IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Philip Scott CANNON,
Plaintiff-Appellant,
v.
OREGON DEPARTMENT OF JUSTICE,
Oregon State Police, Oregon State University,
Oregon Public Defense Services Commission, and
Ruth Ann Johns, as the Personal Representative for
the Estate of Robin A. Jones,
Defendants-Respondents.

Marion County Circuit Court
10C12260; A158676

Dennis J. Graves, Judge.

Argued and submitted June 6, 2016.

Kevin T. Lafky argued the cause for appellant. With him on the briefs were Leslie D. Howell and Lafky & Lafky.

Michael S. Shin, Assistant Attorney General, argued the cause for respondents Oregon Department of Justice, Oregon State Police, Oregon Public Defense Services Commission, and Ruth Ann Johns. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Bruce L. Campbell argued the cause for respondent Oregon State University. With him on the brief was Miller Nash Graham & Dunn LLP.

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

GARRETT, J.

Reversed and remanded as to claim against OPDSC and appellate defense counsel; otherwise affirmed.

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* Garrett, J., *vice* Flynn, J. pro tempore.

GARRETT, J.

Plaintiff, who obtained post-conviction relief on three counts of aggravated murder, brought this action against the Oregon Department of Justice (DOJ), the Oregon State Police (OSP), the Oregon Public Defense Services Commission (OPDSC), and his court-appointed appellate attorney in her capacity as an employee with the Office of Public Defense Services (together, the state defendants), and against Oregon State University (OSU), alleging claims arising from the circumstances of his conviction and incarceration.[1]

Plaintiff's first amended complaint alleged claims against DOJ, OSP, and OSU for negligence and abuse of process, a claim against appellate defense counsel and OPDSC for professional negligence, and a claim against DOJ for false imprisonment. The trial court granted summary judgment for defendants on all claims, and plaintiff appeals, raising six assignments of error. We reject most of the assignments without discussion. We write to address the first assignment of error, in which plaintiff contends that the trial court erred in dismissing his negligence and abuse of process claims against DOJ, OSP, and OSU based on the statute of ultimate repose, ORS 12.115(1), and the fifth assignment of error, in which he contends that the trial court erred in dismissing his professional negligence claim against OPDSC and his appellate counsel based on the statute of limitations, ORS 30.275(9).[2] For the reasons explained

[1] Plaintiff's appellate defense attorney is now deceased. She is represented in this litigation by the personal representative of her estate.

[2] This is the second time that we have addressed an appeal from a judgment dismissing plaintiff's claims. The first appeal concerned the sufficiency of notice under the Oregon Tort Claims Act (OTCA), ORS 30.275(2)(b) (requiring notice "within 180 days after the alleged loss or injury"). Defendants filed a motion to dismiss under ORCP 21, raising, among other points, the statute of ultimate repose and the failure to provide timely notice under the OTCA. The trial court dismissed the claims based on a failure to give timely tort claims notice and therefore did not reach defendants' contentions regarding the statute of ultimate repose.

On plaintiff's first appeal, we reversed the trial court's ruling, holding that notice was timely under the OTCA. *Cannon v. Dept. of Justice*, 261 Or App 680, 322 P3d 601 (2014). We remanded the case to the trial court, and defendants reasserted their contention on summary judgment that the claims are barred by the statute of ultimate repose.

below, we conclude that the trial court did not err in dismissing the claims against DOJ, OSP, and OSU based on the statute of ultimate repose, but that the court did err in granting summary judgment on the claim against OPDSC and appellate counsel based on the statute of limitations. Accordingly, we reverse the court's ruling on that claim.

On review of the trial court's summary judgment rulings, we view the evidence in the record, together with reasonable inferences to be drawn from it, in the light most favorable to plaintiff to determine whether there was a genuine issue of material fact and whether defendants were entitled to judgment as a matter of law. ORCP 47 C; *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 340 P3d 27 (2014).

We begin with plaintiff's first assignment of error, regarding the statute of ultimate repose, ORS 12.115(1), and start with the relevant procedural context. Plaintiff was charged with three counts of aggravated murder. Plaintiff's trial concluded on February 25, 2000, and the jury found plaintiff guilty on all counts on February 28, 2000.

