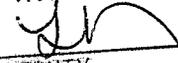


FILED
COURT OF APPEALS
DIVISION II

06 JUL 27 PM 4:03

STATE OF WASHINGTON

BY 
DEPUTY

79001-9

No. _____
Court of Appeals No. 33446-~~11~~

SUPREME COURT
OF THE STATE OF WASHINGTON

AMERICAN SAFETY CASUALTY INSURANCE COMPANY, a
foreign corporation,

Appellant/Respondent,

v.

CITY OF OLYMPIA, a Washington municipal corporation,

Respondent/Petitioner.

FILED
JUL 31 2006

CLERK OF SUPREME COURT
STATE OF WASHINGTON


PETITION FOR REVIEW

PRESTON GATES & ELLIS LLP

Thomas H. Wolfendale, WSBA # 03776

Athan E. Tramountanas, WSBA #29248

Amit D. Ranade, WSBA #34878

Attorneys for Petitioner

City of Olympia

PRESTON GATES & ELLIS LLP

925 Fourth Avenue

Suite 2900

Seattle, WA 98104-1158

(206) 623-7580

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. IDENTITY OF PETITIONER.....	2
III. COURT OF APPEALS DECISION.....	2
IV. ISSUES PRESENTED FOR REVIEW.....	3
V. STATEMENT OF THE CASE.....	3
A. Katspan Failed to Meet Project Deadlines or Specifications.....	3
B. Katspan and American Safety Failed to Comply with Specific Contract Provisions Precedent to their Right to Recovery.....	4
C. Olympia Reserved its Rights and Repeatedly Insisted Upon Compliance with Protest and Claim Requirements.....	5
D. The Trial Court Dismissed American Safety’s Claims Because American Safety Failed to Comply with the Contract’s Protest and Claim Provisions.....	5
VI. ARGUMENT.....	6
A. The Court of Appeals’ Decision Misapplies the Supreme Court’s Decision in <i>Mike M. Johnson, Inc. v. Spokane County</i>	6
1. This Case Involves the Same Factual and Legal Issues as <i>Mike M. Johnson</i>	7
a. Both Spokane County and Olympia Reserved Their Rights During Construction.....	9
b. Both Spokane County and Olympia Reserved Their Rights at the Outset of Claim Negotiations.....	10
c. Both Spokane County and Olympia Reserved Their Rights During Negotiations.....	11
d. Both Spokane County and Olympia Sent Letters that did not Reserve Their Rights...	11

e.	The Similar Number and Nature of the Parties' Reservations of Rights Demand the Same Result.....	12
2.	The Court of Appeals Misapplied the Law on Implied Waiver.....	13
a.	American Safety Bears the Burden of Producing Evidence of Waiver.....	13
b.	Equivocal Acts of Conduct are Insufficient to Establish an Issue of Fact for Implied Waiver	15
B.	The Court of Appeals Decision will Dissuade Future Owners from Entering into Settlement Negotiations	16
V.	CONCLUSION	19

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Absher Const. Co. v. Kent Sch. Dist. No. 415</i> , 77 Wn. App. 137, 890 P.2d 1071 (1995)	13
<i>American Safety Casualty Ins. Co. v. City of Olympia</i> , __ Wn. App. __, 137 P.3d 865 (2006)	2
<i>Berliner v. Greenberg</i> , 37 Wn.2d 308, 223 P.2d 598 (1950)	17
<i>Birkeland v. Corbett</i> , 51 Wn.2d 554, 320 P.2d 635 (1958)	15
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)	14
<i>Central Wash. Bank v. Mendelson-Zeller, Inc.</i> , 113 Wn.2d 346, 779 P.2d 697 (1989)	15, 16
<i>Dunlap v. West Const. Co.</i> , 23 Wn.2d 827, 162 P.2d 448 (1945)	18
<i>Mike M. Johnson, Inc. v. Spokane County</i> , 12 Wn. App. 462, 49 P.3d 916 (2002)	7, 8, 12
<i>Mike M. Johnson, Inc. v. Spokane County</i> , 150 Wn.2d 375, 78 P.3d 161 (2003)	passim
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980)	15, 16
<i>White Pass Co. v. St. John</i> , 71 Wn.2d 156, 427 P.2d 398 (1967)	16
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	14

Other Authorities

RAP 13.4(b)(1)2, 7, 16, 20
RAP 13.4(b)(4)2, 7, 20
Washington’s Evidence Rule 40820

I. INTRODUCTION

This Court should accept review and reaffirm the clear rule it announced in *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003) with regard to the enforcement of contractual claims provisions and implied waivers. This case is virtually identical to the *Mike M. Johnson* case. Both cases involve the same contract provisions. Both cases involve virtually the same frequency and substance of communications regarding dispute resolution procedures. In both cases, the project owners agreed to negotiate while expressly reserving their contractual defenses. This Court concluded that, under these circumstances, the project owner retains the right to enforce contractual claims procedures and the contractor's failure to comply bars recovery.

The Court of Appeals, in its published decision for this case, undermined the certainty this Court provided through the *Mike M. Johnson* decision. The Court of Appeals directly contravened *Mike M. Johnson* by refusing to enforce contractual claims provisions and by punishing Petitioner City of Olympia for expressing a willingness to enter into settlement discussions, even though Olympia expressly reserved its contractual defenses. This Court should accept review to reaffirm the rule set forth in *Mike M. Johnson* and to reestablish the certainty that the rule provided to both contractors and owners.

Olympia respectfully requests this Court to accept review on two grounds. First, the Court of Appeals' decision conflicts with Supreme Court precedent directly on point. *See* RAP 13.4(b)(1). Second, the Court of Appeals' decision in this case involves issues of substantial public interest in that it penalizes Olympia for making efforts to resolve the dispute through negotiation rather than litigation. *See* RAP 13.4(b)(4). This Court should reaffirm the rule it announced in the *Mike M. Johnson* case – and the certainty that decision provided – by accepting review.

