

79001-9

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SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 79001-9

AMERICAN SAFETY CASUALTY INSURANCE
COMPANY, a foreign corporation,

Respondent,

v.

CITY OF OLYMPIA, a Washington municipal corporation

Petitioner.

ANSWER TO PETITION FOR
REVIEW

Submitted by:

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUES PRESENTED FOR REVIEW	1
III. STATEMENT OF THE CASE	2
A. Procedural History	6
IV. SUMMARY OF ARGUMENT	6
V. ARGUMENT	9
A. The decision of the Court of Appeals does not conflict with <i>Mike M. Johnson, Inc. v.</i> <i>Spokane County.</i>	9
B. This case does not present an issue of substantial public importance.....	18
VI. CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Cases	
<i>Mike M. Johnson, Inc. v. Spokane County</i> , 150 Wn.2d 375, 78 P.3d 161 (2003)	passim
<i>Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.</i> , 4 Wn. App. 695, 483 P.2d 880 (1971).....	15-16
Statutes	
RAP 13.4	19
RAP 13.4(b).....	1, 9, 18

I. INTRODUCTION

Petitioner seeks review of the Court of Appeals' decision reversing the trial court's entry of summary judgment in Petitioner's favor. Petitioner has not satisfied the requirements of RAP 13.4(b) and its petition for review must therefore be denied.

II. ISSUES PRESENTED FOR REVIEW

The Court of Appeals held that the City's conduct in continuing to consider American Safety's Request for Equitable Adjustment after the deadlines under the Contract had expired and the City's repeated requests to American Safety to provide documentation supporting its claim could constitute an implied waiver of the Contract requirements regarding that claim. Whether there was a waiver was an issue of fact for the jury to decide.

1. In *Mike M. Johnson v. Spokane County*,¹ the County refused to waive contract rights regarding MMJ's request for additional compensation relating to Change

¹ *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003).

Order No. 3—asserting that MMJ’s claims were not timely—while it continued to negotiate other issues relating to the ongoing construction project. In this case, the City continued to negotiate American Safety’s one and only claim after contract deadlines had passed and the project was completed. Does the Court of Appeals’ decision conflict with this Court’s decision in *Mike M. Johnson*?

2. Does this matter, which is consistent with prior decisions regarding implied waiver, present an issue of substantial public interest?

III. STATEMENT OF THE CASE

This matter arises from a contract (“the Contract”) between Katspan and the City of Olympia. (CP 70-71²) The Contract was for the construction of the Downtown Olympia Segment of the LOTT Southern Connection

² This two-page “Agreement” sets out the general agreement of the parties and lists the various documents that make up the entire contract. The relevant portions of the contract documents appear in various places throughout the Clerk’s Papers.

Pipeline project. (CP 61) LOTT managed Katspan's performance under the Contract.³ (*Id.*)

During the course of construction, Katspan began experiencing financial difficulties. Eventually, American Safety, Katspan's surety, investigated and paid numerous claims by Katspan's subcontractors and suppliers with regard to the Contract. (CP 7) Katspan assigned to American Safety all rights to receive payment from the City for the LOTT project. (*Id.*)

Because of the difficulties Katspan was experiencing completing its work under the Contract, the City unilaterally declared the closing date of the Contract to be September 10, 2001. (CP 106-107) On November 15, 2001,⁴ American Safety submitted its Request for Equitable Adjustment, seeking an additional \$767,995.02 for the work

³ Some of the relevant acts in this matter were performed by LOTT and/or its attorneys and some of the relevant acts were performed by the City and/or its attorneys. It is undisputed that any actions taken by LOTT and/or its attorneys are binding on the City. American Safety will, therefore, refer to all acts as having been performed by or on behalf of the City.

⁴ For the Court's convenience, a partial chronology is attached as Appendix A.

