No. 1040296

SUPREME COURT
OF THE STATE OF WASHINGTON

SKANSKA USA BUILDING INC.,
a Delaware corporation,

Respondent,

v.

1200 HOWELL STREET, LLC,
a Washington limited liability company,

Petitioner.

RESPONDENT'S ANSWER TO THE LOW INCOME HOUSING INSTITUTE AMICUS CURIAE MEMORANDUM

Scott R. Sleight
(WSBA No. 27106)
Kristina Southwell
(WSBA No. 51097)
AHLERS, CRESSMAN, & SLEIGHT PLLC
1325 Fourth Avenue
Suite 1850
Seattle, WA 98101
Ph: (206) 287-9900

Jeanette M. Petersen
(WSBA No. 28299)
PWRFL
1001 Fourth Avenue,
Suite 4131
Seattle, Washington 98154
Ph: (206) 624-6800

Attorneys for Respondent

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I. INTRODUCTION

The Court of Appeals properly performed its judicial review of this case by painstakingly reviewing the voluminous trial court record – which included 28 witnesses and over 800 admitted exhibits – and carefully applying this Court's precedents to the relevant facts. The Court of Appeals' 72-page unpublished opinion is unanimous, meticulously reasoned, and does not conflict with any decision of this Court.

The amicus memorandum of the Low Income Housing Institute ("LIHI") demonstrates that review is unwarranted. LIHI asserts that its construction contracts would be upended if notice deadlines are no longer strictly enforced, erroneously implying that the Court of Appeals' decision overruled *Mike M. Johnson*. However, the Court of Appeals simply concluded that *Mike M. Johnson* does not apply here because the parties' contract underwent significant modifications that rendered the notice and claim procedures ambiguous – and thus impossible to strictly

enforce. LIHI fails to engage in the extensive factual record that distinguishes this case from *Mike M. Johnson*. Nor does it offer any other persuasive argument justifying review. Nevertheless, LIHI invites this Court to revisit Division Two's careful factual and legal analysis of this highly unique contractual dispute. The Court should decline this invitation and deny review.

II. ARGUMENT

A. The Court Of Appeals' Decision Is Consistent With Washington Precedent

LIHI contends that the Court of Appeals' decision "so far departs from this Court's jurisprudence in ***Mike M. Johnson***" that it warrants this Court's review. LIHI 6 (emphasis in original). But LIHI fails to acknowledge any of the facts established at trial, provides no legal analysis whatsoever of *Mike M. Johnson, Inc. v. Cnty. of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003), and blatantly mischaracterizes the Court of Appeals' decision. The Court of Appeals properly held that *Mike M. Johnson* does not control here. Op. 33-34.

1. **This case is not controlled by *Mike M. Johnson*.**

Mike M. Johnson provides that contractors must follow contractual notice requirements unless the owner waives those requirements or the owner and the contractor agree to modify the contract. 150 Wn.2d at 386-87. "[T]he requirement of a writing is for the benefit of the owner, and the owner, either expressly or by conduct, may waive such a requirement." *Swenson v. Lowe*, 5 Wn. App. 186, 188, 486 P.2d 1120 (1971).

As a threshold matter, *Mike M. Johnson* is relevant only if the contract at issue contains unambiguous procedural notice requirements that were not properly followed. Further, *Mike M. Johnson* holds that notice and claim procedures may not be enforced if there is "*either* waiver by the benefitting party *or* an agreement between the parties to modify the contract." 150 Wn.2d at 386-87 (emphasis added). Thus, there is no all-encompassing *Mike M. Johnson* "rule" that requires *all* contractors to follow *all* contractual notice requirements in *all* construction contract disputes.

Rather, Washington courts are required to carefully analyze the specific facts of each case to determine whether the contract contains unambiguous notice and claim procedures and, if so, whether the procedures were modified or waived. If the reviewing court finds lack of clear procedures *or* modification by the parties *or* waiver, *Mike M. Johnson* does not apply to require strict enforcement of the contract's notice and claim procedures. This is precisely what happened here.

