

No. 79001-9

SUPREME COURT  
OF THE STATE OF WASHINGTON

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AMERICAN SAFETY CASUALTY INSURANCE COMPANY, a  
foreign corporation,

Appellant/Respondent,

v.

CITY OF OLYMPIA, a Washington municipal corporation,

Respondent /Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER CITY OF OLYMPIA

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## I. OVERVIEW AND RELIEF REQUESTED

In *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003), this Court reaffirmed a clear rule of law with respect to construction contracts – a party alleging waiver of contractual protections must establish “unequivocal acts of conduct evidencing an intent to waive.” *Id.* at 391.<sup>1</sup> This ruling followed a line of similar decisions on the issue of waiver. See *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995); *Birkeland v. Corbett*, 51 Wn.2d 554, 320 P.2d 635 (1958).

The “unequivocal acts” rule is the correct rule. It provides essential certainty in the enforcement of construction contracts. It also avoids prolonged litigation when a contractor fails to follow a contractual claims procedure, and cannot produce manifest evidence of the contracting agency’s intent to waive. Where, as here, there is no unequivocal evidence of waiver, dismissal on summary judgment is appropriate.

The Court of Appeals’ decision in this case retreats from the clear rule articulated in *Mike M. Johnson*. The Court of Appeals characterized Olympia’s conduct as “equivocal,”<sup>2</sup> but nonetheless treated settlement

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<sup>1</sup> In *Mike M. Johnson*, this Court also addressed issues of actual notice and prejudice, which have been the subject of recent proposed (but rejected) legislation. See HB 1765, 60<sup>th</sup> Leg. (2007). Those issues are not present in or relevant to disposition of this case.

<sup>2</sup> *American Safety Casualty Ins. Co. v. Olympia*, 133 Wn. App. 649, 661, 662, 137 P.3d 865 (2006).

negotiations as purported evidence of waiver (notwithstanding Olympia's clear and repeated reservation of rights to rely on its contractual defenses). If allowed to stand, this decision would punish a contracting agency (and, derivatively, the agency's public constituents) for a willingness to consider settlement. Although the Court of Appeals acknowledged the *Mike M. Johnson* decision, it failed to follow it. In reality, this case is the same as *Mike M. Johnson*, and requires the same result.

Olympia respectfully requests this Court to reaffirm the rule of law it articulated four years ago in *Mike M. Johnson*, reverse the Court of Appeals, and reinstate the trial court's proper grant of summary judgment.

## **II. STATEMENT OF THE CASE**

### **A. The Parties.**

This case involves a construction contract between Katspan, Inc. and Olympia for the Downtown Olympia Segment of the LOTT Southern Connection Pipeline project (the "Project"). CP 61. LOTT Wastewater Management Partnership, now known as the LOTT Alliance ("LOTT"), managed the Project. *Id.*<sup>3</sup> American Safety issued statutory payment and performance bonds on the Project. CP 7. Ultimately, Katspan assigned its rights and obligations under the contract to American Safety due to financial and management difficulties. *Id.*

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

In 2000, Olympia awarded the contract to Katspan to construct the Project. CP 61-62, 70-71. From the outset, Katspan's work was plagued with problems. On several occasions, Olympia had to direct Katspan to correct deficient work. *Id.* In addition, Katspan failed to meet schedule requirements. CP 63, 76-77.

When Katspan's work was at last done, Olympia began preparations to close-out the Project and accept it as finally complete. CP 65. However, Katspan failed to execute the necessary documentation to obtain its final payment. CP 66. Accordingly, on July 2, 2001, Olympia initiated the unilateral close-out of the Project. CP 66, 103-04. Pursuant to the unilateral close-out provisions in the contract, Olympia accepted the Project as finally complete on September 10, 2001. CP 66-67, 106-07.

