FILED September 12, 2013 03:12 PM
Appellate Court Records

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,
and

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; WOODBURNE MASONRY, an Oregon corporation; SHARP & ASSOCIATES, INC., an Oregon corporation; and PORTLAND SHEET METAL WORKS, INC., an Oregon corporation,
Defendant-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,
Respondent on Review,
v.

BROCKAMP & JAEGER, INC., 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; and PORTLAND SHEET METAL WORKS, INC., an Oregon corporation,
Defendants-Respondents,
And

September 2013

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
A146006
S061185

PETITIONER ON REVIEW BROCKAMP & JAEGER, INC.'S BRIEF ON THE MERITS

Review of the Decision of the Oregon Court of Appeals on Appeal
From a Judgment of the Circuit Court for Washington County,
The Honorable Donald R. Letourneau

Opinion Filed:	December 12, 2012
Author of Opinion:	The Honorable Rex Armstrong
Joined By:	The Honorable Rick T. Haselton
	The Honorable Rebecca A. Duncan

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APPENDIX

I. LEGAL ISSUE PRESENTED ON REVIEW

When a construction contract contains an accrual provision that states "any applicable statute of limitations shall begin to run no later than the date of substantial completion," when does the statute of limitations for construction defect claims begin to run? Is the triggering event substantial completion, or is a Certificate of Substantial Completion required?

II. PROPOSED RULE

Petitioner Brockamp & Jager, Inc. ("Brockamp") proposes that the Court ultimately conclude as follows:

The event of substantial completion is sufficient to trigger the accrual provision in the AIA contract between the parties. A Certificate of Substantial Completion is evidence of when the event occurred. However, a Certificate of Substantial Completion is not required to trigger the accrual provision if there is undisputed evidence that substantial completion occurred by a specific date, because it is clear when the owner began to use the building for its intended use.

Substantial completion is an event. It is an event that occurs during construction, and it occurs when the work is complete enough so that the owner can occupy the buildings or otherwise use them for their intended use. A Certificate of Substantial Completion is a document which evidences when the event has occurred, however the document itself is not the only way to

demonstrate when the event occurred, nor is it a pre-requisite for the accrual of any statute of limitations commencing at substantial completion.

The accrual provision of the contract at issue states that the statutory commencement period for acts or failures to act that occur prior to substantial completion begins to run at substantial completion. In light of the abundant, uncontested evidence submitted to the trial court that the Church was using the building as intended, a Certificate of Substantial Completion is not required for the trial court to determine that substantial completion occurred in 1999. The applicable statute of limitations for construction defect claims, therefore, began to run in 1999, as indicated by the evidence submitted by Brockamp. The trial court's Judgment of Dismissal, should therefore be affirmed.

III. STATEMENT OF THE CASE

This case concerns the Sunset Presbyterian Church (the "Church") in Portland, Oregon. Brockamp acted as general contractor for the construction of Phase 1 of the Church, which consisted of separate buildings containing administrative offices and classrooms.[1]

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[1] A sanctuary and other amenities were added in later phases. Brockamp was not involved in the construction of later phases.

In 1998, the Church negotiated a contract[2] with Brockamp using an AIA standard form Document A111, 1987 Edition (hereafter "AIA 111"). SER 1-14. The Church negotiated the provisions of its contract with Brockamp. SER 15-23. AIA 111 adopts and incorporates by reference the 1987 Edition of AIA 201 – General Conditions of the Contract for Construction (hereafter "AIA 201, 1987"). SER 1. Together with other documents listed in the AIA 111, these two documents comprise the contract between the Church and Brockamp. TCF 583-635. Ankrom Moisan Associated Architects (hereafter "Ankrom Moisan") were the architects on the project. Id.

Construction occurred in 1998 and 1999. Pursuant to the terms of the Contract, the work was to commence on January 13, 1998, with Substantial Completion set for "[no] later than January 29, 1999." SER 2-3.