Regarding the threshold question of whether the contract contained unambiguous notice and claim procedures, the Court of Appeals found that it could not identify any clear procedures for the trial court to enforce. Op. 29. The court provided a detailed analysis of the contract language and concluded there were inconsistencies and ambiguities in the contract language such that the existence and meaning of authorization requirements for claims presented a factual question for the jury. Op. 34-35. The court explained: "there are arguable contradictions between the original contract and change order 9

that rendered the proper forms of authorization ambiguous enough that the jury had to determine the intent of the parties." Op. 34.

Howell and Skanska significantly modified the contract's claim provisions through CCD 5 and Change Order 9 (Op. 26-29) – as well as through the subsequent course of dealing between the parties – which distinguished this case from *Mike M. Johnson* (Op. 28, 33-35). The court explained:

> Given the contract's full context, including the modification from change order 9 and the subsequent course of dealing between the parties, *there were issues of fact as to the parties' intent and it would have been inappropriate for the trial court to rule as a matter of law that the contract barred ARs* unsupported by stamped RFIs, construction change directives, or change orders. *In other words, the parties' intent and ultimate agreement addressing authorization*—including whether Howell waived the strict procedures in the contract—*was properly a question of fact for the jury*.

Op. 35 (internal citations omitted) (emphasis added).

Consistent with this conclusion, Howell itself proposed and received a jury instruction on contract interpretation,

reinforcing the court's ultimate finding that the contract's notice and claim procedures were ambiguous and could not be applied as a matter of law. Op. 31.

The Court of Appeals also expressly found that Howell waived the contract's claim requirements. Viewing the evidence in the light most favorable to Skanska – as required on appellate review – the court explained:

> There was evidence that Howell waived the strict authorization procedures under GR-26(A). Many of the ARs that Howell contests in this argument sought less than $15,000, so under change order 9 they were properly approved orally through a field directive. And some were approved before change order 9 was executed. In other instances, disputed ARs demonstrated authorization in writing through e-mails. Other ARs provided RFI responses expressing authorization that were not the exact the change order 9 stamp, or accepting Skanska's warning of a price impact. And some disputed ARs arose from site conditions, not the issued for construction documents, so there was no RFI to stamp or include.

Op. 35-36. The court concluded that "Howell's consistent practice of approving ARs that were not supported by stamped RFIs, construction change directives, or change orders also

provided substantial evidence" of Howell's waiver "when viewed in the light most favorable to Skanska." Op. 36.

Because the Court of Appeals' careful review of the extensive factual record revealed that Howell *both* modified *and* waived the contract's notice and claim procedures, the court logically concluded that *Mike M. Johnson* did not control:

> We note that *Mike M. Johnson* is distinguishable. There is no evidence that the parties in that case modified the contract procedures with change orders or other instruments, or that they mutually engaged in a course of conduct that directly contradicted the express contract provisions governing protest procedures after executing the contract. … These facts are distinguishable from the events in this case.

Op. 33-34.

The Court of Appeals carefully reviewed the full factual record, properly applied this Court's precedent addressing contractual notice and claim procedures, and its unanimous, unpublished opinion does not warrant this Court's review.

B. LIHI Offers No Other Persuasive Reason To Grant Review

LIHI claims that the Court of Appeals' decision will upend the "entire system for calculating construction contingencies and for budgeting . . . if notice deadlines are no longer enforced." LIHI 5-6. LIHI ominously warns: "Apocalyptic may not be too strong a word." LIHI 6.

Unfortunately, it appears that LIHI has failed to carefully read the Court of Appeals' decision, the relevant portions of the trial court record, or this Court's decision in *Mike M. Johnson*. As demonstrated below, LIHI's fears about the potential effects of the Court of Appeals' decision are entirely unfounded.

1. LIHI's policy appeal does not justify review.

Although LIHI asserts that it "accepts the Statement of the Case [set forth] in the opinion" (LIHI 2), it fails to engage with any of the contractual provisions at issue or provide any analysis of the evidence presented at trial. Instead, LIHI baldly claims that the Court of Appeals' decision will have the "devastating" effect of "[p]ermitting general contractors to give notice of cost impacts

at the end of a project – rather than when those impacts occur." LIHI 1. But LIHI's "grave concerns" are based on a fundamental mischaracterization of the Court of Appeals' decision.