II. IDENTITY OF PETITIONER

Olympia is the petitioner and was the respondent before the Court of Appeals. American Safety Casualty Insurance Company was the appellant before the Court Appeals. Katspan, Inc. was the contractor on the underlying project. Due to financial difficulties, Katspan assigned its rights and obligations under the contract to American Safety, who provided the payment and performance bond on the project.

III. COURT OF APPEALS DECISION

On June 27, 2006, Division Two of the Court of Appeals reversed Judge Hicks' decision to grant summary judgment in favor of Olympia. *See Am. Safety Cas. Ins. Co. v. City of Olympia*, __ Wn. App. __, 137 P.3d 865 (2006). Olympia has included a copy of the Court of Appeals' published decision in the Appendix to this Petition.

IV. ISSUES PRESENTED FOR REVIEW

The sole issue in this case is whether Olympia's agreement to discuss settlement impliedly waives its right to enforce contractual requirements. The trial court granted Olympia's motion for summary judgment because American Safety failed to meet its burden of proof on the issue. The Court of Appeals reversed, holding that evidence of willingness to negotiate, coupled with express reservations of contractual defenses, raises issues of fact that require trial.

A. Should the Supreme Court accept review and reverse the Court of Appeals because this case is factually the same as *Mike M. Johnson* and because American Safety cannot show unequivocal acts by Olympia that demonstrate the intent to waive contract rights?

B. Should the Supreme Court accept review and reverse the Court of Appeals because its decision deters future owners from entering into settlement discussions?

V. STATEMENT OF THE CASE

A. **Katspan Failed to Meet Project Deadlines or Specifications.**

In 2000, Olympia awarded Katspan a contract to construct the downtown Olympia segment of the LOTT Southern Connection pipeline project. CP 61-62, 70-71. From the outset, Katspan's work was plagued with problems. On several occasions, Olympia had to direct Katspan to

correct deficient work. *Id.* In addition, Katspan failed to meet schedule requirements. CP 63, 76-77. Ultimately, Katspan assigned its rights and obligations under the contract to American Safety due to financial and management difficulties. CP 7.

B. Katspan and American Safety Failed to Comply with Specific Contract Provisions Precedent to Their Right to Recovery.

The contract between Olympia and Katspan was primarily comprised of the 2000 Washington State Department of Transportation Standard Specifications for Road, Bridge and Municipal Construction.¹ CP 61-62, 70-71. Among other things, the contract set out specific procedures for protesting the project engineer's decisions. *See* CP 46-47; Std. Spec. § 1-04.5. Failure to comply with protest procedures "completely waives any claims for protested work." *Id.* Further, the contract provided a mechanism to appeal protest decisions. *See* CP 53; Std. Spec. § 1-09.11. Again, failure to follow the requirements for administrative claims barred Katspan's (and American Safety's) right to recovery. CP 53-54; Std. Spec. §§ 1-09.11(2), 1-09.12(2). Finally, the contract included a limitations period of 180 calendar days from the date of final acceptance of the project. CP 55; Std. Spec. § 1-09.11(3).

American Safety has never disputed that both it and Katspan failed

to meet any of the contract requirements for additional compensation or to file a lawsuit. Instead, American Safety's entire case rests on its assertion that Olympia's conduct impliedly waived its right to enforce the contract.

C. Olympia Reserved its Rights and Repeatedly Insisted Upon Compliance with Protest and Claim Requirements.

Olympia repeatedly reserved its rights under the contract during the construction and during Olympia's efforts to resolve this dispute through negotiations. Olympia sent Katspan two letters during the project that contained express reservations of rights and that referred to the specific contract claims provisions. CP 326-27, 337-38. Olympia also sent two letters expressly confirming its reservation of rights after the project was complete, as the parties attempted to negotiate. CP 354, 370. In total, Olympia expressly reserved its rights in four separate letters.

D. The Trial Court Dismissed American Safety's Claims Because American Safety Failed to Comply with the Contract's Protest and Claim Provisions.

American Safety filed this lawsuit on August 17, 2004. This was more than two years after the contractual limitations period expired. CP 6. The trial court granted Olympia's summary judgment motion and dismissed American Safety's lawsuit because the undisputed evidence showed that neither Katspan nor American Safety followed the protest and

¹ Olympia cites to the WSDOT Standard Specifications using the abbreviation "Std.

claim provisions in the contract and that American Safety filed its lawsuit well after the limitations period. The trial court also found that American Safety presented insufficient evidence that Olympia's conduct amounted to unequivocal acts demonstrating intent to waive contracts requirements. *See* RP 24. The Court of Appeals reversed and held that Olympia's willingness to enter into settlement discussions, taken in conjunction with its reservations of rights, created an issue of fact regarding implied waiver.

VI. ARGUMENT

The Supreme Court should accept review on two separate grounds. First, the Court of Appeals contravened applicable precedent from this Court. *See* RAP 13.4(b)(1). Second, the Court of Appeals' decision discourages parties from settling their disputes outside of court for fear that such conduct would amount to implied waiver, an issue of substantial public interest calling for this Court's review. *See* RAP 13.4(b)(4).

A. The Court of Appeals' Decision Misapplies the Supreme Court's Decision in *Mike M. Johnson, Inc. v. Spokane County*.

In *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003), this Court did not require Spokane County to include an express reservation of rights in every single piece of correspondence with the contractor. That rule should apply with equal force in this case

Spec.," to the Record of Proceedings as "RP," and to the Clerk's Papers as "CP."

because the two cases present nearly identical circumstances. Yet the Court of Appeals draws fact distinctions from *Mike M. Johnson* that do not exist and misapplies that case's rules on implied waiver. These errors merit Supreme Court review and reversal.

