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NO. 65139-1-I

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

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WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM  
PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF  
SEATTLE, L.P.,

Appellant,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a  
Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a  
foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a  
foreign corporation,

Respondent.

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

HK's brief ("Resp. Br.") amounts to a thinly veiled attack on the Supreme Court's decision squarely rejecting HK's effort to subject the Mariners' and the PFD's claims to a six-year limitations period. *See Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 202 P.3d 924 (2009) ("PFD"). HK argues that no matter what the Supreme Court ruled, and no matter what its contract with the PFD said, this Court *somehow* must limit HK's exposure to claims challenging its defective work. This Court should reject HK's arguments for the following reasons:

**First**, HK for years told the trial court and the Supreme Court that all claims under the Contract accrued by July 1, 1999—and that the Statute of Repose did not apply. The Supreme Court accepted HK's position and ruled on that basis. Principles of judicial estoppel, waiver, and law of the case preclude HK from repudiating its prior position.

**Second**, HK correctly read the accrual clause in its earlier briefs: the Contract fixes the accrual date at July 1, 1999, making the claims timely. HK's new arguments ignore the principle that courts must read contracts according to their plain language. And nothing in the Contract suggests that the agreed accrual date applies only to statutes of limitation.

**Third**, HK's "public policy" arguments lack substance. HK points to nothing in the Statute of Repose, its legislative history, or the case law even remotely suggesting that parties cannot agree on a fixed accrual date.

*Fourth*, even if the Court were to apply a discovery rule, HK admits the Mariners discovered a “pretty big” problem with HK’s work in February 2005, when the Mariners (not the PFD) owned the claim. Because the law charged the Mariners at that moment with *all* knowledge an investigation would disclose, a trier of fact could find the Mariners discovered the claims months before the Statute of Repose ran, making summary judgment improper. In any event, HK worked on Safeco Field into 2000, deferring the start of the repose period under the statute.

*Fifth*, HK’s reliance on the 21-day notice provision in the original Contract ignores the elimination of the notice requirement in 1998. HK’s claim that the original and the modified claims process continued to exist side-by-side, governing different types of claims, is absurd on its face.

*Sixth*, HK admits RCW 4.16.326 does not apply to claims that accrued before its effective date, as these claims did. Further, HK’s argument under RCW 4.16.326(1)(g) recasts its losing argument before the Supreme Court. The Court should reject it on that basis.

## II. ARGUMENT

### A. **Judicial Estoppel, Waiver and Law of the Case Bar HK from Now Raising the Statute of Repose Defense.**

For years HK argued the Mariners’ and the PFD’s claims accrued as of Substantial Completion pursuant to Article 13.7 of the Contract and that, because the claims accrued at that time, the statute of limitations barred them. Even though (1) Article 13.7’s claim accrual date formed the factual basis for HK’s argument; (2) the Supreme Court resolved the last appeal

*only* after accepting HK's assertion that Article 13.7 established the accrual date; and (3) the parties and the judiciary spent years addressing and deciding the statute of limitations issue on the basis of Article 13.7 claim accrual, HK now repudiates Article 13.7 to advance its new statute of repose argument. The law forecloses this gamesmanship.

***Judicial Estoppel.*** HK argues judicial estoppel does not apply because it has not adopted an inconsistent position, it has not been given an unfair advantage, and it has not deceived the court. Resp. Br. 37-38.

HK's own words dispose of its claim that it never advocated an inconsistent position: "Article 13.7 ... provides that all causes of action are deemed to have accrued on the date of substantial completion. Therefore, ***RCW 4.16.310 is inapplicable here.***" CP 175 (emphasis added). See Br. of Resp., No. 59823-6-I (Aug. 24, 2007) at 12 n.8 (same). Ignoring what it said, HK now argues it adopted a "consistent" position that it should not be subject to "unlimited liability." Resp. Br. 37. This amounts to an assertion that HK took the "consistent" position that it should win without facing the merits. No case approaches "inconsistent position" in such a result-oriented way. Simply put, in 2006 and 2007, HK argued based on its position that Article 13.7 controlled accrual and "[t]herefore, RCW 4.16.310 is inapplicable." HK now ***repudiates*** the position on which it staked its earlier defense; indeed, had HK argued in 2007 that the Mariners' and PFD's claims accrued in late 2005, its statute of limitations argument would have been frivolous on its face.

To justify its repudiation, HK seeks refuge in the fact that it “was unsuccessful with its statute of limitations defense,” as if its loss gives it a free pass to say that Article 13.7 does not do what, for two years, it said it did. Resp. Br. 37. According to the case on which HK relies, however, a party’s failure to obtain relief on a repudiated position comprises just one of several “nonexclusive factors” that a court *may* consider in determining whether judicial estoppel applies. *DeAtley v. Barnett*, 127 Wn. App. 478, 483-84, 112 P.3d 540 (2005). But “[t]he focus is upon the inconsistent position.” *Id.* Contrary to HK’s argument, judicial estoppel applies where the litigant’s inconsistent position “was accepted by the court” *even if* the position did not benefit the litigant. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 231, 108 P.3d 147 (2005). “Both are not required.” *Id.* Here, the Supreme Court “accepted” HK’s now-repudiated position that (a) under Article 13.7, “the claims of the PFD and the Mariners accrued no later than July 1, 1999, the date of substantial completion,” and (b) “[n]o party asserts that this provision,” i.e., the Statute of Repose, applies. *See PFD*, 165 Wn.2d at 685-86 & n.1.

