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Appellate Court Records

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. and GARY THOMPSON, dba Portland Plastering Company; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing; WOOD MECHANIX, INC.; 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	Washington County Circuit Court No. C072107CV Court of Appeals No. A142268 (Control) Oregon Supreme Court No. S061488 (Control)

September 2013

CITY BUILDING SUPPLY, an assumed business name of L & W Supply 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 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.

Washington County Circuit Court No. C072107CV

Court of Appeals No. A142301

SUPER ONE, INC., an Oregon corporation,

Third-Party Plaintiff, Petitioner on Review,

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; VIPS MOTOR 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, Respondents on Review.

PIH BEAVERTON, LLC,

Plaintiff-Appellant, Respondent on Review,

v.

SUPER ONE, INC.; GARY THOMPSON, dba Portland Plastering Company; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing; WOOD MECHANIX, INC.,

Defendants-Respondents,

and

T. T. & L. SHEET METAL, INC.

Defendant-Respondent,

Court of Appeals
No. A142268 (Control)

Oregon Supreme Court
No. S061505

Petitioner on Review,

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 business name of L & W Supply 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 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

Court of Appeals
No. A142301

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; VIPS MOTOR 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.

DEFENDANT-RESPONDENT/THIRD-PARTY PLAINTIFF-APPELLANT/PETITIONER ON REVIEW SUPER ONE, INC.'S BRIEF

ON THE MERITS

Petition for review of the decision of the Court of Appeals on appeal from the Judgment of the Circuit Court of Washington County, Honorable Mark Gardner, Judge

Opinion filed: January 9, 2013
Author of Opinion: Hadlock, J.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

Rules

I. INTRODUCTION

Defendant-Respondent/Third-Party Plaintiff/Petitioner on Review Super One, Inc. ("Super One") respectfully submits this brief on the merits. The Court of Appeals concluded in its decision below, *PIH Beaverton, LLC v. Super One, Inc.*, 254 Or App 486, 294 P3d 536, *rev allowed*, 354 Or 61 (2013),[1] that the trial court had erred when it granted Super One summary judgment on the ground that Plaintiff-Appellant/Respondent on Review PIH Beaverton, LLC's ("Plaintiff") sole claim for negligent construction was time-barred under ORS 12.135.[2] That statute of repose pertinently provides that an action must be "commenced within 10 years from substantial completion * * * of such construction, alteration or repair of the improvement to real property." ORS 12.135(1). It further defines "substantial completion" as:

> "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

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[1] A copy of that decision is attached at App-1 to App-10 of Super One's Petition for Review.

[2] The version of ORS 12.135 applicable in this case is the one that was last amended in 1991. ORS 12.135 was also amended in 2009, Or Laws 2009, ch 485, § 3 & ch 715, § 1, but those amendments did not change the statutory language at issue in this case and are, therefore, not pertinent here. The amendments at Oregon Laws 2009, chapter 715, section 1, are also inapplicable because they apply only to "causes of action that arise on or after" their effective date, January 1, 2010. Or Laws 2009, ch 715, § 3. By that date, the trial court had already entered its general judgment in this case. All references to ORS 12.135 in this Petition are to the pre-2009 version, as amended in 1991.

> 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 this case, the Court of Appeals decided that an ORS 87.045 notice of completion, posted by the original owner of the hotel at issue in this case, was not a written acceptance within the meaning of the first clause of that definition. The Court of Appeals then decided that there was a genuine issue of material fact as to when the hotel in this case was substantially completed, and thus when the period of repose under ORS 12.135 began running, even though it is undisputed that the previous owner had posted a notice of completion, taken possession of the hotel and opened it for business more than ten years before Plaintiff commenced this action. Super One respectfully submitted that the Court of Appeals is wrong and requests that the court reverse the decision of the Court of Appeals and affirm the trial court's grant of summary judgment in Super One's favor.

