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COURT OF APPEALS
DIVISION I
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No. 59823-6-I

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

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

Appellants,

vs.

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., a Washington corporation, HERRICK STEEL,
INC., a California Corporation

Cross-Respondents.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES 1

I. INTRODUCTION AND SUMMARY 1

II. STATEMENT OF THE CASE..... 4

 A. The Parties..... 4

 B. Hunt Kiewit Disputes that it Performed any Defective Work 5

 C. The Statute of Limitations Began to Run no Later Than
 "Substantial Completion" of Construction..... 6

 D. The Mariners - Not the PFD - Bear the Cost and Expense of
 Repairing the Intumescent Paint..... 7

 E. The PFD has not Incurred any Cost or Expense to Repair the
 Alleged Defects in the Intumescent Paint 8

 F. Third Party Claims..... 10

III. ISSUES ON APPEAL..... 11

IV. ARGUMENT..... 11

 A. The Complaint Was Not Filed Within the Six Year Limitations
 Period of RCW 4.16.040 11

 B. The Mariner's Claims are not Exempt from the Statute of
 Limitations per RCW 4.16.160 12

 1. The Statute of Limitations is Applicable Because the PFD
 acts in a Proprietary Capacity 13

 2. The Mariners' Reliance upon CLEAN is Misplaced Because
 the PFD Acted in a "Proprietary" Capacity in Constructing
 Safeco Field..... 17

 3. Case law from Other Jurisdictions Supports Hunt Kiewit's
 Position..... 19

4. The PFD is Merely a "Conduit" for the Mariners to sue Hunt Kiewit	21
5. Hunt Kiewit's Conditional Cross Appeal against Long Painting and Herrick Steel	23
V. CONCLUSION.....	24

TABLE OF AUTHORITIES

State Cases

<u>Bellevue School Dist. No. 405 v. Brazier Const. Co.</u> , 103 Wn.2d 111, 691 P.2d 178 (1984).....	14, 15, 19, 20
<u>CLEAN v. State</u> , 130 Wn.2d 782, 928 P.2d 1054 (1996).....	passim
<u>Herrmann v. Cissna</u> , 82 Wn.2d 1, 5, 507 P.2d 144 (1973).....	22
<u>Washington Public Power Supply System ("WPPSS") v. General Elec. Co.</u> , 113 Wn.2d 288, 295, 778 P.2d 1047 (1989)	passim

Federal Cases

<u>City of Moses Lake v. United States</u> , 430 F. Supp.2d 1164, 1171-72 (E.D. Wash. 2006).....	13, 15, 16, 20
<u>Louisiana-Pacific Corp. v. ASARCO Inc.</u> , 24 F.3d 1565, (9 th Cir. 1994) 16	
<u>McClo... o., Inc. v. Wright</u> , 363 F.Supp. 223, 227 (E.D. Va. 1973)	23
<u>Montgomery County v. Microvote Corporation</u> , 23 F.Supp.2d 553 (E.D. Pa. 1998).....	21

Other Jurisdictions

<u>Altoona Area School District v. Campbell</u> , 152 Pa. Cmwlth. 131, 618 A.2d 1129 (1992).....	20
<u>Board of Trustees of Bergen Community College v. J.P. Fyfe, Inc.</u> , 192 N.J. Super. 433, 471 A.2d 38 (1983).....	21
<u>Lovey v. Escambia County</u> , 141 So.2d 761, 765 (Fla. Dist. Ct. App. 1962)	23
<u>Newman Memorial Hospital v. Walton Construction Co., Inc.</u> 37 Kan. App. 2d 46, 149 P.3d 525 (2007)	19, 20
<u>School Dist. Of Borough of Aliquippa v. Maryland Cas. Co.</u> , 587 A.2d 765, 772 (Pa. Sup. Ct. 1991).....	23

State Statutes

RCW 4.16.040.....	11
RCW 4.16.160.....	passim
RCW 4.16.310.....	12

I. INTRODUCTION AND SUMMARY

This appeal involves a claim by the Seattle Mariners¹ against Hunt Kiewit for alleged construction defects at the Mariners' home stadium, Safeco Field. Hunt Kiewit is a joint venture that contracted with The Washington State Major League Baseball Stadium Public Facilities District ("the PFD") to be the general contractor/construction manager for construction of the stadium.