1. This Case Involves the Same Factual and Legal Issues as *Mike M. Johnson*.

This case mirrors *Mike M. Johnson* in every relevant way. As in this case, the contractor in *Mike M. Johnson* sued Spokane County for cost overruns on public construction work. 150 Wn.2d at 378. Spokane County moved for summary judgment based on the same contractual protest and claim procedures at issue in this case, which the contractor failed to follow.² *Id.* at 384. The contractor responded that Spokane County impliedly waived its right to enforce those provisions by entering into settlement negotiations. *Id.* at 384. The trial court granted summary judgment in Spokane County's favor. *Id.* at 384-85. The Court of Appeals reversed and held that Spokane County's participation in settlement negotiations raised questions of fact that required trial. *See Mike M. Johnson, Inc. v. Spokane County*, 112 Wn. App. 462, 471-72, 49 P.3d 916 (2002). The Supreme Court then correctly reversed and held that

² The Mike M. Johnson-Spokane County contract included an earlier version of the very same WSDOT Standard Specifications at issue in this case. *See Mike M. Johnson*, 150 Wn.2d at 381. The relevant sections of that contract are identical to the sections at issue in this case.

there was no question of material fact regarding waiver. *Mike M. Johnson*, 150 Wn.2d at 392.

The Court of Appeals attempts to distinguish this case from the *Mike M. Johnson* case based on the number and substance of communications between the public owner and the contractor in each case. Specifically, the Court of Appeals states that Spokane County “continually asserted it did not intend a ‘waiver of any claim or defense,’” while Olympia “referred to strict compliance with the contract terms in only three instances.” Opinion at 10. This claimed distinction is illusory. In fact, the number and substance of the letters sent by Spokane County and Olympia correspond almost exactly, as summarized in the following table:

	<i>Mike M. Johnson</i> 150 Wn.2d 375	<i>American Safety /</i> <i>Katspan</i>
<u>Letters reserving rights:</u> During construction	2 (<i>Id.</i> at 381)	2 (CP 326-27; 337-38)
<u>Letters reserving rights:</u> After presentation of claim	1 (<i>Id.</i> at 382)	1 (CP 354)
<u>Letters reserving rights:</u> During negotiations	2 (<i>Id.</i> at 383)	1 (CP 370)
Existence of letters that <u>did not</u> expressly reserve rights	Yes (112 Wn. App. at 470-71)	Yes (undisputed)

a. Both Spokane County and Olympia Reserved Their Rights During Construction.

Spokane County and Olympia sent the same number and substance of letters during construction of their respective projects, before presentation of the contractor's claims. Spokane County sent two letters informing the contractor that claims should be submitted according to the Standard Specifications. First, Spokane County sent a letter on July 16, 1998, advising the contractor that "if you believe that you have a claim for additional compensation within this contract please submit this claim per section 1-09.11(2) of the standard specifications (a copy of this section is enclosed) and it will be evaluated." *Mike M. Johnson*, 150 Wn.2d at 381. After a response from the contractor, asserting it was compiling a claim, Spokane County replied, stating it had not received a claim as required under the Standard Specifications:

To the extent that [MMJ] may consider that letter any sort of formal notification of a claim pursuant to the contract ... the letter is rejected because it is too general and nonspecific regarding any relief or remedy which may have been requested. In this regard, you are referred to the applicable contract specifications. All requests for additional time to complete the contract, additional compensation or change order must be submitted within the time permitted and in the form specified in the contract documents.

Id. at 381-82.

Olympia also sent two letters to its contractor during construction

that mirror the substance of the letters sent by Spokane County. First, Olympia sent a letter on April 2, 2001, advising the contractor of the required protest procedures in the Standard Specifications:

Contemporaneously, LOTT reserves its right to demand strict compliance with all other terms of the contract documents, including but not limited to §1-04.5 of the Standard Specifications, which describes the required procedure for protest by the Contractor.

CP 338. Katspan responded, stating it was preparing a claim under the Standard Specifications. CP 342. Like Spokane County, Olympia replied, stating it had not received a properly prepared claim:

Despite Katspan's assertion that it has made specific and formal reservations of rights, LOTT has not received any such notification and does not believe that Katspan has met the requirements for protest of §1-04.5 of the Standard Specifications... Thus, pursuant to §1-09.11, Katspan has waived any claims for which it did not comply with the requirements of §1-04.5.

CP 327.

b. Both Spokane County and Olympia Reserved Their Rights at the Outset of Claim Negotiations.

When the contractor in each case proposed negotiation, Spokane County and Olympia each sent one letter stating their respective willingness to negotiate. Both letters stated in general terms that the owner was not waiving its defenses. In *Mike M. Johnson*, Spokane County sent its letter "in an effort to facilitate a means of timely

completion of the project and settlement of the parties' claims," and stated it did not "intend [a] waiver of any claim or defense which the county might currently have against [MMJ]." *Mike M. Johnson*, 150 Wn.2d at 382-83. In Olympia's case, though Katspan did not propose negotiation until after the construction was complete, Olympia sent a similar letter reserving its defenses at the outset of negotiations: "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.

c. Both Spokane County and Olympia Reserved Their Rights During Negotiations.

When the parties began actual settlement discussions, Spokane County sent two letters to its contractor, on December 23, 1998 and January 27, 1999, stating its position that the contractor's claims were not submitted according to the contract. *Mike M. Johnson*, 150 Wn.2d at 382-83. Similarly, Olympia sent a letter on May 24, 2004, outlining its position that the contractor's claims were not submitted according to the contract. CP 370.

d. Both Spokane County and Olympia Sent Letters that did not Reserve Their Rights.

In addition to Spokane County's five letters and Olympia's four letters expressly reserving their respective rights and relying on the contract claims provisions, both public owners sent letters that made no

reservation of rights or mention of the contract claim procedures. Spokane County sent several such letters, as is evident from the overturned Court of Appeals' decision:

The record reveals that a letter writing flurry occurred between the parties throughout the contract period and beyond. In early August 1998, around the time the finishing touches were being added to the road redesign, the County sent Johnson written notice that it would not consider any protest or claim that did not follow the formal contractual notice procedures. However, after that initial letter, correspondence continued between Johnson and the County, as well as between legal counsel for both parties, with no mention made that the discussions of the claims were no longer timely.

