

No. 79001-9

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

AMERICAN SAFETY CASUALTY INS. CO.,

*Respondent*

v.

CITY OF OLYMPIA,

*Appellant*

---

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 SEP 10 P. 3:43  
BY RONALD R. CARPENTER  
CLERK

BRIEF OF AMICUS CURIAE  
WASHINGTON STATE SCHOOL CONSTRUCTION  
ALLIANCE

---

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 SEP 20 P. 3:07  
BY RONALD R. CARPENTER  
CLERK

Richard O. Prentke, WSBA No. 5786  
Graehm C. Wallace, WSBA No. 26587  
Melissa E. Robertson, WSBA No. 34533  
Andrew L. Greene, WSBA No. 35548  
**PERKINS COIE LLP**  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
206.359.8000

## TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS .....	1
II. INTRODUCTION .....	1
III. STATEMENT OF THE CASE .....	2
IV. ARGUMENT.....	5
A. Washington Law Strongly Favors Private Efforts to Resolve Disputes .....	5
1. Washington Law Encourages Settlement.....	6
2. There Is Good Reason to Encourage Settlement .....	6
B. The Law Requires That a Court Must Enforce a Contract Unless Unequivocal Acts Demonstrate a Clear Intent to Waive.....	9
1. Parties Are Free to Agree on Contractual Limitation Periods .....	10
2. If the Intent to Waive a Contractual Right Is Ambiguous, It Is Not Unequivocal.....	11
3. The Gradation of Ambiguous Conduct Is Irrelevant.....	13
C. Conduct Towards Settlement Should Not Be Evidence of Waiver, Absent Estoppel.....	14
V. CONCLUSION .....	16

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Absher Constr. Co. v. Kent Sch. Dist. No. 415</i> , 77 Wn. App. 137, 890 P.2d 1071 (1995) .....	10, 11, 13, 14
<i>Am. Safety Cas. Ins. Co. v. City of Olympia</i> , 133 Wn. App. 649, 137 P.3d 865 (2006), <i>rev. granted</i> , 160 Wn.2d 1017, 162 P.2d 1130 (2007) .....	5, 6, 13
<i>Baldwin Carpet Linoleum &amp; Carpet, Inc. v. Builders, Inc.</i> , 523 N.W.2d 33 (Neb. App. 1994) .....	9
<i>Birkeland v. Corbett</i> , 51 Wn.2d 554, 320 P.2d 635 (1958) .....	11
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) .....	13
<i>Chadwick v. Nw. Airlines, Inc.</i> , 33 Wn. App. 297, 654 P.2d 1215 (1982), <i>aff'd</i> , 100 Wn.2d 221, 667 P.2d 1104 (1983) .....	6
<i>City of Seattle v. Blume</i> , 134 Wn.2d 243, 947 P.2d 223 (1997) .....	6
<i>City of Seattle v. Kuney</i> , 50 Wn.2d 299, 311 P.2d 420 (1957) .....	10
<i>De Honey v. Gjarde</i> , 134 Wash. 647, 236 P. 290 (1925) .....	14
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998) .....	14
<i>Dombrosky v. Farmers Ins. Co. of Wash.</i> , 84 Wn. App. 245, 928 P.2d 1127 (1996) .....	15
<i>Dunlap v. West Const. Co.</i> , 23 Wn.2d 827, 162 P.2d 448 (1945) .....	8
<i>Gilbert Frank Corp. v. Fed. Ins. Co.</i> , 70 N.Y.2d 966, 525 N.Y.S.2d 793, 520 N.E.2d 512 (1988) .....	9
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978) .....	6
<i>Hurley v. Kiona-Benton Sch. Dist. No. 27</i> , 124 Wash. 537, 215 P. 21 (1923) .....	14
<i>Jones v. Best</i> , 134 Wn.2d 232, 950 P.2d 1 (1998) .....	13
<i>Keesling v. W. Fire Ins. Co. of Fort Scott, Kan.</i> , 10 Wn. App. 841, 520 P.2d 622 (1974) .....	8
<i>Mark v. Seattle Times</i> , 96 Wn.2d 473, 635 P.2d 1081 (1981) .....	13
<i>McMillan v. Montgomery</i> , 121 Or. 28, 253 P. 879 (1927) .....	15
<i>Mike M. Johnson, Inc. v. County of Spokane</i> , 150 Wn.2d 375, 78 P.3d 161 (2003) .....	8, 13
<i>Norwood v. Serv. Distrib. Inc.</i> , 297 Mont. 473, 994 P.2d 25 (2000) .....	12
<i>Oregon Mut. Ins. Co. v. Barton</i> , 109 Wn. App. 405, 36 P.3d 1065 (2001) .....	11