Finally, HK argues it did not “deceive” the Supreme Court when it repeatedly urged that the PFD’s and the Mariners’ claims accrued by July 1, 1999, pursuant to Article 13.7. HK excuses itself as simply intending “to focus the Supreme Court on the issue at bar: the applicability of the statute of limitations.” Resp. Br. 38. But HK understates the significance of accrual issues on the prior appeal: Had the Supreme Court *not* accepted that the PFD’s and the Mariners’ claims accrued on July 1, 1999, the Court

would have had no reason to address HK's limitations argument at all.

HK's position on accrual thus formed the factual basis for the appeal.

**Waiver.** HK argues it did not waive its Statute of Repose defense because its change in position did not harm the PFD or Mariners, given that "the statute of repose lapsed well before" they sued. Resp. Br. 39-40. As a matter of law, however, HK admits a court should find a defense waived if "assertion of the defense is inconsistent with defendant's prior behavior." *Brevick v. City of Seattle*, 139 Wn. App. 373, 381, 160 P.3d 648, 652 (2007) (citation omitted). Here, HK's "prior behavior" revolved around a litigation strategy based on its assertion that all claims relating to Safeco Field accrued for all purposes (including the Statute of Repose) on July 1, 1999. HK cannot argue consistency between this "prior behavior" and its current litigation strategy, which revolves around the proposition that the claims actually accrued *six years* later than HK said before.<sup>1</sup>

**Law of the Case.** HK argues (Resp. Br. 40) the Law of the Case doctrine does not control because the Supreme Court did not "enunciate a principle of law" when it accepted HK's foundation assertion that "the claims of the PFD and Mariners accrued no later than July 1, 1999, the date of substantial completion." *PFD*, 165 Wn.2d at 685. But the Law of the Case doctrine exists to promote *finality and efficiency* in the judicial process. Here, the Supreme Court addressed statute of limitations issues

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<sup>1</sup> To be sure, HK consistently has urged the courts to insulate it from "any liability beyond six years after substantial completion," even if it breached its duties in constructing Safeco Field. Resp. Br. 39. But the Supreme Court, *after* accepting HK's assertion that all claims accrued in 1999, found HK had no right to that protection.

*only* because HK represented that the claims accrued as of substantial completion. To allow HK now to assert an argument squarely contrary to the factual predicate to the Supreme Court proceeding would make the Supreme Court's prior ruling a meaningless and purely academic gesture.

**B. The Accrual Clause Plainly States the Accrual Date, and This Court Should Enforce It.**

**1. The Plain Terms of the Construction Contract Foreclose HK's Statute of Repose Argument.**

In arguing that Article 13.7 does not fix an accrual date, HK begins with a flawed discussion of Washington law on contract interpretation, focusing on "intent," "context," "existing statutes," and "usage of trade." Resp. Br. 8-9. But HK conspicuously omits the most important element of contract interpretation: *the words of the contract*. The Supreme Court unanimously explained Washington contract law as follows:

Washington continues to follow the objective manifestation theory of contracts. ... [W]e attempt to determine the parties' intent by *focusing on the objective manifestations of the agreement*, rather than on the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable meaning of the words used. Thus, *when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. ... We do not interpret what was intended to be written but what was written.*

*Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005) (emphasis added; citations omitted).

Here, the words of Article 13.7 could not be more clear: "any alleged cause of action shall be deemed to have accrued *in any and all*

*events* not later than such date of Substantial Completion,” i.e., by July 1, 1999. CP 793 §13.7.1.1 (emphasis added). HK does not argue any ambiguity in Article 13.7’s manifest purpose of abrogating the discovery rule and fixing an accrual date. Indeed, until its litigation tactics turned sour, HK agreed and read this provision to mean what it says: because “all causes of action are deemed to have accrued on the date of substantial completion,” HK wrote, “RCW 4.16.310 is inapplicable here.” CP 175.

HK read the Contract right in 2006 and 2007. The Contract, which generated hundreds of millions for work HK refuses to defend, expressly provided for accrual of all claims as of the date of Substantial Completion. The Mariners and the PFD lived with the words of the contract even in the face of HK’s statute of limitations defense; now, HK must do the same. In urging the Court to reject the reading that all parties gave this clause until last year, HK offers two arguments:

*First*, HK says the accrual clause would have meant one thing if it had won on its statute of limitations argument—but now must mean something different. “[I]n light of the Supreme Court’s holding” and due to the “Supreme Court’s opinion,” Resp. Br. 8, 17, HK says a court *now* must read the accrual clause to apply *only* in calculating dates relevant to the statute of limitations. Otherwise, HK says, Article 13.7 “would produce a result opposite of the intent.” Resp. Br. 17.

