IN THE SUPREME COURT OF THE STATE OF OREGON

SUNSET PRESBYTERIAN CHURCH, an Oregon non-profit corporation,
Plaintiff-Appellant,
Respondent on Review,

v.

BROCKAMP & JAEGER, INC., an Oregon corporation,
Defendant-Respondent,
Petitioner on Review,

ANDERSON ROOFING, CO., an Oregon corporation; SHUPE ROOFING, INC., fka Epuhs, Inc. and/or Dial One Shupe Roofing, an Oregon corporation; POSITIVE CONSTRUCTION, INC., an inactive Oregon corporation; WOODBURN MASONRY, an Oregon corporation; SHARP & ASSOCIATES, INC., an Oregon corporation; PORTLAND SHEET METAL WORKS, INC., an Oregon corporation,
Defendants-Respondents,

and

DIVERS WINDOW & DOOR, INC., an inactive Oregon corporation; et al, and THE HARVER COMPANY, an Oregon corporation,
Defendants.

Court of Appeals
A146006

S061171 (Control)

SUNSET PRESBYTERIAN CHURCH, an Oregon non-profit corporation,
Plaintiff-Appellant,
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BROCKAMP & JAEGER, INC., an Oregon corporation; SHUPE ROOFING, INC., fka Epuhs, Inc. and/or Dial One Shupe Roofing, an Oregon corporation;

October 2013

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Defendants-Respondents,

and

ANDERSON ROOFING, CO., an Oregon corporation,
Defendant-Respondent,
Petitioner on Review.

and

DIVERS WINDOW & DOOR, INC., an inactive Oregon corporation, et al., and THE HARVER COMPANY, an Oregon corporation,
Defendants.

Court of Appeals
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S061185

RESPONDENT'S BRIEF ON THE MERITS

October 2013

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I. SUMMARY OF ARGUMENT

Plaintiff-Appellant, Respondent Sunset Presbyterian Church (the "Church") filed suit to recover damages caused by the defective construction of classrooms, youth sports facilities, and community spaces at the first phase of its facility in Portland, Oregon ("Phase I"). Defendant-Respondent, Petitioner Brockamp & Jaeger, Inc. ("Brockamp") was the general contractor for Phase 1. The other Defendant-Respondent Petitioner Anderson Roofing Co. was a subcontractor hired by Brockamp to install roofing at Phase 1 ("Anderson"). The Church and Brockamp entered into a contract (the "Construction Contract"), which contained an accrual clause upon which Brockamp relies to argue the Church's claims are untimely. Anderson argues the Church's claims are barred by the statute of ultimate repose.

The Church made several arguments to the Court of Appeals that were not addressed in its decision or by Brockamp in its Petition and Opening Brief here. Therefore, as to those arguments, the Church relies on its briefing to the Court of Appeals. Arguments responsive to Brockamp's Petition and Opening Brief are presented below.

A. As to Brockamp, the Court of Appeals rightly applied the Construction Contract as written.

Brockamp and the Church agreed in the Construction Contract to a procedure for setting the statute of limitations. Specifically, the Contract provided that the statute of limitations would run from the date that the

Church's construction expert, the project architect, inspected Brockamp's work and certified the date that it was deemed "Substantially Complete," thereby affixing the "date of Substantial Completion." Pursuant to this contractually-established procedure, when Brockamp believed the work was substantially complete, Brockamp was required to apply to the architect for an inspection. Upon inspection and an express acceptance by the Church, through its project architect, as to what aspects of construction were complete, the Church would accept the project as "Substantially Complete." Pursuant to the Construction Contract, after going through this procedure, certain claims against Brockamp would then run from the "date of Substantial Completion."

Brockamp has no evidence that it followed this required procedure. Brockamp has no evidence that it gave the Church's architect the opportunity to inspect its work and certify "Substantial Completion." This is contrary to the parties' agreement in the Construction Contract. The point of the accrual clause is that the Church agreed to a shortened period within which to bring its claims, if and when its construction expert, the project architect, inspected Brockamp's work and certified such work as substantially complete. Despite the fact that Brockamp has no evidence that it followed the procedures in the Construction Contract to have the Church's architect inspect its work, request corrections, and certify the work as "Substantially Complete," Brockamp still wants the benefit of the shortened accrual clause tied to this inspection and certification.

