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No. 65139-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
SEATTLE

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

Appellants

v.

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

Respondents/Cross-Appellants

vs.

LONG PAINTING, INC. and HERRICK STEEL, INC.

Cross-Respondents

CROSS-RESPONDENT HERRICK STEEL, INC.'S BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Herrick Corporation, (previously referred to in this litigation as Herrick Steel and hereinafter referred to as "Herrick") subcontracted with Hunt Kiewit to supply and erect structural steel for Safeco Field. Herrick completed its work prior to the date of substantial completion, July 1, 1999.

In January of 2006, more than six years after substantial completion, the Appellants (hereinafter referred to as "Mariners") notified Hunt Kiewit of alleged problems with the intumescent paint applied to the structural steel members of Safeco Field. The Mariners filed suit against Hunt Kiewit on August 14, 2006.

Hunt Kiewit first notified Herrick of the Mariners' claim on February 20, 2006, and sued Herrick as a third-party defendant on October 13, 2006. Hunt Kiewit alleged claims for breach of contract and indemnity against Herrick.

Hunt Kiewit's breach of contract claims against Herrick accrued, at the earliest, when the Mariners notified Hunt Kiewit of problems with the intumescent paint applied to Herrick's structural steel components. Because Hunt Kiewit's breach of contract claims accrued more than six years after substantial completion, they are barred by the statute of repose.

On the other hand, if the Mariners are correct that Article 13.7.1 of the prime contract operates to have all breach of contract claims accruing as of the date of substantial completion, regardless of discovery, **and** if Hunt Kiewit is correct that Article 13.7.1 is incorporated by reference into Herrick's subcontract, then Hunt Kiewit's breach of contract claims against Herrick are barred by the running of the applicable six-year statute of limitations.

Hunt Kiewit's claims are also barred by RCW 4.16.326(1)(g).

Hunt Kiewit has not yet paid any damages to the Mariners, nor has Hunt Kiewit been adjudged legally liable to pay the Mariners any damages on account of the claims at issue here. Hunt Kiewit's claims for indemnity have therefore not yet accrued, and they are now barred by the statute of repose.

Hunt Kiewit argues that Herrick cannot claim the benefits of the statute of limitations, the statute of repose and of RCW 4.16.326(1)(g) because of the "flow down" provision in its subcontract. Hunt Kiewit argues that the "flow down" clauses provide that Herrick will remain liable to Hunt Kiewit for the same amount of time that Hunt Kiewit remains liable to the Mariners. The "flow down" clauses provide no such thing.

The term “flow down clauses” has become a short-hand way of referring to provisions in subcontracts that incorporate by reference provisions in prime contracts. Which parts of the prime contract that are incorporated into the subcontract depend upon the particular incorporation (or “flow down”) language used. Courts, including Washington’s, have distinguished between “flow down” clauses of a broad and general nature, and “flow down” clauses that are limited or specific. The “flow down” clauses in Herrick’s subcontract are specific, being limited to those parts of the prime contract related to Herrick’s work. The “flow down” clauses in Herrick’s subcontract do not incorporate by reference any procedural provisions of the prime contract and do not incorporate by reference any provisions in the prime contract related to statutes of limitation or statutes of repose.

Hunt Kiewit’s corollary argument that the Mariner’s exemption from the statute of limitations “flows down” so that Hunt Kiewit has the same exemption as to its claims against Herrick, is unsupported by the language of Herrick’s subcontract or by applicable law. Hunt Kiewit’s additional argument that it is independently exempt from the statute of limitations because its claims against Herrick are brought “for the benefit of the state” is unsupported by Washington law.

Finally, Hunt Kiewit's argument that Herrick is equitably estopped from asserting defenses based on time bars because of a warranty clause in its subcontract, is without legal support.

II. STATEMENT OF ISSUES

1. Whether the "flow down" clauses in Herrick's subcontract incorporate procedural provisions and/or limitation of action provisions of the prime contract.
2. Whether Hunt Kiewit's claims against Herrick are brought "for the benefit of the state."
3. Whether Herrick is equitably estopped from asserting defenses based upon time bars.

