

No. 40924-1-II
(consolidated with 41780-4-II)
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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 LEILA MILLS

SECOND BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

WATT, TIEDER, HOFFAR
& FITZGERALD, LLP

By: Diane C. Utz
WSBA No. 40008

1215 Fourth Ave., Suite 2210
Seattle, WA 98161
(206) 204-5800

Attorneys for Appellant

11/25/11
pm

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I. ASSIGNMENT OF ERROR

The trial court erred when it granted the motion for summary judgment by Kitsap County (“the County”) dismissing the claims of Swinerton Builders Northwest, Inc. (“Swinerton”) against the County. (SJ CP 291)

II. ISSUES PRESENTED

The trial court granted the County’s motion for summary judgment based on the County’s argument that Swinerton waived its claims against the County in an unrelated settlement Swinerton reached with one of its subcontractors on the Project.

1. Did the trial court err in granting the County’s motion for summary judgment when there are genuine issues of material fact as to the identity of the parties involved in the two separate *M.B. Diddy* and *Swinerton* actions?

2. Did the trial court err in granting the County’s motion for summary judgment when there are genuine issues of material fact as to the interpretation of the *M.B. Diddy* Stipulation and Order of Dismissal and whether Swinerton’s claims against the County were ripe at the time the agreements were made?

3. Did the trial court err in granting the County's motion for summary judgment when the trial court did not have jurisdiction pursuant to the parties' contractual agreement to arbitrate?

4. Did the trial court err in granting the County's motion for summary judgment when *res judicata* does not apply to the facts in this case?

5. Did the trial court err in granting the County's motion for summary judgment when the County failed to plead waiver or *res judicata* in its answer to the Swinerton complaint?

III. STATEMENT OF THE CASE

Swinerton incorporates by reference the Statement of the Case in Swinerton's opening brief in Cause No. 40924-1-II (the "arbitration appeal"), which this Court *sua sponte* consolidated with this appeal after oral argument in the arbitration appeal on June.30, 2011. Additional facts relevant to this appeal (the "summary judgment appeal") are recited in the light most favorable to appellant Swinerton, consistent with the standard of review on summary judgment.¹

¹ *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

A. The Parties' Contract Dispute Process.

In April 2004, Kitsap County and Swinerton executed a contract for construction of the Kitsap County Administration Building 2004-127 ("the Project"). (SJ² CP 88 - 143) The original agreement consists of two parts: the "Capital Project Contract" (see SJ CP 88 – 106) and the "General Conditions for Kitsap County Facility Construction." (See SJ CP 107 - 143)

The "General Conditions for Kitsap County Facility Construction" contains a section addressing an administrative process required for disputes. (SJ CP 139) Specifically, Section 8.01 of this portion of the contract states that if the parties fail to reach agreement on the terms of any request for an equitable adjustment, then the contractor (Swinerton) shall file a claim within 60 days of the owner's final offer or the date of final acceptance. (See SJ CP 139) Thereafter, the owner (the County) has at least 60 days to review the contractor's claim.

In addition, as explained in Swinerton's opening brief in the arbitration appeal (AA Opening Br. 9-11), the contract was modified

² Clerk's Papers relevant to this summary judgment appeal were separately indexed before the court consolidated the summary judgment and arbitration appeals. They are cited as "SJ CP" to avoid any confusion with the Clerk's Papers in the arbitration appeal.

through the Change Order process to incorporate provisions from the AIA A201 Standard General Conditions, thereby introducing additional dispute resolution processes. Subparagraph 7.3.8 of AIA A201 addresses the procedures for payment on Change Orders, including costs that are in dispute, which may be claimed in accordance with Article 4 of the AIA A201. (SJ CP 179) Article 4 of the AIA A201 addresses the Administration of Contracts, including claims and disputes. (SJ CP 175) Under Paragraph 4.6, all claims for unresolved Change Orders must be submitted to an administrative process prior to being subjected to arbitration:

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.

(SJ CP 64) (emphasis added).

B. Swinerton's Project-Related Dispute with the County.

During construction, Swinerton encountered numerous deficiencies and conflicts within the Project documents provided by Kitsap County's designers. (SJ CP 34–36) The design was incomplete, ambiguous and inconsistent. As a result, Swinerton submitted a Request for Equitable Adjustment on September 5, 2007. (SJ CP 34–36)

C. The Basis of the County's Waiver Defenses.

Two separate lawsuits arose out of the Project. The resolution of the first lawsuit, brought by M.B. Diddy, a non-party to the pending lawsuit, is the basis for the County's waiver arguments in its motion for summary judgment.

