

65139-1

65139-1

65139-1-I

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
2010 OCT 15 PM 4:24

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

Appellants,

vs.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION; HUNT
CONSTRUCTION GROUP, INC., and KIEWIT CONSTRUCTION
COMPANY,

Respondents/Cross-Appellants,

vs.

LONG PAINTING, INC. and HERRICK STEEL, INC.,

Cross-Respondents.

RESPONDENTS/CROSS-APPELLANTS' BRIEF

GROFF MURPHY, PLLC
David C. Groff, WSBA # 04706
Michael P. Grace, WSBA # 26091
Daniel C. Carmalt, WSBA # 36421
Attorneys for Respondents/Third Party
Plaintiffs

300 East Pine St.
Seattle, Washington 98122
Telephone: (206) 628-9500
Facsimile: (206) 628-9506

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. CONDITIONAL ASSIGNMENT OF ERROR. 5

**III. ISSUES PERTAINING TO THE CONDITIONAL
ASSIGNMENT OF ERROR 5**

IV. STATEMENT OF THE CASE 5

V. ARGUMENT 7

**A. Article 13.7 was intended by both parties to extinguish
Hunt Kiewit’s liability as of July 1, 2005, and should be
enforced accordingly 8**

**B. Although this action is exempt from the statute of
limitations, the statute of repose still applies 11**

**1. The statute of repose began to run upon substantial
completion, because none of Hunt Kiewit’s post-
completion services gave rise to the Mariners’
cause of action. 11**

**2. The statute of repose lapsed on July 1, 2005,
before the Mariners’ claims accrued 16**

**a. Article 13.7 does not and cannot govern accrual
for statute of repose purposes. 17**

**(1) Article 13.7 refers and applies only to accrual
for the purposes of the statute of limitations,
not for the statute of repose 18**

**(2) To apply Article 13.7 to accrual for purposes
of the statute of repose would violate the public
policy announced in the Tort Reform Act, and
would exceed the authority of the PFD. 22**

**b. The Mariners lacked knowledge of the salient
facts until after the statute of repose lapsed 25**

(1) The Club’s pre-July knowledge of the paint blisters is not attributable to the PFD. . . .	27
(2) The Club’s pre-July knowledge is insufficient to constitute accrual.	29
C. The Mariners waived this action by failing to provide notice and follow dispute resolution provisions as required in the Agreement.	32
D. The Comparative Fault Statute bars the Mariners’ action	34
1. The Mariners’ cause of action accrued after the statute went into effect.	34
2. The applicable statute of limitations for contract actions is six years	35
3. RCW 4.16.326 does not repeal the <i>nullum tempus</i> doctrine.	35
E. Hunt Kiewit is not barred from raising the statute of repose as a defense.	36
1. Judicial estoppel does not apply because Hunt Kiewit has neither adopted an inconsistent position nor been given an unfair advantage.	36
2. Waiver does not apply, because Hunt Kiewit’s conduct was not inconsistent and the Mariners were not prejudiced.	38
3. Law of the Case does not apply, because the Supreme Court did not enunciate a principle of law related to the accrual of the action, the interpretation of the Agreement, or the applicability of the statute of repose.	40
4. Hunt Kiewit is allowed to pursue alternative defenses.	40

VI. CONDITIONAL CROSS-APPEAL 41

A. The flow-down provisions of the Subcontracts bind the subcontractors to Hunt Kiewit to the same degree that Hunt Kiewit is bond to the PFD.41

B. The subcontractors are equitably estopped from invoking any limitation upon Hunt Kiewit’s action.46

C. Hunt Kiewit brings its third-party claims on behalf of, and for the benefit of, the State.48

VII. CONCLUSION. 50

TABLE OF AUTHORITIES

Cases

<i>1000 Virginia Ltd. Partnership v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 423 (2006)	19, 20, 25, 30, 35
<i>1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.</i> , 101 Wn. App. 923, 6 P.3d 74, (2001).	15
<i>3A Indus., Inc. v. Turner Construction Co.</i> , 71 Wn. App. 407, 869 P.2d 65 (1993)	44
<i>Allen v. State</i> , 118 Wn.2d 753, 826 P.2d 200 (1992)	25
<i>Ashmore v. Estate of Duff</i> , 165 Wn.2d 948, 205 P.3d 111 (2009)	36
<i>Bartley-Williams v. Kendall</i> , 134 Wn. App. 95, 138 P.3d 1103 (2006)	36, 37
<i>Bellevue School District v. Brazier</i> , 103 Wn.2d 111, 691 P.2d 178 (1984).	20, 23, 36
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).	9, 10, 21
<i>Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).	16
<i>Brown v. Park Place Homes Realty, Inc.</i> , 48 Wn. App. 554, 739 P.2d 1188 (1987).	13
<i>Cheswold Volunteer Fire Co. v. Lambertson Const. Co.</i> , 489 A.2d 413 (Del., 1984).	24
<i>City of Seattle v. St. John</i> , 166 Wn.2d 941, 215 P.3d 194 (2009)	47
<i>DeAtley v. Barnett</i> , 127 Wn. App. 478, 112 P.3d 540 (2005).	37
<i>Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.</i> , 105 Wn.2d 878, 719 P.2d 120 (1986)	19

<i>Duran v. Henderson</i> , 71 S.W.3d 833 (Tex.App.-Texarkana, 2002)	24
<i>Folsom v. County of Spokane</i> , 111 Wn.2d 256, 759 P.2d 1196 (1988)	41
<i>Haslund v. City of Seattle</i> , 86 Wn.2d 607, 547 P.2d 1221 (1976)	25
<i>Hudson v. Condon</i> , 101 Wn. App. 866, 6 P.3d 615 (2000)	25
<i>Indus. Indem. Co. v. Wick Constr. Co.</i> , 680 P.2d 1100 (Alaska 1984)	43
<i>J. A. Campbell Co. v. Holsum Baking Co.</i> , 15 Wn.2d 239, 130 P.2d 333 (1942)	24
<i>Janisch v. Mullins</i> , 1 Wn. App. 393, 461 P.2d 895 (1969)	19, 31
<i>Kramarecvcky v. Dep't of Soc. & Health Servs.</i> , 122 Wn.2d 738, 863 P.2d 535 (1993)	47
<i>Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.</i> , 150 Wn. App. 1, 206 P.3d 1255 (2009)	7
<i>Lieberman v. Cambridge Partners, L.L.C.</i> , 432 F.3d 482 (3d Cir., 2005)	24
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000)	38, 39
<i>Martin County v. R.K. Stewart & Son, Inc.</i> , 306 S.E.2d 118 (N.C. Ct. App. 1983)	44-46
<i>Mike M. Johnson, Inc. v. County of Spokane</i> , 150 Wn.2d 375, 78 P.3d 161 (2003)	4, 32
<i>Northwest Independent Forest Mfrs. v. Department of Labor and Industries</i> , 78 Wn. App. 707, 899 P.2d 6 (1995)	29
<i>O'Neill v. Farmers Ins. Co. of Washington</i> , 124 Wn. App. 516, 125 P.3d 134 (2004)	39

<i>Oltman v. Holland America Line USA, Inc.</i> , 163 Wn.2d 236, 178 P.3d 981 (2008)	39
<i>Parkridge Associates, Ltd v. Ledcor Industries, Inc.</i> , 113 Wn. App. 592, 54 P.3d 225 (2002)	13-15, 19
<i>Peninsula Methodist Homes and Hospitals, Inc. v. Architect’s Studio, Inc.</i> , No. C.A. 83C-AU-118, 1985 WL 634831.	45
<i>Richter v. Trimberger</i> , 50 Wn. App. 780, 750 P.2d 1279 (1988).	13
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005)	40
<i>Rodriguez v. Niemeyer</i> , 23 Wn. App. 398, 595 P.2d 952 (1979)	32
<i>Seven Gables Corp. v. MGM/UA Entm’t Co.</i> , 106 Wn.2d 1, 721 P.2d (1986)	16
<i>Smith v. Showalter</i> , 47 Wn. App. 245, 734 P.2d 928 (1987)	15
<i>South Tacoma Way, LLC v. State</i> , 169 Wn.2d 118, 233 P.3d 871 (2010).	22
<i>Stone & Webster Engineering Corp. v. Duquesne Light Co.</i> , 79 F. Supp. 2d 1 (D.Mass., 2000).	24
<i>Streeter-Dybdahl v. Nguyet Huynh</i> , 157 Wn. App. 408, 236 P.3d 986 (2010)	39
<i>Tanner Elec. Co-op. v. Puget Sound Power & Light Co.</i> , 128 Wn.2d 656, 911 P.2d 1301 (1996)	8, 22
<i>Universal/Land Const. Co. v. City of Spokane</i> , 49 Wn. App. 634, 745 P.2d 53 (1987).	9
<i>Ward v. Hinkleman</i> , 37 Wash. 375, 79 P. 956 (1905).	28
<i>Warfield v. Alaniz</i> , 453 F. Supp. 2d 1118 (D.Ariz., 2006).	24