III. STATEMENT OF THE CASE

Herrick entered into a subcontract with Hunt Kiewit dated May 29, 1997. CP 1789-1820. Pursuant to that subcontract, Herrick agreed to supply and install structural steel to the Safeco Field project. Herrick completed its work prior to the date of substantial completion for the project. [See Hunt Kiewit's appellate brief footnote 5 at pg. 14]. The date of substantial completion was July 1, 1999. CP 166-67.

Hunt Kiewit first became aware of a problem involving Herrick's work in January of 2006, when the Mariners notified Hunt Kiewit of a

problem with paint blisters on the structural steel. CP 865. The Mariners thereafter sued Hunt Kiewit on August 14, 2006. CP 1-8, Hunt Kiewit brief at p. 7.

In the meantime, Hunt Kiewit first notified Herrick of the Mariners' claim on February 20, 2006. CP 1915. Hunt Kiewit sued Herrick on October 13, 2006 as a third-party defendant in the Mariner's lawsuit. CP 1825-31.

Herrick's subcontract contains two clauses that incorporate by reference certain portions of the prime contract. The first clause is contained in Section 1(b) of the subcontract and provides, in relevant part:

“...[A]ll of the aforesaid Prime Contract documents shall be considered a part of the Subcontract by reference thereto and the Subcontractor agrees to be bound to the Contractor by the terms and provisions therefore **so far as they apply to the Work hereinafter described**, unless otherwise provided herein.” [Emphasis added]. CP 1789

The second clause is found in Section 11 Indemnification, of the subcontract and provides, in relevant part :

“(f) [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.....**” Emphasis added. CP 1803-4.

The subcontract also includes a warranty clause within the indemnity section (Section 11) of the subcontract, and which Hunt Kiewit characterizes as a “flow down” provision, although it does not incorporate any provision of the prime contract into the subcontract.

“(e) [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 therefore;” CP 1804.

Herrick filed a motion for summary judgment based upon the statute of repose on January 15, 2010. CP 1474-88. In February of 2010 the trial court granted Herrick’s motion. CP 2087.

IV. ARGUMENT

Herrick agrees with Hunt Kiewit that Article 13.7 of the prime contract does not apply the statute of repose. For the reasons cited by Hunt Kiewit in its brief, Article 13.7 was clearly intended to eliminate any uncertainties that could arise by application of the discovery rule, and to thereby commence the running of the applicable statute of limitations on a date certain.

In addition, Article 13.7, whose purpose is to eliminate application of the discovery rule, has no relevance to the issue of when a

claim for indemnity accrues. Indemnity claims accrue when the indemnitee pays, or is adjudged legally liable to pay, damages to a third party. *Parkridge Associates, Ltd. v. Ledcor Industries*, 113 Wn.App. 592, 54 P.3d 225 (2002). The discovery rule plays no role in determining when an indemnity claim accrues. To apply Article 13.7 to hold that Hunt Kiewit's indemnity claim against Herrick accrued at the time of substantial completion, before a claim had even been made against Hunt Kiewit, would be nonsensical and fly in the face of well established Washington law.

Even if Article 13.7 could be construed to apply to the statute of repose and to indemnity claims, this provision of the prime contract was not incorporated by reference into Herrick's subcontract, as shown below.

Finally, even if Article 13.7 applied to the statute of repose, and even if it was incorporated by reference into Herrick's subcontract, Hunt Kiewit's claims against Herrick would be barred by the applicable statute of limitations. If all of Hunt Kiewit's claims against Herrick accrued at the time of substantial completion because of the operation of Article 13.7, then the statute of limitations expired on all of Hunt Kiewit's claims prior to its commencement of its lawsuit against Herrick.

A. The “flow down” provisions of Herrick’s subcontract limit the terms of the prime contract that are incorporated into the subcontract to those terms related to Herrick’s work.

Incorporation by reference allows the parties to a contract to incorporate contractual terms by reference to a separate agreement to which they are not parties. *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn.App. 488, 494, 7 P.3d 861 (2000), *review denied* 143 Wn.2d 1003 (2001). The burden of proving incorporation by reference is on the party claiming it. *State v. Ferro*, 64 Wn.App. 195, 198, 824 P.2d 500 (1992).