Mike M. Johnson, 112 Wn. App. at 470-71. Similarly, Olympia sent letters requesting additional information from American Safety that did not expressly reserve its contractual defenses.

e. The Similar Number and Nature of the Parties' Reservations of Rights Demand the Same Result.

Despite the virtually identical circumstances in this case and *Mike M. Johnson*, the Court of Appeals characterizes Spokane County (in *Mike M. Johnson*) as having "repeatedly" asserted its rights under the contract and as having "continually" asserted that it did not intend a waiver of its defenses. Spokane County sent a total of five such letters. These letters mirror the four letters sent by Olympia during construction and during settlement discussions. In short, the only difference between Olympia's

conduct in this case and Spokane County's conduct in *Mike M. Johnson* is that Spokane County sent one additional letter during negotiations. This difference should not lead to a different legal result. The Court should accept review to reaffirm the rule from *Mike M. Johnson*.

2. The Court of Appeals Misapplied the Law on Implied Waiver.

The Court of Appeals' reversal also contravenes this Court's pronouncement of the law on implied waiver in *Mike M. Johnson* and in prior Court of Appeals decisions: An implied waiver requires "unequivocal acts of conduct evidencing an intent to waive." 150 Wn.2d at 386 (citing *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995)). The Court of Appeals' decision is wrong on two fronts. First, the decision misallocates the burden of proof with respect to the issue of waiver in this case. Second, the decision recasts the applicable standard to permit a fact finder to find an implied waiver based upon a party's equivocal acts. The Court of Appeals' decision conflicts with directly applicable Supreme Court precedent and merits review and reversal. RAP 13.4(b)(1).

a. American Safety Bears the Burden of Producing Evidence of Waiver.

The Court of Appeals overlooks that American Safety bears the burden of proof with respect to the issue of waiver. On summary

judgment, “the moving party bears the initial burden of showing the absence of an issue of material fact.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is the defendant and the party meets its initial burden, “then the inquiry shifts to the party with the burden of proof at trial, the plaintiff.” *Id.* at 225. If the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the defendant’s motion for summary judgment. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Olympia bore the initial burden of proof with respect to its summary judgment motion. Olympia moved for summary judgment on the grounds that American Safety failed to comply with mandatory protest and claim procedures and because American Safety did not file its lawsuit within the applicable limitations period. CP 19-59. Because American Safety never disputed the facts material to Olympia’s motion, Olympia met its burden. American Safety then bore the burden to “make a showing sufficient to establish the existence of an element essential to [American Safety’s] case.” *Young*, 112 Wn.2d at 225.

American Safety’s case relies on its contention that Olympia impliedly waived its right to enforce the contract. Under *Mike M.*

Johnson, American Safety did not and cannot meet its burden to produce evidence sufficient to demonstrate the existence of an implied waiver because the record contains undisputed documentary evidence that Olympia expressly reserved its rights under the contract. CP 326-27, 337-38, 354, 370. “[W]hen reasonable minds could reach but one conclusion from the evidence presented, questions of fact may be determined as a matter of law, and summary judgment is appropriate.” *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989). This Court correctly affirmed summary judgment in *Mike M. Johnson* based on these standards. The Court of Appeals’ failure to do so in this case contravenes Supreme Court precedent.

b. Equivocal Acts of Conduct are Insufficient to Establish an Issue of Fact for Implied Waiver.

In addition, the Court of Appeals decision blurs the line between unequivocal acts and equivocal acts. In *Mike M. Johnson*, this Court held that implied waiver requires unequivocal acts of conduct evidencing intent to waive contractual rights. 150 Wn.2d at 386. This rule is not new. *See, e.g., Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980) (“Further, to constitute waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive.”)(citing *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958)); *White*

Pass Co. v. St. John, 71 Wn.2d 156, 163, 427 P.2d 398 (1967) (“[Waiver] will not be implied from doubtful factors.”); *Cent. Wash. Bank*, 113 Wn.2d at 354. As this Court has explained: “It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action must be inconsistent with any other intent than to waive it.” *Wagner*, 95 Wn.2d at 102.

At most, a rational fact finder could decide that Olympia was equivocal in its reservation of rights. While Olympia expressed a willingness to negotiate, American Safety cannot meet its burden by simply ignoring the multitude of letters in which Olympia expressly reserved its right to enforce the contract’s requirements. The Court of Appeals’ own opinion states that this set of facts demonstrates “the equivocal nature of [Olympia’s] conduct towards American Safety.” Opinion at 13 (emphasis added). A showing of equivocal conduct is insufficient under the law. *See Mike M. Johnson*, 150 Wn.2d at 391-92. The Court of Appeals’ decision to the contrary is error. The Supreme Court should accept review and reverse. RAP 13.4(b)(1).

B. The Court of Appeals’ Decision will Dissuade Future Owners from Entering into Settlement Negotiations.

This Court should also accept review because the Court of Appeals’ decision implicates an issue of substantial public importance

calling for this Court's oversight. RAP 13.4(b)(4). In *Mike M. Johnson*, this Court announced a clear rule of law that assured owners that they would not waive expressly reserved contract rights by participating in settlement negotiations. The Court of Appeals' decision undermines those important policy objectives. If the decision is allowed to stand, future owners that agree to participate in informal settlement discussions would thereby risk waiving their contractual rights even if they repeatedly issue express reservations of their rights.

The policy at issue here is similar to the policy behind Washington's Evidence Rule 408, which protects offers of settlement and compromise from being used against the offering party. Washington's courts are burdened with increasing caseloads. Thus, parties' efforts "to adjust their differences are recognized by courts as praiseworthy endeavors to avoid litigation, and that admissions or failure to controvert matters in dispute cannot later be used against a party." *Berliner v. Greenberg*, 37 Wn.2d 308, 318, 223 P.2d 598 (1950). Indeed, this Court has previously applied the policy of supporting private settlement efforts to the very situation present here:

Adopting MMJ's view 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.

