

FILED
Oct 30, 2015
Court of Appeals
Division III
State of Washington

No. 32305-6

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

GENERAL CONSTRUCTION COMPANY, a Delaware corporation,

Respondent/Cross-Appellant,

v.

PUBLIC UTILITY DISTRICT OF NO. 2 OF GRANT COUNTY,
a Washington municipal corporation,

Appellant/Cross-Respondent.

**SECOND AMENDED REPLY BRIEF AS TO GCC's
CROSS-ASSIGNMENTS OF ERROR**

David D. Beaudoin, Esq.
KIEWIT INFRASTRUCTURE
GROUP INC.
2200 Columbia House Blvd.
Vancouver, WA 98661
Telephone: (360) 693-1478
Facsimile: (360) 693-5582

Pro Hac Vice

John Spencer Stewart, WSBA #15887
jstewart@lawssl.com
Thomas A. Larkin, WSBA #24515
tlarkin@lawssl.com
Tyler J. Storti, WSBA #40341
tstorti@lawssl.com
STEWART SOKOL & LARKIN LLC
2300 SW First Avenue, Suite 200
Portland, OR 97201-5047
Telephone: (503) 221-0699
Facsimile: (503) 223-5706

*Attorneys for Respondent/Cross-
Appellant General Construction
Company*

TABLE OF CONTENTS

ARGUMENT IN REPLY	1
I. GENUINE ISSUES OF MATERIAL FACT REQUIRE REVERSAL OF THE SELWAY ORDER ON THE ISSUE OF WAIVER	1
A. GCC Preserved The Issue Of Waiver, And It Is Properly Before The Court.....	2
B. PUD’s Substantive Arguments Regarding Waiver Are Without Merit.....	4
1. The GC-14 Clauses Prohibiting Oral Modifications And Limiting Who May Modify Are Unenforceable. GCC Has Presented Largely Unrebutted Evidence Of Express Waiver.....	4
2. There Are Genuine Issues Of Material Fact With Respect To The Issue Of Implied Waiver.....	6
3. PUD’s Project Engineer And Primary On-Site Representative, Dana Jeske, Had Authority To Waive. In Any Event, PUD Ratified Such Waiver.....	8
II. GENUINE ISSUES OF MATERIAL FACT REQUIRE REVERSAL OF THE SUPERIOR KNOWLEDGE ORDER	12
III. GENUINE ISSUES OF MATERIAL FACT RENDER ERRONEOUS THE COURT’S RULING AS TO MISTAKE	18
IV. THE TRIAL COURT ERRED IN ENTERING THE BLACKBOARD ORDER.....	21
V. GCC’S BRIEF COMPLIES WITH RULES AND RULINGS	27

A.	Procedural History	27
B.	Discussion	29
1.	GCC Deleted the Word “Private” As Directed.....	29
2.	As Directed, GCC Changed “Would” to “Could”.....	30
3.	GCC Complied in Good Faith With Item 7.	32
4.	GCC Complied with the March Ruling, as the July Ruling Confirms.....	32
5.	GCC’s Cited CPs Directly Support its Brief.....	34
6.	ER 408 Is Inapplicable.....	35
	CONCLUSION.....	36

TABLE OF AUTHORITIES

CASES

<i>Absher Constr. Co. v. Kent Sch. Dist.</i> , 77 Wn. App. 137, 890 P.2d 1071 (Div. I 1995).....	8, 9
<i>Aleutian Constructors v. U.S.</i> , 24 Cl. Ct. 372 (1991)	13
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	20
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	23
<i>Bignold v. King County</i> , 65 Wn.2d 817, 399 P.2d 611 (1965)	26
<i>Colonial Imports, Inc. v. Carlton Northwest, Inc.</i> , 121 Wn.2d 726, 853 P.2d 913 (1993).....	14
<i>Costco Wholesale Corp. v. Worldwide Licensing Corp.</i> , 78 Wn. App. 637, 646, 898 P.2d 347 (Div. I 1995).....	10
<i>Dravo Corp. v. Metro. Seattle</i> , 79 Wn.2d 214, 484 P.2d 399 (1971).....	14
<i>Favors v. Matzke</i> , 53 Wn. App. 789, 770 P.2d 686 (Div. I 1989).....	14
<i>Goodman v. The Boeing Co.</i> , 75 Wn. App. 60, 877 P.2d 703 (Div. I 1994).....	9
<i>Haley v. Brady</i> , 17 Wn.2d 775, 137 P.2d 505 (1943).....	5
<i>Harris v. Urell</i> , 133 Wn. App. 130, 135 P.3d 530 (Div. II 2006)	4
<i>Herron v. KING Broadcasting Co.</i> , 112 Wn.2d 762, 776 P.2d 98 (1989).....	20
<i>Hollerbach v. United States</i> , 233 U.S. 165, 34 S. Ct. 553, 58 L. Ed. 898 (1914).....	14

<i>Jones v. State</i> , 170 Wn.2d 338, 242 P.3d 825 (2010).....	23
<i>Kelly Springfield Tire Co. v. Faulkner</i> , 191 Wn. 549, 71 P.2d 382 (1937).....	5
<i>Lang v. Hougan</i> , 136 Wn. App. 708, 150 P.3d 622 (Div. II 2007)	3
<i>Lincoln v. Keene</i> , 51 Wn.2d 171, 316 P.2d 899 (1957).....	14
<i>Maryland Cas. Co. v. Seattle</i> , 9 Wn.2d 666, 116 P.2d 280 (1941).....	14
<i>Mike M. Johnson, Inc. v. Spokane County</i> , 150 Wn.2d 375, 78 P.3d 161 (2003).....	25, 26, 27
<i>Nat'l Bank of Commerce v. Thomsen</i> , 80 Wn.2d 406, 495 P.2d 332 (1972).....	10
<i>Nelson Constr. v. Port of Bremerton</i> , 20 Wn. App. 321, 582 P.2d 511 (Div. II 1978)	12, 13, 14
<i>Northern State Constr. Co. v. Robbins</i> , 76 Wn.2d 357, 457 P.2d 187 (Div. II 1969)	8
<i>Oates v. Taylor</i> , 31 Wn.2d 898, 199 P.2d 924 (1948).....	14
<i>Pacific Northwest Group A v. Pizza Blends, Inc.</i> , 90 Wn. App. 273, 951 P.2d 826 (Div. I 1998).....	4, 5
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997).....	10
<i>Seattle Prof. Eng'g Empl. Ass'n v. The Boeing Co.</i> , 139 Wn.2d 824, 991 P.2d 1126 (2000).....	21
<i>Sherrell v. Selfors</i> , 73 Wn. App. 596, 871 P.2d 168 (Div. III 1994)	4
<i>Simpson Timber Co. v Palmberg Constr. Co.</i> , 377 F.2d 380 (9 th Cir. 1967)	14

<i>Smith v. Hansen, Hansen & Johnson, Inc.</i> , 63 Wn. App. 355, 818 P.2d 1127 (Div. II 1991)	10
<i>State v. Hutton</i> , 57 Wn. App. 537, 789 P.2d 778 (Div. I 1990).....	6
<i>United States v. Atlantic Dredging Co.</i> , 253 U.S. 1, 40 S. Ct. 423, 64 L. Ed. 735 (1920).....	14
<i>V.C. Edwards Contracting Co., Inc. v. Port of Tacoma</i> , 83 Wn.2d 7, 514 P.2d 1381 (1973).....	13
<i>Van Dinter v. Orr</i> , 157 Wn.2d 329, 138 P.3d 608 (2006).....	14
<i>Walla Walla Port District v. H.G. Palmberg</i> , 280 F.2d 237 (1960).....	14
<i>Wash. Mut. Sav. Bank v. Hedreen</i> , 125 Wn.2d 521, 886 P.2d 1121 (1994).....	19, 21

OTHER AUTHORITIES

Restatement (Second) of Agency § 82 (1958).....	10
---	----

RULES

RAP 1.2.....	4
RAP 10.3.....	6, 27, 28, 34
RAP 10.4.....	27, 34
RAP 17.4.....	28
RAP 5.3.....	2, 3

General Construction Company ("GCC") submits this *Amended* Reply Brief in response to the issues raised in the Amended Response Brief filed on September 14, 2015 by Public Utility District No. 2 of Grant County ("PUD"), and in support of GCC's cross-assignments of error.