Katspan had performed. (CP 116-321) American Safety divided the claim into four categories (CP 117-18) and submitted documentation relating to each category. (CP 123-321)

The City did not respond to the claim until American Safety's attorney called the City's attorney on March 14, 2002. (CP 323, 329) In response to that call, the City's attorney sent American Safety's counsel⁵ a list of questions and a request for additional documentation. (CP 345-47) Thereafter, the City's attorney sent several letters to American Safety's counsel regarding the need for additional information. (CP 349-50, 331, 354-55)⁶

On January 22, 2003, American Safety's counsel notified the City's counsel that American Safety had received four or five bankers boxes of documents from Katspan. (CP 334) The City reviewed the additional documents but still was not satisfied and continued to

⁵ American Safety's present counsel on appeal did not previously represent American Safety.

⁶ See Appendix A. The specific communications are also discussed in detail herein at pages 14-15.

request additional documentation. On April 23, 2003, the City's counsel wrote to American Safety's attorney, stating that, if the additional documentation was not received by May 16, 2003, the City would deny the claim. (CP 357-59)

American Safety was still awaiting additional information from Katspan and was unable to meet the City's May 16, 2003, deadline. On July 31, 2003, the consultant who had been assisting American Safety with its claim contacted the City's consultant regarding the additional information the City required. (CP 412) The consultants exchanged emails on August 4 and 8, 2003, regarding the additional information needed to assess the claim. (CP 414, 416, 418-19) On May 21, 2004, American Safety's counsel notified the City's counsel that the additional information was ready for review. (CP 335) The City's attorney responded by stating that the claim had been denied and any lawsuit would be untimely under the terms of the Contract. (CP 370)

A. Procedural History

American Safety filed suit on August 17, 2004. (CP 6-9) The City filed a Motion for Summary Judgment on April 5, 2005. (CP 19-44) The trial granted the motion on April 29, 2005. (CP 421-23) The City filed a Motion for Award of Attorney's Fees on May 13, 2005. (CP 431-52) The court granted that motion on May 27, 2005. (CP 478-79) American Safety appealed that order to Division Two of the Court of Appeals. (CP 484-90)

On June 27, 2006, the Court of Appeals reversed the trial court's decision, holding that reasonable minds could differ as to whether the City had waived the Contract terms. *See* Appendix to Petition for Review at 12, 14. The court also reversed the award of attorney fees to the City. *Id.* at 16.

IV. SUMMARY OF ARGUMENT

Contrary to the City's assertion, this case is not "virtually identical to *Mike M. Johnson, Inc. v. Spokane County*⁷"⁸ Most significantly, the cases do not involve

⁷ 150 Wn.2d 375.

the same “substance of communications regarding dispute resolution procedures.”⁹ The parties in *Mike M. Johnson* were discussing multiple issues relating to the ongoing project, only one of which (a claim for additional compensation relating to Change Order No. 3) involved the question timely compliance. With regard to Change Order No. 3, the County was adamant and unambiguous. It refused to consider MMJ’s untimely proffers, stating in each such case that it would only accept submissions meeting the requirements of the contract and that the County did not intend to waive those contract terms.¹⁰ Thus, this Court concluded the parties’ negotiations regarding multiple issues could not be deemed a waiver of contract terms with regard to MMJ’s claim for additional compensation as to Change Order No. 3.

Here, the parties were discussing only one issue—the Request for Equitable Adjustment. The project was

⁸ Petition for Review at 1.

⁹ *Id.*

¹⁰ See *Mike M. Johnson*, 150 Wn.2d at 380-83.

completed. The parties had no reason to continue negotiations except as to American Safety's request for additional funds.

Thus, the Court of Appeals properly concluded a jury should decide whether the City's conduct in continuing to negotiate that single claim constituted a waiver of the Contract requirements. Because the facts of this matter differ from *Mike M. Johnson*, the Court of Appeals' decision is not in conflict with that case.

Because the City continued to negotiate with American Safety and expressed its willingness to adjust payments if American Safety provided sufficient documentation, a fact question arises whether the City impliedly waived its right to absolute compliance with the protest and claim provisions of the Contract. This fact question does not present a legal issue of substantial public interest and importance.

V. ARGUMENT

RAP 13.4(b) provides that a petition for review will be granted only if certain criteria are satisfied, including the following:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;

...

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Neither criteria is satisfied in this matter.