Mike M. Johnson, 150 Wn.2d at 392; see also *Dunlap v. West Const. Co.*, 23 Wn.2d 827, 830, 162 P.2d 448 (1945) (holding that willingness to negotiate settlement does not waive contractual notice requirements).

The Court of Appeals attempts to distinguish *Mike M. Johnson* on this point in two ways. Both fall short of the mark. First, the Court of Appeals notes that the parties in *Mike M. Johnson* were negotiating more than one issue. Opinion at 11. This distinction has no bearing on the policy implications at issue. Whether parties have one issue or several issues, the Court of Appeals' decision dissuades negotiation altogether because it identifies willingness to negotiate as an implied waiver. Second, the Court of Appeals contends that Spokane County would have hurt both parties if it terminated negotiations in *Mike M. Johnson*, whereas termination in this case would have supposedly harmed American Safety alone. Opinion at 12. This contention ignores the risks and costs associated with litigation for both parties.³ It also contravenes the important principle of judicial economy. The Court should reaffirm its prior decision in *Mike M. Johnson*. It should encourage parties to negotiate rather than litigate.

³ Olympia's willingness to negotiate was especially reasonable given the status of the law at the time. The history of this case tracked developments in the *Mike M. Johnson* case. The majority of the discussions between Olympia and American Safety occurred after the May 23, 2002 Division Three decision. Not surprisingly, Olympia's position stiffened

VII. CONCLUSION

The Court should accept review for two reasons. First, the Court of Appeals drew a nonexistent factual distinction between this case and *Mike M. Johnson* and misapplied the law on implied waiver. Second, the Court of Appeals' reversal discourages future owners from negotiating out of fear that such conduct could impliedly waive their contractual rights. Efforts to settle disputes privately should be praised – not penalized. The Court of Appeals' decision is error and should be reversed.

DATED this 27th day of July, 2006.

Respectfully submitted,

PRESTON GATES & ELLIS LLP

By 

Thomas H. Wolfendale, WSBA # 03776

Athan E. Tramountanas, WSBA #29248

Amit D. Ranade, WSBA #34878

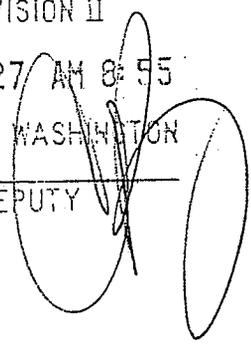
Attorneys for Petitioner
City of Olympia

after this Court issued its decision in the case.

APPENDIX

Received
JUN 28 2006
Preston Gates Ellis LLP

FILED
COURT OF APPEALS
DIVISION II
06 JUN 27 AM 8:55
STATE OF WASHINGTON
BY _____
DEPUTY



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

AMERICAN SAFETY CASUALTY
INSURANCE COMPANY, a foreign
corporation,

Appellant,

v.

CITY OF OLYMPIA,

Respondent.

No. 33446-1-II

PUBLISHED OPINION

VAN DEREN, A.C.J. — American Safety Casualty Insurance Company (American Safety) appeals the trial court's ruling granting summary judgment in favor of the City of Olympia. American Safety acted as a surety for Katspan Inc. on a contract between the City and Katspan. It argues that the trial court erred because material issues of fact exist about (1) whether the City waived the contract's lawsuit and protest time limits; and (2) whether the City prevented American Safety from complying with the contract's claim information requirements. Further, American Safety argues that the trial court erred when it awarded the City attorney fees. Finding that material issues of fact remain to be resolved, we reverse and remand for trial.

FACTS

I. BACKGROUND

A. The Construction Project

In July 2000, Katspan, a general contractor, entered into a contract with the City of Olympia for Katspan to complete a public works construction project called the LOTT Southern Connection Pipeline. LOTT Wastewater Management Partnership, now known as the LOTT Alliance, managed the project.

American Safety issued a payment and performance bond for Katspan with the City as the obligee. Katspan entered into a general agreement of indemnity with American Safety in which Katspan assigned all its rights to receive payment from the City on the LOTT project to American Safety.

The LOTT project is a system of sewer lines that route wastewater from Tumwater to the LOTT Wastewater Treatment Plant, located in downtown Olympia. The project was built in several segments and Katspan contracted to construct the Downtown Olympia segment. The City agreed to pay Katspan in increments totaling about \$1.8 million. The contract contained specific protest provisions and procedures.

Katspan agreed to have two crews working on the project at all times. The contract segmented Katspan's work into city blocks and provided that Katspan had 17 calendar days to complete work on any given block and 90 days to complete the entire project. Katspan planned to begin work on September 5, 2000, and the project's scheduled completion date was December 4, 2000.

Katspan did not meet all of its contractual obligations, including the contract schedule.

B. Contract Provisions

Section 1-04.5 of the contract between the City and Katspan set out the required protest procedure. If Katspan wished to file a protest against the City, the contract required Katspan to immediately provide written notice of its protest. Thereafter, Katspan had 15 days to supplement the protest with a written statement that included the date of the protested order, the nature and circumstances that caused the protest, the contract provisions that supported the protest, the estimated cost of the protested work, and an analysis of the progress schedule.

The contract also required Katspan, if the protest was continuing, to provide the project engineer with a written statement of the actual adjustment it requested. And it required Katspan to keep records of extra costs and time incurred and to allow the project engineer access to those records.

Section 1-09.11(1) stated that if negotiations under Section 1-04.5 failed to provide a satisfactory result, Katspan "shall pursue the more formalized method outlined in Section 1-09.11(2) for submitting a claim." Clerk's Papers (CP) at 53. Section 1-09.11(2) required Katspan to submit a claim containing detailed and specific information. Section 1-09.11(3) limited the time in which Katspan could bring a claim or cause of action against the City to 180 days after the date of final acceptance of the project. Failure to bring a claim within the required time barred any claims or causes of action.