In order for incorporation by reference to be effective, it must be clear and unequivocal. *Seventh-Day Adventists*, *supra* at 494. It must be clear that the parties to the contract had knowledge of and assented to the incorporated terms. *Seventh-Day Adventists* at 494-95. Although a subcontract may incorporate by reference the terms of the prime contract generally, a subcontract may also limit the incorporation to a special purpose. *Simes Constr. Co. v. Wash. Pub. Power Sys.*, 28 Wn.App. 10, 15, 621 P.2d 1299 (1980), *review denied*, 95 Wn.2d 1012 (1981). If a subcontract incorporates the prime contract in a general and unlimited

manner, it incorporates both the prime contract's work specifications as well as the prime contract's procedural provisions. *Sime*, supra, at 14-15 (a subcontract's general and unlimited incorporation of a prime contract incorporated the procedural notice requirement in the prime contract). In *Sime*, the "flow down" provision was not limited to the work documents. Instead it provided:

"A. Subcontract documents include all the below listed items, all of which are incorporated herein and made part hereof by reference thereto.

1. The Contract between the Owner and the Contractor dated and the conditions thereof (general, supplementary and other conditions)."

Sime at 14.

In Herrick's subcontract, Paragraphs 1(b) and 11(f) are clearly limited to work documents by the express terms of those clauses. They do not provide for a general and unlimited incorporation of the prime contract documents.

In *3A Industries, Inc. v. Turner Construction Co.*, 71 Wn.App. 407, 869 P.2d 65 (1993), review denied 124 Wn.2d 1006 (1994), the Court of Appeals analyzed an incorporation clause that was limited to the subcontractor's work, but that contained an additional provision that the general contractor would have the same "rights and remedies" against the subcontractor as the owner had against the general contractor. *3A*

Industries at 66. There, the Court of Appeals observed, first, that incorporation clauses like Turner’s generally relate to the performance of a subcontractor’s work according to the specifications, not to the settlement of disputes or the right to sue. Secondly, the Court of Appeals held that only because of the addition of the “rights and remedies” language into the incorporation clause did the dispute resolution provisions of the prime contract become incorporated into the subcontract. Without that additional language, the incorporation clause would apply only to the manner of the subcontractor’s work. *3A Industries* at 70. The Court of Appeals determined that vague references to “rights, responsibilities, and obligations” found in the incorporation clauses was insufficient to incorporate dispute resolution clauses of the prime contract into the subcontract.

In Herrick’s subcontract, the incorporation clauses include only the vague references to “obligations and responsibilities”, and then only as they are applicable to Herrick’s work. The clauses in Herrick’s subcontract do not include the “rights and remedies” language found in *3A Industries*.

Other courts have also applied the limiting language of the “subcontractor’s work” to the meaning of incorporation clauses. In *U.S.*

ex rel. Quality Trust, Inc. v. Cajun Contractors, Inc., 486 F.Supp.2d 1255, 1263 (D. Kan. 2007) the court held that an incorporation clause similar to the clauses in Herrick's subcontract was not broad enough or specific enough to incorporate the Federal Acquisition Regulations that were part of the prime contract. In *Plum Creek Wastewater Authority v. Aqua-Aerobic Systems, Inc.*, 597 F.Supp.2d 1228 (D. Colo. 2009) the court held that an incorporation clause without the limiting language relating to the "subcontractor's work" was sufficiently broad to incorporate the forum selection provision of the prime contract; while in *Topro Services, Inc. v. McCarthy Western Constructors, Inc.*, 827 F.Supp. 666 (D. Colo. 1993) the court held that an incorporation clause with the limiting language relating to the "subcontractor's work" did not incorporate the forum selection clause of the prime contract. The court in *Plum Creek* specifically drew the distinction between its decision and the *Topro* court's decision, based upon the limiting language of the "subcontractor's work." *Plum Creek* at 1233.