Plaintiff filed a petition for post-conviction relief on January 12, 2004. On September 2, 2009, his convictions were set aside by stipulated agreement and judgment, without prejudice. The state did not retry plaintiff, because the prosecution trial exhibit files could not be located. Plaintiff was released from prison in December 2009, and he filed this action on February 26, 2010, alleging torts in connection with the investigation of the murders, the analysis of the evidence, and the conduct of prosecution and defense counsel.[3]

[3] In his first claim, plaintiff alleged that defendants OSP and DOJ and their agents were negligent in failing to use a methodology that was accepted by the standards in the field to analyze firearms and toolmark identification, in failing to preserve evidence, in failing to investigate exculpatory evidence, in failing to provide evidence, in failing to reexamine the guilty verdict in light of newly discovered evidence, and in presenting forensic testimony lacking in adequate quality control, proficiency testing, technical review, and scientific documentation. In his second claim, plaintiff asserted that OSU's employee, acting in the scope of his employment, negligently failed to analyze and use scientifically accepted methods to analyze evidence pertaining to the criminal cases, leading to plaintiff's conviction and incarceration. In his third claim, plaintiff alleged that defendants DOJ, OSP, and OSU committed an abuse of process in prosecuting plaintiff "with the alterior [*sic*] purpose of convicting Plaintiff without lawful and sufficient evidence." In his fourth claim, plaintiff alleged that OPDSC and appellate defense counsel were negligent in failing competently to represent plaintiff in

Defendants filed a motion for summary judgment, contending, among other arguments, that plaintiff's claims against DOJ, OSP, and OSU are barred by the statute of ultimate repose, ORS 12.115(1), which provides:

> "In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of."

Defendants argued that all of the alleged misconduct occurred during the investigation, prosecution, and defense of plaintiff in connection with the three murders, and that those acts were complete, at the latest, when plaintiff's trial ended and the case was submitted to the jury on February 25, 2000. Plaintiff's action was commenced more than 10 years later, on February 26, 2010.

Plaintiff responded that the period of ultimate repose did not begin to run until the date plaintiff obtained post-conviction relief, September 2, 2009, or, at the earliest, the date the jury reached its guilty verdict, February 28, 2000. He further argued that the period of ultimate repose was tolled because, until his release from prison, he had an active and continuous relationship of trust with defendants. In the alternative, plaintiff contended that application of the statute of ultimate repose would violate his right to a remedy under Article I, section 10, of the Oregon Constitution. The trial court granted defendants' motion and this appeal followed.[4]

On appeal, plaintiff reprises the arguments he made in the trial court. Plaintiff acknowledges that under Oregon

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his direct appeal "by failing to include viable claims that Plaintiff requested be included in his appeal."

[4] The trial court cited the statute of ultimate repose as the basis for its dismissal of plaintiff's first claim, for negligence, against DOJ, OSP, and OSU, plaintiff's second claim, for negligence, against OSU, and plaintiff's third claim, for abuse of process, against DOJ, OSP, and OSU. Because the factual allegations relating to the abuse of process claim are identical to the negligence allegations and no evidence has been presented on summary judgment that would distinguish the claims, we conclude that the abuse of process claim is subject to the period of ultimate repose for negligence described in ORS 12.115. *See Davis v. Somers*, 140 Or App 567, 572-73, 915 P2d 1047, *rev den*, 324 Or 78 (1996) (holding that breach of contract claim was subject to period of ultimate repose in ORS 12.115(1) where breach of contract allegations consisted only of previously alleged negligence and "evidence at trial was no different"). Plaintiff does not argue otherwise on appeal.

case law, the period of ultimate repose in ORS 12.115(1) runs from the date of the act or omission complained of, regardless of when the damage resulted or when the act or omission was discovered. *See Josephs v. Burns & Bear*, 260 Or 493, 501-02, 491 P2d 203 (1971), *overruled on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001); *Catt v. Dept. of Human Services*, 251 Or App 488, 508, 284 P3d 532 (2012) ("Unlike the statute of limitations, the discovery rule does not toll the statute of ultimate repose, because it was intended 'to provide an overall maximum upper limit on the time within which a tort action could be brought, regardless of the date of discovery or of any other circumstances.'" (Quoting *Josephs*, 260 Or at 498)).

