

COURT OF APPEALS DIVISION I,  
THE STATE OF WASHINGTON

Kimaco, L.L.C., a Washington,  
Limited Liability Company,

Appeal No.  
66453-1-I

versus

Snohomish No.  
10-2-03946-3

Wright Hotel Development, Inc.,  
A Nevada corporation, and  
successor in interest to  
Wright Development West  
Coast, LLC,  
Appellant

2011 MAR -14 PM 4:14  
COURT OF APPEALS DIVISION I  
CLERK OF COURT

---

**BRIEF OF APPELLANT**

---

SUBMITTED BY:

**WOLFE LAW GROUP, LLC**  
Scott G. Wolfe, Jr (WSBA #39026)  
Jason Stone (WSBA #39641)  
93 S. Jackson St, #77275  
Seattle, WA 98101-2818  
P: (206) 801-1600  
F: (866) 761-8934  
www.wolfelaw.com  
Attorneys for Appellant  
Wright Hotel Development, Inc., and  
Wright Development West Coast, LLC

**The Table of Contents**

**THE TABLE OF CONTENTS..... 1**

**THE TABLE OF AUTHORITIES ..... 2**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 3**

**STATEMENT OF THE CASE..... 3**

**ARGUMENT..... 6**

    I. STANDARD OF REVIEW ..... 6

    II. THE ARBITRATION PROVISION WAS MUTUALLY ASSENTED TO AND  
    DOES NOT CREATE A “ONE-SIDED” OBLIGATION ..... 7

        A. THE INSTANT PROVISION CAN BE DISTINGUISHED FROM PROVISIONS  
        CONSIDERED "UNILATERAL" BY COURTS..... 7

        B. INTERPRETING ARBITRATION PROVISION TO CREATE AN AFFIRMATIVE  
        OPTION IN FAVOR OF MUKILTEO HOTEL IS IRRECONCILABLE WITH  
        REMAINDER OF CONTRACT, WHERE AFFIRMATIVE OPTIONS ARE  
        EXPLICITLY CREATED BY THE PARTIES..... 9

    III. ALL AMBIGUITIES MUST BE INTERPRETED IN FAVOR OF  
    ARBITRATION..... 12

**CONCLUSION ..... 13**

## The Table of Authorities

### **Washington Case Law**

*Zuver v. Airtouch Communications Inc.* .....6, 12  
153 Wn.2d 293, 302 P.3d 753 (Wash. 2004)

*Stein v. Geonerco, Inc.* .....6, 7  
105 Wn.App. 41, 17 P.3d 1266 (2001)

*Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape  
Group, Inc.* .....6, 12  
148 Wn.App 400, 200 P.3d 254 (2009)

*Satomi Owners Ass'n v. Satomi, LLC* .....7, 8  
167 Wn.2d 781 (Wash. 2009)

*Woodall v. Avalon Care Center-Federal Way, LLC*.....8  
155 Wn.App. 919, 231 P.3d 1252 (Wash. App. I 2010)

*Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.* .....8  
460 U.S. 1, 103 So.Ct. 927 (1983)

### **Alaska Case Law**

*Willis Flooring, Inc. v. Howard S. Lease Constr. Co.* .....8  
529 P.2d 1113, 1118 (1974)

### **Assignments of Error**

1. The trial court erred in denying Wright Hotel Development, Inc.'s Motion to Compel Arbitration and granting Mukilteo Hotel, L.L.C.'s cross-motion Re: No Obligation to Arbitrate.

### **Issues Pertaining to Assignments of Error**

1. Whether Mukilteo Hotel, L.L.C. is required to arbitrate the dispute between it and Wright Hotel Development, Inc. pursuant to the arbitration provisions of the June 19, 2008 contract.

### **Statement of the Case**

On or around June 19, 2008, Wright Development West Coast, LLC and Mukilteo Hotel, LLC ("Mukilteo Hotel") executed a contract whereby Wright Development West Coast, LLC would provide general contractor services in the erection of a hotel located at 9600 Harbour Place, Mukilteo, Snohomish County, Washington. *CP* at 246.

Wright Hotel Development, Inc. (“Wright”) is the surviving entity from a merger of Wright Development West Coast, LLC, defendant in this action, and other entities. CP at 246.

The Fixed Sum Contract included Exhibit A that contained Terms and Conditions binding upon the parties. CP at 246.