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

The contract between Olympia and Katspan was primarily comprised of the 2000 Washington State Department of Transportation Standard Specifications for Road, Bridge and Municipal Construction. CP 61-62, 70-71. Among other things, the contract set out specific

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<sup>3</sup> For ease of reference, except for direct quotes, Olympia will generally refer to LOTT as the named party, Olympia.

procedures for Katspan to protest the project engineer's decisions. *See* CP 46-47; Std. Spec. §1-04.5. Failure to comply with protest procedures "completely waives any claims for protested work." *Id.* Further, the contract provided a mechanism to appeal protest decisions. *See* CP 53; Std. Spec. §1-09.11. Failure to follow this mechanism bars Katspan's (and American Safety's) right to recovery. CP 53-54; Std. Spec. §§1-09.11(2), 1-09.12(2). Finally, the contract included a limitations period of 180 calendar days from the date of final acceptance of the Project. CP 55; Std. Spec. §1-09.11(3).

There is no dispute that both Katspan and American Safety failed to meet any of the contract requirements for additional compensation or to file a lawsuit. Nonetheless, on November 26, 2001, more than two months after the Project was accepted as finally complete, American Safety presented Olympia with a document entitled, "Request for Equitable Adjustment on Southern Connection Pipeline" (hereafter, "Request"). CP 116-321. This document requested \$767,995.02 for Katspan's alleged delays and extra costs. CP 119. Significantly, American Safety did not title this document as a "claim" under Std. Spec. §1-09.11(2). CP 116. Indeed, the Request did not comply with the requirements of a claim under Std. Spec. §1-04.5 or Std. Spec. §1-09.11. CP 370.

**D. Olympia's Attempts to Avoid Litigation.**

Olympia took no action on the Request until March 14, 2002. CP 68, 323, 333. On that date, counsel for American Safety left voicemail for Olympia's counsel asking if the parties could arrive at a quick solution. CP 323, 329. Olympia agreed to enter into discussions. CP 68. Olympia sent a follow-up letter to American Safety's counsel asking for information to support the Request. CP 345-47. This began a long process where American Safety repeatedly failed to provide Olympia with information necessary to evaluate the Request. *See* CP 323-24, 331, 334, 345-47, 349-50, 354-55, 373. Finally, after more than a year of American Safety failing to provide supporting information, Olympia sent a letter warning American Safety that it would no longer be willing to negotiate if American Safety did not provide the supporting information by May 16, 2003. CP 358. American Safety did not meet this deadline. CP 334. Thus, Olympia denied the unsupported Request. *Id.*

**E. Olympia Reserved Its Rights and Repeatedly Insisted upon Compliance with Protest and Claim Requirements.**

Olympia repeatedly reserved its rights under the contract during the construction and during Olympia's efforts to resolve this dispute through negotiations. Olympia sent Katspan two letters during the Project that contained express reservations of rights and referred to the specific contract

claims provisions. CP 326-27, 337-38. Olympia also sent two letters expressly confirming its reservation of rights after the Project was complete, as the parties attempted to negotiate. CP 354, 370. In total, Olympia reserved its rights in four separate letters. CP 326, 337, 354, 370. Nonetheless, on August 17, 2004 – more than a year after Olympia halted discussions on the Request, and 1,072 days after Olympia accepted the Project as finally complete – American Safety brought this lawsuit. CP 6.

### III. PROCEDURAL HISTORY

Shortly after American Safety instituted the lawsuit, Olympia moved for summary judgment. CP 19. The trial court granted Olympia's summary judgment motion and dismissed American Safety's lawsuit. The trial court ruled that undisputed evidence showed neither Katspan nor American Safety followed the protest and claim provisions in the contract and that American Safety filed its lawsuit well after the limitations period. CP 422, RP 24. In response to American Safety's argument that Olympia's willingness to enter into negotiations on the request was an implied waiver by conduct, the trial court correctly cited *Mike M. Johnson* for the proposition that "there's got to be an unequivocal, clear waiver." RP 24. The trial court ruled American Safety failed to present sufficient evidence that Olympia's conduct amounted to unequivocal acts demonstrating intent to waive contract requirements. *See id.*