<i>Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.,</i> 165 Wn.2d 679, 202 P.3d 924 (2009)	2, 35, 48, 49
---	---------------

Statutes:

RCW 4.16.040	1
RCW 4.16.160	22, 23, 48-50
RCW 4.16.300	13, 14, 19, 35
RCW 4.16.310	Passim
RCW 4.16.326	4, 7, 34-36

Other Authority:

1986 Tort Reform Act	22
Article 13.7	Passim
The Construction Industry Formbook, Section 5.08 (1979)	43
<i>Restatement (Third) of Agency</i> , § 5.03	28
Werner Sabo, Legal Guide to AIA Documents, Section 4,82 (4 th Ed. 1998)	9

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Huber, Hunt & Nichols-Kiewit Construction (“Hunt Kiewit”) completed construction of Safeco Field on July 1, 1999. More than six years later – no earlier than September 2005 – the appellants (hereafter “Mariners”)¹ discovered alleged defects in the intumescent paint at the stadium. In late 2006 the Mariners sued Hunt Kiewit, alleging that Hunt Kiewit was responsible for the alleged defects. In response, Hunt Kiewit disputed there are any defects in its work. Hunt Kiewit further asserted the affirmative defenses of the statute of limitations and the statute of repose.

Soon after the Mariners filed suit, Hunt Kiewit moved for summary judgment on the grounds that the Mariners’ claims were time barred by the six-year statute of limitations contained in RCW 4.16.040. In support of its argument that the statute of limitations had lapsed, Hunt Kiewit cited Article 13.7.1 of the prime contract entitled “Commencement of Statutory Limitations Period.” That article provides that for purposes of commencing the “applicable statute of limitations,” claims accrue no later than substantial completion. The trial court agreed that the Mariners’

¹ For ease of reference, the Appellant Washington State Major League Baseball Stadium Public Facilities District is referred to individually as “the PFD,” The Baseball Club of Seattle, L.P. is referred to as “the Baseball Club,” and both are referred to collectively as “the Mariners.” The Defendants are collectively referred to as “Hunt Kiewit”.

claims were untimely per the statute of limitations, and dismissed the case.

The Supreme Court reversed, holding that the Mariners' claims were brought for the benefit of the state, and therefore *exempt* from the applicable statute of limitations. *Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 165 Wn.2d 679, 694, 202 P.3d 924 (2009). Per the Supreme Court decision, however, it follows that if the Mariners' claims are exempt from the statute of limitations, then Article 13.7.1 – and the accrual language contained therein – no longer applies.

Upon remand, Hunt Kiewit moved for summary judgment on several grounds, including the six-year construction statute of repose contained in RCW 4.16.310. The statute of repose provides that all claims must *accrue* within six years of substantial completion, or they are time barred. And although claims brought “for the benefit of the state” may be exempt from statutes of limitation, such claims are *specifically covered* by the statute of repose.

The record before the trial court demonstrated that the Mariners' claims did not accrue until at least September 2005, more than six years after substantial completion of the stadium. This was confirmed by the Mariners' counsel during oral argument, who acknowledged that “the moment of actual discovery was probably September.”

Recognizing that their September 2005 discovery means that *the claim did not accrue within the six year repose period*, the Mariners contend that certain language in Article 13.7.1 – “Commencement of Statutory Limitations Period” – still applies. According to the Mariners, the accrual language in Article 13.7.1 *also* applies to the statute of repose, even though Article 13.7.1 specifically applies to statutes of limitation, and does not mention or refer to statutes of repose. The Mariners contend that *all* claims accrue upon substantial completion, regardless of whether the statute of limitations is enforceable, and regardless of when the alleged defect is discovered.

The Mariners’ current position not only contradicts the plain language of Article 13.7.1, it is utterly inconsistent with the plain language of statute of repose, which specifically applies to claims brought for the benefit of the state. Furthermore, the Mariners’ position is utterly inconsistent with the relief which they sought from the Supreme Court. Having convinced the Supreme Court that this claim is exempt from the applicable statute of limitations, the Mariners still rely upon selective language in Article 13.7.1, the contract statute of limitations provision.

This Court must reject the Mariners’ ploy. Because of the Supreme Court ruling that this claim is for the benefit of the state, the contract statute of limitations provision does not apply. In contrast, the

statute of repose is unequivocal: it specifically applies to claims brought for the benefit of the state.

Moreover, as the Mariners admit in the record, Article 13.7 is an industry standard provision intended to *limit* liability. But if the statute of limitations accrual language in 13.7.1 is applied without a corresponding statute of limitations, Article 13.7.1 is turned from a shield into a sword. Such an interpretation would strip public works contractors of the protections of the statute of repose and subject them to unlimited liability. Neither case law nor sound public policy supports such an interpretation.

There are several additional grounds upon which to affirm the trial court. The Mariners' position also contradicts the plain language of RCW 4.16.326(1)(g), which bars all construction defect claims that have not accrued and been filed within six years of substantial completion. There is no dispute that the Mariners' claim is not exempt from application of this statute, which is neither a statute of limitation or repose.

In addition, the Mariners failed to comply with the contractual requirements and time limits applicable to this claim. As discussed herein, the Mariners' failure to follow these procedures provides independent grounds to affirm the trial court per the principles of *Mike M. Johnson v. County of Spokane* and its progeny.

Finally, the trial court also dismissed Hunt Kiewit's third party

claims against subcontractors Herrick Steel and Long Painting, on the grounds that if the Mariners' claims are time barred, then Hunt Kiewit's third party claims are as well. For the reasons set forth herein, if the trial court's dismissal of the Mariners' claims is reversed, then the dismissal of Hunt Kiewit's third party claims against the subcontractors must also be reversed as well.

II. CONDITIONAL ASSIGNMENT OF ERROR

If the trial court erred in dismissing the Mariners' cause of action against Hunt Kiewit, then the trial court likewise erred in dismissing Hunt Kiewit's third party claims against Long Painting and Herrick Steel.

III. ISSUES PERTAINING TO THE CONDITIONAL ASSIGNMENT OF ERROR

1. Whether the contractual flow-down provisions in the parties' contracts make Herrick Steel and Long Painting liable to Hunt Kiewit to the same extent that Hunt Kiewit is liable to the PFD, such that if the PFD's claims are not time barred, then neither are Hunt Kiewit's.

2. Whether Hunt Kiewit's third party claims against Herrick Steel and Long Painting are brought "for the benefit of the state" where Hunt Kiewit asserts pass through claims for its liability to the PFD, if any.

IV. STATEMENT OF THE CASE

On September 30, 1996, Hunt Kiewit entered into an agreement

with the PFD for construction of Safeco Field (the “Agreement”). CP 35-163.² The Agreement was drafted by the PFD’s counsel, based upon an American Institute of Architects standard form. *Id.*

The Agreement contained an AIA standard provision (Article 13.7.1) establishing when statutes of limitation commence to run. CP 156. According to the Mariners, the intent of this provision was to “protect[] the contractor from extended periods of liability.” CP 940. The Contract also contained claims and dispute resolution procedures (the “Claim Call Process”) applicable to claims by either party. CP 991-999.

Hunt Kiewit successfully performed the work, and Substantial Completion was certified on July 1, 1999. CP 166-167. In February, 2005, Club president Chuck Armstrong noticed some paint blisters on certain steel beams at the Terrace Club Level. The blisters were on the layer of paint applied over the intumescent. However, Armstrong did not know the cause of the blisters or realize that there was a problem with the intumescent paint. The Club was unaware of this information until at least September 2005, several months after the sixth anniversary of Substantial Completion, and the date that the statute of repose expired. As the Mariners’ counsel admitted to the trial court:

MR. PARNASS: I think it’s fair to say the record shows

² Hunt Kiewit subcontracted most of the work on the project, as required by law.

that the PFD and the Mariners were not aware of the specific technical cause of the failure until September or October...The actual aha light bulb moment going off was- ***- the moment of actual discovery was probably September.***

RP 44-45 (10/15/09) (emphasis added).

In January, 2006, the Mariners notified Hunt Kiewit of a problem. CP 865. The Mariners filed a claim against Hunt Kiewit on April 19, 2006. CP 868-874. It is undisputed that the Mariners did not comply with the Claim Call Process prior to filing suit on August 14, 2006. CP 1-8.