The Court should reject Brockamp's failure to follow the Contract. On its affirmative defense under the Construction Contract, Brockamp did not meet its burden of proof. The Court of Appeals correctly so ruled, and this Court should affirm.

Brockamp makes a number of arguments as to why the Oregon Supreme Court should overlook its failure to follow the inspection and certification procedures on the Construction Contract (which were to protect the Church), but still give Brockamp the full benefit of the time-limitation clause in the Construction Contract. The Church responds to these arguments below. In sum, Brockamp's effort to find a way around its failure of proof leads it to make arguments that justify Brockamp's failure to follow contractually-agreed procedures, and would jeopardize the certainty of the AIA contract process, agreed to by countless parties across Oregon. Brockamp's predicament here leads Brockamp to argue against a contract procedure under its control, and agreed upon by the Church. This Court should affirm the Court of Appeals as to Brockamp.

B. As to the subcontractor Anderson, the Court of Appeals rightly applied ORS 12.135 as written.

The Court of Appeals correctly analyzed the statute of repose and applied its plain language. Like Brockamp, Anderson failed to meet its burden on summary judgment on its affirmative defense. Anderson admits it has no evidence of a written acceptance by the Church acknowledging the project was

suitably complete for the Church's intended purpose. Therefore, the only issue is "the date of acceptance of the completed construction, alteration or repair of such improvement by the contractee." ORS 12.135 (2007). The Court of Appeals correctly applied the statute as written, giving "completed" its plain meaning. In the process, the Court of Appeals rejected Anderson's invitation to re-write the statute and create a messy, fact-intensive rule. As it stands, the statute provides a bright-line, objective rule for the commencement of the repose period: either written agreement by the party to be charged (the property owner), or the completion of the job by the contractor. Both are objective, and externally-verifiable, and ensure that contractors and property owners alike can plan their business accordingly. This Court should therefore affirm the Court of Appeals as to Anderson.

II. ARGUMENT

A. The Court of Appeals correctly enforced Brockamp's contractual obligation.

1. The Court correctly applied the plain language of the Construction Contract.

The Construction Contract defines the date of Substantial Completion as "the date certified by the Architect in accordance with paragraph 9.8." ER-4, Paragraph 8.1.3. The Construction Contract required Brockamp to follow a simple, specific procedure to apply to the architect to certify the precise date of Substantial Completion:

> When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected . . . Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. . . . When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion[.] . . . The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

ER-5 and ER-6, Paragraph 9.8.2.

Brockamp has no evidence that it satisfied this process. By skipping this procedure, Brockamp denied the Church the opportunity to have its independent expert, the project architect, inspect Brockamp's work, confirm the work's suitability, and certify completeness for the Church. At root, the contractual accrual clause is an agreement between the Church and Brockamp that if the Church's architect inspects and certifies Brockamp's work, the parties would deem certain claims accrued on that date.

Though Brockamp has no evidence that it complied with this contractual process, it asks this Court to forgive that failure at the expense of the certainty guaranteed to both parties, and at the expense of the Church, which never had the opportunity to have the project architect inspect the work and certify the completion of the work. Brockamp asks this Court to give it the full benefit of the Construction Contract's accrual clause, while denying the Church the

protections that the accrual scheme in the Construction Contract requires. This Court should enforce the contract only as written: without a "date certified by the architect," there is no contractual date of Substantial Completion. The Court of Appeals correctly determined that Brockamp did not have the evidence it needed to support the application of the contractual accrual clause. This Court should therefore uphold that ruling and remand this case back to the trial court.

2. Brockamp's arguments would undermine parties' ability to define their rights and remedies by contract, and burden trial courts with questions of fact.

Without the evidence it needs – the date certified by the architect – Brockamp makes several arguments to excuse its failure to follow the Construction Contract. First, Brockamp argues that the Court should simply ignore the Construction Contract's definition of "the date of Substantial Completion" as "the date certified by the architect[.]" This Court should reject that argument. "In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 42.230; *In re Marriage of Matar and Harake*, 353 Or 446, 457, 300 P3d 144 (2013) ("It is axiomatic that public policy requires that persons of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held

sacred and shall be enforced by courts of justice; and it is only when some other overpowering rule of public policy intervenes, rendering such agreements unfair or illegal, that they will not be enforced." (citation omitted)). Brockamp offers no reason for suggesting this Court ignore the plain and unambiguous definition of Substantial Completion, other than that it cannot prove the "date certified by the architect" and, therefore, cannot meet its burden on summary judgment.

