

65357-1-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FREDERICK AND KATHY KOHOUT,

Appellants,

v.

HOME CURB APPEAL, LLC, and
JOHN R. MULINSKI AND JANE DOE MULINSKI, and
HARDING & SONS, INC.

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE RICHARD EADIE

BRIEF OF APPELLANTS FREDERICK AND KATHY KOHOUT

Eileen I. McKillop, WSBA 21602
Attorneys for Appellants Frederick and Kathy
Kohout

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

FILED
COURT OF APPEALS DIVISION I
SEATTLE, WA
2010 OCT -8 PM 4:29

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR.....	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	9
A. THE TRIAL COURT COMMITTED OBVIOUS ERROR WHEN IT DENIED THE KOHOUTS' MOTION TO COMPEL ARBITRATION OF ITS BREACH OF CONTRACT CLAIM AGAINST HOME CURB APPEAL, LLC.....	9
B. THE KOHOUTS HAVE NOT WAIVED THEIR RIGHT TO ARBITRATE BY NOT IMMEDIATELY APPEALING THEIR FIRST MOTION TO COMPEL ARBITRATION.....	13
C. THE KOHOUTS HAVE NOT OTHERWISE WAIVED THEIR RIGHT TO ARBITRATE.....	16
1. The Contractor's Registration Statute Required the Kohouts to File a Lawsuit in Superior Court.	17
2. The Assertion of Claims Against Non-Signatories to an Arbitration Agreement Cannot Constitute a Waiver of the Arbitratable Claims.	19
D. THE KOHOUTS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS INCURRED AT THE TRIAL COURT LEVEL AND ON APPEAL.....	24
IV. CONCLUSION.....	25

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Allied-Bruce Terminex Companies, Inc. v. Dobson</i> , 684 So.2d 102 (Ala. 1995).....	20
<i>American Home Assurance Co. v. Vecco Concrete Construction Co., Inc.</i> , 629 F.2d 961 (4th Cir. 1980)	19, 20
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 262, 897 P.2d 1239 (1995).....	11
<i>Cornier v. Micor, Inc.</i> , 46 F.3d 1098, 1101 (9 th Cir. 2006)	21
<i>Davidson v. Hensen</i> , 135 Wn.2d 112, 118, 954 P.2d 1327 (1998).....	11
<i>E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fibert & Resin Intermediates</i> , 269 F.3d 187 (3d Cir. 2001)	21
<i>Granite Equip. Leasing Corp. v. Hutton</i> , 84 Wn.2d 320, 525 P.2d 223 (1974).....	25
<i>Harvey v. Joyce</i> , 199 F.3d 790 (5th Cir. 2000)	20
<i>Herzog Aluminum, Inc., v. General America Window Corporation</i> , 39 Wn. App. 188, 692 P.2d 867 (1984).....	24
<i>Hill v. G.E. Power Systems, Inc.</i> , 282 F.3d 343 (5th Cir. 2003)	20
<i>International Creative Management, Inc. v. D & R Entertainment Co., Inc.</i> , 670 N.E.2d 1305, 1310 (1996).....	14

<i>Kinsey v. Bradley</i> , 53 Wn. App. 167, 765 P.2d 1329 (1989)	17
<i>Letizia v. Prudential Bache Securities, Inc.</i> , 802 F.2d 1185 (9 th Cir. 1986)	21
<i>Lindsey v. Bamacint, LLC</i> , 2009 WL 1209464 (D.Minn.) (2009)	15
<i>Meat Cutters Local # 494 v. Rosaurer's Super Markets, Inc.</i> , 29 Wn.2d 150, 154, 627 P.2d 1330 (1981)	11
<i>Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1, 103 S.Ct. 927, 941-942, 74 L.Ed.2d 765 (1983)	17
<i>Mt. Hood Beverage Co. v. Constellation Brands, Inc.</i> , 149 Wn.2d 98, 63 P.3d 779 (2003)	24
<i>Nelson v. Westport Shipyard, Inc.</i> , 140 Wn. App. 102, 163 P.3d 807 (2007)	14
<i>Perez v. Mid-Century Ins. Co.</i> , 85 Wn. App. 760, 765, 934 P.2d 731 (1997)	11
<i>Powell v. Sphere Drake Ins. PLC</i> , 97 Wn. App. 890, 988 P.2d 12 (1999)	21
<i>Simula, Inc. v. Autoliv, Inc.</i> , 175 F.3d 716, 719 (9th Cir. 1999)	12
<i>Terminix Intern Co. Ltd. Partnership v. Jackson</i> , 669 So.2d 893 (Ala. 1995)	21
<i>Thomson-CSF, SA v. Am. Arbitration Ass'n.</i> , 64 F.3d 773 (2d Cir. 1995)	21
<u>Statutes</u>	
RCW 18.27.040	3
RCW 18.27.040(3)	17