In September, 2009, Hunt Kiewit moved for summary judgment based upon the statute of repose, as well as RCW 4.16.326(1)(g) and the Mariners' failure to comply with the contract claim provisions. The Mariners were provided with a full opportunity to brief and argue against Hunt Kiewit's motion (CP 932-958), and the trial court initially denied Hunt Kiewit's motion. CP 1413-1414. In February 2010, following a hearing on a summary judgment motion brought by Herrick Steel, the trial court revised its previous order, and granted Hunt Kiewit's motion for summary judgment.³ CP 2087. The trial court also granted summary

³ Although they do not assign error to the issue, the Mariners incorrectly contend that the trial court's *sua sponte* revision of its earlier denial of summary judgment to Hunt Kiewit was improper. Under CR 54(b), a decision that adjudicates fewer than all of the claims in an action is not final unless the court makes written findings that there is no just reason for delay for the entry of judgment. In the absence of such findings, a judgment resolving fewer than all claims as to fewer than all parties "is subject to revision at any time." *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 14, 206 P.3d 1255 (2009) (upholding a trial court's *sua sponte* revision to a damages award).

judgment to Herrick Steel and Long Painting, thereby disposing of all claims in the case.

V. ARGUMENT

Both parties agree that Article 13.7 of the Agreement was intended to protect Hunt Kiewit from extended periods of liability. However, in light of the Supreme Court's holding that this action is exempt from the statute of limitations, Article 13.7 cannot be selectively read to establish accrual for purposes of the statute of repose. Rather, once it is determined that an action is exempt from the statute of limitations, the accrual provision Article 13.7 should be enforced to give effect to the intent of the parties to relieve Hunt Kiewit from liability after July 1, 2005. Alternatively, Article 13.7 must be ignored as inapplicable, or the accrual provision must be stricken as unenforceable. To do otherwise would subvert the intent of Article 13.7 and subject Hunt Kiewit to unending liability in contravention of public policy.

A. Article 13.7 was intended by both parties to extinguish Hunt Kiewit's liability as of July 1, 2005, and should be enforced accordingly.

The touchstone of contract interpretation is the parties' intent, determined in light of the context of the agreement and "the reasonableness of respective interpretations advocated by the parties." *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656,

674, 911 P.2d 1301 (1996).“Contractual language also must be interpreted in light of existing statutes and rules of law,” *id.*, as well as standard usage of trade. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

It cannot be reasonably disputed that the PFD drafted⁴ the agreement based upon AIA standard forms (A111 and A201). Such forms have been widely used and interpreted, and are accepted in the industry. The PFD included the following statute of limitations provision in the General Conditions:

Commencement of Statutory Limitations Period

As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and 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 156. This provision is unaltered from the A201 form. As such, reference to AIA commentary and authorities regarding this provision is directly relevant. The context and intent of Article 13.7, the statute of limitations provision, is clear. As one commentator has explained:

All states fix the time period after which parties cannot file suit.... [I]t is important for the parties and the court to be able to determine when the period starts *so that the cutoff*

⁴ To the extent there is any question regarding which party has the more reasonable interpretation of the contract, any doubt must be resolved in favor of Hunt Kiewit. Contract language is to be interpreted most strongly against the party who drafted the contract. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 638, 745 P.2d 53 (1987); see also *Berg*, 115 Wn.2d at 677.

date can be calculated. That is the purpose of this section.

Werner Sabo, Legal Guide to AIA Documents § 4.82, at 395 (4th ed.1998)

(emphasis added). The commentary cited by the Mariners agrees:

The *statute of limitations* in all jurisdictions starts when a claim has accrued... These provisions *eliminate the discovery rule* by providing that the *statute of limitations* begins on the date of the contractually specified occurrence.

Appellants' Brief at 33 (citations omitted) (emphasis added).

These authorities make it clear that the intent of Article 13.7 is to prevent application of the discovery rule, and to establish a date certain, beyond which the contractor will no longer be subject to claims under the contract.

At the trial court, the Mariners agreed that Article 13.7 is intended to limit the contractor's liability. CP 940. ("For the contractor, Section 13.7 abrogates any discovery rule and *thereby protects the contractor from extended periods of liability.*"). And in their brief before this Court, the Mariners explain,

Section 13.7 eliminates the "discovery rule," i.e., the principle that a cause of action accrues "when a plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the facts that give rise to the claim." "This language [in the standard AIA contract] precludes application of the discovery rule; indeed, that is its obvious intent."

Appellants' Brief at 33 (citations omitted) (alterations in original).

Thus, there is no dispute that the parties intended Article 13.7 to protect the contractor from extended liability by providing a date certain after which time Hunt Kiewit would not be subject to liability. That date is clear: July 1, 2005, six years after substantial completion. To the extent that this provision can still be applied, it must be construed to give effect to this intent. This Court should hold that Hunt Kiewit's liability under the Agreement was extinguished as of July 1, 2005, pursuant to the Agreement as construed and interpreted in light of the intent of the parties.

B. Although this action is exempt from the statute of limitations, the statute of repose still applies.

The trial court correctly dismissed the Mariners' claims because they failed to accrue within the six-year statute of repose. The statute of repose commenced on substantial completion because all post-completion work was unrelated to the Mariners' cause of action. And because Article 13.7 does not circumvent the statute of repose, the Mariners' claims failed to accrue before the statute of repose lapsed.

1. The statute of repose began to run upon substantial completion, because none of Hunt Kiewit's post-completion services gave rise to the Mariners' cause of action.

The construction statute of repose begins to run either upon substantial completion or termination of services:

Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is

later, shall be barred....The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

RCW 4.16.310. Substantial Completion occurred on July 1, 1999, CP 166-167, at which time the statute of repose began to run. In their opposition to Hunt Kiewit's motion for summary judgment, the Mariners did not dispute this point. *See generally* CP 932 – et seq..

After the close of the hearing, the Mariners orally requested to submit additional evidence. RP 82-83 (10/15/09). Hunt Kiewit objected, and the Court refused to consider new evidence. Nevertheless, the Mariners then submitted nearly 300 pages of additional documents and argued for the first time that Hunt Kiewit performed “punch work” into early 2000. The Mariners contend that these documents demonstrate that the statute of repose began to run in February, 2000, as opposed to July 1, 1999. CP 1120-1410.

The trial court properly refused to consider the Mariners’ untimely evidence. The Mariners fail to explain why this evidence or the associated legal argument was not presented in its response papers. There is nothing improper about a trial court refusing to consider untimely affidavits, and nothing improper about a trial court refusing to consider new evidence upon a motion for reconsideration that could have been discovered prior to

the trial court's ruling. *Brown v. Park Place Homes Realty, Inc.*, 48 Wn.App. 554, 559, 739 P.2d 1188 (1987); *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988). Hunt Kiewit objected to the inclusion of additional evidence and argument after the conclusion of the hearing, and the trial court sustained that objection. RP 83 (10/15/19). The Court was perfectly justified in refusing to consider nearly 300 pages of additional evidence submitted after the close of the hearing.

However, even if the Mariners' untimely documents are considered, they do not establish that their claims *arise from* the punch list work. RCW 4.16.300 provides that the statute of repose applies to "all claims or causes of action of any kind ... *arising from* such person having constructed ... any improvement upon real property." Thus, if a claimant contends that the statute of repose begins to run from "termination of services" after substantial completion, there must be a nexus between the post-completion services and the claim at issue. *Parkridge Associates, Ltd v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 54 P.3d 225 (2002).

In *Parkridge*, third party defendant Freeman argued that it only provided punch list work past the Substantial Completion date, and that this work did not give rise to the cause of action. Ledcor provided evidence that the punch list work *did* give rise to the cause of action. The Court held as follows:

Ledcor argues and provides evidence that the work Freeman performed at Parkridge until December 5, 1994 qualifies as “services” for purposes of RCW 4.16.300. In response, Freeman argues that there must be a nexus between the services performed and the cause of action.

We agree with both contentions. The plain language of RCW 4.16.300, describing actions or claims “arising from” various services, shows that ***the services considered in this assessment must be those that gave rise to the cause of action.***

Id. at 599 (emphasis added).

The Mariners’ untimely documents fail to establish “a nexus between the services performed and the cause of action.” *Id.* The Mariners’ cause of action arose from the alleged selection and use of an incompatible zinc-based primer on exposed structural steel beams that were to receive a coating of intumescent paint. *Appellants’ Brief* at 7. This work was largely subcontracted out to Long Painting,⁵ who performed a wide range of painting work at the stadium. CP 519-588. Long Painting’s post-completion punch list and warranty work included such activities as patching spots that had been disturbed during the baseball season,⁶ painting doors and door frames,⁷ and miscellaneous

5 Herrick Steel shop-primed the structural steel with a zinc-based primer before it was shipped to the site for erection. However, by definition, this erection work was performed before Substantial Completion. Herrick Steel had no items remaining on the punch list. CP 1141.

6 CP 1323-1325, 1328, 1360, 1365, 1366, 1369, and 1377.

7 CP 1361, 1366 and 1380.

other surfaces.⁸ ***The Mariners have provided no evidence that Hunt Kiewit, Long Painting, or any other subcontractor performed work on the intumescent paint, or any priming or painting of exposed structural steel after substantial completion.*** The Mariners' untimely documents simply do not establish a nexus between the punch list work and the Mariners' claims.