II. LEGAL QUESTIONS AND PROPOSED RULES OF LAW

A. Legal Questions

1. Whether an owner of an improvement who posts an ORS 87.045 notice of completion has accepted the improvement in writing, within the meaning of ORS 12.135(3), so that the date of the posting is the date of "substantial completion" that starts the period of repose running under

ORS 12.135(1), when the owner also takes possession of the improvement at the same time and uses it for its intended purpose.[3]

2. In the absence of a written acceptance within the meaning of ORS 12.135(3), whether an owner of real property who has taken possession of the improvement and used it for its intended purpose, has accepted the completed construction within the meaning of ORS 12.135(3), so that the date of that acceptance is the date of "substantial completion" that starts the period of repose running under ORS 12.135(1).

B. Proposed Rules of Law

1. Under ORS 12.135(3), the posting of an ORS 87.045 notice of completion is an acceptance in writing of the construction of an improvement to real property, so that the date of posting of such a notice is the date of "substantial completion" that starts the period of repose running under

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[3] ORS 12.135(1) provides in full:

> "An action against a person, whether in contract, tort or otherwise, arising from such person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from such person having furnished the design, planning, surveying, architectural or engineering services for such improvement, shall be commenced within the applicable period of limitation otherwise established by law; but in any event such action shall be commenced within 10 years from substantial completion or abandonment of such construction, alteration or repair of the improvement to real property."

ORS 12.135(1), when the owner who posts the notice also takes possession of the improvement at the same time and uses it for its intended purpose.

2. In the absence of a written acceptance, an owner of real property accepts a completed construction within the meaning of ORS 12.135(3) when the owner takes possession of the improvement and uses it for its intended purpose, so that that date is the date of "substantial completion" that starts the period of repose running under ORS 12.135(1).

III. NATURE OF THE ACTION, RELIEF SOUGHT IN THE TRIAL COURT, AND NATURE OF TRIAL COURT JUDGMENT

Plaintiff filed this civil action for damages alleging that Super One, the general contractor, and Super One's subcontractors built Plaintiff's hotel in a negligent manner. Super One's Response Brief Supp ER 1-Supp ER 11 (Amended Complaint). On Super One's motion, the trial court granted summary judgment against Plaintiff on the ground that its sole claim for negligence was time-barred under ORS 12.135. Plaintiff's Opening Brief ER 31 to ER 33 (Letter Ruling). As a result, the trial court subsequently entered a General Judgment in Super One's favor and against Plaintiff. Plaintiff's Opening Brief ER 34-ER 35 (General Judgment).

IV. STATEMENT OF MATERIAL FACTS

For purposes of review, and without conceding their truth for other purposes, Super One accepts as true the following facts recited by the Court of Appeals in its decision, in the light most favorable to the Plaintiff, in

accordance with this court's standard of review under ORCP 47:

> "In December, 1995, * * * VIP'S Motor Inns, Inc., contracted with defendant Super One, a general contractor, to build a hotel and perform certain related site work. [TCF 172 (Declaration of Steve Johnson ("Johnson Dec") Ex A)]. Super One engaged the remaining defendants, as subcontractors, to perform specific aspects of the construction. On February 13, 1997, VIP'S filed a 'Notice of Completion' of the hotel pursuant to ORS 87.045, a statute related to the filing of construction liens. [Plaintiff's Opening Brief ER 15 (Johnson Dec ¶ 3); Super One's Response Brief Supp ER-12 (Affidavit of Porting of Notice of Completion) & Supp ER -13 (Notice of Completion)]. Also on February 13, 1997, Washington County issued a certificate for 'Temporary Occupancy from 2/13/97–3/3/97' for the hotel. [Defendant-Respondent/Petitioner on Review T. T. & L. Sheet Metal, Inc.'s ("T. T. & L.") Response Brief SER-22]. According to Steven Johnson, the then-president of VIP'S Motor Inns, Inc., posting and recording a notice of completion was always done "as a routine matter when a hotel was about to open." [Plaintiff's Opening Brief ER 15 (Johnson Dec ¶ 3)]. He explained that VIP'S sometimes "might even take possession of the property under a temporary certificate of occupancy" before the property was fully complete. [Plaintiff's Opening Brief ER 6 (Transcript of Deposition of Steve Johnson ("Johnson Tr") 37)]. Here, the parties agree that VIP'S did, in fact, begin accepting guests and operating the hotel on or around February 13, 1997. [Plaintiff's Opening Brief 5].
>
> "Regarding the status of the hotel's construction in early 1997, Johnson testified that he did not 'have an independent recollection of exact dates,' but said that he did "not believe [defendants] had completed their work as of [February 13].' [Plaintiff's Opening Brief ER 5 (Johnson Tr 36)]. Johnson asserted that he knew that 'construction efforts and work by Super One on the job site' continued even after the contractors had submitted all pay applications 'because work just needed to be done. Things needed to be completed.' [*Id.*] Johnson further testified that he specifically recalled 'there being quite a bit of work to be done between ourselves in order to * * * complete the project.' [Plaintiff's Opening Brief ER 10 (Johnson Tr 54)]. When asked if particular contractors had performed work after February 13, 1997, Johnson testified that he knew 'for a fact' that