RCW 60.04.171.....	4
RCW 7.04A.060 (1).....	10
RCW 7.04A.060 (2).....	10
RCW 7.04A.070	22
Uniform Arbitration Act, Chapter 7.04A RCW.....	9, 10
<u>Rules</u>	
CR 42(a).....	4
RAP 18.1(a)	24
<u>Treatises</u>	
2 Domke § 22:6.....	22
I. MacNeil, R. Speidel, and T. Stipanowich, II <i>Federal Arbitration Law</i> at 20:16 - 20:17 (Aspen Law & Business (1997)	12

I. ASSIGNMENTS OF ERROR

The trial court erred in entering its April 9, 2010 Order Denying Frederick and Kathy Kohouts' Motion to Compel Arbitration and a Stay of the Proceedings of the only remaining claim in this action for breach of contract against Home Curb Appeal, LLC.

II. STATEMENT OF THE CASE

This is a case involving a general contractor, Home Curb Appeal, LLC ("HCA"), and its owners, John and Shannon Mulinski ("Mulinskis"), who fraudulently deceived homeowners, Plaintiffs and Petitioners Frederick and Kathy Kohout ("the Kohouts"), out of hundreds of thousands of dollars on a substantial remodeling project of their residence.

On July 3, 2006, the Kohouts entered into a written contract with HCA for a substantial remodel/addition of the Kohouts' residence in Woodinville, Washington (the "Project") for a base contract sum of \$801,955.00 plus \$71,374.00 tax for a total of \$873,329.00. (CP 575-573). After several negotiated credits and deductions, the base contract amount was reduced to \$668,848.55, plus an additional \$185,132.28 in changes for extra work, for an agreed contract amount of \$853,980.83. By January 2008, the Kohouts had paid

HCA and the Mulinskis a total of \$822,653.50 under the contract. (CP 282-288 and CP 349-378).

HCA's conditions of contract contain the following arbitration clause:

Any disputes or claims will be resolved by binding arbitration. One arbitrator will be appointed upon five days written notice. Arbitrator may award attorney's fees to prevailing party, and costs and allocate his fee. Washington law will govern. (CP 304).

By February 2008, HCA had not completed over \$230,000 worth of work that the Kohouts had paid under the contract, including the plumbing, electrical, countertops, paint, toilets, sinks, and cabinetry. (CP 282-288). Furthermore, HCA failed to pay nineteen of its subcontractors over \$137,000 of work that the Kohouts had paid HCA under the contract. As a result, nine subcontractors filed mechanics liens on the Kohouts' property, totaling \$101,601.15. (CP 282-288 and CP 380-383). The Kohouts paid off one of the subcontractor's liens, Ricardo Torres, for a total of \$23,863.57. (CP 282-288). In February 2008, the Kohouts terminated HCA from the project.

On August 25, 2008, one of HCA's subcontractors, Harding & Son's, Inc., filed a lien foreclosure action against the Kohouts and

HCA alleging that HCA had not paid it a total of \$10,188.64 for work performed on the Kohouts' residence.(CP 133-139).

On September 2, 2008, the Kohouts served HCA and the Mulinski with a detailed claim for damages in excess of \$796,635.00. On September 3, 2008 and again on September 15, 2008, the Kohouts served HCA and the Mulinskis with a demand for arbitration of the Kohouts' claims in accordance with the contract. (CP 475-478). The demand for arbitration recommended that Judge Robert Alsdorf (Ret.) be appointed as the arbitrator. HCA would not agree to arbitrate the claim and requested to be allowed to complete the project. (CP 480). Consequently, on September 27, 2008, the Kohouts sued HCA, John and Shannon Mulinski, and HCA's bonding companies, Merchants Bonding Company and Key Bank Covington Branch, alleging causes of action for breach of contract, breach of warranty, unjust enrichment, fraud, intentional misrepresentation, conversion, and violation of the Consumer Protection Act. (CP 482-492). The Kohouts were required to file suit in Superior Court against the two bonding companies pursuant to the Contractor's Registration Statute, RCW 18.27.040. The Kohouts' Complaint requests that the matter be

stayed and that the parties be compelled to arbitrate pursuant to the contract.