The Mariners cite to *Smith v. Showalter*, 47 Wn. App. 245, 734 P.2d 928 (1987), and claim that that Court held "the statute of repose did not begin to run until the contractor terminated his services in 1981, even though the fire resulted from work completed in 1977." *Appellants' Brief* at 36. This is misleading: the *Showalter* Court actually held that both substantial completion and termination of services occurred on the same date in 1981. *Showalter*, 47 Wn. App. at 251. *Showalter* does not discuss the argument raised here and in *Parkridge*, that there must be a nexus between the final services and the cause of action. In *Showalter*, that issue was irrelevant because the "final services" in question did not post-date substantial completion.⁹

8 CP 1362, 1366, 1370, 1377, 1380, 1381 and 1391.

⁹ The Mariners also cite to *1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74, *aff'd* 144 Wn.2d 570 (2001), for the proposition that "termination of services" includes services required to move a project from "substantial completion" to "final completion." That case does not address the nexus requirement. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."

To survive summary judgment, the Mariners must do more than merely assert that a question of fact exists. Rather, the Mariners must provide probative, affirmative evidence sufficient to raise a material question of fact. *Seven Gables Corp. v. MGM/UA Ent't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The Mariners failed to do so. The Mariners' untimely documents do not change the fact that their claims arose from alleged conduct that occurred long before Substantial Completion, and that the statute of repose began to run on that date.¹⁰

2. The statute of repose lapsed on July 1, 2005, before the Mariners' claims accrued.

Because the statute of repose began to run upon substantial completion, the Mariners' cause of action had to accrue before July 1, 2005. The Mariners claim that their cause of action accrued either (1) upon substantial completion, in accordance with Article 13.7 of the Agreement, or (2) in February, 2005, when the Mariners first noticed paint blisters. Article 13.7 does not make the Mariners' cause of action accrue

Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1, 124 Wn. 2d 816, 824, 881 P.2d 986 (1994).

¹⁰ In addition, the Mariners cannot claim the benefit of the "termination of services" prong for the simple reason that the PFD never terminated Hunt Kiewit pursuant to the provisions of the Agreement. The statute does not define "termination of services." However, the industry-standard Agreement between the parties (based upon standard AIA form contracts) goes into great detail as to when a termination of services occurs. Termination occurs when the Owner, either for cause or for convenience, relieves a Contractor from further performance under the Contract. CP 158-161. It is undisputed that the termination provisions of the Agreement were never invoked.

upon substantial completion. The trial court correctly ruled that the statute of repose lapsed before the Mariners' cause of action had accrued.

a. Article 13.7 does not and cannot govern accrual for statute of repose purposes.

The Mariners argue that, pursuant to Article 13.7 of the Agreement, all causes of action accrued upon substantial completion. The Mariners claim that this is true both for purposes of the statute of limitations and the statute of repose.

The problem with this argument is that, as the Mariners admit, the purpose of Article 13.7 is to *limit liability* for both parties to the Agreement, and to protect the Contractor from extended periods of liability. However, in light of the Supreme Court's opinion that this action is exempt from the statute of limitations, this argument would produce a result opposite of the intent: namely, all causes of action would accrue (for statute of repose purposes) upon substantial completion, and because the statute of limitations does not apply to the PFD, the PFD would have an unlimited period of time to bring the action – no matter when the alleged defect was discovered. Under the Mariners' theory, there is literally no end to Hunt Kiewit's potential liability.

The result is that, where one party is exempt from the statute of limitations, a provision intended to protect a contractor has the effect of

actually stripping away all protections. The plain language of the provision does not allow for such a reading, but even if it did, the Court should refuse to enforce the provision as a violation of public policy, and as contrary to the clear intent of the parties.

(1) Article 13.7 refers and applies only to accrual for the purposes of the statute of limitations, not for the statute of repose.

Article 13.7 makes no reference to, and has no bearing upon, the statute of repose. The language in both the title and the provision itself deals exclusively with the statute of limitations. Courts, commentators, and even the Mariners agree: the intent of Article 13.7 is to eliminate the discovery rule where it is applied and provide a date certain for the end of liability.¹¹ As such, the provision assumes the existence of a corresponding statute of limitations. However, if a party to the contract is exempt from the statute of limitations, the provision does not apply to that party's claims. Otherwise, Article 13.7 is transformed from a provision designed to *protect* the Contractor from stale claims into a provision that effectively *eliminates all such protection*.

In light of the acknowledged intent of the provision, there is no

¹¹ As discussed in Section V.A above, the intent of the parties as to Article 13.7 is clear from the face of the document: namely, that all claims not brought within six years of substantial completion are barred under the terms of the Agreement. Hunt Kiewit believes that this intent can and should be enforced through dismissal of this action.

basis to extend it to include accrual for statute of repose purposes. The Mariners cite to *Parkridge*, supra, and suggest that it is “absurd on its face” to have two “accrual” dates: one for the statute of repose, and another for the statute of limitations. *Appellants’ Brief* at 24. Far from absurd, the notion has long been recognized by Washington courts. “The word ‘accrued’ does not necessarily mean the same in all contexts under all circumstances and for all purposes.” *Janisch v. Mullins*, 1 Wn.App. 393, 399, 461 P.2d 895 (1969). In fact, accrual for statute of repose purposes has been specifically linked to “discovery,” regardless of what constitutes accrual for statute of limitations purposes. “We have interpreted ‘accrue’ under RCW 4.16.300 and .310 to mean ‘discovery.’ ” *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 884, 719 P.2d 120 (1986).

Prior to the Court’s adoption of the discovery rule for construction defect cases,¹² Washington Courts held that construction defect claims accrue upon breach, not discovery. Nevertheless, Washington Courts have held that – at least for the purposes of the statute of repose – construction defect cases accrue upon discovery, not upon breach. *Del Guzzi, supra*.

However, as an alternative to this relief, Hunt Kiewit believes that Article 13.7 can be construed as addressing accrual for purposes of the statute of limitations only.

¹² *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 586-587, 146 P.3d 423 (2006)

The existence of two separate meanings for the term “accrual” is necessary to an understanding of the Supreme Court’s opinion in *Bellevue School District v. Brazier*, 103 Wn.2d 111, 691 P.2d 178 (1984). In *Brazier*, the Bellevue School District sued its Contractor for breach of contract for defects discovered fifteen years after substantial completion. The Contractor invoked the statute of repose as a defense, arguing that the defects were not discovered, and the cause of action did not accrue, within six years of substantial completion. Bellevue could have argued (as the Mariners do here) that the date of discovery was irrelevant, because the cause of action “accrued” upon breach. However, this was not Bellevue’s argument.¹³ Rather, the parties and the Court all understood that, for statute of repose purposes, “accrual” is synonymous with “discovery.”

This was also the Legislature’s understanding of the term when it amended the statute of repose in 1986 in response to *Brazier*. The Legislature expressly intended to eliminate the State’s cause of action against a contractor for construction defects not discovered within six years. CP 883. However, the amendment would have been ineffective unless the legislature understood “accrual” under RCW 4.16.310 to mean “discovery”. This is because, prior to *Vertecs, supra*, the State’s cause of

¹³ Instead, the District argued, and the Court decided, that it was exempt from the statute of repose under the nullum tempus doctrine.

action for undiscovered construction defects accrued upon breach, and hence the statute of repose (which only requires a cause of action to “accrue” within six years of substantial completion) would *always* be satisfied to contract actions. The Legislature must have intended “accrue” under the statute of repose to mean “discover,” regardless of what it meant in other contexts.

The Mariners argue that Article 13.7 is simply meant to eliminate use of the discovery rule. However, as discussed above, Washington courts and legislators interpreted “accrue” to mean “discovery” *even before* the discovery rule was adopted. Even before the discovery rule, the statute of repose barred all actions not “discovered” within six years.

Courts prefer reasonable interpretations over those that would make the contract imprudent. *Berg*, 115 Wn.2d at 672. To interpret “accrue” under Article 13.7 as applying to the statute of repose would render this contract unreasonable and imprudent. No contractor would voluntarily give up its only statutory protections and subject itself to unending, unlimited liability. The trial court was correct in ruling that the accrual referred to in Article 13.7 did not constitute accrual for purposes of the statute of repose.

(2) To apply Article 13.7 to accrual for purposes of the statute of repose would violate the public policy announced in the Tort Reform Act, and would exceed the authority of the PFD.

If Article 13.7 is interpreted to apply to the statute of repose, it is void because the PFD lacked authority to circumvent the legislative pronouncements in RCW 4.16.310 and 4.16.160. “[A] contract that is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.” *Tanner Elec.*, 128 Wn.2d at 669. Moreover, an administrative agency has only those powers expressly granted or necessarily implied by statute. When a state agency enters into a contract that violates public policy and a statutory scheme, the contract is void and unenforceable. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 125-26, 233 P.3d 871 (2010).