The PFD is a party to this appeal in name only. The PFD leases Safeco Field to the Mariners, and assigned its right to make claims against Hunt Kiewit to the Mariners. The Mariners therefore sued Hunt Kiewit in the name of, and as an assignee of, the PFD.

The Mariners contend that Hunt Kiewit breached its construction contract with the PFD by failing to properly apply intumescent paint to steel beams at the stadium. The Mariners contend that they have paid over \$3.0 million to repair the alleged defects. Hunt Kiewit denies its work was defective in any respect.

The Mariners filed suit against Hunt Kiewit more than seven years after Substantial Completion of construction. Consequently, Hunt Kiewit moved for summary judgment on the grounds that the claims were time barred by the six-year statute of limitations contained in

¹ "Seattle Mariners" or "Mariners" are used for ease of reference to refer to respondent The Baseball Club of Seattle, L.P., the privately held limited partnership that owns and operates the Seattle Mariners Major League Baseball Team.

RCW 4.16.040. The trial court granted Hunt Kiewit's motion and dismissed all claims.

The Mariners contend that their claims are exempt from the statute of limitations by RCW 4.16.160, which provides that statutes of limitation shall not apply when an action is brought "for the benefit of the state." However, not every action brought by a municipality is brought "for the benefit of the state." Rather, the action must arise out of an exercise of sovereign power that the state delegated to the municipality.

The Mariners contend that its claims were brought "for the benefit of the state" because Safeco Field is owned by a municipal corporation (the PFD), and that "construction of Safeco Field fell within the general police power of the State," citing CLEAN v. State, 130 Wn.2d 782, 928 P.2d 1054 (1996).

The Mariners grossly misread the CLEAN decision. CLEAN has nothing to do with statutes of limitation. Rather, CLEAN addressed several challenges to the "Stadium Act," the legislation which authorized creation of the PFD. In particular, CLEAN addressed whether the Legislature's enactment of the Stadium Act pursuant to an emergency clause usurped the peoples' right to referendum. CLEAN, 130 Wn.2d at 804-05. The CLEAN court deferred to the Legislature, and held that the Stadium Act was validly passed pursuant to the police power exception to the right of referendum. As a result, the Mariners' reliance on CLEAN distorts the concept of "for the benefit of the state"

as that phrase is used in RCW 4.16.160 and interpreted by several cases.

The Mariners' claims are for their own, private benefit. As between the PFD and the Mariners, the Mariners are the real party in interest. Indeed, pursuant to its Lease with the PFD, the Mariners are "solely responsible" for the cost of repairing any alleged design or construction defects at Safeco Field.

The fact that the PFD has not incurred any damages also demonstrates that this action is for the benefit of the Mariners. While the Mariners claim to have paid over \$3.0 million to repair the alleged defects, the PFD has not paid a dime. Nor is it certain that the PFD will ever do so.

The Mariners acknowledge that the PFD has not paid any repair costs, but contend that the PFD "remains ultimately responsible" for such costs because the Mariners have a right of reimbursement from the "Excess Revenues Fund" controlled by the PFD. See Appellants' Brief at 6, generally 6-9. This is an incomplete and misleading description of the PFD's obligations with regard to the Excess Revenues Fund.

Although the Mariners may have an inchoate right of reimbursement from the "Excess Revenues Fund," whether the Mariners will ever actually be reimbursed from the Excess Revenues Fund is wholly speculative. There is nothing in the record to demonstrate that there are presently any actual "funds" in the Excess Revenues Fund. Rather, funds will only be placed in the Excess

Revenues Fund if certain future conditions are met. There is no guarantee that such conditions will ever be met, or that funding will ever occur. And if it turns out the Excess Revenues Fund is insufficient to reimburse the Mariners for the intumescent paint repairs - or for any other capital cost - then the Mariners' right of reimbursement is limited to the available funds in the Excess Revenues Fund, if any. In that circumstance, *the PFD has no liability to reimburse the Mariners for its unrecovered costs.* Simply stated, there is nothing in the record demonstrating that the PFD has, or ever will, incur any damages for the intumescent paint repairs.

The trial court got it right. This action is not "for the benefit of the state," it is solely for the benefit of the Mariners, a private party that leases a public facility. The Mariners are simply not entitled to cloak themselves in a sovereign right of the State for their own private benefit. This action does not fall within the exemption established in RCW 4.16.160, and the trial court's dismissal should be affirmed.

