

Filed: April 24, 2014

IN THE SUPREME COURT OF THE STATE OF OREGON

PIH BEAVERTON, LLC,

Respondent on Review,

v.

SUPER ONE, INC.,

Petitioner on Review,

and

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 BUIDING SUPPLY,
an assumed business name of L & W Supply Corp.;
WOOD MECHANIX, INC.; DEMIAN DAWSON,

dba Spectra Caulking; VIPS 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; and ESKEW & ESKEW,
dba Eskew Roofing,

Defendants.

SUPER ONE, INC.,
an Oregon corporation,

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,

Respondents on Review.

PIH BEAVERTON, LLC,

Respondent on Review,

v.

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

Defendants-Respondents,

and

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

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 BUIDING SUPPLY,
an assumed business name of L & W Supply Corp.;
WOOD MECHANIX, INC.;
DEMIAN DAWSON, dba Spectra Caulking;
VIPS 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; and
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.

(CC C072107CV; CA A142268 (Control), A142301; SC S061488 (Control))

On review from the Court of Appeals.*

Argued and submitted on January 13, 2014.

Jack Levy, Smith Freed & Eberhard, P.C., Portland, argued the cause and filed the briefs for petitioner on review Super One, Inc. With him on the brief was Chin See Ming.

Michael T. Stone, Brisbee & Stockton, LLC, Hillsboro, argued the cause for petitioner on review T. T. & L. Sheet, Metal, Inc.

Daniel T. Goldstein, Ball Janik, LLP, Portland, argued the cause and filed the briefs for respondent on review PIH Beaverton, LLC. With him on the brief were Phillip E. Joseph and James C. Prichard.

Michael J. Vial filed the brief on behalf of *amicus curiae* Oregon Trial Lawyers Association.

WALTERS, J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

*Appeal from Washington County Circuit Court, Mark Gardner, Judge. 254 Or App 486, 294 P3d 536 (2013).

1 WALTERS, J.

2 In this case, we consider the meaning of the term "substantial completion"
3 as used in ORS 12.135, a statute of ultimate repose for claims arising from the
4 construction, alteration, or repair of improvements to real property. We affirm the
5 decision of the Court of Appeals and remand to the circuit court for further proceedings.

6 The following facts are taken from the record on summary judgment and
7 are undisputed. Defendant general contractor Super One, Inc., and various
8 subcontractors, including defendant subcontractor T. T. & L. Sheet Metal, Inc.,
9 contracted with VIP's Industries, Inc. and VIP's Motor Inns, Inc. (VIP's) to build a hotel.¹
10 Defendant general contractor and VIP's used a standard form contract supplied by the
11 American Institute of Architects (AIA). Defendants began work in 1996. On February
12 13, 1997, VIP's posted a "completion notice" pursuant to ORS 87.045, a statute
13 governing construction liens.² On or about that same date, VIP's also obtained a

¹ VIP's was the original owner of the hotel and is not party to this case.

² ORS 87.045 provides, in part:

 "(1) The completion of construction of an improvement shall occur
when:

 "(a) The improvement is substantially complete;

 "(b) A completion notice is posted and recorded as provided by
subsections (2) and (3) of this section; or

 "(c) The improvement is abandoned as provided by subsection (5) of
this section.

 "(2) When all original contractors employed on the construction of
an improvement have substantially performed their contracts, any original

1 certificate for temporary occupancy and began accepting paying guests. However, a
2 Certificate of Substantial Completion was not issued by the architect or accepted by VIP's
3 as had been contemplated by the contract between the parties. After the date on which
4 VIP's posted the completion notice, defendants continued to perform construction work.
5 The county issued a certificate of final occupancy on September 24, 1997.

6 In 2006, plaintiff purchased the hotel and soon thereafter allegedly
7 discovered damage. Plaintiff filed an action against defendants for negligence, nuisance,
8 and trespass on May 23, 2007, a date that was more than 10 years after the posting of the
9 completion notice but less than 10 years after the issuance of the certificate of final
10 occupancy. Defendants moved for summary judgment, arguing that plaintiff's claims
11 were barred by ORS 12.135,³ which applies to claims arising from the construction,

contractor, the owner or mortgagee, or an agent of any of them may post
and record a completion notice."