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Padron v. Goodyear Tire &amp; Rubber Co.</i> , 34 Wn. App. 473, 662 P.2d 67 (1983) .....	13
<i>Reynolds v. Travelers' Ins. Co.</i> , 176 Wash. 36, 28 P.2d 310 (1934) .....	15
<i>Richmond v. Grabowski</i> , 781 P.2d 192 (Colo. Ct. App. 1989).....	12
<i>Schwier v. Atlas Assur. Co.</i> , 227 Mich. 104, 198 N.W. 719 (1924) .....	9
<i>Seafirst Ctr. Ltd. P'hip v. Erickson</i> , 127 Wn.2d 355, 898 P.2d 299 (1995) .....	6
<i>Seafirst Ctr. Ltd. P'ship v. Kargianis, Austin &amp; Erickson</i> , 73 Wn. App. 471, 866 P.2d 60 (1994).....	6
<i>Syrett v. Reisner McEwin &amp; Assoc.</i> , 107 Wn. App. 524, 24 P.3d 1070 (2001) .....	10
<i>United Pac. Ins. Co. v. Boyd</i> , 34 Wn. App. 372, 661 P.2d 987 (1983) .....	11
<i>Valley Constr. Co. v. Lake Hills Sewer Dist.</i> , 67 Wn.2d 910, 410 P.2d 796 (1965) .....	14
<i>Voelker v. Joseph</i> , 62 Wn.2d 429, 383 P.2d 301 (1963) .....	11, 12
<i>White Co. v. Canton Transp. Co.</i> , 131 Ohio St. 190, 2 N.E.2d 501 (1936) .....	12
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997) .....	13
<i>Yakima Asphalt Paving Co. v. Dep't of Transp.</i> , 45 Wn. App. 663, 726 P.2d 1021 (1986) .....	10
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) .....	13
<b>Statutes</b>	
Ch. 60.28 RCW .....	11
RCW 47.28.120 .....	10
<b>Constitutional Provisions</b>	
Wash. Const., art. VIII, § 7.....	4
<b>Other Authorities</b>	
BLACK'S LAW DICTIONARY 1563 (8th ed. 2004) .....	11
Michael H. Graham, <i>Handbook of Federal Evidence</i> § 408.1 (6th ed. 2007).....	7
Mori Irvine, <i>Better Late than Never: Settlement at the Federal Court of Appeals - Part One</i> , Washington State Bar News, September 2001 .....	7
Robert F. Cushman & Kenneth M. Cushman, <i>Construction Litigation: Representing the Owner</i> § 1.28 (2d ed. 1990).....	8
Stephen McG. Bundy, <i>The Policy in Favor of Settlement in an Adversary System</i> , 44 Hastings L.J. 1 (Nov. 1992).....	7

## **I. Identity and Interest of Amicus**

Amicus Curiae Washington State School Construction Alliance is a coalition of nearly 30 Washington school districts. Its identity and interest are more fully described in its Motion to File Brief of Amicus Curiae.

## **II. Introduction**

There is no factual dispute that this lawsuit was not filed within the applicable 180-day contractual limitation period. There is no legal dispute that, absent waiver, Washington courts enforce such limitation periods. The Court of Appeals erred when it resurrected this lawsuit by equating settlement communications that occurred after the limitation period expired—most of which expressly reserved all rights and defenses—to unequivocal conduct evidencing an intent to waive a contractual right. The Court's action contravenes well established precedent of this Court, and must be reversed.

This Amicus Brief addresses three practical issues at the center of this appeal:

First, as this Court has repeatedly noted, this state has a strong public policy of encouraging settlements. The decision below discourages parties' efforts to engage in discussions that might lead to the resolution of disputes because the Court of Appeals treats such efforts as evidence of waiver. If upheld, the decision will increase litigation (and its length and cost), especially for public contracting entities, the costs of which will be borne by the state's taxpayers.