H. STATEMENT OF THE CASE

A. The Parties

Appellant the Baseball Club of Seattle, L.P. ("The Mariners") is a privately held limited partnership that owns the Seattle Mariners and leases and operates Safeco Field. CP 4. The Washington State Major League Baseball Stadium Public Facilities District ("the PFD") owns Safeco Field. CP 3-4. The PFD is a party in name only, and has

assigned all claims to the Mariners. CP 4, ¶2.

Respondent Huber, Hunt & Nichols-Kiewit Construction Company Joint Venture ("Hunt Kiewit") was the general contractor/construction manager for construction of Safeco Field.²

Cross-respondents Herrick Steel ("Herrick") and Long Painting ("Long") were subcontractors to Hunt Kiewit for construction of Safeco Field.³ Hunt Kiewit filed third party claims against Herrick and Long, asserting that if Hunt Kiewit was liable to the Mariners, then Herrick and Long were liable to Hunt Kiewit to the same extent.

B. Hunt Kiewit Disputes that it Performed any Defective Work.

As stated in its answer and affirmative defenses, Hunt Kiewit flatly disputes that its work was defective in any respect. CP 34-40. Moreover, Hunt Kiewit's motion for summary judgment was solely limited to whether the Mariners' claims were time barred by the statute of limitations. Cause, extent, and responsibility for the alleged construction defects were not addressed or at issue in the motion. Nonetheless, the Mariners make multiple statements of "fact" in their brief regarding the cause and extent of the alleged defects as if such statements were established and undisputed. See Appellants' Brief at 4-

² Respondents Hunt Construction Group, Inc. and Kiewit Construction Company are members of the Hunt Kiewit Joint Venture.

³ Herrick provided structural steel for the project, and prepared the steel for the application of the intumescent paint. Long applied the intumescent paint.

6. Many of these statements are not undisputed facts; they are nothing more than unproven allegations. The cause and extent of the alleged defects are irrelevant to the issue on appeal.

C. The Statute of Limitations Began to Run no Later Than "Substantial Completion" of Construction.

Hunt Kiewit and the PFD entered into the construction contract⁴ for Safeco Field on May 6, 1996. CP 45. Hunt Kiewit achieved Substantial Completion⁵ of construction on July 1, 1999. CP 174-176. That date is significant because the construction contract provides that the statute of limitations for claims against Hunt Kiewit begins to run no later than the date of Substantial Completion:

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 165.

The Mariners allege they first noticed blisters in the intumescent paint in February 2005, less than six years after Substantial Completion. CP 6, ¶16; CP 226-27. They further allege that shortly thereafter, they

⁴ The contract is a manuscript based upon the AIA A111 form, and incorporates General Conditions based upon the AIA A201 form.

⁵ Substantial Completion is defined in the contract as "the stage in the progress of the Work...when the construction is sufficiently complete, in accordance with the Contract Documents, so the Mariners can fully occupy and utilize the Work for its intended use." CP 148-149.

"investigated and conducted repairs." CP 6, ¶17. However, the Mariners waited until August 14, 2006 - more than seven years after Substantial Completion - to file suit against Hunt Kiewit. CP 1-8.

D. The Mariners - Not the PFD - Bear the Cost and Expense of Repairing the Intumescent Paint.

The Mariners have long known that they bear the risk of repairing any design or construction defects at Safeco Field. When the Mariners executed the Lease with the PFD in 1996, the PFD plainly shifted the risk of "Major Maintenance and Capital Improvements" to the Mariners:

The Club is solely and exclusively responsible for all Major Maintenance and Capital Improvements during the Operating Term, other than work that is part of initial construction...The Club is solely and exclusively responsible for all costs and expenses incurred in connection with Major Maintenance and Capital Improvements...

CP 335, ¶ 7.1. The term "Major Maintenance and Capital Improvements" specifically includes costs and expenses resulting from alleged construction or design defects:

Major Maintenance and Capitol Improvements shall mean *any work that is reasonably required* to be performed in and about the Leased Premises (other than with respect to District Offices) *to repair, restore or replace components of the leased premises necessitated by any damage, destruction, ordinary wear and tear, defects in construction or design...*

CP 335-36, ¶ 7.1 (italics added). The term further includes any cost or expense for reapplication of intumescent paint, whether or not necessitated by construction or design defects:

Major Maintenance and Capital Improvements shall include, but shall not be limited to, such items as:... *general re-application of protective materials in the leased premises such as paint or weatherproofing* (including finishes to public concourses, club/suite concourses, and the structure and exterior of the Leased Premises).