In February of 1999, Brockamp issued its warranty for the work, which ran "for a period of one (1) year beyond the substantial completion date of February 7, 1999." SER 29. Punch list work on the buildings occurred throughout February of 1999. SER 24-28. On February 14, 1999, the Church held its first service in the newly completed construction. SER 33. In March of 1999, the Church held a dedication service to celebrate completion of its new home. SER 30-38. On May 28, 1999, Washington County issued a Notice of

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[2] Brockamp actually entered into two separate contracts -- one for a building package and one for a site work package. Only the building package contract is at issue in this suit. However, both contracts were closed out at the same time.

Completion of Final Inspection Requirements and Certificate of Occupancy. ER 13.

During June of 1999, Brockamp submitted an application for payment that indicated its work was 100% complete. ER 14; SER 39-42. During July of 1999, Ankrom Moisan approved final payment to Brockamp. Id. In November of 1999, Ankrom Moisan approved closeout of Brockamp's contract. ER 19-20. In December of 1999, the Church approved final payment to Brockamp. Id. The 1-year warranty provided by Brockamp expired in February of 2000. SER 29.

Having been notified that the Church intended to file suit against Brockamp, Brockamp filed its Complaint against its subcontractors in March of 2009.[3] Shortly thereafter, also in March of 2009, the Church filed its Complaint against Brockamp.

Brockamp filed a Motion for Summary Judgment asserting that all of the Church's claims were time-barred years before the Church's claims were filed[4]

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[3] Brockamp's claims were filed in anticipation of a construction defect suit by the Church, out of concern that the 10-year statute of ultimate repose was approaching.

[4] For the purposes of the original motion and any appeal, there is no need for the Court to determine whether the statute of limitations for negligence claims arising from construction defect is 2 years pursuant to ORS 12.110 and *Abraham v. T. Henry,* 350 Or 29, 249 P3d 534 (2011), or 6 years pursuant to ORS 12.080(3). Whether the applicable time period is 2 years or 6 years, it had elapsed years prior to the time the Church filed suit, nearly 10 years after substantial completion occurred.

because (pursuant to the accrual clause in the written contract) the claims had accrued at the time substantial completion of the Church occurred in 1999. TCF 693-708. Judge Letourneau agreed and dismissed all of the Church's claims. ER 24-27; ER 31-37.

On December 12, 2012, the Court of Appeals reversed Judge Letourneau's decision with respect to when the Church's claims accrued because no Certificate of Substantial Completion could be found, even though there was ample evidence showing that substantial completion and final completion occurred in 1999. *Sunset Presbyterian Church v. Brockamp & Jaeger*, 254 Or App 24, 29-30, 295 P2d 62 (2012). App 73-86.

IV. SUMMARY OF ARGUMENT

The trial court did not err when it granted summary judgment. The written contract between the Church and Brockamp specifically contemplated that the statutory limitation period for claims relating to the construction of the Church would commence as agreed. The Church and Brockamp agreed that "acts or failures to act" that occurred during construction would commence to run at substantial completion of the Church.

The Church asked the trial court to create legal fiction by determining that the project never reached the stage of substantial completion, simply because no Certificate of Substantial Completion could be located after this litigation began -- more than 10 years after the project was completed.

Brockamp submitted abundant, uncontested evidence that substantial completion and final completion of the Church took place in 1999. Therefore, the trial court correctly determined that the statute of limitations on all of the Church's claims expired prior to the filing of the Church's Complaint in 2009.

V. ARGUMENT

A. The Statute of Limitations on All of the Church's Claims Expired Well Before the Church Filed Suit.

1. According to the plain language of the accrual clause, it applies to "All Statutes of Limitations" for "Any Alleged Cause of Action," and therefore includes tort claims.

The accrual provision at issue states,

> "13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD
>
> 13.7.1 As between the Owner and Contractor:
>
> .1 Before Substantial Completion. As to acts or failures to act occurring prior the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion."

ER 9. According to the plain language of the contract, "all applicable statutes of limitations shall commence to run" not later than substantial completion of the Church. The contract is not limited to claims for breach of contract only. It clearly states, "any alleged cause of action" accrued not later than substantial completion.

