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NO. 65139-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM  
PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF  
SEATTLE, L.P.,

Appellant,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a  
Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a  
foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a  
foreign corporation,

Respondent.

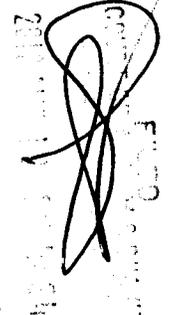
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BRIEF OF APPELLANTS

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In August 2006, the Washington State Major League Baseball Stadium Public Facilities District (“PFD”) and The Baseball Club of Seattle, L.P. (“Mariners”) brought this breach of contract action against Huber, Hunt & Nichols-Kiewit Construction (“HK”), the contractor responsible for constructing Safeco Field. The PFD and the Mariners sought to recover more than \$3 million paid to repair defects in HK’s fireproofing construction work. HK substantially completed the stadium in July 1999; the PFD and the Mariners discovered the latent defects less than six years later, in early 2005.

In February 2007, HK moved for summary judgment. HK argued these claims accrued in July 1999 because its contract with the PFD made *all* claims accrue on the date of Substantial Completion of Safeco Field, i.e., July 1, 1999. Because the PFD and the Mariners sued more than six years later, HK claimed the limitations period barred the claims. The trial court agreed. The Supreme Court, however, reversed. Although the Court *accepted* HK’s assertion that the claims accrued on July 1, 1999, it held that the limitations period did not apply. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 202 P.3d 924 (2009).

On remand, HK tried a new gambit to avoid defending its work: it repudiated its prior position and argued that the PFD's and the Mariners' claims *actually* accrued in September 2005, more than six years after the accrual date HK advocated before the Supreme Court. HK made this new argument to take advantage of the statute of repose, RCW 4.16.310, which extinguishes any construction claim that "has not accrued" by six years after the later of (a) the date of Substantial Completion or (b) for contractors who continue work after Substantial Completion, the date when they finish their work. Even though HK *expressly* told the Supreme Court that the statute of repose did not apply (and that the claims accrued July 1, 1999), it argued on remand that the statute of repose barred the claims for defective work because they did not accrue until September 2005—more than six years after Substantial Completion. HK argued that the contract's accrual clause—which refuted its argument—was "void" as a matter of public policy, *even though* just months earlier HK had relied on that clause as the linchpin of its argument to the Supreme Court.

The PFD and the Mariners opposed HK's new accrual theory, pointing out that (a) HK had litigated timeliness issues to a conclusion before the Supreme Court in proceedings that *expressly* rested on the enforceability of the accrual clause and (b) even if one ignored the accrual clause, the evidence showed that, as a factual matter, the claims accrued

within six years of Substantial Completion. The trial court *denied* HK's summary judgment motion, and HK did not seek reconsideration. The case then took a bizarre turn: months after denying HK's summary judgment motion, and without notice to the PFD and the Mariners, the trial court *sua sponte granted* summary judgment to HK based on the statute of repose—even though HK had no motion pending. Because the trial court's decision lacks any basis in the law, this Court should reverse.

*First*, the law does not allow HK to take one position on accrual as the foundation for its argument on appeal, and then to contradict what it told the Supreme Court to facilitate a new argument. Principles of judicial estoppel, waiver, and law of the case bar that sort of gamesmanship.

*Second*, on the merits of the statute of repose argument, HK had it right on the first appeal: the contract supplies the applicable accrual date, i.e., July 1, 1999, the date of Substantial Completion. That disposes of its argument under the statute of repose. Washington law does not support HK's resort to "public policy" to void an accrual provision in a contract between sophisticated parties, which HK embraced in years of litigation. Washington enforces construction contracts as written, and every court to have considered a "public policy" objection to this clause has rejected it.

*Third*, even if HK could avoid the contractual accrual date, the statute of repose by its terms does not begin to run *at least* until a

contractor terminates its work on a project. Because HK did not terminate its services on Safeco Field until early 2000, the claims accrued within the statute of repose even under HK's theory. Further, even if the repose period began running on Substantial Completion, the date on which the PFD's and the Mariners' claims accrued presents a question of fact not appropriate for summary judgment on this record. Based on the evidence, a trier of fact could find that the claims were discovered between February and May 2005—well within the statutory accrual period.

**Fourth**, HK cannot rely on RCW 4.16.326(g)(1) to do an end-around the Supreme Court's decision. That statute, passed in 2003, incorporates by reference the existing statutes of limitation and statute of repose, giving those provisions additional teeth. But RCW 4.16.326 does not apply retroactively to claims that accrued before its effective date, as these claims did. Further, RCW 4.16.326(1)(g) does not restrict, limit, or repeal principles of *nullum tempus*, recognized in the prior appeal in this action, which make clear that time limitations do not run to bar actions (such as this) brought in the name, or for the benefit, of the sovereign.

**Fifth**, HK cannot justify summary judgment based on a contractual 21-day notice provision in the original construction contract executed in 1996: the parties agreed to eliminate that notice requirement in 1998.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Granting Defendants' Motion for Summary Judgment (CP 2098-2100), dismissing the claims of the PFD and the Mariners.

2. The trial court erred in entering its Order Denying Plaintiffs' Motion for Reconsideration (CP 2101-02).

3. The trial court erred in apparently failing to consider evidence submitted by the PFD and the Mariners concerning HK's work after the date of Substantial Completion (CP 2099, 2102).

## III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether principles of judicial estoppel, waiver, or law of the case preclude HK from relying upon RCW 4.16.310, the statute of repose, given HK's repeated representations—on which the Supreme Court relied—that “RCW 4.16.310 is inapplicable here” (CP 175). (Assignments of Error 1, 2)

2. Whether the standard accrual clause in the Construction Agreement between HK and the PFD satisfies the statute of repose, by making *all* claims accrue as of the date of Substantial Completion, well within the period specified by RCW 4.16.310. (Assignments of Error 1, 2)

3. Assuming *arguendo* that HK may invoke the statute of repose and that the parties' Construction Agreement does not control,

whether the trial grant properly granted HK summary judgment based on the statute of repose, RCW 4.16.310, where:

a. the trial court improperly refused to consider evidence establishing that HK did not terminate its services until well into 2000, which disposes of HK's statute of repose argument; and

b. the record contains ample evidence that the construction defect was discovered, and the claims accrued, within six years of Substantial Completion. (Assignments of Error 1, 2, 3)

4. Whether RCW 4.16.326(1)(g), which requires compliance with "applicable" statutes of limitation and the statute of repose, applies to bar the PFD's and the Mariners' claims where:

a. the statute does not bar claims, such as these, that accrued before the Legislature passed this new law;

b. the PFD and the Mariners' claims accrued within the period of repose, and no statutes of limitation are "applicable"; and

c. RCW 4.16.326 does not repeal the exemption from the statute of limitations, RCW 4.16.040, for actions that benefit the state. (Assignments of Error 1, 2)

5. Whether HK can rely upon the Construction Agreement's 21-day claim deadline, even though the parties in 1998 deleted that provision from the Construction Agreement. (Assignments of Error 1, 2)

#### IV. STATEMENT OF THE CASE<sup>1</sup>

##### A. The Parties

The PFD, a Washington municipal corporation, developed and owns Safeco Field. CP 421. The Baseball Club of Seattle, L.P. (the “Mariners”), owns and operates the Seattle Mariners and leases Safeco Field from the PFD pursuant to a detailed Ballpark Operations and Lease Agreement (the “Lease”). CP 289–404 (Lease); CP 421.

Huber, Hunt & Nichols-Kiewit Construction (“HK”) is a joint venture composed of two of the nation’s largest construction companies, Hunt Construction Group and Kiewit Construction Company. CP 421. HK was the general contractor that built Safeco Field. It received hundreds of millions of dollars to fulfill its contractual duties. CP 421.

##### B. The Agreed Date for Claim Accrual

On May 6, 1996, the PFD executed a contract (the “Construction Agreement”) with HK, defining the parties’ obligations in connection with construction of the stadium. CP 36–163 (Construction Agreement); *see also* CP 789-93 (Construction Agreement excerpts), 985–1001, 1006–1050 (modifying Construction Agreement). The Agreement provides that all claims between the PFD and HK *accrue at Substantial Completion*:

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<sup>1</sup> The Washington Supreme Court’s opinion succinctly summarizes the background facts. *See Wash. State Major League Baseball Stadium PFD*, 165 Wn.2d at 682-85.

As to acts or failures to act occurring prior to 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.***

CP 793 §13.7.1.1 (emphasis added). All parties agree that Substantial Completion for Safeco Field occurred on July 1, 1999. CP 422; CP 649. HK and its subcontractors, however, continued to work at least through February 2000, CP 1120-22, CP 1150-1410, and HK received payments in 2000 exceeding \$5 million for its Safeco Field work. CP 1131.

### **C. HK's Defective Work**

The Construction Agreement required HK to apply an intumescent coating system to large quantities of exposed structural steel beams and columns at Safeco Field. (An “intumescent” coating swells as a result of heat exposure, increasing in volume and decreasing in density; it functions as an important component in a passive fire protection system.) The Construction Agreement’s specifications originally required HK to select a primer for application to the raw steel at the place of fabrication. CP 966-70. The PFD later revised the Contract—with HK’s express consent—to ***require*** HK to use a ***specific*** primer (known as “Tnemec”) that the project Architect, NBBJ, determined to be compatible with the intumescent coating, which would be applied over the primer. CP 961-64; CP 976-80.