On October 3, 2008, another HCA subcontractor, Knights Insulation, Inc., filed a separate lien foreclosure action against the Kohouts and HCA for \$6,374.38 for labor and materials supplied on the Kohouts' residence. (CP 144-147).

On October 28, 2008, the Kohouts filed an Answer to the two Complaints filed by Harding & Sons and Knight's Insulation. (CP 46-58). In their Answer, the Kohouts alleged cross claims against Home Curb Appeal and the Mulinskis for (1) defense and indemnity for all amounts they may be found owing to the lien claimants; (2) breach of contract; (3) unjust enrichment; (4) fraud and/or misrepresentation; (5) conversion; and (6) violation of the Consumer Protection Act. In their prayer for relief, the Kohouts' prayed that their lawsuit be stayed and that the parties be compelled to arbitration pursuant to their contract. On November 18, 2008, the Court issued an Order consolidating all three lawsuits under CR 42(a) and RCW 60.04.171. (CP 32-33).

Within weeks of the order consolidating the three lawsuits, on December 2, 2008, the Kohouts filed a Motion for an Order Compelling Arbitration and a Stay of Proceedings. (CP 210-218;

CP 126-209; CP 79-125). The Kohouts sought to compel arbitration of only their claims against Home Curb Appeal and the Mulinskis pursuant to the arbitration clause in their contract, and requested a stay of the consolidated lawsuit against the other parties pending the arbitration. HCA and the Mulinskis objected to the motion contending that the claims are not subject to arbitration, and that the Kohouts waived their right to arbitration by filing a lawsuit in Superior Court which included parties and claims not subject to arbitration. (CP 685-690). The Kohouts argued that the arbitration clause is broad and includes any claims against the Mulinskis relating to the contract, and that the two lien foreclosure actions should be stayed. Finally, the Kohouts argued that Washington's Contractor Registration statute required that they bring an action against the contractor and the bond in superior court, and that the Complaint requested that the action be stayed against the bonding companies pending arbitration against HCA and the Mulinskis. (CP 232-235; CP 236-242; CP 243-256). On December 15, 2008, the Court denied the Motion for an Order Compelling Arbitration and a Stay of Proceedings. (CP 257-259). The Kohouts filed a motion for reconsideration of the court's order. (CP 262-281; CP 282-328; CP 329-403). On January 2, 2009, the

court denied the motion for reconsideration. (CP 404-405). The Court's order denying the motion for reconsideration states that it is fundamentally unfair to stay the actions against the subcontractors pending the arbitration, and that the Mulinskis, as nonparties to the arbitration agreement, cannot be compelled to arbitrate. (CP 404-405).

On February 12, 2010, HCA and the Mulinskis filed a motion for partial summary judgment of the Kohouts' claims for breach of warranty, fraud, intentional misrepresentation, conversion and violation of the Consumer Protection Act. (CP 746-766). The motion was noted for hearing on March 12, 2010, without contacting the court to schedule the hearing. After conferring with the Judge's bailiff, Defendants filed a renote of the motion rescheduling the hearing to March 19, 2010, only ten (10) days prior to the March 29, 2010 trial date. Defendants argued that the economic loss rule barred the Kohouts' tort claims for fraud, intentional misrepresentation and conversion. The Defendants also argued that the Kohouts' claims for breach of warranty are not supported by the law or the facts, that the Kohouts' Complaint fails to plead fraud with particularity, that the Kohouts cannot establish all of the elements of a CPA claim, and that there are no facts

supporting any liability against the Mulinskis personally. (CP 746-766).

The Kohouts filed an opposition to the motion and a cross-motion for partial summary judgment on the same claims. (Kohouts' Supplemental Designation Clerk's Papers, Docket Nos. 191-198). The Kohouts argued that the economic loss rule does not apply to claims for fraud, intentional misrepresentation or conversion, and presented evidence supporting a breach of the warranty claim under the contract, that HCA and the Mulinskis committed fraud and intentional misrepresentation, that the Complaint plead both the elements and circumstances of the fraudulent conduct, that HCA committed both a per se violation of the Consumer Protection Act and an unfair and deceptive practice involving the public interest. The Kohouts presented evidence of numerous homeowners, subcontractors and suppliers that have filed lawsuits against HCA and the Mulinskis claiming the same protracted course of conduct in misrepresenting that it was licensed, bonded and insured, failing to complete work that it had been paid to do, and failing to pay subcontractors and suppliers for work that was completed.