Second, the precedent of this Court is that waiver of a written contract by reason of conduct can be established solely by "unambiguous" conduct; the conduct must demonstrate an "unequivocal" intent to waive contract rights, a properly high and demanding hurdle. "Unequivocal intent" by definition cannot be proved by ambiguous conduct. Such conduct, therefore, *cannot* waive a contractual right. The decision below permits a plaintiff to proceed to trial with no evidence of unequivocal waiver, a result in clear contravention of this Court's precedent.

Third, courts typically have required detrimental reliance when ruling that unequivocal conduct evidences waiver. Given the public-policy of encouraging settlements, and given the strict requirements to establishing waiver only by unequivocal conduct, absent estoppel, settlement discussions should never be evidence of waiver.

### **III. Statement of the Case**

Katspan, Inc. ("Katspan") contracted with the City of Olympia ("City") to construct the LOTT Southern Connection Pipeline project ("Project"). Clerk's Papers ("CP"), at 61, 70-71. Katspan commenced construction on September 5, 2000, and the Project was scheduled for completion 90 days later—on December 4, 2000. CP 62-63, 73-74.

The contract between Katspan and the City incorporated the 2000 Standard Specifications for Road, Bridge and Municipal Construction. CP 61-62, 70-71. The Standard Specifications are issued by the Washington State Department of Transportation and the American Public

Works Association, and they are used by the State and many municipalities.

Katspan failed to meet numerous obligations under the contract, including timely completion of the Project. CP 63. The City exercised the unilateral contractual "close-out" process on July 2, 2001, and issued its "Final Acceptance" of the Project on September 10, 2001.<sup>1</sup> CP 66-67, 103-04, 106-07. By this time, Katspan had become insolvent and had assigned its rights and obligations to its surety, American Safety Casualty Insurance Company ("American Safety"). See CP 7-8, ¶¶ 6-10.

Section 1-09.11(3) of the Standard Specifications provided that any lawsuit arising out of the Project must be brought within 180 days from the date of Final Acceptance. CP 55. "[F]ailure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action." *Id.* Neither Katspan nor American Safety timely commenced suit within 180 days of Final Acceptance. See CP 6.

On November 26, 2001—nearly five months after Katspan last performed work on the Project—American Safety presented the City with a document titled "Request for Equitable Adjustment on Southern Connection Pipeline" ("Request") that sought \$767,995.02 in extra-contractual compensation. CP 67, 116-120. The City did not respond. CP 68, 323, 333. Other than this Request, there were *no communications or interactions* between the City and either Katspan or American Safety

---

<sup>1</sup> The City exercised the unilateral close-out process because Katspan refused to provide any of the information required by the City to facilitate the Project close-out. CP 65-66, 89, 93, 97.

during the 180 days following the September 10, 2001 Final Acceptance.

*Id.*

On March 14, 2002—after the 180-day contractual limitation period had expired—counsel for American Safety contacted counsel for the City to request that the parties address the surety's Request. CP 323, 329. Consistent with Section 1-09.13(2) of the Standard Specifications which "encouraged" nonbinding alternate dispute resolution, the City agreed to discuss the Request. CP 57, 68, 323-24. The City observed, however, that it would not even discuss the issues unless American Safety provided supporting documentation sufficient to allow the City to evaluate the Request.<sup>2</sup> CP 67-68, 331, 345-47.

American Safety never provided adequate supporting documentation, and the City eventually denied the Request. CP 333-35, 349-350, 354, 357-58, 370. This lawsuit followed, over one thousand days after Project completion and *years* after the contractual limitation period had expired. *See* CP 6.

The trial court granted summary judgment in favor of the City based on the untimeliness of American Safety's lawsuit. The Court of Appeals reversed and remanded, holding that "[i]t remains an issue of fact whether the totality of the circumstances resulted in an implicit waiver of the contract provisions for timeliness of claims and suit." *Am. Safety Cas.*

---

<sup>2</sup> The City's insistence that American Safety provide backup to support the Request is required by Washington law. Article VIII, Section 7 of the Washington State Constitution prohibits the gift of public funds; thus, by law, a governmental entity must investigate and verify such claims before it can meaningfully determine if settlement discussions are even possible.

*Ins. Co. v. City of Olympia*, 133 Wn. App. 649, 661, 137 P.3d 865 (2006),  
*rev. granted*, 160 Wn.2d 1017, 162 P.2d 1130 (2007).

#### IV. Argument

##### A. Washington Law Strongly Favors Private Efforts to Resolve Disputes

The Court of Appeals' opinion establishes a dangerous precedent that will discourage reasonable parties—especially public contracting entities—from attempting to resolve disputes, including untimely disputes, in good faith to avoid litigation. This Court should reverse and remand for entry of judgment in favor of the City.