A decision by this Court to ignore the Construction Contract's definition of the "date of Substantial Completion" would have several undesirable consequences. First, it would remove the agreed certainty of the date for parties using the AIA contract. This would fundamentally disrupt the agreed rights of contracting parties. Oregon courts have long held that the freedom of contract must be respected absent some "overpowering" public policy to the contrary. *See Wilkinson v. Carpenter*, 276 Or 311, 315, 554 P2d 512 (1976) ("[I]n the absence of some countervailing policy, the parties to a contract should be allowed to allocate the actual risks of the venture as they see fit." (citing Williston on Contracts 467, s 1511 (3d ed 1970))).

If this Court disregards the presence or absence of a date certified by the architect, then any number of contracts in Oregon will be called into question. It is conceivable that contractors who believed they were protected by the Certificate of Substantial Completion date will be sued by property owners who

do not believe the date certified by the architect is any more important than other evidence to the contrary. Under Brockamp's argument, contracting parties will never be sure what claims they may have against each other and when, even if they agree upon it, until a court makes a decision about it many years later. As Brockamp argues, traditionally parties to a contract may stipulate to procedures for a shorter time limit for claims than otherwise allowed at law. *Ausplund v. Aetna Indemnity Co.*, 47 Or 10, 81 P 577, *on reh'g*, 82 P 12 (1905). This Court should bind the parties here to the specific pre-requisites to trigger such contractually-agreed time limits.

This raises a second undesirable consequence from Brockamp's argument: uncertainty for the parties and inefficiency for the court system. If the Court rejects the specific trigger established by the parties – the "date certified by the architect" – that action would erase the certainty promised by the accrual clause in these AIA forms in the first place. The parties would then be left fighting about what date might trigger the accrual clause for each separate contract. Moreover, each court would have to conduct its own fact-intensive inquiry into when certain components of the project were suitable to be used by occupants, and for what purposes, and then announce a "date of substantial completion," often several years after construction and well into litigation. That is not what contracting parties want, nor what Brockamp and the Church agreed to here. Brockamp's argument would create uncertainty for

contracting parties and increase the burden on Oregon's courts. The Court of Appeals correctly determined that the case should be remanded back to the trial court, and this Court should do the same.

3. The Church's arguments are consistent with the plain meaning of the Construction Contract.

Brockamp argues that the Church asks the Court to "create legal fiction" by determining that the project never reached a stage of substantial completion. Brockamp persistently urges this Court to focus on the "event" of substantial completion, which misses the point entirely. Under the contractual accrual clause on which Brockamp relies, what is critical is not the event of "substantial completion," but the "date of Substantial Completion." Substantial completion and completion can mean many different things depending on which definition is used and for what purpose. *See, e.g.*, ORS 87.035 (completion triggering lien time limit); ORS 12.135 (substantial completion triggering ultimate repose period); ORS 701.143 (substantial completion triggering jurisdictional time limits for construction contractors board). Brockamp cannot rely on any of those other definitions of completion or substantial completion external to its Contract for a defense under that Contract; Brockamp must use the date of Substantial Completion – capital S, capital C as a defined term – which can only be "the date certified by the architect." The parties are dealing with a contractual statute of limitation, and a contractual definition that triggers it. As agreed, the "date of Substantial Completion" is not an event. It is a contract

certification, regardless of what any *ex post facto* review may surmise was the "event" of substantial completion.

As demonstrated above, Substantial Completion is the date when the Church's expert agent, the architect, is asked by Brockamp to inspect its work and to certify completion of the work. At that point, the architect would have inspected and certified the completeness of Brockamp's work, and agreed on behalf of the Church to transfer control and responsibility for the project. If the architect had inspected and acknowledged Brockamp's work as substantially complete, then it makes sense for the parties to have agreed that the clock should start ticking.

However, Brockamp did not and cannot prove that it ever followed this contractual process. It has no evidence that the Church was afforded the opportunity, through its architect, to inspect Brockamp's work and to certify its completeness and, thereby, trigger the agreed shortened period to bring claims. Brockamp brazenly asks this Court to overlook its failure to comply with the architect inspection and certification requirements, and nonetheless give Brockamp the full benefit of the accrual clause – as if the Church's architect had inspected its work – without any evidence to support it. In short, Brockamp cannot prove that it ever fixed the "date of Substantial Completion" – not a calendar date, but an agreement by the Church, through its architect, to take responsibility for the project and any claims it may have against Brockamp.