³ ORS 12.135 was amended in 2009 with an effective date of January 1,
2010. *See* Or Laws 2009, ch 715, §§ 1, 3. This action is governed by the 2007
provisions of ORS 12.135, and we therefore refer to that version of the statute.

ORS 12.135 (2007) provided, in part:

"(1) 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 * * * 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.

"* * * * *

"(3) For purposes of this section, 'substantial completion' means the

1 alteration, or repair of improvements to real property.⁴ ORS 12.135(1) requires that such
2 claims be commenced within the applicable statute of limitations, but in any event not
3 later than 10 years from "substantial completion" or abandonment, whichever comes
4 earlier. ORS 12.135(3) defines "substantial completion" to mean

5 "the date when the contractee accepts in writing the construction, alteration
6 or repair of the improvement to real property or any designated portion
7 thereof as having reached that state of completion when it may be used or
8 occupied for its intended purpose or, if there is no such written acceptance,
9 the date of acceptance of the completed construction, alteration or repair of
10 such improvement by the contractee."

11 Defendants argued that "substantial completion" occurred on February 13, 1997, when
12 VIP's either accepted the construction in writing by posting the completion notice or
13 demonstrated acceptance of the construction by opening its doors to the public. Plaintiff
14 responded that a completion notice pursuant to ORS 87.045 is not a written acceptance of
15 construction sufficient to satisfy the requirements of ORS 12.135 and that the 10-year
16 period of ultimate repose did not begin to run until VIP's accepted "completed"

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, if there is no such written acceptance, the date
of acceptance of the completed construction, alteration or repair of such
improvement by the contractee.

"(4) For the purposes of this section, an improvement to real
property shall be considered abandoned on the same date that the
improvement is considered abandoned under ORS 87.045."

⁴ Defendants also argued that plaintiff's claim was barred by ORS 12.115.
Before this court, defendants limited their argument to ORS 12.135, and we also confine
our discussion to that statute.

1 construction of the hotel.

2 The trial court accepted defendants' argument that, because the hotel was
3 open for business by February 13, 1997, "substantial completion" occurred on that date
4 and plaintiff's claims were time-barred. Plaintiff appealed, and the Court of Appeals
5 reversed. *PIH Beaverton, LLC v. Super One, Inc.*, 254 Or App 486, 294 P3d 536 (2013).
6 Like the trial court, the Court of Appeals rejected defendants' argument that the notice of
7 completion posted by VIP's pursuant to ORS 87.035 satisfied the requirements for written
8 acceptance in ORS 12.135(3). However, unlike the trial court, the Court of Appeals also
9 rejected defendants' argument that "substantial completion" occurred when VIP's opened
10 for business. The court reasoned that, in the absence of written acceptance, ORS
11 12.135(3) requires evidence that the owner accepted the construction as fully completed.
12 Because the evidence adduced on summary judgment indicated that construction was not
13 fully complete on February 13, 1997, but continued thereafter, the Court of Appeals held
14 that the trial court had erred in granting summary judgment. 254 Or App at 500.

15 Defendants petitioned for review, which this court granted to decide two
16 legal questions presented by defendants' motions for summary judgment:

17 1. When a constructed facility is opened for business, does the
18 owner's written completion notice pursuant to ORS 87.045 demonstrate
19 written acceptance of construction sufficient to satisfy ORS 12.135(3)?

20 2. If there is no written acceptance that satisfies ORS 12.135(3),
21 must a defendant that seeks the benefit of the 10-year limitations period
22 demonstrate that the owner accepted the construction as fully complete, or
23 is evidence that the owner accepted the construction as sufficiently

1 complete for its intended use or occupancy sufficient?⁵

2 In reviewing a trial court's disposition of a motion for summary judgment, this court
3 determines whether the moving party is entitled to judgment as a matter of law. ORCP
4 47 C.

