IN THE SUPREME COURT OF THE STATE OF OREGON

PIH BEAVERTON, LLC,

Plaintiff-Appellant,
Respondent on Review

v.

SUPER ONE, INC.

Defendant-Respondent
Petitioner on Review.

GARY THOMPSON, dba Portland Plastering Company; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing; WOOD MECHANIX, INC.; and T. T. & L. SHEET METAL, INC.,

Defendants-Respondents,

and

DOES 1 through 8; ESKEW CONTRACTING, INC.; DAN RIMA, dba Dan Rima Construction; and DOES 1 and 2,

Defendants.

SUPER ONE, INC.,

Third-Party Plaintiff,

v.

DAN RIMA, dba Dan Rima Construction; ESKEW CONTRACTING, INC.; T. T. & L. SHEET METAL, INC.; STO CORP.; ROSE CITY BUILDING SUPPLY, an assumed

Washington County Circuit
Case No. C072107CV

Court of Appeals
No. A142268

Oregon Supreme Court
No. S061488

November 2013

business name of L & W S Corp., WOOD MECHANIX, INC.; DEMIAN DAWSON, dba Spectra Caulking; VIP'S MOTOR INNS, INC.; DAVID ESKEW; and MICHAEL ESKEW, dba Eskew Roofing,

Third-Party Defendants.

PIH BEAVERTON LLC, a Delaware limited liability company,

Plaintiff,

v.

SUPER ONE, INC., an Oregon corporation; GARY ThOMPSON, dba Portland Plastering Company; DOES 1 through 8; ESKEW CONTRACTING, INC, an Oregon corporation; DAN RIMA, dba Dan Rima Construction; WOOD MECHANIX, INC., an Oregon corporation; DEMIAN DAWSON, dba Spectra Caulking; T. T. & L. SHEET METAL, INC.; DOES 1 and 2; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing

Defendants.

SUPER ONE, INC., an Oregon corporation,

Third-Party Plaintiff-Appellant,

v.

DAN RIMA, dba Dan Rima Construction, an individual; ESKEW CONTRACTING, INC., an Oregon corporation; T.T. & L. SHEET

METAL, INC., an Oregon corporation; STO CORP; a foreign corporation; Rose City Building Supply, an assumed business name of L & W SUPPLY CORP., an Oregon corporation; DEMIAN DAWSON, dba Spectra Caulking, an individual; VIP'S MOTORS INNS, Inc., an Oregon corporation; DAVID ESKEW; and MICHAEL ESKEW, dba Eskew Roofing, Third-Party Defendants, and WOOD MECHANIX, INC., an Oregon corporation; and GARY THOMPSON, dba Portland Plastering Company, Third-Party Defendants-Respondents.	61488

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

Amicus Curiae Brief filed on behalf of
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November 2013

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INTRODUCTION

The Court of Appeals decision below, *PIH Beaverton, LLC v. Super One, Inc.* 254 Or. App. 486, 294 P.3d 536 (2013) held that the trial court erred in granting summary judgment to Defendant-Respondent/Petitioner on Review Super One, Inc. ("Super One") as to Plaintiff-Appellant/Respondent on Review PIH Beaverton, LLC's ("PIH") tort claims for negligent construction of a hotel on the grounds that the claims were barred by the statute of ultimate repose set forth at ORS 12.135. The hotel was originally built by Super One and its subcontractors for PIH's predecessors in interest, VIP'S Industries, Inc., and VIP'S Motor Inns, Inc. under a standard form AIA contract. 294 P.3d 536 (2013) at 539-540.

ORS 12.135 provides, in pertinent part, that an action under any legal theory arising from the performance of construction, alteration or repair of any improvement to real property must be commenced by no later than the applicable statute of limitations or "Ten years after substantial completion or abandonment of the construction, alteration or repair..." ORS 12.135(1)[1]. The statute defines substantial completion as "the date when the contractee accepts in

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ORS 12.135 was amended in 2009, but the amendments did not change the statutory language applicable to this case. The language and section numbering of the pre-amendment statute will be used in this brief unless otherwise noted.

writing the construction, alteration or repair of the improvement to real property or any designated portion thereof 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).