A. The decision of the Court of Appeals does not conflict with *Mike M. Johnson, Inc. v. Spokane County*.

*Mike M. Johnson, Inc. v. Spokane County*¹¹ primarily addresses whether actual notice of a claim under a construction contract acts as an exception to mandatory protest and claim procedures in the contract. That issue was not presented to the Court of Appeals in this case. Rather, the issue the court decided was whether material issues of fact precluded a summary finding that the City had not waived the Contract's requirements. In *Mike M.*

¹¹ 150 Wn.2d 375.

Johnson, the waiver issue was secondary. The Court's only statement regarding whether the county's *actions* waived Mike M. Johnson's compliance with the contract was as follows:

MMJ also urges that the county's continued negotiations may evidence its intent to waive MMJ's compliance. *The parties were not only discussing concerns over change order number 3, however, but were discussing numerous issues and protests throughout this period of time.* Adopting MMJ's views would have the county unrealistically halt *all discussions* for fear of evidencing its intent to waive mandatory claim provisions under the contract. We decline to reach such a result, as it would detrimentally impact all concerned. We find no question of material fact as to whether the county waived contractual compliance.¹²

The Court's holding with regard to implied waiver was, therefore, premised entirely on the fact that the parties were discussing more than the one issue for which MMJ sought a finding of waiver (i.e., additional compensation relating to Change Order No. 3). It is also significant that, when discussing Change Order No. 3, the County was clear and unwavering with regard to its reliance upon the

¹² *Id.* at 392 (emphasis added).

contract procedures. This Court's opinion discloses the following facts¹³:

6/4/98	County issues Change Order No. 3.
6/26/98	MMJ writes County re seven concerns, one of which is Change Order No. 3.
7/16/98	County writes to MMJ that it must submit a claim per contract procedure if it wants additional compensation.
7/24/98	MMJ writes to the County regarding "various project delays and their impacts." The letter includes a one-sentence summary of the reason Change Order No. 3 increased its costs, promising a "detailed progress schedule."
8/3/98	County notifies MMJ that the increased costs are MMJ's own responsibility.
8/7/98	County writes MMJ stating that the letter request is denied and insisting that MMJ follow the terms and conditions of the contract in making claim.
8/14/98	MMJ writes to County with additional but insufficient information about its additional costs.
8/25/98	MMJ sends a spreadsheet to the County with 29 line items of dates, only one of which related to Change Order No. 3.
9/1/98	County writes to MMJ that it wants to negotiate resolution of the parties' claims, but the County does not intend a waiver of any claims or defenses.
9/1-12/22/98	MMJ writes several letters to County about additional compensation, none of which comply with the contract terms.

¹³ *Id.* at 378-84.

12/23/98 and 1/27/99	County writes to MMJ stating that MMJ has “failed to perfect any claims” because it has not followed contract procedure and the “claims submitted are not timely.” County agrees to meet on 1/29/99, but “does not intend to waive any claim or defense which it might have.”
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Another important difference between the present case and *Mike M. Johnson*, is that the communications in *Mike M. Johnson* occurred with regard to an ongoing project. Because MMJ was still working on the project, it was necessary for the parties to continue to work together to resolve their disputes.

In contrast, in the present matter, all pertinent communications occurred after the project was completed and dealt with only one issue—Katspan’s Request for Equitable Adjustment. The City’s table in its Petition for Review purporting to summarize and compare the number and substance of the letters in *Mike M. Johnson* and this matter ignores these significant factual distinctions between the two matters.¹⁴ In addition, the City points to

¹⁴ Petition for Review at 8.

the communications between the parties *before* American Safety submitted its Request for Equitable Adjustment as evidence of non-waiver.¹⁵ American Safety has consistently maintained that it is the City's acts *after* the Request for Equitable Adjustment was submitted that constitute a waiver of the Contract requirements.

Because the parties in this matter were discussing only one issue, there was no danger that, by continuing to discuss *other* issues, the City might inadvertently waive the Contract requirements as to the Request for Equitable Adjustment. Unlike in *Mike M. Johnson*, there was no need for the parties to continue negotiations *except* in relation to the contractor's request for additional compensation.

