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COURT OF APPEALS
DIVISION II

No. 40924-1

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY [Signature]
DEPUTY

SWINERTON BUILDERS NORTHWEST, INC.,
a Delaware corporation,

Plaintiff/Appellant,

v.

KITSAP COUNTY,
a Washington municipal corporation,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE THEODORE F. SPEARMAN

REPLY BRIEF OF APPELLANT

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I. REPLY ARGUMENT

Kitsap County's responsive brief fails to raise any valid basis for upholding the Trial Court's denial of Swinerton's motion to compel arbitration. Instead, the County's arguments only underscore the numerous errors made by the Trial Court, which include ignoring the express terms of RCW 7.04A.070. In the contract between Swinerton and Kitsap County, the parties agreed to send all disputes to arbitration. Under RCW 7.04A, when the parties contractually agree to arbitration, arbitration must be granted.

The County never brought forth evidence or legal argument in the County's opposition to Swinerton's Motion to Compel Arbitration in an effort to dispute Swinerton's contention that the County and Swinerton modified the original contract (through numerous signed change orders) to include an agreement to arbitrate all disputes. The County's belated attempts to now argue that no such agreement to arbitrate was ever intended are improper and misguided. Under the relevant facts and Washington law, the Trial Court's Order denying Swinerton's Motion to Compel should

be reversed and the case should be remanded with instructions to the Trial Court to enter an order compelling arbitration.

A. The Trial Court Erred In Denying Swinerton's Motion To Compel Arbitration Under RCW 7.04A.070.

In its opposition to Swinerton's Motion to Compel Arbitration, the County did not deny the existence of an arbitration agreement between the parties. (CP 16-19) Instead, the County focused on the merits of the underlying case, and in particular, the merits of the County's alleged res judicata/waiver defense. As such, it is undisputed that the parties agreed to arbitration. The undisputed arbitration provision in the contract between Swinerton and the County provides:

Any Claim arising out of or related to the Contract...shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration.

(CP 144) The undisputed arbitration provision is extremely broad and applies to all *claims*. Under RCW 7.04A.070, and based on the uncontested agreement to arbitrate, the Trial Court erred by not granting Swinerton's Motion to Compel.

In its Amended Brief, the County essentially concedes that the County did not dispute the existence of the arbitration agreement. Instead, the County spends significant time arguing that

Swinerton's motion was insufficient to establish incorporation of the AIA A201 General Conditions, which admittedly included the above quoted arbitration provision. The County's arguments are incorrect. The County's arguments are also too late. The County should have raised these arguments in response to Swinerton's Motion to Compel. "A party opposing arbitration bears the burden of showing that the agreement is not enforceable." ***Satomi Owners Ass'n v. Satomi LLC***, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). The County was required to address the enforceability of the agreement in its opposition to Swinerton's Motion to Compel. By not opposing the enforceability of the arbitration agreement, the County failed to meet its burden.

Instead of challenging Swinerton's evidence of incorporation of the AIA A201 General Conditions by multiple change orders signed by the County and Swinerton, the County's response to Swinerton's Motion to Compel focused only on the merits of the County's defense of res judicata/waiver. (CP 16-19) Focusing on the merits of a defense, however, is directly contrary to the inquiry required under RCW 7.04A.070. A motion to compel arbitration invokes special proceedings:

(1) *On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.*

...

(3) *The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.*

RCW 7.04A.070 (emphasis added). The court's decision to send the claim to arbitration is not discretionary, and is not dependent on the merits.

The County never even addressed the underlying contract, so the County naturally never satisfied its burden of showing that the arbitration agreement was not enforceable. The County cannot overcome this error by now raising arguments about the intent of the undisputed change orders and how Swinerton and the County intended Construction Change Directives ("CCDs") to be resolved. The County's argument requires evidence as to the parties' intent that the County never provided to the Trial Court. Further, the County's new arguments do not explain how CCDs would be

resolved without the use of the AIA A201 dispute process. There is not a single reference to the CCDs in the initial contract. CCDs only exist under the AIA A201 and for this reason, the parties' Change Orders incorporated the AIA A201.