In its decision, the Court of Appeals held that the date of substantial completion in this case is a question of material fact and that the dates of occupancy of the hotel by the owner and the owner's posting of an ORS 87.045 notice of completion did not determine, as a matter of law, the date of substantial completion for purposes of a statute of ultimate repose analysis under ORS 12.135. The Court of Appeals further held that, absent a written acceptance of completion by the owner, the work is not completed within the meaning of ORS 12.135 until the owner has accepted construction "that *actually* has been completed." Or, put another way, "when the contractee takes from the contractor responsibility for the maintenance, alteration, and repair of the improvement, which typically, if not invariably, will be the point at which little or no work remains to be done by the contractor." 294 P.3d 536 (2013) at 543, italics in original. The record before the Court did not conclusively establish when PIH's predecessors in interest accepted construction that actually had been completed. Accordingly, the Court of Appeals reversed the trial court and remanded the case for further proceedings.

Oral argument in this case has been consolidated with this Court's review of the Court of Appeals decision in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or. App. 24, 295 P.3d 62 (2012). The issues presented on review in the two cases are identical in many respects. For this reason, this brief will address arguments that are common to both cases. Any distinctions or arguments specific to only one case will be noted.

The Oregon Trial Lawyers Association (OTLA) urges this court to uphold the decision below and hold that substantial completion in the context of ORS 12.135 does not occur until the owner or contractee provides a written acceptance of the work as substantially complete or accepts construction that actually has been completed.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

OTLA adopts the question presented and proposed rule of law as stated in PIH Beaverton, LLC's Brief on the Merits.

ARGUMENT

I. There is no date of substantial completion under the AIA contract because no Certificate of Substantial Completion was issued by the Architect.

The Defendants-Respondents/Petitioners on review both performed their work under standard form AIA (American Institute of Architects) construction contracts. These contracts have a mechanism for establishing the date of substantial completion, which if followed, eliminates any dispute or

controversy on that issue. Under the AIA contract, the date of substantial completion can only be established by the project architect issuing a certificate of substantial completion. This process is described in the Court of Appeals decision in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.* at 65-66 and *PIH Beaverton, LLC v. Super One, Inc.* at FN 6 and is summarized as follows. In order to for this certificate to be issued, the contractor is required to submit an application to the architect when the contractor believes that the project is substantially complete. Then, the architect must perform an inspection and issue the certificate if the architect concludes that the work is ready to be used or occupied for its intended purpose. The architect is then supposed to prepare a "punch list" of items that remain uncompleted and/or need to be corrected.

There is nothing in the record of either of the two cases before this Court demonstrating that the architect issued a certificate of substantial completion. Although the briefing submitted by the parties to the Court of Appeals does not explain the absence of these certificates, all parties appear to agree that, in both cases, the certificates of substantial completion cannot be located or were never issued in the first place. The AIA contracts do not provide any other mechanism for establishing the date of substantial completion. Obviously, as a factual matter, both projects were substantially completed at some point in time, but the date was never fixed within the meaning of the AIA contracts. Since this date was never fixed, substantial completion did not

"occur" under the contracts. Any subsequent attempt by the trial courts to fix a date of substantial completion for the purpose of giving effect to other contractual provisions would amount to adding language to the contract that the parties never negotiated or agreed upon. This of course would be contrary to the legislative requirement that: "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; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." ORS 42.230

II. The contractual accrual clause is a legal nullity.

The AIA contracts also contain accrual clauses which provide that the statute of limitations for any claim arising under the contract for acts or omissions occurring prior to substantial completion shall accrue at and run from the date of substantial completion as established by the certificates of substantial completion which were to have been issued by the project architects, but were not. Under these provisions, the contractee would not get the benefit of any discovery rule which may apply to those claims covered by the accrual clause.