RCW 4.16.310 and 4.16.160 were amended in the 1986 Tort Reform Act to specifically apply the statute of repose defense to actions brought for the benefit of the state. This reflects an effort to balance the interests of the State with the unlimited risk faced by contractors in providing services to the public.¹⁴ The Act legislatively overruled the

¹⁴ “[P]rofessionals, such as architects and engineers, face ... difficult choices, financial instability, and unlimited risk in providing services to the public.” Preamble to the Tort Reform Act, 1986 c 305.

Supreme Court's earlier decision in *Brazier, supra*,¹⁵ by specifically eliminating the State's ability to bring an action for any breach of contract not discovered¹⁶ within six years of substantial completion.

Ten years later, the legislature enacted the Stadium Act to create a Public Facilities District to build Safeco Field. (Laws of 1995, 3d Spec. Sess., ch. 1.) Nothing in the Stadium Act authorized the PFD to contract around this public policy decision. Nevertheless, the PFD now contends that this is exactly what it did. If that is the effect of the provision when applied to the PFD, then the PFD lacked authority to enter into this contract. RCW 4.16.310 and 4.16.160 were amended specifically to remove a contractor's "unlimited risk in providing services to the public." 1986 c 305. Now, the PFD attempts to subject Hunt Kiewit to that unlimited risk by purporting to contract around the statute of repose. Such an attempt is contrary to the terms and policy of an express legislative enactment and is illegal and unenforceable.

The provision is void for yet another public policy reason. While parties can contract for shorter limitation periods than are allowed under

15 "The rule announced in the decision in *Bellevue School District v. Brazier* is legislatively reversed. The six year 'accrual' requirement in construction cases is made applicable to the state." CP 883.

16 Or, in the terms of the Supreme Court, "discover[ed] the salient facts underlying the elements of the cause of action." *Vertecs*, 158 Wn.2d at 576.

state statute, they cannot contract to invalidate or waive a statute of limitations, prospectively and indefinitely, in the underlying contract itself. Any waiver must be for a definite period of time, and must be brought after a dispute has arisen. See 1 A.L.R. 2d 1445; *J. A. Campbell Co. v. Holsum Baking Co.*, 15 Wn.2d 239, 255, 130 P.2d 333 (1942).

The same reasoning holds true for the statute of repose. Any agreement in advance, in the underlying contract, to indefinitely waive a statute of repose violates the policy behind the creation of the statute of repose, and is void. Many jurisdictions go so far as to hold that a statute of repose is never waivable – even by express agreement of the parties.¹⁷

The Mariners point to case law to argue that Article 13.7 has been upheld by many courts, and that it does not violate public policy. Without exception, those cases uphold the acknowledged intent of the provision: to protect contractors from *extended periods of liability* – an intent consistent with the broader public policy goals of ensuring finality for contracting parties. But here, the Mariners turn the intent of this provision on its head. Not a single case cited by the Mariners stands for the proposition that a

¹⁷ *Stone & Webster Engineering Corp. v. Duquesne Light Co.*, 79 F. Supp. 2d 1, 8 -9 (D.Mass., 2000) (written agreement purporting to waive statute of repose for an open-ended time period was void); see also *Duran v. Henderson*, 71 S.W.3d 833, 837-838 (2002); *Lieberman v. Cambridge Partners, L.L.C.*, 432 F.3d 482, 490 (3d Cir., 2005); *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1130 (D.Ariz., 2006); *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 421 (Del., 1984).

contract may be enforced in a manner that is inconsistent with its obvious intent, that opens its parties up to unlimited liability, and that is inconsistent with express legislative limitations upon sovereign immunity.

By enacting RCW 4.16.310, the legislature made an important state policy decision to limit the liability faced by contractors – *even in actions for the benefit of the state*. The PFD may not contract around this policy in an attempt to impose unlimited liability upon Hunt Kiewit.

b. The Mariners lacked knowledge of the salient facts until after the statute of repose lapsed.

The trial court properly found that the Mariners' action had not accrued prior to July 1, 2005. While the determination of when a plaintiff discovered its cause of action is a question of fact, the issue can be decided as a matter of law if reasonable minds could reach but one conclusion. *Allen v. State*, 118 Wn.2d 753, 760, P.2d 200 (1992); *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-621, 547 P.2d 1221 (1976); *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000). Under the discovery rule:

the cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action. This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action.

Vertecs, 158 Wn.2d at 575-576 (internal citations omitted).

The timeline regarding the discovery of the salient facts is undisputed:

- 2/05 Club president Chuck Armstrong noticed paint blisters on a few steel beams on the Terrace Club Level. CP 804.
- 3/7/05 The Club's painting contractor¹⁸ proposed remediation for the blisters "in the same manner" as the Club's ordinary maintenance work. CP 815.
- 5/13/05 A Club employee asks the Club consultant questions regarding the blistering fireproofing. CP 1056.
- 7/1/05 This date marked the sixth anniversary of Substantial Completion, and the date that the Statute of Repose expired.
- 9/8/05 The Club notified the PFD of the intumescent paint repairs, stating "***this is NOT the type of maintenance contemplated by the lease as being our responsibility.***" CP 818-819.
- 9/19/05 Club employee opened one of the blisters and observed that the intumescent paint had separated from the primer coat. CP 822.

18 By coincidence, at this time the Club's own painting contractor (for normal maintenance issues) was Long Painting, the same painting subcontractor that Hunt Kiewit used on the project. The Mariners try to sensationalize this point, but none of the evidence they submit suggests that Long Painting thought that this was anything other than the same sort of maintenance issue they had been asked to fix before, and there is no evidence to suggest that Long Painting had any remaining business relationship with Hunt Kiewit.

- 10/10/05 Manufacturer of intumescent stated that potential causes of the problem were an epoxy primer that had been allowed to cure for too long, or by a zinc-rich primer that reacted with the steel beams. CP 825.
- 10/14/05 The Club took samples of the primer to determine its composition. CP 827.
- 10/27/05 Northwest Laboratories identified the primer as MC Zinc. Custom Coating Consultants, LLC noted that MC Zinc was not approved for use with the intumescent. CP 836.

The Mariners' claim failed to accrue before July 1, 2005, because the undisputed facts show that the PFD was unaware of the alleged defects until two months after that date. However, even if the Club's knowledge is attributable to the PFD, it is still uncontested that the Mariners lacked knowledge of the "salient facts" until after the statute of repose expired. For these reasons, the trial court's decision should be upheld.

(1) The Club's pre-July knowledge of the paint blisters is not attributable to the PFD.

The PFD alleges that Hunt Kiewit breached the Agreement by failing to use a compatible primer. The Club was not a party to the Agreement, and brings this action by way of assignment from the PFD. As such, it is not the Club's knowledge that is relevant for purposes of

accrual, but the PFD's knowledge.

The PFD had no knowledge of the paint blisters, or that it might be asked to pay for their repair, until September 8, 2005 – more than two months after the statute of repose had lapsed. As such, the statute of repose bars this action.

The Mariners are expected to argue that, pursuant to the operations agreement between the PFD and the Club, the Club acted as the PFD's agent for maintenance purposes. There is no support in the record for this claim. However, even if a limited agency existed, the Club was solely responsible for normal maintenance obligations, and could not obtain reimbursement for such expenses. CP 310-311. The PFD was obliged only to reimburse the Club for extraordinary expenses. CP 326.

Under the law, the Club's knowledge as of July 1, 2005 was not attributable to the PFD. An agent's knowledge of facts is only imputed to a principal where (1) the fact is material to the agent's duties to the principal, and (2) the agent is not acting adversely to the principal or for its own purposes. *Restatement (Third) of Agency*, § 5.03. Neither condition applies here. Prior to July 1, 2005, the Club believed the paint problem was merely a normal maintenance obligation within the scope of its own repair responsibilities as tenant. *Ward v. Hinkleman*, 37 Wash. 375, 380-381, 79 P. 956 (1905). Further, because only unanticipated

capital costs were reimbursable under the lease, the question of whether the paint blisters constituted normal maintenance or unanticipated capital costs was a point of contention between the Club and the PFD. Because an adversarial relationship existed over the classification of the expense, the Club's knowledge was not imputed to the PFD. *Id.*

Only on September 8, 2005 did the Club place the PFD on notice that it would be asked to reimburse the Club for this work. This also marks the first date that the PFD was informed of the paint blisters. For purposes of the PFD, September 8, 2005 is the earliest date that this cause of action could have accrued. Because the Club stands in the shoes of the PFD for purposes of this suit, September 8, 2005 also marks the earliest accrual date for the Mariners.

(2) The Club's pre-July knowledge is insufficient to constitute accrual.