5 COMPLETION NOTICE AS ACCEPTANCE OF CONSTRUCTION

6 The first question presented focuses on the first clause of ORS 12.135(3),
7 which defines "substantial completion" to include "the date when the contractee accepts
8 in writing the construction * * * as having reached that state of completion when it may
9 be used or occupied for its intended purpose." Defendants contend that when VIP's
10 posted a completion notice pursuant to ORS 87.045, that notice, combined with the fact
11 that VIP's was open for business on that date, constituted acceptance of the construction
12 sufficient to satisfy the requirements of ORS 12.135. To analyze that argument, we must
13 consider the text of both statutes.

14 ORS 87.010 grants those who perform labor, furnish transportation or
15 material, or rent equipment used in the construction of an improvement a lien on the
16 improvement for their labor, material, or services.⁶ To perfect such a lien, the person

⁵ The second question also is presented in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, ___ Or ___, ___ P3d ___ (April 24, 2014).

⁶ ORS 87.010(1) provides:

"Any person performing labor upon, transporting or furnishing any material to be used in, or renting equipment used in the construction of any improvement shall have a lien upon the improvement for the labor, transportation or material furnished or equipment rented at the instance of the owner of the improvement or the construction agent of the owner."

1 claiming the lien must act not later than 75 days after the person has ceased to provide
2 labor, material, or services, or 75 days after "completion of construction," whichever is
3 earlier.⁷ ORS 87.045(1) provides that "completion of construction" occurs when any one
4 of three events occurs: (1) the construction is "substantially complete," (2) "a completion
5 notice is posted and recorded," or (3) the construction is "abandoned."

6 A completion notice may be filed once "all original contractors employed
7 on the construction of an improvement have substantially performed their contracts."
8 Any "original contractor [or] the owner" may post and record such notice. ORS
9 87.045(2). That notice "shall state in substance [that] * * * [n]otice hereby is given that
10 the building, structure or other improvement on the following described premises * * *
11 has been completed" and shall thus notify "[a]ll persons claiming a lien upon the same
12 under the Construction Lien Law * * * to file a claim of lien as required by ORS 87.035."
13 *Id.*

14 Thus, an owner's posting of a completion notice pursuant to ORS 87.045

⁷ ORS 87.035 provides, in part:

"(1) Every person claiming a lien created under ORS 87.010 (1) or (2) shall perfect the lien not later than 75 days after the person has ceased to provide labor, rent equipment or furnish materials or 75 days after completion of construction, whichever is earlier. Every other person claiming a lien created under ORS 87.010 shall perfect the lien not later than 75 days after the completion of construction. All liens claimed shall be perfected as provided by subsections (2) to (4) of this section.

"(2) A lien created under ORS 87.010 shall be perfected by filing a claim of lien with the recording officer of the county or counties in which the improvement, or some part thereof, is situated."

1 demonstrates that the owner has concluded that all original contractors have substantially
2 performed their contracts and has stated, in writing, that "the building, structure, or other
3 improvement" located at the described property "has been completed." The question
4 remains, however, whether an owner's posting of such notice demonstrates that the owner
5 has "accept[ed]" the construction as "having reached that state of completion when it may
6 be used or occupied for its intended purpose." ORS 12.135(3).

7 "Accept" or "acceptance" when used in a legal sense has a well-defined
8 meaning. In 1971, the relevant edition of *Black's Law Dictionary* defined "acceptance"
9 as

10 "[T]he taking and receiving of anything in good part * * *. The act of a
11 person to whom a thing is offered or tendered by another, whereby he
12 receives the thing with the intention of retaining it, such intention being
13 evidenced by a sufficient act."

14 *Black's Law Dictionary* 27 (4th ed 1957) (originally published 1951).