Section 21 of Exhibit A provided in part:

CLAIMS AND DISPUTE RESOLUTION:

...In the event a dispute arises between MHL and Contractor, Contractor shall continue to perform the Work without interruption or delay, provided that MHL pays all undisputed amounts due Contractor. Contractor agrees to resolve any disputes arising from the Agreement by binding arbitration to be held in King County, Washington, in accordance with the rules of the American Arbitration Association then in effect.”

CP at 273-74, emphasis ours.

The term “Claim” is defined by Section 1.3 of the Fixed Sum Construction Contract, as follows: “Claims shall mean all liabilities, losses, damages, *liens*, demands, suits, judgments, fines penalties, costs, and expenses...” CP at 248, *emphasis ours*.

Wright filed a mechanics lien contending Mukilteo Hotel is indebted to it for \$3,469,383.00, and thereafter, on November 22,

2010, Mukilteo Hotel filed a motion for summary judgment seeking to invalidate the lien. *CP* at 120. Wright subsequently filed a motion to compel arbitration and motion to stay proceedings, contending the disputes between it and Mukilteo Hotel are subject to the arbitration clause in their contract. *CP* at 241-277. Thereafter Mukilteo Hotel filed its motion Re No Obligation to Arbitrate. *CP* at 116-131.

The trial court granted Mukilteo Hotel's motion Re No Obligation to Arbitrate holding that Mukilteo Hotel never agreed to arbitrate this dispute and as a result there is no enforceable agreement to arbitrate the dispute between Wright and Mukilteo Hotel. *CP* at 13-14. Wright argues that the Mukilteo Hotel and Wright agreed to resolve any disputes arising from the Agreement by binding arbitration and that an enforceable agreement to arbitrate does exist.

## Argument

### I. Standard of Review

Arbitrability is a question of law that is reviewed de novo. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302 P.3d 753 (Wash. 2004). It is the burden of the party seeking to avoid arbitration to show that the arbitration agreement is not enforceable. *Id.*

Four principles guide the court when determining whether two parties agreed to arbitrate: 1) that the duty to arbitrate arises from the contract; 2) that a question of arbitrability is a judicial question unless the parties clearly provide otherwise; 3) that courts should not reach the underlying merits of the controversy when determining arbitrability; and 4) that as a matter of policy, courts favor arbitration of disputes. *Stein v. Geonerco, Inc.*, 105 Wn.App., 41, 45-46, 17 P.3d 1266 (2001). “Washington State has a strong public policy favoring arbitration.” *Heights at Issaquah Ridge, Owners Ass’n v. Burton Landscape Group, Inc.*, 148 Wn.App. 400, 403, 200 P.3d 254 (2009). Contractual disputes are generally arbitrable “unless the court can say with positive assurance that no

interpretation of the arbitration clause could cover the particular dispute.” *Stein* at 46.

## II. The Arbitration Provision Was Mutually Assented To And Does Not Create A “One-Sided” Obligation

The trial court accepted Mukilteo Hotel’s argument that it “never agreed to arbitrate,” and that the provision at controversy creates a “one-sided” arbitration clause that furnished Mukilteo Hotel with “the option” of whether to arbitrate or not. *CP* at 14, *CP* at 120. This conclusion is at odds with Washington’s jurisprudence, and reads an option into the parties’ contract that clearly does not exist in its plain text.

### A. The Instant Provision Can Be Distinguished from Provisions Considered “Unilateral” By Courts

Unilateral provisions in an arbitration agreement are enforceable in Washington so long as they are not “substantively unconscionable.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d

781, 815 (Wash. 2009).<sup>1</sup> However, this rule is inapplicable here because the arbitration provision at controversy does not create an option or unilateral obligation.

Compare the arbitration clause in this matter to other cases where an option to arbitrate was found enforceable:

In *Satomi*, the clause read as follows:

7. Seller's Right to Arbitration. At the option of the Seller, Seller may require that any claim asserted by Purchaser or by the Association under this Warranty or any other claimed warranty relating to the Unit or Common Elements must be decided by arbitration . . . . The decision rendered by the arbitrator shall be final and binding without appeal or review.”  
167 Wn.2d 781, 790 (Wash. 2009), fn4

In *Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184 (Alaska S.C. 1983), cited by *Satomi*, the arbitration provision provided as follows:

---

<sup>1</sup> Note that much, if not most, of Washington jurisprudence on unilateral arbitration contracts is focused on the “mutuality” requirement of contracts, and specifically the question of whether a non-signatory to an agreement can be compelled to arbitrate. In such inquiries, the Washington Court of Appeals has recognized that even nonsignatories to an arbitration agreement can be bound by the agreement under ordinary contract and agency principles. *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn.App. 919, 924, 231 P.3d 1252 (Wash. App. Div. 1 2010).