CP 336 at ¶ 7.1(h) (italics added). Pursuant to foregoing provisions in the Lease, the Mariners are responsible to pay the cost of repair, not the PFD. It is likewise undisputed that the PFD has not paid anything towards the cost of repair.

E. The PFD has not Incurred any Cost or Expense to Repair the Alleged Defects in the Intumescent Paint.

The Mariners contend that "although the Mariners have advanced funds...the PFD remains ultimately responsible for those costs." See Appellants' Brief at 6. Stated differently, the Mariners contend that they have a right to repayment from the "Excess Revenues Fund" established by the Stadium Act.

However, there is nothing in the record to indicate that there are presently any "funds" in the Excess Revenues Fund. Rather, the Excess Revenues Fund will only be "funded" if the revenue from the First Admissions Tax⁶ exceeds the amount necessary to pay the principal and interest payments on Parking Bonds issued by the county for construction of the parking structure. CP 199, Recital E.

⁶ The First Admissions Tax is a tax upon tickets sold for events at Safeco Field.

There is no guarantee this will ever occur. Indeed, the "Project Closeout and Settlement Agreement" between the Mariners and the PFD expressly contemplates that the First Admissions Tax *may be insufficient* to fund "prudent and desirable" capital improvements:

The PFD and the Club in the Lease also established an Excess Revenues Fund for use in paying unanticipated capital projects and improvements (but not construction overruns) to assure the ongoing viability of the Ballpark, both during and beyond the term of the Lease. The Excess Revenues Fund will be funded with proceeds of the First Admissions Tax. The First Admissions Tax, however, initially is pledged to repayment of the Parking Bonds, so that the Excess Revenues Fund, under current arrangements, will not be funded for several years. *As a result, the First Admissions Tax, the only dedicated revenue source that will survive retirement of the existing Ballpark Bonds and Parking Bonds under existing law, may not be sufficient to provide for prudent and desirable capital improvements to the Ballpark.*

CP 199, Recital E (italics added). The Settlement Agreement further makes it clear that the Mariners' right of repayment is strictly contingent upon the availability of adequate funds in the Excess Revenues Fund:

The PFD 's obligation to reimburse the Club for Unanticipated Capital Costs and interest under this Section is limited to the availability of funds that (i) are currently committed to the Excess Revenues Fund, and (ii) may be committed to the Excess Revenues Fund in the future through the end of the lease term[.] If at the end of the Lease term... there are insufficient funds in the Excess Revenues fund... to reimburse the Club for advances and interest otherwise reimbursable under this Section, the PFD shall have no further obligation under this Section after paying to the Club (i) all funds in the Excess Revenues Fund and (ii) all funds due to be received by the Excess Revenues Fund from activities or collections during the Lease term, within (30) days of receipt of such funds.

CP 201, ¶ 4(b) (italics added). In other words, the PFD's obligation to reimburse the Mariners for unanticipated capital costs is capped by the available amounts in the Excess Revenues Fund, if any.⁷

The Lease also contemplates the possibility of insufficient funds in the Excess Revenues Fund. The Lease provides that Mariners remain "solely liable" to pay for capital improvements, and that the PFD has no liability beyond its obligations to make certain contributions to the Fund:

Notwithstanding anything in this Agreement to the contrary, the PFD shall have no liability for any Major Maintenance and Capital Improvements other than its specific obligations to make PFD Contributions as provided herein during the Tenn. ... The Club remains solely liable for the funding of all Major Maintenance and Capital Improvements after Substantial Completion and during the Operating Term from any and all sources available to the Club, subject to Articles 7.6 and 7.7.

CP341, ¶7.3.3.

F. Third Party Claims

Hunt Kiewit thereafter filed a Third-Party Complaint against Herrick Steel and Long Painting, as the Mariners' allegations implicate their respective scopes of work. CP 12-13 at ¶¶138, 39, 46 and 47. Hunt Kiewit's third party claims were dismissed at the same time that the trial court dismissed the Mariners' claims against Hunt Kiewit.

⁷ The PFD's 2005 Annual Report contained in the record indicates that, as of that date, there was \$ 13.4 million in liabilities booked against the Excess Revenues Fund. CP 290.