The Court of Appeals reversed, holding American Safety's mere assertion of implied waiver created a material issue of fact and made summary judgment improper. *American Safety Casualty Ins. Co. v. Olympia*, 133 Wn. App. 649, 661, 662, 137 P.3d 865 (2006). The Court of Appeals held that implied waiver creates an issue of fact, notwithstanding decisions from this Court affirming summary determinations on issues of implied waiver. The Court of Appeals attempted to distinguish *Mike M. Johnson*, holding Spokane County in that case "continuously asserted that it did not intend a 'waiver of any claim or defense,'" *id.* at 658 (quoting *Mike M. Johnson*, 150 Wn.2d at 392), while Olympia "referred to strict compliance with the contract terms in only three instances." *Id.* at 659. The Court of Appeals also noted Spokane County and the contractor were negotiating more than one issue in *Mike M. Johnson*, while in this case, the parties were only negotiating the Request. *Id.* at 660.

Under the rule of *Mike M. Johnson*, the Court of Appeals erred as a matter of law. The trial court correctly granted summary judgment, and this Court should reverse the Court of Appeals and reinstate the trial court's decision.

#### IV. ARGUMENT

The trial court correctly dismissed American Safety's claims. The Court of Appeals, however, misapplied the law on implied waiver, as

stated by this Court in *Mike M. Johnson*, to hold an issue of fact existed precluding summary judgment. The Court of Appeals' attempt to distinguish *Mike M. Johnson* misses the mark. No evidence exists for a finder of fact to hold that Olympia unequivocally waived its contractual defenses. This Court should reverse the Court of Appeals and reinstate the trial court's dismissal of American Safety's lawsuit.

**A. Implied Waiver Requires Clear, Voluntary, and Unequivocal Conduct, Which Does Not Exist in this Case.**

This Court clearly stated the requirements for a waiver of contract provisions by conduct in *Mike M. Johnson*: Waiver by conduct “requires **unequivocal acts of conduct** evidencing an intent to waive.” 150 Wn.2d at 386 (emphasis added) (citing *Absher Constr. Co.*, 77 Wn. App. at 142; *Birkeland*, 51 Wn.2d at 565). This is not a new concept in Washington law. This Court has long held that absent a failure to comply with an express contractual duty, a party may waive its rights under a contract through conduct **only** if it amounts to “the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” *Birkeland*, 51 Wn.2d at 565:

The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them.

*Id.* “Intent cannot be inferred from doubtful or ambiguous factors.”

*Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

This rule makes sense. If, for example, a letter raising the prospect of settlement, but otherwise reserving all rights, qualifies as “unequivocal” evidence of waiver, then every construction protest case will proceed to trial. In the case of public projects such as this, the taxpayers will ultimately bear the burden of these litigation expenses and delays. Under *Mike M. Johnson*, Olympia did not waive its contractual defenses absent unequivocal evidence to the contrary. Particularly because Olympia repeatedly and expressly reserved its rights under the contract, American Safety cannot meet this burden as a matter of law. The Court of Appeals’ efforts to avoid the holding of *Mike M. Johnson* and manufacture a factual dispute are unavailing.

**B. The Facts of this Case Are the Same as in *Mike M. Johnson*, and Lead to the Same Result.**

Notwithstanding the Court of Appeals’ attempt to distinguish *Mike M. Johnson*, this case mirrors *Mike M. Johnson* in every relevant way. The number and substance of letters from Olympia reserving the right to rely on contractual defenses are virtually identical to the letters sent by Spokane County in *Mike M. Johnson*. Also, like in *Mike M. Johnson*, Olympia’s willingness to enter into negotiations with American Safety did not evidence any intent, much less unequivocal intent, to waive

contractual defenses.

**1. As in *Mike M. Johnson*, the Number and Substance of Letters from Olympia Do Not Evidence Waiver.**

The Court of Appeals attempted to distinguish this case from *Mike M. Johnson* based on the number and substance of communications between the public owner and the contractor in each case. This claimed distinction is illusory. In fact, Spokane County sent only five letters discussing their contractual rights, while Olympia sent four. CP 326, 337, 354, 370. Moreover, the substance and timing of the letters correspond almost exactly.