Super One had. [Plaintiff's Opening Brief ER 12 (Johnson Tr 56)]. He explained further:

> "'To the best of my recollection, specifically, there was work to do at the back of the property having to do with storm drainage and wetlands * * * [n]ot after the building itself was completed[,] * * * [but] after we took possession and occupied and opened for business." [*Id.*]
>
> "Johnson did not 'have a specific recollection of individual items as to the structure,' as opposed to the storm-drainage and wetlands work, that were left to be done after February 13, 1997, but reiterated that the company's 'typical practice and experience was to have quite a bit of work still left to do' after the initial occupancy, given that it 'usually pushed very, very, hard to get into possession and open for business as soon as possible.' [Plaintiff's Opening Brief ER 13 (Johnson Tr 57)].

PIH Beaverton, 254 Or App at 491-93 (footnotes omitted) (citations to the record added).

The parties do not dispute that VIP'S Motor Inns, Inc. ("VIP'S") did not sign a Certificate of Substantial Completion, as contemplated in its American Institute of Architects standard-form construction contract with Super One. Plaintiff's Opening Brief 4. Johnson has declared that he "considered construction of the Hotel by Super One to be complete once all Washington County approvals were obtained, a final certificate of occupancy issued, and Super One completed all work required under the contract for construction of the Hotel." Plaintiff's Opening Brief ER-15 (Johnson Dec ¶ 3). Washington County issued its Notice of Completion of Final Inspection Requirements and Certificate of Occupancy for the hotel on September 24, 1997. TCF 172

(Johnson Dec Ex C).

Plaintiff bought the hotel from VIP'S in 2006. TCF 172 (Declaration of Gregory W. Clay ¶ 3). Plaintiffs filed its Complaint in this action on May 23, 2007, less than 10 years after September 24, 1997, when Washington County issued its Notice of Completion of Final Inspection Requirements and Certificate of Occupancy, but more than 10 years after February 13, 1997, VIP'S posted its notice of completion and opened the hotel for business on.

V. SUMMARY OF THE ARGUMENT

Under ORS 12.135, Plaintiff was required to have commenced its suit within ten years from "substantial completion" of the hotel. "[S]ubstantial completion" is defined as the date on which the contractee "accepts in writing" the "construction * * * of the improvement as having reached that state of completion when it may be used or occupied for its intended purpose" or, if there is no written acceptance, the date of "acceptance of the completed construction * * * of such improvement." ORS 12.135(3).

To "accept" is "to receive with consent" or "assent to the receipt of." *Webster's Third New Int'l Dictionary* 10 (unabridged ed 2002) [hereinafter "*Webster's*"]. To "accept in writing" within the meaning of ORS 12.135, therefore, is to receive with consent in writing, or assent in writing to the receipt of, the improvement as having reached that state of completion when it may be used or occupied for its intended purpose.

Under Oregon's Construction Lien Law, an owner may only post a notice of completion, "[w]hen all original contractors employed on the construction of an improvement have substantially performed their contracts[.]" ORS 87.045(2). The notice triggers the time in which those contractors and others have to perfect their liens in order to be paid. ORS 87.045(4), ORS 87.035(1). Here, VIP's posted its notice of completion, took possession of and occupied the building and opened for business as a place of accommodation to the public at large, all around the same day. It would be incongruous to hold that that notice operated only to start the time running for them to perfect their liens so that they may be paid, but not to start the time running for when VIP's or its successors may sue those contractors, when VIP's had in fact opened the hotel's doors to paying guests. Viewed objectively, under the totality of all the facts, even in the light most favorable to Plaintiff, the only reasonable conclusion that can be drawn is that the notice was VIP'S written assent to its receipt of the hotel as "having reached that state of completion when it may be used or occupied for its intended purpose." ORS 12.135(1) The hotel reached "substantial completion" when VIP'S posted the notice on February 13, 1997, and the period of repose started running under ORS 12.135(1) that same day.