The Court should reject Brockamp's attempts to trivialize its contractual agreement, and reject its invitation to deny the Church the inspection and certification requirements in the Construction Contract, which were the essential *quid pro quo* for the Church's agreement to a shortened statute of limitations.

Brockamp also argues that the decision of the Court of Appeals renders the accrual provision meaningless by "essentially nullify[ing] the parties' intent to contractually eliminate any discovery rule." This is nonsense. The Church's position is simple: Brockamp does not receive the benefit of the shortened accrual clause if Brockamp fails to provide the Church the benefit of the architect's inspection and certification process. The Court of Appeals rightly held that because Brockamp failed to follow the inspection and certification procedures, Brockamp had no evidence that the Church's architect discovered anything about Brockamp's work: whether it was complete, whether it was deficient, what was left to be done, or what needed to be re-done. If Brockamp had submitted evidence that it followed the process to fix the date of Substantial Completion, and that the architect did inspect and certify completion of the work, then it makes sense to charge the Church with a shortened period within which to bring its claims. The architect's certification process provides bright-line certainty to both contractor and owner, and would have informed the Church's decision-making process regarding when to assert any given claims.

Brockamp cannot ignore the contractually-set procedure, deprive the Church of that protection and certainty, and then seek advantage for its failure to follow the Construction Contract by asking this Court to enforce the accrual clause.

4. Brockamp's foreign caselaw does not override the policy that the Construction Contract should be enforced according to its plain meaning.

Brockamp argues that a couple of cases from other jurisdictions support its position. They do not.

Brockamp's first case, *Holy Family Catholic Congregation v. Stubenrauch Associates, Inc.*, 136 Wis2d 515, 402 NW2d 382 (1987). concerned a *statutory* limitation, not the contractual accrual period at issue here. In its analysis of the Wisconsin statutory limitations applicable to a certain claim, the court noted that "substantial completion" was not defined in the statute. *Holy Family Catholic Congregation*, 136 Wis2d at 521. The architect, a party to that case, pointed to its certificate of substantial completion as evidence of substantial completion. *Id*. at 521-522. But, the court looked to the legislative intent behind that particular statute, and did not agree that the architect's own certification was dispositive under the *statutory* scheme. *Id.* at 522. Based on this case, Brockamp concludes that a Certificate of Substantial Completion is not important, and that the Court should disregard its absence.

However, the case here is very different. The court in *Holy Family Catholic Congregation*, did not consider, let alone bypass, the contractual

inspection and certification procedures inherent in the Construction Contract. The court in *Holy Family Catholic Congregation* instead applied a statutory analysis to the application of a state statute. The case is not informative about how this Court should handle the Construction Contract at issue and Brockamp's failure to comply with the Contract.

Brockamp also cites to *Allen v. A&W Contractors, Inc.*, 433 So2d 839 (La Ct App 1983). There, the court considered a delay claim and affirmed an arbitrator's finding that the date of substantial completion was earlier than that certified by the architect. But it is not clear how this case affects this Court's analysis because the opinion does not reference the precise text of the underlying contract. The Construction Contract before this Court is on the 1987 form, which could not have been before the *Allen* court in 1983. Further, the opinion does not reference the scope of the arbitration agreement, which may be very different from the state court, arms-length legal process in which Brockamp and the Church are engaged. The *Allen* court also specifically noted the courts' extremely limited scope of review on appeal from an arbitration under Louisiana law. *Allen*, 433 So2d at 841. In sum, Brockamp's caselaw presents situations which are very different than those before the Court. Therefore, these do not support Brockamp's argument.

5. The Court should reject Brockamp's remaining excuses that Phase 1 was too big of a job for it to follow the Contract, or that it was at the mercy of the Architect.

Brockamp makes additional arguments that the Court should also reject. Brockamp argues that if the Court enforces the Construction Contract as written, then Brockamp is left at the architect's mercy to certify the date of substantial completion. This is a disingenuous argument because it is Brockamp, not the architect, which is responsible for initiating this process. Brockamp has no evidence that it attempted to start the process, but was somehow stymied by the architect. That issue is simply not before the Court.