Contractor, at its sole option, shall have the right to require Subcontractor to arbitrate any and all claims, disputes, and other matters in question between the Contractor and the Subcontractor arising out of or related to the Subcontract or the breach thereof.

These two provisions stand in sharp contrast to the clause at controversy here, which does not affirmatively provide any party with the right to choose or not choose arbitration. The fact the provision at controversy reads the “Contractor agrees [to arbitrate]” instead of the “Contractor and Owner agrees [to arbitrate]...” cannot be read to create an unwritten option for Mukilteo Hotel to choose or not choose arbitration. There is no jurisprudence to support such an interpretation, and it is contrary to the general Washington policy in favor of arbitration. *Stein, supra*, and this Brief’s Standard of Review Section.

B. Interpreting Arbitration Provision To Create An Affirmative Option In Favor Of Mukilteo Hotel Is Irreconcilable With Remainder Of Contract, Where Affirmative Options Are Explicitly Created By The Parties

The contract between Wright and Mukilteo Hotel is not lacking examples when specific rights and options have been

reserved to the parties.<sup>2</sup> The agreement contains over 50 instances of such explicit options.<sup>3</sup> The following contains an index of each of these specifically enumerated options:

No.	CP	Paragraph	Party with Option
1	249	3.3	Mukilteo
2	249	3.3	Mukilteo
3	251	5.1.2	Mukilteo
4	251	5.1.4	Mukilteo
5	252	7.1	Mukilteo
6	256	2.3	Mukilteo
7	257	2.4.4	Mukilteo
8	257	2.4.4	Mukilteo
9	257	2.5	Mukilteo
10	258	2.5.2	Mukilteo
11	258	2.5.3	Mukilteo
12	258	2.5.4	Mukilteo
13	259	3.2	Mukilteo
14	260	3.3	Mukilteo
15	261	5.1.1	Mukilteo
16	261	5.2.1	Mukilteo
17	262	5.3	Mukilteo
18	262	5.3.4	Mukilteo
19	263	5.4	Mukilteo
20	263	6.2	Mukilteo
21	263	6.3	Mukilteo
22	263	6.4	Mukilteo
23	264	6.6	Contractor

---

<sup>2</sup> Other sections of the *same* agreement are relevant to the court in interpreting the contract. At the trial court, Mukilteo Hotel introduced a separate contract between Wright and a subcontractor to compare the arbitration clause in that contract to the arbitration clause at controversy here. Clearly, the notion that terminology used in a separate and completely independent contract lacks believability.

<sup>3</sup> Only three of these are reserved to Wright. The remainder are reserved to Mukilteo.

24	264	6.6	Contractor
25	264	6.7	Mukilteo
26	265	7	Mukilteo
27	265	7	Mukilteo
28	266	8.5	Mukilteo
29	268	9.6	Mukilteo
30	268	10	Mukilteo
31	268	11.1	Mukilteo
32	269	11.4	Mukilteo
33	270	13.2	Mukilteo
34	270	14	Mukilteo
35	270	14	Mukilteo
36	270	15	Mukilteo
37	271	15	Mukilteo
38	272	17.3	Contractor
39	272	17.3	Mukilteo
40	273	19	Mukilteo
41	273	19	Mukilteo
42	274	21	Both
43	274	24	Mukilteo
44	274	24	Mukilteo
45	275	(a)	Mukilteo
46	275	(b)	Mukilteo
47	275	(c)	Mukilteo
48	275	(d)	Mukilteo
49	275	(e)	Mukilteo
50	275	(f)	Mukilteo
51	276	(g)	Mukilteo
52	276	¶ 2	Mukilteo

Notably absent from the Section 21's arbitration provision is any specific reservation of an option in favor of Mukilteo Hotel to arbitrate a dispute. Had Mukilteo wished to bargain for the

option to choose arbitration, it could have reserved the right or option as it did at least 48 other times in the agreement.

### III. All Ambiguities Must Be Interpreted In Favor of Arbitration

RCW §7.04A.070 provides that on motion of a party showing an agreement to arbitrate and alleging another party's refusal to arbitrate pursuant to the agreement the court shall order the parties to arbitrate unless the court finds that there is no enforceable agreement to arbitrate.

Washington's strong public policy favoring arbitration directs Courts to "indulge every presumption 'in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn.App. 400, 405, 200 P.3d 254 (2009), quoting *Zuver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 301, 103 P.3d 753 (2004) quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25, 103 S.Ct. 927 (1983).