C. Pre-Completion Correspondence

On January 5, 2001, LOTT sent Katspan a letter granting a 20-day extension for the overall contract deadline. Katspan responded that it did not agree with the extension time and it

referred to an earlier letter it had sent regarding additional costs it had incurred on the project. Neither letter Katspan sent complied with the contract's protest requirements.

On February 26, 2001, Katspan sent another letter to LOTT. This one sought to preserve its right to request additional time and money and stated that Katspan would prepare additional documentation to support its request and that it would contact LOTT to discuss the request. Katspan did not provide the documentation nor arrange a meeting.

In April 2001, the City sent Katspan a letter informing Katspan that LOTT considered Katspan to have breached the contract because of Katspan's failure to meet the contractual deadlines. The City acknowledged that LOTT was willing to grant an extension, but it demanded that Katspan complete its work on the project. The letter also notified Katspan that LOTT reserved "its right to withhold liquidated damages from future pay applications and to pursue liquidated damages accrued by Katspan." CP at 338.

Katspan disputed that it had breached the contract. It acknowledged that it had not completed the project in the contract's required timeframe, but it stated that the delays were a result of changes to the work in the original bid. It further disputed LOTT's reservation of a right to pursue liquidated damages.

When the project was almost completed, LOTT began to prepare to close it out and accept it as complete. As part of the close out procedure, project engineer Parametrix, Inc. sent Katspan two letters asking for the information that Katspan had promised in its February 26 letter. Katspan responded that the information would be coming shortly, but Katspan never sent it. Parametrix then sent Katspan a letter requesting that Katspan execute a change order for all additional work, which Katspan did not do.

Before Katspan completed the project, the company became insolvent and Katspan assigned all of its rights under the contract to American Safety.

In July 2001, LOTT initiated a unilateral close out of the project. On September 10, 2001,¹ LOTT accepted the project as finally complete.

4. Post-Completion Communications

In November 2001, American Safety sought an equitable adjustment for \$767,995.02 from the City for Katspan's delays, which caused extra costs to Katspan. The request did not follow the specific requirements for a formal administrative claim under the contract.

By March 2002, American Safety had not received a response from the City, so its attorney contacted the City's attorney. Thereafter, the City notified American Safety that it needed additional information and documentation in order to make the requested equitable adjustment. American Safety communicated to the City that it was having difficulty obtaining the requested documents from Katspan and asked if the City would be willing to enter into negotiations without the information. The City responded that it would proceed but that it would not negotiate a claim that had inadequate "backup information." CP at 331.

In May 2002, American Safety sent the City two three-ring binders containing information pertaining to the adjustment request. In August 2002, the City responded that it needed additional information regarding the basis of the costs for which American Safety was claiming reimbursement. In November 2002, the City again requested additional information from American Safety. Finally, in January 2003, American Safety notified the City that it had

¹ The contract's 180-day lawsuit limitation period began on the day the project was accepted as complete. Thus, Katspan had until March 9, 2002, to file a lawsuit under the contract.

received four or five boxes of documents from Katspan and that the boxes were available for review. The City reviewed the documents and on April 23, 2003, it notified American Safety that the documents did not contain all of the requested/required information. It stated that American Safety had until May 16, 2003, to produce the information and if it failed to do so, LOTT would deny American Safety's claim. American Safety failed to meet the deadline.

On July 31, 2003, American Safety, through its consultant, contacted the City to discuss the outstanding information the City was demanding. The City's forensic accountant, Paul Pederson, responded on August 4, 2003, and stated that he had "been given the green light to discuss the LOTT matter." CP at 414. In August 2003, the consultants exchanged emails about the information and how American Safety should format it.

On May 21, 2004, American Safety contacted the City to notify it that the information was available. The City responded, denying American Safety/Katspan's claim and stating that it was no longer willing to consider the matter. It further stated that American Safety/Katspan could no longer file a lawsuit on the matter because a suit was now untimely under the contract.

II. PROCEDURAL FACTS

In August 2004, American Safety sued the City. The City counterclaimed alleging that Katspan breached its contract with the City when it failed to timely complete the work on the LOTT project. The City alleged that it was entitled to liquidated damages.²

The City moved for summary judgment, arguing that the contract's suit limitation period precluded American Safety from bringing its claim. The court granted the motion and, in its oral decision, stated that the City did not waive any of its rights under the contract, that "there's got to

² Subsequently, the City voluntarily moved the trial court to dismiss its counterclaim.

be an unequivocal, clear waiver,” and American Safety did not meet its burden in proving such unequivocal acts. Report of Proceedings a 24.

Subsequently, the City moved for an award of attorney fees, which the court also granted. American Safety appeals.

ANALYSIS

I. STANDARD OF REVIEW

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Grundy*, 155 Wn.2d at 6. The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

II. ISSUES OF FACT

American Safety argues that the trial court erred in granting summary judgment because material issues of fact existed about whether the City (1) waived the 180-day lawsuit limitation period; (2) waived the contract’s time requirement for submitting a request; and (3) behaved in a manner that prevented American Safety from complying with the contract’s claim information requirements.

A. Waiver

Generally, procedural contract requirements must be enforced unless the benefiting party waives them or the parties agree to modify the contract. *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003).

A party that benefits from a contract's provision may waive that provision. *Mike M. Johnson*, 150 Wn.2d at 391. That waiver may be implied by the party's conduct, but waiver by conduct "requires unequivocal acts of conduct evidencing an intent to waive." *Mike M. Johnson*, 150 Wn.2d at 391 (quoting *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995)). Whether a party has implicitly waived a contractual provision is a mixed question of fact and law. *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971).

Occasionally [waiver] is proved by the express declaration of the party, or by his undisputed acts or language so inconsistent with his purpose to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary. Then the waiver is established as a matter of law.

Reynolds, 4 Wn. App. at 700 (quoting *Alsens Am. Portland Cement Works v. Degnon Contracting Co.*, 222 N.Y. 34, 37, 118 N.E. 210 (1917)).