The contract between Brockamp and the Church defines substantial completion in AIA 201, 1987. Section 9.8 SUBSTANTIAL COMPLETION states,

> "9.8.1 Substantial Completion is the stage in the process of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use."

ER 5.

> "9.8.2 When the Contractor considers that the Work, or a portion therof 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. The Contractor shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. 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. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not in accordance with the requirements of the Contract Documents, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. The Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion. 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, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial

> Completion of the Work or designated portion thereof unless otherwise provided in the Certificate 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.
>
> 9.8.3 Upon Substantial Completion of the Work or designated portion therof and upon application by the Contractor and certification by the Architect, the Owner shall make payment reflecting adjustment in retainage, if any, for such Work or portion thereof as provided in the Contract Documents."

ER 5-6.

According to the contract, substantial completion occurs when "the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use." Once this occurs, the contractor asks the Architect to inspect the work and certify its substantial completion for acceptance by the Owner. ER 5-6 (provisions 9.8.2 and 9.8.3). Notably, construction does not need to be 100% complete to be considered substantially complete. This is clear from the directive that the architect "shall fix the time within the Contractor shall finish all items on the list accompanying the Certificate."

From the definition of "substantial completion" in the contract, it is clear that substantial completion is functionally derived. It occurs when the building can be occupied or put to its intended use. Generally, the intended use of a building is reached through its availability for occupancy; so, these two items are often one and the same.

Substantial completion then triggers a variety of events. Any warranties issued typically begin to run at substantial completion. The punch list process begins as the contractor addresses repair and/or completion of the minor issues that are typical of all construction projects. Responsibility for utilities will be transferred from contractor to owner at that time, and a Final Inspection and/or Certificate of Occupancy is issued by the building department. The contract paperwork is then finalized triggering the release of retainage and lien rights. At that point, the building is 100% complete and the contract is closed out.

As evidenced by the documents submitted, the Church was both substantially complete and 100% complete in 1999. Substantial completion of Brockamp's work on the Church occurred in February 1999. SER 29; SER 33. The Church began to occupy the buildings in February of 1999; the warranty for Brockamp's work began to run in February 1999; and the warranties for the subcontractors' work (with one or two exceptions) also began to run in February 1999. Id. Punch list work similarly began to occur in January and February of 1999. SER 24-28; TCF 645-687. By February of 1999, the Church was holding services in the completed Phase 1 buildings. SER 33. On the weekend of March 13, 1999, the Church held a widely-advertised open house for the community. SER 30-38.

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In May of 1999, the Washington County Building Department issued a Notice of Completion of Final Inspection Requirements and Certificate of Occupancy. ER 13.

While none of the parties have been able to locate a Certificate of Substantial Completion, the record is clear that substantial completion occurred in 1999.

In fact, the Church was 100% complete in 1999. By June of 1999, Brockamp submitted an application for payment that indicated its Phase 1 work was 100% complete. ER 14. During July of 1999, Ankrom Moisan approved final payment to Brockamp. Id. Ankrom Moisan approved closeout of the contract by November 1999. ER 19-20. The 1 year warranty provided by Brockamp expired in February of 2000. SER 29.

All statutes of limitations therefore began to run in 1999. Regardless of whether a 6-year statute of limitations applies to tort claims for construction defect pursuant to ORS 12.080(3) or a 2-year statute of limitations applies pursuant to ORS 12.110, the claims all expired in 2005.[5]

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[5] Product liability claims are governed by ORS 30.905. *Gladhart v. Oregon Vineyard Supply Co.,* 164 Or App 438, 994 P2d 134 (1999) overturned on other grounds. In the context of the "eight plus two" analysis that applies to the statute of limitations, any claims for product liability expired 2 years after substantial completion.

a. Under Oregon law, the parties to a contract may stipulate to a time limitation for claims. Such limitations are upheld so long as they are reasonable.

Oregon courts have not yet construed this particular provision of AIA 201, 1987. However, beginning in 1905 with *Ausplund v. Aetna Indemnity Co.*, 47 Or 10, 81 P 577, *on reh'g*, 82 P 12 (1905), Oregon courts have recognized that parties to a contract may stipulate to a shorter time limitations for claims arising out of the contract, and that the agreed-upon limitation will be upheld so long as it is reasonable.