15 We think it likely that the legislature used "acceptance" in that legal sense,
16 because it used it in conjunction with the legal term "contractee" and because, as we will
17 explain, the legislative history supports that interpretation. However, even if the
18 legislature used "accepts" or "acceptance" in its lay sense, the ordinary meaning of those
19 terms is not far different. The dictionary definition of "acceptance" refers to the "act of
20 accepting," which is in turn defined as the participial form of "accept"; the relevant
21 definition of "accept," according to *Webster's*, is "to receive with consent." *Webster's*
22 *Third New Int'l Dictionary* 10 (unabridged ed 1971) (originally published 1961). Thus,
23 we conclude that, by using those terms, the legislature intended to describe the date when

1 a contractee receives the construction and consents or assents to it as sufficiently
2 complete for its intended use or occupancy.

3 Our review of the legislative history of the bill that became ORS 12.135,
4 House Bill (HB) 1259, provides an explanation for the legislature's use of the terms
5 "accepts" and "acceptance." HB 1259 was enacted in 1971 and at that time, as is true
6 today, parties engaging in construction projects commonly used form contracts drafted
7 and provided by the AIA. See J. Charles Sheak and Timothy J. Korzun, *Old Game, New*
8 *Rules: A Brief Guide to 1987 Changes in the A.I.A. A201, General Conditions of the*
9 *Contract for Construction*, 8 Constr Law 3 (1988) ("Since their initial publication * * *,
10 the construction form documents published by the [AIA] have been adopted and used
11 nationwide * * *. [T]hese documents * * * form the basic framework upon which parties
12 to construction projects structure their rights and obligations."). In 1971, the AIA form
13 contract defined the date on which construction was substantially complete as the date
14 "certified by the Architect when construction is sufficiently complete, in accordance with
15 the Contract Documents, so the Owner may occupy the Work or designated portion
16 thereof for the use for which it is intended." American Bar Association, *Construction*
17 *Contract Claims*, app IV, § 8 at 511 (1978) (comparing Paragraph 8.1.3 of the 1970
18 edition with that provision of the 1976 edition). As described in the AIA contract, the
19 certificate shall state the "responsibilities" of the parties "for maintenance, heat, utilities,
20 and insurance" and shall be submitted to the owner and contractor for written

1 "acceptance."⁸ Thus, the 1970 AIA form contract equated the date on which the
2 construction was sufficiently complete for its intended use and occupancy with the date
3 on which the owner took responsibility for its maintenance.

4 The legislative history of ORS 12.135 indicates that industry
5 representatives who participated in the drafting of HB 1259 also equated those dates.
6 Industry representatives agreed that the original bill should be amended to provide that
7 "substantial completion" occurs when a "contractee accepts in writing the improvement
8 * * * as having reached that state of completion when it may be used or occupied for its
9 intended purpose" and explained that the statute of ultimate repose should accrue at that
10 time because, by giving "written acceptance" of construction, the owner undertook
11 responsibility for the utilities, insurance, maintenance, and repair of the facilities. *See*
12 Tape Recording, House State and Federal Affairs Committee, Subcommittee on Financial
13 Affairs, HB 1259, May 10, 1971, Tape 16, Side 2 (statement of Preston Hiefield, counsel
14 for the Associated General Contractors) ("The person for whom the facilities are built
15 takes over the operation and control of the premises, takes over maintenance and any

⁸ Paragraph 9.7.1 of the 1970 AIA form contract provided, in part:

"When the Architect on the basis of an inspection determines that the Work is substantially complete, he will then prepare a Certificate of Substantial Completion, which shall establish the Date of Substantial Completion, shall state the responsibilities of the Owner and the Contractor for maintenance, heat, utilities, and insurance, and shall fix the time within which the Contractor shall complete the items listed therein. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such Certificate."