ARGUMENT IN REPLY

I. GENUINE ISSUES OF MATERIAL FACT REQUIRE REVERSAL OF THE SELWAY ORDER ON THE ISSUE OF WAIVER

There are genuine issues of material fact on the issue of waiver presented in the context of GCC's Selway claim that require reversal of the Selway Order. PUD's Response Brief ignores the basis of GCC's Selway claim, which has been explained in detail through past briefing. GCC will not repeat that explanation here, except to emphasize that the issue is *not* that the Contract (at T-40 1.06C) required a NACE Level 2 inspector; it is that PUD *changed* the Contract mid-Project by adding the new requirement that such inspector be an *independent third-party* rather than an employee of GCC's subcontractor Selway.¹ That PUD-directed extra work increased GCC's costs, since such independent third-party inspector costs exceeded the amounts budgeted by Selway for use of an employee.²

PUD's only argument as to this claim is that GCC did not comply with the notice of claim provisions of the Contract, but PUD fails to address (or contradict any of the evidence in the record supporting) GCC's arguments that (1) PUD waived formal compliance with such notice

¹ CP 13599, 13877-13878, 13882, 13824-13825, 13770.

² CP 13825, 13877-880, 13770.

provisions,³ (2) such notice provisions do not apply where, as here, PUD directed GCC to proceed with the changed and extra work,⁴ and (3) notwithstanding the foregoing, GCC complied with the Contractual notice requirements exactly as interpreted by PUD.⁵ GCC will not restate here the facts and law on those points, but will limit its argument to address other issues raised for the first time elsewhere in PUD's Response Brief.

A. GCC Preserved The Issue Of Waiver, And It Is Properly Before The Court.

PUD argues (at pp. 37-39 of its Response Brief) that “non-waiver is a verity on appeal,” and inaccurately contends that GCC's Notice of Discretionary Review (“NDR”) failed to specify that GCC was challenging the trial court's ruling as to waiver. PUD is simply incorrect.

RAP 5.3 requires an NDR to “designate the decision or part of decision which the party wants reviewed.” RAP 5.3(a)(3). GCC's NDR provides that it is seeking cross-review of the “four (4) orders underlying the Order Certifying for Appeal in their entirety” that were *not* included in PUD's NDR, including the Selway Order. CP 17568-17569. Waiver was the primary focus of the parties' briefing and declarations related to PUD's Selway motion,⁶ the trial court's letter ruling on that motion and the Order incorporating (and attaching) that letter ruling,⁷ and GCC's motion for reconsideration of that Order.⁸

³ See GCC 2nd Amd. Brief at 12-16, 29-34, 51-52.

⁴ See GCC 2nd Amd. Brief at 40-45.

⁵ See GCC 2nd Amd. Brief at 34-39.

⁶ See, e.g., CP 13749-13753, 13756-13760, 13769-13777, 13823- 13831, 13879-13880, 13904-13907.

⁷ See, e.g., CP 27-29, 15136-15138.

⁸ See, e.g., CP 15092-15094, 15098-15104.

Likewise, waiver was squarely at issue in each of the (denied) motions for partial summary judgment giving rise to the five Orders of which *PUD* sought review. GCC's memoranda preserved the waiver issue with respect to those later motions.⁹

Each of the foregoing Orders (along with the underlying letter rulings) were incorporated into and attached to the "Order Certifying for Appeal" in which the trial court certified each such Order for review. CP 10902-11007. It was from that document that *both* parties sought discretionary review. CP 17341, 17568-17569.

Moreover, GCC thoroughly discussed waiver in its opening Brief, both in response to PUD's assignments of error and in support of GCC's cross-assignment regarding the Selway Order.¹⁰ GCC adequately challenged the trial court's ruling on the issue of waiver contained in the Selway Order, complied with RAP 5.3 in designating the entirety of that Order in its NDR, and clearly raised and discussed the waiver issue in its opening Brief. The issue of waiver is properly before the Court.

Even if the Court were to determine that there was some technical shortcoming in GCC's challenge of the trial court's ruling on waiver, Washington appellate precedent firmly supports considering the issue nonetheless, especially where it is raised in the parties' briefs.¹¹

⁹ See, e.g., CP 364, 377-381 (Slot Claim); CP 5281, 5295 (Claim 2); CP 5419, 5428-5430 (Claims 7/16); CP 408-410 (Claim 10); CP 6172, 6181-6182 (Claim 11).

¹⁰ GCC 2nd Amd. Brief at 4-5, 6, 7, 12-16, 26-27, 29-34, 51-52.

¹¹ See, e.g., *Lang v. Hougan*, 136 Wn. App. 708, 719, 150 P.3d 622 (Div. II 2007) ("Ordinarily, we treat unchallenged findings of fact as verities on appeal. However, an appellate court may excuse a party's failure to assign error where the briefing makes the nature of the challenge clear and the challenged finding is argued in the text of the brief.")

B. PUD's Substantive Arguments Regarding Waiver Are Without Merit.

On pages 39-48 of its Response Brief, PUD makes six fact-barren and conclusory arguments regarding waiver, none of which have merit.

1. The GC-14 Clauses Prohibiting Oral Modifications And Limiting Who May Modify Are Unenforceable. GCC Has Presented Largely Unrebutted Evidence Of Express Waiver.

PUD initially relies on GC-14 to argue that there was “no express waiver” because, PUD contends, there is no signed writing evidencing waiver. This argument is fundamentally flawed for two primary reasons. First, the clause at the end of GC-14 to which PUD cites is unenforceable as a matter of Washington law, because it purports to prohibit oral modifications and limit who may modify a written contract. In *Pacific Northwest Group A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 277-78, 951 P.2d 826 (Div. I 1998), the Court held unenforceable a clause requiring any changes to the lease to be in writing, explaining:

A paradox of the common law is that a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification. The common law rule has been lauded as allowing parties to quickly modify their contractual obligations when faced with unforeseen circumstances, and has been consistently followed in Washington.

Id. at 277-78 (internal citations omitted). The Court held that the declaration testimony offered by the tenant:

(internal citations omitted)); *see also Harris v. Urell*, 133 Wn. App. 130, 137-38, 135 P.3d 530 (Div. II 2006); *Sherrell v. Selfors*, 73 Wn. App. 596, 598-99, 871 P.2d 168 (Div. III 1994); RAP 1.2(a).

... raises a question of fact as to whether the parties modified the lease. Whether there actually was a meeting of the minds for such modification involves credibility determinations that cannot be made here [on summary judgment].

Id. at 281. On that basis the Court reversed the trial court's entry of summary judgment. *Id.* at 282; *see also Kelly Springfield Tire Co. v. Faulkner*, 191 Wn. 549, 556, 71 P.2d 382 (1937).¹² The Washington Supreme Court has also enforced oral modifications to a written construction contract through which a party authorized and agreed to pay for extra work.¹³

Second, PUD's contention that there is "no factual support" for PUD's express waiver of the notice of claim provisions of the Contract is wrong.¹⁴ As detailed in GCC's 2nd Amd. Brief (at 12-16), the record

¹² The *Kelly Springfield* case involved the enforceability of oral modifications to a written guaranty, which contained a "no oral modification clause" that also limited which representatives could modify (in writing) the contract in a very similar manner to GC-14. 191 Wn. at 551. Though the contract in that case required any changes to the contract to be in writing *and* signed by only the general or assistant credit manager, the guarantor testified that he had oral discussions with a district manager, who agreed that (despite what the contract said) guarantor could be released from the guaranty if he took certain steps as prescribed by the district manager. *Id.* at 553. The trial court's decision granting the bank's motion on the basis that the written terms of the guaranty foreclosed the potential of it being modified by an oral agreement or by anyone other than the credit manager was reversed on appeal. The Supreme Court held:

Although the guaranty provided, among other things, that it could not be modified or abrogated except in writing and in the manner provided in the contract, it is well settled that such a contract may be modified or abrogated by the parties thereto in any manner they choose, notwithstanding provisions therein prohibiting its modification or abrogation except in a particular manner.

Id. at 555.

¹³ *See, e.g., Haley v. Brady*, 17 Wn.2d 775, 788, 137 P.2d 505 (1943) (affirming verdict for subcontractor to enforce five oral agreements to change the scope and payment terms of the written contract, noting that "[t]he right to modify a written contract by a subsequent oral one is unquestioned.").

¹⁴ It appears PUD also misinterprets the meaning of "express" as necessarily requiring a writing. PUD Response Brief at 39-40. "Express" means "made known distinctly and explicitly, and not left to inference or implication. Declared in terms; set forth in words.

contains largely un rebutted evidence that PUD's Project Engineer Dana Jeske expressly waived and modified the notice of claim provisions of the Contract. See CP 13904-13907, 13823-1324, 13879-13880, 14788-14790.

2. There Are Genuine Issues Of Material Fact With Respect To The Issue Of Implied Waiver.

PUD also argues that there was no implied waiver, which it bases on out-of-context excerpts of a few PUD-selected documents. None of those documents mean what PUD argues they mean; nor do the documents change the fact of PUD's waiver of the contractual provisions at issue.