The Oregon courts reiterated its adherence to this principle in *Biomass One, LP v. S-P Construction*, 103 Or App 521, 799 P2d 152 (1990). In *Biomass One*, the Court of Appeals considered a 1 year time limit specified in a contract between a general contractor and a subcontractor was enforceable. *Biomass One* concerned the construction of a power plant. Biomass One hired S-P Construction ("S-P") to act as the general contractor of the power plant. S-P subcontracted with BHS to manufacture and install a fuel handling system for the power plant.

Biomass One brought suit against S-P alleging that S-P breached its contract for construction. S-P then filed a third-party claim against BHS alleging that BHS was at fault for any defects in the fuel system.

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The contract between S-P and BHS contained a clause entitled "Limitation of Time for Commencement of Claims." The clause stated,

> ". . . any claim or cause of action of any kind arising out of or connected with this Contract, directly or indirectly, shall further be barred . . . unless asserted by the commencement of an action within one year after any inaction or omission or the occurrence of any matter to which such claim or cause of action relates."

Biomass One, 103 Or App at 525. On a motion for summary judgment, the trial court determined that the paragraph required S-P to bring its action within 1 year after BHS ceased performance and granted summary judgment to BHS. S-P appealed.

The Court of Appeals affirmed, citing *Ausplund* for the principle that a statute of limitations can be cut off by a contract which requires that claims be brought within a shorter time period.

A number of courts around the country that have addressed this specific provision in the AIA 201, 1987, which eliminates the discovery rule by mandating an accrual date for the cause of action, have upheld the provision. *Fed'l Ins. Co. v. Konstant Architecture Planning, Inc.*, 388 Ill App3d 122, 902 NE2d 1213 (2009) (the relevant provision in "the AIA contract in this case controlled the accrual date of the applicable statute of limitations and precluded application of the discovery rule."); *Trinity Church v. Lawson-Bell, et al.*, 394 NJ Super 159, 925 A2d 720 (2007) ("We conclude that plaintiff's complaint

was properly dismissed because it was filed beyond the statute of limitations which, by contract, commenced on the date of substantial completion of the construction project."); *Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc., et al.*, 2006 PA Super 12, 892 A2d 830 (2006) (The relevant AIA contract "language precludes application of the discovery rule; indeed, that is its obvious intent." And further, "the language is not restricted to contractual claims or claims arising from the agreement but encompasses all causes of actions generally."); *Schultz v. J.D. Cooper et al.*, 134 SW3d 618, 621 (KY 2003) ("The parties in this case made a deliberate election to replace that date [based on the discovery rule] with a date certain for the accrual of any action.").

According to Oregon case law, a court must generally construe contracts in a manner that gives effect to the contract. *Oregon Bank v. Nautilius Crane & Equipment Corp.*, 68 Or App 131, 146, 683 P2d 95 (1984) (courts avoid construction of an agreement that renders any part of it meaningless); *Public Market Co. of Portland v. City of Portland*, 171 Or 522, 565, *on reh'g*, 138 P2d 916, 130 P2d 624 (1942) (a contract is to be construed as seeking a legal rather than illegal object). *See also, Godlove v. Russell*, 134 Or 445, 447, 293 P 936 (1930) (construction that makes contract valid and performance possible will be preferred to one making it void or performance impossible or meaningless); *Thompson Optical Institute v. Thompson*, 119 Or 252, 237 P 965 (1925) (where a contract is fairly open to two constructions and where one construction would

be lawful and the other unlawful, the former must be adopted); ORS 42.230 (where there are several provisions or particulars, such construction is, if possible to be adopted as will give effect to all).

If allowed to stand, the Court of Appeals's decision would render the accrual provision meaningless. By inserting a certificate requirement where none exists, the court would essentially nullify the parties' intent to contractually eliminate any discovery rule.