B. The County's *Res Judicata* And Waiver Defenses Do Not Alter the Application of RCW 7.04A.070.

Nothing in the AIA A201 arbitration clause contains any exceptions with respect to claims or defenses based upon *res judicata* and/or waiver. (CP 144) There is nothing special about the application of claim or issue preclusion principles that requires such defenses to be decided by a court rather than by an arbitrator as required under the undisputed terms of the parties' modified Contract. The County's assertion of *res judicata* and/or waiver based on the ambiguous *M.B. Diddy Order*¹ as a defense to Swinerton's claims is an issue "related to the Contract" and the claims asserted by Swinerton. As such, the defense (just like any

¹ An example of the ambiguity is the repeated reference in the Order to claims that could have been asserted in the *M.B. Diddy* action. To the extent arbitration was required, Swinerton's claims could not have been properly asserted in that litigation. At best, the application of the *M.B. Diddy Order* represents a defense to Swinerton's claim which the arbitrator, (and not the trial court), should resolve. As a part of this arbitration, the arbitrator would have to decide whether a release of Kitsap County Administration is a release of Kitsap County, the only entity with which Swinerton had a contract. See Arg. §C, *infra*, in which Swinerton preserves its right to further argue the merits, if necessary.

other defense) is subject to the undisputed arbitration provision. To the extent any *res judicata*, waiver, or collateral estoppel defenses exist, it makes no sense that those defenses should be resolved in Superior Court while the claims to which the alleged defenses apply would be decided by the arbitrator.

The trial court denied Swinerton's Motion to Compel Arbitration, not because of the absence of an agreement to arbitrate, but instead because of the Trial Court's erroneous conclusion that the County's *res judicata* defense was valid. In reaching a decision on the applicability of the County's defense, the Trial Court considered the merits of the underlying claim and violated RCW 7.04A.070. Indeed, Washington courts indulge every presumption "*in favor of arbitration regardless of whether the problem at hand is the construction of contract language itself or the allegation of waiver, delay, or a like defense to arbitrability.*" **Adler v. Fred Lind Manor**, 153 Wn.2d 331, 342, 103 P.3d 773 (2004) (emphasis added) (*citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983)); **Yakima County v. Yakima Count Law Enforcement Officers Guild**, 157 Wn. App. 304, 321, 237 P.2d 316 (2010).

The County claims that Division III of the Court of Appeals determined that there is no question that (1) Washington court's can look to Federal cases for guidance on the issue of whether questions of arbitrability are for the court decide and (2) the wealth of Federal case law holds that a party may not seek to compel arbitration when there has been *a previous resolution of the claim against the opposing party in a judicial proceeding in **Yakima County***, 157 Wn. App. at 325-37. The County also argues that the **Yakima County** court held that it is for the court (and not an arbitrator) to decide the res judicata effect of such a judgment before allowing subsequent claims based on the same transaction to proceed to arbitration. Tellingly, however, the County concedes in a footnote that Division III did not actually answer the question whether arbitrability of defenses, like res judicata, is a question for the court or an arbitrator. (Resp. Br. 15, n.5)

The County properly concedes this point, in part because one of the cases on which **Yakima County** heavily relied is **John Hancock Mutual Life Ins. Co. v. Olick**, 151 F.3d 132, 137-38 (3rd Cir. 1998). In the **John Hancock** case, the Third Circuit Court of Appeals recognized that while *some* Federal Courts have held that

claims of res judicata based on prior Federal judgments must be decided by the District Court before compelling arbitration, not all courts have been persuaded by the same logic.