As HK and its subcontractor now admit, HK did *not* use the Tnemec primer as specified; instead, they used a Wasser MC-Zinc primer. CP 1066-67. As a result of HK's failure to follow the specifications, the intumescent product separated from the beams and columns, creating large "blisters" on the face of the structural steel. CP 422; CP 2145-51. The coating failure did *not* result from normal wear or tear or exhaustion of useful life; instead, it resulted from an incompatibility between the materials used by HK. CP 422; CP 2149.

**D. Discovery and Repair of the Defective Work**

Mariners President Chuck Armstrong noticed the blisters on the structural steel in February 2005—five years and eight months after Substantial Completion of Safeco Field. CP 1076. He promptly directed Safeco Field facilities staff to examine the issue. After an initial investigation, the Mariners' Vice-President for Ballpark Operations wrote on May 13, 2005, that "now we are discovering some other locations where the coating is blistering and will probably flake off." CP 1056. He described the problem as "a pretty big job" and hired a construction management expert to coordinate inspection and repair. *Id.*; *see* CP 1052.

At around the same time, HK's subcontractor Long Painting also learned of the delamination problem. On March 7, 2005, a consultant advised Long Painting that the "blistering and delaminating of the existing

Intumescent Fire Protection Material” in an area along the third base line would need to be repaired by applying a new tie-coat, i.e., a proper primer on top of the improper Wasser zinc primer—the solution that the PFD and the Mariners ultimately adopted. CP 1071-72.

When repair work began, the PFD and the Mariners discovered defects in the intumescent coating far more extensive than first believed. During repairs, removal of a blister routinely caused the intumescent product to sheet off an entire column or beam, not just from the immediate site of the blister. CP 422-23; CP 2149-50. The PFD and the Mariners put HK on notice of the problem and gave it an opportunity to inspect the defect before the repair work. CP 6-7; CP 1724 (HK’s Third Amended Answer). Despite having collected hundreds of millions of dollars in public funds for the construction of Safeco Field, however, HK did not bother to respond. CP 7.

The Mariners advanced for the PFD’s benefit more than \$2.45 million to pay for the first phase of repair, which covered approximately 29,600 square feet of structural steel beams and columns.<sup>2</sup> CP 805. In addition, the Mariners advanced more than \$500,000 to pay for a second

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<sup>2</sup> The Mariners’ advances benefit the PFD because “the PFD must reimburse the Mariners for ‘Unanticipated Capital Costs’ incurred in making repairs to the facility.” *Wash. State Major League Baseball Stadium PFD*, 165 Wn.2d at 683. As of this writing, the PFD’s reimbursement has begun.

phase of repair to the structural steel beams and columns in the Press Box and the Hit It Here Café and Kitchen, located over right field. *Id.*

**E. Course of Proceedings**

**1. HK's First Summary Judgment Motion and the Supreme Court's Reversal**

The PFD and the Mariners sued on August 14, 2006, alleging that HK breached the Construction Agreement by failing to apply the primer under the intumescent coating in accordance with the Contract. CP 1-8.

HK answered on October 13, 2006, alleging as affirmative defenses that the Statute of Limitations (RCW 4.16.160) and the Statute of Repose (RCW 4.16.310) barred the claims of the PFD and the Mariners. CP 9-15. HK also asserted third party claims against its subcontractors, Long Painting and Herrick Steel, alleging that if HK were liable to the PFD and the Mariners, then their subcontractors bore responsibility. *Id.* HK filed an amended Answer on February 7, 2007, alleging for the first time that RCW 4.16.326(1)(g) barred the claims. CP 25-31.

On February 23, 2007, HK moved for summary judgment against the PFD and the Mariners on the ground that they filed the Complaint outside the six year statute of limitations. CP 168-83. HK based its motion *entirely* on the Construction Agreement's claim accrual clause: HK argued that because all claims accrued by the date of Substantial Completion (July 1, 1999), the limitations period expired before the PFD

and the Mariners sued on August 14, 2006. CP 174. On March 23, 2007, the trial court granted HK's motion, accepting HK's argument that the accrual clause governed and dismissing the PFD's and the Mariners' claims—as well as HK's third party claims. CP 415-17. The PFD and the Mariners appealed, CP 423, and HK filed a cross appeal. CP 423-24.

On appeal, HK again represented that the statute of repose did not apply because the Construction Agreement provided that all claims accrued upon Substantial Completion. *See* Br. of Resp./Cross-Appellants, No. 59823-6-I (Aug. 24, 2007) at 12 n.8. On March 5, 2009, the Supreme Court reversed the trial court's grant of summary judgment, holding that RCW 4.16.160 exempted the claims from the statute of limitations because the action was brought "in the name of or for the benefit of the state," as that term is used in RCW 4.16.160. *Wash. State Major League Baseball Stadium PFD*, 165 Wn.2d at 695-96. The Court began its substantive discussion by noting HK's factual contention "that the claims of the PFD and Mariners accrued no later than July 1, 1999" based on the contractual accrual clause, carefully pointing out that "[n]o party asserts that [the Statute of Repose] is applicable." CP 424–25 & n.1.

The Supreme Court remanded the case for further proceedings.

## 2. Denial of the Post-Remand Summary Judgment Motions

Not long after the mandate issued from the Supreme Court, Herrick moved for summary judgment on HK's third-party claims, arguing that—unlike the PFD and the Mariners—HK could not claim an exemption from the statute of limitations, since it did not sue “for the benefit of the state” and, according to Herrick, the Supreme Court's holding governed only the relationship between HK and the PFD. CP 455-61. In opposition, HK *again* took the position that Section 13.7 of the Construction Agreement provided for claim accrual as of Substantial Completion. CP 479. It argued, however, that the same exception to the limitations period that applied to the PFD's and Mariners' claims against HK also applied to HK's claims against Herrick because of “flow down” provisions of the subcontract. CP 470-79. The trial court granted Herrick's motion on August 7, 2009, dismissing HK's claims. CP 492-94. HK moved for reconsideration. CP 495-508.

A month later, HK moved for summary judgment on the PFD's and the Mariners' claims. CP 643-71. HK made three alternative arguments:

*First*, flatly contradicting its prior representations to the trial court and the Supreme Court, HK argued that the PFD's and the Mariners' claims did *not* accrue at Substantial Completion because the contractual accrual clause violated public policy. CP 653-54. HK claimed that, instead, a

discovery rule governed accrual. Ignoring evidence showing discovery of HK's defective work between February and May 2005, HK contended the PFD and the Mariners did not discover their claims until September 2005 at the earliest, after the statute of repose expired.

*Second*, HK took another run at barring the claims under the statute of limitations. Although HK admitted that the claims were *exempt* from the statute of limitations, it made the peculiar argument that the PFD and the Mariners nevertheless had to sue within "the statute of limitations applicable to the type (or cause) [sic] of action." CP 664. Because they filed too late, HK argued that principles of comparative fault barred the claims under RCW 4.16.326(1)(g)—a statute passed four years after Substantial Completion.

*Third*, HK urged that the PFD and the Mariners failed to follow the Construction Agreement's claim procedure, which it said required claims to be filed within 21 days of discovery. CP 666. HK did not mention that the parties eliminated the 21-day filing requirement in 1998. CP 991, 1016.

On the same day, Long Painting moved for summary judgment on HK's third-party claims, arguing (as had Herrick) that, unlike the PFD and the Mariners, HK was not suing "for the benefit of the state" and therefore could not claim an exemption from the statute of limitations. CP 629-42.

By order dated October 20, 2009, the trial court *denied* HK's motion without comment or explanation. CP 1413-14 ("First Order"). On the same

day, it denied Long Painting's motion against HK. CP 1415-16. Then, on November 16, 2009, the trial court granted HK's motion for reconsideration on the Herrick motion, vacated its order dismissing Herrick, and denied Herrick's motion for summary judgment. CP 1456-57. Thus, as of November 20, 2009, the trial court had denied all motions for summary judgment, including HK's motion predicated on the statute of repose. No party filed a motion for reconsideration.

### 3. The Trial Court's *Sua Sponte* Dismissal

On January 15, 2010, third party defendant Herrick brought yet another summary judgment motion seeking dismissal of HK's claims against it. CP 1474-89. Herrick primarily argued that its steel priming work complied with its subcontract, meaning that Herrick bore no liability for the intumescent failure. CP 1474-89. But Herrick *also* urged that the statute of repose barred any claim by HK on the basis that HK's claims accrued on January 23, 2006, because "[i]t is undisputed that HK was not aware of any alleged defects in Herrick's work until January 23<sup>rd</sup> 2006, more than five months after the six year statute of repose had expired." CP 1482. In response, HK did *not* renew its motion against the PFD and the Mariners. Instead, it reminded the trial court that it already rejected the statute of repose defense in its October 2009 rulings. CP 1644-57.