The statute of limitations for the Church's negligence, negligence per se, and nuisance claims is 6 years (at the most). The parties agreed by contract to eliminate any discovery rule which may otherwise have applied to these claims. Therefore, the latest the statute of limitations on the Church's claims for negligence, negligence per se, and nuisance could have expired was in 2005.

B. A Certificate of Substantial Completion Should Not Be Required to Determine When Substantial Completion Occurred.

By focusing exclusively on the Certificate of Substantial Completion and ignoring the plain language of the contract, the Court of Appeals overlooked a veritable mountain of evidence, including all of the undisputed facts submitted by Brockamp relating to the timing of the use of the Church.

The Church asked the court to conclude that all of this evidence should be overlooked because the parties are unable to produce a Certificate of Substantial Completion more than 10 years after substantial completion

occurred. This is akin to asking the court to conclude that because a person cannot provide a copy of her birth certificate, there is no proof that she was ever born, even if she is walking and talking in the courtroom.

The Church's reasoning not only defies all logic and common sense, it is unsupported by Oregon law.

1. There is no question that substantial completion occurred in 1999.

'Substantial completion' is defined as:

> "... the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use."

ER 5. According to the plain language of the contract, 'substantial completion' is an event that occurs during construction. It occurs when the work is complete enough so that the owner can occupy the buildings, or otherwise use them for their intended purpose.

Although there is no case law on this issue in Oregon, other jurisdictions have recognized the AIA definition of substantial completion. "Substantial completion has a definite meaning in the construction industry." *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 NJ 479, 500, 610 A2d 364 (1992), *overruled on other grounds by, In re Tretina Printing, Inc. v. Fitzpatrick & Associates., Inc.*, 135 NJ 349, 640 A2d 788 (1994). The American Institute of Architects (AIA) distributes widely-used forms that define and use the concept

of "substantial completion." *See, Perini, supra*, 129 NJ at 500, (citing Justin Sweet, Sweet on Construction Industry Contracts: Major AIA Documents § 1.1 (1987)). As in the contract between the Church and Brockamp, substantial completion is defined by the AIA as the date when "construction is sufficiently complete ... so the owner can occupy or utilize" the building. *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 144 NJ 84, 675 A2d 1077 (1996).

AIA 201, 1987 explains the formal process by which the parties document their agreement that the work is substantially complete. When the contractor considers the work to be substantially complete, the contractor prepares and submits a punch list to the architect. ER 5-6. The contractor completes the punch list and asks the architect to inspect to determine if there is agreement that the work is substantially complete. Id. If the architect agrees, he prepares a certificate for the parties to sign. Id. The certificate evidences the date of substantial completion (which the architect has already agreed has occurred). Id.

From the plain language of the contract, it is clear that the event of substantial completion occurs independently of, and regardless of, whether any certificate is subsequently issued. The contract states,

> "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, shall establish the responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage

> to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion therof unless otherwise provided in the Certificate of Substantial Completion."

ER 6 (emphasis added).

The issuance of a certificate by the architect is not a condition that triggers substantial completion. The work must already be substantially complete for the architect to issue the certificate. By the same logic, the lack of a Certificate of Substantial Completion does not mean that the work was never substantially complete.

There is case law from other jurisdictions that have agreed that a Certificate of Substantial Completion issued by an architect does not preclude other evidence of substantial completion. Oregon runs the risk of being out of step with the many other jurisdictions that have concluded that statutes of limitations relating to work performed by a contractor prior to substantial completion accrue at substantial completion.

In *Holy Family Catholic Congregation v. Stubenrauch Associates, Inc.*, 136 Wis2d 515, 402 NW2d 382 (1987), APP 55, the Wisconsin Court of Appeals recognized that a certificate issued by an architect is evidence of when substantial completion occurred, but is not necessarily the only evidence. The issue in *Holy Family* was whether the congregation's claims were time-barred.

The court stated,

> "While we implicitly adopt the architect's definition of substantial completion, we reject the notion that the architect may unilaterally determine the [statute of limitations] six-year period's commencement. For the purposes of the statutory limit, it is the court, not the architect, who determines the date of substantial completion."