On March 19, 2010, the court granted the Defendants'

motion and dismissed all of the Kohouts' claims against the Mulinskis personally, and dismissed the Kohouts' claims against HCA for breach of warranty, fraud, intentional misrepresentation, and conversion with prejudice. (CP 780-783). The court requested further briefing from the parties on whether a Consumer Protection Act claim may be established by evidence of other lawsuits against HCA wherein the homeowners allege similar patterns of deceptive conduct. After receiving the parties' supplemental briefing on the CPA claim, and despite unrefuted evidence of a per se violation of the CPA, on April 6, 2010, the court entered an order dismissing the Kohouts' claim against HCA for violation of the Consumer Protection Act. (CP 425-428).

Thus, the only remaining claim that the Kohouts have is against HCA for breach of contract. HCA is effectively insolvent and has no assets, and its contractor's license has been suspended. The trial court's Orders have extinguished the bulk of the Kohouts' claims and now limit them to only a breach of contract claim against an insolvent LLC.

By the time the court issued its March 19, 2010 order, HCA had settled the two lien foreclosure actions filed by Knights Insulation and Harding & Son's and had settled with all of the third-

party subcontractors. (CP 812-815; CP 849-851). Thus, as of March 19, 2010, the only remaining claim in this lawsuit is the Kohouts' claim for breach of contract against HCA.

On March 22, 2010, the Kohouts filed a second motion to compel arbitration of their one remaining claim against HCA for breach of contract. (CP 429-431; CP 432-428; CP 442-451; CP 452-533). HCA opposed the motion arguing that the Kohouts have waived their right to compel arbitration by (1) filing a lawsuit in superior court against parties and claims that are not subject to arbitration; (2) by failing to invoke the arbitration clause by not cooperating with HCA's counsel in the selection of the arbitrator; and (3) by litigating the claims not subject to arbitration. (CP 916-923). On March 29, 2010, the Kohouts filed a reply memorandum in support of their motion to compel arbitration. (CP 621-625). On April 12, 2010, the court denied the Kohouts' second motion to compel arbitration on the basis of waiver. (CP 634-635).

III. ARGUMENT

A. THE TRIAL COURT COMMITTED OBVIOUS ERROR WHEN IT DENIED THE KOHOUTS' MOTION TO COMPEL ARBITRATION OF ITS BREACH OF CONTRACT CLAIM AGAINST HOME CURB APPEAL, LLC.

The Uniform Arbitration Act, Chapter 7.04A RCW governs all agreements to arbitrate entered into on or after January 1, 2006.

RCW 7.04A.020 (1) (a). The Kohouts entered into a written contract with Home Curb Appeal and John Mulinski on April 19, 2006. The contract contains an arbitration provision, which states, in pertinent part, as follows:

Any disputes or claims will be resolved by binding arbitration. One arbitrator to be appointed upon five days written notice. Arbitrator may award attorney's fees to prevailing party, and costs and allocate his fee. Washington law will govern.

Therefore, the Uniform Arbitration Act, Chapter 7.04A RCW, applies to this matter.

An agreement to submit to arbitration any controversy arising between the parties to the agreement is valid, enforceable, and irrevocable. RCW 7.04A.060 (2). The only exception to the irrevocability of an agreement to arbitrate is when a ground exists at law or in equity for the revocation of a contract. RCW 7.04A.060 (1). Where the Court finds that an agreement to arbitrate exists or that a controversy is subject to an agreement to arbitrate, the Court shall order the parties to arbitrate. RCW 7.04A.070 (1).