Brockamp also argues that it was impossible for it to perform its duties under the Construction Contract because Phase 1 of the Church's facility was a big job. Thus, Brockamp argues, it should be excused from following the Construction Contract (to the detriment of the Church). Brockamp should be embarrassed by this argument, and the Court must reject it. State records show that Brockamp has been licensed as an Oregon contractor for over 40 years since 1972. If Brockamp was not capable of performing as agreed, it should not have taken the job. But Brockamp did, and was paid for it. The Oregon Supreme Court need not enter the business of selectively excusing the performance of contracting professionals based on factually unsupported assertions that they were in over their heads. In any event, this is all the more

reason to establish a clear completion date for purposes of liability. The Court should therefore reject Brockamp's argument.

Brockamp finally argues that the Court, and not the architect, should determine the date of substantial completion. In essence, Brockamp asks the Court to ignore the parties' inspection/certification requirements in the Construction Contract. In its effort to minimize its failure of proof, Brockamp mischaracterizes the Certificate of Substantial Completion as "a single document." That succinctly summarizes the Church's counter-argument: the Certificate of Substantial Completion is much more than a piece of paper. It is the written culmination of a process between Brockamp and the Church's architect, whereby Brockamp formally transfers control of the project to the Church after the Church's architect inspects and certifies the completeness of the work. It is because of this application by Brockamp, and inspection and certification by the architect – none of which is in the record – that the AIA contract here shortens the statute of limitations and charges the property owner with knowledge of claims it may have against the contractor. Since Brockamp has no evidence of any compliance with the inspection and certification procedures in the Construction Contract, this Court should affirm the Court of Appeals and remand this matter to the trial court for further proceedings.

B. As to the Church's claims against the Subcontractors, under ORS 12.135, the start date for the statute of repose is the date the Church accepted the completed construction, which is a question of fact.

The Church did not have a contract directly with Anderson. Anderson moved for summary judgment based on the statute of repose at ORS 12.135 (2007). The Court of Appeals correctly interpreted ORS 12.135 and determined that there was a question of fact regarding the completion of the project. This Court should affirm.[1]

The Church was required to bring claims against Anderson "within 10 years from substantial completion[.]" *Former* ORS 12.135 (1991), *amended by* Or Laws 2009, ch 485, § 3, and ch 715, § 1. This statute of repose defined "substantial completion" as follows:

> the date when the contractee accepts in writing the construction, alteration or repair as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such written acceptance, the date of acceptance of the completed construction alteration or repair of such improvement by the contractee.

ORS 12.135(3)(1991) (emphases added). Anderson does not dispute that there is no written acceptance of the work by the Church in this case. Therefore, Anderson's defense turns on the second part of the definition of substantial completion: "the date of acceptance of the completed construction[.]"

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[1] Anderson also argued the more general statute of repose at ORS 12.115 applied. The Court of Appeals rightly applied the more specific statute, and rejected the chaos that application of ORS 12.115 would bring to multi-party actions. This Court should affirm, and the Church otherwise relies on its briefing to the Court of Appeals on this point.

Anderson argues that the Church and Court of Appeals are wrong, and that this Court should insert the word "substantially" into the statute, so that the definition of "substantial completion" in the statute would read as follows:

> the date when the contractee accepts in writing the construction . . . as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such written acceptance, the date of acceptance of the *substantially* completed construction, alteration or repair of such improvement by the contractee.

The Court should reject this for several reasons. First, that is not what the legislature wrote in the text of the statute. This Court should decline any invitation "to insert what has been omitted, or to omit what has been inserted." ORS 174.010. *See also State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009)("[T]ext and context remain primary, and must be given primary weight in the analysis."). The legislature set forth a two step definition of substantial completion that on its face is plain and unambiguous. "Substantial completion" is either a date fixed in writing, or the date of acceptance of the completed construction. The legislature did not include the word "substantially" before "completed." Nor did the legislature use the language in the second part of the definition that it used in the first part. If it had meant to define "substantial completion" as Anderson argues, the legislature could also have written as follows:

> the date when the contractee accepts in writing the construction . . . as having reached that state of completion when it may be used or occupied for its

> intended purpose or, if there is no such written acceptance, the date the contractee accepts *the construction . . . as having reached that state of completion when it may be used or occupied for its intended purpose*.