However, plaintiff argues that his case falls within the rule of *Stevens v. Bispham*, 316 Or 221, 230-31, 851 P2d 556 (1993), meaning that, in plaintiff's view, the statute of ultimate repose was tolled until his convictions were set aside on September 2, 2009, or, at the earliest, when the jury rendered its guilty verdicts on February 28, 2000. Until those dates, plaintiff contends, he could not have brought his claims.

In *Stevens*, the Supreme Court held that an incarcerated person's claim for legal malpractice against criminal defense trial counsel does not accrue until the person has been exonerated of the criminal offense. We discuss *Stevens* at length below in addressing plaintiff's fifth assignment of error, which concerns the trial court's application of the statute of limitations to dismiss the claim against plaintiff's appellate attorney. But *Stevens* does not assist plaintiff with respect to the statute of ultimate repose, because that case solely concerns when a claim for malpractice *accrues* for purposes of the statute of limitations. As the Supreme Court explained in *Shasta View Irrigation Dist. v. Amoco Chemicals*, 329 Or 151, 162, 986 P2d 536 (1999), a statute of limitations may be tolled in certain circumstances but, with few exceptions, a statute of ultimate repose may not be tolled. The statute of ultimate repose establishes a maximum time to file a claim, regardless of the date of discovery of an injury or other circumstances that may affect the expiration of the statute of limitations. It "provides a deadline for the initiation of an action whether or not the injury has

been discovered or has even occurred." *Sealey v. Hicks*, 309 Or 387, 394 n 7, 788 P2d 435 (1990); *Urbick v. Suburban Medical Clinic, Inc.*, 141 Or App 452, 457, 918 P2d 453 (1996) ("'It matters not when the claim has accrued, or even *if* it has accrued.'" (Quoting *Lesch v. DeWitt*, 118 Or App 397, 399-400, 847 P2d 888, *vac'd on other grounds*, 317 Or 585, 858 P2d 872 (1993) (Emphasis in original.))). Unless otherwise provided by statute, an ultimate repose period "'cannot be extended regardless of unfairness to the plaintiff.'" *Shasta View Irrigation Dist.*, 329 Or at 162 (quoting *DeLay v. Marathon LeTourneau Sales*, 291 Or 310, 315, 630 P2d 836 (1981)). When the ultimate repose period has expired, the claim is extinguished and no legally cognizable injury exists. *Sealey*, 309 Or at 392.

Here, the statute of ultimate repose required plaintiff to bring an action within "10 years from the date of the act or omission complained of." ORS 12.115(1). Thus, in considering whether plaintiff's claims against DOJ, OSP, and OSU are barred, the question is when the acts or omissions complained of in those claims *occurred*. The question of when plaintiff's claims "accrued" is a statute-of-limitations question that is irrelevant to the statute-of-repose inquiry; therefore, *Stevens* and other cases pertinent to the tolling of a statute of limitations do not bear on the analysis.

The record on summary judgment requires the conclusion that the acts or omissions complained of by DOJ, OSP, and OSU all occurred before and during plaintiff's trial, which concluded on February 25, 2000, more than 10 years before plaintiff filed his complaint. Indeed, plaintiff makes no argument to the contrary.[5] We therefore reject

[5] In his first amended complaint, plaintiff also alleged that DOJ and OSP were negligent in failing to reexamine the jury's verdict in light of evidence discovered after plaintiff's trial suggesting plaintiff's innocence, an act that would have occurred within the period of ultimate repose. Plaintiff made no argument on that point in his response to defendants DOJ and OSP's motion for summary judgment. In fact, in his response to DOJ's and OSP's motion for summary judgment, plaintiff argued that "the earliest possible triggering date for the statute of ultimate repose is when the actions of these actors culminated and became a negligent act on February 28, 2000, when the jury verdict of guilty was rendered." In his briefs on appeal, plaintiff has not included any argument or citation to evidence in the record on summary judgment connecting the alleged newly discovered evidence to the alleged post-verdict negligence by DOJ or OSP. We consider the allegation to have been waived.

plaintiff's contention that the period of ultimate repose had not expired.