PUD's first several "examples" are from June and July of 2005, which pre-date PUD's initial express waiver in August of 2005. CP 13904-13905, 13823-13824.¹⁵ PUD's cited examples also pre-date PUD's subsequent re-emphasis of the PUD-modified protocol for handling changes, change orders and claims that took place throughout 2005, 2006 and early 2007. For example, in September of 2005, PUD directed GCC to perform rock excavation (even though the Contract and GCC's accepted bid specifically excluded rock excavation), and Mr. Jeske demanded that GCC withdraw its claim letter and refrain from sending such claim letters

Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with 'implied'" Black's Law Dictionary (Online 2d Ed.); see also *State v. Hutton*, 57 Wn. App. 537, 541, 789 P.2d 778 (Div. I 1990) (quoting dictionary definition of "expressly" as "in direct or unmistakable terms: in an express manner; explicitly, definitely, directly" in context of oral statement of *Miranda* warnings). "Express" waiver need not be in writing.

¹⁵ PUD offers "Appendix C" as a summary of purported excerpts of various documents. The Court should disregard that Appendix (and "Appendix B"), because it is submitted in violation of RAP 10.3 (a)(8), which provides that an "appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." PUD did not seek the Court's permission, and the purported excerpts drafted by PUD's counsel are not contained in the Clerk's Papers.

in the future, with the warning that if GCC did not abide by such directives, GCC's Project Manager would face removal. CP 13904-13907.¹⁶ Another example includes the circumstances surrounding Request for Information ("RFI") 207 and PUD's mandate – waiving the Contract provisions -- that GCC withdraw it and re-submit it without any indication of "Cost Effect." CP 13880, 13889-13902; *see also*, n. 17 *infra*.

Notwithstanding the foregoing, PUD's general "implied waiver" argument fails to address the claim-specific waivers that accompanied PUD's direction for GCC to proceed with the extra and changed work giving rise to the claims at issue, despite knowing that such work would cost extra money and delay GCC. *See* GCC 2nd Amd. Brief at 29-34.

Whether viewed as a general Project-wide waiver (express or implied) or a claim-specific waiver evidenced by PUD's awareness of the extra work coupled with its direction to proceed, the substantial evidence in

¹⁶ PUD argues that unspecified portions of the Declaration of David Bishop regarding several events on the Project site that occurred during his tenure as Project Manager are somehow "inadmissible," merely because PUD much later ordered Mr. Bishop removed from the site. PUD's position is untenable. Mr. Bishop's Declaration is only cited in support of facts about which he has direct personal knowledge, including his personal exchanges (as GCC's Project Manager) with PUD's Dana Jeske in mid to late 2005 with respect to Mr. Jeske's insistence that Project issues must be dealt with in the field and that PUD would not tolerate claim letters. CP 13904-10905, 13909-13910, 13823-13824. It was Mr. Bishop who was the first target of Mr. Jeske's venom in this regard following Mr. Bishop's submission of a notice of claim letter, which Mr. Jeske demanded be withdrawn under the threat that he would have Mr. Bishop removed from the Project. CP 13905-13907, 13911 (App. MM). (In fact, Mr. Jeske later followed through with that threat and ordered that Mr. Bishop be removed from the Project site. CP 13905 at ¶13.) Mr. Jeske directed Mr. Bishop that PUD did not want to receive any claim documentation on the Project, and that GCC should instead focus on performing the work and to leave claim discussions for later meetings. CP 13905-13906. Mr. Bishop has first-hand knowledge of such facts, which directly support PUD's waiver of any formal notice of claim requirements of the Contract. *See* GCC 2nd Amd. Brief at 12-16.

the record gives rise to genuine disputes of material fact precluding entry of partial summary judgment on the issue of waiver.

3. PUD's Project Engineer And Primary On-Site Representative, Dana Jeske, Had Authority To Waive. In Any Event, PUD Ratified Such Waiver.

PUD's third and fourth arguments are that PUD's primary on-site representative, Dana Jeske, did not have authority to waive the notice of claim provisions of the Contract. In addition to failing to dispute or address the substance of Mr. Jeske's unequivocal words and conduct supporting express and implied waiver, PUD's agency arguments are misplaced. Genuine issues of material fact preclude entry of partial summary judgment on these agency questions.

To support its argument that Mr. Jeske did not have actual authority, PUD relies on two readily distinguishable cases: *Northern State Constr. Co. v. Robbins*, 76 Wn.2d 357, 457 P.2d 187 (1969) and *Absher Constr. Co. v. Kent Sch. Dist.*, 77 Wn. App. 137, 890 P.2d 1071 (Div. I 1995). In both cases, the design professionals whose actions were argued to modify or waive provisions of the construction contracts were independent, third-party design companies (in *Northern State*, an architect; in *Absher*, an engineering subconsultant of the architect). *Northern State*, 76 Wn.2d at 358 and 364; *Absher*, 77 Wn. App. at 139.¹⁷ The third-party

¹⁷ The other facts in *Absher* also differ from the facts at issue here, and support GCC's waiver argument. In *Absher*, the contractor admitted that it did not provide notice of the particular claim to the owner and the owner was found to have had no actual knowledge of the underlying basis for the claim, which is not the case here. 77 Wn. App. at 142-143. Also, in *Absher* the Court found it noteworthy that the contractor had left blank the "Cost Implication" space on its request for information form. 77 Wn. App. at 143. In the current case, the undisputed evidence is that Mr. Jeske ordered GCC to withdraw its RFI 207 when GCC had noted an "Increase" in the "Cost Effect" section of the form (indicating

designers were *not* direct employees of the respective project owners with which the claimant contractors were in privity of contract. *Id.* Here, Mr. Jeske was a direct employee of PUD. CP 13904, 14004, 13771. The cited cases do not support PUD's argument.

Moreover, PUD ignores that the Contract (at GC-2) specifically identifies the PUD Project Engineer as "[t]he employee designated by the [PUD] as its representative during the progress of the work." CP 19561; *see also* CP 19572 (GC-18: "The Engineer shall represent the [PUD]."). Mr. Jeske served as PUD's Project Engineer and primary on-site PUD representative (CP 14004, 13904), though he also at times identified himself as PUD's "Project Manager." CP 13882, 8707, 1697.¹⁸

PUD also argues that Mr. Jeske did not have apparent authority. The foregoing evidence of *actual* authority (including PUD's inclusion in the Contract of clauses specifically designating the Engineer as being vested with authority to represent PUD), also constitutes conduct by the principal (PUD) sufficient to support Mr. Jeske's *apparent* authority.¹⁹

///

///

that there would be costs associated with the subject changed work), and ordered GCC to resubmit it with the "Cost Effect" information omitted. CP 13880, 13899-13902. GCC followed Mr. Jeske's order, resubmitted RFI 207R[evised], and in the transmittal e-mail confirmed Mr. Jeske's representation that "[c]ost impacts will be addressed separately with the District." CP 13901.

¹⁸ In its Amended Response Brief, PUD for the first time cites RCW 54.12.010. That statute does not have anything to do with waiver and does not support PUD's argument.

¹⁹ *Goodman v. The Boeing Co.*, 75 Wn. App. 60, 85, 877 P.2d 703 (Div. I 1994) (A "principal is bound by a notification directed toward an agent who 'has, or appears to have, authority in connection with it, either to receive it, to take action upon it, or to inform the principal or some other agent who has duties in regard to it.'").

Importantly, whether apparent authority exists depends upon the circumstances and is a question of fact to be decided by the trier of fact.²⁰ Based on the record in this case, there exist genuine disputes of material fact as to the extent of Mr. Jeske's authority.

In any event, whether or not Mr. Jeske had actual or apparent authority to order extra work and waive the formal notice of claim requirements of the Contract, PUD ratified such actions by executing Change Orders 2 and 3 to pay claims for which no notice was given and by negotiating and executing the Settlement Agreement in 2007. CP 13771-13776, 13824-13830, 13868-13872. "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Riss v. Angel*, 131 Wn.2d 612, 636, 934 P.2d 669 (1997) (quoting *Nat'l Bank of Commerce v. Thomsen*, 80 Wn.2d 406, 413, 495 P.2d 332 (1972) citing Restatement (Second) of Agency § 82 (1958)).

Between the fall of 2005 and February of 2007, GCC and PUD handled design changes, issues and directed extra work exactly as Mr. Jeske had ordered (i.e. during Project meetings and through informal discussions) so that the work could continue, with the agreement that the negotiation of change orders would be handled thereafter. CP 13771,

²⁰ *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 362, 818 P.2d 1127 (Div. II 1991); *Costco Wholesale Corp. v. Worldwide Licensing Corp.*, 78 Wn. App. 637, 646, 898 P.2d 347 (Div. I 1995).