**a. Both Spokane County and Olympia reserved their rights during construction.**

Spokane County and Olympia sent the same number and substance of letters during construction of their respective projects, before presentation of the contractor's claims. Spokane County sent two letters informing the contractor that claims should be submitted according to the Standard Specifications. First, Spokane County sent a letter on July 16, 1998, advising the contractor that "if you believe that you have a claim for additional compensation within this contract please submit this claim per section 1-09.11(2) of the standard specifications (a copy of this section is enclosed) and it will be evaluated." *Mike M. Johnson*, 150 Wn.2d at 381. After a response from the contractor, asserting it was compiling a claim,

Spokane County replied, stating it had not received a claim as required under the Standard Specifications:

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

*Id.* at 381-82.

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

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

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

Despite Katspan's assertion that it has made specific and formal reservations of rights, LOTT has not received any such notification and does not believe that Katspan has met the requirements for protest of §1-04.5 of the Standard

Specifications... Thus, pursuant to §1-09.11, Katspan has waived any claims for which it did not comply with the requirements of §1-04.5.

CP 327. Thus, Olympia put the contractor on notice of intent to enforce its contractual rights, just as Spokane County did in *Mike M. Johnson*.

**b. Both Spokane County and Olympia reserved their rights at the outset of claim negotiations.**

When the contractor in each case proposed negotiation, Spokane County and Olympia each sent one letter stating their respective willingness to negotiate. Both letters stated *in general terms* that the owner was not waiving its defenses. In *Mike M. Johnson*, Spokane County sent its letter “in an effort to facilitate a means of timely completion of the project and settlement of the parties’ claims,” and stated it did not “intend [a] waiver of any claim or defense which the county might currently have against [MMJ].” *Mike M. Johnson*, 150 Wn.2d at 382-83. Olympia sent a similar letter reserving its defenses at the outset of negotiations: “Without waiving any of its defenses, LOTT has stated several times that it is willing to negotiate these claims in order to come to a quick resolution.” CP 354. Thus, just as in *Mike M. Johnson*, Olympia was transparent that settlement discussions were not a waiver of rights.

**c. Both Spokane County and Olympia reserved their rights during negotiations.**

When the parties began actual settlement discussions, Spokane

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

**d. Both Spokane County and Olympia sent letters that did not reserve their rights.**

In addition to Spokane County's five letters and Olympia's four letters reserving their respective rights and relying on the contract claims provisions, both owners sent letters that made no reservation of rights or mention of the contract claim procedures. Spokane County sent several such letters, as is evident from the overturned Court of Appeals' decision:

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

*Mike M. Johnson*, 112 Wn. App. at 470-71. Similarly, Olympia sent letters requesting additional information from American Safety that did

not expressly reserve its contractual defenses. *See* CP 357-58. In *Mike M. Johnson*, letters such as these did not preclude summary judgment, and should not do so here.

**e. The similar number and nature of the parties' reservations of rights demand the same result.**

Despite the virtually identical circumstances in this case and *Mike M. Johnson*, the Court of Appeals characterizes Spokane County (in *Mike M. Johnson*) as having “repeatedly” asserted its rights under the contract and as having “continually” asserted that it did not intend a waiver of its defenses. *American Safety*, 133 Wn. App. at 658. Spokane County sent a total of five such letters. These letters mirror the four letters sent by Olympia during construction and during settlement discussions.