Id. at 524. The court determined that substantial completion occurred when the congregation first occupied the building for its intended use. As a result, the appellate court affirmed the trial court's ruling that the congregation's claims were time-barred. *Id.*

Similarly, in *Allen v. A&W Contractors, Inc.*, 433 So2d 839(La Ct App 1983), APP 63, the Court of Appeals of Louisiana refused to vacate an arbitrator's award based on a determination of substantial completion that differed from the date certified by the architect. The underlying contract in *Allen* was also an AIA contract. The *Allen* court stated,

> "We acknowledge, as we must, that the contract under consideration provides for execution by the owner's architect of a certificate of substantial completion which 'shall establish the Date of Substantial Completion ...'. We do not consider this provision to be sacrosanct if the facts show substantial completion at a date earlier than that certified by the owner's architect."

Id. at 841. Both *Holy Family* and *Allen* demonstrate that other courts have made the distinction between substantial completion <u>as an event</u> and a Certificate of Substantial Completion <u>as evidence</u> to demonstrate when

substantial completion occurred. Both courts determined that other evidence could be used to determine when substantial completion occurred. The *Holy Family* Court determined that evidence other than an architect's certificate could be considered by the court to pinpoint substantial completion for the express purpose of deciding when the statutory limitations period in that matter accrued.

Despite the lack of a certificate,[6] Brockamp has put forth abundant, undisputed evidence that substantial completion of Phase 1 occurred in 1999. SER 24-47. In 1999, the Church was occupying the buildings, holding services, and welcoming the community into its newly-constructed home. Id.; SER 30-38. Now, the Church asks the court to ignore these events and to ignore the terms of the agreement between the Church and Brockamp in favor of a tortured interpretation of both the provisions of the contract and Oregon case law.

Essentially, the Church asserts that 'substantial completion' is a legal construct that cannot occur without the certificate. This makes no sense and is unsupported by the plain language of the contract. The accrual provision pointedly does not mention that a Certificate of Substantial Completion must be

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[6] The evidence does not show that a Certificate of Substantial Completion was not issued. There was no evidence presented that the architect refused to issue a certificate. Testimony taken 10 years later demonstrated only that no one could recall. ER 11-12; ER 22. Mr. Feil's declaration states that he cannot recall whether a certificate was issued. ER 22. The certificate could have been obtained and simply lost in the intervening years. Nevertheless, other evidence submitted by Brockamp directly references 'substantial completion.'

issued in order for the statutory limitation period to commence. ER 9. The plain language of the contract does not require a certificate for the statutory period to accrue. It requires only the event. ER 9.

As the Church points out, Section 13.4 of A 201, 1987 states,

> "No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing."

ER 8. This language directly addresses the Church's theory that the Church only agreed that the statute of limitations for its contractual claims would accrue upon the issuance of a certificate. According to the plain language of the contract, even if the architect had failed to issue a Certificate of Substantial Completion, that failure would not affect Brockamp's rights under the contract.

Essentially, the Church asserts that the issuance of a certificate is a condition precedent to the application of the accrual provision. However, the provision does not contain any contractual conditions precedent because there are no further duties outlined in this provision for either the Church or Brockamp to carry out. The provision concerns itself only with timing of the statute of limitations for certain events. While the events ("acts or failures to act") may or may not occur, they are not conditions precedent because they do not trigger the performance or non-performance of further duties by any party.

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According to the plain language of the contract, the only condition which must occur for the statutory period to commence is that substantial completion must occur. "Acts or failures to act" that occurred prior to substantial completion accrue upon substantial completion. ER 9. There is no mention of whether a Certificate of Substantial Completion must be issued in order to trigger the accrual of the statutory period.

The Church agreed that for "acts or failures to act" that occurred prior to the work being sufficiently complete so as to be occupied for its intended purpose, that date would control the beginning of the statutory limitations period. The Church now asks the court to create legal fiction by determining that 'substantial completion' never occurred simply because the certificate cannot be located. It asks the court to make this determination despite the fact that the Church has clearly been occupied and utilized for its intended purpose for more than 10 years, beginning in 1999.