The statutory arbitration process stems from, and is governed by, the parties' contract. By agreeing to arbitrate, each party is contracting to give up his/her constitutional right to go to

Court and have a judge or jury hear the case. Therefore, the terms of the contract to arbitrate dictate the scope of what is to be arbitrated. In an action to compel arbitration, the sole inquiry for the court is whether the parties bound themselves to arbitrate the particular dispute. *Meat Cutters Local # 494 v. Rosaurer's Super Markets, Inc.*, 29 Wn.2d 150, 154, 627 P.2d 1330 (1981). The Court carefully examines the arbitration agreement to determine its proper scope; and if the dispute can fairly be said to involve an interpretation of the agreement to arbitrate then the inquiry is at an end, and the proper interpretation is for the arbitrator. *Id.* at 154. The Court will apply a liberal interpretation to the grant of authority to the arbitrator because of Washington's strong public policy in favor of arbitration. See, e.g., *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); citing *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995); *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997).

In this case, the Kohouts entered into a written contract with Home Curb Appeal on April 19, 2006, which explicitly created an agreement to arbitrate. Their agreement covers any dispute or claims relating to the contract. The phrase "any dispute" should include any dispute relating to the contract, whether founded on

statute, torts, property rights or any other source. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999) (holding that arbitration agreements pertaining to “any dispute(s)” are to be broadly and liberally interpreted); see also I. MacNeil, R. Speidel, and T. Stipanowich, II *Federal Arbitration Law* at 20:16 - 20:17 (Aspen Law & Business (1997)).

The trial court denied the Kohouts' first motion to compel arbitration and for a stay of these proceedings contending that the Kohouts' claims against John and Shannon Mulinski were not within the scope of the arbitration clause in the contract. On March 19, 2010, the court dismissed the Kohouts' claims against John and Shannon Mulinski personally, and the Kohouts claims against HCA for breach of warranty, fraud and/or misrepresentation, and conversation. The trial court later dismissed the Kohouts' claim against HCA for violation of the Consumer Protection Act. By this time, HCA had settled its claim against its subcontractor and dismissed all of the third-party defendants. The two lien foreclosure actions by Knights Insulation and Harding & Sons have also been dismissed.

With the dismissal of the Mulinskis personally, the Kohouts are entitled to arbitrate their only remaining claim for breach of

contract against Home Curb Appeal, LLC. The Kohouts' claim against Home Curb Appeal for breach of contract relates to and arises out of the Kohouts' written contract with Home Curb Appeal for the remodeling of their home. Thus, the trial court clearly erred in denying the Kohouts' motion to compel arbitration all of the Kohouts' breach of contract claim against Home Curb Appeal.

Lastly, since the Kohouts' claims against Merchants Bonding Company and Key Bank Covington Branch involve the same contractual issues consigned to arbitration under the terms of the parties' contract, they should be stayed until the completion of the arbitration, so as not to interfere with the Kohouts' right to arbitrate.

B. THE KOHOUTS HAVE NOT WAIVED THEIR RIGHT TO ARBITRATE BY NOT IMMEDIATELY APPEALING THEIR FIRST MOTION TO COMPEL ARBITRATION.

The Kohouts' right to appeal of the order denying their second motion to compel arbitration has not been waived because they did not immediately appeal the trial court's earlier order denying their first motion to compel arbitration. The Kohouts' Notice of Appeal did include an appeal of the trial court's December 15, 2008 order denying the Kohouts' first motion to compel. However, on June 23, 2010, the Court of Appeals' Court Clerk ruled that this appeal may proceed only on the Kohouts' appeal of the

April 9, 2010 order denying the second motion to compel arbitration.

The Washington Court of Appeals, Division 2, in *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 163 P.3d 807 (2007), addressed a motion to dismiss an appeal based on the argument that Westport had waived its right to appeal because, after the court denied its first motion to compel arbitration, it engaged in discovery and further litigated the claims, and then filed an appeal of the trial court's denial of its second motion to compel arbitration. The court denied the motion to dismiss ruling that Westport's failure to appeal the trial court's order denying its first motion to compel did not bar Westport from bringing its second motion to compel, and that Westport's ongoing discovery did not operate to waive its right to appeal because the conduct was not inconsistent with Westport's intention to continue to seek arbitration. *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 109-110, 163 P.3d 807 (2007).