Also, as the table above indicates,¹⁶ the County in *Mike M. Johnson* precluded any implication of waiver by

¹⁵ *Id.* at 9-20.

¹⁶ The factual differences between this matter and *Mike M. Johnson* can be seen by comparing the above table to the chronology, relating to the facts of this case, set forth in Appendix A. American Safety did not prepare a side-by-side table because all because the facts in *Mike M. Johnson* leave off before the project was completed, whereas all relevant events in the present matter occurred after the project was completed.

stating consistently, after MMJ had made the request for additional compensation for Change Order No. 3, that strict compliance was required, no waiver was being made, and the claim was being denied. In contrast, the City's behavior in this case raises a question of fact whether, after American Safety's request for additional compensation was made, the City was willing to negotiate those terms despite American Safety's noncompliance with the Contract requirements.

In discussing the Request for Equitable Adjustment, the City repeatedly requested additional information, yet did not reserve its rights under the Contract. On March 25, 2002, the City's attorney sent specific questions to American Safety's attorney regarding the claim, stating that once the answers were received the City could better analyze the claim. (CP 345) The letter contained no reservation of rights. (*Id.*) On August 2, 2002, the City's attorney stated the City had reviewed the information provided but needed additional submissions, which he specifically listed. (CP 349) He said the additional

information was needed “so that Lott can complete its review of Katspan’s claim.” (*Id.*) Again, the City made no reference to the Contract requirements or a reservation of rights. (*Id.*) On April 23, 2003, the City’s attorney reaffirmed the request for additional information. (CP 357-58) Once again, the letter did not refer to the Contract requirements, nor did it reserve any rights. (*Id.*) During the entire negotiation period, the City’s attorney made only one general reference to the City’s defenses. (CP 354)

The parties’ continuing discussions support the conclusion that a jury could conclude a waiver had occurred.

Mike M. Johnson does not stand for the proposition that contract requirements may never be impliedly waived by a party’s conduct. Other cases addressing that issue are still valid and binding. Indeed, the *Mike M. Johnson* opinion cites to other cases addressing waiver, including *Reynolds Metals Co. v. Electric Smith Construction &*

Equipment Co.,¹⁷ a case also relied upon by the Court of Appeals in this matter.

As the *Reynolds* court noted, “[w]hether or not a waiver is to be *implied* must necessarily be a mixed question of fact and law.”¹⁸ Although a party may expressly waive a right, it is commonly “sought to be proved by various species of proof and evidence, by declarations, by acts and by non-feasance, permitting differing inferences and which do not directly, unmistakably or unequivocally establish it.”¹⁹ In that event, it is for the jury to decide whether the intention to waive existed.²⁰ Thus, although case law states implied waiver requires unequivocal acts, it is also true that, “when facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a

¹⁷ *Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 483 P.2d 880 (1971).

¹⁸ 4 Wn. App. at 700 (emphasis in original).

¹⁹ *Id.* (quoting *Alsens Am. Portland Cement Works v. Degnon Contracting Co.*, 222 N.Y. 34, 37, 118 N.E. 210 (1917)).

²⁰ *Id.*

controlling fact exists and another that it does not exist, there is a question of fact.”²¹ In that event, the jury must decide whether the evidence establishes an unequivocal waiver.

Here, the Court of Appeals properly concluded the facts presented by American Safety could lead reasonable minds to infer that the City’s conduct constituted an implied waiver of the Contract requirements. In his letter to American Safety’s attorney dated November 12, 2002, the City’s attorney wrote, “Without waiving any of its defenses, LOTT has stated several times that it is willing to negotiate these claims in order to come to a quick resolution.” (CP 354) After that letter was sent, however, the City acted in such a way that a reasonable person could conclude it *was* waiving its defenses. The City and its consultant communicated with American Safety’s counsel several times, requesting additional information and not referring in any manner to the Contract requirements or a reservation of rights. (CP 357-59, 414, 416, 418-19) After

²¹ *Id.*

American Safety submitted the request for equitable adjustment, the City referred to its rights under the Contract only one other time. That reference was in a letter to American Safety dated May 27, 2004. (CP 370) Thus, it was sent *after* all the events that American Safety contends constitute a waiver. If the City had waived the Contract requirements before May 27, 2004, a statement on that date could not negate the waiver that had already occurred.