OTLA urges the Court to hold that the contractual accrual clauses are inapplicable to tort claims as discussed in part III below. However, if the Court holds that these provisions are applicable to claims for negligence and negligence *per se*, it is clear the accrual clauses should not be applied in these

cases because certificates of substantial completion were never issued and, consequently, the dates of substantial completion were never established under the contract. Since there are no fixed dates of substantial completion, the only way to give the accrual provisions legal effect is for the court to modify the contract by adding a mechanism that establishes the date of substantial competition that the parties never agreed to.

III. Contractual accrual clauses do not apply to tort claims.

It is not clear from the plain language of the AIA contracts whether the accrual clauses are intended to apply to claims for the breach of extra-contractual duties such as negligence and negligence *per se*. Here, OTLA relies upon and incorporates by reference Sunset Presbyterian Inc.'s analysis of the contractual language in its Opening Brief and Excerpt of Record to the Court of Appeals, pages 14-20 and offers the following additional arguments.

In order for the accrual clauses to have the effect that Petitioners on Review assert, they would have to operate as a waiver and release of all negligence and negligence *per se* claims. Damage is a necessary element of negligence, and without it, Plaintiff has no negligence claim. *Stevens v. Bispham,* 316 Or 221, 228, 851 P2d 556 (1993). "Until [plaintiff] is deemed to have been harmed, that requisite element is missing, plaintiff has no claim that he could have brought against defendant, and therefore, the statue of limitations has not yet begun to run." *Id.* In these cases, defective construction work is not the

"damage," rather, it is the proximate cause of the damage. The damage is the water intrusion, dry rot and consequential damage to the structures caused over a period of years by the defective construction work. Such damage could not have occurred at or before substantial completion.

Application of the AIA accrual clause to negligence claims would have the bizarre effect of causing the statute of limitations to begin to run on claims that Respondents did not have at substantial completion because they had not yet suffered, much less discovered, damage. Applied in such a manner, the accrual clauses operate as waivers and releases of claims for negligence.

The standard of proof for the waiver of a legal right or claim in Oregon is well established. "A waiver, under Oregon law, is the 'intentional relinquishment of a known right.'" *Guardian Management, LLC v. Zamiello*, 194 Or.App. 524, 95 P.3d 1139 (2004) at 529 (quoting, in part, *Wright Schuchart Harbor v. Johnson*, 133 Or.App. 680, 893 P.2d 560 (1995)). "It must be plain and unequivocal, either in its terms or by conduct, clearly indicating an intention to renounce a known privilege or power." *Id*. "In order to make out a case of waiver, there must be a clear, unequivocal, and decisive act of the party showing such a purpose." *Id*.

The holding in *Guardian Management* is consistent with decisions in other jurisdictions. For example, the Supreme Court of Missouri has stated: "well-established rule of construction that a contract provision exempting one

from liability for his or her negligence will never be implied but must be clearly and explicitly stated." *Poslosky v. Firestone Tire and Rubber Co*., 349 S.W.2d 847, 850 (Mo.1961) at 850. By their terms, the AIA contract accrual clauses at issue in these cases do not disclaim liability for negligence or negligence *per se*. As such, they are not "plain or unequivocal" in disclaiming Plaintiff's claims and cannot operate as a waivers or releases as to these causes of action.

IV. Occupancy, use for intended purpose and responsibility for the maintenance, alteration, and repair of the improvement are all questions of fact.

If this Court accepts the analysis of the Court of Appeals and the arguments of OTLA and Respondents on Review, then it must find that the date of substantial completion cannot be determined by the AIA contracts. However, the projects were substantially completed, factually speaking, as such, the ORS 12.135 statute of ultimate repose began to run at some point. This leaves the Court to determine whether the record allows for this date to be established as a matter of law or whether it must be determined by a finder of fact.

As the Court of Appeals explains in its decisions in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.* and *PIH Beaverton, LLC v. Super One, Inc.,* ORS 12.135(3) has two separate triggers for substantial completion and the running of the statute of ultimate repose. First, "the date when the contractee accepts in writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having

reached that state of completion when it may be used or occupied for its intended purpose or," 2. "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).