Other courts have ruled the same way when an appeal has been made of the trial court's denial of more than one motion to compel arbitration. In *International Creative Management, Inc. v. D & R Entertainment Co., Inc.*, 670 N.E.2d 1305, 1310 (1996), the Court of Appeals of Indiana held that despite the denial of four

motions to compel arbitration, the appeal was timely and that the motions were not in any way calculated to expand the time in which to appeal. In *Lindsey v. Bamacint, LLC*, 2009 WL 1209464 (D.Minn.) (2009), MFR previously moved to compel arbitration of Plaintiff's claims against it and to stay the proceedings. After the Complaint was amended, Chrysler filed a second motion to compel arbitration to account for additional claims contained in the Amended Complaint, and later appealed the orders on both motions to compel arbitration. Plaintiff argued that MFR defaulted or waived arbitration due to its actions and inactions since Plaintiff filed her complaint. The *Lindsey* court denied the motion and concluded that Plaintiff's claims against MFR are arbitrable and stayed all claims pending the outcome of the arbitration. *Lindsey v. Bamacint, LLC*, 2009 WL 1209464 (D.Minn.) (2009).

In this case, the trial court denied the Kohouts' first motion to compel contending that the Kohouts' claims against John and Shannon Mulinski were not within the scope of the arbitration clause in the contract. It was only after the trial court dismissed the Kohouts' claims against the Mulinskis personally, and also dismissed their claims against HCA for breach of warranty, fraud and/or misrepresentation, conversion, and violation of the

Consumer Protection Act, that the Kohouts filed a second motion to compel arbitration of the one remaining claim for breach of contract against HCA. Thus, at the time the Kohouts filed their second motion to compel arbitration, only their breach of contract claim against HCA remained. The trial court's denial of the second motion to compel arbitration was clearly in error because, at the very least, the Kohouts' breach of contract claim against HCA is subject to arbitration. The fact that the Kohouts did not immediately appeal the trial court's order denying their first motion to compel arbitration does not preclude them from an appeal from the order denying their second motion to compel arbitration of their only remaining claim for breach of contract against HCA.

C. THE KOHOUTS HAVE NOT OTHERWISE WAIVED THEIR RIGHT TO ARBITRATE.

HCA and the Mulinskis also argued that despite the fact that a valid, enforceable and irrevocable agreement to arbitrate exists, the Kohouts waived arbitration by (1) filing a lawsuit in superior court against HCA and the Mulinskis and their bonding companies; (2) by asserting claims against the Mulinskis who are not subject to the arbitration clause; (3) by moving to consolidate the two lien foreclosure actions; (4) and by defending Defendants' Motion for

Partial Summary Judgment.

A court will find waiver where the party claiming the right to arbitrate: (1) knew of an existing right to arbitrate; (2) acted inconsistently with the right to arbitrate; and (3) prejudiced the other party by the inconsistent acts. *Kinsey v. Bradley*, 53 Wn. App. 167, 170, 765 P.2d 1329 (1989), *citing Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-942, 74 L.Ed.2d 765 (1983).

1. The Contractor's Registration Statute Required the Kohouts to File a Lawsuit in Superior Court.

The Kohouts filing of a lawsuit in superior court against HCA, the Mulinskis, and HCA's bonding companies, Merchant Bonding Company, and Key Bank Covington Branch, cannot constitute waiver. Under Washington's Contractors' Registration statute, the Kohouts were required to file a lawsuit in superior court against HCA and its bonding companies. RCW 18.27.040(3) provides, in pertinent part, that "[t]he surety issuing the bond shall be named as a party to any suit upon the bond." RCW 18.27.040(3). Moreover, the statute requires that the action be filed in Superior Court. RCW 18.27.040(3). The Kohouts' Complaint clearly prayed that the

matter be stayed and that the parties be compelled to arbitration pursuant to the terms of the Agreement.

HCA and the Mulinskis cannot satisfy their “heavy burden of proof” to demonstrate waiver and prejudice. The Kohouts properly filed an action against HCA, the Mulinskis, and the two bonding entities in Superior Court as required by the Contractors’ Registration Statute. The Kohouts’ Complaint expressly requested a stay of the proceedings pending arbitration of their claims against Home Curb Appeal and the Mulinskis. In September 2008, the Kohouts served two demands for arbitration to HCA and the Mulinskis in accordance with the contract, but HCA and the Mulinski refused to arbitrate. After they refused to arbitrate, the Kohouts filed a Complaint, praying as relief that the Court stay their lawsuit and compel the parties to arbitration pursuant to their contract. After the Court consolidated the two lien foreclosure actions, the Kohouts again moved the Court to stay the proceedings and to compel arbitration. The Kohouts did not engage in any discovery or motion practice, nor did they delay in seeking a stay and arbitration of their claims. Merely taking part in litigation by filing a Complaint and an Answer while simultaneously seeking to stay the proceedings and to compel arbitration does not

waive the Kohouts' right to arbitration. Lastly, HCA and the Mulinskis cannot establish the requisite prejudice from such an act.