13823-13824, 13779-13883. In February 2007, after extra work had begun, the parties collected the dozens of then-outstanding claim issues to negotiate formal change orders. CP 13771-13776, 13824-13830, 13868-13872. Even though GCC (as directed by PUD) had not submitted formal written notice or strictly followed notice provisions of the Contract for those claim issues and extra work had commenced,²¹ PUD approved Change Orders 2 and 3 (as part of the Settlement Agreement) agreeing to pay GCC an additional approximately \$6 Million and granting an extension of time of more than 350 days. *Id.* By approving after-the-fact Change Orders 2 and 3 on issues and claims for which the formal notice requirements of the Contract had not been strictly followed, but were instead handled exactly as Mr. Jeske directed, PUD ratified Mr. Jeske's waiver and became bound by that waiver.²²

The issue of waiver is properly before the Court and there are genuine issues of material fact with respect to the underlying issues of agency and waiver. Summary judgment as to waiver, including its application to the Selway Claim (or any other GCC claim), is improper.

²¹ Mr. Jeske originally submitted a declaration stating that there had been contemporaneous formal written notice for all of the issues paid in Change Orders 2 and 3. CP 14003, 14008-14009. However, PUD has never produced formal written notice or formal Commission Approval relating to such issues, and PUD's counsel later on the record disavowed Mr. Jeske's false testimony. CP 3585-3587, 3593-3594, 11551, 11555-11556, 11567-11568, 11573-11574, 11603-11606, 11610 (May 10, 2011 Hrg. Tr.).

²² The Selway claim was analyzed during those same negotiations, as were other claims at issue in this action that had arisen by that time (including the Slot Claim), but they were not included in Change Orders 2 and 3 and were explicitly excepted from the Settlement Agreement with the agreement that they would be negotiated further at a later time. CP 13771-13777, 13826-13831, 13868, 13919-13920, 13929-13939.

II. GENUINE ISSUES OF MATERIAL FACT REQUIRE REVERSAL OF THE SUPERIOR KNOWLEDGE ORDER

In its Response Brief, PUD ignores the substantial evidence in the record and presented in GCC's Brief as to the critical information concerning the stability of the Dam that PUD had developed over the years prior to the Project, which was crucial to Project bidders, and which PUD failed to disclose to GCC (or even to PUD's own designer, Jacobs). *See* GCC 2nd Amd. Brief at 9-12.²³ Instead, PUD attempts to shift the focus to what it claims GCC purportedly knew. But the evidence relied upon by PUD does not support the inferences PUD attempts to draw from it, and PUD's conclusions are specifically refuted (or disputed) by the record.

As an initial matter, PUD misstates the elements of a superior knowledge claim recognized in Washington and federal jurisprudence in the context of public works construction projects. PUD relies on the case of *Nelson Constr. v. Port of Bremerton*, 20 Wn. App. 321, 582 P.2d 511 (Div. II 1978),²⁴ which states a rule that PUD interprets in a manner that is

²³ There is no merit to PUD's conclusory argument that unspecified "portions" of the Declaration of Dave Anderson are "inadmissible." Mr. Anderson, who is a professional engineer, is one of the expert witnesses GCC will likely call to testify at trial. CP 18681. A copy of his *curriculum vitae* is attached as Exhibit A to his Declaration. CP 18681, 18695-18697. Like the above witnesses, Mr. Anderson's Declaration sets forth that his testimony is based on personal knowledge and also on his review, as a professional engineer, of documents received from the Federal Energy Regulatory Commission ("FERC") pursuant to public records requests and from PUD during discovery. CP 18681. Many of those documents were classified as Critical Energy Infrastructure Information ("CEII") by FERC, meaning that they can only be reviewed by authorized individuals to whom FERC provides clearance. CP 18681, 18684 (and Exhibit G thereto at CP 18826, 18834), 1291-1292. Copies of the relevant documents summarized in his Declaration are attached as exhibits and further support each statement. CP 18681-18691 (and Exhibits A through Q). In short, PUD offers no basis for rendering such testimony and documents "inadmissible," except the unilateral and unsupported conclusions and argument of its counsel. Mr. Anderson's Declaration, including the exhibits, are admissible.

²⁴ The facts in *Nelson* are readily distinguishable. In *Nelson*, the owner disclosed the

contrary to controlling Washington Supreme Court precedent set forth in, for example, *V.C. Edwards Contracting Co., Inc. v. Port of Tacoma*, 83 Wn.2d 7, 514 P.2d 1381 (1973). Though the *Nelson* opinion refers to requiring information to be “willfully withheld,” other cases on point do not use that language, but instead discuss the owner’s affirmative obligation to disclose and not remain silent, and simply require that the owner/agency be in possession of information that it fails to provide to bidders pre-bid. *V.C. Edwards*, 83 Wn.2d at 10 (discussing “port’s failure to accurately advise the contractor of the number of times his work would conflict” and that it “failed to mention . . . some 30 additional points” of conflict, but making no mention of intentional or willful withholding.). The more accurate and well-established statement of the superior knowledge doctrine can be found in the cases cited in GCC’s 2nd Amd. Brief (at 52-56), which is the same description set forth in the *Aleutian Constructors v. U.S.*, 24 Cl. Ct. 372 (1991) case cited by PUD.

The cases cited in the *Nelson* opinion also support the rule that there is an affirmative obligation to disclose superior knowledge relevant to the

substance of its knowledge to the plaintiff before plaintiff submitted its bid. 20 Wn. App. at 323-324. Here, PUD failed to disclose not only the substance of its knowledge about the stability of the Dam and its classification as the most serious Potential Failure Mode Analysis category, but also any of the substantial number of documents in its possession discussing such issues in detail. CP 3647-3648, 3656-3676, 4035-4036, 2830, 18685-18691. Moreover, in *Nelson*, when the owner was asked about the existence of rocks and anticipated dredging methods, it issued an addendum to *all bidders* providing additional pertinent information. 20 Wn. App. at 325. Here, PUD provided no such information in any bid document and when a bidder other than GCC specifically asked about the sequencing shown on the plans, PUD did not issue an addendum with its answer, but only provided the answer to the contractor who asked the question. CP 19451-19452, 19466, 19470, 19487, 19489.

transaction that the defendant knows and that plaintiff does not have and cannot obtain (whether such withholding is “willful” or not). *See Simpson Timber Co. v Palmberg Constr. Co.*, 377 F.2d 380, 385 (9th Cir. 1967); *Lincoln v. Keene*, 51 Wn.2d 171, 316 P.2d 899 (1957). In *Simpson Timber*, which also cites *Lincoln v. Keene* and *Oates v. Taylor*, 31 Wn.2d 898, 199 P.2d 924 (1948), the Court explained that under Washington law “once a duty to disclose has arisen, suppression of a material fact is tantamount to an affirmative misrepresentation,” and that there is a “duty to divulge all information in its possession . . . if such information was peculiarly within the scope of its own knowledge and not readily obtainable by [the other party], or if [the other party] made a broad inquiry regarding [the subject] to which [the owner] did not completely and truthfully answer.” 377 F.2d at 385. Other Washington cases since *Oates* have confirmed the same rule that there is a duty to disclose facts peculiarly within their knowledge.²⁵ The *Nelson* opinion also relies upon cases that, in turn, rely upon federal superior knowledge cases cited in GCC’s 2nd Amd. Brief.²⁶

Factually, PUD repeatedly refers to two documents it argues GCC

²⁵ *E.g.*, *Van Dinter v. Orr*, 157 Wn.2d 329, 334, 138 P.3d 608 (2006), *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993), *Favors v. Matzke*, 53 Wn. App. 789, 796, 770 P.2d 686 (Div. I 1989).

²⁶ *Nelson* relies on *Dravo Corp. v. Metro. Seattle*, 79 Wn.2d 214, 218, 484 P.2d 399 (1971), which (at 218) quotes *Maryland Cas. Co. v. Seattle*, 9 Wn.2d 666, 670, 116 P.2d 280 (1941), which relies on two “typical and leading” cases establishing the same rule: *Hollerbach v. United States*, 233 U.S. 165, 34 S. Ct. 553, 58 L. Ed. 898 (1914) and *United States v. Atlantic Dredging Co.*, 253 U.S. 1, 40 S. Ct. 423, 64 L. Ed. 735 (1920). Those same two cases served as the basis for the Ninth Circuit Court of Appeals’ decision (applying Washington law) in *Walla Walla Port District v. H.G. Palmberg*, 280 F.2d 237 (1960), in which the Court concluded that “[t]he Supreme Court of Washington impliedly approved [their] holdings as applied to the facts existing in those cases.” 280 F.2d at 247-248.

should have been aware of prior to submitting its bid that PUD argues would have disclosed PUD's superior knowledge: the Stability Analysis Report and a Geotechnical Report. PUD's arguments ignore relevant evidence as to those documents and greatly overstate their factual content.