On February 9, 2010, after hearing argument on Herrick’s motion, VRP (2/09/10) 2–16, the trial court announced its intent to sign an order dismissing *all* claims in the case—including the PFD’s and the Mariners’ claims against HK. VRP (2/09/10) 18–19. The trial court rested its decision on the same statute of repose argument it rejected just a few months before, *id.*, even though HK at the time did not even have a motion pending seeking dismissal of the PFD’s and Mariners’ claims. (Indeed, HK that day *argued* that the statute of repose issue had been “heard, briefed, argued, and decided.” VRP (2/09/10) 14.<sup>3</sup>) The trial court did not give counsel for the PFD or the Mariners a chance to speak before ruling, nor did it allow them to brief any renewed motion by HK. Indeed, because no motion concerning the PFD or the Mariners was pending, their lead trial counsel, Mr. Parnass, was not even in the courtroom—nor was *any* counsel for Long Painting in attendance. *See* VRP (2/12/10) 1.

Consistent with the trial court’s oral declaration of intent, it entered an order (“Second Order”) on February 17, 2010, *granting* HK’s *initial* motion for summary judgment against the PFD and the Mariners<sup>4</sup>—a motion the trial court had already denied and that was no longer pending.

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<sup>3</sup> The PFD and the Mariners attach as an Appendix excerpts of the Report of Proceedings from February 12, 2010, containing dialogue between HK’s counsel and the trial court.

<sup>4</sup> The Second Order listed *exactly* the same factual materials as the First Order. *Compare* CP 1413-14 *with* CP 2098-99. In other words, the trial court made no pretense that new facts had come to its attention to justify its abrupt change in course.

CP 2098-2100. Compounding the irregularity of the proceedings, the trial court entered the Second Order despite the absence of the notice to the PFD and the Mariners required by Rule 54(f)(2)—and without any waiver of notice. *See* CP 2100 (no waiver of notice).

The PFD and the Mariners moved for reconsideration. CP 1731-44. The trial court denied the motion without argument. CP 1747-48. The PFD and the Mariners filed a timely Notice of Appeal from the Second Order on March 30, 2010. CP 2095-2102.

## V. ARGUMENT

This Court applies a *de novo* standard in reviewing the trial court's ruling on summary judgment. *See Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 252, 143 P.3d 590 (2006). Because the trial court erred in dismissing the PFD's and the Mariners' claims, this Court should reverse.

### A. Principles of Judicial Estoppel, Waiver, and Law of the Case Bar HK from Asserting a Statute of Repose Defense It Disclaimed before the Supreme Court.

HK's current position manifests a complete about-face from the position it advocated between 2007 and 2009. Given that the judiciary spent three years deciding issues predicated *entirely* on HK's contention that the PFD's and the Mariners' claims accrued on July 1, 1999, the law does not allow HK to repudiate the factual basis for that argument simply because the Supreme Court rejected its position.

In 2007, HK explained why the claims accrued on July 1, 1999—  
and why the statute of repose did not apply:

RCW 4.16.310, the Statute of Repose, provides that causes of action arising from construction that have not accrued within six years of the date of substantial completion are time-barred. *See* RCW 4.16.310. In this case, **Article 13.7** of AIA Form A201 Revised General Conditions of the Contract for Construction for the Washington State Major League Public Facilities District Baseball Stadium Project entered into between the PFD and Hunt-Kiewit provides that all causes of action *are deemed to have accrued* on the date of substantial completion. **Therefore, RCW 4.16.310 is inapplicable here.**

CP 175 (emphasis added). On appeal, HK reiterated its position:

RCW 4.16.310, the Statute of Repose, provides that causes of action arising from construction that have not accrued within six years of the date of Substantial Completion are time-barred. In this case, Article 13.7 of the General Conditions provides that all causes of action are deemed to have accrued no later than the date of Substantial Completion.

Br. of Resp./Cross-Appellants, No. 59823-6-I (Aug. 24, 2007) at 12 n.8.

HK took this position on the facts for an obvious tactical reason: it wanted the claims to accrue *as early as possible*, so it could argue that the statute of limitations expired before the PFD and the Mariners sued.

The Supreme Court accepted HK's position on the date of accrual. It decided the appeal based on the agreement of all parties, including HK, that the claims accrued on July 1, 1999, and that the limitations period would bar them *unless* the claims fit within the statutory exception for

claims brought in the name, or for the benefit, of the state. *See* RCW 4.16.040. The Supreme Court also expressly accepted the parties' agreement that the statute of repose did not apply. *Wash. State Major League Baseball Stadium PFD*, 165 Wn.2d at 686 n.1. In short, the Supreme Court *relied* on HK's stated position.

Once it lost on appeal, however, HK began advocating a position that would have made the earlier appeal—and the attendant expenditure of judicial and party resources—completely unnecessary. To facilitate a different argument under the statute of repose, HK has decided to shift its version of the facts and argue that the PFD's and the Mariners' claims accrued by no earlier than September 2005. CP 650-51. Had HK made the same factual contention to the Supreme Court in 2008 and 2009, the earlier appeal would have been unnecessary: if the claims accrued in 2005, the commencement of this lawsuit in 2006 *easily* satisfied the six-year limitations period set forth in RCW 4.16.040.

The law does not reward this sort of gamesmanship. Once HK invited the trial court and the Supreme Court to decide important issues based on *repeated* representations that the claims accrued on July 1, 1999, and that the statute of repose did not apply, it lost the right to re-frame the facts simply because the Supreme Court ruled against it. This Court

should reject HK's statute of repose argument without even having to analyze the merits, on any one of at least three grounds:

**Judicial Estoppel.** Judicial estoppel “precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Skinner v. Holgate*, 141 Wn. App. 840, 847, 173 P.3d 300 (2007) (judicial estoppel barred claim that plaintiff had not disclosed in bankruptcy proceeding) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)); *see also Moriarty v. Svec*, 233 F.3d 955, 962 (7th Cir. 2000) (plaintiff judicially estopped from arguing on **second** appeal that “single employer” doctrine did not apply, where it previously argued and prevailed on **first** appeal that two companies were “single employer”). The doctrine exists to “preserve respect for judicial proceedings” and to “avoid inconsistency, duplicity, and ... waste of time.” *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005) (citation omitted). The doctrine exists primarily to protect the “integrity of the judicial process.” *Yniguez v. Arizona*, 939 F.2d 727, 739 (9th Cir. 1991).

Courts consider three factors in deciding whether judicial estoppel bars an argument: (1) whether the party is taking a position “clearly inconsistent” with its earlier position; (2) whether judicial acceptance of the current position would “create[] the perception that the court was

misled”; and (3) whether the party would “derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Skinner*, 141 Wn. App at 848 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). Here, HK brought its original summary judgment motion based *entirely* on the position that the PFD and Mariner claims accrued at Substantial Completion pursuant to Section 13.7 of the General Conditions and that the statute of limitations therefore barred them. The trial court and the Washington Supreme Court decided important issues (in a published decision) *only* because they accepted HK’s factual position that the claims accrued as of Substantial Completion.

HK’s two positions are clearly inconsistent, create the undeniable perception that HK misled the Supreme Court during the first appeal (since HK’s current position would have made that appeal, and the decision it produced, unnecessary), and appear calculated to give HK an unfair advantage by allowing it to make two motions for summary judgment based on mutually incompatible versions of the facts. The Court should hold HK judicially estopped from contesting what it previously contended, i.e., that the claims accrued as of Substantial Completion.

**Waiver.** HK’s position in the appeal waived its right to raise the statute of repose as a defense. A party waives an affirmative defense if “(1) assertion of the defense is inconsistent with defendant’s prior

behavior or (2) the defendant has been dilatory in asserting the defense.”

*Brevick v. City of Seattle*, 139 Wn. App. 373, 381, 160 P.3d 648,

652 (2007) (citation omitted). This rule “prevent[s] a defendant from

ambushing a plaintiff during litigation either through delay in asserting a

defense or misdirecting the plaintiff away from a defense for tactical

advantage.” *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d

563 (2002).

HK ***repeatedly and unequivocally*** manifested its intent to waive the statute of repose defense—because it thought it would do better with the contradictory statute of limitations defense. HK told the trial court “RCW 4.16.310 is inapplicable here.” CP 175. It said the same thing to the Supreme Court, which wrote that “HK contends that the claims of the PFD and Mariners accrued ***no later than*** July 1, 1999, the date of substantial completion,” and that “***no party*** asserts that this provision [i.e., the statute of repose] is applicable.” *Wash. State Major League Baseball Stadium PFD*, 165 Wn.2d at 685, 686 n.1 (emphasis added). HK waived its right to argue a different accrual date and invoke RCW 4.16.310 when it told the trial court, the Supreme Court, the PFD, and the Mariners that the defense did not apply—all to enable a statute of limitations defense.

***Law of the Case.*** “An unchallenged conclusion of law becomes the law of the case.” *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706,

716-717, 846 P.2d 550 (1993) (citations omitted). Here, the Supreme Court ruled on the issues raised by HK’s statute of limitations motion *only* because it expressly relied on HK’s assertion that the claims accrued “no later than July 1, 1999.” That determination became the law of the case; HK cannot pretend that it now writes on a blank slate.

Each of these doctrines affords a principled basis to resolve this appeal without even reaching the merits of the statute of repose argument.

**B. By Contract, the Claims Accrued as of the Date of Substantial Completion and Comply with the Statute of Repose.**

HK’s statute of repose defense also fails on the merits. The statute of repose bars claims that do not *accrue* within a certain period—but says nothing about how to determine accrual. Here, the Construction Agreement contains a standard accrual clause that satisfies the statute of repose by saying *exactly* when the parties agree claims will accrue. The PFD and HK had every right to agree to a contractual definition of claim accrual, as HK repeatedly recognized in this litigation. Washington public policy provides no basis to override that agreement.