1. M.B. Diddy Lawsuit Against Swinerton.

On August 18, 2006, Swinerton was sued by a subcontractor, M.B. Diddy, that had performed work on the Project. (See SJ CP 14) The subcontractor alleged breach of contract claims against Swinerton. (SJ CP 20) The subcontractor's suit also named "Kitsap County Administration" as a defendant, but only to the extent necessary to recover from the statutory retainage fund for public projects pursuant to RCW Ch. 60.28. (SJ CP 14) No cross claims were ever alleged by either defendants Swinerton nor named co-defendant Kitsap County Administration. (CP 37)

Swinerton resolved the subcontractor's breach of contract claim through mediation³ on May 16, 2007 (SJ CP 81-82), and stipulated to a settlement and dismissal under CR 2A on the same

³ Only Swinerton and M.B.Diddy participated in the mediation. Neither defendant Kitsap County Administration nor respondent County attended the mediation or participated in settlement negotiations. (See SJ CP 81-83)

day. (SJ CP 38-42) Swinerton and M.B. Diddy signed a stipulated order of dismissal in December 2007, and forwarded it to the named party "Kitsap County Administration" for signature on December 20, 2007. (SJ CP 11)

2. Swinerton Lawsuit Against Kitsap County.

The lawsuit out of which this appeal arises involves a claim by Swinerton against the entity with whom it entered into a contract for the work, respondent "Kitsap County." Specifically, Swinerton's claim against the County is for breach of contract and breach of warranties associated with the Project. Swinerton's Complaint was filed on January 4, 2008. (SJ CP 3-6) The County filed its answer, which did not include a counterclaim, and which did not assert its current waiver defense as required under CR 12(b), on July 10, 2008. (CP 7-12)

IV. ARGUMENT

A. Summary Judgment Is Not Appropriate Because Genuine Issues of Material Fact Exist.

1. Summary Judgment Standard.

The standards for summary judgment are well established. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law.⁴ All reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party.⁵ The appellate court reviews an order granting summary judgment de novo, taking all facts and inferences in the light most favorable to the nonmoving party.⁶

Moreover, the party moving to enforce the terms of a settlement agreement has the burden of proving there is no genuine dispute as to the material terms of the agreement.⁷ If the moving party meets its burden, “the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact.”⁸

The County’s motion for summary judgment in effect was an attempt to “enforce” the settlement agreement from an unrelated case. In a motion to enforce a settlement agreement, however, the

⁴ CR 56(c); *Babcock v. Mason County Fire Dist No. 6.*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

⁵ *Degel*, 129 Wn.2d 43 at 48.

⁶ *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 155 P.3d 952 (Div. 2 2007), review granted, 163 Wn.2d 1017, 180 P.3d 1291 (2008) and *aff’d*, 166 Wn.2d 489, 210 P.3d 308 (2009).

⁷ *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696 – 697, 994 P.2d 911 (2000).

⁸ *Patterson v. Taylor*, 93 Wn. App. 579, 584, 969 P.2d 1106 (1999).

trial court must view the evidence in the light most favorable to the moving party and “determine whether reasonable minds could reach but one conclusion.”⁹ “[I]f the nonmoving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues of fact.”¹⁰

Swinerton raised many genuine issues of material fact and supported those issues with valid arguments and affidavits. (See, e.g., SJ CP 81–83) The County, however, provided no evidence to counter the issues raised by Swinerton. As a consequence, the trial court erred in granting the County’s motion for summary judgment.

2. Summary Judgment Was Not Proper Because A Question Of Material Fact Exists Whether The Parties To The *M.B. Diddy* Lawsuit Are The Same As The Parties To This Lawsuit.

In a case such as this, summary judgment is only proper with respect to a written contract if the contract, viewed in light of the parties’ objective manifestations, has only one reasonable meaning.¹¹ Contract principles govern final judgments entered by

⁹ *In re the Marriage of Ferree*, 71 Wn. App. 35, 44, 856 P.2d 706 (1993).

¹⁰ *Brinkerhoff*, 99 Wn. App. at 697.