In fact, the reading urged by the PFD and the Mariners would produce *precisely* the result the Supreme Court envisioned. The Court understood the PFD’s and the Mariners’ claims accrued on July 1, 1999,

and that the Statute of Repose did not apply—because HK assured the Court on both counts. *PFD*, 165 Wn.2d at 685-86 & n.1. The Court held that no statute of limitations applied to the PFD’s and the Mariners’ claims. *Id.* at 694. The Court meant what it said.

**Second**, HK asserts the “plain language” of Article 13.7 makes it apply only to statutes of limitation, not the Statute of Repose. Resp. Br. 3, 18. But HK never explains why, if the language were “plain,” it said the opposite for years. And HK cannot square its reading with the clause’s words. According to its title, Article 13.7 governs the “Commencement” of **any** “Statutory Limitations Period.” The Statute of Repose functions as a limitations period: it “absolutely bars the commencement of suit” unless a claim accrues in the specified manner. *Del Guzzi Constr. Co., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 883-84, 719 P.2d 120 (1986). While the Statute differs from a statute of limitations, “it remains that RCW 4.16.310 is a *limitation* on the right to bring suit on construction claims of a certain age”; put another way, “RCW 4.16.310 is a limitation provision.” *Bellevue School Dist. v. Brazier*, 103 Wn.2d 111, 121-22, 691 P.2d 178 (1984) (italics in original). The Statute of Repose therefore constitutes a “limitation” on the “commencement” of actions to which Article 13.7 applies by its terms.

Further, HK’s textual argument rests on the **heading** of Article 13.7 (an unreliable guide to contract interpretation), while ignoring the Article’s text. The first clause of Article 13.7 says “any applicable statute of limitations shall commence to run” at substantial completion, and that

clause appears directed at statutes of limitation. But Article 13.7 goes on to say that “any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.” CP 793. Nothing suggests *this* clause applies only to statutes of limitation; rather, the plain words of this second clause (which HK correctly read until it lost in the Supreme Court) make claims accrue “in any and all events” at the “date of Substantial Completion.” If the second clause meant what HK says, it would be redundant of the first, violating the basic precept that a court must interpret an agreement to give “effect to all the contract’s provisions.” *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007) (citation omitted).

**2. HK’s Claim of a Hidden Intent Cannot Trump the Accrual Clause’s Plain Terms.**

HK maintains that, no matter what the accrual clause says, the parties intended Article 13.7 to protect HK from liability, and the Court should therefore read that Article to achieve the desired *outcome* without regard to the Contract’s words. Resp. Br. 8, 11, 17.<sup>2</sup> HK cites no law in support of this extraordinary position; it simply urges that this Court revise the Contract to save HK from the Supreme Court’s decision.

To support its claim of unexpressed intent, HK points first to the language of Article 13.7, which HK correctly characterizes as “unaltered

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<sup>2</sup> HK also brought a claim for “Reformation of Contract,” alleging “strict application” of Section 13.7 “would not give effect to the mutual intent of the parties.” CP 1464. As “evidence” of this “mutual intent”, HK offered the Declaration of Robert Aylesworth (CP 895)—but the trial court granted a motion to strike his inadmissible conjecture. CP 1095-1101, 1411-1412. Although HK has not appealed that order, it briefs its “intent” as if the record contained evidence on this point. *See* Resp. Br. 8-9. It does not.

from the A201 form.” Resp. Br. 9. HK then turns to commentary saying the clause provides a fixed accrual date so “the cutoff date [for claims] can be calculated.” Resp. Br. 9-10 (emphasis omitted). HK concludes by declaring that “the intent of Article 13.7 is to prevent application of the discovery rule, and to establish a date certain” when a contractor’s liability will end. *Id.* at 10. HK argues that this Court therefore must *ignore* the unambiguous accrual clause and shield HK from liability for defective work—even though the Supreme Court declined to do exactly that.

In fact, rather than focus on protecting contractors, commentators stress that Article 13.7 exists to *fix* an accrual date and thereby avoid ambiguity. *See* Resp. Br. 9-10 (quoting commentary).<sup>3</sup> Here, Article 13.7 promotes certainty by avoiding the need to decide when the Mariners and the PFD actually discovered the claims against HK: the Contract fixes the accrual date at July 1, 1999. Article 13.7 thus furthers a paramount goal in Washington’s construction industry, i.e., a “precise allocation of risk as secured by contract.” *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 827, 881 P.2d 986 (1994).