**1. The Construction Agreement Claim Accrual Provision Satisfies the Statute of Repose.**

The statute of repose bars “[a]ny cause of action which has not accrued within six years after ... substantial completion” or within six years after “termination of services,” whichever is later. RCW 4.16.310.

The statute thus “establishes the time period in which the cause of action must accrue.” *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 192 n.8, 69 P.3d 895 (2003). A claim that “has not accrued” within the prescribed period is extinguished. *Donovan v. Pruitt*, 36 Wn. App. 324, 327, 674 P.2d 204 (1988). But the statute of repose does **not** address how courts should decide when a claim accrues; instead, ordinary principles outside the statute of repose govern claim accrual. *Harmony at Madrona Park Owners Ass’n. v. Madison Harmony Dev. Inc.*, 143 Wn. App. 345, 352-53, 177 P.3d 755 (2008). The same rules govern accrual for statute of limitations and statute of repose purposes. *See Parkridge Associates, Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 606, 54 P.3d 225 (2002) (characterizing as “absurd on its face” proposition that different accrual dates could govern statutes of limitations and repose).

Here, Section 13.7 of the General Provisions states that all claims between the parties that arise from acts or failures to act prior to Substantial Completion accrue at Substantial Completion:

As to acts or failures to act occurring prior to 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;

CP 156 (emphasis added). The claims against HK thus accrued as of the date of Substantial Completion. The statute of repose therefore cannot bar those claims, since the statute affects only claims that *fail* to accrue within six years of the date of Substantial Completion.

Section 13.7 is an industry-standard claim accrual provision used widely in AIA contract documents, as HK acknowledges. CP 175 n.26. *All* courts that have considered similar contractual accrual provisions have enforced them as reasonable and consistent with public policy. In *Harbor Court Assoc. v. Leo A. Daly Co.*, 179 F.3d 147 (4th Cir. 1999), for example, the Fourth Circuit upheld a similar AIA contractual accrual provision. In *Harbor Court*, the owner argued (as does HK) that the contractual accrual clause in the AIA contract was unenforceable as a matter of public policy (both under Maryland and Nebraska law) and that a discovery rule should govern accrual. The Fourth Circuit rejected the appeals to “public policy,” holding that Maryland courts had an “established commitment to protecting individuals’ efforts to structure their own affairs through contract” and that the parties “are sophisticated business actors who sought, by contract, to allocate business risks in advance.” *Id.* at 150-51. Addressing the issue under Nebraska law, the Court noted that “appellants have not presented even a single case, from any jurisdiction, in which a contractual provision changing the date on

which a cause of action accrues has been held to be violative of public policy.” *Id.* at 153. Nebraska would likely “allow sophisticated business actors to contract to eliminate this uncertainty from their business affairs.” *Id.* Many cases stand for the same proposition.<sup>5</sup>

Washington courts have not addressed the validity of the AIA accrual provision. Like other states, however, Washington gives parties the freedom to determine the timeliness of claims arising out of their contracts. Thus, *contractual* limitation provisions routinely prevail over general statutes of limitations “unless prohibited by statute or public policy, or unless they are unreasonable.” *Ashburn v. Safeco Ins. Co. of America*, 42 Wn. App. 692, 696, 713 P.2d 742, 744 (1986). In *Ashburn*, the Court upheld a one year limitation period in the parties’ contract and refused to “adopt Nebraska’s rule that contract limitation of actions provisions which conflict with statutory time periods are void.” *Id.* Similarly, in *Yakima Asphalt Paving Co. v. Dept. of Transportation*, 45

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<sup>5</sup> See, e.g., *Steadfast Ins. Co. a/s/o Skanska USA Bldg. Inc. v. Brodie Contractors, Inc.*, No. 4:07CV00058, 2008 U.S. Dist. LEXIS 88448 (W.D. W.Va. Oct. 31, 2008); *College of Notre Dame of Maryland v. Morabito Consultants Inc.*, 752 A.2d 265 (Md. Ct. Spec. App. 2000), *Gustine Uniontown Assoc. Ltd. v. Anthony Crane Rental, Inc.*, 892 A.2d 830 (Pa. Super. 2006) (enforcing Article 9.3’s identical accrual clause as reasonable); *Schultz v. Cooper*, 134 S.W.3d 618 (Ky. App. 2003) (enforcing the accrual clause as reasonable and not violative of public policy); *Harbor Court Assoc. v. Leo A. Daly Co.*, 179 F.3d 147 (4th Cir. 1999) (enforcing AIA contractual provision entitled Section 11.3 abrogating discovery rule by fixing accrual date for any action to the date that work on project was substantially completed); *Federal Ins. Co. v. Konstant Arch. Planning, Inc.*, 902 N.E. 2d 1213 (Ill. App. Ct. 2009).

Wn. App. 663, 666, 726 P.2d 1021 (1986), the court upheld a contract provision altering the usual limitations period and requiring a contractor to sue within 180 days of acceptance of the contract. And in *Absher Constr. Co. v. Kent School District No. 415*, 77 Wn. App. 137, 890 P.2d 1071 (1995), the court upheld a clause requiring the contractor to sue within 120 days of substantial completion because “parties to a contract can agree to a shorter limitations period than that called for in a general statute.” *Id.* at 147-148. See also *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 391, 78 P.3d 161 (2003) (upholding contractual claims procedure barring untimely claims); *Southcenter View Condo. Owners Ass’n v. Condo. Builders*, 47 Wn. App. 767, 773, 736 P.2d 1075 (1986) (upholding one year deadline for suit).

These cases all apply the principle that parties have freedom to contract to determine the time limits for bringing contract claims. Here, HK contracted for a standard accrual rule—and then repeatedly invoked that rule through two years of litigation because it thought it could obtain a tactical advantage by doing so. The Court should not indulge HK’s eleventh hour effort to turn its back on the Agreement to facilitate an end-around the Supreme Court’s decision. Instead, the Court should enforce this contract between sophisticated parties as written.

**2. The Agreed Accrual Provision Does Not Violate Public Policy.**

HK’s “public policy” argument in the trial court rested on the fact that the Legislature amended RCW 4.16.310 in 1986 in response to *Bellevue School Dist. No. 405 v. Brazier Construction Co.*, 103 Wn.2d 111, 691 P.2d 178, 185 (1984), in which the Supreme Court held that the statute of repose did not apply to claims brought by or for the benefit of the state. 103 Wn.2d at 120. The Legislature responded by amending RCW 4.16.310 and so that it applies to **all** construction claims, including claims for the state. According to HK, the 1986 amendment not only overruled *Bellevue School District* by making the statute of repose apply to actions brought for the benefit of the state—but also **forbade** contractual agreements governing when claims brought for the benefit of the state **accrue** for purpose of the statute of repose. CP 656. Basic principles of Washington law foreclose this argument.

Washington public policy **strongly** favors enforcing contracts as written. Courts will not “under the guise of public policy, rewrite a clear contract between the parties.” *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 380, 917 P.2d 116 (1996). *See also State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 483, 687 P.2d 1139 (1984) (courts “shall not invoke public policy to override an otherwise proper contract even though

its terms may be harsh and its necessity doubtful”). This policy applies with special force to construction contracts:

There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. ***In cases involving construction disputes, the contracts entered into among the various parties shall govern their economic expectations.*** The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business.

*Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 828, 881 P.2d 986 (1994) (emphasis added). Here, sophisticated parties entered into a contract with an industry standard clause allocating risks relating to claim accrual.<sup>6</sup> Washington law enforces such bargains.

Given this policy of favoring enforcement of contracts, the Washington courts will not override a contract provision based on “public policy” unless a statute (a) expressly ***prohibits*** the provision in question or (b) expressly ***requires*** a different provision. Put another way,

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<sup>6</sup> HK persuasively explained why courts should enforce construction contracts as written: “Washington has an entrenched judicial philosophy of upholding parties’ negotiated allocation of risk, particularly when the parties are sophisticated business parties. Specifically, Washington courts uphold contractual provisions limiting or excluding remedies. ‘It is a basic principle of contract law that parties by an express agreement may contract for an exclusive remedy that limits their rights, duties and obligations.’ *Graoch Associates No. 5 Ltd. Partnership v. Titan Cont. Corp.*, 126 Wn. App. 856, 865, 109 P.3d 830 (2005) (citing *Bd. of Regents v. Wilson*, 27 Ill. App. 3d 26, 326 N.E.2d 216 (1975)). Washington black letter law provides that such provisions are enforceable because contracting parties may allocate risks as they see fit. *Soccolo Constr., Inc. v. City of Renton*, 102 Wn. App. 611, 614-615, 9 P.3d 886 (2000) (citing *Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wn.2d 214, 218, 484 P.2d 399 (1971)).” CP 917 (HK’s Response to Long Painting’s Motion for Summary Judgment).

Washington courts enforce an agreement “unless prohibited by some stricture against allocation of loss contemplated by the parties’ agreement.” *Redford v. City of Seattle*, 94 Wn.2d 198, 206, 615 P.2d 1285 (1980) (Industrial Insurance Act did not prohibit contractual indemnification agreement). *See also State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 88 P.3d 375 (2004) (state did not violate “priority programming statute” by entering into construction contracts without competitive bid; statute “completely silent” as to whether state required to comply with public bidding laws); *Dahl v. Parquet and Colonial Hardwood Floor Co., Inc.*, 108 Wn. App. 403, 410, 30 P.3d 537, 540-41 (2001) (upholding right of parties to use MAR procedures in binding arbitration under RCW 7.04).