1 other alterations or repair."). Thus, the legislature used the terms "accepts" or
2 "acceptance" to mean that the owner received the construction and consented or assented
3 to it as having reached a particular state of completion -- completion sufficient for its
4 intended use or occupancy -- understanding that that acceptance would, at least under the
5 1970 AIA form contract, have legal consequences.⁹

6 We are not persuaded that the owner's notice of completion under ORS
7 87.045 fulfills that same purpose or, more importantly, meets the terms of the statute. By
8 issuing a completion notice under ORS 87.045, an owner indicates that construction is
9 sufficiently complete that liens may be filed. However, the owner does not necessarily
10 "accept" anything, much less take control of and responsibility for the construction.
11 Furthermore, although an owner's issuance of a completion notice indicates that the
12 owner believes, at least for purposes of issuing the notice, that all of the original
13 contractors have "substantially performed their contracts," that is not necessarily an

⁹ The parties' contract in this case also is an AIA form contract, and its provisions are substantially similar to the 1970 AIA form contract. Paragraph 9.8.1 of the parties' contract defines "Substantial Completion" 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 the Owner can occupy or utilize the Work for its intended use." Paragraph 9.8.2 provides that 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 which the Contractor shall finish all items on the list accompanying the Certificate. * * * 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."

1 acceptance of the construction as sufficiently complete for its intended use or occupancy.
2 Additional work by the original or subsequent contractors may be necessary for the
3 construction to reach that state.

4 One additional clue that notice of completion pursuant to ORS 87.045 does
5 not necessarily constitute written acceptance for purposes of ORS 12.135(3) is that
6 subsection (4) of ORS 12.135 defines "abandonment" by reference to ORS 87.045, but
7 does not define "substantial completion" by reference to that statute. Subsection (4) was
8 added to ORS 12.135 in 1991, at the same time that the legislature amended that statute
9 to make the 10-year limitations period run from the date of the abandonment of the
10 construction as well as from the date of its substantial completion. *See* Or Laws 1991, ch
11 968, § 1. In subsection (4), the legislature provided that property is considered
12 abandoned "on the same date that the improvement is considered abandoned under ORS
13 87.045." However, the legislature did not similarly refer to ORS 87.045 in defining
14 "substantial completion" in subsection (3) of ORS 12.135. Explicit reference to ORS
15 87.045 for the purposes of one, but only one, aspect of ORS 12.135 is a further indication
16 that the legislature did not intend to make the posting of a completion notice pursuant to
17 ORS 87.045 an act that necessarily constitutes written acceptance of construction under
18 ORS 12.135(3).

19 We conclude that a completion notice pursuant to ORS 87.045 does not
20 necessarily establish that the owner accepts the construction of the improvement as
21 complete for occupation and, therefore, that the posting and filing of that document alone
22 does not establish the date that the 10-year statute of ultimate repose begins to run under

1 ORS 12.135. That does not mean, however, that the only document that can constitute a
2 written acceptance under that statute is an acceptance of the terms of a Certificate of
3 Substantial Completion as provided in a standard AIA contract or that a completion
4 notice under ORS 87.045, when combined with other facts, cannot meet the requirements
5 of ORS 12.135. Evidence that, when considered in its entirety, demonstrates written
6 consent or assent to construction as sufficiently complete for its intended use or
7 occupancy will satisfy the requirements of ORS 12.135.

8 In this case, defendants argue that, by proving that VIP's had obtained a
9 temporary occupancy permit and opened its hotel to visitors at the time that it posted a
10 written completion notice pursuant to ORS 87.045, defendants proved that the
11 requirements of the first clause of ORS 12.135(3) were satisfied. After all, defendants
12 assert, the notice stated that the hotel "has been completed" and the owner was using and
13 occupying the hotel for its intended purpose on the date that the notice was posted.

14 Plaintiff responds that the contract between the parties provided for
15 construction in addition to the hotel facility itself (including the construction of a storm
16 drainage system); that that additional work was not complete on February 13, 1997; and
17 that VIP's had not accepted the responsibilities assigned by a Certificate of Substantial
18 Completion by that date. Therefore, plaintiff contends, a factfinder could find that VIP's
19 did not accept or give consent to the construction of the improvement as a whole or even
20 as sufficiently complete for its intended use or occupancy on February 13, 1997.