“A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.” *Northwest Independent Forest Mfrs. v. Department of Labor and Industries*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). The Mariners' claim accrued when they learned the “salient facts” regarding these elements – i.e., when they discovered (1) that Hunt Kiewit breached the contract, and (2) that this breach caused the Mariners damage.

The Mariners acknowledged, in oral argument before the trial court, that as of July 1, 2005 they had not learned the salient facts regarding their cause of action:

THE COURT: You'll concede for the record delamination was not discovered, or the issue of delamination between the primer and the intumescent paint had not been discovered in May of '05? ...

MR. PARNASS: I think it's fair to say the record shows that the PFD and the Mariners were not aware of the specific technical cause of the failure until September or October.

THE COURT: Okay.

MR. PARNASS: With the zinc.

THE COURT: That they used the zinc primer, the gloss.

MR. PARNASS: The actual aha light bulb moment going off was -- the moment of actual discovery was probably September.

RP 44-45 (10/15/09). The Mariners' sole argument, at oral argument and now before this Court, is that even though they did not *actually* know the salient facts until after the statute of repose lapsed, they were nevertheless *charged with notice* under the rule of *Vertecs*. In simple terms, the Mariners argue that because they *should have discovered* the salient facts before July 1, 2005, their claims accrued before that date.

This argument is absurd and nonsensical. The "constructive notice" provisions of *Vertecs* constitute a *limitation* upon a plaintiff's right

to maintain an action, not an *expansion* of that right. Much like laches, the principle was designed to encourage diligence by starting the clock on the statute of limitations earlier for plaintiffs who remained willfully blind for too long, while preserving the rights of “innocent” plaintiffs. *Janisch*, 1 Wn. App. at 399 (“We seek to construe the word ‘accrued’ in a manner consistent with a prima facie purpose to compel the exercise of a right within a reasonable time”). The principle is inapplicable in the unique circumstances here, where the Mariners *want* an accrual date as early as possible because their action is exempt from the statute of limitations. Constructive notice is intended as a shield to help defendants avoid protracted liability; the Mariners may not use it as a sword. Application of this principle to the statute of repose would not encourage diligence on the part of the Mariners, but rather, would reward their ignorance.

Regardless of when they *could have discovered* the salient facts underlying their cause of action, the Mariners acknowledge that they did not discover the salient facts until (at the earliest) September, 2005 – months after the statute of repose expired. RP 44-45 (10/15/09). This does not trigger accrual for purposes of the statute of repose.

The statute has a broad scope barring All causes of action that do not accrue within 6 years after substantial completion or termination of any of the specified services, *whether the damage was or could have been discovered within that period.*

Rodriguez v. Niemeyer, 23 Wn. App. 398, 401, 595 P.2d 952 (1979) (citations omitted) (emphasis added). The trial court properly dismissed the Mariners' claims.

C. The Mariners waived this action by failing to provide notice and follow dispute resolution provisions as required in the Agreement.

Under the holding in *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 389, 78 P.3d 161 (2003), parties to a construction contract must fulfill required contractual notice and dispute resolution provisions or risk having their claims waived. Washington courts have had no difficulty applying this rule to dismiss claims made by contractors. There is no principled reason to take a different approach here.

The Agreement between the PFD and Hunt Kiewit contained a provision that required *both parties* to provide notice of any claim “within 21 days after the claimant first recognizes, or a reasonable contractor exercising normal prudence and judgment should have recognized, the condition giving rise to the Claim.” CP 118. “Failure to file claims within the prescribed time period shall result in the waiver and/or release of such a claim.” *Id.*

The Mariners argue that, because of an amendment to the claim process, the PFD was not bound by the 21-day notice provision. This amendment implemented a “Claim Call process” tied to the monthly

progress payments and a Disputes Review Board to address problems arising during construction. CP 991-999.

The modifications cited by the Mariners relate *only* to claims arising *during construction of the Stadium*. The modifications do not apply to post-completion claims. Pursuant to the express language of the amendment to the Agreement “[t]he following modifies and amends the General Conditions of the Contract ... *to the extent that such documents are inconsistent.*” CP 991 (emphasis added). Since the amendment dealt only with the claims process *during construction*, it is inapplicable to post-completion claims such as the one here and the 21-day notice provisions therefore continue to apply to claims occurring after the close of the Claim Call Process. There is no dispute that the Mariners waited more than 21 days before filing its claim. The Mariners waived their right to recover pursuant to the Agreement.

Even if this Court determines that the amendment did alter the PFD’s post-completion contractual notice obligations, the PFD *still* has not complied with these modified mandatory provisions. The PFD failed to raise its claims in the course of a Claim Call, did not seek resolution of its claims before the Disputes Review Board, and initiated this litigation without complying with clear conditions precedent to the same. Regardless of which dispute resolution provisions apply, the PFD has

waived its claims by failing to comply.

D. The Comparative Fault Statute bars the Mariners' action.

The trial court's dismissal was also appropriate under RCW 4.16.326(1)(g). That statute excuses a contractor

from any obligation, damage, loss, or liability for those defined activities under the principles of comparative fault ... (g) To the extent that ... *an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations.*

RCW 4.16.326(1)(g) (emphasis added). This is not a statute of limitations or a statute of repose. It provides a contractor with an affirmative defense by which it can completely eliminate its liability where an owner has not brought an action within six years. Even measured from "termination of services," the Mariners' claim is still barred pursuant to RCW 4.16.326(1)(g), because the action was not filed until August, 2006. For purposes of this statute, it is simply irrelevant whether the cause of action was brought for the benefit of the state.

1. The Mariners' cause of action accrued after the statute went into effect.

The Mariners correctly point out that RCW 4.16.326 only applies to claims that accrued after the statute went into effect on July 23, 2003. *Appellants' Brief* at 44. As discussed at great length above, the Mariners' claims did not accrue until their discovery of the salient facts underlying their cause of action in 2005. RCW 4.16.326 applies.

2. The applicable statute of limitations for contract actions is six years.

Contrary to the Mariners' argument, the *2009 Opinion* did not hold that there is no "applicable statute of limitations." Rather, the Court found the Mariners' action *exempt* from the applicable statute of limitations:

the action by the PFD and the Mariners against Hunt Kiewit ... qualifies under the 'for the benefit of the state' *exemption* to the *six year contract statute of limitations* in RCW 4.16.160.

PFD, 165 Wn.2d at 694. The Supreme Court understood that the "applicable statute of limitations" was the six-year limitations period for contract actions.

Moreover, the statute itself *specifies* what is meant by "applicable statute of limitations":

In contract actions the applicable contract statute of limitations expires, regardless of discovery, *six years* after termination of the services enumerated in RCW 4.16.300, whichever is later.

RCW 4.16.326(1)(g) (emphasis added).

3. RCW 4.16.326 does not repeal the *nullum tempus* doctrine.

While RCW 4.16.326(1)(g) makes reference to the statute of limitations applicable to actions based upon breach of contract, it is not a statute of limitations or a statute of repose. *Vertecs*, 158 Wn.2d at 583-584. Rather, it creates a right, on the part of a defendant to an action, to

raise a legislatively crafted defense.

As the *Brazier* court noted, the *nullum tempus* doctrine does not apply to “[t]hose statutes which create a substantive right unknown to the common law and in which time is made an inherent element of the right so created.” *Brazier*, 103 Wn.2d at 117-118. RCW 4.16.326 creates just such a right. Dismissal was proper pursuant to RCW 4.16.326.

E. Hunt Kiewit is not barred from raising the statute of repose as a defense.

Because of the obvious problems that the statute of repose presents to the Mariners’ claims, the Mariners argue that Hunt Kiewit is precluded from using the statute of repose as an affirmative defense, even though it was timely raised and preserved in Hunt Kiewit’s answer. Each of the Mariners’ arguments is without merit.

1. Judicial estoppel does not apply because Hunt Kiewit has neither adopted an inconsistent position nor been given an unfair advantage.

The Mariners contend that Hunt Kiewit made statements in the earlier appeal that judicially estop it from raising the statute of repose defense. Judicial estoppel requires a showing of three elements: (1) an inconsistent position, (2) that generates an unfair advantage, and (3) that defrauds the court. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009). Appellate courts review a trial court’s determination regarding judicial estoppel for abuse of discretion. *Bartley-Williams v.*

Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006).

First, Hunt Kiewit's statute of repose argument is not inconsistent with its earlier position. Hunt Kiewit's position is, and has always been, that neither the language of the Agreement nor the law subjects it to unlimited liability. Hunt Kiewit is not repudiating this position. Rather, Hunt Kiewit argues that if this action is exempt from the statute of limitations, then the language of the Agreement must be properly construed and applied to give effect to the intent of the parties. The two positions are not inconsistent.

