plaintiffs' claims were not timely. The court entered
15 a limited judgment dismissing plaintiffs' claims against KPI and T&M Pipeline, Inc.¹

16 On appeal, plaintiffs and defendant KPI--the only defendant that is a party
17 to this appeal--reassert their arguments and present the same two questions. We
18 addressed both questions in recent opinions. In *Riverview Condo. Assn. v. Cypress*
19 *Ventures* (A150586), 266 Or App 574, 593, ___ P3d ___ (2014) (*Riverview*), we were

¹ Plaintiffs' claims against KCI for inspection and repair work performed after March 10, 2005, were not time-barred. Plaintiff did not appeal the dismissal of plaintiffs' claims against T&M Pipeline, Inc.

1 required to determine which statute of limitations applied to the plaintiff's "construction-
2 defect claims--*i.e.*, claims based on [the] defendants' negligence during construction." As
3 in this case, the defendants in *Riverview* asserted that ORS 12.110(1) governed, pointing
4 to the same footnote in *Abraham*. *Id.* at 599. We disagreed and, based on another line of
5 cases,² determined that construction-defect claims alleging injury to an interest in real
6 property are governed by the six-year statute of limitations in ORS 12.080(3). *Id.* at 600.
7 We rejected the argument that the Supreme Court's statement in *Abraham* was binding
8 precedent. We found that the statement was *dictum* without any precedential value. *Id.*
9 at 599-600. Given our decision there and plaintiffs' claims here allege an injury to an
10 interest in real property, the trial court was correct in the first part of its conclusion that
11 the applicable statute of limitations was ORS 12.080(3).

12 In *Tavtigan-Coburn v. All Star Custom Homes, LLC*, 266 Or App 220, ___
13 P3d ___ (2014), we addressed the second part of the conclusion to be reached here.
14 Relying on the Supreme Court's decision in *Rice v. Rabb*, 354 Or 721, 320 P3d 554
15 (2014), we held that ORS 12.080(3) does contain a discovery rule. *Tavtigan-Coburn*,
16 266 Or App at 222. Like claims under ORS 12.080(4) for injury to personal property in
17 *Rice*, claims under ORS 12.080(3) for injury to an interest in real property accrue under
18 ORS 12.010 upon discovery.

19 In light of those decisions, we conclude that ORS 12.080(3) governs and is

² See *Sutter v. Bingham Construction*, 81 Or App 16, 724 P2d 829 (1986); *Taylor v. Settecase*, 69 Or App 222, 685 P2d 470, *rev dismissed*, 298 Or 68 (1984); *Beveridge v. King*, 292 Or 771, 643 P2d 332 (1982).

1 triggered by discovery of a claim. In this case, genuine issues of material fact remain
2 regarding the date that the period of limitations commenced. Questions remain to be
3 answered about the earlier of either (1) the date of plaintiffs' actual discovery of the
4 alleged injury or (2) the date when a person exercising reasonable care should have
5 discovered the injury, including learning of facts that an inquiry would have disclosed.
6 *Greene*, 335 Or at 123. Therefore, the trial court erred in granting defendants' motion for
7 summary judgment.

8 Reversed and remanded as to plaintiffs' claim against KPI; otherwise
9 affirmed.