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STATE OF WASHINGTON

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

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AMERICAN SAFETY CASUALTY INSURANCE  
COMPANY, a foreign corporation,

Respondent,

v.

CITY OF OLYMPIA, a Washington municipal corporation

Petitioner.

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RESPONDENT'S  
SUPPLEMENTAL BRIEF

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ORIGINAL

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## I. INTRODUCTION

The issue presented by this case is whether petitioner, City of Olympia (“the City”), waived its right to insist upon compliance with deadlines contained in a construction contract between the City and Katspan, Inc. Respondent, American Safety Insurance Company (“American Safety”) was Katspan’s surety and has been assigned Katspan’s rights under the contract.

The City asserts the Court of Appeals erred in two respects. First, the City argues that this case is controlled by *Mike M. Johnson, Inc. v. County of Spokane*,<sup>1</sup> in which this Court concluded that, as a matter of law, the county did not waive compliance with contractual claim requirements. In fact, as the Court of Appeals explained, this case is factually distinguishable from *Mike M. Johnson*, and the Court’s ruling in that case does not apply to the circumstances of this case.

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

Second, the City contends the Court of Appeals misapplied Washington case law regarding implied waiver. Contrary to the City's assertion, the court specifically recognized that, under Washington law, (1) the party asserting waiver bears the burden of proof on this issue, and (2) waiver must be established by unequivocal acts evidencing an intent to waive. The court then applied these principles to the present case to conclude that reasonable minds could differ regarding whether the City impliedly waived its right to require compliance with contractual claims procedures. The Court of Appeals correctly determined that summary judgment was improper, and its decision should be upheld.

## **II. ISSUES PRESENTED FOR REVIEW**

1. In *Mike M. Johnson*, this Court ruled that, as a matter of law, Spokane County did not waive its rights to enforce claims procedure requirements in a construction contract. The county consistently refused to waive those rights while it continued to negotiate other issues relating to an ongoing construction project. Here, the City

continued to negotiate American Safety's one and only claim after contract deadlines had passed and the project was completed. Does this Court's decision in *Mike M. Johnson* require that summary judgment be granted in favor of the City on the waiver issue?

2. The Court of Appeals specifically recognized that, under Washington law, (1) the party asserting waiver bears the burden of proof on this issue, and (2) waiver requires unequivocal conduct evidencing an intent to waive. Does the court's decision conflict with existing Washington case law on these issues?

### **III. STATEMENT OF THE CASE**

This matter arises from a contract between Katspan and the City for the construction of the Downtown Olympia Segment of the LOTT Southern Connection Pipeline project. (CP 61, 70-71) LOTT managed Katspan's performance under the Contract. (*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 experienced in 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, American Safety submitted a Request for Equitable Adjustment under the Contract, seeking an additional \$767,995.02 for the work 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 counsel<sup>2</sup> a list of questions

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<sup>2</sup> American Safety's present counsel on appeal did not previously represent American Safety.

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)

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 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 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.<sup>3</sup> The court also reversed the award of attorney fees to the City.<sup>4</sup>

#### IV. ARGUMENT

A. The Court of Appeals decision in this case does not conflict with *Mike M. Johnson*.

In *Mike M. Johnson*, this Court ruled that Spokane County did not waive compliance with contractual claim procedure requirements by negotiating with a construction contractor.<sup>5</sup> As the Court of Appeals in this case correctly recognized, *Mike M. Johnson* is distinguishable from the case at bar and does not mandate summary judgment in the City's favor.

In *Mike M. Johnson*, Spokane County entered into a contract with Mike M. Johnson, Inc., ("MMJ") for the construction of two sewer projects. Delays ensued after MMJ encountered buried telephone lines at one of the sites. Thereafter, MMJ wrote to the county setting forth several

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<sup>3</sup> *Am. Safety Cas. Ins. Co. v. City of Olympia*, 133 Wn. App. 649, 660-61, 137 P.3d 865 (2006).

<sup>4</sup> *Am. Safety*, 133 Wn. App. at 664.