¹¹ *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 116 P.3d 409 (2005).

stipulation or consent.¹² When interpreting a contract, the primary objective is to discern the parties' intent.¹³

In this case, defendant/respondent Kitsap County was not a party to the *M.B. Diddy* Stipulation and Order of Dismissal. 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."¹⁴ "[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent."¹⁵

As a general rule, the parties' intentions are considered questions of fact.¹⁶ Throughout this case, the County has relied on a settlement agreement and stipulated order from a totally separate case, the result of a mediation in which the County did not participate, to argue that Swinerton forfeited its rights to bring

¹² *Martinez v. Kitsap Pub. Servs., Inc.*, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999).

¹³ *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

¹⁴ *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

¹⁵ *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)..

¹⁶ *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 517, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027, 110 P.3d 755 (2005).

claims under the Swinerton/Kitsap County contract. The County is well aware that Kitsap County (the named defendant in this case) was not a party to the *M.B. Diddy* lawsuit and did not sign the *M.B. Diddy* Stipulation and Order of Dismissal. The County is also aware that no consideration was ever exchanged for Swinerton's alleged forfeiture of all of its contract claims against the County in a Stipulation and Order arising out of a lawsuit to which the County was not a party. (See SJ CP 82) The County's reliance on the *M.B. Diddy* Order of Dismissal in the County's Motion for Summary Judgment is misplaced.

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.

(SJ CP 38-42) (emphasis added). As demonstrated by the highlighted language, the Order of Dismissal was limited to claims that **could have been asserted** in the *M.B. Diddy* litigation against

Kitsap County Administration. This 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 against Kitsap County Administration. Clearly, Swinerton **could not have** asserted Swinerton's claims against defendant Kitsap County in the *M.B. Diddy* litigation because **Kitsap County was not a party** to the *M.B. Diddy* lawsuit.

Moreover, the County has repeatedly claimed that other language in the Order resulted in an expanded release/waiver and/or discharge of claims. This argument, however, inevitably leads to an ambiguity within the language of the Stipulation and Order - and, therefore, a disputed question of fact. Reading the Order as a whole, several potential interpretations exist with respect to the alleged release by Swinerton of claims against Kitsap County Administration. Given the varied interpretations, the scope of any release or waiver of claims against Kitsap County Administration and whether any such release or waiver would apply to the contract claims Swinerton seeks to arbitrate with respondent Kitsap County pursuant to their contract is a question of fact. Under Washington law, all such questions of fact *must be resolved in*

favor of Swinerton for the purposes of a Motion for Summary Judgment.¹⁷

3. Summary Judgment Was Not Proper Because A Question Of Material Fact Exists Whether The Stipulation And Order To Dismiss Applied to Swinerton's Unripe Claims Against Kitsap County.

In addition to the fact that Kitsap County (the respondent here) was not a party in the *M.B. Diddy* litigation, the claims brought by Swinerton against defendant Kitsap County in this action could not have been brought at the time M.B. Diddy brought its claims against Swinerton. The Swinerton/Kitsap County contract has very distinct administrative procedures for claims and disputes, which had not been exhausted at the time the M.B. Diddy stipulation was signed by the parties to that stipulation. Therefore, based on the language of the Stipulation and Order for Dismissal, those claims that were not yet "ripe" were not waived.

¹⁷ The County has further attempted to rely on a Division One decision that addressed Swinerton's right to vacate the stipulation and order of dismissal in the *M.B. Diddy* lawsuit. Division One held that the court could not vacate the dismissal in the other action. *M.B. Diddy v. Swinerton Builders*, No. 63874-2-1, 2009 LEXIS 2631 (Div. I Oct. 19, 2009). However, the potential res judicata effect of the stipulation was never briefed or considered by Division One – nor could it have been, as that issue was never in the previous case. Consequently, Division One never determined what the consequence of the stipulation would be in any action between Kitsap County and Swinerton. The res judicata effect of the Division One opinion/decision is properly before this court now.

Specifically, the “General Conditions for Kitsap County Facility Construction” contains a section that addresses an administrative process required for disputes that must occur before formal litigation or arbitration. (SJ CP 139) Section 8.01 of this portion of the contract provides that if the parties fail to reach agreement on the terms of any request for an equitable adjustment, then the contractor shall file a claim within 60 days of the owner’s final offer or the date of final acceptance. Thereafter, the owner has at least 60 days to review the contractor’s claim.

Additionally, under the AIA A201, Article 4.6 General Conditions, as incorporated into the contract between Swinerton and the County through numerous Change Orders, all claims, were subjected to a distinct administrative process prior to being subject to arbitration:

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.