Division II’s decision in *Ashburn* illustrates these principles. In *Ashburn*, the plaintiff argued that the court should not enforce a one-year contractual limitation period on claims because it supposedly conflicted with a statutory six-year statute of limitation. The court rejected this argument, noting that Washington law contained *no express statutory prohibition* on a contractual limitation period that varied from the statute of limitations. *Ashburn*, 42 Wn. App. at 695. Likewise, in *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 874 P.2d 868 (1994), this Court held that the Model Toxics Control Act (“MTCA”) did not

prohibit agreements allocating the risk of MTCA liability, even if they departed from the statutory scheme of joint and several liability:

It is well-settled that parties may incorporate into a contract any provision that is not illegal or against public policy.

...

In the absence of *express statutory language evidencing a legislative intent to prohibit agreements* in which private parties allocate the risk of MTCA liability between themselves, we conclude that such agreements are not prohibited under the MTCA.

*Id.* at 543-44 (emphasis added). As in *Car Wash*, “[i]n the absence of express statutory language evidencing a legislative intent to prohibit agreements in which private parties allocate the risk” arising from claim accrual, the statute of repose does not forbid those agreements.

Presumably aware of this tenet of Washington law, the Legislature states its intent plainly and unambiguously when it prohibits a specific contractual arrangement. In RCW 4.24.115, for example, the Legislature declared “void and unenforceable” any construction contract clause indemnifying for damages caused by the sole negligence of the indemnitee. And in RCW 4.24.360, the Legislature declared any construction contract that “purports to waive, release, or extinguish” rights for damages arising out of unreasonable delay “against public policy and ... void and unenforceable.” In each case, the Legislature identified the

contractual provision that it intended to prohibit and declared it beyond the power of parties' agreement. RCW 4.16.310 does nothing of the sort.

**3. Section 13.7 Does Not Impermissibly “Waive” the Statute of Repose.**

HK urged the trial court to decline to enforce the contractual accrual clause on the theory that it impermissibly purported to “waive” the statute of repose. CP 656-69. HK contended parties cannot “waive” the statute of repose “even by express agreement” and that, in any event, it did not “waive” the statute here. *Id.* But HK cited *no* authority holding that a contractual accrual clause impermissibly “waived” a repose defense.<sup>7</sup>

In any event, HK’s waiver argument rests on a mischaracterization of what Section 13.7 does: it does *not* “waive” the statute of repose; rather, it implements the statute—which does not define accrual—by

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<sup>7</sup> Two of HK’s cases involved statutory causes of action that, by their terms, expired if not brought within a specified period of time. *See, e.g., Duran v. Henderson*, 71 S.W.3d 833, 837–38 (Tex. App. 2002) (party could not waive provision in Uniform Fraudulent Transfers Act extinguishing statutory claim after four years of transfer); *Warfield v. Alaniz*, 453 F.Supp.2d 1118, 1130 (D. Ariz. 2006) (same). The Washington Supreme Court has explained that non-claim statutes such as these have no bearing on the interpretation of RCW 4.16.310. *See Bellevue School Dist.*, 103 Wn.2d at 119-20. Another case involved alleged waiver as a result of a failure to plead a statute of repose as an affirmative defense. *Cheswold Vol. Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984). And the last case involved a tolling agreement that waived in advance any “time-related defense,” without addressing accrual. *Stone & Webster Eng’g Corp. v. Duquesne Light Co.*, 79 F. Supp. 2d 1, 8-9 (D. Mass. 2000). Further, *Stone & Webster* noted that “courts in other jurisdiction[s] have permitted such a waiver of the statute of repose.” *Id.* at 8 (citing *ESI Montgomery County, Inc. v. Montenay Int’l Corp.*, 899 F. Supp. 1061, 1066 (S.D.N.Y. 1995), *First Interstate Bank of Denver v. Central Bank & Trust Co.*, 937 P.2d 855, 860 (Colo.App. 1997); *One North McDowell Assoc. v. McDowell Dev. Co.*, 98 N.C. App. 125, 389 S.E.2d 834, 836 (1990)).

defining *when* claims accrue. For that reason, *every* court that has considered the AIA accrual clause has held it to be reasonable, enforceable, and consistent with public policy. *See, e.g., Gustine*, 892 A.2d at 838-39 (quoting *Harbor Court*, 179 F.3d at 151 (“the only courts to consider a contractual accrual date provision have all enforced it”)).

**C. Even if the Contractual Accrual Provision Does Not Apply, the Trial Court Erred in Granting Summary Judgment Based on the Statute of Repose.**

Section 13.7 *eliminates* the “discovery rule,” i.e., the principle that a cause of action accrues “when a plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the facts that give rise to the claim.” *Parkridge Assocs.*, 113 Wn. App. at 608. “This language [in the standard AIA contract] precludes application of the discovery rule; indeed, that is its obvious intent.” *Gustine Uniontown Assoc. Ltd. v. Anthony Crane Rental, Inc.*, 892 A.2d 830, 836 (Pa. Super. 2006).<sup>8</sup> Thus, in attacking Section 13.7, HK urged application of a discovery rule.

But even if a discovery rule determines the accrual of the claims, HK had no right to summary judgment on the statute of repose. Under the statute of repose, claims must accrue within six years of (1) substantial

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<sup>8</sup> “In many jurisdictions, a claim ‘accrues’ when the harm caused has been discovered by the innocent party. This is called the ‘discovery rule.’ These provisions eliminate the discovery rule by providing that the statute of limitations begins on the date of the contractually specified occurrence.” Commentary on AIA Document A201-1997, available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab080258.pdf>.

completion or (2) termination of services, “*whichever is later.*” RCW 4.16.310 (emphasis added). Here, because HK continued to perform significant work on Safeco Field well into 2000, its argument that the PFD and the Mariners discovered their claims by September 2005 dooms their statute of repose argument as a matter of law. Further, even if one measures the period of repose from the date of Substantial Completion, the record at least raises an issue of fact as to whether the PFD and the Mariners discovered their claims before July 1, 2005, six years after Substantial Completion on July 1, 1999.

**1. Evidence Improperly Ignored by the Trial Court Shows the Claims Accrued within Six Years of the Termination of HK’s Services.**

HK’s summary judgment motion blithely ignored half of the statute of repose. Rather than measuring the six-year period of repose solely from substantial completion, the Legislature recognized that contractors often work past that date. As a result, the six-year repose period runs from *the later* of substantial completion or “the termination of the services enumerated in RCW 4.16.300.” RCW 4.16.310. The “services enumerated in RCW 4.16.300” include “design, planning, surveying, architectural or construction or engineering services”—the services that HK provided on Safeco Field. *See* RCW 4.16.300.

The Legislature intended the “whichever is later” phrase to protect owners on long-term construction projects, such as Safeco Field. For contractors who complete work early in the project, the statute of repose does not begin to run until substantial completion; for contractors who work *beyond* substantial completion, the statute of repose begins running after substantial completion, when their services terminate. This Court made the point in *1519-1525 Lakeview Boulevard Condominium Ass’n v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74 (2000), *aff’d* 144 Wn.2d 570, 29 P.3d 1249 (2001), where the Court rejected an owner’s argument that the statute of repose did not begin running until the “termination of services” of *all* persons associated with the project:

If all services must have terminated before the six-year period begins to run, there could be no services left to perform that would move a project from a state of “substantial completion” to full completion. ***For contractors performing those final services, therefore, the statute runs from the date the last service was provided;*** for the others, it runs from the date of substantial completion.

101 Wn. App. at 930 (emphasis added).

Division III applied these principles in *Smith v. Showalter*, 47 Wn. App. 245, 734 P.2d 928 (1987), where a contractor worked on a home from 1975 until 1981, and then sold it. In 1984, fire destroyed the home, and the buyer (owner) sued the contractor in July 1985. A fire expert

concluded the fire began in an outlet in the west wall of the utility room. The trial court held the statute of repose barred the suit because the six year period began when the contractor wired and occupied the utility room in 1977. 47 Wn. App. at 247. The Court of Appeals reversed, holding the statute of repose did not begin to run until the contractor terminated his services in 1981, even though the fire resulted from work completed in 1977. Citing the legislative purpose to protect owners “where long-term construction was involved,” the Court of Appeals held that because the contractor “continued to work on the home from 1975 until 1981,” the “latter date would mark the beginning of the 6-year period of the statute of repose in RCW 4.16.310.” 47 Wn. App. at 249-50.<sup>9</sup>

The evidence shows that HK continued to work *long* after Substantial Completion. The Certificate of Substantial Completion itself (submitted by HK on its 2007 motion) shows that HK had *not* completed its Safeco Field work as of July 1, 1999, noting that “[a] list of items to be completed or corrected is attached hereto (**Hunt-Kiewit Substantial Completion Matrix**).” CP 166-67. Further, project records submitted by the PFD and the Mariners show HK and its subcontractors performing

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<sup>9</sup> In connection with a motion to amend its answer, HK argued that the statute of repose always begins running on substantial completion except with respect to claims *arising from* subsequent services, citing *Parkridge Associates*. But *Parkridge* did not actually make that holding, since it held that the statute of repose began running on the date of the contractor’s termination of services in any event. 113 Wn. App. at 597, 600.

work on *scores* of open items at least through February 2000. *See* CP 1120-22; CP 1150-1410. As of February 7, 2000, HK reported to the PFD that its subcontractors (including Long Painting) still had thirty open items—but HK believed it was “on target to be complete by 15 February, 2000.” CP 1150. Indeed, HK received payments in 2000 exceeding \$5 million for its Safeco Field work. CP 1131.