Alternatively, under the second clause of ORS 12.135(3), "substantial completion" may also occur in the absence of a writing, namely, on "the date of acceptance of the completed construction, alteration or repair of *such*

improvement by the contractee." (emphasis added).

Contrary to the Court of Appeals, that definition does not require "total completion" or acceptance of "construction * * * that actually has been 'completed.'" *PIH Beaverton*, 254 Or App at 496. It makes no linguistic or logical sense to define "substantial completion" to require "total completion." Rather, the word "such" in the definition operates to incorporate from the first clause of ORS 12.135(3) the qualification that the improvement need only have "reached that state of completion when it may be used or occupied for its intended purpose." That interpretation is supported by legislative history.

The representative of the proponent of the bill who drafted the specific amendment that is now ORS 12.135(3), defining "substantial completion," explained to both the House and Senate committees responsible for considering the bill that the time for bringing claims starts when the owner accepts and takes responsibility from the contractor for the maintenance, alteration, and repair of the improvement. The Court of Appeals in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App 24, 33, 295 P3d 62 (2012), *rev allowed*, 354 Or 61 (2013), whose review is consolidated with this one, mistakenly believed that his testimony was addressed solely to the non-written acceptance portion of ORS 12.135(3). However, he did not distinguish between the written acceptance and the non-written acceptance portions of ORS 12.135(3). Indeed, he did not acknowledge any difference at all. The

legislative history does not indicate that the legislature understood written and non-written acceptance under ORS 12.135(3) to mean acceptance of two different stages of completion. Substantial completion by non-written acceptance and substantial completion by written acceptance are both satisfied by an acceptance of a construction that has reached the point where it may be used and occupied as intended. That point was reached in this case when VIP'S opened the hotel to paying guests around February 13, 1997, more than ten years before Plaintiff commenced its action here. Accordingly, Plaintiff's action is time-barred under ORS 12.135.

VI. ARGUMENT

At issue in this case is whether the Court of Appeals erred in reversing the trial court's grant of summary judgment under ORCP 47, in favor of Super One's and against Plaintiff, on the ground that Plaintiff's claim is time-barred under ORS 12.135. "On review, this court examines the summary judgment record, in accordance with ORCP 47 C, to determine whether the pleadings and any supporting documents on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." *Bresee Homes, Inc. v. Farmers Ins. Exch.*, 353 Or 112, 114, 293 P3d 1036 (2012).

A. An ORS 87.045 Notice of Completion Suffices as an Written Acceptance under ORS 12.135(3) When The Owner Uses and Occupies the Improvement for its Intended Purpose

The first question on review is whether Plaintiff's hotel had reached "substantial completion" around February 13, 1997, when it posted and recorded an ORS 87.045 notice of completion. ORS 12.135(3) defines "substantial completion" as, among other things, "the date when the contractee accepts in writing the construction * * * of the improvement * * * as having reached that state of completion when it may be used or occupied for its intended purpose,"

Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified by *State v. Gaines,* 346 Or 160, 206 P3d 1042 (2009), Oregon courts interpret statutes by engaging in three levels of analysis, with the "paramount goal of discerning the legislature's intent." *Gaines,* 346 Or at 171. First, the court examines the text and context of the statute. *Id.* at 171. Here, "words of common usage typically should be given their plain, natural, and ordinary meaning." *PGE,* 317 Or at 611. Second, the court will consider legislative history proffered by a party, "even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." *Gaines*, 346 Or at 172. The court considers legislative history "only for whatever it is worth—and what it is worth is for the court to decide." *Id.* at 173. Third, and finally, "if the legislature's intent remains

unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* at 172.