First, with respect to the Stability Analysis prepared by PUD's outside designer Jacobs, there are genuine factual issues with respect to whether it was provided or available to GCC pre-bid and, in any event, it does not disclose the most crucial aspects of PUD's superior knowledge because PUD had not disclosed such information to Jacobs either.²⁷ Though PUD claims the Stability Analysis was included as an appendix to the QCIP allegedly made available to bidders upon request (which factual contention is disputed), the record reflects that PUD searched its own records and could not "find any record of GCC formally receiving a copy of the QCIP." CP 6939, 6938 (though some "thought the QCIP was in the bid document . . . [PUD] unable to find it in the contract file or any letter transmitting it to GCC."). PUD does not dispute that the Contract documents provided to bidders do *not* expressly reference by name the Stability Analysis. CP 18685. GCC disputes having received or reviewed the Jacobs Stability Analysis at any time before submitting its bid or before PUD awarded GCC the Contract. CP 1291-1292, 2308-2310.

PUD also claims that GCC's Ben Hugel was given access to the Stability Analysis in April of 2005 (citing to the declaration of Jacobs'

²⁷ CP 1291-1292, 2308-2310, 3620-3640, 3647-3648, 3656-2676, 4035-4036, 2830, 18685-18691, 6861, 6899.

Reece Voskuillen), but that contention is specifically disputed in the record. For one thing, PUD labeled the Stability Analysis as “CEII – Do Not Release” on March 24, 2005, meaning that it could only be reviewed by those with Critical Energy Infrastructure Information (“CEII”) clearance, which GCC’s representatives did not have (and were not advised by PUD to obtain). CP 18685, 19169, 1291-1292. The copy from FERC’s files also warns: “The Entire Volume of this Future Unit Stability Analysis **Contains Critical Energy Infrastructure Information Do Not Release.**” CP 19109-19110 (emphasis in original).²⁸ Moreover, Mr. Voskuillen testified that Mr. Hugel “largely focused on review of the geotechnical report and not the stability [analysis] report,” that he did not recall whether Mr. Hugel “specifically asked for the stability [analysis] report,” and that the only reason Mr. Hugel would have known to ask for the Stability Analysis is if he had a copy of the QCIP, which Mr. Voskuillen did not bring into the room where Mr. Hugel was sitting. CP 6941-6943.

In any event, even if GCC had been provided with the Stability Analysis and reviewed it, such document does *not* disclose the most crucial aspects of PUD’s superior knowledge that would be necessary for GCC to meaningfully evaluate impacts on its construction sequence. CP 18690. For example, the Stability Analysis does not expressly mention that FERC, Hatch and PUD had reached a consensus that the tendon anchor corrosion issue had been classified as a Category I (most serious) Potential Failure

²⁸ GCC’s counsel obtained these CEII documents, including the Stability Analysis, shortly before filing this action, and only after obtaining CEII Clearance from FERC. CP 18690.

Mode in 2004 – just before the Project bid. CP 18685. Indeed, it does not mention any concern with respect to the integrity or potential corrosion of the tendons. CP 18683-18691. It also fails to disclose various other details, including the criteria that would be used to judge the acceptability of alternate construction sequences, the extent of FERC's overall review and approval authority over any sequence changes, and the voluminous studies and data from the consultants who had studied such issues for years before the Project. CP 18689-18690. The likely reason (and established material fact) Jacobs' Stability Analysis lacked such crucial information known to PUD is that PUD had not disclosed such information to Jacobs. CP 3647-3648, 4035-4036, 2830, 6861, 6899.

Similarly, the Geotechnical Report does not disclose the most crucial aspects of PUD's superior knowledge. The Geotechnical Report does not disclose the likelihood of corrosion of the anchor tendons, or that such integrity concerns had been the subject of years of PUD/FERC investigation and analysis, which had resulted in the Category I (most serious) Potential Failure Mode classification. CP 18691, 15224-15249.

Even if GCC had such documents (which is disputed as to the Stability Analysis), the most important Dam stability details bearing on the PUD-approved Two Slot Method were not disclosed. Under the well-established doctrine of superior knowledge, PUD's failure to disclose the crucial information peculiarly within its own control and not readily obtainable by GCC constitutes a breach entitling GCC to damages. As discussed in GCC's 2nd Amd. Brief (at 9-12, 17-20), PUD knew GCC did

not have the necessary information and that GCC's bid (and specifically the Two Slot Method designed and approved by PUD) was based on incomplete information, but opted to stay silent and snap-up GCC's significantly lower bid to try to save money. The gamble backfired when the Dam moved downstream, and PUD must be held accountable.

III. GENUINE ISSUES OF MATERIAL FACT RENDER ERRONEOUS THE COURT'S RULING AS TO MISTAKE

PUD's Response Brief again ignores the substantial evidence on point and the alternative and equitable nature of GCC's mistake theory, and instead mischaracterizes disputed evidence it claims supports the lack of a unilateral or mutual mistake.

First, PUD's argument that GCC's alternative theory of mistake is subject to dismissal because it sounds in equity is misplaced. GCC's Complaint and its memoranda in opposition to PUD's motion for summary judgment on the mistake theory have consistently explained that GCC's mistake theory is asserted in the alternative, sounds in equity, and seeks (alternatively) reformation of the Contract if and to the extent it is determined that the Contract does not provide for the slot work to proceed concurrently via the Two Slot Method, because the parties were mistaken as to whether the Dam was stable enough to tolerate that method. *See, e.g.*, CP 14 ("equitable" claim "[a]s an alternative claim for relief"); CP 7014 (alternative theory), CP 7026-7034 (Court has authority to reform contract based on mistake, discussing reformation authorities).²⁹

²⁹ If that alternative equitable remedy of reformation is determined to be the appropriate theory at trial, then GCC may recover money damages flowing from PUD's breach of the

Second, PUD's argument regarding the timeliness of GCC's assertion of the mistake theory is based on a fundamentally incorrect interpretation of GCC's theory. Though PUD directed GCC to abandon the Two Slot Method when the Dam moved in early 2006, GCC did not know that it might be mistaken about the viability of the Two Slot Method (or that PUD was also mistaken or had acted inequitably) until its counsel obtained the CEII documents regarding PUD's superior knowledge from FERC through a public records request *commencing on or about November 12, 2007*. CP 1290-1292, 18690. Upon learning of such information, GCC promptly acted to assert its (alternative) equitable remedies in its Complaint.

Third, PUD overstates the applicable burden of proof. The Washington Supreme Court has clearly explained the appropriate manner in which to consider a summary judgment motion where a "clear and convincing" standard will apply at trial:

The Court has expressly cautioned, however, that *the clear and convincing evidence standard . . . does not materially alter the normal standard for deciding motions for summary judgment*. While the issue turns on what the jury could find, and while the court must keep in mind that the jury must base its decision on clear and convincing evidence, *the evidence is still construed in the light most favorable to the nonmoving party and the motion is denied if the jury could find in favor of the nonmoving party*.

Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury.

reformed Contract. *Wash. Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 886 P.2d 1121 (1994) (awarding damages for breach of reformed contract).

It by no means authorizes trial on affidavits. *Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.* Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Herron v. KING Broadcasting Co., 112 Wn.2d 762, 768-769, 776 P.2d 98 (1989) (emphasis added) (citing and quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Fourth, PUD's argument that GCC bore the risk of the alleged mistake fundamentally ignores the nature of the mistake at issue in this alternative theory. The evidence in the record reflects that at the time the Contract was awarded GCC had no knowledge (and no way of knowing) about PUD's and FERC's serious concerns with the potentially corroded anchor tendons and the stability of the Dam. *See* GCC 2nd Amd. Brief at 9-12. Especially given PUD's pre-bid and pre-award assurances that a Two Slot Method would be acceptable and PUD's acceptance of GCC's bid on that basis (and PUD's and its designer's design and approval of the version of the Two Slot method under which the parties performed early in the Project),³⁰ it cannot be said that GCC bore the risk of such a mistake.

Finally, PUD's argument that the mistake at issue relates to a "future event," rather than an "existing fact," is simply incorrect. Whether

³⁰ *See* GCC 2nd Amd. Brief at 17-20.

or not the Dam was stable enough for the concurrent Two Slot construction is a fact that existed at the time the parties entered into the Contract. Whether both parties were mistaken as to that fact, or whether only GCC was mistaken and PUD inequitably failed to disclose its superior knowledge to correct that mistake, such a mistake is exactly the sort of mistake that entitles a party to reformation.³¹

IV. THE TRIAL COURT ERRED IN ENTERING THE BLACKBOARD ORDER.

Regarding the issue of writing on blackboard as notice, PUD's Response Brief acknowledges Mr. Kittle's Declaration testimony directly on point (CP 1446), and fails to cite to *any* evidence that rebuts or contradicts that testimony about the occurrence of the writing on the blackboard. PUD also cannot point to any provision of the Contract or any other legal authority disallowing blackboard writing as a method of providing notice "in writing." Instead, although inappropriate at the summary judgment stage, PUD first resorts to questioning Mr. Kittle's credibility by misconstruing his later deposition testimony on subjects *unrelated* to the writing on the blackboard. PUD's second strategy is to challenge Mr. Kittle's authority to bind GCC and to downplay the authority of Mr. Jeske and other PUD representatives who attended the meeting in question. PUD's misdirection strategies are unavailing.³²

³¹ See, e.g., rules discussed in *Seattle Prof. Eng'g Empl. Ass'n v. The Boeing Co.*, 139 Wn.2d 824, 832-33, 991 P.2d 1126 (2000), *Hedreen*, 125 Wn.2d at 525-26.