The trial court apparently ignored this evidence. On October 19, 2009, a few days after argument on HK’s summary judgment motion, the PFD and the Mariners filed a supplemental submission showing that HK continued to work on Safeco Field in late 1999 and 2000. *See* CP 1120-23 (Notice of Supp. Filing); CP 1124-1410 (Supp. Klein Decl.). HK never moved to strike. The following day, October 20, 2009, the trial court entered the First Order, *denying* HK’s summary judgment motion without referring to either HK’s reply materials or the PFD’s and the Mariners’ supplemental submission. *See* CP 1413-1414. Four months later, on February 17, 2010, the trial court entered its Second Order, despite the failure to give notice of presentation, as required by Rule 54(f). CP 2098-2100. The Second Order likewise made no reference to the materials the PFD and the Mariners filed in October, showing HK’s continued work. In their Motion for Reconsideration, however, the PFD and the Mariners

relied on this material, CP 1735, arguing that their claims accrued within six years of termination of services. CP 1739-41.

The evidence of HK's post-Substantial Completion work thus was "called to the attention of the trial court before the order on summary judgment was entered" on February 17, 2010. RAP 9.12. Especially in these circumstances—in which the trial court entered its order without proper notice under Rule 54(f), granting a motion that was no longer pending—the Court should consider this material. *See Mithoug v. Appollo Radio*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (requiring appellate consideration of all evidence "called to the attention of the trial court," even if not "considered" by trial court); *Skeie v. Mercer Trucking Co.*, 115 Wn. App. 144, 147, 61 P.3d 1207 (2003) (considering on review affidavit not listed in summary judgment order but not expressly excluded).

To the extent the trial court *deliberately* excluded this evidence from consideration before entering its Second Order, it erred. If HK wished to renew its previously-denied motion for summary judgment, Rule 56(c) entitled the PFD and the Mariners to (a) notice of "28 calendar days" and (b) the right to file "affidavits ... or other documentation." The trial court had no basis for depriving the Mariners and the PFD of their right to respond—and their right to include in that response the evidence first filed in October 2009. Even if one construes the *sua sponte* summary

judgment a “reconsideration” of the First Order, the trial court violated local rules by failing to invite a response from the PFD and the Mariners: King County Local Civil Rule 56(c)(4) requires that “[a]ll motions to reconsider shall conform to the requirements of CR 59 and LCR 7(b)(5).”<sup>10</sup> Local Civil Rule 59(b) in turn provides that “[n]o response to a motion for reconsideration shall be filed unless requested by the court”—but *also* that “[n]o motion for reconsideration will be granted without such a request.”

Based on the evidence properly before the trial court when it entered its Second Order, the statute of repose does not bar the claims, as long as they accrued at least before February 2006, i.e., within six years of HK’s completion of the services set forth in RCW 4.16.300. Even HK maintains that the PFD’s and the Mariners’ claims accrued by at least September **2005**, when HK claims the PFD and Mariners learned the cause of the widespread delamination of the intumescent coating. *See* CP 652. Thus, the trial court erred in granting summary judgment.

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<sup>10</sup> Under Civil Rule 59(b), any motion for reconsideration by HK would have been untimely by several months: the rule requires such a motion “not later than 10 days after entry of the ... order” on which the party seeks reconsideration.

**2. Even Assuming the Period of Repose Runs from Substantial Completion, the Record Discloses Genuine Issues of Fact as to the Accrual Date.**

A cause of action accrues under the discovery rule “when a plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the facts that give rise to the claim.” *Parkridge Assocs.*, 113 Wn. App at 608. Once a plaintiff is “placed on notice” of appreciable harm, the “plaintiff must make further diligent inquiry to ascertain the scope of the actual harm” and is “charged with what a reasonable inquiry would have discovered.” *Green v. A.P.C.*, 136 Wn.2d 87, 96-97, 960 P.2d 912 (1998). The discovery rule imputes “all facts” that would have been learned once the plaintiff has notice of facts sufficient to excite inquiry:

A person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that a reasonable inquiry would disclose.

*1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006). Accrual “is not postponed by the fact that the substantial damages occur later, and is not postponed until the specific damages occur for which the plaintiff seeks recovery.” *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000).

Here, the facts in the record would permit (and perhaps require) a trier of fact to find that the PFD and the Mariners “discovered” problems with the intumescent coating system before July 1, 2005, six years after

the date of Substantial Completion. Mariners President Chuck Armstrong noticed the blisters in *February 2005* and directed Ben Barton, the ballpark's maintenance manager, to examine the issue. CP 1076. By May 13, 2005, the Mariners' Vice President of Ballpark Operations advised that "now we are discovering some other locations where the coating is blistering and will probably flake off."<sup>11</sup> CP 1052, 1056. He described the problem as "a pretty big job," hired a construction management expert to coordinate the repair, and "asked for ... assistance in compiling potential costs for the upcoming capital budget," which the Mariners coordinate with the PFD under the Lease. *Id.* In other words, when the Mariners began budgeting for capital expenditures to repair the defects in HK's work (the repair costs that the PFD and the Mariners seek to recover in this lawsuit), the July 1, 2005, cutoff that HK seeks to invoke *still lay more than six weeks in the future*.<sup>12</sup>

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<sup>11</sup> For purposes of maintaining Safeco Field, only notice to the Mariners matters, and for statute of limitations and statute of repose purposes, notice to the Mariners would be imputed to the PFD. Article 3.2 of the Ballpark Lease (CP 310) provides that "[t]he Club is solely and exclusively responsible for the Operations and Maintenance of the Leased Premises in accordance with the Applicable Standard during the Operating Term," even though the PFD owns the ballpark. Similarly, Article 7.1 (CP 326-27) provides that "[t]he Club is solely and exclusively responsible for all Major Maintenance and Capital Improvements during the Operating Term, other than work that is part of initial construction." The term "Major Maintenance and Capital Improvements" includes, but is not limited to, work performed to repair "defects in construction or design."

<sup>12</sup> Even HK's subcontractor Long Painting discovered the delamination problem by at least March 7, 2005, when one of its consultants advised it that the "blistering and delaminating of the existing Intumescent Fire Protection Material" along the third base line would need to be repaired by applying a new tie-coat, i.e., a proper primer on top of the improper Wasser zinc primer. CP 1071-72.

On this evidence, the accrual date under the discovery rule at least presented a question of fact that the trier of fact must resolve at trial. Countless cases stand for the proposition that a trial court cannot resolve application of the discovery rule on summary judgment when the trier of fact might reach a different conclusion. *See, e.g., 1000 Virginia*, 158 Wn.2d at 589 (“[F]actual issues preclude summary judgment on the question when [owner] discovered its cause of action”); *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 539, 871 P.2d 601 (1994) (“[w]hether a plaintiff has exercised due diligence under the discovery rule is a question of fact”); *Parkridge Assocs.*, 113 Wn. App. at 608 (reversing summary judgment; “unclear from the record before us whether Ledcor, in the exercise of due diligence, should have discovered the alleged breach of contract before it did”). Indeed, even the trial court appeared to recognize the point: the trial court noted at argument that in discussing accrual, “we get into [a] question of fact.” VRP (10/15/09) 42.

Even if a discovery rule properly applied, the record at least raised a genuine issue of fact as to whether the PFD and the Mariners discovered the harm before July 1, 2005, and were therefore “charged” at that time with knowing “all facts” that investigation would disclose. *1000 Virginia*, 158 Wn.2d at 581; *Green*, 136 Wn.2d at 96-97. The trial court erred in resolving this fact issue on summary judgment.

**D. RCW 4.16.326(1)(g) Does Not Bar the PFD's and the Mariners' Claims.**

HK also moved for summary judgment on the ground that RCW 4.16.326(1)(g) bars the PFD's and the Mariners' claims.<sup>13</sup> CP 661-65. This statute provides an affirmative defense to construction claims where, *inter alia*, "an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations." RCW 4.16.326(1)(g). Seeking to relitigate the issues it lost before the Supreme Court, HK argues the PFD and the Mariners did not sue "within the applicable statute of limitations," theorizing that the statute remained "applicable" *even though* it exempted actions brought in the name of the state.<sup>14</sup> CP 661-65.

HK's argument lacks merit for three reasons. *First*, the statute does not apply retroactively to claims that accrued before its effective date, July 23, 2003, as did the claims here pursuant to the General Conditions. *Second*, the statute does not apply because the Supreme Court has held that there is no "applicable" statute of limitations. *Third*,

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<sup>13</sup> Although the trial court said that it was granting HK's motion based on the statute of repose, VRP (2/12/10) 17, the PFD and the Mariners will brief this issue on the assumption that HK will propose it as an alternative ground for affirmance.