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<sup>3</sup> Contrary to HK’s argument, the accrual clause does not exist to “protect” contractors. Abrogation of the discovery rule *sometimes* favors a contractor by accelerating accrual—but it also may *defer* accrual to the contractor’s detriment. In a multi-year project, an owner may discover a claim early in the work. The elimination of the discovery rule in that context *extends* the period of time for the owner to sue. *Harmony at Madrona Park Owners Assn. v. Madison Harmony Dev. Inc.*, 143 Wn. App. 345, 351-352, 177 P.3d 755 (2008) (absent contractual clause deferring accrual to Substantial Completion, breach of contract claim accrues at time of breach). The fact that the accrual clause has pros *and* cons for both parties, CR 940, negates HK’s suggestion that the Court must construe the clause to protect contractors. Resp. Br. 10. Instead, the clause exists to provide certainty.

**C. No Policy Limits Enforcement of Article 13.7.**

HK argues that even if Article 13.7 supplies the accrual date for the Statute of Repose, the Legislature (a) mandated that parties use a discovery rule in determining accrual under the Statute of Repose, and (b) silently *forbade* public parties from altering this definition by contract. Resp. Br. 20-23. Neither argument makes sense.

**1. The Legislature Did Not Mandate Use of a Discovery Rule for the Statute of Repose.**

The Statute of Repose says “any cause of action that has not accrued” by a certain date “shall be barred”—but does not define accrual. Traditional rules govern accrual under the Statute of Repose. *See* App. Br. 24. And the cases treat the accrual date for statute of limitations and Statute of Repose purposes as the same—because the two statutes operate together: if a claim has not accrued by the time specified, the Statute of Repose bars the claim; if it *has* timely accrued, the plaintiff must sue within the applicable limitations period. It would be “absurd on its face” to suggest one accrual date for the statute of limitation and a different accrual date for the Statute of Repose. *See* App. Br. 24 (citing *Parkridge Assoc. Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 606, 54 P.3d 225 (2002)). Because HK admits the Contract fixed accrual for the statute of limitations, it likewise did so for the Statute of Repose—consistent with the language fixing accrual “in any and all events.”

In response, HK urges that cases “long” have recognized a distinction between “accrual” for limitations periods and accrual for the Statute of Repose. Resp. Br. 19. But HK’s authorities say no such thing.

*Janisch v. Mullins*, 1 Wn. App. 393, 399, 461 P.2d 895 (1969), for example, established the accrual rule for negligent diagnosis claims in medical malpractice actions. In *Bellevue School District*, 103 Wn.2d at 123, the Supreme Court held the statute of repose did not apply to school districts—without defining accrual.<sup>4</sup> (Only the dissent, 103 Wn. 2d at 128-29, discussed application of a discovery rule.) In *Del Guzzi*, 105 Wn.2d at 884, a subcontractor sued for “negligent failure to design accurate plans.” Because the claim in *Del Guzzi* sounded *in tort*, the court applied a discovery rule to decide accrual; *Del Guzzi* did not discuss the accrual rule for a contract claim.

## 2. Public Policy Does Not Invalidate This Industry Standard Contractual Provision.

In any event, nothing suggests the Legislature intended to prohibit parties from entering into contracts that *fix* accrual for Statute of Repose purposes on a date other than discovery—just as parties often fix accrual for statute of limitations purposes. See App. Br. 28-32. Because no “express statutory language evidenc[es] legislative intent to prohibit agreements” allocating risk associated with claim commencement and accrual, HK’s public policy argument lacks merit. See *Carwash Ents., Inc. v. Kampanos*, 74 Wn. App. 537, 543-44, 874 P.2d 868 (1994).

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<sup>4</sup> In 1986, the Legislature “legislatively reverse[d]” *Bellevue School District* (CP 883) and made “applicable” to the State the Statute of Repose’s “accrual requirement.” But the 1986 legislation went no further—it specifically did *not* mandate any rule as to when claims accrue or prohibit parties from fixing an accrual date by contract. In other words, the 1986 amendment dealt “only with the accrual *period* during which a cause of action must arise,” CP 883 (emphasis added), not the means for determining accrual.

In arguing to the contrary, HK relies on *Tanner Electric Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 911 P.2d 1301 (1996), and *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.2d 871 (2010). Neither supports its position. In *Tanner Electric*, the Supreme Court analyzed whether RCW 54.48, which governs service agreements between public utilities and cooperatives, **required** a “point of use” term in the contract. The Court found no statutory requirement, thereby giving the parties freedom to contract. *Id.* at 674. By contrast, in *South Tacoma*, the State sold property in violation of an express statutory **requirement** that it provide written notice of the sale to abutting land owners. *Id.* at 126. Unlike the situation in *South Tacoma*, nothing in RCW 4.16.310 restricts accrual agreements. Just as the statute in *Tanner Electric* left the parties free to contract, RCW 4.16.310 does not purport to preempt the right of sophisticated parties to set a predictable, bright line accrual date.