Given the nature of construction projects, project owners (such as the City and other public entities) commonly negotiate in good faith with contractors notwithstanding a potentially defective claim. This is behavior that should be encouraged because it is consistent with the public policy of reducing litigation through informal discussions. An owner may strongly believe that a contractor has not timely brought a claim, yet may want to understand the contractor's position—as the City attempted to elicit here—to assess its risks. It makes good business sense to learn the potentially relevant facts and arguments and to attempt to settle even an untimely dispute if the cost of settlement is on balance a preferred course of action.

The opinion below actively discourages owners from such discussions—or even communicating with the contractor at all—and therefore impedes dispute resolution. Indeed, the Court of Appeals suggested that, rather than responding to inquiries from American Safety,

the City "could have halted all communication with American Safety." *Am. Safety Cas. Ins.*, 133 Wn. App. at 660. This suggestion not only contravenes Washington law and its strong public policy favoring settlement, but it ignores the practicalities of resolving disputes in the construction industry. Such an approach is equally detrimental to contractors, as they will be driven to litigation before the owner will even be willing to talk with them.

### **1. Washington Law Encourages Settlement**

The express and "strongly favor[ed]" public policy in Washington is to encourage settlements. *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (quoting *Seafirst Ctr. Ltd. P'ship v. Kargianis, Austin & Erickson*, 73 Wn. App. 471, 476, 866 P.2d 60 (1994)); *Haller v. Wallis*, 89 Wn.2d 539, 545, 573 P.2d 1302 (1978); *Chadwick v. Nw. Airlines, Inc.*, 33 Wn. App. 297, 300, 654 P.2d 1215 (1982), *aff'd*, 100 Wn.2d 221, 667 P.2d 1104 (1983). Mindful of this principle, this Court previously has rejected interpretations of the law that discourage the settlement of disputes. *See, e.g., Blume*, 134 Wn.2d at 258 (declining to apply the "independent business judgment rule" because it would discourage settlements and be "contrary to the express public policy of this state which strongly encourages settlement").

### **2. There Is Good Reason to Encourage Settlement**

This policy is critical to the operation of business and also judicial economy. Resolving disputes through settlement is nearly always faster,

more efficient, and less expensive than litigation. Settlements foster predictability by eliminating uncertain outcomes and the significant risks and costs of trial and appeal. Furthermore, settlements are conducive to amicable and peaceful relations between the parties. *See, e.g.*, Michael H. Graham, *Handbook of Federal Evidence* § 408.1, n.6 (6th ed. 2007) ("The law . . . favors settlement of litigation which reduces the burden on courts and counsel and mitigates the antagonism and hostility that protracted litigation leading to judgment may cause."); Mori Irvine, *Better Late than Never: Settlement at the Federal Court of Appeals - Part One*, Washington State Bar News, September 2001; Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 *Hastings L.J.* 1, 3-5 (Nov. 1992).

Settlement of disputes is also necessary for the efficient administration of the courts. Even after a lawsuit is filed, the vast majority of cases settle prior to trial. Over the past five years, only between 1.1% and 1.5% of civil cases filed in Washington Superior courts went to trial. *See* Washington Courts Home Page, *available at* [http://www.courts.wa.gov/caseload/?fa=caseload.display\\_years&folderID=Superior&subfolderID=ann&year=2006&fileID=ACTVCIV](http://www.courts.wa.gov/caseload/?fa=caseload.display_years&folderID=Superior&subfolderID=ann&year=2006&fileID=ACTVCIV) (last visited Sept. 4, 2007).

Settlement of construction disputes, specifically, is equally common. Construction disputes are often complex. Trying construction disputes can be expensive and uncertain because of the complicated facts, technical issues, intricate damages, and expert testimony required. *See*

Robert F. Cushman & Kenneth M. Cushman, *Construction Litigation: Representing the Owner* § 1.28 (2d ed. 1990) ("The complexity of construction litigation, the number of parties and events, and the time elements involved combine to make construction litigation much more expensive than many other types of litigation, and to make a reasonable settlement, if obtainable, particularly attractive"). Achieving a sensible, businesslike resolution through a settlement based on assessment of the risks and consideration of the significant transaction costs associated with litigating a construction dispute is rational behavior that should be encouraged.