2. The Assertion of Claims Against Non-Signatories to an Arbitration Agreement Cannot Constitute a Waiver of the Arbitrable Claims.

HCA did not dispute that the Kohouts' claims against it are subject to the arbitration clause. Instead, HCA and the Mulinskis argued that the Kohouts waived their right to arbitrate any claims against any party because they filed a lawsuit asserting claims against the Mulinskis and the bonding companies, which are not signatories to the agreement. The presence of non-arbitrable claims, or the presence of parties who are not signatories to the agreement to arbitrate, does not preclude a stay to allow for arbitration of those disputes that are arbitrable. For example in a multi-party construction case, *American Home Assurance*, the court stayed the entire action involving all of the parties (including non-signatories to the arbitration agreement). *American Home Assurance Co. v. Vecco Concrete Construction Co., Inc.*, 629 F.2d 961 (4th Cir. 1980). The court explained its reasoning as follows:

Mercury is clearly entitled to a stay of the third-party action [brought by Vecco, which was a signator to a Mercury-Vecco arbitration agreement]. And since questions of fact common to all actions pending in the present

matter are likely to be settled in the Mercury-Vecco arbitration, we find that all litigation should be stayed pending the arbitration proceedings. While it is true that the arbitrator's findings will not be binding on those not parties to the arbitration, considerations of judicial economy and avoidance of confusion and possible inconsistent results nonetheless militate in favor of staying the entire action.

Id. at 964. The federal court's reasoning in *American Home Assurance* is equally applicable under the Washington arbitration statute. Other federal and state cases also recognize the court's power to stay court proceedings either wholly or as to the arbitrable claims pending the completion of arbitration by some of the parties as to some of the claims in front of the court. See, e.g., *Hill v. G.E. Power Systems, Inc.*, 282 F.3d 343 (5th Cir. 2003) (if a suit against a nonsignatory is based on the same operative facts and is inherently inseparable from the claims against a signatory, the trial court has discretion to grant a stay pending arbitration if the suit would undermine the arbitration proceedings and thwart the federal policy in favor of arbitration); *Harvey v. Joyce*, 199 F.3d 790 (5th Cir. 2000) (non-signator entitled to stay claims against it pending outcome of arbitration of claims brought against a co-party); *Allied-Bruce Terminex Companies, Inc. v. Dobson*, 684 So.2d 102 (Ala. 1995) (arbitrable claims stayed); *Terminix Intern Co. Ltd.*

Partnership v. Jackson, 669 So.2d 893 (Ala. 1995) (the trial court has discretionary authority to stay a nonarbitrable claim pending arbitration of related claims).

In addition, the federal courts and the Washington Court of Appeals have recognized that “nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.” *Corner v. Micor, Inc.*, 46 F.3d 1098, 1101 (9th Cir. 2006); *Powell v. Sphere Drake Ins. PLC*, 97 Wn. App. 890, 892, 988 P.2d 12 (1999) (citing *Thomson-CSF, SA v. Am. Arbitration Ass’n.*, 64 F.3d 773, 776 (2d Cir. 1995)). Among these principles are (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986). Nonsignatories can also seek to enforce arbitration agreements as third party beneficiaries. *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fibert & Resin Intermediates*, 269 F.3d 187, 195 (3d Cir. 2001). Thus, the mere fact that the Kohouts’ asserted claims against the Mulinskis and the bonding companies can not constitute a waiver of their right to arbitrate their claims against HCA.

For the same reasons, the fact that the two lien foreclosure actions were consolidated with the Kohouts' action against HCA and the Mulinskis can not constitute a waiver of the right to arbitrate. The Kohouts' motion to compel arbitration did not ask the court to compel arbitration of the two lien foreclosure actions. The Kohouts requested that the court stay these two lien foreclosure actions pending arbitration of their claims against HCA and the Mulinskis. Where multiple causes of action exist, RCW 7.04A.070 provides the Court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration. The only exception to the stay is when a claim accompanying the arbitratable claim is severable. RCW 7.04A.070. If a claim is severable, then Court may sever the claim and limit the stay to the arbitratable claim. RCW 7.04A.070. The pertinent law is summarized at 2 Domke § 22:6, "Stay of Court Action," at 22:15-22:17:

If a party to a contract containing an arbitration clause brings court action on a subject within the scope of the arbitration provision, the other party may move to stay the action and request that arbitration proceedings be instituted. Such an action may be brought by a nonsignatory if the action is based upon the same operative facts and is inherently inseparable from the claims against a signatory. When the case involves both arbitrable and nonarbitrable claims, the court generally will only stay the arbitrable claims. However, the court may stay the litigation of the

nonarbitrable claims until after the arbitration of the nonarbitrable claims, particularly “when the arbitrable claims ‘permeate’ the case and the nonarbitrable and the nonarbitrable claims are weak or peripheral.” Since courts inherently possess the power to stay proceedings when required by the interests of justice, the decision of whether to grant a motion to stay is vested in the discretion of the trial court...

... A motion for stay is the only way that a party may effectively stop a suit in favor of arbitration proceedings. No affirmative defense to the suit, such as an answer pleading the contract or submission to arbitrate, will be sufficient to stay the court action.

In this case, the Kohouts’ claims against HCA and the Mulinski include a claim for damages relating to the two lien foreclosure actions. Because the two lien foreclosure claims are not severable, the Court should have granted the Kohouts’ first motion to compel arbitration, and stayed the entire action, including the two lien foreclosure actions, pending the outcome of the arbitration. At the very least, the court should have compelled arbitration of the Kohouts’ claims against HCA and the Mulinskis, and allowed the two lien foreclosure actions to proceed. The mere consolidation of the two lien foreclosure actions cannot support a finding that the Kohouts affirmatively waived their right to compel arbitration of their remaining claim for breach of contract against HCA.

Accordingly, it was obvious error for the court to deny the Kohouts' second motion to compel arbitration of their breach of contract claim against HCA.

D. THE KOHOUTS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS INCURRED AT THE TRIAL COURT LEVEL AND ON APPEAL.

Under RAP 18.1(a), if the Kohouts prevail on appeal, they are entitled to an award of their attorney's fees and costs in the trial court for any attorney's fees and costs incurred relating to the motion to compel arbitration and on appeal as the prevailing party. A court may award attorney's fees and costs to a prevailing party pursuant to a contractual provision, statutory provision, or a well recognized principle of equity. *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-122, 63 P.3d 779 (2003). A "prevailing party" is the party in whose favor final judgment is rendered. *Herzog Aluminum, Inc., v. General America Window Corporation*, 39 Wn. App. 188, 192, 692 P.2d 867 (1984).

The contract between the parties contains a prevailing attorney fee clause which states as follows:

Any disputes or claims will be resolved by binding arbitration. One arbitrator to be appointed upon five days written notice. Arbitrator may award attorney's fees to

prevailing party, and costs and allocate his fee.
Washington law will govern.

A provision in a contract providing for the payment of attorneys' fees in an action to collect any payment due under the contract includes both fees necessary for trial and those incurred on appeal as well. *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223 (1974). The prevailing attorney fee provision is enforceable and the Kohouts are entitled to their attorney's fees and costs as a prevailing party at the trial court and on appeal.

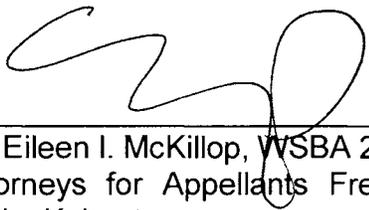
IV. CONCLUSION

The trial court erred in denying the Kohouts' second motion to compel arbitration of their breach of contract claim against HCA. The fact that the Kohouts did not immediately appeal the trial court's order denying their first motion to compel arbitration does not preclude them from appealing the trial court's order denying their second motion to compel arbitration, when the trial court dismissed all of the Kohouts' claims against the Mulinskis and HCA, and the only remaining claim in the litigation is a breach of contract action against HCA. Thus, this court should reverse the trial court's decision and rule that the Kohouts' remaining claim for breach of contract against HCA is subject to arbitration. This court

should also award the Kohouts their attorney's fees and costs incurred at the trial court level and on appeal.

DATED this 9 day of October, 2010.

OLES MORRISON RINKER & BAKER LLP

By 
Eileen I. McKillop, WSBA 21602
Attorneys for Appellants Frederick and
Kathy Kohout