(SJ CP 64) (emphasis added)

At the time the settlement agreement between the parties to the *M.B. Diddy* litigation was signed, the administrative processes addressed in Section 8.07 of the “General Conditions for Kitsap

County Facility Construction” and Article 4.6 of the AIA A201 General Conditions had not been exhausted. The mediation between the parties in the *M.B. Diddy* litigation, at which the CR 2A agreement was signed, occurred on May 16, 2007. The Stipulation and Order for Dismissal that was drafted based on the CR 2A mediated agreement between M.B. Diddy and Swinerton was circulated in December 2007, and a signed copy was provided to Kitsap County Administration on December 20, 2007.

On the other hand, Swinerton did not even start the administrative dispute process outlined in the Swinerton/Kitsap County contract until Swinerton submitted its Request for Equitable Adjustment (“REA”) on September 5, 2007. (SJ CP 34–36) As outlined in the Swinerton/Kitsap County contract, the REA must be submitted first, before dispute resolution is begun. (See SJ CP 133) The owner/architect is required to review the REA and formally respond. If an agreement is not reached on the REA, a claim must be filed with the County within 60 days of the REA decision. (See SJ CP 139) Finally, in accordance with AIA 201, an arbitration demand may be filed after an additional 30 days from the date of

the submittal of the claim to the architect or after the architect's decision. (SJ CP 64)

Clearly this administrative process had not been exhausted prior to the agreement to release claims that could have been brought in the *M.B. Diddy* mediation on May 16, 2007. As a result, Swinerton's claims against defendant Kitsap County in this action could not have been asserted, and there is at least a question of fact whether it was the parties' intent that they forever be waived.

Further, even if the administrative process had been exhausted and the legal distinction between Kitsap County (the defendant/respondent in this action) and Kitsap County Administration (the "placeholder" named lien defendant in the *M.B. Diddy* action) were ignored, Swinerton's claims against defendant/respondent Kitsap County could not "have been asserted" in the *M.B. Diddy* Kitsap County Superior Court action because Article 4.6 expressly mandates arbitration of all such claims. As a result, the claims brought by Swinerton that defendant/respondent Kitsap County seeks to avoid by the County's motion for summary judgment were not subject to the *M.B. Diddy* order. (See SJ CP 81 – 82)

Prohibiting Swinerton from pursuing its claims in arbitration because Swinerton followed the procedures and terms of its contract with the County would work a substantial injustice and contrary to Washington law. Furthermore, prohibiting Swinerton from pursuing its claims against the County because of an Order that applies, at best, to claims against Kitsap County Administration (an entity that is not a party to this lawsuit or to Swinerton's contract with Kitsap County) would also work a substantial injustice contrary to the facts before this Court and Washington law.

Following the standards applicable to summary judgment and construing all facts in the light most favorable to Swinerton, clearly Swinerton's breach of contract claims against defendant Kitsap County were not included within the scope of the *M.B. Diddy* Order between M.B. Diddy, Swinerton, and, nominally, Kitsap County Administration. The very nature of a question of fact regarding the identity of the parties to the *M.B. Diddy* Order and whether an alleged release of Kitsap County Administration would be a release (or an intended release) of Swinerton's breach of contract claims against defendant Kitsap County are genuine issues of material fact that preclude summary judgment.

B. The Parties Agreed To Arbitrate All Claims. Therefore Summary Judgment Was Not Proper Because The Trial Court Did Not Have Jurisdiction.

Swinerton and the County agreed to arbitrate any and all claims that arose on the Project. The parties incorporated the provisions of the AIA A201 through the numerous change orders executed on the Project. Article 7.3.8 of the AIA A201, which addresses the procedures for payment on Change Orders and other costs that are in dispute and that can be claimed in accordance with Article 4 of the AIA A201. (SJ CP 179) Article 4 of the AIA A201 addresses the Administration of Contracts, including claims and disputes and provides that all disputes between the parties are subject to arbitration. (SJ CP 175) Under Article 4.6, all claims, including claims for unresolved Change Orders or CCDs, are subject to arbitration:

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**.

(SJ CP 64)(emphasis added)

Washington's Uniform Arbitration Act, RCW 7.04A, provides that arbitration clauses are valid, enforceable, and irrevocable, "except upon a ground that exists at law or equity for the revocation

of contract.”¹⁸ Moreover, courts must 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 **like defense to arbitrability.**¹⁹

Because the claims in this case are subject to arbitration, the trial court did not have subject matter jurisdiction to rule on the County’s motion for summary judgment. Therefore, this court should overturn the trial court’s decision to grant summary judgment.