Or

> the date when the contractee accepts, in writing *or otherwise*, the construction . . . as having reached that state of completion when it may be used or occupied for its intended purpose

There are certainly many other possibilities, but the point is that the legislature did not select any of these possibilities. Instead it used plain and unambiguous language, which the Court of Appeals rightfully applied as written.

A second reason for the Court to reject Anderson's suggestion is that it would be circular to use the term "substantial completion" in the definition of "substantial completion." This logical error would undermine the statute, and render the definition of substantial completion meaningless and useless. Trial courts will not be able to avoid extensive, fact-intensive inquiries if defendants must demonstrate when property owners accepted their projects as substantially complete, particularly in the only situation that would arise: when there is no written acceptance of the construction as substantially complete.

Third, Anderson's proposed definition would leave the start date of the statute of repose exclusively in the Church's hands. Either way under Anderson's proposed definition, the statute of repose period would not commence until the Church accepted the project as having reached the point of

completion when it could be used for its intended purpose, either in writing or otherwise. That leaves the determination completely within the Church's control.

However, the two-part structure of the legislature's definition splits control of the start date. This logically ensures that an arbitrary property owner cannot indefinitely create uncertainty about the start date for the statute of repose by withholding acceptance of the property at the time it is capable of being used for its intended purpose. Instead, under the statute as written, even if a property owner does not clearly accept the property at this time, the contractor can complete the construction and leave the property in the care of the owner at the end of the job, and thereby commence the repose period.

Fourth, the statute of repose should create a bright-line rule, so that defendants do not need to defend against stale claims, and property owners do not waste resources and court time pursuing them. The definition of substantial completion adopted by the Court of Appeals achieves this. Either the Church would accept, in writing, the project as substantially complete, or the contractors would complete the construction and transfer the property back to the Church as complete. The latter scenario provides an objective and externally-verifiable end date for the construction from which all of the parties will be able to plan for claims arising from the construction. This provides

certainty to the contractors and clarity to the property owner, and gives full effect to the plain and unambiguous language of the statute.

The legislative history supports a clearly-defined start date for the repose period. By defining substantial completion as the date from which the ultimate repose period would run, the legislature sought to mark the date on which the contractor's control of the project ceased and the owner's responsibility for maintenance clearly began. *See* Tape Recording, Senate State and Federal Affairs Committee, HB 1259, May 24, 1971, Tape 14, Side 2 (statement of Mr. Hiefield, legal counsel for the AGC). The legislature required an acceptance in writing as part of substantial completion because it would allow for the contractor and owner to reach an express and definite meeting of the minds concerning the date of substantial completion. *See Id.* In other words, the definition of substantial completion was based on the legislature's understanding that the date of the writing would be a reliable measure of the date of Substantial Completion.

It remains undisputed that there is no writing wherein the Church accepted Phase 1 in writing as having reached the required state of completion. Instead, the subcontractors submitted evidence intended to establish the date that Phase 1 might have been able to be "used or occupied for its intended purpose." This is irrelevant, and contrary to ORS 12.135. The date of the final

completion of the construction presents an objective, verifiable and concrete date for the commencement of the statute of repose.

Therefore, this Court should reverse and remand.

III. CONCLUSION

The Court should reverse and remand for trial on the merits for the reasons set forth above, and as set forth by the Court of Appeals.

Dated: October 24, 2013.

/s/ Daniel T. Goldstein

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation of ORAP 5.05(2) and is 4,868 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

Dated: October 24, 2013.

/s/ Daniel T. Goldstein

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CERTIFICATE OF SERVICE

I certify that, on October 24, 2013, I served two copies by United States Postal Service, via first class delivery, of the foregoing *Respondent's Brief on the Merits* on the following parties at the addresses below:

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Dated: October 24, 2013.

/s/ Daniel T. Goldstein

Phillip E. Joseph, OSB 88237
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Ball Janik LLP
Representing Appellant Sunset Presbyterian Church

CERTIFICATE OF FILING

I certify that, on October 24, 2013, I caused the foregoing Respondent's Opening Brief to be electronically filed with the Appellate Court Administrator at this address:

Appellate Court Administrator
Appellate Court Records Section
1163 State Street
Salem, OR 97301-2563

Dated: October 24, 2013.

/s/ Daniel T. Goldstein

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