2. There is no genuine issue of material fact that the Church was complete in 1999.

For the purposes of Brockamp's Motion for Summary Judgment (and this appeal), it makes no difference if substantial completion occurred in February 1999, March 1999, May of 1999, or on any other date in 1999. This is because even if substantial completion is determined to have occurred as late as December 1999, at the time the project was 100% complete, the Church's

claims were still time-barred by December 2005 – well before the Church filed its suit.

Other jurisdictions have held that a determination that a contractor fulfilled its contractual obligation eliminates the need to determine if substantial completion occurred for the purposes of triggering the accrual provision. *Ferrante Immobiliare, LLC v. Guido A. Pace*, 891 NYS2d 27, 68 AD3d 463 (2009). In other words, even if substantial completion never occurred pursuant to the AIA contract definition, the statute of limitations begins to run at final completion pursuant to the accrual provision. *Id.*

Ferrante concerned a project which resulted in a dispute between the parties while the work was ongoing. The general contractor was performing work for an owner pursuant to an AIA contract containing the standard accrual provision. In 2003, a dispute arose between the owner and contractor regarding payment and the contractor's completion and/or abandonment of the contract, though the space was complete enough for use. *Id.* at 465. Although the contractor asked for a certificate to be issued by the architect, the architect failed to do so. *Id.*

To resolve the dispute, the parties bypassed the architect (whom plaintiff later sued) and in 2005 entered into a settlement agreement in which they agreed that plaintiff would pay the general contractor $13,500 "as final payment under the Agreement." The settlement did not stipulate whether the

contractor's work was substantially complete. *Id.* The settlement "stress[ed] that [the contractor], which had already completed or abandoned the project, was to receive its final payment under the contract." *Id.* Under the terms of the settlement, the owner retained its rights with respect to any subsequently discovered defects in workmanship.

When suit was later filed against the contractor, the court granted its motion to dismiss based on the timing of the suit. The owner asserted that because the contractor never completed its work under the contract, the statute of limitations never commenced to run, and that the settlement date did not necessarily mark the accrual date of their negligence and breach of contract claims, since neither a certificate of substantial performance for a final certificate for payment was ever issued by the architect as required in the original contract.

The *Ferrante* Court found these arguments without merit, noting that the AIA contract provided that "[f]inal payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor... the Contractor has fully performed the Contract." *Id.*

As a result, the *Ferrante* Court held that the statutes of limitations on the owners' claims "arguably accrued in 2003, clearly began to run, at the latest, on March 30, 2005, the date of execution of [the owners'] settlement agreement with [the contractor], which expressly provided that in consideration for the

settlement [the owners] would pay [the contractor] the sum of $13,500 'as final payment under the Agreement'." *Id.*

In the case at bar, there is no dispute that final completion and close-out of construction of the building all occurred in 1999. In June 1999, Brockamp submitted an application for payment indicating that its Phase I work was 100% complete. ER 14; SER 39-42. In July 1999, Ankrom Moisan approved final payment to Brockamp. SER 39. Ankrom Moisan then approved closeout of the contract in November 1999. ER 19-20.

As in *Ferrante*, this court should enforce the accrual provision given that there is ample evidence that the building was 100% complete in 1999. All applicable statutes of limitations began to run in 1999 and expired well before the Church filed suit in 2009.

C. The Court of Appeals's Ruling Creates Poor Policy for Oregon.

1. Requiring a Certificate of Substantial Completion overlooks the complexities of closing out a multi-year, multi-party project.

Construction and close-out of a $6 million, multi-year project (such as the project at issue) is a complex endeavor requiring the cooperation of many parties. Ideally, the project architect hired by the owner will issue a Certificate of Substantial Completion that accurately documents when the event occurred. However, there may be many reasons why a Certificate of Substantial Completion may not be issued or may not be accurate.