Hunt Kiewit relies upon *Martin County v. R.K. Stewart & Son, Inc.*, 306 S.E.2d 118 (N.C. Ct. App. 1983) and *Peninsula Methodist Homes and Hospitals v. Architect's Studio, Inc.*, No. C.A. 83C-AU-118, 1985WL 634831 (Del. Super. Aug. 28, 1985) for the proposition that

flow down clauses incorporate time bars into the subcontract that are applicable between the general contractor and the owner. However, a review of the incorporation clauses in each of those cases reveals that the incorporation clauses there are materially different than the clauses in Herrick's subcontract. In *Martin County* the incorporation clause is not limited to the "subcontractor's work." *Martin County* at 557-58. In addition, the incorporation clause there includes the "rights, remedies, and redress" language similar to that in *3A Industries*, supra. As observed by the court in *3A Industries*, that additional language is material. The incorporation clause in *Peninsula Methodist* likewise does not contain the limiting language of the "subcontractor's work." *Peninsula Methodist* at 5.

Hunt Kiewit also cites *Indus. Indem. Co. v. Wick Constr. Co.*, 680 P.2d 1100, 1104 (Alaska 1984) for the general proposition flow down provisions result in the parties to the subcontract assuming correlative positions of the parties to the prime contract. However, what that case really discussed was that "flow down" provisions must be mutual to be enforceable. That is, the rights and obligations flowing down from the owner to the general contractor to the subcontractor must also flow up from the subcontractor to the general contractor.

Hunt Kiewit argues that Paragraph 11(e) of the Herrick's subcontract is a "flow down" provision. However, reading the plain language of the provision reveals that Paragraph 11(e) does not purport to incorporate any terms of the prime contract into the subcontract. The paragraph is a warranty provision by which Herrick agreed to make good at its own expense, any defect in its work "which may occur or develop prior to the Contractor's release from liability to the Owner therefore...." The paragraph merely describes the work that is being warranted as that work where defects occur prior to the Owner releasing Hunt Kiewit. The paragraph does not incorporate any provisions of the prime contract nor does it waive or modify any statute of repose, statute of limitation, or RCW 4.16.326(1)(g). In fact, the Owner released Hunt Kiewit on December 22, 1999. (CP 1127-1139).

The thrust of Hunt Kiewit's argument seems to be that the "flow down" provisions in Herrick's subcontract operate to incorporate the Mariners' exemption to the statute of limitations into Herrick's subcontract, thus providing Hunt Kiewit an exemption to the statute. Thus, Hunt Kiewit argues that Herrick "unequivocally and unconditionally agreed to assume all obligations and responsibilities to the PFD [Mariners], and agreed to be bound to Hunt Kiewit to the same

extent that Hunt Kiewit was bound to the PFD” (Hunt Kiewit brief at p. 44).

The problems with Hunt Kiewit’s argument are at least twofold. First, Hunt Kiewit cites no language in Herrick’s subcontract with such an expansive assumption of responsibilities. That is because there is no such language. The “flow down” provisions are specific and limited, as shown above. Second, the Mariners’ exemption from the statute of limitations is not based upon any term or provision of the prime contract. Instead, it is based upon the Washington Supreme Court’s interpretation of the exemption statute. Given the limited nature of the “flow down” clauses in Herrick’ subcontract, there is no exemption to incorporate into the subcontract.

B. Hunt Kiewit’s claims against Herrick are not brought for the “benefit of the state.”

The term “for the benefit of the state” as found in RCW 4.16.160 “is properly understood to refer to the character or nature of the municipal conduct.” *Washington Public Power Supply System v. General Elec. Co.*, 778 P.2d 1047, 1051(Wash.1989). “The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasi-

municipality of the state, in the same manner as to actions brought by private parties: [. . .] there shall be no limitation to actions brought in the name or for the benefit of the state,” Washington Revised Code. § 4.16.160. Municipal actions are brought “for the benefit of the state” when such actions “arise out of the exercise of powers traceable to the sovereign powers of the state which have been delegated to the municipality.” *Washington Public Power Supply System*, 778 P.2d. at 1049.