But waiver becomes a question of fact for the jury when the party seeks to prove it by using various forms of evidence such as declarations, acts, and non-feasance. *Reynolds*, 4 Wn. App. at 700-01 (quoting *Alsens*, 222 N.Y. at 37). And that kind of evidence creates different inferences that do not "directly, unmistakably or unequivocally establish [waiver]." *Reynolds*, 4 Wn. App. at 700 (quoting *Alsens*, 222 N.Y. at 37). In short, "[w]hen facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact exists and another that it does not exist, there is a question of fact." *Reynolds*, 4

Wn. App. at 701 (quoting *Alsens*, 222 N.Y. at 37). The burden of proof rests with the party claiming waiver. *Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998).

B. Lawsuit Limitation Period

American Safety points to several letters the City sent after the 180-day period had ended, which it argues created a genuine issue of fact about whether the City waived the limitation period. Specifically, it points to the City's letters and emails sent on March 25, 2002, August 1, 2002, October 2, 2002, November 12, 2002, and April 23, 2003. American Safety argues that none of those letters mentioned the limitation period and, in fact, indicated that the City was still willing to consider the claim well past the 180-day period.

The City primarily relies on our Supreme Court's decision in *Mike M. Johnson*, 150 Wn.2d at 378. It argues that here, as in *Mike M. Johnson*, the trial court did not err in refusing to find that a material issue of fact existed because reasonable minds could not differ on whether the City intended to waive the contract terms. 150 Wn.2d at 377-78.

But the facts in *Mike M. Johnson* differ from those here. There, Spokane County hired Mike M. Johnson, Inc. (MMJ) to construct two sewer projects. *Mike M. Johnson*, 150 Wn.2d at 378. The contract allowed the County to change the projects through a change order so long as the work remained in the general scope of the contract. *Mike M. Johnson*, 150 Wn.2d at 378. The County entered a change order and during the course of the work on the change order, MMJ had to stop work because it encountered a buried telephone line. *Mike M. Johnson*, 150 Wn.2d at 378-89. The delay caused MMJ to incur additional costs and it sought compensation from the County, but it failed to follow the contract's prescribed notice, protest, and claim procedures. *Mike M. Johnson*, 150 Wn.2d at 380-81. Instead, MMJ sent the County a letter discussing its

multiple concerns. The County responded by requesting that MMJ follow the specific contractual procedures. *Mike M. Johnson*, 150 Wn.2d at 380, 385. Despite MMJ's failure to follow those procedures, the parties exchanged several more letters in which the County repeatedly referred to the contract's provisions and repeatedly asserted its rights under the contract. *Mike M. Johnson*, 150 Wn.2d at 380-83.

Our Supreme Court found that the benefiting party, the County, had not waived its right to enforce the notice provisions of its contract with MMJ because it continuously asserted that it did not intend a "waiver of any claim or defense." *Mike M. Johnson*, 150 Wn.2d at 392. The Court further declined to find waiver in the County's continued negotiations with MMJ because such a finding would "have the [C]ounty unrealistically halt all discussions for fear of evidencing its intent to waive mandatory claim provisions under the contract." *Mike M. Johnson*, 150 Wn.2d at 392.

In contrast, here, the City referred to strict compliance with the contract terms in only three instances. Two of those letters were before final completion and acceptance of the job and well before any limitation period began to run. For example, in its April 2, 2001 letter the City/LOTT notified Katspan that the City considered Katspan to be in breach of contract. The City stated that it reserved its right to withhold liquidated damages and that it "reserves its right to demand strict compliance with all other terms of the contract." CP at 338.

And in its April 18, 2001 letter the City stated:

Despite Katspan's assertion that it has made specific and formal reservation of its rights, LOTT has not received any such notification and does not believe that Katspan has met the requirements for protest of §1-04.5 of the Standard Specifications. . . . Thus, pursuant to §1-09.11, Katspan has waived any claims for which it did not comply with the requirements of §1-04.5.

CP at 327.

Finally, in the only letter that the City sent after the 180-day limitation period, it responded to American Safety's request for "possible quick solutions." CP at 329. It stated: "*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 at 354 (emphasis added). Thereafter, for a period of a year and a half, the City continuously asked American Safety to provide more information; it referred to possible subsequent litigation; and it set a new date for final production of documentation of American Safety's claims. See CP at 358 (April 23, 2003 letter stating the need for certain documentation necessary "if the matter is litigated," and setting May 16, 2003 as date for delivery of documentation); see also CP at 414 (August 4, 2003 email indicating the City's consultant has "been given the green light to discuss the LOTT matter" with American Safety's consultant).

Further, unlike in *Mike M. Johnson*, here, only one issue remained:³ whether American Safety was entitled to an equitable adjustment and, correspondingly, whether the City was entitled to liquidated damages for Katspan's breach of the contract. All negotiations and communications between American Safety and the City focused on American Safety's production of documentation related to this issue. The City did not continuously express its intent to abide by the contractual provisions.

If the City had no intention of allowing future litigation on American Safety's claims, it could have informed American Safety that it was relying on strict conformance with the contract

³ In *Mike M. Johnson Inc. v. Spokane County*, MMJ and the County negotiated and litigated other issues unrelated to the dispute over the change order. 150 Wn.2d 375, 384, 392, 78 P.3d 161 (2003).

terms. The City could also have halted all communication with American Safety after March 9, 2002. In *Mike M. Johnson*, our Supreme Court found that if Spokane County had terminated communication with MMJ, such a result would have detrimentally impacted both parties. 150 Wn.2d at 392. Here, if the City had terminated negotiations, it would have only detrimentally affected American Safety. And in doing so, it would have saved both parties the time, effort, and costs of continuing the search for and production of documents and information related to American Safety's claims.

The City's continued requests for information, its reference to future litigation, and its new deadline for production well beyond the contract limitations period create different inferences such that reasonable minds could differ about whether the City waived the contract terms. This raises a material question of fact about whether the City's intent was to rely on the contract terms to eliminate American Safety's ability to pursue its claim. Thus, it is a question of fact for the jury to decide and summary judgment was improper.