III. ISSUES ON APPEAL

1. Whether the Mariners' claims against Hunt Kiewit for construction defects at Safeco Field are time barred because (a) the Mariners failed to file suit within the six year statute of limitation; and (b) the claims are not exempt from the statute of limitation per RCW 4.16.160 because the claims are for the benefit of the Mariners, not for the benefit of the state.
2. If the Court holds that the Mariners' claims are not time barred, whether the dismissal of Hunt-Kiewit's third party claims against Long Painting and Herrick Steel should be reversed as well.

IV. ARGUMENT

A. The Complaint Was Not Filed Within the Six Year Limitations Period of RCW 4.16.040.

Several points are undisputed. First, the Mariners' claim accrued no later than July 1, 1999, the date of Substantial Completion. See CP 174-176. Second, the applicable limitations period for the Mariners' claim is six years, per RCW 4.16.040. Finally, it is undisputed that that the Mariners failed to file their claims within the six year limitation period. Rather, the Mariners filed their complaint on

August 14, 2006, more than seven years after Substantial Completion.

CP 1-8.

B. The Mariners' Claims are not Exempt from the Statute of Limitations per RCW 4.16.160.

Given that the foregoing points are undisputed, the Mariners claims can only survive if they are exempt from the statute of limitations. As noted above, the Mariners contend that its claims are exempt because the action was brought "for the benefit of the state" within the meaning of RCW 4.16.160, which states in relevant part:

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 quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310⁸, *there shall be no limitation to actions brought in the name or for the benefit of the state*, and no claim of right predicated upon the lapse of time shall ever be asserted against the state...

RCW 4.16.160 (italics added). The Mariners' argument is without merit. Case law demonstrates that the Mariners' claims against Hunt Kiewit were not brought for the benefit of the state.

⁸ RCW 4.16.310, the Statute of Repose, provides that causes of action arising from construction that have not accrued within six years of the date of Substantial Completion are time-barred. In this case, Article 13.7 of the General Conditions provides that all causes of action are deemed to have accrued no later than the date of Substantial Completion. RCW 4.16.310 therefore does not exempt the claims at issue from the statute of limitations.

1. The Statute of Limitations is Applicable Because the PFD acts in a Proprietary Capacity.

The exemption set forth in RCW 4.16.160 is only available to a municipality if the municipality "is acting as an agent of the state exercising delegated sovereign powers." Washington Public Power Supply System ("WPPSS") v. General Elec. Co., 113 Wn.2d 288, 295, 778 P.2d 1047 (1989). Conversely, a municipality acting in a "proprietary" capacity is not exempt. WPPSS, 113 Wn.2d at 295. A municipality acts in a proprietary capacity when it "regulates and administers the local and internal affairs of the territory which is incorporated, for the special benefit and advantage of the urban community embraced within the boundaries of the municipal corporation." City of Moses Lake v. United States, 430 F. Supp.2d 1164, 1171-72 (E.D. Wash. 2006) (applying Washington law, citing WPPSS, 113 Wn.2d at 295-96).

To paraphrase the WPPSS Court, the task is to determine whether the conduct of the PFD, in contracting with Hunt Kiewit, was an exercise of delegated sovereign powers of the state, or whether it was an exercise of proprietary municipal power for the special or peculiar advantage of its own members. See WPPSS, 113 Wn.2d at 296. In doing so the Court "may look to constitutional or statutory provisions indicating the sovereign nature of the power, and . . . consider . . . traditional notions of powers which are inherent in the sovereign." *Id.* "Relevant 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." Id.

An examination of the Washington cases which address this question demonstrates that Washington Courts have only applied the exemption in RCW 4.16.160 when there is a delegated sovereign power that derives from the State Constitution.

Consider Bellevue School Dist. No. 405 v. Brazier Const. Co., 103 Wn.2d 111, 691 P.2d 178 (1984). In that case, the Bellevue School District sued the builder of a high school that was completed 20 years earlier. The Supreme Court found that the claim was exempt from the statute of limitations because the School District's "duty to educate" was an express attribute of sovereignty set forth in the State Constitution:

The duty and power to educate the people are not only inherent qualities of sovereignty but are *expressly made an attribute of sovereignty in the state of Washington by the state constitution.* Const. art. 9, §§1, 2. The state exercises its sovereign powers and fulfills its duties of providing education largely by means of a public school system under the direction and administration of the State Superintendent of Public Instruction, State Board of Education, school districts and county school boards.