We further reject plaintiff's contention that the period of ultimate repose was tolled until his release from prison under an exception for a plaintiff who is in a relationship of trust and confidence with the defendant. The Supreme Court acknowledged in *Josephs*, 260 Or at 501-02, and *Cavan v. General Motors*, 280 Or 455, 458, 571 P2d 1249 (1977), that a period of ultimate repose might be tolled during a time when the plaintiff had an active and continuing "relationship of trust and confidence with the defendant and in which continued treatment or other ongoing resort to the skills of the defendant is required. The classic example is the physician-patient relationship." *Cavan*, 280 Or at 458. Plaintiff asserts that he had a continuous and ongoing relationship with defendants during the period of prosecution and incarceration. It is true that plaintiff had an adversarial relationship with the state defendants for various periods during his prosecution and imprisonment, but it was not one of "trust and confidence" such that DOJ, OSP, and OSU had a duty to act in plaintiff's interest in the way required to toll the period of ultimate repose.

Finally, with respect to plaintiff's constitutional argument, the Supreme Court has previously considered and rejected the contention that application of a statutory period of ultimate repose before a claim becomes actionable violates the remedy clause of Article I, section 10. *Josephs*, 260 Or at 502 (holding that "a statute which purports to extinguish a remedy before the legally protected right becomes actionable" does not violate Article I, section 10);[6] *see also* *Horton v. OHSU*, 359 Or 168, 193, 376 P3d 998 (2016) ("[W]ithin constitutional limits, the legislature has authority

[6] The court in *Josephs* reasoned:

"It has always been considered a proper function of legislatures to limit the availability of causes of action by use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest. It is in the interest of the public that there be a definite end to the possibility of future litigation from past actions. It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation."

260 Or at 501-02.

to alter a common-law duty or condition the procedural means of recovering for a common-law injury." (citing *Josephs*)). For the foregoing reasons, we conclude that the trial court did not err in dismissing plaintiff's claims against DOJ, OSP, and OSU based on the statute of ultimate repose.

We turn to plaintiff's fifth assignment of error, concerning the dismissal of his claim for professional negligence by his appellate counsel. The court ruled that plaintiff's claim was barred by the statute of limitations, ORS 30.275(9), which provides:

> "Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury."

Plaintiff's claim was filed more than two years after the alleged professional negligence. However, the discovery rule applies to legal malpractice claims. *Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or 270, 277, 265 P3d 777 (2011) (the statute of limitations does not begin to run on a legal malpractice claim until the client knows or in the exercise of reasonable care should know every fact which it would be necessary for the client to prove in order to support his right to judgment). An injury is "discovered" when the plaintiff knows or should have known the existence of (1) harm, (2) causation, and (3) tortious conduct. *Id.* When all three elements are or should be known, the limitation period begins to run. *Gaston v. Parsons*, 318 Or 247, 255, 864 P2d 1319 (1994).

Plaintiff alleges that his appellate defense counsel "failed competently to represent Plaintiff [in his direct criminal appeal] by failing to include viable claims that Plaintiff requested be included in his appeal." In their motion for summary judgment, the state defendants contended that plaintiff's claim is barred by the two-year statute of limitations, because plaintiff brought that claim in February 2010, but he discovered the claim more than two years earlier.

Defendants posit that plaintiff discovered his claims either when his convictions were affirmed on direct appeal in July 2002, or, at the latest, on January 12, 2004, when he filed his petition for post-conviction relief.

Plaintiff acknowledged that he was aware of the basis for his current claim against appellate defense counsel when he filed his petition for post-conviction relief alleging inadequate assistance of counsel. But, he argued, citing *Stevens*, 316 Or at 238, that he was legally "estopped" from asserting a civil claim against appellate defense counsel related to his criminal charges until September 2, 2009, when he obtained post-conviction relief. The trial court ruled for defendants and dismissed plaintiff's claim. On appeal, the parties reprise their arguments, which turn on whether *Stevens* applies to plaintiff's claim. We turn, then, to the Supreme Court's decision in *Stevens*.