In some instances, interest in expediting the close-out process of a project may cause the architect to focus on other matters, delaying the issuing of the substantial completion despite substantial completion occurring at an earlier time. An owner that has been financing a project for years with little to show for it may be eager to put the project to use. Such an owner may be willing to overlook the formality of a certificate prepared by an architect. In other instances, owners may choose to avoid the cost of paying an architect for a visit to the project that an architect likely requires prior to signing such a document. The architect's schedule may not allow for him to visit the project for months to issue a Certificate of Substantial Completion, despite the project reaching substantial completion at a much earlier date.

Even if a certificate is issued, a project file may be destroyed or lost prior to the time litigation results years later. The certificate is not typically filed with any government entity and the financer may not be provided with the document or be interested in its retention.

By defining substantial completion as narrowly as the Court of Appeals, contractors would be bound to the date on a certificate signed by the architect, regardless of the other evidence that may exist.

For the court to hold that a Certificate of Substantial Completion is the definitive document establishing substantial completion for purposes of triggering the accrual provision at issue, overlooks the real-world complexities

posed by large construction projects. Owners, contractors, and architects in the throes of finalizing a $6 million dollar project are likely not be as concerned about the paperwork as the lawyers who may be required to reconstruct events once litigation has begun.

2. The Court, not the architect, should determine when the statutory limitations period has begun.

By ruling that substantial completion can only be determined by establishing when the architect hired by the owner certifies the work as substantially complete, the Court of Appeals has placed the contractor's legal rights solely in the hands of the project architect, hired by the owner. The Court of Appeals held that Brockamp needed to submit evidence establishing "the date that was certified by the architect in the certificate of substantial completion." *Sunset Presbyterian Church*, 254 Or App at 29. According to the Court of Appeals, the date certified by the architect in the Certificate of Substantial Completion is necessary in order to prove when substantial completion occurred for the purpose of triggering the accrual provision.

By doing so, the Court of Appeals has essentially given the project architect the power of unilaterally and definitively determining the commencement of the statutory period for claims made against the contractor. It is the court, not the architect hired by the owner, who should make this determination.

On review, this court should reject the notion that the project architect may unilaterally and definitively determine the commencement of the statutory period. It is the court that should determine the commencement of the statutory limitations period and, therefore, when substantial completion occurred.

An Oregon Court asked to determine when the statutory limitations period begins to run should look beyond the existence or non-existence of a single document to consider all of the available evidence. The Oregon Courts should be able to look to any relevant and admissible evidence to determine when substantial completion occurred and an owner is able to use the building as intended.

CONCLUSION

Brockamp respectfully requests that this court affirm the ruling of the trial court and determine that the Church's claims are time-barred as a matter of law. Pursuant to the accrual provision in the contract between the parties, the Church's claims accrued at substantial completion. There is abundant uncontested evidence in the record demonstrating that substantial completion of the Church was achieved in February of 1999, and that 100% completion of the Church also occurred in 1999.

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A Certificate of Substantial Completion is not necessary to show that the project reached substantial completion in February of 1999, given the overwhelming amount of uncontested evidence submitted by Brockamp.

Dated this 12th day of September, 2013.

SMITH FREED & EBERHARD P.C.

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CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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 6,440 words.

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)(f).

Dated this 12th day of September, 2013.

SMITH FREED & EBERHARD P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2013, I served the foregoing **PETITIONER ON REVIEW BROCKAMP & JAEGER, INC.'S BRIEF ON THE MERITS** on the following parties by notice of electronic filing using the Supreme Court's CM/ECF system:

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I further certify that on September 12, 2013, I served the foregoing **PETITIONER ON REVIEW BROCKAMP & JAEGER, INC.'S BRIEF ON THE MERITS** on the following parties by mailing two (2) copies to said person(s) contained in a sealed envelope, with postage paid, and deposited in the post office at Portland, Oregon, on said day, addressed to said person(s) as follows:

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I also certify that on September 12, 2013, I filed **PETITIONER ON REVIEW BROCKAMP & JAEGER, INC.'S BRIEF ON THE MERITS.** with:

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by e-filing through the Supreme Court's CM/ECF filing system on said day.

Dated this 12th day of September, 2013.

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