School districts are, by law, municipal corporations with direct authority to establish maintain and operate public schools and to erect and maintain buildings for that and allied purposes. In essence, *a school district is a corporate arm of the state*

established as a means of carrying out the state's constitutional duties and exercising the sovereign's powers in providing education. The state has thus made the local school district its corporate agency for the administration of a constitutionally required system of free public education.

Bellevue School Dist. No. 405, 103 Wn.2d at 115-16 (italics added).

Contrast this holding with that in the WPPSS case. In WPPSS, the Supreme Court held that the WPPSS, by contracting with General Electric for a Nuclear Steam Supply System, was not acting "for the benefit of the state" because the State's facilitation of energy production was not a sovereign function based in the Constitution:

[A]lthough the State may facilitate the production of electrical energy, *there is no indication in the constitution or the statutes that supplying electric energy is a sovereign function of the State.*

Likewise, the production of electricity has not traditionally been considered a power or duty which is inherent in the sovereign. Rather, it was considered either a private business or a proprietary municipal function for the advantage of each community...

[T]he increased need for electricity and the concomitant need for increasing participation by more individual PUDs and cities does not transform the development, production, and supply of electric energy into an exercise of a sovereign power of the State.

WPPSS, 113 Wn.2d at 301 (italics added).

Similarly, in Moses Lake the Court held that the City of Moses Lake was not exempt from the statute of limitations under RCW

4.16.160 with regard to actions it took to rehabilitate its water system in response to contamination, because such actions did not arise from sovereign powers delegated by the state. Moses Lake, 430 F. Supp.2d at 1177-78. In doing so, the Court stated "the actions of Moses Lake taken with respect to the...wells...represent regulation and administration of the local and internal affairs of Moses Lake for the special benefit and advantage of the urban community embraced within the boundaries of the municipal corporation of Moses Lake." Id.

The Court's findings in Moses Lake are equally applicable to the facts in this case. The fact that Safeco Field is located in King County necessarily means that the entertainment it provides primarily benefits those who reside in King County, and therefore serves a proprietary function. As stated in CLEAN, "it is the ushers, program sellers, food and memorabilia vendors, and the owners and employees of Seattle area restaurants, retail stores and hotels who primarily benefit in an economic sense from the assured presence of a major league baseball team that plays its home games in a stadium in King County." 130 Wn.2d at 807 n.9.

Also relevant is Louisiana-Pacific Corp. v. ASARCO Inc., 24 F.3d 1565, (9th Cir. 1994) (applying Washington law). In that case, the court found that the Port of Tacoma was exempt from the statute of limitations under RCW 4.16.160 because the Port's lease of logyards was a sovereign function with origins in the State Constitution. The

court reasoned that "[t]he Washington Constitution provides that areas designated by the port commission, up to 2000 feet from the harbor line, shall be reserved for landings, wharves, streets, and other conveniences of navigation and commerce.' Id. at 1582, quoting Wash. Const. Art. XV, § 1.

The analysis set forth in ASARCO applies equally to the issue at hand. Because there is no indication that the Mariners' claims are derived from a sovereign function based in the Constitution, the Mariners' claims are not exempt from the statute of limitations.

2. The Mariners' Reliance upon CLEAN is Misplaced Because the PFD Acted in a "Proprietary" Capacity in Constructing Safeco Field.

The Mariners also contend that their action against Hunt Kiewit is exempt from the statute of limitation because the "construction of Safeco Field fell within the general police power of the State," citing CLEAN v. State, 130 Wn.2d 782, 928 P.2d 1054 (1996). See Brief of Appellants at 6.

The Mariners grossly misread CLEAN. CLEAN has nothing to do with statutes of limitation. Rather, CLEAN addressed several challenges to the "Stadium Act," the legislation which authorized creation of the PFD. In particular, CLEAN addressed whether the Legislature's enactment of the Stadium Act pursuant to an emergency clause usurped the peoples' right to referendum. CLEAN, 130 Wn.2d

at 804-05. The CLEAN court deferred to the Legislature, and held that the Stadium Act was validly passed pursuant to the police power exception to the right of referendum.