For example, the Second Circuit Court of Appeals held that a collateral estoppel defense to arbitration based on a prior Federal judgment should be decided by an arbitrator because it is a merit-based defense to arbitration in *U.S. Fire Ins. Co. v. National Gypsum Co.*, 101 F.3d 813, 817 (2nd Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997). In *National Gypsum*, the court explained that whether such a defense is itself arbitrable, like any other ambiguity in the scope of arbitration, must stem from the language of the arbitration agreement itself. This is because arbitration is a matter of contract and a defense based upon the issue-preclusive effect of the prior judgment is part of the dispute on the merits. *National Gypsum*, 101 F.3d 813. Thus, the Second Circuit concluded that unless it may be said "with positive assurance" that the parties intended to place the collateral estoppel issue with the court, the viability of that affirmative defense must be decided by an arbitrator. 101 F.3d 813.

Like the Second Circuit Court of Appeals, the Ninth Circuit also has held that the res judicata effect of a prior arbitration award on a subsequent arbitration should be decided by an arbitrator rather than the court. ***Chiron Corp. v. Ortho Diagnostic Sys., Inc.***, 207 F.3d 1126, 1132 (9th Cir. 2000). In ***Chiron***, the plaintiff biotechnology company entered into a joint business arrangement with the defendant company. The agreement between the parties provided for the arbitration of any disputes arising out of the contract. 207 F.3d at 1128. When a dispute arose, the plaintiff filed a declaratory judgment action in federal court seeking an order compelling arbitration of the dispute. In response, the defendant moved for summary judgment on the ground that a prior arbitration award issued in favor of the defendant operated as res judicata to all claims the plaintiff sought to raise in the second arbitration proceeding. ***Chiron***, 207 F.3d at 1129. The district court concluded, however, that the res judicata defense was itself an arbitrable issue within the scope of the parties' agreement, and therefore granted the plaintiff's request for an order compelling a second arbitration. The Ninth Circuit affirmed. ***Chiron***, 207 F.3d at 1134.

Notably, while the defendant acknowledged that the dispute itself was subject to arbitration, it argued that a defense of res judicata should be treated differently from the merits of the dispute, premised on the notion that the court would make a better decision than an arbitrator or that it was unfair to leave the issue to an arbitrator. *Chiron*, 207 F.3d at 1132. Rejecting these arguments, the Ninth Circuit instead affirmed the contractual nature of arbitration, noting that the defendant had already elected to arbitrate all disputes under the parties' agreement. Citing *National Gypsum* with approval, the Ninth Circuit observed that the res judicata defense, like any other affirmative defense, was part of the merits of the dispute that was plainly arbitrable under the unambiguously broad arbitration clause in the agreement between the parties. *Chiron*, 207 F.3d at 1132, 1134. Therefore, the court held that the arbitrator should decide the issue of res judicata.

Here, the undisputed arbitration provision provides that any claim arising out of or relating to the contract shall be subject to arbitration. This arbitration provision is almost identical to the provision considered by the Ninth Circuit in *Chiron*, 207 F.3d at 1132. Logic dictates then that any defense to a claim should also

be subject to arbitration. In accord with CR 8(c), waiver and res judicata are affirmative defenses.² Therefore, similar to the **National Gypsum** and **Chiron** cases, the language of the arbitration agreement itself states that, as a matter of contract, an affirmative defense such as waiver or res judicata must be decided by the arbitrator.

The County also argues that Swinerton expressly waived its rights to compel arbitration through the *M.B. Diddy* Order. This ignores the Washington Supreme Court's directive that courts must indulge every presumption "*in favor of arbitration regardless of whether the problem at hand is the construction of contract language itself or the allegation of waiver, delay, or a like defense to arbitrability.*" **Adler**, 153 Wn.2d at 342 (emphasis added); **Yakima County**, 157 Wn. App. at 321. The County's *res judicata* and waiver defenses do not alter the application of RCW 7.04A.070.

² CR 8(c) provides that a party shall set forth affirmative defenses; otherwise those defenses are waived. Kitsap County did not plead either waiver or res judicata as an affirmative defense in its Answer to Swinerton's Complaint.

C. Swinerton Reserves The Right To Further Argue The Merits, If Necessary, But Swinerton's Claims Against The County Were Not Included In The Express Language Of The *M.B. Diddy* Order Relied Upon By The County And The Trial Court.