Moreover, there is no "unfair advantage." Judicial estoppel is imposed only where a litigant succeeds in obtaining relief pursuant to one theory, and then seeks additional relief based upon an inconsistent theory. *DeAtley v. Barnett*, 127 Wn. App. 478, 483, 112 P.3d 540 (2005). Inherent in the doctrine of judicial estoppel is the requirement that a party **won the relief that it requested** in the earlier forum.¹⁹ Here, Hunt Kiewit was unsuccessful with its statute of limitations defense: the earlier dismissal of its action was overturned on appeal. There is no "unfair advantage" in allowing Hunt Kiewit to argue an alternative theory where

¹⁹ The irony here is that the Mariners, who successfully argued at the Supreme Court that their claim is exempt from the statute of limitations, now attempt to enforce the statute of limitations provision in the Agreement. It is the Mariners, not Hunt Kiewit, who should be judicially estopped from changing their position and attempting to invoke Article 13.7.

its initial request for relief was denied.²⁰

Finally, judicial estoppel requires a finding that the allegedly inconsistent position in some way deceived the Court. However, the allegedly inconsistent position – that the statute of repose was inapplicable to the current case – was not deceptive, and was irrelevant to the issue before the Court. The purpose of the statements was merely to focus the Supreme Court on the issue at bar: the applicability of the Statute of Limitations. Regardless of whether the statute of repose applied, and regardless of when the claims accrued, the Supreme Court’s holding would be the same: the Mariners and the PFD were exempt from the statute of limitations.

2. Waiver does not apply, because Hunt Kiewit’s conduct was not inconsistent and the Mariners were not prejudiced.

The Mariners also claim that Hunt Kiewit waived its statute of repose defense. Under Washington law, an affirmative defense can be waived if (1) a party is dilatory²¹ in asserting the defense, or (2) a party engages in conduct inconsistent with the defense. *Lybbert v. Grant*

²⁰ The “unfair advantage” prong is also inapplicable for another reason: it was third-party defendant Herrick Steel that initially raised the statute of repose defense in its Motion for Summary Judgment. The trial court agreed that the statute of repose barred action against it. It would be manifestly unfair to dismiss an action against some defendants, but not against all, merely because one had raised an earlier, unsuccessful motion based upon a different position.

²¹ Hunt Kiewit *immediately* asserted the statute of repose defense in its answer to the Mariners’ complaint. CP 12. It was not dilatory.

County, 141 Wn.2d 29, 1 P.3d 1124 (2000).

The *Lybbert* rule is intended to prevent “trial by ambush.” It is almost uniformly applied where a defendant asserts an insufficiency of process defense, yet waits until the statute of limitations has passed before bringing a motion to dismiss. *See, e.g., Lybbert, supra; see also Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 178 P.3d 981 (2008); *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010); *O’Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 125 P.3d 134 (2004). Waiver has been rejected, however, where the failure to assert a defense has not resulted in any harm to the other party – either because the defense was raised in time for the plaintiff to correct the deficiency, or because the deficiency was already fatal before the answer to the complaint was due. *Id.*

The harm element of the waiver defense is not present here, because the statute of repose lapsed well before the Mariners brought suit. There was no “ambush.” Hunt Kiewit is merely pursuing an alternative legal argument, as it is entitled to do.

Moreover, as discussed above, Hunt Kiewit’s early conduct is not inconsistent with its earlier position. Hunt Kiewit has only ever tried to enforce the intent of Article 13.7 of the Agreement: to protect against liability beyond six years after substantial completion. Even the Mariners

agree that this was the intent. Hunt Kiewit is merely asking the Court to enforce the intent of the parties in light of the Supreme Court's ruling.

3. Law of the Case does not apply, because the Supreme Court did not enunciate a principle of law related to the accrual of the action, the interpretation of the Agreement, or the applicability of the statute of repose.

The Mariners also contend that the Law of the Case doctrine applies to preclude Hunt Kiewit from invoking the statute of repose. “[T]he law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

The law of the case doctrine is not applicable here, because the Supreme Court did not “enunciate a principle of law” regarding either the statute of repose, the accrual date for the Mariners’ claims, or the intent of the parties. The only conclusion of law reached by the Supreme Court was the very limited conclusion that this action is exempt from the statute of limitations. This holding is not inconsistent with, and does not preclude, Hunt Kiewit’s current argument that the accrual language in the Agreement is unenforceable.

4. Hunt Kiewit is allowed to pursue alternative defenses.

Defendants are allowed to present alternative defenses and to refine their legal theories as discovery progresses, the facts of the claims

become more clear, and as rulings from the court narrow the issues in dispute. There is nothing improper or inconsistent in Hunt Kiewit's pursuit of the statute of repose defense in an attempt to secure the protections intended by Article 13.7 of the Agreement.²²

VI. CONDITIONAL CROSS-APPEAL

The trial court also dismissed Hunt Kiewit's third party claims against Long and Herrick, pursuant to Motions for Summary Judgment filed by those parties. As discussed above, the trial court's dismissal of the Mariners' action was appropriate. However, if this Court finds that the PFD retains the right to bring this action against Hunt Kiewit, then Hunt Kiewit retains the right to pursue its claims against its Subcontractors.

A. **The flow-down provisions of the Subcontracts bind the subcontractors to Hunt Kiewit to the same degree that Hunt Kiewit is bound to the PFD.**

In large scale construction projects, it is of the utmost importance that a prime contractor such as Hunt Kiewit be able to "pass down" liabilities that may arise as a result of work performed by subcontractors. It is a fundamental principle of risk allocation that the party that is best able to control the risk (i.e., the subcontractor who performs the work)

²² The statements regarding the statute of repose cited by the Mariners' from Hunt Kiewit's earlier briefing were arguments for purposes of summary judgment, and not a stipulation that the statute of repose applied as a matter of law. However, even if Hunt Kiewit had so stipulated, "the long-standing rule [is] that stipulations of law are not binding." *Folsom v. County of Spokane*, 111 Wn.2d 256, 261, 759 P.2d 1196 (1988). It is not for the litigants to decide the law, but for this Court.

should likewise be the one to bear the risk. Without the ability to allocate liability to the party who can best control the risk, a prime contractor can find itself paying for the mistakes of its subcontractor.

The Prime Contract between the PFD and Hunt Kiewit **required** Hunt Kiewit to use “flow down” provisions:

By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and **to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these documents, assumes toward the Owner and Architect.**

CP 127 (emphasis added). Consistent with this requirement, the Long and Herrick subcontracts contain a number of “flow down” provisions making the Subcontractors’ liability to Hunt Kiewit coextensive with Hunt Kiewit’s liability to the PFD. For example:

[T]he Subcontractor warrants and guarantees the Work covered by this Subcontract and agrees to make good, at its own expense, any defect in materials or workmanship which may occur or develop **prior to the Contractor’s release from responsibility to the Owner** therefor;

CP 525 and CP 1804, Section 11 (e) (emphasis added).

[T]he Subcontractor assumes toward the Contractor **all obligations and responsibilities that the Contractor assumes toward the Owner and others**, as set forth in the Prime Contract, insofar as applicable, generally or specifically, to Subcontractor’s Work.

Id., Section 11 (f) (emphasis added).

The provisions in this Subcontract could not be more clear. Long Painting and Herrick are liable to Hunt Kiewit to the same extent that Hunt Kiewit is liable to the PFD, and until Hunt Kiewit is released from responsibility to the PFD. There are no qualifications and there are no exceptions. Long Painting and Herrick unconditionally assumed “*all* of the obligations and responsibilities” which Hunt Kiewit owed to the PFD. *Id.* The parties clearly intended that Herrick’s and Long Painting’s liability be coextensive with Hunt Kiewit’s.

Flow-down provisions such as those found in the Subcontracts are standard in the construction industry. When such clauses are used,

the same rights and duties should flow equally from the owner down through the general contractor to the subcontractor, as well as flowing from the subcontractor up through the general contractor to the owner.

Indus. Indem. Co. v. Wick Constr. Co., 680 P.2d 1100, 1104 (Alaska 1984) (quoting R. Cushman, *The Construction Industry Formbook*, § 5.08 (1979)). “The parties to the subcontractor thus assume the correlative position of the parties to the prime contract.” *Id.*

Here, the Subcontractors and Hunt Kiewit expressly allocated risk through the use of the flow-down provisions to make their obligations and responsibilities to each other consistent with the obligations and responsibilities running between the PFD and Hunt Kiewit. Such

provisions are valid and enforceable under Washington law. *3A Indus., Inc. v. Turner Construction Co.* 71 Wn. App. 407, 869 P.2d 65 (1993) (holding that arbitration provisions flow down to subcontractors).

The “flow down” provisions of the Subcontract leave no doubt. While the parties may not have been able to envision precisely the circumstances under which Hunt Kiewit might be liable to the PFD, Long Painting and Herrick unequivocally and unconditionally agreed to assume all obligations and responsibilities to the PFD, and agreed to be bound to Hunt Kiewit to the same extent that Hunt Kiewit was bound to the PFD. The Subcontract contained no limits or qualifications to this assumption of obligations. Contracting parties may allocate risks as they see fit, and the Court should give effect to that allocation of risk by allowing Hunt Kiewit’s claims against Long Painting and Herrick to proceed.