Finally, HK holds out the specter of “unending, unlimited liability” for flaws in its work. Resp. Br. 21. HK cites no legal principle for the proposition that the Court can read words out of a contract between sophisticated parties because otherwise one party might face liability for errors in its work. Further, HK ignores that it could have protected itself by negotiating a different accrual date or fixing a contractual limitations period.<sup>5</sup> And any contractor may protect itself through insurance or

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<sup>5</sup> HK implies, without record support, that the PFD presented it with a form contract that it signed without negotiation. Resp. Br. 6, 9. In fact, the PFD selected HK based on its qualifications, and HK thereafter negotiated **both** contract terms **and** the contract price. See CP 36-63; RCW 39.10.370-380. HK also negotiated substantial modifications to the original contract terms, such as the revamped Notice of Claim provisions. CP 981-1000.

enhanced quality control and project management to mitigate exposure for failure to follow the contract. “[I]t is more equitable to place the burden of loss on the party best able to prevent it, i.e., the contracting party who can avoid breaching the contract.” *1000 Virginia Ltd. P’Ship v. Vertecs Corp*, 158 Wn.2d 566, 580, 146 P.3d 423 (2006).

Nor need the Court nullify Section 13.7 to further the purposes of RCW 4.16.310. In *1519-1525 Lakeview Boulevard Condominium Ass’n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001), the Supreme Court identified three statutory purposes. The claims here do not implicate (much less threaten) any of them:

**First**, the statute protects contractors from liability for the acts of others, since “[t]he longer the owner has possession of the improvement, the more likely it is that the damage was the owner’s fault or the result of natural forces.” *Jones v. Weyerhaeuser Co.*, 48 Wn. App. 894, 899, 741 P.2d 75 (1987) (cited in *Lakeview*, 144 Wn.2d at 577). No one claims the paint failure had anything to do with post-completion conduct by the PFD or the Mariners or that it resulted from “natural forces.”

**Second**, the statute puts an outside limit on when a claim must accrue, so as not to place “too great a burden” on contractors. *Lakeview*, 144 Wn.2d at 578. Here, the modest claims by the PFD and the Mariners do not place “too great a burden” on HK, which collected hundreds of millions to build the ballpark. Indeed, when HK signed its Contract with the PFD in 1996, **any** contractor (even on a private project) faced exposure for up to **twelve years** after substantial completion, i.e., the six year accrual

period plus the six year limitations period. *See Gevaart v. Metco Constr. Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (once action accrues within six years, it is “extended by the relevant limitation statute as to that injury”). The Mariners and the PFD therefore sued *well* within the period of exposure that HK should have expected in 1996.

*Third*, the Statute of Repose exists to “prevent plaintiffs from bringing stale claims when evidence might have been lost or witnesses might no longer be available.” *Lakeview*, 144 Wn.2d at 578. But HK never argued the loss of evidence or unavailability of witnesses, and documents and witnesses from the Project remain available: HK’s primary project managers are participating actively in HK’s defense, CP 33 (Decl. of HK’s “Project Administrator”); CP 166, 895-904, 1095-98 (Decl. of HK’s General Manager for Safeco Field), and other important participants in the ballpark’s construction have offered testimony. CP 961-980 (Decl. of Lead Architect at NBBJ); CP 514-518 (Decl. of Long Painting President); CP 1493 (Decl. of Herrick President).

Public policy does not forbid enforcement of the plain language of the parties’ agreement. *See App. Br. 26-27.*

### **3. Article 13.7 Does Not “Waive” the Statute of Repose.**

HK mischaracterizes the accrual clause as a “waiver” of the Statute of Repose and claims parties have no power to waive the Statute. *Resp. Br. 24-25.* In fact, Article 13.7 does not purport to waive the Statute of Repose; instead, it provides a contractual accrual date that provides a start date for

the Statute of Repose—as HK understood in prior briefing. None of HK’s “waiver” cases forbids parties from making that agreement.

Further, the lone Washington case cited by HK in support of its waiver argument, *J.A. Campbell Co. v. Holsum Baking Co.*, 15 Wn.2d 239, 255, 130 P.2d 333 (1942), holds only that parties *may* waive statutes of limitation after commencement of an action. *J.A. Campbell* does not address (much less decide) whether parties may prospectively “waive” a statute of repose before suit begins. Unable to find support in Washington law, HK cites cases from other states, arguing that “[m]any jurisdictions go so far as to hold that a statute of repose is never waivable—even by express agreement of the parties.” Resp. Br. 24 n.17. But the Mariners and the PFD distinguished four of the five cases cited by HK, App. Br. 32 n.7, and HK did not bother to respond. The fifth, *Lieberman v. Cambridge Partners LLC*, 432 F.3d 482 (3d Cir. 2005), considered whether the Sarbanes-Oxley Act “revived” securities fraud claims that did not accrue within a repose period for claims under federal securities laws. The Court held that Sarbanes-Oxley did not revive the claims, as “extending the amended statute of limitations to revive expired securities fraud claims would have an impermissible retroactive effect.” 432 F.3d at 492. The case has no bearing on a contractually agreed accrual date.