In sum, the only difference between Olympia’s conduct in this case and Spokane County’s conduct in *Mike M. Johnson* is that Spokane County sent one additional letter during negotiations. But given that the rule requires *American Safety* to present “unequivocal” evidence, the fact that Olympia sent five letters instead of four is irrelevant.<sup>4</sup> The Court of Appeals was wrong to distinguish this case from *Mike M. Johnson* based

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<sup>4</sup> In support of its waiver argument in *Mike M. Johnson*, the contractor also presented evidence of Spokane County’s actual notice of the additional work that was the subject of the dispute, and the County’s direction to the contractor to continue performing the work. *See id.*, 150 Wn.2d at 386-89, 405 (Chambers, J. dissenting). These issues are not present in this case, as no such evidence exists on the record. Nonetheless, in *Mike M. Johnson*, this Court held that actual notice was insufficient to satisfy the requirements of the

on the number and substance of letters reserving contractual rights, and should be reversed on this ground alone.

**2. Settlement Should be Encouraged, Regardless of the Number of Claims.**

The Court of Appeals' attempt to distinguish *Mike M. Johnson* because the parties in that case were negotiating more than one issue further ignores this Court's sound reasoning behind its holding (namely, that settlement negotiations do not waive defenses):

Adopting MMJ's view would have the county unrealistically halt all discussions for fear of evidencing its intent to waive mandatory claim provisions under the contract. We decline to reach such result, as it would detrimentally impact all concerned.

*Mike M. Johnson*, 150 Wn.2d at 392. This reasoning – and the policy behind it in favor of negotiated settlements – applies regardless of whether parties have one issue or several issues. In fact, this Court has previously held that settlement discussions do not waive a defendant's right to rely on a contract's procedural claim requirements.

Before *Mike M. Johnson*, and under facts strikingly similar to this case, this Court held that negotiations do not waive the right to rely on contractual claims procedures. In *Dunlap v. West Constr. Co.*, 23 Wn.2d 827, 829, 162 P.2d 448 (1945), the plaintiff entered into a contract with a construction company that required it to provide written notice of a claim

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contract. *Id.* at 391.

within 30 days after the claim accrued and then provide a written proof of claim within an additional 30 days thereafter. The plaintiff did neither. *Id.* at 830. Instead, the plaintiff submitted a written claim several months after the claim accrued. *Id.* A representative of the construction company discussed the claim with the plaintiff's counsel and requested details of the demand. *Id.* This Court held that "negotiations, discussion, and efforts to arrive at a settlement" did not impliedly waive a contractual requirement to provide notice of claims. *Id.* at 830. Similarly, American Safety failed to meet the Contract's notice of claim requirements but submitted its Request anyway. Also similarly, Olympia requested additional information on the Request in an effort to arrive at settlement.<sup>5</sup> As this Court held in *Mike M. Johnson* and in *Dunlap*, such discussions, even if they progress to settlement negotiations, do not constitute a waiver of contractual claims procedures.

Moreover, the Court of Appeals contended that Spokane County would have hurt both parties if it terminated negotiations in *Mike M. Johnson*, whereas termination of negotiations in this case would have supposedly harmed American Safety alone. *American Safety*, 133 Wn. App. at 660. This contention is short-sighted and ignores the risks and

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<sup>5</sup> The discussions between the parties never actually proceeded to settlement negotiations because American Safety never provided the requisite supporting information.

costs associated with litigation for both parties.<sup>6</sup> It also contravenes the important principle of judicial economy.

In *Mike M. Johnson* (and *Dunlap*), this Court announced a rule of law that allows contracting parties to reserve their rights and still conduct settlement negotiations. Under the Court of Appeals' decision, however, parties must always be fearful of settlement negotiations, for the mere mention of settlement risks a waiver of contractual defenses, even if all rights are expressly reserved. This Court should reaffirm the rule in *Mike M. Johnson*, which encourages, rather than discourages, settlement.

**C. American Safety's Claim of Waiver Does Not Create an Issue of Fact.**

Under the correct standard of law, even the Court of Appeals acknowledged that American Safety failed to present any unequivocal evidence of waiver. *American Safety*, 133 Wn. App. at 661 ("We have discussed the equivocal nature of the City's conduct..."). Thus, even under the Court of Appeals' opinion, there is no genuine issue of material fact regarding waiver in this case.