B. This case does not present an issue of substantial public importance.

The City mischaracterizes the effect of *Mike M. Johnson*. That case does not stand for the proposition that settlement negotiations may never waive contract rights. Rather, as explained above, the Court concluded that continued communications regarding multiple issues during an ongoing project did not constitute a waiver of the contract requirements regarding only one of those issues.

Thus, the only issue as to whether review should be granted under RAP 13.4(b)(4) is whether the Court of Appeals' determination that a question of fact exists regarding implied waiver presents an issue of "substantial

public interest.” The law applicable to implied waiver is well established and is not challenged in this case.

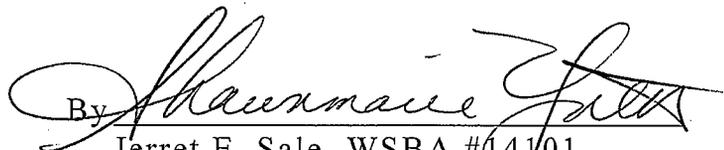
Whether the Court of Appeals correctly determined a factual issue exists is not an issue of significant public interest or importance.

VI. CONCLUSION

The City’s Petition for Review does not satisfy the requirements of RAP 13.4. The Court of Appeals’ decision does not conflict with *Mike M. Johnson* or any other decision of this Court. In addition, this matter does not present any issue of substantial public interest. The Petition for Review should be denied.

DATED August 28, 2006.

BULLIVANT HOUSER BAILEY PC

By 
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Attorneys for Appellant/Respondent

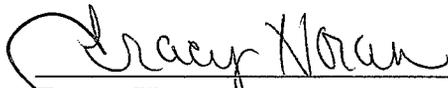
CERTIFICATE OF SERVICE

The undersigned certifies that on this 28th day of August, 2006, I caused to be served Answer to Petition for Review to:

Athan E. Tramountanas	<input type="checkbox"/>	via hand delivery.
Thomas H. Wolfendale	<input checked="" type="checkbox"/>	via first class mail.
Preston Gates & Ellis LLP	<input type="checkbox"/>	via facsimile.
925 Fourth Ave., Ste. 2900		
Seattle, WA 98104-1158		

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of August, 2006, at Seattle, Washington.



Tracy Horan

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Appendix A

CHRONOLOGY
(partial)

4/2/2001	Letter from PGE to Katspan re disputes, including "LOTT reserves its right to demand strict compliance with all other terms of the contract documents"	CP 337-39
4/4/2001	Letter from Katspan to PGE acknowledging contract requirements.	CP 341-43
4/18/2001	Letter from PGE to Katspan denying that Katspan is entitled to adjustments and had waived any claims by failure to meet the protest requirements.	CP 326-27
9/10/2001	Final acceptance of project completion.	CP 106
11/15/2001	Request for Equitable Adjustment submitted.	CP 116-321
3/25/2002	Letter from PGE to G&M requesting additional documents.	CP 345-47
8/1/2002	Letter from PGE to G&M requesting additional documents.	CP 349-50
10/2/2002	Email from PGE to G&M stating backup documentation is necessary to resolve claim; such documents would be necessary "to substantiate court claim."	CP 331
11/12/2002	Letter from PGE to G&M re further negotiations: "Without waiving any of its defenses."	CP 354
4/23/2003	Letter from PGE to G&M re need for certain documentation; documentation required "if the matter is litigated." Sets May 16, 2003, date.	CP 357-58
8/4/2003	Email from City's consultant that he has "been given the green light to discuss the LOTT matter" with American Safety's consultant.	CP 414
5/21/2004	G&M informs PGE the requested documentation is ready.	CP 335
5/27/2004	Letter from PGE to G&M denying claim.	CP 370
8/17/2004	American Safety files suit.	CP 6-9