The Court of Appeals expressly held that there was substantial evidence demonstrating that Skanska complied with notice requirements and timely submitted its delay claims. Op. 36-40. And for other claims, the Court of Appeals found that there "was a factual conflict that prevented the trial court from ruling as a matter of law that the AR amendments were untimely." Op. 43. Unlike the scenarios posed by LIHI, Skanska did not blatantly disregard unambiguous notice and claim procedures – it complied with them.

The Court of Appeals' statement of facts plainly illustrates that *Howell* – not Skanska – was the responsible party for the cost impacts remaining unpaid at the end of the project:

> Rather than amend the price to encompass all the changes between the 60 percent [architecture drawings] and the issued for construction documents, [Howell] agreed to have Skanska proceed with the work while requesting money for

> changes piecemeal through ARs. This process was formalized in construction change directive 5, which directed Skanska to build based on the issued for construction documents and change order 9, which set out the process through which Howell would approve resulting changes to cost and schedule impacts.

Op. 5. Because Howell refused to amend the contract – even though the contract required a price reconciliation – Howell directed Skanska to proceed despite lacking an agreement on price and schedule, deliberately leaving cost and time adjustments unresolved.

> Change order 9 allowed Howell to approve work changes through stamped RFIs and field directives, then approve the cost of that work after Skanska finished the work. This expanded the short list of authorization methods in section GC-26(A) while contradicting the provision requiring the parties to agree on a price before Skanska performed any work.

Op. 34.

The Court of Appeals' opinion is legally unremarkable: because Howell made such extensive changes to the contract, the court was required to "consider the whole contract in context,

including [CCD 5], change order 9, and Howell's subsequent actions during the AR process" to determine whether the contract contained unambiguous notice and claim procedures and if so whether they were modified or waived. Op. 33 (citations omitted). After carefully considering the whole contract in context – and viewing the evidence in the light most favorable to Skanska – the Court of Appeals found ambiguities requiring resolution by the jury and concluded there was substantial evidence that the contract's claim notice requirements were modified by both parties and waived by Howell. Op. 35-36.

As both the Court of Appeals and this Court in *Mike M. Johnson* have made clear, contractors must follow unambiguous contractual notice and claim procedures "*unless* those procedures are waived" or there is "an agreement between the parties to modify the contract." *Mike M. Johnson*, 150 Wn.2d at 386-87; Op. 33. There is nothing uniquely "devastating" or "apocalyptic" in recognizing that parties to a construction contract may decide to modify or waive an agreement they have made.

Like any responsible developer, LIHI and the public agencies funding its projects regularly rely "on the language in [their] construction contracts regarding timely notice for change orders, add-ons, and corrections." LIHI 5. To the extent that LIHI wishes to ensure that its contractual claim notice requirements are enforced, Washington law provides a simple answer: do not waive or modify these contractual terms.

III. CONCLUSION

This Court should deny review.

I certify that this brief is in 14-point Times New Roman font and contains 1,911 words, excluding the parts of the document exempted from the word count, in compliance with the Rules of Appellate Procedure. 18.17(b).

Dated this 25th day of June 2025.

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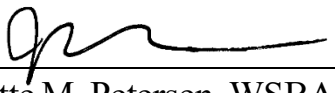


Jeanette M. Petersen, WSBA No. 28299

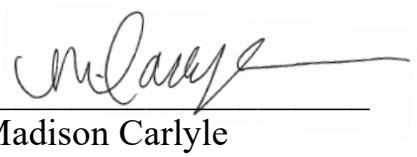
Ahlers Cressman & Sleight PLLC
Scott Sleight, WSBA No. 27106
Kristina Southwell, WSBA No. 51097

Attorneys for Respondent Skanska

CERTIFICATE OF SERVICE

I certify that on the date shown below this document was efiled via the Washington State Appellate Courts website, which electronically serves all counsel of record.

SIGNED in Seattle, Washington this 25th day of June, 2025.



Madison Carlyle

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- swebster@Cairncross.com
- swood@woodgrlaw.com
- trang.nguyen@acslawyers.com
- tscanlan@cairncross.com

Comments:

Sender Name: Madison Carlyle - Email: madison@pwrFL-law.com
Filing on Behalf of: Jeanette Motee Petersen - Email: Petersen@pwrfl-law.com (Alternate Email: madison@pwrfl-law.com)

Address:
1001 4th Avenue
Suite 4131
Seattle, WA, 98154
Phone: (206) 624-6800

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