Recent Case Notes*

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Statute Of Limitations/Duty To Inquire/Relation Back

Statute of limitations in ORS 12.110 is not triggered by facts that give rise to duty to inquire

In *Doughton v. Morrow,* 255 Or App 422 (February 27, 2013), the Oregon Court of Appeals held that the statute of limitations in ORS 12.110 is not triggered by the discovery of facts that only give rise to a duty to inquire as to whether there is a substantial possibility of a claim. The Court also held that a claim does not relate back if the original complaint did not put a reasonable defendant on notice of potential additional liability.

In July 2004, plaintiffs purchased a lot from defendant. After building their home, plaintiffs drilled a well in what they believed to be the northwest corner of their property based on the location of an access road and cul-de-sac. Unbeknownst to plaintiffs, however, defendant had constructed the cul-de-sac in the wrong location. In July 2005, plaintiffs' neighbors informed them that the well was located on their property. Plaintiffs cancelled the installation of the well and on October 28, 2005, obtained a survey, which confirmed that the well drilled by plaintiffs was indeed on their neighbors' property.

On August 10, 2007, within two years of the survey but not the warning from the neighbors, plaintiffs sued the defendant for negligence based on the erroneous location of the cul-de-sac. On August 18, 2010, plaintiffs filed an amended complaint alleging an additional negligence claim based on the quality of the construction of the cul-de-sac and access road, and breach of contract. Defendant successfully moved for summary judgment, arguing that plaintiffs' claims were barred by the statute of limitations.

The Court of Appeals reversed in part and affirmed in part. Relying on *Greene v. Legacy Emanuel Hospital,* 335 Or 115, 123 (2002), the court held that the statute of limitations on plaintiffs' original negligence claim was not triggered by facts that only gave rise to a duty to inquire as to whether an injury had occurred. Even though the neighbors' complaints triggered a duty to inquire—and plaintiffs did inquire by ordering the survey—the statute of limitations did not begin to run based only on the neighbors' self-interested complaints. The negligence claim based on faulty construction was time-barred, however, because plaintiffs had reliable information about the condition of the cul-de-sac before the July 2004 closing on the property. Specifically, plaintiffs observed deep ruts in the gravel on the cul-de-sac and communicated with their realtor regarding the condition and potential issues with the county.

The court then held that the breach of contract claim was time barred because the amended complaint, read as a whole, did not put defendant on notice that it was at risk of additional liability arising out of the quality of the construction of the entire access road, as opposed to the location of the cul-de-sac. ✪

— Submitted by Erin Catherman, Bodyfelt Mount LLP

Statute Of Limitations/ Discovery Rule

Limitations period for battery claim under Oregon Tort Claims Act does not begin to run until plaintiff discovers the conduct was tortious

In *Doe v. Lake Oswego School District and Judd Johnson,* 353 Or 321 (March 7, 2013) the Oregon Supreme Court held that the limitations period for a battery claim under the Oregon Tort Claims Act does not begin to run until the plaintiff discovers each of the three elements of an injury: (1) harm; (2) causation; and (3) tortious conduct (harmful or offensive in nature).

In this case, seven adult male plaintiffs sued the Lake Oswego School District and their fifth grade teacher, Judd Johnson, alleging Johnson had molested them in his classroom between 1968 and 1984. Because the claims were against

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a public body and its agent, plaintiffs' claims were subject to the OTCA, which required them to file their claims within two years after the alleged loss or injury. ORS 30.275.

The trial court granted defendant's Rule 21 motion and dismissed plaintiffs' claims as untimely because all three elements of the injury were established at the time of the touching—by 1984 at the latest. The trial court reasoned that plaintiffs must have known the conduct was tortious at the time the harm occurred because all fifth graders would have known Mr. Johnson's touching was wrong. The Court of Appeals affirmed.

The Supreme Court reversed. Focusing on the tortious conduct element, it considered whether plaintiffs knew or should have known the touching was harmful or offensive when it occurred. The Court agreed with plaintiffs that they had alleged facts from which a jury could conclude that plaintiffs did not know the touching was offensive when it occurred, because Mr. Johnson had "groomed" them to gain their trust, respect and admiration so that they would comply with his instructions and requests. Therefore, the limitations period did not begin to run until the plaintiffs discovered the tortious nature of the conduct between 2006 and 2008, and their claims were timely filed. The Court cautioned, however, that a plaintiff does not need to know the full extent of an injury for the limitations period to begin to run—knowledge of some harm that is a result of tortious conduct is sufficient to start the clock. ✪

— Submitted by Megan S. Cook, Bullivant Houser Bailey PC

Bad Faith/Settlement

Non-execution clause in settlement agreements may prove fatal to bad faith claim

In *Brownstone Homes Condominium Association v. Brownstone Forest Heights,* LLC, 255 Or App 390 (February 27, 2013) the Oregon Court of Appeals held that when a stipulated general judgment and money award is entered against an insured defendant after the plaintiff and the insured execute a settlement agreement and covenant not to execute, the insurer has no responsibility to satisfy the judgment because the insured was not legally obligated to pay anything on the judgment due to the non-execution clause of the settlement agreement.

Brownstone Homes Condominium Association sued, among others, A&T Siding, Inc. alleging various construction defects. A&T was insured by two carriers, Zurich and Capitol. The Capitol policy at issue provided that it would pay "those sums that [A&T] becomes legally obligated to pay as damages."

A&T and Zurich entered into a settlement agreement with the plaintiff whereby A&T agreed to have a judgment entered against it in favor of the plaintiff in the amount of $2 million. The settlement agreement provided, in essence, that the plaintiff would not execute on any judgment. Zurich paid $900,000 of the stipulated judgment and A&T assigned its rights against Capitol to the plaintiff. The plaintiff then served a writ of garnishment against Capitol for the unpaid portion of the stipulated judgment.

Relying primarily on *Stubblefield v. St. Paul Fire & Marine,* 267 Or 397 (1973), the Court of Appeals held that the non-execution provision of the settlement agreement rendered the subsequent stipulated judgment essentially a nullity, because the settlement did not obligate A&T to pay anything. The assignment of A&T's rights against Capitol did not provide the plaintiff with any greater rights than A&T possessed. The applicable policy provision required that Capitol need only pay those sums its insured was legally obligated to pay.

Also part of the dispute was the timing of the entry of judgment *vis-a-vis* execution of the settlement agreement. The court agreed with Capitol that the terms of ORS 31.825 require that a judgment be entered before any covenant not to execute in order for the assignment to transfer any rights to the assignee. If the judgment is entered and assigned after the formation of the covenant not to execute, the assignor is not legally obligated to pay the judgment, thus there are no rights of recovery to assign. ✪

— Submitted by James Usera, Harris Wyatt & Amala LLC

Motor Vehicle/ Negligence Per Se

Operating an unsafe vehicle means driving a vehicle that creates a probable—not just possible—danger

In *State v. Stookey,* 255 Or App 489 (February 27, 2013), the Oregon Court of Appeals interpreted ORS 815.020, regard-

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