In ascertaining whether an action is brought “for the benefit of the state,” the court “may look to constitutional or statutory provisions indicating the sovereign nature of the power, and ... may consider ... traditional notions of powers which are inherent in the sovereign.” *City of Moses Lake v. U.S.*, 430 F. Supp. 2d 1164, 1171 (E.D. Wash. 2006). Also germane to this analysis are “the general powers and duties under which the municipality acted, the purpose of those powers, and whether the activity or its purpose is normally associated with private or sovereign concerns.” *City of Bainbridge Island v. Brennan*, 2005 WL 1705767, *13 (Wash. Ct. App. 2005). Generally, when a municipal corporation acts as an agent of the state to promote public welfare, it acts in a sovereign capacity. *City of Moses Lake*, 430

F.Supp.2d at 1171. However, when a municipal corporation regulates and administers the local and internal affairs of an incorporated territory, it acts in a proprietary capacity. *Id.* at 1171-72. The determining test in ascertaining whether an action falls within the governmental function or proprietary function is “whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity.” *Okeson v. City of Seattle*, 78 P.3d 1279, 1285 (Wash. 2003).

In *Neighbors & Friends of Viretta Park v. Miller*, 940 P.2d 286 (Wash. Ct. App. 1997), the plaintiffs, an unincorporated voluntary association, sought declaratory judgment against the City of Seattle and others. *Id.* at 287. As declaratory judgments must be filed within a specific period of limitation, the plaintiffs sought to seek refuge under the “for the benefit of the state” exception. *Id.* at 292. Plaintiffs alleged that they, and not the City, were acting on behalf of the sovereign. *Id.* The court held that “[a]n action is brought in the name or ‘for the benefit of the state’ only if it is a municipal action arising out of powers traceable to the sovereign powers of the state that have been delegated to the municipality . . . Moreover, [Plaintiff’s] depiction of itself as standing in the City’s shoes is inconsistent with

the real posture of this case. [Plaintiff] is acting for its members, not for the City.” *Id.* The court further held that the City was, in fact, defending itself from the action of the plaintiffs, and “[n]o court has ever held that citizens suing a municipality get the benefit of [for the benefit of the state exemption].” *Id.*

The cases demonstrate that the “for the benefit of the state” exception is applicable only when one is acting in a sovereign capacity or is carrying out a sovereign function. It is not applicable to a private entity when the private entity is acting for its own interests, especially when the private entity and the State are opposite parties in a law suit. Hunt Kiewit is not pursuing an indemnity against Herrick for the benefit of the State; the State stands to be made whole by Hunt Kiewit regardless of whether Herrick pays any monies to Hunt Kiewit. Hunt Kiewit is pursuing an indemnity against Herrick solely to mitigate its own loss in the event it is required to pay damages to the PFD. Accordingly, Hunt Kiewit is precluded from raising the exception “for the benefit for the state” as it is a private entity seeking indemnification from Herrick for its own benefit under a contractual obligation.

C. Herrick is not equitably estopped from asserting defenses bases upon time bars.

The elements of equitable estoppel are:

1. An admission, statement, or act inconsistent with the claim afterwards asserted;
2. An action by the other party on the faith of such admission, statement or act; and
3. Injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act.

Uznay v. Bevis, 161 P.3d 1040, 1046 (Wash. Ct. App. 2007). *See also*, *Tacoma Northpark, LLC v. NW, LLC*, 96 P.3d 454, 459 (Wash. Ct. App. 2004) (*quoting* 19 Am.Jur. § 34 p. 634). Estoppel is disfavored and the party asserting estoppel must demonstrate “each of its elements by clear, cogent and convincing evidence.” *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 881 P.2d 986, 994 (Wash. 1994) (*citing* *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wash.2d 726, 734, 853 P.2d 913 (1993)).