³² This section of PUD's Response Brief also inexplicably challenges the admissibility of one sentence of one of several declarations in the record signed by Scott Hanson on a non-blackboard issue. PUD cites to CP 1296 and offers only an out-of-context excerpt of Mr. Hanson's deposition, which does not appear in the Clerk's Papers and cannot be

First, PUD does not challenge Mr. Kittle's Declaration testimony as to what occurred at the January 6, 2006 meeting he attended with others from GCC and PUD shortly after the Dam moved. CP 1446. Mr. Kittle recounts PUD's directions to (a) "abandon the then-approved Two Slot Method and schedule for pouring concrete," (b) "change the sequence of its then planed [sic] concrete pours in Slot B," and (c) "propose a new sequence involving work in only one slot at a time." *Id.* After noting that PUD representatives were writing on a blackboard during that meeting, Mr. Kittle declares: "I wrote on the blackboard that abandoning the Two Slot Method and complying with the PUD's directive to work in one slot at a time would cost GCC both time and money" and that "[i]t was clear from the context of our discussion that GCC believed the PUD would be responsible for the costs and delays arising from the PUD's directive to pour concrete in one slot at a time." *Id.* PUD cites to no evidence rebutting that such notice was given.

considered pursuant to RAP 9.12. Even taking the excerpt at face value, the only thing Mr. Hanson confirms is that he was not in attendance at one particular meeting in early January 2006 around the time when PUD first stopped work and directed GCC to abandon the Two-Slot Method. When read in context, counsel's deposition question is clearly limited to asking "specifically what was directed" *at the January 6 meeting*. Mr. Hanson's Declaration does not indicate he was in attendance at that meeting or mention the meeting at all. In fact, Mr. Hanson's deposition testimony is in all respects consistent with his Declaration testimony, which is certainly admissible. *See* CP 1295-1297. Regarding the subject of PUD's directive to GCC to re-sequence and reschedule its work, Mr. Hanson's deposition testimony confirms what he had declared under penalty of perjury in his earlier Declaration – i.e., that GCC altered its construction sequence as required by PUD following the downstream movement of the Dam. *See* CP 20317-20318 (at 125:19-126:25); CP 20319 (at 146:23-147:19); 20320-20321 (at 160:4-162:21). Mr. Hanson declares under penalty of perjury that he "ha[s] personal knowledge" of the matters set forth in his Declaration and he offers numerous specific details (and supporting exhibits) to confirm that fact. PUD's attempt to call his credibility into question is not only without merit, but it is also inappropriate at the summary judgment stage.

PUD challenges Mr. Kittle's credibility by citing to his deposition testimony on other subjects. Such credibility assessment is inappropriate at the summary judgment stage.³³ Also, the excerpts of Mr. Kittle's deposition to which PUD cites were filed on February 11, 2014 and were not before the trial court when it entered its Blackboard Order in 2012, so they should not be considered by the Court here. RAP 9.12. In any event, Mr. Kittle's subsequent deposition testimony in all respects supports the above Declaration testimony, and at no point has Mr. Kittle changed or disavowed his testimony on those subjects.³⁴

Among other evidence confirming the topics discussed at the January 6, 2006 meeting is the calendar entry of PUD's Dana Jeske.³⁵

Next, PUD argues that section GC-12 of the Contract somehow divests Mr. Kittle of authority to speak for GCC. PUD misinterprets that section. GC-12 provides for GCC to designate an "authorized site representative who shall be authorized to represent and act for the Contractor in all matters," but it does *not* in any way prohibit others from speaking on GCC's behalf to give notice, or otherwise limit the number of representatives who may bind GCC. CP 19567-19568.

³³ See, e.g., *Jones v. State*, 170 Wn.2d 338, 354 n. 7, 242 P.3d 825 (2010); *Babcock v. State*, 116 Wn.2d 596, 598, 809 P.2d 143 (1991).

³⁴ See CP 20307-20308 (at 120:19-122:7; 123:13-17); CP 20309 (at 145:13-147:20); CP 20310 (at 214:18-215:2); CP 20312 (at 226:4-13); CP 20312-20313 (at 228:6-16; 229:24-230:4; 231:23-232:9); CP 20314-20315 (at 233:17-234:7; 235:9-239:9). Mr. Kittle's deposition testimony also confirms that the Declaration was in his words that had been communicated to counsel to type up. CP 20310-20311 (at 216:18-217:18).

³⁵ CP 20148 (PUD's Dana Jeske noting that on "January 6, 2006" he "[m]et with Ben [Hugel], Chuck, Dave M and Ed [Kittle] on Future unit stability, trends of work to-date and monolith 10-11 crackmeter movements. Discussed their plans and how they can help to prevent the [PUD] from shutting the job down until the a and c slots are filled.").

PUD again relies on the clauses of GC-14 purporting to prohibit oral modifications and limit which PUD representatives may modify the Contract. As discussed in section I(B)(1) above, those GC-14 clauses are unenforceable as a matter of Washington law. In any event, no provision of GC-14 limits who from PUD may *receive* notice. CP 19569-19570.

PUD also cites to one-line of one meeting minute excerpt to argue that there is some perceived inconsistency between Mr. Kittle's Declaration and his deposition testimony. No such inconsistency exists. Mr. Kittle's testimony about the PUD-directed abandonment of the Two Slot Method and change in construction sequence has been consistent throughout. *Compare, e.g.*, CP 1446 and CP 20307-20308 (at 120:19-122:7; 123:13-17); CP 20309 (at 145:13-147:20); CP 20310 (at 214:18-215:2); CP 20312 (at 226:4-13); CP 20312-20313 (at 228:6-16; 229:24-230:4; 231:23-232:9); CP 20314-20315 (at 233:17-234:7; 235:9-239:9).

Though this assignment of error only deals with the blackboard issue, PUD also baldly argues that there is no "document" mentioning the PUD-directed change to the construction sequence. Once again PUD simply ignores the evidence in the record. GCC has presented many documents, including contemporaneous documents from January and February of 2006, discussing the development and PUD approval of the changed sequence. *See, e.g.*, CP 1296, 1446, 4527, 8978, 20148 (Apps. R, S, EE, FF, LL).³⁶

³⁶ CP 8978 is an e-mail from PUD's George Thompson forwarding the Daily Report from January 5, 2006 documenting the Dam movement and confirming that "GCC has altered their planned pour sequence" following PUD "ask[ing] them to make their next pour in the

Finally, PUD attempts to analogize the blackboard issue to the *Mike M. Johnson* case (“*MMJ*”),³⁷ but that case is readily distinguishable (on the blackboard issue and the issues of notice and waiver involved in PUD’s assignments of error). In *MMJ*, it was undisputed that the contractor “made no objection to the design change, proposed compensation, or altered schedule, and began the work under change order number 3,” and that the contractor did not even mention anything with respect to additional compensation or delays related to the design change until more than three weeks thereafter. 150 Wn.2d at 379, 380-81. To the contrary, in the current case, GCC *immediately* notified PUD of its objection to the directed change from the approved Two Slot Method to a One Slot Method at the January 6, 2006 meeting and, in writing on the Project site blackboard, provided notice that such change would entitle GCC to

upstream portion of Slot B instead of downstream as planned.” CP 8977-8978 (App. EE). CP 20148 (App. FF) is the above-referenced excerpt from PUD’s Mr. Jeske’s Palm Pilot calendar documenting the January 6, 2006 meeting with several GCC representatives regarding Dam stability during which the group “[d]iscussed their plan and how they can help to prevent the [PUD] from shutting the job down until the a and c slots are filled.” CP 20148 (App. FF). CP 4527 is a March 2008 Memorandum prepared by PUD’s engineer commenting on GCC’s REA, in which he acknowledges that following the Dam movement, “[f]or safety reasons, the construction sequence was reviewed and mitigation steps were implemented to improve stability,” which the Memorandum admits “changed the plan.” CP 4527 (App. LL). In addition, GCC’s Brief cites to PUD’s engineer’s “Review Comments” to Submittal 54A, which documents that PUD’s and its engineer’s approval of the altered pour sequence was conditioned on, among other things, proceeding with a sequential One Slot Method using a reduced crack length criterion for purposes of increasing stability. CP 9086-9088 (App. II). Such comments and conditions are among the written expressions of PUD’s directive for GCC to abandon the agreed plan and to proceed with a changed plan. Moreover, certain specifics of PUD’s directive to proceed with the changed One Slot sequence were communicated through the submittal process, in particular Submittal 54 and responses surrounding RFI 62. CP 9086 (App II), CP 9319-9320 (App. JJ), CP 20160-20163 (App. KK). Another e-mail from Mr. Thompson during that process directed GCC to submit the new PUD-required sequence in order to comply with the PUD-imposed shorter, post-dam movement crack length criterion. CP 20153.
³⁷ *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003).

additional compensation and an extension of time. CP 1446. PUD cites no countervailing evidence to rebut that fact.