In this case, the plain, natural and ordinary meaning of the term "accept" is "to receive with consent" or "assent to the receipt of." *Webster's* at 10. The phrase beginning with "accept in writing" in ORS 12.135, therefore, plainly, naturally and ordinarily means to receive with consent in writing, or assent in writing to the receipt of, an improvement as having reached that state of completion when it may be used or occupied for its intended purpose. Here, Super One respectfully submits that VIP'S effectively received its hotel with consent, and assented to its receipt, in writing, that its hotel had reached a state of completion that it may be used and occupied for its intended purpose when it posted and recorded its ORS 87.045 notice of completion, took control of the building and opened its doors to the public.

Under Oregon's Construction Lien Law, an ORS 87.045 notice triggers the time in which contractors employed on the construction and others have to perfect their liens in order to be paid. ORS 87.045(4), ORS 87.035(1). An owner may post a notice of completion only when all those original contractors "have substantially completed their contract." Under OEC 311(1)(x),[4] VIP'S is

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[4] OEC 311 provides:

(continued on next page)

presumed to have obeyed the law. In addition, VIP'S explicitly represented in its notice that the "building, structure, and other improvements * * * have been completed." Super One's Response Brief Supp ER-13 (VIP'S Notice of Completion). It also swore in an affidavit dated February 13, 1997, which it recorded along with the notice, that the building was "now completed." Super One's Response Brief Supp ER-12 (VIP'S Affidavit of Posting of Notice of Completion).

The Court of Appeals concluded as a matter of law that, "Nothing about [an ORS 87.045 notice of completion] purports to constitute 'acceptance' of an improvement to real property." *PIH Beaverton*, 254 Or App at 497. The court went on to state that, "even if the notice could be viewed as an acceptance of something, it would not necessarily be an acceptance that the hotel project was sufficiently complete to 'be used or occupied for its intended purpose,' as the first clause of ORS 12.135(3) requires." *Id.* Super One respectfully submits that the Court of Appeals is wrong. It is undisputed that VIP'S stated in its recorded and posted notice, which it intended for its contractors, that the improvements "have been completed" and swore in its accompanying affidavit

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"(1) The following are presumptions:

* * * * *

"(x) The law has been obeyed."

that was also recorded, that the building was "now completed." It is also undisputed that around the same time as it posted the notice to its contractors, it used and occupied the hotel for its intended purpose, even though some work still needed to be done, by opening for business. In light of VIP's statements in its notice and affidavit, and the fact that VIP's had opened the hotel's doors to paying guests, it would be incongruous to hold that VIP'S notice operated only as a written notice that the contractors had finished enough of their work to start the time running for them to perfect their liens so that they may be paid, but not as VIP'S acceptance of the hotel as complete enough to start the time running for when VIP's or its successors may sue those contractors.

Viewed objectively, under the totality of all the facts, even in the light most favorable to Plaintiff, the only reasonable conclusion that can be drawn is that VIP's notice sufficed as its written assent to its receipt of the hotel as "having reached that state of completion when it may be used or occupied for its intended purpose." ORS 12.135(1). Accordingly, the hotel reached "substantial completion" when VIP'S posted the notice on February 13, 1997, such that the period of repose under ORS 12.135(1) started running that same day and expired before Plaintiff commenced this action.

B. In the Absence of a Written Acceptance, Substantial Completion under ORS 12.135(3) Merely Requires Acceptance of a Completed Construction That Has Reached the Point Where It May be Used or Occupied for Its Intended Purpose and Not Total Completion

In the alternative, the second clause of ORS 12.135(3), defines

"substantial completion," in the absence of a written acceptance, to mean "the date of acceptance of the completed construction, alteration or repair of *such* improvement by the contractee." (emphasis added). The Court of Appeals below read this definition to mean acceptance of construction that "actually has been 'completed,'" without "any notion of less-than-total completion." *PIH Beaverton*, 254 Or App at 496. The Court of Appeals, in short, interpreted "*substantial* completion" to require "*total* completion," an interpretation that the court itself suggests is "counterintuitive." *Id.* Super One respectfully submits that it is not only "counterintuitive," but makes no linguistic or logical sense as well.