Mukilteo Hotel contends it reserved itself an “option” to choose whether or not to arbitrate. *CP* at 120. The arbitration clause itself, however, does not affirmatively state this option.

The court is directed to “indulge every presumption in favor of arbitration.” Wright and Mukilteo Hotel are both parties to this agreement, and the agreement clearly contains an arbitration provision that requires “any disputes” to be resolved by binding arbitration. Reading an option into this provision would be to indulge presumptions against arbitration, which is opposite of the court’s duty.

The contract reserves an option to Mukilteo Hotel on at least 48 other occasions, but does not indicate any option respecting arbitration. Further, the clause does not contain an unilateral arbitration provision similar to the clause in *Satomi* and related cases.

### **Conclusion**

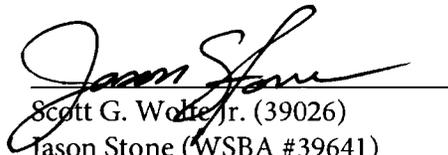
Wright has a dispute with Mukilteo Hotel that arises from their construction contract. When such a dispute exists, the

contract's Section 21 mandates that Wright "resolve [it] by binding arbitration." The contract does not afford Mukilteo Hotel an option to submit or not submit to the arbitration proceeding.

Indulging every presumption in favor of arbitration, the court should reverse the decision of the trial court and compel Mukilteo Hotel to participate in the arbitration.

Dated: March 4, 2011

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Scott G. Wolfe Jr.", is written over a horizontal line.

Scott G. Wolfe Jr. (39026)

Jason Stone (WSBA #39641)

Wolfe Law Group, LLC

Attorneys for Appellant

DECLARATION OF SERVICE

Scott G. Wolfe Jr. declares as follows:

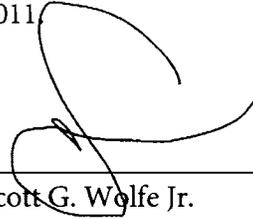
1. That I am over the age of eighteen and not a party herein;
2. On the 4<sup>th</sup> day of March, 2011, I caused to be served copies of the foregoing Appellant Brief of Wright Hotel Development, Inc., addressed as follows:

J. Scott Ralston Richard J. Gregorek Gregorek and Associates, PLLC 3450 Carillon Point Kirkland, WA 98033 Fax: 425.827.7154 Email: scottr@rjglegal.com Email: rickg@rjglegal.com <i>Counsel for Plaintiff</i>	Sent via US Mail
A. Shawn Hicks 800 Fifth Ave, Suite 3825 Seattle, WA 98104 Fax: 206-812-1418 Email: shawnhicks@att.net <i>Counsel for Jabez Holdings, Inc. d/b/a ST Fabrication, Inc. and Green Effects</i>	Sent via US Mail
Kevin B. Hansen Livengood Fitzgerald & Alskog, PLLC 121 Third Avenue PO Box 908 Kirkland, WA 98083-0908 Telephone: (425) 822-9281 Facsimile: (425) 828-0908 E-Mail: hansen@lfa-law.com <i>Counsel for Northshore Paving, Inc.</i>	Sent via US Mail

<p>Dennis J. McGlothlin  Olympian Law Group  1221 E. Pike Street, Ste 205  Seattle, WA 98122-3930  Fax: 206-527-7100  Email: dennis@olympiclaw.com  <i>Counsel for Northwest Custom Gutters, Inc.</i></p>	<p>Sent via US Mail</p>
<p>Richard H. Skalbania  Ashbaugh Beal LLP  701 Fifth Ave, Ste 4400  Seattle, WA 98104-7012  Fax: 206-344-7400  Email: rskalbania@lawasresults.com  <i>Counsel for Mukilteo Hotel LLC and Westchester Fire Ins. Co.</i></p>	<p>Sent via US Mail</p>
<p>Chris Covert  PO Box 68810  Portland, OR 97268  (503) 657-0100  F: (503) 657-0013  cavtemtr@aol.com  <i>Counsel for Sonoma Pacific Construction, Ltd</i></p>	<p>Sent via US Mail</p>
<p>Wendie Wendt  11824 NE 116<sup>th</sup> Street  Kirkland, WA 98034  P: (425) 820-1300  F: (425) 820-1333  Email: wendiew@reidelroofing.com  <i>Counsel for HRM Northwest, LLC</i></p>	<p>Sent via US Mail</p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED the March 4, 2011.



A handwritten signature in black ink, appearing to read "Scott G. Wolfe Jr.", is written over a horizontal line. The signature is stylized and somewhat cursive.

Scott G. Wolfe Jr.