In *MMJ*, the contractor's President "admitted he knew of the protest and claim provisions but could not say whether he actually complied," and the contract administrator admitted that he discussed the contract provisions with the President, but that the President "did not care to comply because compliance was too time consuming." *Id.* at 384. There are no such admissions in this case.

The undisputed conduct of the owner in the *MMJ* case differs significantly from PUD's conduct. Throughout the time period at issue in *MMJ*, "the county repeatedly asserted that it did not intend a 'waiver of any claim or defense' or 'of any other remedy or contract provision,'" including in several letters to the contractor that expressly reserved (and stated that the county did not waive) rights related to the notice of claim provisions of the contract. *Id.* at 392, *see also id.* at 381, 382, 382-383, 383. To the contrary, the record here contains substantial evidence that PUD waived (expressly and through its unequivocal conduct) strict compliance with the notice and claim provisions of the Contract, and that PUD mandated an alternative protocol for handling Project changes and issues, which both parties followed for the first two years of the Project. *See GCC 2nd Amd. Brief* at 12-17. There is no evidence here even approaching the type of undisputed, consistent and unequivocal documentary evidence in the *MMJ* case as to the owner's refusal to waive contract notice requirements.

The *MMJ* decision also reaffirmed the holding of *Bignold v. King County*, 65 Wn.2d 817, 822, 399 P.2d 611 (1965) with respect to the “long-established rule” that owners may waive contractual notice provisions, including where “the owner’s knowledge of the changed conditions [is] coupled with its subsequent direction to proceed with the extra work that evidence[s] its intent to waive enforcement of the written notice requirements under the contract.” *MMJ*, 150 Wn.2d at 387-88. That is exactly what occurred with each of the GCC claims at issue, and particularly the Slot Claim. *See* GCC 2nd Amd. Brief at 17-20, 29-34, 39-45. Such waiver renders moot the issue of whether writing on a blackboard constitutes notice “in writing” under the Contract. But (in the alternative) based on the unrebutted evidence in the record, the trial court erred in entering the Blackboard Order, because there are genuine issues of material fact with respect to that issue.

V. GCC’S BRIEF COMPLIES WITH RULES AND RULINGS

Section IV of PUD’s Response Brief wrongfully accuses GCC of non-compliance with RAP 10.3 (a)(5), 10.4(f) and with the July 9, 2015 Commissioner’s Ruling, which are based on mischaracterized excerpts of that Ruling, underlying briefing and GCC’s Second Amended Brief.

A. Procedural History

On January 21, 2015, PUD filed a Motion to Strike and for Sanctions aimed at GCC’s original opening Brief. On March 9, 2015, the Court issued its Commissioner’s Ruling (“March Ruling”), which ordered GCC to make a few discrete modifications to remove specified

argumentative statements from its Statement of the Case and to shorten a few citations that spanned longer page ranges of the Clerk's Papers. *See* March Rul. at 1-3. The Commissioner rejected PUD's request to strike any portion of GCC's Brief. *Id.* The Commissioner also found that there were no misrepresentations in GCC's Brief, and denied PUD's request for sanctions. *Id.* at 4-5. GCC made the directed changes, and several related (and similarly minor) changes, before filing its Amended Brief on March 19, 2015.

On April 1, 2015, PUD filed a Motion to Modify the March Ruling. That Motion to Modify attacked each aspect of the Commissioner's well-reasoned determination, sought vague and ill-defined modifications to the Ruling and requested reversal of the denial of sanctions. A three Judge panel of the Court denied PUD's Motion to Modify on June 10, 2015. *See* Order Denying Motion to Modify.

PUD's fifth motion in this Court, also filed on April 1, 2015, was a (second) Motion to Strike and for Sanctions, which was directed at GCC's Amended Brief. GCC filed an Answer to that Motion on April 23, 2015, and PUD filed a Reply on May 4, 2015. On June 16, 2015, in response to PUD's repeated argument that the 20-page limitation in RAP 17.4 precluded it from listing all of the alleged violations of RAP 10.3 (a)(5), the Commissioner issued a letter dated June 16, 2015 ("6/16 Letter") inviting PUD to submit a comprehensive list of all alleged violations. The Commissioner's letter indicated that "[t]hereafter, the Court will not consider any additional motions to strike from the PUD concerning GCC's

opening brief.”

In response to the Commissioner’s 6/16 letter, PUD submitted a 56-page tome containing a list of 97 additional statements PUD wished to strike. Following a Response thereto by GCC, the Commissioner heard oral argument on June 24, 2015. Following the hearing, PUD requested (and was granted) supplemental briefing. Both parties submitted memoranda, and on July 9, 2015 the Commissioner issued its July Ruling.

The July Ruling flatly rejected PUD’s admissibility arguments and its request for sanctions. *See* July Rul. at 1-2, 6-7. It also denied the motion to strike as to the vast majority of the 100+ statements in PUD’s moving papers, but directed GCC to make various edits to its Amended Brief and to file a Second Amended Brief. *Id.* at 2-7. GCC complied with the Ruling and filed its Second Amended Brief (hereinafter “Brief”).

B. Discussion

1. GCC Deleted the Word “Private” As Directed.

First, PUD challenges GCC’s use of the word “private” in a sentence of GCC’s Brief that appeared in both of its earlier Briefs and which was not challenged in any of PUD’s various memoranda in support of its two Motions to Strike. In both its Second Motion to Strike (at 2-3) and its Response to the Court’s 6/16 Letter, PUD challenged two sentences which each contained the word “private” once. In the July Ruling, the Commissioner quoted those same two challenged sentences, noted that “[t]he citations [to the Clerk’s Papers] support the substance of the above statements,” but that in this context the word “private” “tend[s] to

constitute argument,” so the Commissioner directed GCC to remove that word from its brief. July Rul. at 3.

GCC complied with the Commissioner’s directive and removed both uses of the word “private” in the two sentences PUD challenged and that were quoted in the July Ruling. See GCC Brief at 9.

The use of the word “private” about which PUD now complains is in a completely different paragraph on a different page of GCC’s Brief. GCC Brief at 10. That same sentence was referenced in the July Ruling, but only with respect to deleting the word “Amazingly” (which deletion GCC made). July Rul. at 3 (item 3). The July Commissioner’s Ruling did not mention the use of the word “private” in that sentence. *Id.* Furthermore, PUD challenged only the use of the word “Amazingly” and not the use of the word “private” in that sentence. See PUD Resp. to 6/16 Ltr. at 6-7. That is why it did not catch GCC’s attention to delete it – though GCC acknowledges that it is referencing the same subject matter as the two instances where “private” was deleted. It was certainly not a deliberate attempt by GCC to disobey the Commissioner’s Ruling. GCC assumes that the Court will disregard that particular use of the word “private” if it deems it argumentative or in contravention of the July Ruling. In either case, GCC apologizes to the Court for that inadvertent (and harmless) oversight.

2. As Directed, GCC Changed “Would” to “Could”

The July Ruling (item 5) directed GCC as follows: “Page 12 of the Amended Opening Brief: Change ‘would’ to ‘could’”, without any further

instruction or detail. This ruling was in response to PUD's argument in its Response to the Court's 6/16 Letter (at page 14, item 19) that two uses of the word "would" on page 12 of GCC's Amended Brief constituted "speculation about what GCC may or may not have done five years previously." As directed, GCC's Brief changed those two uses of "would" to "could," when describing what GCC might have done if it had been provided with the superior knowledge information about Dam stability which PUD possessed but failed to disclose to GCC. See GCC Brief at 12 ("Had PUD disclosed . . . , GCC could have" and "GCC also could have"). GCC complied with the Court's directive.

Again, PUD's current argument ignores all of the foregoing and mischaracterizes the situation. PUD's Response Brief vaguely refers to two alleged uses of the word "would" on what it argues "had been page 12 of GCC's Brief." GCC assumes PUD is referring to what is now the second to last sentence on page 11 of the Brief, which deals with a completely different subject matter (contract formation) than the uses of "would" that PUD had challenged as being "speculative." In the Amended Brief, that sentence began on page 11 and ended on page 12. PUD did not challenge the use of the word "would" in that sentence. Rather, PUD challenged the use of the word "irrevocable." PUD Resp. to 6/16 Ltr. at 12-13. Addressing that same sentence, the July Ruling directed GCC only to on "Page 11 [not 12] . . . Change 'irrevocable' to 'final.'" July Rul. at 4 (item 4). In its Brief, GCC simply deleted "irrevocable" to avoid any issue on that collateral point. See Brief at 11.