The party seeking to invoke equitable estoppel must be free from fault. *Harstad v. Frol*, 704 P.2d 638, 642 (Wash. Ct. App. 1985). This means that a party cannot base a claim of equitable estoppel “on conduct, omissions, or representations induced by his or

her own conduct, concealment, or representations.” *Kramarevcky v. Department of Social and Health Services*, 863 P.2d 535, 538 (Wash. 1993) n.1 (internal citations omitted). Equitable estoppel is based on the notion that a party is liable for the representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Renner v. City of Marysville*, 187 P.3d 283, 287 (Wash. Ct. App. 2008). It is not applicable when both the “parties can determine the law and have knowledge of the underlying facts.” *Schoonover v. State*, 64 P.3d 677, 681 (Wash. Ct. App. 2003). To demonstrate injury under equitable estoppel, the party seeking to invoke it must “establish he or she justifiably relied to his or her detriment on the words or conduct of another.” *In re Lopez*, 110 P.3d 764, 766 (Wash. Ct. App. 2005) (citing *Kramarevcky v. Department of Social and Health Services*, 122 Wash.2d 738, 747, 863 P.2d 535 (1993)). Reliance “must be justified.” *Irvin Water Dist. No. 6 v. Jackson Partnership*, 34 P.3d 840, 846 (Wash. Ct. App. 2001).

Equitable estoppel is applicable “when a party acts to his prejudice because of reasonable and good faith reliance on the assurances of another.” *Pacific Erectors, Inc. v. Gall Landau Young*

Const. Co., Inc., 813 P.2d 1243, 1250 (Wash. Ct. App.1991). Equitable estoppel is based upon a representation of existing or past facts. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 616 P.2d 644, 646 (Wash. 1980). Consequently, equitable estoppel is not applicable if the representations relied on are “matters of law, rather than fact.” *Laymon v. Washington State Dept. of Natural Resources*, 994 P.2d 232, 237 (Wash. Ct. App. 2000).

Finally, equitable estoppel is a “shield” and, therefore, is available only as a defense to claims against enforcement of a contract. *McCormick v. Lake Washington School Dist.*, 992 P.2d 511, 516 (Wash. Ct. App. 1999); *Klinke*, 616 P.2d at 646.

Herrick’s reliance on the statute of repose defense is not inconsistent with the “flow down” clauses in the Subcontract because Herrick never contemplated that the “flow down” clauses would preclude the application of the statute of repose and potentially subject Herrick to unlimited liability. Put another way, Herrick never represented that it would not seek to rely on the statute of repose if that statute became applicable.

Second, the representations relied on here by Hunt Kiewit are matters of law (under Hunt Kiewit's argument the “flow down”

provisions in the Subcontract incorporate the procedural provisions of the Prime Contract and therefore the statute of repose does not apply here) rather than fact, and, thus, are not subject to the equitable estoppel doctrine. *Laymon*, 994 P.2d at 237.

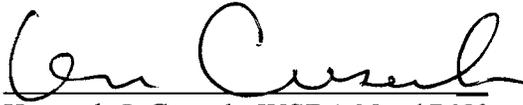
Finally, Hunt Kiewit is seeking to apply the doctrine of equitable estoppel not as a shield but as a sword to make Herrick liable to Hunt Kiewit to the same extent Hunt Kiewit is liable to the PFD under the Prime Contract. Hunt Kiewit is not using it as a defense to claims against enforcement of a contract. Accordingly, it cannot avail itself of the equitable estoppel doctrine. *McCormick*, 992 P.2d at 516.

V. CONCLUSION

For the foregoing reasons, Herrick respectfully requests the Court to affirm the decision of the trial court granting summary judgment to Herrick.

DATED this 14th day of January, 2011.

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No. 65139-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
SEATTLE

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

Appellants

v.

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

Respondents/Cross-Appellants,

v.

HERRICK STEEL CORPORATION,

Cross-Respondents.

CERTIFICATE OF SERVICE

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TO: Clerk of the Court

And TO: All Parties and Counsel of Record.

The undersigned declares as follows:

I am over the age of 18, not a party to this action, and competent to be a witness herein.

On the 14th day of January, 2011, I caused to be served and filed a true and correct copy of Cross-Respondent Herrick Steel, Inc.'s Brief as indicated:

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Signed and dated at Seattle, Washington this 14th day of January, 2011

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Sheela Schlorer