Discussing a dispute does not—and should not—result in waiver of a contract. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 392, 78 P.3d 161 (2003) (refusing to find waiver notwithstanding "continued negotiations" of a claim because such a result would "unrealistically halt all discussions for fear of evidencing its intent to waive mandatory claim provisions under the contract" and "detrimentally impact all concerned"); *Dunlap v. West Const. Co.*, 23 Wn.2d 827, 830, 162 P.2d 448 (1945) ("negotiations, discussion, and efforts to arrive at settlement" do not impliedly waive a contractual requirement to provide notice of claims); *see also Keesling v. W. Fire Ins. Co. of Fort Scott, Kan.*, 10 Wn. App. 841, 848, 520 P.2d 622 (1974) ("preliminary negotiations

looking to an amicable settlement of a loss is not a waiver of the terms of a policy . . . unless it appears that the assured was misled to his injury").<sup>3</sup>

Directly contrary to these policies and to sound business judgment, the Court of Appeals' decision would encourage the opposite kind of behavior—the halting of all communication and more lawsuits. If this decision stands, owners will be fearful that anything they say in seeking information that might lead to a settlement will instead simply lead to an allegation of waiver. In response, a rational owner may be silent, ignore well-meaning offers to negotiate, wait until a lawsuit is filed, and then file a motion for summary judgment. If the owner misunderstood the facts leading to the claim—which could have been revealed through settlement negotiations—time and money will have been misspent. Settlement may then be even more difficult, as parties who have incurred costs in litigating often harden their positions.

**B. The Law Requires That a Court Must Enforce a Contract Unless Unequivocal Acts Demonstrate a Clear Intent to Waive**

It is undisputed that, absent waiver, Washington law enforces contractual limitation periods such as the 180-day period in this contract.

The Court of Appeals' decision is at odds with this Court's precedent that

---

<sup>3</sup> Courts in other jurisdictions agree. *See, e.g., Baldwin Carpet Linoleum & Carpet, Inc. v. Builders, Inc.*, 523 N.W.2d 33, 38-39 (Neb. App. 1994) (limitations period in state Contract Claims Act not tolled while contractor and university engaged in settlement discussions); *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512 (1988) ("Evidence of communications or settlement negotiations . . . either before or after expiration of a limitations period . . . is not, without more, sufficient to prove waiver or estoppel . . ."); *Schwier v. Atlas Assur. Co.*, 227 Mich. 104, 110, 198 N.W. 719 (1924) (negotiations between parties after suit was not waiver of pleaded defense because plaintiff was not misled and "the law commends, it does not punish, efforts toward amicable settlements").

one cannot demonstrate waiver of a written contract absent *unequivocal* acts demonstrating a clear intent to waive the contract. The Court of Appeals' decision was further flawed because it relied on the occasional *absence* of affirmative statements reserving contractual rights as evidence of unequivocal waiver.

**1. Parties Are Free to Agree on Contractual Limitation Periods**

It is well settled in Washington that parties can contractually agree on time periods within which the parties must file lawsuits. Washington courts have long enforced contractual periods of limitation—including periods of limitation shorter than the 180 days required by the contract here.<sup>4</sup> *See, e.g., Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 147-48, 890 P.2d 1071 (1995) (upholding provision requiring action to be commenced within 120 days of substantial completion); *Yakima Asphalt Paving Co. v. Dep't of Transp.*, 45 Wn. App. 663, 666, 726 P.2d 1021 (1986) (upholding 180-day limit to commence suit); *Syrett v. Reisner McEwin & Assoc.*, 107 Wn. App. 524, 530, 24 P.3d 1070 (2001) (upholding provision of six month limitation); *City of Seattle v. Kuney*, 50 Wn.2d 299, 301, 311 P.2d 420 (1957) (upholding provision of one year limitation).

Prompt litigation is preferable for many reasons. Parties must be permitted to timely investigate the bases for a claim. It is also simply

---

<sup>4</sup> The reasonableness of the 180-day limit to suit in the underlying contract with the City is also evidenced by Washington statute, which requires that parties to certain construction contracts must file suit within 180 days of completion. *See* RCW 47.28.120.

smart business for parties to know whether their project is complete and closed or whether issues remain unsettled. Parties need to know if they must establish reserves or if they can move on and invest those funds in other areas. Tracking potential disputes is particularly important in public contracts, and the statutory 45-day lien period (*see* Ch. 60.28 RCW) and strict budgetary concerns all militate in favor of timely resolution.