<sup>14</sup> HK took the exact opposite position earlier in the case. In opposing Herrick's argument that this statute barred HK's claims as to Herrick, HK emphasized that the Supreme Court held that "*there is no applicable statute of limitations*" and that therefore the "statute has no application under these circumstances." CP 478 (emphasis added).

the statute does not abrogate the principle of *nullum tempus*, which served as the foundation for the Supreme Court's decision.

**1. RCW 4.16.326(1)(g) Does Not Apply to Causes of Action That Accrued Prior to July 23, 2003.**

The Washington Supreme Court held in *Cambridge Townhomes LLC v. Pacific Star Roofing Inc.*, 166 Wn.2d 475, 486, 209 P.3d 863 (2009), that RCW 4.16.326(1)(g) does not apply retroactively to claims that accrued prior to the effective date of the statute, July 23, 2003. The Court in *Cambridge* addressed a situation similar to this case, in which the project was substantially complete and the claim accrued *prior* to the statute's effective date, but the owner sued *after* the effective date:

Thus, for the purpose of applying RCW 4.16.326(1)(g), *the operative date* is when the claim *accrues*, not when it is filed. Because the accrual of the claim here predated the effective date of RCW 4.16.326(1)(g), its application in this instance would be retroactive and contrary to our precedent.

*Cambridge Townhomes*, 166 Wn.2d at 486 (first emphasis added). Here, as explained above (and as HK urged for two years), Section 13.7 of the General Conditions made the claims accrue as of the date of Substantial Completion, July 1, 1999. Because RCW 4.16.326(1)(g) does not apply retroactively, HK's argument fails as a matter of law.

**2. Even if RCW 4.16.326(1)(g) Applies, Appellants' Claims Satisfy Both Prongs of The Requirement.**

Even if this Court were to hold that RCW 4.16.326(1)(g) applies, the statute bars only claims that (1) do not accrue within the period established by the statute of repose or (2) are not filed within the period prescribed by the “applicable” statute of limitations. The claims of the PFD and the Mariners satisfy both prongs of that test:

*First*, as noted above, the claims timely accrued, whether this Court applies Section 13.7 of the Construction Agreement or the “discovery rule” advocated by HK. The PFD and the Mariners at least raised an issue of fact as to compliance with the statute of repose.

*Second*, no statute of limitations “applies” to the claims of the PFD or Mariners. Although the statute does not define the term “applicable,” the ordinary dictionary definition means “capable of being applied: having relevance . . . fit, suitable, or right to be applied: APPROPRIATE . . . SYN see RELEVANT.” *Webster’s Third New International Dictionary* at 105 (2002). Here, the Supreme Court held that no “suitable” or “appropriate” or “relevant” statute of limitation applies: “the action by the PFD and the Mariners against HK regarding construction defects at Safeco Field qualifies under the ‘for the benefit of the state’ exemption to the six year contract statute of limitations.” *Wash. State Major League Baseball*

*Stadium PFD*, 165 Wn.2d at 694. RCW 4.16.326(1)(g) therefore does not bar claims for HK's defective workmanship.

**3. RCW 4.16.326(1)(g) Does Not Repeal the Exemption in RCW 4.16.040 for Actions Brought in the Name of the State.**

Although the Supreme Court ruled that the statute of limitations specifically exempts these claims, HK argued in the trial court that RCW 4.16.326(1)(g) abrogates RCW 4.16.040's exemption for actions in the name of the state. In HK's words, the "doctrine of *nullum tempus* does not apply to the issue of comparative fault of the PFD." CP 663.

But HK reads the Supreme Court's decision too narrowly. The Court recognized that the statutory exemption for actions in the name of the state "reflects a facet of sovereign immunity under the old English common law doctrine, '*nullum tempus occurrit regi*,' meaning 'no time runs against the king.'" *Wash. State Major League Baseball Stadium PFD*, 165 Wn.2d at 686 (citation omitted). For that reason, the Washington Supreme Court has held that "absent express legislation directing otherwise," statutes limiting the time for suit, no matter how labeled, do not apply to actions by the sovereign. *Bellevue School Dist.*, 103 Wn.2d at 120. Thus, in *Bellevue School District*, the Supreme Court held that the initial version of the statute of repose, RCW 4.16.310, did not apply to a school district's claim. *Id.* at 124.

The Legislature responded to *Bellevue School District* by making clear that the statute of repose thereafter *would* apply to actions brought in the name of the state. RCW 4.16.310. But the Legislature made no such provision in RCW 4.16.326(1)(g). Under *Bellevue School District*, the principle of *nullum tempus* means that the limitations periods incorporated by reference into RCW 4.16.326(1)(g) do not run against the sovereign.

Further, if HK's reading were correct, RCW 4.16.326(1)(g)'s enactment in 2003 repealed *sub silentio* the sovereign claims exemption in RCW 4.16.040. But "[a]uthority is legion that implied repeals of statutes are disfavored and courts have a duty to interpret statutes so as to give them effect." *Bellevue School Dist.*, 103 Wn.2d at 122 (citing *U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981); *Gross v. Lynnwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978); *Ronken v. County Comm'rs*, 89 Wn.2d 304, 572 P.2d 1 (1977)). To establish implied repeal, a party must show the following:

(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.

*Bellevue School Dist.*, 103 Wn.2d at 122 (quoting *U.S. Oil & Ref. Co.*, 96 Wn.2d at 88, 633 P.2d 1329).

Here, the language of RCW 4.16.326 manifests no intent to repeal the sovereign claim exemption to the limitations period prescribed by RCW 4.16.040. It “does not itself establish any limitations period,” choosing instead only to incorporate existing limitations periods (and, by extension, their exemptions) by reference. *1000 Virginia*, 158 Wn.2d at 584. That being the case, the sovereign claims exemption in RCW 4.16.040 applies with equal force in RCW 4.16.326.

**E. No Contractual Notice Clause Governs the Claims.**

HK moved for summary judgment on the ground that the PFD and Mariners failed to comply with a 21-day notice provision in Articles 4.3.3 and 4.3.9 of the General Provisions. CP 666-69. In fact, however, the parties modified Articles 4.3.3 and 4.3.9 in 1998 to *eliminate* the 21-day requirement—a fact HK neglected to mention in its motion. CP 666-67.

HK relied below on Article 4.3.3 of the General Provisions to the Construction Agreement, which initially (in 1996) provided that either party must assert claims “within 21 days after the claimant first recognizes, or a reasonable contractor exercising normal prudence and judgment should have recognized, the condition giving rise to the Claim, whichever is later.” CP 118. In June 1998, however, the PFD and HK entered into a “Three Party Agreement” in which they comprehensively

modified the notice and claim provisions. CP 985-1001. In so doing, the parties deleted the old Article 4.3.3 and replaced it with the following:

Claims made by either party must be made pursuant to the Claim Call process outlined in subparagraph 9.6.7 of the General Conditions and in the First Modification.

CP 991. Similarly, the amended Article 4.3.9 provides that written notice of property damage “shall be made pursuant to the Claim Call process outlined in subparagraph 9.6.7 of the General Conditions and in the First Modification.” CP 992. As a result, after 1998, the contract no longer contained the 21-day notice provision on which HK rested its motion. Instead, the parties agreed to deal with claims under a new subparagraph 9.6.7, which first appeared in the First Modification, CP 1006-50.

Subparagraph 9.6.7 had subparts addressing, in turn, Contractor Claims, Subcontractor Claims, and Owner Claims. CP 1016.

Subparagraph 9.6.7 addressed Owner Claims as follows:

**.3 Owner’s Claims.** On a monthly basis beginning as of the date of the execution of this First Modification, the Owner will include with each month’s progress payment a statement of any Owner Claims, including any claim of Owner that Contractor, by reason of its sole neglect, fault or negligence, bears responsibility for a Subcontractor Claim such that the Subcontractor will not be reimbursed as a Cost of Work or other cost of Contractor’s performance or will not receive an adjustment to the Preliminary MACC if such Subcontractor Claim is determined to be valid.

Owner's delivery of a progress payment shall constitute a waiver of Owner's Claims arising from events of which it has received notice twenty (20) days or more prior to the date of delivery of the progress payment.

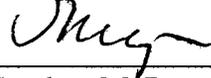
*Id.* Thus, under new subparagraph 9.6.7, the PFD would waive a claim *only* if it made a progress payment to HK without a timely "statement of any Owner Claims." Because HK never argued that the PFD made a progress payment after discovering the delamination of the intumescent coating, it has no basis to argue waiver of the claims.

## VI. CONCLUSION

For these reasons, the Court should reverse the trial court's Second Order granting summary judgment, reverse the trial court's denial of the PFD's and the Mariners' motion for reconsideration, and remand with directions that the trial court, after four years of litigation, finally consider the merits of the claims of defective work on Safeco Field.

RESPECTFULLY SUBMITTED this 13th day of August, 2010.

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# APPENDIX

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SUPERIOR COURT OF KING COUNTY, WASHINGTON

WASHINGTON STATE MAJOR	)	Case No. 06-2-26848-1 SEA
LEAGUE BASEBALL STADIUM,	)	COA NO. 65139-1-I
	)	
Plaintiff,	)	
	)	February 12, 2010
v.	)	10:30 a.m.
	)	
HUBER, HUNT & NICHOLS -	)	
KIEWIT COMPANY, ET AL.,	)	
	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS, taken before the  
HONORABLE JULIE SPECTOR, at the King County Courthouse.