21 We agree that the material facts are disputed and that the trial court
22 correctly rejected defendants' argument that they were entitled to summary judgment

1 under the first clause of ORS 12.135(3). Accordingly, we turn to defendants' alternative
2 argument that they are entitled to summary judgment under the second clause of that
3 statute.

4 ACCEPTANCE OF COMPLETED CONSTRUCTION

5 Without a written acceptance, the second clause in the definition of
6 "substantial completion" applies: "[I]f there is no such written acceptance, the date of
7 acceptance of the *completed* construction, alteration or repair of such improvement by the
8 contractee" is the date of "substantial completion." ORS 12.135(3) (emphasis added).
9 The Court of Appeals concluded that that second clause identifies a potentially different
10 date than the date referenced in the first clause. *PIH Beaverton*, 254 Or App at 499. The
11 court explained that, when a contractee accepts the construction in writing, the
12 construction may be less than fully complete; it need be only substantially complete.
13 Without a writing, however, a contractee must accept "completed" construction, which,
14 the court reasoned, requires that the construction be fully complete. *Id.* at 496.

15 Defendants disagree with that analysis. They argue that, in enacting the
16 relevant clauses, the legislature intended to identify not two potentially different dates but
17 two different ways in which a party may prove "substantial completion." Defendants
18 maintain that ORS 12.135(3) provides that construction is substantially complete when it
19 has "reached that state of completion when it may be used or occupied for its intended
20 purpose" and that an owner may accept the construction as substantially complete in
21 either of two ways: in writing or by otherwise demonstrating acceptance of the
22 construction. Defendants argue that the fact that VIP's opened the hotel to visitors on

1 February 13, 1997, demonstrates that it accepted the construction of the hotel as
2 substantially complete on that date, even if it did not do so in writing.

3 To agree with defendants' interpretation, we would have to conclude that
4 the legislature used the term "completed" construction in the second clause of ORS
5 12.135(3) to include construction that is less than fully complete. Defendants agree and
6 contend that the legislature used "completed" in the second clause as a reference to the
7 state of completion described in the first clause -- construction that has "reached that state
8 of completion when it may be used or occupied for its intended purpose." For that
9 proposition, defendants point to the legislature's use of the word "such" in the second
10 clause -- "completed construction, alteration or repair of *such* improvement" -- as
11 referring back to the state of completion described in the first clause. We are not
12 convinced. The word "such" modifies the noun "improvement" and refers back to the
13 improvement described in the first clause -- "improvement to real property or any
14 designated portion thereof."

15 Although it is nevertheless conceivable that the legislature used the word
16 "completed" in the second clause of ORS 12.135(3) to capture in one word the state of
17 completion spelled out more fully in the first clause, the text and context of the statute
18 and its legislative history include many indicators to the contrary. First, the ordinary
19 meaning of the word "complete" is "to bring to an end often into or as if into a finished or
20 perfected state * * * to make whole, entire, or perfect: end after satisfying all demands or
21 requirements." *Webster's* at 465. Similarly, the adjectival form of "complete" is defined
22 as "possessing all necessary parts, items, components, or elements: not lacking anything

1 necessary." *Id.* Accordingly, the ordinary meaning of something that has been
2 "completed" is something that has been brought into a finished or perfected state; that is
3 whole, entire, and perfect; that possesses all necessary parts, components, and elements;
4 and that lacks nothing necessary to it. It seems unlikely that the legislature used the word
5 "completed" to describe construction that, although sufficiently complete for occupation,
6 is not in a finished or perfected state.

7 Second, as originally drafted, HB 1259 differentiated between "substantial
8 completion" and full completion.¹⁰ Specifically, the original version of the bill provided
9 that claims must be brought "within six years after the substantial completion of the
10 improvement" or "within six years after the acceptance of the completed improvement by
11 the contractee, whichever is earlier." From that text, it is apparent that the drafters had in
12 mind two potentially different dates: that of substantial completion and that of full
13 completion. The drafters provided that an action would accrue on the "earlier" of the two
14 dates.