PUD is attempting to manufacture an appearance of noncompliance by inappropriately and vaguely challenging uses of single words that it had not previously challenged and which the Commissioner's Ruling did not address. GCC complied with the July Commissioner's Ruling on this exceedingly minor issue.

3. GCC Complied in Good Faith With Item 7.

The July Ruling (at 4, item 7) directed GCC to delete an opening clause and to insert the word "did" in such a way that the resulting sentence would contain a potentially misleading statement. The Ruling did not explain the basis for this edit or what Rule it believed was violated. As such, rather than leave a potentially misleading sentence in its Brief, GCC deleted the clause the Court directed, and re-wrote the rest of the sentence to more accurately summarize the facts in the record. Compare Amd. Brief at 15-16 with Brief at 15. The new sentence not only complies with the July Ruling and is well-supported by the undisputed record, but the same facts are set forth in several other sentences of the Statement of the Case that were found in the Commissioner's Ruling to be in compliance with the Rules and well-supported by the Clerk's Papers. See, e.g., Brief at 15 (first paragraph, and first two sentences of second paragraph); 15-16 (paragraph regarding Mr. Thompson's consistent testimony); 16 (first two sentences of first full paragraph). Once again, PUD is making much ado about nothing.

4. GCC Complied with the March Ruling, as the July Ruling Confirms.

For its last accusation of non-compliance, PUD repeats for at least the third time its ill-founded and twice unsuccessful argument to strike an

entire paragraph from GCC's Brief. PUD argues that the earlier March Ruling supports its position, but PUD severely distorts the record.

The March Ruling quoted limited excerpts from one paragraph of GCC's original Opening Brief (at 16) and directed GCC to remove argument from such statements. March Rul. at 2. In its Amended Brief, GCC removed any argument as directed from the statements and, in fact, largely deleted and re-wrote sentences setting forth the subject facts. *See* Amd. Brief at 15. PUD moved to modify the March Ruling seeking a more far-reaching ruling, but the Court denied the Motion to Modify.

In its second Motion to Strike, PUD challenged the re-drafted paragraph on page 15 of GCC's Amended Brief. In PUD's Response to the Court's 6/16 Letter, PUD asserted (among several other arguments) the *identical* argument it is now asserting (i.e. that the re-written sentence violates the March Ruling). *See* PUD Resp. to 6/16 Ltr. at 24-27 (item 39). Specifically, PUD argued there exactly what it argues again here: "The 3/9/15 Commissioner's Ruling found that Example 4 'constituted argument and violate(d) RAP . . . ,' but "[i]n its Amended Brief, GCC opts not to comply with the Commissioner's Ruling." *Id.* at 27.

In response to that argument, the July Ruling found *no violation* of the earlier March Ruling or of the Rules, and did *not* direct *any* changes (editorial or otherwise) to that paragraph. *See* July Rul. at 2, 3-4. As such, PUD's Response Brief is essentially a motion for reconsideration, which is not provided for in the Rules or properly before the Court.

5. GCC's Cited CPs Directly Support its Brief.

PUD also contends that one clause (of several) from a sentence in the Argument section of GCC's Brief violates RAP 10.3(a)(5) and 10.4(f) based on PUD's argument that the cited Clerk's Papers do not support the clause.³⁸

The subject fact (that PUD and its designer Jacobs designed the specific version of the Two Slot Method ultimately approved for the Project) is well supported by the record. First, that point is collateral to the issue being discussed on pages 57 and 58. Second, that fact is but one of several more relevant points discussed in that sentence. Third, and most importantly, PUD completely ignores the first citation following the subject clause to "Id." which refers to the previous citation containing two supporting references: "See Statement of the Case at I.C(1), pp. 17-20," and "CP 1289-1295." Brief at 57.

In section I.C(1) of its Statement of the Case, GCC explains in more detail how PUD and Jacobs modified the basic conceptual concurrent Two Slot Method set forth in GCC's bid Narrative and designed the specific Two Slot Method ultimately employed early in the Project, and also notes: "After analyzing (with its designer, Jacobs) the structural implications of the Two-Slot Method during May, June and July, PUD designed what it determined to be an acceptable Two-Slot Method." Brief at 18. That sentence cites "CP 1295, 4506-4515, 20064-20076 (Apps. Y, Z, BB, CC),"

³⁸ As an initial matter, RAP 10.3 (a)(5) deals only with the Statement of the Case, not the Argument, and is inapplicable. RAP 10.4(f) provides in pertinent part that "[a] reference to the record should designate the page and part of the record." On its face, GCC's citation to several supporting specific Clerk's Papers complies with that subsection.

all of which are directly on point.³⁹

The second reference (CP 1295) PUD ignores also directly supports this undisputed sequence, explaining: “[i]n July 2005, PUD designed what it determined to be an acceptable Two Slot Method.” CP 1295.

6. ER 408 Is Inapplicable.

On page 59, PUD again repeats its already-rejected (in the July Ruling) argument that ER 408 somehow renders unspecified evidence “inadmissible.” PUD assigns no error to any evidentiary ruling by the trial court involving ER 408, and PUD’s arguments are simply wrong.

Rule 408 only renders evidence of offers to compromise “a claim” inadmissible “to prove liability for or invalidity of the claim or its amount.” ER 408. The Rule “does not require exclusion when the evidence is offered for another purpose.” *Id.*

The statements previously challenged by PUD have nothing whatsoever to do with any offer to compromise any claim, or any claim at issue in this action. Indeed, most of the statements PUD listed involve facts that occurred long before this lawsuit was filed during discussions and negotiations of Project change orders. In GCC’s Brief, there are a few references to the parties’ February 2007 Settlement Agreement, the negotiation of which also resulted in Change Orders 2 and 3, but such

³⁹ In addition to the Declaration testimony in CP 1295, those other references also directly support the subject factual statement. For example, CP 20064 is an e-mail from PUD’s Dana Jeske to GCC stating: “Attached is Jacobs [sic] review of the proposed construction sequence, as well as a *modification* that would keep the crack length to a more reasonable value.” App. Y (Emphasis added). Similarly, CP 20098-99 (App. Z) and CP 20129 and 20134 (App. BB) are additional examples documenting the reviews, comments and changes by PUD/Jacobs of their ultimately-approved version of the Two Slot Method.

statements do **not** involve offers of compromise covered by ER 408 and most certainly are **not** offered to “prove liability for or invalidity of” the matters addressed and resolved in those documents (which matters are not even at issue in this lawsuit). Rather, those events are simply facts providing background for the entire Project and, in particular, to establish that PUD paid an additional \$6 Million to GCC for extra work and granted nearly a year of additional time for other claims (not at issue in this action) despite (per PUD’s directives) GCC not having given formal written notice of such other claims. *See, e.g.*, CP 13771-13776, 13824-13830, 13868-13872. ER 408 has no application whatsoever to these statements.

CONCLUSION

Genuine issues of material fact permeate the four Orders under cross-review, and the trial court’s entry of those Orders granting partial summary judgment should be reversed.

RESPECTFULLY SUBMITTED this 30th day of October, 2015.

STEWART SOKOL & LARKIN LLC

By: s/ John Spencer Stewart

John Spencer Stewart, WSBA #15887

Stewart Sokol & Larkin, LLC

2300 SW First Avenue, Suite 200

Portland, OR 97201-5047

Telephone: (503) 221-0699

Fax: (503) 223-5706

Email: jstewart@lawssl.com

*Attorneys for General Construction
Company*

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 30th day of October, 2015, I electronically filed the **SECOND AMENDED REPLY BRIEF AS TO GCC's CROSS-ASSIGNMENTS OF ERROR** and I caused a true and correct copy of the same to be delivered to counsel as follows:

David E. Sonn, WSBA #07216
davids@jdsalaw.com
H. Lee Lewis, WSBA #46478
leel@jdsalaw.com
Jeffers Danielson Sonn & Aylward, P.S.
2600 Chester Kimm Rd.
Wenatchee, WA 98801

Attorneys for Defendant/ Appellant/Cross-Respondent Public Utility District No. 2 of Grant County

 X by first-class postage-paid envelope, and addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.

 X by e-mailing a full, true and correct copy thereof to the attorney at the attorney's last known e-mail address, on the date set forth below.

DATED this 30th day of October, 2015 in Portland, Oregon.

s/ John Spencer Stewart
John Spencer Stewart, WSBA #15887
jstewart@lawssl.com
*Attorneys for Respondent General
Construction Company*