APPEARANCES

FOR THE PLAINTIFF: **MR. ZACK THOMLINSON**

FOR THE DEFENDANT HERRICK: **MR. CHRISTOPHER WRIGHT**

FOR THE DEFENDANT HUBER, HUNT & NICHOLS - KIEWIT:  
**MR. MICHAEL GRACE**

STEPHEN W. BROSCHEID  
OFFICIAL COURT REPORTER  
KING COUNTY COURTHOUSE  
SEATTLE, WASHINGTON

1 expert declaration that states, I've reviewed the  
2 allegations for the investigation reports and in my  
3 opinion, based upon what's before me, it's possible that  
4 Herrick's work by applying the primer at the thickness  
5 that it applied it is too thick and could have  
6 contributed, if the Mariners' allegations are correct, if  
7 the plaintiff's allegations are correct.

8 In response, Herrick says, well, you are  
9 right, you have a question of fact there, but now we are  
10 really going to talk about this statute of repose issue  
11 that before we only had 10 lines on before.

12 So the complaints or references to  
13 Hunt-Kiewit incorporating by reference all of this  
14 original briefing, is simply to avoid having to have put  
15 all that in the original briefing to begin with, when it  
16 clearly is set up as a throw-away argument by Herrick  
17 anyway.

18 Now, on reply they start to raise other  
19 statutes and other arguments that we have moved to  
20 strike, and believe that the Court should properly grant  
21 that motion.

22 But back to the bottom line here. The bottom  
23 line here is that the Court has already ruled that  
24 Herrick should not be granted summary judgment based upon  
25 the statute of repose, nor should Hunt-Kiewit, nor should

1 Long Painting. It's already been heard, briefed, argued,  
2 and decided.

3 THE COURT: You would agree if I had granted  
4 it on the issue of the statute of repose solely, I'm not  
5 talking about the specifications in the contract, you  
6 would agree that if I had granted it as a reply,  
7 procedurally it would be out of order at that time and it  
8 had to come back, certainly he had the ability, and when  
9 I say he, I'm referring to you, Mr. Wright, that's why he  
10 gets to write such a short brief because he is in front  
11 of the same Court and I'm aware of what the arguments  
12 were and I can incorporate all of the prior arguments,  
13 although procedurally he is in a better posture now.

14 Instead of raising the statute of repose  
15 essentially as a -- I don't want to say an afterthought,  
16 but it's not squarely perfected in the record because it  
17 comes in, as you noted, in the reply.

18 You objected back in August. Mr. Stanislaw  
19 was here and kind of said, yes, well, and then we had  
20 that somewhat spirited discussion off the record about  
21 how that should have been preserved or may have been  
22 presented. And here we are now and it's squarely before  
23 the Court on that single issue.

24 Of course, I have your objections, and I  
25 think, aside from the motions to strike, I have what is

1 and what should have been properly briefed back in August  
2 now before the Court. Would you agree with that?

3 I'm just talking about procedurally, if an  
4 appellate court were to look at this again. And  
5 obviously it would go back to the Supreme Court on this  
6 issue.

7 MR. GRACE: I agree with that if the court  
8 also acknowledges that what's properly before the Court  
9 is the briefing that we incorporate by reference.

10 THE COURT: Sure.

11 MR. GRACE: But I would only agree that this  
12 is what the Court is considering right now. But again, I  
13 think the focus has to be that back in 2009, all of those  
14 issues at the end of the day were properly before the  
15 Court.

16 Although Herrick failed to properly raise the  
17 arguments and issues originally in its opening brief, the  
18 Court cured that deficiency by ultimately allowing  
19 Hunt-Kiewit to submit response briefing and considering  
20 Hunt-Kiewit's response briefing in the motion for  
21 reconsideration.

22 So the Court cured any deficiencies in  
23 Herrick's original briefing by going through the  
24 reconsideration process that the Court will recall  
25 ultimately ended up happening after the motions -- the

1 motion from Long Painting and the motion by my client  
2 against the PFD, which there is lengthy briefing and  
3 there was substantial argument about.

4           So at this point I agree that the briefing  
5 contains everything the Court needs to make its decision,  
6 except that the Court has already made its decision. So  
7 I think as a matter of procedural posture, it's improper  
8 for Herrick to be bringing this motion again when it has  
9 already been briefed, heard, argued, and decided by the  
10 Court.

11           Can Hunt-Kiewit renote its motion again  
12 against did the PFD and have that motion considered  
13 again? If the operative effect of Herrick's motion, if  
14 the Court were to grant that, if the Court were to grant  
15 Herrick's motion today, then I think the Court also needs  
16 to grant an order immediately granting Hunt-Kiewit's  
17 motion.

18           THE COURT: Of course.

19           MR. GRACE: I would encourage the Court to do  
20 that, but you can't only do part, you can't just grant  
21 Herrick's.

22           THE COURT: You end up back in front of the  
23 Supreme Court, which I think was the discussion I had  
24 with you. I think Mr. Stanislaw was also here. We  
25 discussed that and how to get that posture back in front

1 of the Supreme Court.

2           It's just that we kind of went sideways in  
3 the fall because it was brought up as part of the reply.  
4 And knowing that our appellate courts are so process  
5 driven, I don't think I had a choice but to -- to perfect  
6 the record in the way that the Court did.

7           I agree with you. I think we end up with the  
8 statute of repose flowing to everybody, to all -- the  
9 primary and the sub. And then you are back in front of  
10 our Supreme Court.

11           MR. GRACE: If the Court wants to grant an  
12 order today dismissing everything, we would be inclined  
13 to agree.

14           THE COURT: All right. That's what I'm going  
15 to do. You are going to take a ride back up to the  
16 Supreme Court.

17           MR. GRACE: Thank you, Your Honor.

18           MR. TOMLINSON: Thank you, Your Honor.

19           THE COURT: Can you draft an order?

20           MR. TOMLINSON: Just to be clear, Your Honor,  
21 are you granting it as to the plaintiffs, as well?

22           THE COURT: To both.

23           MR. GRACE: Dismissing all claims in the  
24 case.

25           MR. TOMLINSON: All claims in the lawsuit.

1 MR. GRACE: Entirely.

2 THE COURT: I want to see what the Supreme  
3 Court does with this. When Mr. Stanislaw and Mr. Grace  
4 and I all discussed that they had essentially  
5 rewritten -- for any contractor to be able to rely on a  
6 definitive end of when they will be held to liability, in  
7 a five-four opinion on an earlier part of this case, this  
8 will be rewritten. They will have to do it again on the  
9 statute of repose. You are going to both take that up.

10 MR. WRIGHT: Can I ask that there be separate  
11 orders, because one of the issues last time in the  
12 Supreme Court was that it was unclear --

13 THE COURT: Right, it was unclear. I'm  
14 talking to the Supreme Court because these are separate  
15 issues for each party.

16 MR. WRIGHT: Do you have any problem with our  
17 proposed order as long as we strike out the --

18 MR. TOMLINSON: I'd like to review the order  
19 again.

20 MR. WRIGHT: I have it right here.

21 THE COURT: Why don't you look at it. I  
22 don't want to rush through the order. I want this order  
23 to be correct now that we are posturally in the order  
24 that we should have been. Did you have another question?

25 MR. TOMLINSON: I guess I do. I'm unclear as

1 to the status of the previous order denying Hunt-Kiewit's  
2 motion for summary judgment on these -- I think these  
3 precise grounds.

4 THE COURT: It was posturally out of order  
5 for the reasons why this Court vacated what I did,  
6 because it came in in the reply.

7 I was waiting for this day. It's here. I  
8 don't think I need to say anything more. I think you  
9 know where you are with the Supreme Court. You have a  
10 lot of work in front of you.

11 MR. GRACE: But the effect of the --

12 THE COURT: The effect of the ruling today --

13 MR. GRACE: The effect of the ruling today is  
14 to grant Herrick's motion for summary judgment.

15 THE COURT: Correct.

16 MR. GRACE: To grant Hunt-Kiewit's motion for  
17 summary judgment.

18 THE COURT: Correct.

19 MR. GRACE: And to grant Long Painting's  
20 motion for summary judgment.

21 THE COURT: That's correct. That's the order  
22 of the court.

23 Let me tell you, if you cannot get the orders  
24 to me today, I will be gone for about a week and a half  
25 starting Tuesday, because Monday is the President's Day

1 holiday. If you can't get the orders to me today, it  
2 will have to wait until about the 25th of February.

3 MR. GRACE: I think we can do it today.

4 MR. WRIGHT: I can do it today, because mine  
5 is a pretty simple one.

6 THE COURT: Yours are pretty simple. You  
7 will be back in front of the Supreme Court. So they can  
8 be absolutely clear what this court has found insofar as  
9 the dates that are not in dispute, July 1, 1999, July 1,  
10 2005.

11 MR. GRACE: Thank you, Your Honor.

12 THE COURT: That will conclude this matter.

13 (11:24 a.m., end of proceedings)

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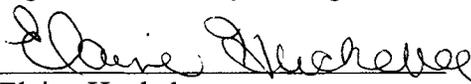
I hereby certify that on the 13th day of August, 2010, I mailed a true and correct copy of the foregoing document titled Brief of Appellants to counsel of record at the following addresses by depositing the envelope in regularly maintained interoffice mail. This mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, postage thereon being fully prepaid:

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EXECUTED at Seattle, Washington this 13<sup>th</sup> day of August, 2010.

  
Elaine Huckabee

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