Additionally, Hunt Kiewit submits that the language in CLEAN upon which the Mariners primarily rely ("it is certainly within the general police power of the State to construct a publicly owned stadium") is nothing more than *dicta* that should be disregarded by the Court. See CLEAN, 130 Wn.2d at 806. CLEAN addressed the manner in which the Stadium Act was passed by the *Legislature*, it did not address or determine whether the *PFD* served a proprietary or sovereign function. There is no authority for the proposition that the manner in which legislation is passed, i.e., pursuant to an emergency clause, transforms an otherwise proprietary function into a sovereign one. In truth, the PFD's function is much less significant. As noted by the CLEAN court:

[a]lthough we have concluded...that a public purpose is served by construction of a baseball stadium, *it cannot be seriously contended that the development of a baseball stadium for a major league team is a "fundamental purpose" of state government.*

CLEAN, 130 Wn.2d at 798 (emphasis added).

As a result, the Mariners' reliance on CLEAN distorts the concept of "for the benefit of the state" as that phrase is used in RCW

4.16.160 and must be rejected. The PFD simply did not build a structure that serves a sovereign function, such as the school discussed in Bellevue School Dist. No. 405 or the Port facilities in ASARCO.

3. Cases from Other Jurisdictions Support Hunt Kiewit's Position.

The overwhelming weight of authority from other jurisdictions also supports Hunt Kiewit's position. For example, consider Newman Memorial Hospital v. Walton Construction Co., Inc. 37 Kan. App. 2d 46, 149 P.3d 525 (2007). In Newman, the Kansas Court of Appeals considered a construction defect claim brought by a county hospital against the contractor and subcontractors that had worked on a medical office building project. The defendants argued that the hospital's claims were barred by the statute of limitations. The hospital claimed it was exempt from the statute of limitations because construction of the medical office building was a governmental function. *Id.* at 47-51. The Kansas Supreme Court disagreed, holding that "when a governmental entity operates a hospital, it acts in a proprietary function." *Id.* at 63. This conclusion was based in part upon the fact that the operation of a hospital is usually carried out by private individuals or companies. *Id.*

Newman is analogous to the instant case in several ways. First, just as Newman's medical office building was constructed so that it could be leased out to private parties, the Public Facilities District ("PFD") constructed Safeco Field for lease to the Mariners. Second, Safeco Field is operated by a private party, like the hospital in Newman. Finally, in

Newman the hospital was permitted, but not required, to construct the building at issue. Likewise the Stadium Act permits, but does not require, the PFD to build the stadium.⁹

This "mandatory vs. voluntary" distinction is further illustrated in Altoona Area School District v. Campbell, 152 Pa. Cmwlth. 131, 618 A.2d 1129 (1992). In that case, a school district brought several claims against a contractor and architect after the marble facade of a recently constructed public library began to deteriorate and fail. *Id.* at 135. The defendants moved for summary judgment based upon the statute of limitations. The trial court denied the motion, holding that the doctrine of *nullum tempus occurrit regi* ("time does not run against the king")¹⁰ made the school district exempt from the statute. *Id.* at 136.

On appeal, the Altoona court considered whether the *nullum tempus* doctrine applied by focusing on whether the school district was seeking to enforce "strictly public rights." *Id.* at 138. In doing so, the court distinguished between *mandatory and voluntary* action. The court noted that the school district "was not obligated by law to enter into a

⁹ A similar distinction was made under Washington law by the court in City of Moses Lake, 430 F. Supp. 2d 1164, 1177 (E.D. Wash 2006) (refusing to exempt the claims from the statute of limitations in part, because "Moses Lake is not compelled by the state constitution or state law to operate a municipal water system. It voluntarily chose to do so").

¹⁰ In Washington this doctrine has been codified in RCW 4.16.160. See Bellevue School Dist. No. 405 v. Brazier Const. Co., 100 Wn.2d 776, 782, 675 P.2d 232 (1984) (explaining, while discussing RCW 4.16.160, that "the rule *nullum tempus* rests on the public policy of protecting the domestic sovereign from omissions of its own officers and agents whose neglect, through lapse of time, would otherwise deprive it of rights").

contract to construct the library, but instead, entered in the contract voluntarily as it was authorized to do under the Library Code." Id.

Based upon this distinction, the court concluded that the school district was not exempt from the statute of limitations because it was not "seeking to enforce and vindicate obligations imposed by law, but was, rather, seeking to enforce and vindicate obligations arising from its own voluntary transactions." Id. at 141.¹¹ See also Board of Trustees of Bergen Community College v. J.P. Fyfe, Inc., 192 N.J. Super. 433, 471 A.2d 38 (1983) (holding that the doctrine of *nullum tempus* did not apply to community college's claims against roofing subcontractor; community college drew part of its revenue from the private payments made by students and was therefore distinct from elementary and secondary public schools that provided free public education). Id. at 436-37.