The Court of Appeals incorrectly relied on *Reynolds Metal Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 483 P.2d 880

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<sup>6</sup> Olympia's willingness to negotiate was especially reasonable given the status of the law at the time. The history of this case tracked developments in the *Mike M. Johnson* case. The majority of the discussions between Olympia and American Safety occurred after the May 23, 2002, Division Three decision. Not surprisingly, Olympia's position stiffened after this Court issued its decision in the case on October 23, 2003.

(1971), for the proposition that a claim of waiver is necessarily a question of fact precluding summary judgment. *American Safety*, 133 Wn. App. at 661. However, *Reynolds Metal* did not even address summary judgment. Instead, that court considered whether sufficient evidence was presented at trial to show whether a party to a contract waived another party's breach of the contract. 4 Wn. App. 701-02. That is different than the issue presented in this case, which is whether there is any evidence that Olympia engaged in unequivocal acts of conduct evidencing an intent to waive contractual defenses. On this issue, and under similar circumstances, Washington appellate courts have regularly refused to find issues of fact regarding waiver. See, e.g., *Mike M. Johnson*, 150 Wn.2d at 392-3 (finding no question of material fact and holding summary judgment was proper); *Absher*, 77 Wn. App. at 139 (affirming summary judgment); *Dunlap*, 23 Wn.2d at 831 (affirming a dismissal at the close of plaintiff's case). Thus, the mere claim of waiver of contractual defenses does not create an issue of fact.

Summary judgment is proper when reasonable persons could reach but one conclusion. *Ames v. Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993). Here, to avoid summary judgment, American Safety must show **unequivocal acts of conduct** by Olympia evidencing an intent to waive its contractual defenses. *Mike M. Johnson*, 150 Wn.2d at 386. Because of the letters sent by Olympia reserving its right to rely on its contractual defenses, American Safety cannot do so. At most, the letters

sent by Olympia, when coupled with Olympia's willingness to reach a negotiated settlement with American Safety, shows equivocal conduct. *American Safety*, 133 Wn. App. at 661. But because of the express reservation of rights, no reasonable person could conclude that Olympia's conduct amounted to an unequivocal waiver of contractual rights. Accordingly, the Court of Appeals was wrong when it held that an issue of fact exists, and this Court should reverse.

**D. American Safety Did Not Petition for Review on Issues Decided by the Court of Appeals in Olympia's Favor.**

The Court of Appeals decided two issues raised in American Safety's appeal in favor of Olympia: (1) discussion between the parties' consulting experts could not have waived Olympia's right to rely on its contractual defenses; and (2) Olympia's actions did not prevent American Safety from complying with the contract's claim procedures. 133 Wn. App. at 661-63. American Safety did not raise these issues in response to Olympia's petition for review, as required by RAP 13.4(d). Accordingly, these issues are not subject to this Court's review.<sup>7</sup>

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<sup>7</sup> If, however, American Safety raises these issues in its supplemental briefing, and to the extent this Court decides to review them, Olympia respectfully refers the Court to its discussion of the issues in its Respondent's Brief at 25 (regarding discussion between consultants) and 27 (regarding Olympia's actions not preventing American Safety from complying with the Contract claim procedures.)

**E. Olympia Requests Its Fees and Costs on Appeal.**

Olympia requested its attorney's fees on appeal in its Respondent's Brief. Respondent's Brief at 29. Pursuant to RAP 18.1(b), this request is continuing, and Olympia respectfully requests its fees and costs associated with the ongoing appeal.

**V. CONCLUSION**

In *Mike M. Johnson*, this Court set out clear rules for enforcement of claims procedures in construction contracts. A party cannot survive summary judgment for failure to follow contract procedures simply by alleging that the other party waived its rights. Only unequivocal conduct can establish waiver, and there is none in this case. This Court should reaffirm the rule of *Mike M. Johnson*, reverse the Court of Appeals, and reinstate the summary judgment correctly granted by the trial court.

DATED this 9th day of July, 2007.

Respectfully submitted,

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