**D. Even if the Court Applies a Discovery Rule, the Claims Accrued in Time.**

Even if the Court were to disregard the accrual clause and apply a discovery rule, the Mariners and the PFD discovered this claim before the

Statute of Repose ran—no matter how one calculates the start date. Even leaving aside Article 13.7, the court erred in granting summary judgment.

**1. The Mariners Discovered the Claim before July 1, 2005.**

Factual issues typically preclude summary judgment on the question of when an owner discovers a cause of action. *See* App. Br. 42. Here, HK’s argument (and the judgment) hinges on the notion that no one “discovered” a claim against HK by July 1, 2005, i.e., within six years of Substantial Completion. At the least, however, an issue of fact existed on that point: the record would permit (if not *require*) a trier of fact to conclude that the claims accrued before July 1, 2005. App. Br. 40-41.

HK admits Mariners President Chuck Armstrong discovered the manifestation of HK’s breach, i.e., large paint blisters, in *February 2005*. By May 2005—two months *before* HK says the Statute of Repose ran—the Club knew fixing the blisters would be a “pretty big job” that would entail costs for the upcoming capital budget.<sup>6</sup> CP 1052, 1056. HK cannot dispute that the Mariners were “placed on notice” of appreciable harm in February 2005. As a matter of law, the Mariners *at that time* were “charged with what a reasonable inquiry would have discovered.” *Green v. A.P.C.*, 136 Wn.2d 87, 96-97, 960 P.2d 912 (1998)—and a “reasonable inquiry” in fact led straight to HK’s failure to follow the Contract.

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<sup>6</sup> Nothing in the record supports HK’s absurd statement that the “Club believed the problem was merely a normal maintenance” obligation. Resp. Br. 28.

Although HK argues claims did *not* accrue under the discovery rule until after July 1, 2005, none of its arguments survives scrutiny:

**First**, based on word play with the phrase “salient facts,” HK contends claims did not accrue until the Mariners and the PFD discovered the *specific* technical cause of the paint failure. Resp. Br. 29-31. But Washington law does not defer accrual under the discovery rule until a claimant hires an expert to run tests and learns of the results. The cases uniformly hold that “[n]otice that would lead a diligent party to further inquiry is notice of everything to which such inquiry would lead.” *Young v. Savidge*, 155 Wn. App. 806, 824, 230 P.3d 222 (2010) (citations omitted). In *1000 Virginia*, 158 Wn.2d at 589, a contractor argued (as HK does) that a cause of action did not accrue until the claimant “hired experts to determine the cause of the leaks and decided to bring suit.” The Supreme Court disagreed, holding that “factual issues preclude summary judgment” because the evidence showed the owner discovered defects “within the scope of [defendant’s] work” earlier—just as the Mariners discovered problems in early 2005. See *Gevaart*, 111 Wn.2d at 503 (knowledge of noticeable condition triggered duty to exercise diligence to discover “why” condition existed; claim accrued on knowledge of condition); *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501 (1995) (“smoking gun” not necessary for accrual; claimant who “reasonably suspects” wrongful act “is on notice that legal action must be taken.”).

**Second**, HK contends only the PFD’s discovery (not the Mariners’ discovery) of the claims matters, arguing the PFD did not know of the claims until September 8, 2005. Resp. Br. 28. But HK forgets to tell the

Court that in 2001 the PFD assigned **all** claims related to construction of Safeco Field to the Mariners. CP 196.<sup>7</sup> As a result, at the time of discovery in early 2005, the Mariners owned the claims. “As assignee of the claim, the [Mariners were] the real party in interest and entitled to bring the action in [their] own name under CR 17(a).” *Dept. of Labor and Industries v. Wendt*, 47 Wn. App. 427, 431, 735 P.2d 1334 (1987), *overruled on other grounds by State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). Thus, it matters whether **the Mariners** (not the PFD) discovered the facts.

**Third**, resting on its false assumption that the PFD’s knowledge matters (which it does not), HK asserts the Court cannot impute the Mariners’ knowledge to the PFD. But “[g]enerally, an agent’s knowledge is imputed to the principal if that knowledge is relevant to the agency relationship,” *Kelsey Lane Homeowners Ass’n v. Kelsey Lane Co., Inc.* 125 Wn. App. 227, 235, 103 P.3d 1256 (2005), and the Mariners here acted as the PFD’s agent in keeping the ballpark in good repair. CP 310, 326-27.

HK concedes the agency relationship but contests the imputation of knowledge, claiming the Mariners and the PFD had “adverse” interests in fixing HK’s defective work. Resp. Br. 28-29. But under Washington law, the “adverse interest” exception to imputation applies only if HK can show “the agent’s relations to the subject-matter are so adverse as to practically destroy the relation of agency.” *Am. Fidelity & Cas. Co. v. Backstrom*, 47

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<sup>7</sup> The PFD’s interest in this action stems from its obligation to reimburse the Club the repair costs for HK’s defective construction from the Excess Revenue Fund—a public obligation of the PFD that will be relieved once a court holds HK accountable for its defective work. See *PFD*, 165 Wn.2d at 693, fn.2.