The Court of Appeals and Respondents on Review have addressed at some length the issue of whether the ORS 87.045 completion notice for lien purposes or any of the other documents in the record constitute an acceptance in writing that the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose. Those arguments are well stated and will not be repeated here.

If there is no written acceptance of substantial completion, then, as explained by the Court of Appeals, substantial completion does not occur until the contractee accepts the completed construction, alteration or repair of the improvement. *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc*. at 68. (Emphasis added). In examining the term "completed," the Court of Appeals first examined the text of the statute and found that: "Complete," as relevant here, means "possessing all necessary parts, items, components or elements: not lacking anything necessary: ENTIRE, PERFECT," or "brought to an end or to a final or intended condition * * *: CONCLUDED, COMPLETED," *Webster's Third New Int'l Dictionary* 465 (unabridged ed 2002), and thus does not

encompass the incomplete. In short, a consideration of the text shows that the second clause of ORS 12.135(3) applies only when a contractee has accepted construction that *actually* has been completed. *PIH Beaverton, LLC v. Super One, Inc.* at 543.

The Court of Appeals then reviewed the legislative history of ORS 12.135 and found that the proponents of the statute of ultimate repose in the legislature contemplated that substantial completion would occur and the statute of ultimate repose would begin to run when "the person takes responsibility from the contractor for the maintenance, alteration, and repair of the improvement." *Id., Sunset Presbyterian Church v. Brockamp & Jaeger, Inc*. at 67. It is clear from this well-reasoned analysis that, in the absence of a written acceptance, substantial completion does not occur and the statute of ultimate repose does not begin to run until the project is fully complete or very close to it and the owner has taken responsibility for the maintenance, alteration and repair of the improvement.

In these two cases it is important to draw a distinction between the buildings and the "improvements" as a whole. Again, the record indicates that the buildings were complete enough to be occupied and used to some degree by their owners more than 10 years before either lawsuit was filed. However, that fact does not establish whether the improvements as a whole were fit for use at the same time, or if considerable work remained to be done.

The record in these cases shows that both Respondents on Review began to occupy and/or use their respective buildings more than 10 years before their lawsuits were filed. The record also shows that, in both cases, Petitioners on Review and their subcontractors continued to perform substantial work on the improvements after occupancy and/or use of the buildings. The record does not clearly describe the type of or volume of work completed after occupancy commenced. The record also fails to provide insight as to when the Respondents on Review took responsibility for the maintenance, alteration and repair of the improvements. These two issues must be determined by a finder of fact before any judgment can be made as to the date of substantial completion and the running of the statute of ultimate repose.

While the record is largely silent on these issues, it is easy to conceive of a situation where an owner would begin to use or occupy an improvement before it was fully or even substantially completed. For example, in the past decade, many condominium projects and other residential housing developments were partially occupied before the project was finished. In some cases, units were sold and occupied by purchasers before construction on other units even started. In those cases, portions of the improvement were occupied months or years prior to completion of other portions. To use the example of a hotel, the owner could certainly make use of some completed hotel rooms while contractors installed and finished the drywall, plumbing fixtures, flooring and other critical

components in other hotel rooms. In both cases, the project is occupied and being used for its intended purpose, but it is not substantially complete by any reasonable definition.

CONCLUSION

Presbyterian Church v. Brockamp & Jaeger, Inc. and *PIH Beaverton, LLC v. Super One, Inc.* were correctly decided by the Court of Appeals. The Petitioners on Review could have applied for and obtained certificates of occupancy which would have established a definitive date for substantial completion. They failed to do so, and, as a result, the dates of substantial completion and the running of the statute of ultimate repose in these cases can only be established by determining when Respondents on Review accepted the fully completed improvements and took over responsibility for maintenance, alteration and repair of the improvements. The facts in the record do not allow this determination to be made as a matter of law. The cases should be remanded for trial on the merits.

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November 2013

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limit for brief in ORAP 5.05(2)(b) and (2) that the word count of this brief as described in ORAP 5.05(2)(a) is approximately 2,896 words.

Type size

I further 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 this 7th day of November, 2013.

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