<sup>5</sup> *Mike M. Johnson*, 150 Wn.2d at 392.

concerns, including the problem with the telephone lines. The county responded that, if MMJ believed it had a claim for additional compensation, it needed to submit that claim in accordance with the appropriate contractual provisions.<sup>6</sup>

MMJ did not submit a claim for additional compensation. Instead, it wrote another letter to the county regarding various delays on the project. The county responded by again stating that MMJ would have to comply with contractual requirements to assert a claim or seek additional compensation.<sup>7</sup> The county added:

Spokane County simply cannot accept a letter, such as the July 24, 1998, letter, as anything other than an attempt to cause Spokane County to acquiesce in what might be later claimed to be some sort of attempt to modify our contract. As we have repeatedly advised you, Spokane County must insist that you follow the terms and conditions of our contract in every respect on both of these projects.<sup>8</sup>

MMJ wrote to the county several more times demanding payment of additional sums and requesting more

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<sup>6</sup> *Mike M. Johnson*, 150 Wn.2d at 380-81.

<sup>7</sup> *Id.* at 381.

<sup>8</sup> *Id.* at 382.

time to finish the projects. MMJ never submitted a formal claim to the county, however.<sup>9</sup> Although the county agreed to meet with MMJ to resolve the parties' disputes, it repeatedly asserted that it was not waiving its rights under the contract.<sup>10</sup>

During the negotiations, which took place while the projects were ongoing, MMJ and the county discussed several issues unrelated to the phone line problem. When the parties were unable to reach an agreement regarding those issues, MMJ filed suit against the county alleging claims for additional compensation and unpaid contract balances on both projects.<sup>11</sup>

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<sup>9</sup> According to MMJ's contract administrator, Mike Johnson did not like to comply with the contractual notice requirements because they were too time-consuming. Instead, he preferred to send a letter demanding additional payment and then "sort through the mess at the end of the contract." *Id.* at 384. Thus, unlike the present case, MMJ deliberately chose not to comply with contractual requirements. Here, the evidence establishes that American Safety made every effort to respond to the City's requests for additional information and did not deliberately ignore the requirements under the Contract.

<sup>10</sup> *Id.* at 383.

<sup>11</sup> *Id.* at 384.

Thereafter, the county filed a motion for summary judgment seeking dismissal of MMJ's claim for additional compensation. The county argued that MMJ's claim was barred as a matter of law because MMJ failed to follow contractual procedures for asserting a claim. The court granted the motion, concluding no genuine issue of material fact existed regarding MMJ's failure to comply with contractual claims procedures.<sup>12</sup> The court of appeals reversed, ruling that issues of fact existed regarding whether (1) MMJ was excused from complying with the claims procedures because the county had actual notice of MMJ's claim and (2) the county waived enforcement of the procedures by negotiating a settlement with MMJ.<sup>13</sup>

This Court reversed on both grounds cited by the court of appeals. With respect to the waiver issue, the Court noted that, in correspondence with MMJ, the county repeatedly asserted that it did not intend to waive its rights

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<sup>12</sup> *Id.* at 385.

<sup>13</sup> *Id.*

under the contract.<sup>14</sup> The Court also rejected MMJ's argument that the county's negotiations with MMJ evidenced an intent to waive the contractual notice and claims requirements. The Court noted that the parties were discussing several issues, not just the one involving the phone lines.<sup>15</sup> The Court explained, "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."<sup>16</sup> Accordingly, the Court concluded the county was entitled to summary judgment in its favor, dismissing MMJ's claims for additional compensation.<sup>17</sup>

The City relies on the *Mike M. Johnson* decision to support its argument that it is entitled to summary judgment in this case. However, as the Court of Appeals correctly

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<sup>14</sup> *Id.* at 392.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 393.

recognized, “the facts in *Mike M. Johnson* differ from those here.”<sup>18</sup>

The Court of Appeals pointed out the following differences between this case and *Mike M. Johnson*:<sup>19</sup>

<i>Mike M. Johnson</i>	This Case
The county <i>continuously</i> asserted it did not intend to waive its rights under the contract.	The City mentioned compliance with contractual requirements three times over an extended period of communication, and two of those occurred before the suit limitation period began to run.
The county and MMJ were negotiating several issues involving two projects, while some of the work was continuing.	There was only one project, and it was completed.
If the county had discontinued negotiations while the work was underway, it might have affected an ongoing working relationship.	If the City had discontinued negotiations, it would have had no detrimental effect on the City, only on American Safety.