Wn.2d 77, 82, 287 P.2d 124 (1955). HK points to *no* evidence of any adverse interest. In fact, the Mariners in May 2005 knew they had a “pretty big job” on their hands—making the issue “material” to the PFD. The Mariners and the PFD promptly *agreed* that the repair costs would be reimbursed from the Excess Revenues Fund (CP 284, 406-07) and joined as co-plaintiffs to sue HK to preserve tax revenues. HK cites nothing from which the Court could infer an adversarial relationship that destroyed the agency—much less evidence permitting judgment as a matter of law.

**2. In Any Event, the Claim Accrued within Six Years of HK’s Termination of Services.**

Even if the Court decides not to apply Article 13.7 and finds the PFD and Mariners did not discover the claims in February 2005, the claims *still* comply with the Statute of Repose because the PFD and the Mariners sued within six years of HK’s termination of work. App. Br. 34.

HK tries to avoid this argument, claiming the trial court sustained its objection to evidence showing HK’s continued work after substantial completion. Resp. Br. 12-13. In fact, HK objected only to counsel’s statement as to whether the Mariners’ knowledge of defects would be imputed to the PFD; the court noted HK’s statement and concluded the hearing *without ruling* on its objection. RP 82-83. When the court denied HK’s summary judgment motion, CP 1413-14, it did not exclude evidence of HK’s work after substantial completion.<sup>8</sup> Further, the Mariners and PFD

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<sup>8</sup> The order denying summary judgment failed to list the documents submitted by the Mariners and the PFD—but it likewise failed to list all of HK’s reply papers, suggesting clerical oversight by the trial court rather than deliberate exclusion. CP 1413-14.

filed that evidence *months* before the court entered its *sua sponte* summary judgment dismissing the claims. CP 1120-1410. No principle allows a court to ignore evidence called to its attention *months* before a *sua sponte* ruling made without notice or briefing as required by CR 54(f) and 56(c). Thus, under RAP 9.12, which HK does not address, this Court should consider evidence presented before entry of summary judgment.<sup>9</sup>

The improperly ignored evidence shows HK continued to work on Safeco Field long after substantial completion, earning millions of dollars. Under RCW 4.16.310, the six-year period of repose runs until “six years after termination of the services enumerated in RCW 4.16.300.” Because HK worked into 2000, the claims accrued well within six years of termination of its work.

HK relies on *Parkridge*, 113 Wn. App. at 599, where this Court “agreed” “there must be a nexus between the [post-completion] services performed and the cause of action” for the repose period to be extended after substantial completion. But *Parkridge* relied on *Lakeview*, 101 Wn. App. at 930, *aff’d* 144 Wn.2d 570, 29 P.3d 1249 (2001)—and *Lakeview* does *not* include a “nexus” requirement: “For contractors performing those final services [after the date of substantial completion, such as HK]... the

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<sup>9</sup> HK’s bland excuse that a court may revise an interlocutory ruling “at any time,” Resp. Br. 7 n.3, misses the point. Although the trial court had the right to revisit its decisions, the Mariners and the PFD had a right to its consideration of evidence submitted months previously. In the case on which HK relies, *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 14, 206 P.3d 1255 (2009), the trial court revised a decision made after trial; nothing suggests that court refused to consider *any* evidence.

statute runs from the date the last service was provided; for the others it runs from the date of substantial completion.”

*Lakeview* more faithfully follows the statute. Under RCW 4.16.310, the Statute of Repose runs from the *later* of “the period within six years after substantial completion of construction” *or* “the period within six years after the termination of the services enumerated in RCW 4.16.300.” The statute does *not* refer to “the period within six years after the termination of the services *giving rise to the claim*”; instead, the repose period runs from the termination of any post-completion services that fall within the services listed in RCW 4.16.300, which includes “having constructed, altered or repaired any improvement.” Because HK “constructed, altered or repaired” Safeco Field after July 1, 1999, the Statute of Repose began to run only after it terminated its work.<sup>10</sup>

**E. The Contract Claims Process Does Not Bar the Mariners’ and the PFD’s Claims.**

HK half-heartedly argues that the Contract bars the PFD’s and the Mariners’ claims because they supposedly failed to follow a claims process that the parties agreed to abrogate in 1998. Resp. Br. 32-33. HK argues the 1998 modifications apply only to claims arising during construction, asserting the original contractual 21-day notice period lived on (in parallel) to govern “post-completion claims,” such as these.

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<sup>10</sup> HK argues “termination” under RCW 4.16.310 occurs only when an owner “relieves a Contractor from further performance under the Contract,” i.e., fires the contractor. Resp. Br. 16 n.10 (citing CP 158-161). No case follows this absurd reading.