¹⁰ HB 1259, as first introduced, provided, in part:

"Section 2. (1) An action, whether in contract, tort or otherwise, against a person, arising from such person's work, as a contractor for the construction, alteration or repair of any improvement to real property, shall be commenced within six years after the substantial completion of the improvement to real property or within six years after the acceptance of the completed improvement by the contractee, whichever is earlier.

"(2) For purposes of subsection (1) of this section 'substantial completion' means the date when the contractee accepts the improvement * * * as having reached that state of completion when it may be used or occupied for its intended purpose."

1 Thereafter, Representative Stathos proposed to amend the bill to require
2 that acceptance of substantial completion occur in writing. Those appearing on behalf of
3 the Associated General Contractors (AGC) agreed. Mr. Kalinoski testified that, "when
4 the contractor agrees with the owner that the owner may occupy a part of the building,
5 * * * the contractor should be responsible to secure something from the owner saying that
6 he is occupying the building and that would be the beginning" of the limitations period.
7 Tape Recording, House Committee on State and Federal Affairs, Financial Affairs
8 Subcommittee, March 3, 1971, HB 1259, Tape 5, Side 1 (statement of J. R. Kalinoski).
9 However, Mr. Kalinoski also requested the addition of a further amendment allowing
10 contractors "to establish through some other facts * * * that things are done." Tape
11 Recording, House Committee on State and Federal Affairs, Financial Affairs
12 Subcommittee, April 9, 1971, HB 1259, Tape 14, Side 2 (statement of J. R. Kalinoski).
13 In discussing that further change, counsel for AGC explained that "the owner's * * *
14 acceptance is conditioned on his acknowledgement that [the contractor] has completed
15 [his] work and [has] completed it in accordance with [the owner's] desires and his
16 specifications." Tape Recording, House Committee on State and Federal Affairs,
17 Financial Affairs Subcommittee, May 10, 1971, Tape 16, Side 2 (statement of Preston
18 Hiefield). Thus, those who discussed the bill during the amendment process apparently
19 continued to distinguish between the date on which an owner takes occupancy of an
20 improvement and accepts it in writing, and the date on which the owner accepts the work
21 as fully complete in accordance with contractual specifications.

22 After all amendments to the original bill were engrossed, the final version

1 of the bill merged the "written acceptance of substantial completion" with "acceptance of
2 completed construction" into a single section defining "substantial completion" -- ORS
3 12.135(3). However, the progress of the bill from its first draft to its final engrossment
4 reveals that, contrary to defendants' argument that the legislature intended to equate the
5 two events, the legislature intended to differentiate between the date on which a
6 contractee accepts the construction as sufficiently complete for its intended use or
7 occupancy and the date on which a contractee accepts the completed construction. We
8 conclude, as did the Court of Appeals, that to meet the terms of the second clause of ORS
9 12.135(3), a defendant must establish the date on which the construction was fully
10 complete, not the date on which it was sufficiently complete for its intended use or
11 occupancy.

12 The summary judgment record in this case gives rise to a material question
13 of fact about whether VIP's accepted the construction that was the subject of the contract
14 between the parties as fully complete by February 13, 1997. On the one hand, evidence
15 in the record shows that VIP's obtained a certificate of temporary occupancy, posted a
16 completion notice, and began accepting guests on February 13, 1997. On the other hand,
17 the record also shows that construction work continued after that date, and the county did
18 not issue the certificate of final occupancy for the hotel until September 24, 1997. The
19 trial court erred in concluding, as a matter of law, that VIP's accepted completed
20 construction on February 13, 1997, and granting summary judgment on that basis.

21 In summary, defendants failed to establish, as a matter of law, that they
22 were entitled to summary judgment under either the first or the second clause of ORS

1 12.135(3). We therefore affirm the decision of the Court of Appeals and remand to the
2 circuit court for further proceedings.

3 The decision of the Court of Appeals is affirmed. The judgment of the
4 circuit court is reversed, and the case is remanded to the circuit court for further
5 proceedings.