C. Protest and Claim Requirements

American Safety also argues that the City implicitly waived the contract's protest and claim requirements. It points to two different acts that it argues create an issue of fact about whether the City waived the protest procedure. First, it cites to the City's April 23, 2003 letter, acknowledging the City's receipt of information and setting a new deadline for the City's receipt of the required additional information. Further, American Safety cites the email interaction that took place in July and August 2003, between the City and American Safety in which the City's consultant indicated that he would discuss the matter.

The City counters that its willingness to work with American Safety did not extend the contract's time requirement and that, although Pederson agreed to discuss the matter, he did not waive the City's contract defenses. And it argues that as an independent claims consultant, Pederson could not bind the City.⁴

We have discussed the equivocal nature of the City's conduct toward American Safety in the preceding section and do not repeat it here. It remains an issue of fact to be decided by the fact finder to determine whether the totality of the circumstances resulted in an implicit waiver of the contract provisions for timeliness of claims and suit.

But the City is correct that, as an independent forensic accountant, Pederson could not waive the City's contract rights. Before a principal can be liable for the acts of his agent, the agency relationship must first be established. *Stansfield v. Douglas County*, 107 Wn. App. 1, 17, 27 P.3d 205 (2001) (quoting *Matsumura v. Eilert*, 74 Wn.2d 362, 363, 444 P.2d 806 (1968)). An agency relationship may exist, either expressly or implicitly, when one party acts at the instance of and, in some material degree, under the direction and control of the other. *Stansfield*, 107 Wn. App. at 17 (quoting *Matsumura*, 74 Wn.2d at 368)). Both the principal and the agent must consent to the relationship and the burden of proof rests with the party trying to assert agency. *Stansfield*, 107 Wn. App. at 17 (citations omitted).

Here, American Safety argues that the issue is not whether Pederson had authority to waive the contract's provision but, whether, Pederson had the authority to discuss the case. It argues that the City actually waived the provisions and that Pederson's e-mail communication

⁴ The City argues that Pederson was not its agent because both he and the City would have had to agree to an agency relationship, and they did not.

indicated that he had knowledge of the City's waiver. We agree with American Safety that Pederson's engagement with American Safety is part of the totality of the circumstances that a trier of fact must consider in deciding whether the City implicitly waived strict enforcement of the contract between it and Katspan.

We hold that genuine issues of material fact exist and that the trial court erred when it granted summary judgment in favor of the City.

III. THE CITY'S ACTIONS

American Safety argues that the City's actions prevented American Safety from complying with the contract's informational requirements and, therefore, the City waived those requirements. Specifically, American Safety points to the City's final refusal to consider the claim.

American Safety cites to Division Three's holding in *Weber Const. Inc., v. Spokane County*, to support its argument. 124 Wn. App. 29, 98 P.3d 60 (2004), *review denied*, 154 Wn.2d 1006 (2005). There, Weber entered into a contract with the County to build a road. When it began excavating, Weber came across several boulders that were unsuitable for fill or embankments. *Weber*, 124 Wn. App. at 31. Weber had to obtain fill from another site, which caused delay and increased cost to Weber. *Weber*, 124 Wn. App. at 31. The County entered a change order permitting Weber to haul extra material, but Weber protested the change order because the County did not provide instructions on how Weber was to dispose of the boulders. *Weber*, 124 Wn. App. at 34. Weber followed the contract's required protest procedures, but it did not include one piece of required information, the cost estimate. *Weber*, 124 Wn. App. at 34.

Weber could not provide the estimate without the County designating a dumpsite for the boulders, and the County did not provide the needed information. *Weber*, 124 Wn. App. at 34.

Division Three held that Weber presented substantial evidence that it strictly complied with the contract's protest and claim procedures but that, even if it had not, the County's failure to provide the required information waived strict compliance. *Weber*, 124 Wn. App. at 35. Thus, judgment as a matter of law was erroneous, and Division Three remanded to the fact finder to determine the case on its merits. *Weber*, 124 Wn. App. at 35-36.

In contrast here, the City did not hold the requested information. Rather, Katspan, the defunct company, had the required information and documents, and Katspan failed to provide it to American Safety. The evidence shows that American Safety did not strictly comply with the contract's notice and protest procedures and that it took more than three years between Katspan's initial January 2001 letter indicating its disagreement with the time extension and the additional costs it had incurred and American Safety's final May 2004 notice that it had all the information the City required. During that time, unlike the County's actions in *Weber*, the City did not prevent American Safety from obtaining the required information from Katspan.

Thus, we hold that the City's actions did not prevent Katspan/American Safety from complying with the notice and protest procedure.

IV. ATTORNEY FEES

American Safety argues that the trial court erred in granting the City attorney fees because RCW 39.04.240 and RCW 4.84.250 allow attorney fees for the prevailing party and if we overturn the summary judgment ruling, then the City is no longer the prevailing party.

RCW 39.04.240 governs the award of attorney fees in public works contracts. It states that the provisions of RCW 4.84.250 through 4.84.280 apply to actions arising out of a public works contract. RCW 39.04.240(1). RCW 4.84.250 allows attorney fees to the prevailing party.

Because we reverse the summary judgment in favor of the City, it is not yet the prevailing party, and we reverse the trial court's attorney fees award in favor of the City.

V. ATTORNEY FEES ON APPEAL

The City argues that it is entitled to attorney fees on appeal.

Under RAP 18.1 we may grant attorney fees and expenses where an applicable statute grants a party that right. RCW 39.04.240(1) and RCW 4.84.250 allow the court to grant attorney fees and costs to the prevailing party. Because the City is not the prevailing party on appeal, we do not grant it attorney fees.

We reverse and remand for trial.

Van Deren, A.C.J.
Van Deren, A.C.J.

We concur:

Armstrong, J.
Armstrong, J.
Hunt, J.
Hunt, J.