**2. If the Intent to Waive a Contractual Right Is Ambiguous, It Is Not Unequivocal**

Waiver by conduct "requires *unequivocal acts* of conduct evidencing an intent to waive." *Absher*, 77 Wn. App. at 143 (citing *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958)) (emphasis added); *United Pac. Ins. Co. v. Boyd*, 34 Wn. App. 372, 376, 661 P.2d 987 (1983). "Unequivocal" is the antithesis of ambiguity. It means "[u]nambiguous; clear; free from uncertainty." BLACK'S LAW DICTIONARY 1563 (8th ed. 2004). The Court of Appeals confused *ambiguity* that might in some circumstances constitute a "dispute of material fact" with ambiguity that specifically precludes conduct from being unequivocal. Equivocal or ambiguous conduct—as a simple matter of definition—cannot be unequivocal.

The "unequivocal acts" standard is demanding for good reason. Waiver permanently surrenders an established contractual right. *Voelker v. Joseph*, 62 Wn.2d 429, 435, 383 P.2d 301 (1963); *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001). Waiver modifies the written contract upon which the parties had explicitly agreed, and any

ambiguous conduct short of a written, explicit waiver dangerously opens up all contracts to uncertainty and litigation.

Accordingly, this Court has recognized that "[c]aution must be exercised both in [the] proof and application" of implied waiver. *Voelker*, 62 Wn.2d at 436; *see also White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 198, 2 N.E.2d 501 (1936) ("Courts move slowly and carefully when the claim is made that a party has waived the terms of a written contract and agreed to different terms by parol, as it in fact, if not in law, amounts to a modification of the original contract"); *Norwood v. Serv. Distrib. Inc.*, 297 Mont. 473, 489, 994 P.2d 25 (2000) ("[A] party claiming waiver must prove that the language or conduct by the other party showed, in an unequivocal manner, that the party voluntarily and intentionally relinquished the right to receive the full benefit" of the contract); *Richmond v. Grabowski*, 781 P.2d 192, 195 (Colo. Ct. App. 1989) (for waiver of a contractual right to be implied from conduct, "the conduct should be *free from ambiguity* and clearly manifest the intention not to assert the benefit") (emphasis added).

The Court of Appeals' opinion allows parties to avoid explicit contractual obligations by alleging that *ambiguous* conduct creates a dispute of material fact on the occurrence of *unequivocal* waiver. While a party to a contract certainly may choose to waive a contract provision

meant for its benefit, implied waiver must be explicit. *Absher*, 77 Wn. App. at 147-48; *see also Mike M. Johnson*, 150 Wn.2d at 386.<sup>5</sup>

The Court of Appeals' opinion confused the test for implied waiver by conduct. *See Am. Safety Cas. Ins.*, 133 Wn. App. at 661. By relying on *ambiguity* as to the "totality of the circumstances," the Court of Appeals ignored that a party must show the *absence of ambiguity* to establish unequivocal conduct.

### 3. The Gradation of Ambiguous Conduct Is Irrelevant

The proponent of waiver has the burden to demonstrate unambiguous conduct that evidences an *unequivocal* intent to waive the contract.<sup>6</sup> *Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998). That burden should not be met by a scorecard calculating the number of times one party reminded the other party that waiver was not intended. It is impractical and unwise to establish a rule of law that, although contracts

---

<sup>5</sup> The City's briefs to this Court amply demonstrate how the court below misapplied the rule of law announced in *Mike M. Johnson*. If anything, the City's argument here is stronger than that of the County in *Mike M. Johnson* because here, the only acts by the City that American Safety points to as evidence of "waiver" occurred *after* the limitations period for filing suit had already expired.

<sup>6</sup> A party alleging waiver has the burden of responding to summary judgment motions with competent evidence as required by *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). Any lesser standard will lead to more time intensive and expensive litigation, itself contrary to the policy behind summary judgment. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) ("Summary judgment motions are important to the process of resolving disputes."); *Padron v. Goodyear Tire & Rubber Co.*, 34 Wn. App. 473, 475, 662 P.2d 67 (1983) ("One of the important functions of the summary judgment procedure is the avoidance of long and expensive litigation productive of nothing.") (citing *Mark v. Seattle Times*, 96 Wn.2d 473, 484, 635 P.2d 1081 (1981)).

are generally enforceable, one party must constantly remind the other party that the contract must be followed and that waiver is not intended.