"Substantial completion" does not and cannot mean "total completion" because the legislature used the word "such" to describe the improvement in the second clause of ORS 12.135(3). The plain, natural, ordinary meaning of that term is "having a quality already or just specified" or "previously characterized or specified." *Webster's* 2283. The word "such" is "used to avoid repetition of a descriptive term." *Id.* Therefore, its presence in the second clause of ORS 12.135(3) operates to incorporate from the first clause of that definition the qualification that the improvement need only have "reached that state of completion when it may be used or occupied for its intended purpose." Thus, VIP'S "accepted" the hotel, even in the absence of a writing, when it used an occupied the building for its intended purpose, a hotel, when it opened for

business on February 13, 1997. This interpretation is supported by legislative history.

The impetus for ORS 12.135 came from the Associated General Contractors of America, Inc. ("AGCA"), a trade association. *See Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Or 243, 248, 611 P2d 1158 (1980) (so recognizing). The original bill, House Bill (HB) 1259 (1971), attached at App 1-2, provided that the limitations period would commence at "substantial completion of the improvement to real property" or "acceptance of the completed improvement by the contractee, whichever is earlier." HB 1259, § 2(1) . The bill defined "substantial completion" as "the date when the contractee accepts 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." *Id.* § 2(2) . At an April 9, 1971, work session of the Subcommittee on Financial Affairs of the House Committee on State & Federal Affairs, the Subcommitee adopted the proposal of Representative Donald Stathos to amend the definition of "substantial completion" to require a written acceptance. Minutes, House Committee on State & Federal Affairs, Subcommittee on Financial Affairs, HB 1259, Apr 9, 1971(attached at App 3). Another amendment around that time also deleted the language that provided that the limitations period may commence at "acceptance of the completed improvement by the contractee." House

Amendments to House Bill 1259, House Committee on State & Federal Affairs, Apr 16, 1971 (attached at App 4-5); HB 1259 Engrossed (1971) (attached at App 6-8).

Dissatisfied with these and other amendments, the AGCA proposed new amendments to the bill, authored by its counsel, Preston Hiefield. Minutes, House Committee on State & Federal Affairs, Subcommittee on Financial Affairs, HB 1259, Apr 26, 1971 (attached at App-9); Minutes, House Committee on State & Federal Affairs, Subcommittee on Financial Affairs, HB 1259, May 10, 1971 (attached at App 10); *see also Securities-Intermountain*, 289 Or at 249 (recognizing amendments). Mr. Hiefield's amendments, dated May 7, 1971,[5] contained the exact definition of "substantial completion" as it exists in ORS 12.135 today. House Amendments to Printed Engrossed House Bill 1259, House Committee on State & Federal Affairs, May 17, 1971 (typewritten) (attached as App 11 to 12); House Amendments to Printed Engrossed House Bill 1259, House Committee on State & Federal Affairs, May 17, 1971 (printed) (attached as App 13). It was Mr. Hiefield, therefore, who added the second clause to the definition of "substantial completion" to allow for an acceptance without a writing, in response to Representative Stathos' earlier amendment requiring a written acceptance. Mr.

[5] The May 7, 1971, date may be found at the bottom of App 12.

Hiefield's amendments were enacted in their entirety. *Compare* House Amendments to Printed Engrossed House Bill 1259, House Committee on State & Federal Affairs, May 17, 1971 (typewritten) (attached as App 11 to 12) *with* HB 1259 Enrolled (1991) (attached as App 14 to 15).

Mr. Hiefield addressed his amendments to both the Subcommittee on Financial Affairs of the House Committee on State & Federal Affairs and the Senate State and Federal Affairs Committee and explained that the time for bringing claims starts when the owner accepts and takes responsibility from the contractor for the maintenance, alteration, and repair of the improvement. Tape Recording, House State and Federal Affairs Committee, Subcommittee on Financial Affairs, HB 1259, May 10, 1971, Tape 16, Side 2 (statement of Preston Hiefield); Tape Recording, Senate State and Federal Affairs Committee, HB 1259, May 24, 1971, Tape 14, Side 2 (statement of Preston Hiefield). He explained that that time was when the contractor's typical one-year warranty period started and distinguished it from an owner's full acceptance of the completed construction at the end of the one-year warranty period. Tape Recording, House State and Federal Affairs Committee, Subcommittee on Financial Affairs, HB 1259, May 10, 1971, Tape 16, Side 2 (statement of Preston Hiefield).

