Abraham v. T. Henry Construction, Inc., and the "Streisand Effect"

Jonathan Henderson
Davis Rothwell Earle & Xóchihua PC

On March 10, 2011, the Supreme Court released its opinion in *Abraham v. T. Henry Construction, Inc.,* 350 Or 29 (2011). The Court confirmed that Oregon permits tort recovery by a homeowner against the builder of a home, even when the two are in privity of contract, and even in the absence of a special relationship. In some ways, the holding is simply an extension of the Court's holding in *Harris v. Suniga,* 344 Or 301 (2008), where the Court held that a subsequent purchaser of a home may maintain a negligence claim against the builder without running afoul of Oregon's Economic Loss Doctrine. The *Abraham* Court stated: "This case requires us to address an 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 home-owner and builder are in a contractual relationship." 350 Or at 33. The Court concluded that the common law imposes liability on one who negligently causes a foreseeable injury to another, and so the existence of a contract or the absence of a special relationship are of no moment and do not prevent a homeowner from bringing a negligence claim against the builder. The common law imposes liability on the builder unless such liability is "altered or eliminated by contract or some other source of law." 350 Or at 37.


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By itself, this holding is not all that remarkable in light of the Court's recent rulings in cases such as *Harris.* The more interesting aspect of the *Abraham* opinion is found in footnote 3, as well as plaintiffs' subsequent attempts to convince the Court to modify the footnote by removing the second sentence. Footnote 3 states:

> 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).

The footnote is dictum; that is, it was neither necessary nor essential to the decision of the Court. As such, it is not binding on the lower courts. However, even as dictum, it is persuasive. See *State v. Thompson,* 166 Or App 370, 375 (2000) ("[W]e generally will follow dicta that are helpful[.]") It also likely indicates how the Court would rule if the issue were before it.

After the *Abraham* opinion was released, plaintiffs petitioned the Supreme Court for reconsideration and requested the Court remove the second sentence of footnote 3. Plaintiffs' petition was supported by amicus briefs requesting the same thing: removal of the second sentence of footnote 3. On May 5, 2011, the Supreme Court denied the petition for reconsideration. (Available at 2011 Ore. LEXIS 433 May 5, 2011).

The "Streisand Effect" is the name given to the phenomenon in which one's attempt to hide or cover information leads to the unintended consequence of drawing unwanted attention to the same information. The phrase originated from an incident in 2003. Singer Barbra Streisand learned photographs of her California beach house were posted online. She filed suit against the individual who posted the pictures, as well as the site hosting the pictures, seeking $50 million. However, her lawsuit led to an unintended result: within one month, a half million people had visited the site hosting the pictures and had copied the images. Soon, the pictures appeared everywhere.

Back to the story. By unsuccessfully attempting to remove the second sentence of footnote 3 in the *Abraham* opinion, plaintiffs and amici have drawn attention to the footnote, and have arguably strengthened its persuasiveness. The frenzy by those seeking to convince the Court to remove the second sentence drew attention, and with the entire defense bar watching, the Court refused the request to remove a *single dictum sentence* in a footnote.

Ordinarily, dicta are attacked on the ground that the issue addressed was not adequately briefed or argued to the court by the parties because the issue was not necessary or essential to the court's decision. Here, those attacking the *Abraham* footnote as mere dictum are at a disadvantage because the petition for reconsideration brought the issue back

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squarely in front of the Court, and yet, the petition was still denied. This serves only to strengthen the persuasiveness of the dictum.

Notwithstanding the denied petition for reconsideration, the footnote in *Abraham* is still dictum, and as such, not binding on the lower courts. However, it is arguably more persuasive than ordinary dicta because the Court's refusal to remove it demonstrates that the Court, upon reflection a second time, meant what it said.

The fact that plaintiffs and amici petitioned immediately for reconsideration, seeking the removal of the second sentence of the footnote, highlights the gravity of the Court's announcement for the plaintiffs' bar. Over the last several years, plaintiffs have been largely successful in persuading trial courts that a claim for negligent construction is subject to a six-year statute of limitations, located at ORS 12.080(3), and that the discovery rule applied to toll the statutory period until plaintiffs discover the harm.

Enter footnote 3 from the *Abraham* opinion. This announcement has likely caught many plaintiffs unawares. It is not uncommon for a homeowner to take more than two years dealing with issues such as water intrusion before seeking the advice of counsel. In Oregon, "it is immaterial that the extent of damages could not be determined at the time of the tort for purposes of determining when the statute of limitations commence[s] to run." *Jaquith v. Ferris,* 297 Or 783, 788 (1984). A plaintiff need know only that she was harmed by defendant's tortious conduct before the statutory period commences to run; she need not know the extent of the harm. When this general rule is combined with a two-year statute of limitations, the result is that many claims will be defeated with valid limitations defenses.

Defendants have capitalized on footnote 3 already; at least one large negligent construction lawsuit has been dismissed by an Oregon state trial court on the grounds that the claim was untimely because it was not brought within two years after plaintiffs discovered the harm. There, the trial court relied heavily on footnote 3 of the *Abraham* opinion, and was especially persuaded by the Supreme Court's denial of the motion for reconsideration. There are likely a significant number of cases on file or waiting in the wings that could also be subject to valid limitations defenses based on footnote 3.

Defense counsel should be mindful of the potential coverage implications associated with moving against a negligence claim. If there are other claims alleged in the complaint, the negligence claim may be the claim that is providing coverage for the insured's defense.

Defendants should make use of the *Abraham* case to strike while the iron is hot. If there is good evidence that plaintiff discovered the alleged harm more than two years before filing suit, the claim may be subject to dismissal. The statute of limitations should be asserted as an affirmative defense unless it clearly does not apply. If an answer has already been filed, ORCP 21 G(2) may permit a defendant to seek leave of court to assert a limitations defense if the defense was not asserted in the first responsive pleading.