Here, the City and Katspan had an unambiguous contract, and the City regularly informed Katspan and American Safety that it expected the parties to comply with its terms. CP 61, 70-71, 326-27, 337-39, 354, 370. Whether the City referenced its intent to follow the contract in zero, one, or ten communications should be irrelevant. The contract is valid and must be enforced unless the City's conduct demonstrated an *unequivocal* intention to waive its rights.

**C. Conduct Towards Settlement Should Not Be Evidence of Waiver, Absent Estoppel**

Importantly, American Safety does not identify any conduct by the City that evidences the City's intent to waive the contract *before* the 180-day period had expired. All of the settlement discussions are alleged to have occurred *after* the 180-day period.<sup>7</sup> American Safety does not contend that it relied on conduct before the 180 period lapsed, and it explicitly denies any estoppel argument.<sup>8</sup> American Safety instead

---

<sup>7</sup> To support its waiver argument, American Safety identifies several examples of conduct by the City's *consultant* that allegedly waived the 180-day limit to suit. The City's consultants were not parties to the City's contract with Katspan and therefore had no authority to modify or waive the contract on the City's behalf. It is well established in Washington that a consultant is "not a general agent of his or her employer and [has] no implied authority to make a new contract or alter an existing one for the employer." *Absher*, 77 Wn. App. at 143; *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998); *Valley Constr. Co. v. Lake Hills Sewer Dist.*, 67 Wn.2d 910, 410 P.2d 796 (1965); *De Honey v. Gjarde*, 134 Wash. 647, 236 P. 290 (1925); *Hurley v. Kiona-Benton Sch. Dist. No. 27*, 124 Wash. 537, 215 P. 21 (1923). Accordingly, the Court should disregard allegations about the consultants' conduct in reaching its decision on waiver.

<sup>8</sup> See Appellant's Reply Brief at 4 ("American Safety does not argue estoppel in this matter . . . What American Safety does argue is that the City's actions evidence an

attempts to resurrect an expired claim based on conduct that occurred after it had lost its ability to file suit.

Courts generally have found implied waiver of a contract only where the beneficiary misled the other party to that party's detriment, raising an issue of estoppel. *See, e.g., Reynolds v. Travelers' Ins. Co.*, 176 Wash. 36, 46, 28 P.2d 310 (1934). Conversely, courts generally have not found that conduct constitutes implied waiver where the party claiming waiver has not relied on any misrepresentation. *See Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 256, 928 P.2d 1127 (1996); *see also McMillan v. Montgomery*, 121 Or. 28, 32-33, 253 P. 879 (1927) ("To make out a case of waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts *amounting to an estoppel on his part.*") (emphasis added).

Here, the detrimental reliance test is not met, nor even claimed to exist. Not only was the City's conduct not clear and unequivocal, but the conduct that allegedly waived the contract did not occur until *after* the 180-day limit to suit had expired. *The City did not communicate with American Safety regarding the claim before the contractual deadline.* There were no communications on which American Casualty *could* have relied to its detriment. American Safety's allegations, thus, amount to nothing more than an attempt to resurrect a right that it had already lost.

---

intent to waive the suit limitations period") (emphasis added). This dispute thus differs significantly from cases in which courts have found implied waiver. *See Reynolds*, 176 Wash. at 46.

The requirement of estoppel should particularly apply to cases such as this where the City merely attempted to determine if it could resolve the dispute short of litigation. Instead, despite having no unequivocal evidence of waiver, the Court of Appeals has punished the City. Given Washington's strong public policy of encouraging settlements, and given the strict requirements for establishing waiver only by unequivocal conduct, this Court should make clear that, absent estoppel, settlement discussions should never be evidence of waiver.

#### V. Conclusion

The Washington State School Construction Alliance respectfully requests that this Court encourage settlement of disputes, reaffirm its precedent requiring unequivocal conduct to support waiver, enforce the contract, reverse the Court of Appeals, and affirm summary judgment.

DATED: September 10, 2007

**PERKINS COIE LLP**

By   
Richard Ottesen Prentke, WSBA #5786  
Graehm C. Wallace, WSBA #26587  
Melissa E. Robertson, WSBA #34533  
Andrew L. Greene, WSBA #35548  
Attorneys for Washington State School  
Construction Alliance, Amicus Curiae