In fact, the parties intended the 1998 modifications to replace the Contract's dispute resolution procedures in Articles 4.3-4.7. The amended dispute resolution procedures by definition apply to *all* "Claims," CP 991 ¶ 4.1.3, including claims for additional payment as well as all "other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." *Id.* Article 4.3.3 as amended provides that Claims—with *no* exception for "post completion" claims—"must be made pursuant to the Claim Call process." Similarly, Article 4.5.2 as amended provides that "[a]ny controversy or claim arising out of or related to the Contract, or the breach thereof, shall be subject to the alternative dispute resolution procedures ... after compliance with the Claims Call procedure." *Id.* The amendment specifically provides certain Claims—including Claims for "failure of the Work to comply with the requirements of the Contract Documents," such as these—*survive* final payment, which otherwise would waive the Owner's claims.

The Mariners and PFD can waive Claims under the modified dispute resolution procedures *only* if they deliver a "progress payment" more than 20 days after receiving notice of events giving rise to a Claim. CP 1016 ¶ 11. HK does not even argue that the Mariners or PFD delivered progress payments to HK after receiving notice of these claims—or that they otherwise failed to comply with the amended process.

**F. RCW 4.16.326(1)(g) Does Not Bar the Claims.**

HK concedes RCW 4.16.326(1)(g) does not apply to claims that

accrued before its effective date, i.e., July 23, 2003. Thus, if the Court holds that the claims accrued as of Substantial Completion under Article 13.7, HK agrees its defense under RCW 4.16.326(1)(g) fails.

But even if this Court holds that the claims accrued after July 23, 2003, RCW 4.16.326(1)(g) **does not** provide HK a defense. In arguing to the contrary, HK asks the Court to step through the looking glass and find that, even though the Supreme Court held these claims “exempt from” limitations periods, RCW 4.16.326(1)(g) incorporates otherwise “applicable” limitations periods and bars the claims—thereby undoing the Supreme Court’s decision. Resp. Br. 35-36. HK’s arguments lack merit:

**First**, RCW 4.16.160 (which excepts from statutes of limitation any actions brought to benefit the state) shows that **no** “applicable” limitations period governs these claims. The statute delineates claims by the sovereign to which limitations statutes apply and claims to which they do not. RCW 4.16.160 is entitled “**Application** of limitations to actions by state, counties, municipalities.” (Emphasis added.) And the provision makes plain that, while the statutes of limitations “**shall apply**” to certain county and other municipal actions, there “**shall be no limitation** to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state.” *Id.* (emphasis added). As a result, RCW 4.16.040 is not an “applicable” limitations period incorporated into RCW 4.16.326(1)(g).

**Second**, the cases make clear that RCW 4.16.160 makes statutes of limitation **inapplicable** to sovereign claims, such as those asserted here.

The case HK cites in support of its argument notes that “the State, acting in its sovereign capacity, is *immune from the application* of limitation periods to actions brought for the benefit of the State.” *Bellevue School Dist.*, 103 Wn.2d at 114 (emphasis added) (citing *Tacoma v. Hyster Co.*, 93 Wn.2d 815, 821, 613 P.2d 784 (1980)).<sup>11</sup>

*Third*, HK’s interpretation of RCW 4.16.326(1)(g) would implicitly repeal the RCW 4.16.160 statute of limitations immunity for all construction projects. But Washington courts disfavor implied repeal, *Bellevue School Dist.*, 103 Wn.2d at 122 (citations omitted), and implied repeal here would fly in the face of the Supreme Court’s opinion in this case *applying* RCW 4.16.160. In any event, nothing suggests the Legislature intended to repeal RCW 4.16.160, in whole or in part, by enacting RCW 4.16.326(1)(g). To the contrary, RCW 4.16.326 “does not alter the statute of repose” or modify any limitation periods that exist elsewhere in Chapter 4.16. *1000 Virginia*, 158 Wn.2d at 583-85.

### III. CONCLUSION

For these reasons, the PFD and the Mariners respectfully request that this Court reverse the trial court’s summary judgment and remand with direction that this case proceed to the merits.

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<sup>11</sup> Many cases formulate the rule the same way. See *Allis-Chalmers Corp. v. City of North Bonneville*, 113 Wn.2d 108, 112, 775 P.2d 953, 955 (1989) (RCW 4.16.160 “*does not apply* in the case of a municipality collecting B & O taxes in a sovereign capacity”) (emphasis added); *Dept. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 512, 694 P.2d 7 (1985) (“the State, acting in its sovereign capacity, is *immune from the application* of limitation periods to actions brought for the benefit of the State”) (emphasis added), citing *Bellevue Sch. Dist.*, 103 Wn.2d at 114.

RESPECTFULLY SUBMITTED November 15, 2010.

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I hereby certify that on the 15th day of November, 2010, I mailed a true and correct copy of the foregoing document titled Reply Brief of Appellants to counsel of record at the following addresses by depositing the envelope in regularly maintained interoffice mail. This mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, postage thereon being fully prepaid:

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