The court concluded:

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<sup>18</sup> *Am. Safety*, 133 Wn. App. at 658.

<sup>19</sup> *Id.* at 658-60.

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.

\* \* \*

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.<sup>20</sup>

In sum, the Court of Appeals properly distinguished *Mike M. Johnson* from the present case. The City apparently believes a bright-line rule should exist—i.e., negotiations by a party can *never* result in a waiver of that party's contractual rights. However, the Washington courts have long recognized that the issue of waiver presents a question of fact to be decided with reference to the particular circumstances at hand.<sup>21</sup> Here, the City's actions,

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<sup>20</sup> *Id.* at 660, 661.

<sup>21</sup> See, e.g., *Bowman v. Webster*, 44 Wn.2d 667, 670, 269 P.2d 960 (1954); *Pac. Comm'l Co. v. Nw. Fisheries, Co.*, 115 Wash. 608, 616, 197 P. 930 (1921); *Beagles v. Seattle-First Nat'l Bank*, 25 Wn. App. 925, 932 n.3, 610 P.2d 962 (1980).

taken as a whole, evidence an intent to waive its right to enforce claims procedure requirements under the Contract. At a minimum, there is a question of fact regarding this issue which, as the Court of Appeals properly held, makes summary judgment improper.

**B. The Court of Appeals correctly applied existing Washington case law regarding implied waiver.**

In its Petition for Review, the City argued that the Court of Appeals erred in its analysis of the requirements for implied waiver. In particular, the City claimed the court (1) failed to recognize that American Safety bore the burden of showing the existence of a waiver and (2) concluded equivocal acts by the City were sufficient to establish waiver.<sup>22</sup> In fact, the Court of Appeals correctly applied a long line of Washington cases regarding implied waiver and determined a question of fact existed on this issue.

First, the Court of Appeals specifically acknowledged that American Safety bore the burden of establishing a

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<sup>22</sup> Petition for Review at 13.

waiver by the City. The court stated, “The burden of proof rests with the party claiming waiver.”<sup>23</sup>

Second, the Court of Appeals also specifically acknowledged that implied waiver “requires *unequivocal* acts of conduct evidencing an intent to waive.”<sup>24</sup> The court then explained:

[W]aiver 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. And that kind of evidence creates different inferences that do not “directly, unmistakably or unequivocally establish waiver.” In short, “when 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.”<sup>25</sup>

Here, American Safety presented evidence showing the City intended to waive its right to enforce contractual claim procedures. Even though the deadlines for presenting

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<sup>23</sup> *Am. Safety*, 133 Wn. App. at 657.

<sup>24</sup> *Id.* at 656 (quoting *Mike M. Johnson*, 150 Wn.2d at 391) (emphasis added).

<sup>25</sup> *Id.* (quoting *Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 701, 483 P.2d 880 (1971)).

claims had expired, the City repeatedly requested additional information from American Safety. Moreover, before denying American Safety's claim on May 27, 2004, the City never informed American Safety the claim would be denied as untimely. Under these circumstances, a reasonable person could conclude the City unequivocally evidenced an intent to waive its right to require compliance with contractual provisions. The Court of Appeals correctly applied Washington law regarding implied waiver to conclude a question of fact existed on this issue, making summary judgment improper.

**V. CONCLUSION**

For the reasons set forth above and in American Safety's earlier briefing in this Court and in the Court of Appeals, the Court of Appeals' decision should be AFFIRMED.

DATED July 9, 2007.

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**CERTIFICATE OF SERVICE**

BY RONALD K. CARPENTER

The undersigned certifies that on this 9<sup>th</sup> day of July,

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

DATED this 9<sup>th</sup> day of July, 2007, at Seattle, Washington.

  
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Kimberly Fergin

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