Courts in other jurisdictions have utilized the flow-down provision to ensure that a subcontractor remains liable to a prime contractor even when the claims against the subcontractor would otherwise have been time-barred. In *Martin County v. R.K. Stewart & Son, Inc.*, 306 S.E.2d 118 (N.C. Ct. App. 1983), Martin County contracted with R.K. Stewart & Son to build a hospital building, and Stewart subcontracted with Statesville Roofing and Heating. The county sued Stewart, and Stewart sued the subcontractor. The county’s claims and Stewart’s claims were

ostensibly barred by the statute of limitations, but because the county's contract with Stewart was under seal, it was exempt under North Carolina law from the statute of limitations. The subcontract, however, was not under seal, and the subcontractor won summary judgment due to the statute of limitations defense. On appeal, the Court held that, where the underlying contract is exempt from the statute of limitations, the broad flow down provisions of the subcontract rendered the subcontractor liable to the prime contractor, notwithstanding the fact that the statute of limitations had otherwise expired.

The *R.K. Stewart* Court's holding is persuasive, and closely mirrors the legal issues present here. The Court gave strong consideration to the broad flow down provisions of the Subcontract. In light of the express language of those provisions the Court held:

A plainer example of a subcontractor expressly assuming and being responsible for all of a building contractor's obligations to the owner with respect to the work subcontracted can scarcely be imagined. What these obligations are, we do not know, but what this part of the subcontract means is quite clearly that: ***If, after all this time, Stewart is contractually obligated to Martin County because of the roofing job Statesville did, then Statesville is to the same degree and same extent still bound to Stewart***

Id. at 119 (emphasis added); see also *Peninsula Methodist Homes and Hospitals, Inc. v. Architect's Studio, Inc.*, No. C.A. 83C-AU-118, 1985

WL 634831 (Del. Super. Aug. 28, 1985) (refusing to bar action against subcontractor on statute of limitations grounds where contractor remained liable to the owner).

The same analysis applies here. Long Painting, Herrick and Hunt Kiewit are sophisticated business parties that entered into a contract containing various risk-allocation provisions intended to make all obligations and responsibilities consistent between the parties involved. To paraphrase the words of the *R.K. Stewart* court: A plainer example of a subcontractor expressly assuming and being responsible for all of a building contractor's obligations to the owner with respect to the work subcontracted can scarcely be imagined. *If, after all this time, Hunt Kiewit is contractually obligated to the PFD because of work performed by the Subcontractors, then the Subcontractors are to the same degree and same extent still bound to Hunt Kiewit.*

B. The subcontractors are equitably estopped from invoking any limitation upon Hunt Kiewit's action.

The Subcontractors' affirmative defenses relating to the statute of limitations and the statute of repose must be rejected pursuant to the principles of equitable estoppel.

Under the principle of equitable estoppel, a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon....

The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

City of Seattle v. St. John, 166 Wn.2d 941, 948-949, 215 P.3d 194 (2009) (quoting *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993)) (internal quotation marks omitted).

The elements of estoppel are met here. In 1998, Long Painting and Herrick entered into subcontracts with Hunt Kiewit, in which the Subcontractors agreed to "make good...any defect in materials or workmanship which may occur or develop prior to the Contractor's release from responsibility to the Owner therefore," and to "assume[] toward the Contractor all obligations and responsibilities that the Contractor assumes toward the Owner." CP 525 and CP 1804. Hunt Kiewit relied upon these agreements in awarding the job to the Subcontractors. Hunt Kiewit would not have entered into the Subcontracts without these representations; in fact, Hunt Kiewit was contractually obligated, in the Prime Contract, to require just these assurances from subcontractors on the project. CP 127.

Herrick and Long Painting made contractual representations in 1998 that are inconsistent with their current attempts to avoid liability.

The Subcontractors now deny that their obligations are coextensive with Hunt Kiewit's, and suggest instead that Hunt Kiewit should bear liability for any Subcontractor mistakes. This position is inconsistent with their earlier contractual representations, and it would be inequitable to allow the Subcontractors to change their position now, after they have received the benefits of the Subcontract.

Hunt Kiewit and the Subcontractors allocated the risk for unanticipated liabilities and contracted for coextensive liability: Long Painting and Herrick would be liable to Hunt Kiewit to the same extent that Hunt Kiewit was liable to the PFD. It would be unfair, inequitable, and contradict the language of the subcontractors to allow the Subcontractors to reverse this position and subject Hunt Kiewit to sole responsibility for their breaches.

C. Hunt Kiewit brings its third-party claims on behalf of, and for the benefit of, the State.

The Washington Supreme Court ruled that this action was exempt from the statute of limitations, and remanded to the trial court "to consider whether HK's third party claims should be treated the same as the PFD and Mariners claims under RCW 4.16.160." *PFD*, 165 Wn.2d at 695.

In answer to this question, Hunt Kiewit stands in the same position, *vis a vis* the Subcontractors, that the PFD stands in relation to

Hunt Kiewit. RCW 4.16.160 states, in pertinent part, that “there shall be no limitation to actions brought in the name *or for the benefit of* the state.” (Emphasis added.) There is no requirement that the State actually be a named party to the action. The only consideration is whether the action is brought “for the benefit of the state.” Indeed, the Supreme Court held that not only the PFD, but also the Club as assignees, qualify for the “benefit of the state” exception to the statute of limitations. *PFD*, 165 Wn.2d at 694 (“the action by the PFD and the Mariners ... qualifies under the ‘for the benefit of the state’ exemption”).

If the Club qualifies for the “benefit of the state” exception, there is no reason why Hunt Kiewit should not as well. As the Supreme Court has held, “[t]he ‘for the benefit of the state’ language in RCW 4.16.160 is properly understood to refer to the character or nature of municipal conduct rather than its effect.” *Id.*, at 686 (emphasis in original). Here, the Supreme Court has already determined that the PFD’s conduct is for the benefit of the state, and that its action is exempt from the applicable statute of limitations. Hunt Kiewit’s derivative third party action against Long Painting and Herrick Steel is based upon the exact same set of facts as the PFD’s action against Hunt Kiewit. Hunt Kiewit does not stand to profit from this breach of contract action. Instead, Hunt Kiewit seeks the return of money that properly belongs to the State, from the entities that

are ultimately responsible for the PFD's damages. If Hunt Kiewit recovers against Long Painting and Herrick Steel for breach of contract, every penny will go to the PFD. Hunt Kiewit does not bring this cause of action for its own benefit, but for the benefit of the State. Hunt Kiewit is entitled to the exemption from the statute of limitations contained in RCW 4.16.160.

VII. CONCLUSION

For the foregoing reasons, Hunt Kiewit respectfully requests the Court to affirm the decision of the trial court. In the event that the Court reverses the trial court's dismissal of the Mariners' claims, Hunt Kiewit respectfully request the Court to likewise reverse the dismissal of Hunt Kiewit's claims against Herrick Steel and Long Painting.

///

///

///

///

///

///

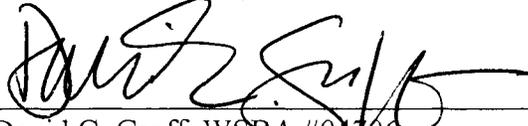
///

///

Dated this 15th day of October, 2010.

Respectfully submitted,

GROFF MURPHY, PLLC

A handwritten signature in black ink, appearing to read "David C. Groff", is written over a horizontal line.

David C. Groff, WSBA #04106

Michael P. Grace, WSBA #26091

Daniel C. Carmalt, WSBA # 36421

*Attorneys for Respondents/Third Party
Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on October 15, 2010,
true and correct copies of the foregoing document to the counsel of record
listed below, via the method indicated:

John Parnass
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 1700
Seattle, WA 98101
Ph. 206/622-3150
Fx. 206/628-7700
Attorney for Appellants

- Hand Delivery Via
Messenger Service
- First Class Mail
- Federal Express
- Facsimile

Richard L. Martens
Martens & Associates PS
705 Fifth Avenue South, Suite 150
Seattle, WA 98104-4436
Ph. 206/709-2999
Fx. 206/709-2722
*Attorney for Third-Party Defendant
Long Painting, Inc.*

- Hand Delivery Via
Messenger Service
- First Class Mail
- Federal Express
- Facsimile

Kenneth J. Cusack
Law Office of William J. O'Brien
999 Third Avenue, Suite 805
Seattle, WA 98104
Ph. 206/515-4800
Fx. 206/515-4848
*Attorney for Third-Party Defendant
Herrick Steel, Inc.*

- Hand Delivery Via
Messenger Service
- First Class Mail
- Federal Express
- Facsimile

DATED: October 15, 2010.


Sarah Damianick, Legal Assistant
Groff Murphy, PLLC