In *Sunset Presbyterian*, whose review is consolidated with this one, the Court of Appeals characterized Mr. Hiefield's testimony as describing the non-

written acceptance portion of ORS 12.135(3). 254 Or App at 33. Based on that characterization, the court concluded that:

> "if the contractee does not accept in writing that the improvement or a designated portion thereof has reached the state of completion at which "it may be used or occupied for its intended purpose," then substantial completion for purposes of beginning the repose period under ORS 12.135 occurs at a later point, *viz.*, when the contractee accepts the 'completed construction, alteration or repair of the improvement.' As the proponents of ORS 12.135 explained, the latter point is reached 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. In other words, in contrast with written acceptance, under which the contractee and contractor may share responsibility for the maintenance, alteration, and repair of the improvement, acceptance of the completed construction, alteration, or repair of the improvement occurs when there is no shared responsibility for those tasks."

Id. at 34. The problem with the court's conclusion is that, in his appearances before the House and Senate committees, Mr. Hiefield did not distinguish between the written acceptance and the non-written acceptance portions of ORS 12.135(3) and certainly did not indicate that they occurred at different times. Indeed, he simply did not distinguish between written and non-written acceptances at all.

Thus, Mr. Hiefield's testimonies do not support the Court of Appeals conclusion in *Sunset Presbyterian* that the legislature intended written and non-written acceptances under ORS 12.135(3) to mean acceptances of two different stages of completion. It also does not support the Court of Appeals decision in

this case that substantial completion by non-written acceptance requires an acceptance of a totally complete building. Substantial completion by non-written acceptance, similar to substantial completion by written acceptance, is the date that an owner accepts a construction as having reached the point where it may be used and occupied as intended. As described by Mr. Hiefield, that is when the owner assumes responsibility for the maintenance, alteration, and repair of the building. Super One respectfully submits that that point is unequivocally reached when an owner *in fact* uses and occupies a building for its intended purpose, as was the case here when VIP'S opened the hotel to paying guests around February 13, 1997, more than ten years before Plaintiff commenced its action.

Plaintiff may argue that Mr. Hiefield characterized substantial completion as the time typically when little or no work is left to be done. But this case does not involve that typical situation. As VIP's President stated, VIP'S "usually pushed very, very, hard to get into possession and open for business as soon as possible," even when there was "quite a bit of work still left to do." [Plaintiff's Opening Brief ER 13 (Johnson Tr 57)]. That fact that there was work that remained to be done does not change the fact that VIP'S had in fact occupied the building and opened it to the public. It was VIP'S that ran that business, not Super One, so it cannot be gainsaid, as Plaintiff insists, that VIP's had not accepted the building from Super One.

To the extent the court resorts to maxims of statutory construction, the maxim recognized by the Court in *Securities & Exch. Comm'n v. C. M. Joiner Leasing Corp.*, 320 US 344, 350, 64 S Ct 120, 123, 88 L Ed 88 (1943), that "courts will construe the details of an act in conformity with its dominating general purpose," supports the interpretation that substantial completion in the absence of a written acceptance requires only an acceptance of building that is complete enough to be used or occupied for its intended purpose. The contrary requirement that an unwritten acceptance must be an acceptance of a totally complete building fails to provide the bright-line test that is the general purpose of a statute of repose. Simply put, there is no objective criteria available to identify when an owner is giving such an unwritten acceptance. A municipal final certificate of occupancy such as the one in this case does not help because it is no indicia of an *owner's* acceptance, but merely that of a municipality that a building has passed all final inspections.

VII. CONCLUSION

For all of the reasons discussed above, the court should reverse the decision of the Court of Appeals and affirm the judgment of the trial court that Plaintiff's sole claim of negligence against Super One is time-barred under ORS 12.135.

DATED: September 26, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,333.

Type Size

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)(g).

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CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that, on the date set forth below, I filed the foregoing **DEFENDANT-RESPONDENT/THIRD-PARTY PLAINTIFF-APPELLANT/PETITIONER ON REVIEW SUPER ONE, INC.'S BRIEF ON THE MERITS** using the electronic filing system provided by the Oregon Judicial Department.

I further certify that, on that same day, I used the electronic service function of that system to serve the same document on:

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