Stevens involved a legal malpractice claim by a former criminal defendant against his trial counsel, based on the lawyer's advice to plead "no contest." After another person confessed to the crime, the plaintiff's conviction was vacated. The plaintiff filed a malpractice claim against his trial counsel more than two years after the alleged negligence.

The question for the Supreme Court was when the claim against trial counsel accrued. The court explained that the statute of limitations on a legal malpractice claim does not begin to run until the client knows or, in the exercise of reasonable care, should know that the client has suffered harm as a result of the lawyer's acts or omission. *Id.* at 227. When the claim involves an action against criminal defense trial counsel for contributing to the client's criminal conviction, the court concluded, it is "inappropriate" to allow the person to assert a claim for malpractice "unless and until the person has challenged successfully the conviction through direct appeal or post-conviction process *** or the person otherwise has been exonerated of the offense." *Id.* at 230-31. That is because, until then, the client cannot be said to have suffered legally cognizable harm as a result of trial counsel's alleged negligence.

The court identified several bases for what might seem a counterintuitive conclusion—that is, that a client has not been "harmed" as a result of trial counsel's malpractice until the client has completed a *successful* challenge to his convictions. The court's discussion highlighted the nature of a criminal conviction and the public policy, as expressed through the "panoply of protections accorded to the criminally accused," to treat any person who has been convicted of a criminal offense as validly convicted, "unless and until the person's conviction has been reversed, whether on appeal or through post-conviction relief, or the person otherwise has been exonerated." 316 Or at 230, 231. As the court explained:

> "In our society, no other legal outcome of the trial process is so difficult to obtain. Yet, to allow a person convicted of a criminal offense to sue that person's lawyer without having first overturned the conviction would mean that the courts would be permitting relitigation of a matter that is supposed to be settled: The complaining party is deemed by the law to be guilty. The panoply of protections accorded to the criminally accused (including direct appeal and post-conviction relief) is so inclusive, and the significance of a conviction so important to vindication of the rule of law, that it would appear most unusual to permit a person to prosecute a legal malpractice action premised on some flaw in the process that led to that person's conviction at the same time that the person's conviction remained valid for all other purposes. In other words, while the conviction and sentence remain valid for all other purposes, it is inappropriate to treat a complaining convicted offender as having been 'harmed' in a legally cognizable way by that conviction." *Id.* at 231-32.

In short, the court concluded, a convicted offender is not "harmed," in a legally cognizable way, by defense counsel's malpractice until the conviction is successfully challenged.

Stevens involved a claim against trial counsel. But, in *Abbott v. DeKalb*, 221 Or App 339, 343, 190 P3d 413 (2008), *rev dismissed*, 346 Or 306 (2009), we applied the prior-exoneration rule to a malpractice claim against trial *and appellate defense counsel*. We did not separately discuss the rule's applicability to a claim against appellate counsel;

we appear to have simply assumed that it applied. *Id.* at 343-44.

The state argues that the *Stevens* prior-exoneration rule should not apply to appellate counsel. The state points out that, after *Stevens* and *Abbott*, the Supreme Court decided *Drollinger v. Mallon*, 350 Or 652, 260 P3d 482 (2011), which involved a malpractice claim against *post-conviction* counsel. In *Drollinger*, the court distinguished *Stevens* and concluded that "exoneration" is not a prerequisite to the filing of a legal malpractice claim against post-conviction counsel. In the state's view, *Drollinger* suggests a restrictive view of *Stevens*, limiting its application to claims against criminal defense *trial* counsel.

We believe a fairer reading of the court's reasoning in *Drollinger* is that the significant distinction is not between trial and direct appeal, but between the criminal context, on the one hand, and the civil post-conviction context, on the other. The court in *Drollinger* took pains to explain that the prior-exoneration requirement was "designed for malpractice actions against *criminal defense counsel*," as distinct from the *civil* post-conviction process. *Id.* at 665 (emphasis added). Indeed, the court noted that "the principles that drove this court's decision in *Stevens* are *** more strongly connected to the trial and appeal processes." *Id.* at 666 n 8. Furthermore, in rejecting a prior-exoneration requirement in the civil post-conviction context, the court's primary concern was the fact that there could be no "exoneration" from the effects of post-conviction counsel's inadequacy:

> "There is another more specific and practical way in which that line of reasoning from *Stevens* fails to translate into the post-conviction context. *Stevens* is premised on the assumption that the legislature's scheme of protections for criminal defendants includes one or more mechanisms for correcting any wrongs suffered by a criminal defendant as a result of his or her attorney's constitutional or statutorily inadequate representation. In *Stevens*, the required exoneration was available 'through direct appeal, through post-conviction relief proceedings, or *** otherwise.' However, there is no express statutory mechanism in Oregon law for obtaining 'exoneration' from a denial of post-conviction relief *caused by the inadequacy of post-conviction counsel*. In

> light of the absence of any realistic mechanism for obtaining 'exoneration' *from the results of post-conviction counsel's inadequacy,* extending the exoneration requirement of *Stevens* to malpractice actions against post-conviction counsel would create an insurmountable and arbitrary bar to relief that does not exist with respect to malpractice claims against criminal defense counsel."

Id. at 662-63 (footnote omitted; emphases added). Given the absence of a mechanism for exonerating a client from the harmful result of post-conviction counsel's inadequacy, the court concluded that the prior-exoneration requirement was inapplicable. *Id*. at 666.

The state argues that, in the same way that *Drollinger* distinguished *Stevens* and concluded that no exoneration is required in the post-conviction context, we should conclude that prior exoneration does not apply in the context of a direct criminal appeal, which the state characterizes as "post-conviction." We disagree. A direct criminal appeal is not "post-conviction" in the sense used in our law or by the Supreme Court in *Drollinger*. As noted, the court in *Drollinger* repeatedly distinguished the criminal defense context from the *civil* post-conviction context, and expressly explained that the prior-exoneration requirement was more suited to the trial *and appellate* process. 350 Or at 666 n 8.[7]

For several additional reasons, we are persuaded that the same considerations on which the Supreme Court in *Stevens* grounded the prior-exoneration requirement apply to the claim against appellate defense counsel in this case. Here, as in *Stevens*, a determination of negligence by appellate defense counsel necessarily would require a relitigation of the underlying conviction, because plaintiff's claim could not succeed without establishing that, absent appellate counsel's negligence, the conviction would have been overturned and plaintiff would have been acquitted on retrial. *See Drollinger*, 350 Or at 668 (referring to the traditional "case within a case" methodology); *Watson v. Meltzer*, 247 Or App 558, 566, 270 P3d 289 (2011), *rev den*, 352 Or 266

[7] And, as the court said, it allowed review "to consider whether and how the *Stevens* exoneration rule might apply to a malpractice action against post-conviction counsel." *Drollinger*, 350 Or at 659.

(2012) (explaining that "case within a case" expression "is simply the application of the but-for causation requirement that applies in ordinary negligence cases").

In addition, direct appeal, unlike post-conviction relief, is an extension of the defense of the criminal prosecution, and challenges the conviction itself, which, as the court held in *Stevens*, is entitled to a presumption of correctness until it is overturned. 316 Or at 231 ("[T]o allow a person convicted of a criminal offense to sue that person's lawyer without having first overturned the conviction would mean that the courts would be permitting relitigation of a matter that is supposed to be settled: The complaining party is deemed by the law to be guilty."). Moreover, as with representation by trial counsel, appellate defense counsel's representation was "criminal defense" and thus subject to statutory and constitutional procedures and standards that are enforceable through appeal and subject to correction through post-conviction relief. Unlike in *Drollinger*, here, those procedures provided a mechanism for exoneration.

In short, the approach that is most consistent with *Stevens* and *Drollinger* is to conclude that the prior-exoneration rule articulated in *Stevens* for malpractice claims against trial defense counsel is equally applicable to claims against appellate counsel. Thus, plaintiff's claim against appellate counsel did not accrue until exoneration. Plaintiff brought his claim against appellate counsel and OPDSC within two years of the date of his exoneration and it was timely under ORS 30.275(9). The trial court therefore erred in dismissing the claim against OPDSC and appellate counsel.

Reversed and remanded as to claim against OPDSC and appellate defense counsel; otherwise affirmed.