This court allowed the trial court to rule on the merits while this appeal was pending. (10/14/10 Order Granting Motion to Modify) On January 14, 2011, the trial court granted the County summary judgment dismissing Swinerton's claims, addressing issues that should have been resolved by the arbitrator. Swinerton has appealed that order by Notice of Appeal mailed today, and will ask this court to stay perfection of the second appeal pending resolution of this appeal. Swinerton expressly reserves the right to address dismissal on the merits in its second appeal, if necessary. But as a preliminary matter, Swinerton's claims clearly were not included in the express language of the *M.B. Diddy* order relied upon by the county and the trial court.

Contract principles govern final judgments entered by stipulation or consent. ***Martinez v. Miller Industries, Inc.***, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999). When interpreting a contract, the primary objective is to discern the parties' intent. ***Tanner Elec. Co-op. v. Puget Sound Power & Light Co.***, 128

Wn.2d 656, 674, 911 P.2d 1301 (1996). Defendant Kitsap County was not a party to the Stipulation and subsequent Order in the *M.B. Diddy* litigation. As such, Kitsap County has no ability to comment on the intent of the parties to the Order. “Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions.” ***Lynott v. Nat'l Union Fire Ins. Co.***, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). “[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent.” ***Berg v. Hudesman***, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

Kitsap County is attempting to rely on a settlement agreement and Order from a totally separate case (that were the result of a mediation the County did not participate in) to argue that Swinerton forfeited Swinerton's rights to bring claims under the Swinerton/County contract. Kitsap County is well aware that no consideration was ever exchanged between Kitsap County and Swinerton for Swinerton's alleged forfeiture of all of Swinerton's contract claims against Kitsap County. (CP 194)

Kitsap County's reliance on the *M.B. Diddy* Order of Dismissal is misplaced. When ellipses are not used, the Order of Dismissal provides:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that *all claims asserted herein, or which could have been asserted herein, by and between Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest, Fidelity & Deposit Co. of Maryland, United States Fidelity and Guaranty Co., Liberty Mutual Insurance Company, Federal Insurance Co., and Kitsap County Administration, are hereby dismissed with prejudice, without admission of liability, and without costs to any party.*

(CP 194) (emphasis added) As seen by the highlighted language, the Order was limited to claims that could have been asserted in the *M.B. Diddy* litigation between Swinerton and Kitsap County Administration. The language tracked the first paragraph of the Stipulation which was also limited to claims "which could have been asserted" in the *M.B. Diddy* litigation between Swinerton and Kitsap County Administration.

Reading the Order as a whole, several potential interpretations exist with respect to the alleged release by Swinerton of claims against Kitsap County Administration. Which interpretation is correct as to Kitsap County's defense is to be resolved by the arbitrator. This is true whether the defense is

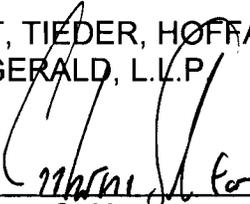
viewed as a defense to the claim or to arbitration itself. See Argument at Section B, *infra*.

II. CONCLUSION

For the reasons set out in this and the opening brief, this Court should reverse and remand with instructions that the trial court shall sign an order compelling arbitration.

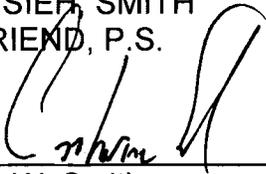
Dated this 24th day of January, 2011.

WATT, TIEDER, HOFFAR &
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By: 

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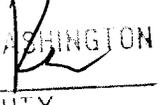
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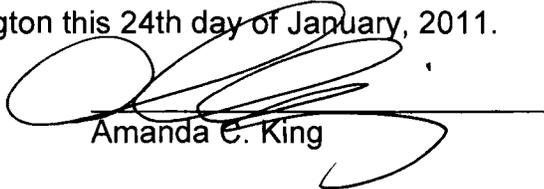
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

STATE OF WASHINGTON
BY 
DEPUTY

That on January 24, 2011, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 24th day of January, 2011.


Amanda E. King