4. The PFD is Merely a "Conduit" for the Mariners to sue Hunt Kiewit.

The PFD is not exempt from the statute of limitations under RCW 4.16.160 for the additional reason that it is merely acting as a "conduit" for a private party (i.e., the Mariners) to sue Hunt Kiewit.

The Washington Supreme Court has held:

¹¹ In contrast, consider a more recent Pennsylvania decision in which the court applied the mandatory/voluntary distinction to determine that *nullum tempus* applied. In Montgomery County v. Microvote Corporation, 23 F.Supp.2d 553 (E.D. Pa. 1998), a county brought an action against the manufacturer of electronic voting machines that had malfunctioned in several of the prior elections. The federal district court concluded that the county was entitled to invoke *nullum tempus* because the purchase of these electronic voting machines had been required by state statute.

if the state is a mere formal plaintiff in a lawsuit, acting only as a conduit through which one private person can conduct litigation against another, the state is not exempt from the defense that the statute of limitations has run on the action.

Heiuiann v. Cissna, 82 Wn.2d 1, 5, 507 P.2d 144 (1973). The PFD is a party to this case in name only; the claim is for the Mariners' benefit as an assignee of the PFD. CP 205, ¶ 7. The Settlement Agreement entered into between the PFD and the Mariners also provides that the Mariners will be the ultimate beneficiary of the proceeds from any lawsuits filed by virtue of the assignment:

To perfect any construction claim, the Club shall have the right (but not the obligation) to prosecute any Construction Claim in the name of the PFD. The proceeds of any such claim, whether through ¶ treated as funds received in connection with construction of the Ballpark, subject to provisions of Section 5 of this Agreement. CP 206, ¶ 7(c).

Section 5 of the Agreement provides:

Any funds coming into the possession of the PFD after the date of this Agreement in connection with construction of the Ballpark (including, but not limited to any funds received... on account of recovery on a Construction Claim...) shall be paid to the Club within fourteen (14 days) of their receipt by the PFD.. .CP 202, ¶ 5(a).

Thus, even if any recovery from the Mariners' claims actually went to the PFD, pursuant to Paragraph 7(e), the PFD simply serves as a conduit for such recovery, and is obligated to return the recovered funds to the Mariners within fourteen days. Under Washington law, a private claim such as the Mariners' is not exempt from the statute of limitations.

Herrmann, 82 Wn.2d, 1.

Courts in other jurisdictions have reached the same result. See, e.g., McCloskey & Co., Inc. v. Wright, 363 F.Supp. 223, 227 (E.D. Va. 1973) ("The law appears to be well-settled, however, that an assignee of a government claim may not rely upon the government's immunity to the statute of limitations where it is intended to enforce the claim for private benefit."); Lovey v. Escambia County, 141 So.2d 761, 765 (Fla. Dist. Ct. App. 1962) ("The right to assert sovereign immunity from the operation of the statute of limitations does not extend, however, to [the Government's] assignee or transferee where the suit is brought for the private benefit, and to enforce the rights of a private person."); School Dist. of Borough of Aliquippa v. Maryland Cas. Co. 587 A.2d 765, 772 (Pa. Sup. Ct., 1991) (The doctrine of *nullum tempus* does not apply to a surety prosecuting a subrogated claim from a school district because "the public interests have been made whole...this is now a matter between two private litigants.").

5. Hunt Kiewit's Conditional Cross Appeal against Long Painting and Herrick Steel

In the event that the Court reverses the dismissal of the Mariners' claims against Hunt Kiewit, then the Court must also reverse the dismissal of Hunt Kiewit's third party claims against Herrick Steel and Long Painting. The third party claims were dismissed because the same statute of limitations is applicable. Therefore, to the extent that the Mariners claims are time barred, Hunt Kiewit acknowledges that its third party claims would be too.

However, if the Court rules that the Mariners claims are not time barred; than it follows that the third party claims should be reinstated as well. There was no briefing regarding whether the third party claims are time barred independently of the Mariners' claims. In the event that the Mariners' claims are remanded, the Court must do the same for the third party claims so that the trial court can address that issue.

V. CONCLUSION

For the foregoing reasons, the Court should deny the Mariners' appeal and affirm the decision of the trial court.

Dated this 24th day of August, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on August 24, 2007, true and correct copies of:

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