C. Summary Judgment Was Not Proper Because The County’s Res Judicata Argument Does Not Apply To The Facts Of This Case.

The County’s defense of res judicata fails for at least four reasons, each of which is independently fatal to the County’s claim that Swinerton’s settlement with its subcontractor M.B. Diddy also resolved all claims Swinerton had or would have against the County. First, res judicata does not operate to bar claims that could have been brought as permissive cross-claims in an initial lawsuit. Second, res judicata does not operate to bar claims that arise out of

¹⁸ RCW 7.04A.060(1).

¹⁹ *Verbeek v. Greenco*, 159 Wn. App. 82, 87 (2010)(citing to *Heights at Issaquah Ridge v. Burton Landscaping Group*, 148 Wn. App. 400, 407 (2009)).

a transaction separate and apart from a previously litigated issue. Third, res judicata does not operate to bar claims brought under two separate actions unless the actions are identical in relevant aspects. Finally, res judicata does not operate to bar claims in a second action that could not have been brought in the first action because they had not yet accrued.

1. Res Judicata Does Not Bar Claims That Could Have Been Brought As Permissive Cross-Claims In A Prior Proceeding.

In the County's Motion for Summary Judgment, it alleged that Swinerton's lawsuit was barred by the doctrine of res judicata because Swinerton's claims could have been brought in the M.B. Diddy action. In the M.B. Diddy action, however, any claims brought by Swinerton against co-defendant Kitsap County Administration would have been a cross-claim under CR 13(g).

However, CR 13(g) and res judicata principles generally are inconsistent with the idea that a cross-claim that could have been brought, but was not, is thereby barred. Under CR 13(g), the assertion of a cross claim is permissive, not mandatory.²⁰ If co-parties assert cross claims and are therefore adversaries, the

²⁰ See *Nautilus, Inc. v. Transamerica Title Ins. Co.*, 13 Wn. App. 345, 353, 534 P.2d 1388 (1975)

principles of res judicata apply.²¹ Although res judicata may apply when co-parties are adversaries through cross pleadings, it applies only to those claims that were actually asserted through cross pleadings. Otherwise, application of res judicata in such circumstances would conflict with the rule that cross claims are permissive.²²

In this case, no cross-claims were brought between the co-defendants Swinerton and Kitsap County Administration in the prior *M.B. Diddy* action. (see CP 37) Consequently, res judicata does not apply as a bar to Swinerton's claims in this lawsuit.

2. Res Judicata Does Not Bar The Litigation Of Claims That Were Not Previously Litigated.

A prior judgment is res judicata as to every question that was properly a part of the matter adjudicated, but it does not bar litigation of claims that were not in fact adjudicated.²³ Res judicata does not bar claims that arise out of a transaction separate and

²¹ *Pacific Nat'l Bank v. Bremerton Bridge Co.*, 2 Wn.2d 52, 59, 97 P.2d 162 (1939); *Snyder v. Marken*, 116 Wash. 270, 272-73, 199 P. 302, (1921).

²² *Krivaka v. Webber*, 43 Wn. App. 217, 221, 716 P.2d 916 (1986).

²³ *Department of Ecology v. Yakima Reservation Irrig. Dist.*, 121 Wn.2d 257, 290, 850 P.2d 1306 (1993).

apart from the issue previously litigated.²⁴ Further, res judicata is not intended to deny the litigant its day in court.²⁵

For example, in *Mellor v. Chamberlin*,²⁶ the Court held that even though two lawsuits both arose from a single real estate transaction, the subject matters differed such that the second suit was not barred by res judicata. In the first lawsuit, a real estate buyer contended that the seller had misrepresented the extent of the property included in the sale. That lawsuit was settled between the parties and an order of dismissal with prejudice was entered by the court. Shortly thereafter, the buyer brought a second lawsuit, claiming that the seller breached a covenant of warranty. The buyer prevailed in that action on the theory that an adjoining landowner's encroachment onto the property breached the seller's warranty of quiet and peaceful possession.

On appeal, the seller contended that the issue in the second lawsuit should have been raised in the first, and because it was not, the second lawsuit was barred by res judicata. In ruling against the seller, the court held that "although both lawsuits arose out of the

²⁴ *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 226, 588 P.2d 725 (1978).

²⁵ *Luisi Truck Lines, Inc. v. Utilities & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967).

²⁶ *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983).

same transaction (sale of property), their subject matter differed" and the second suit was therefore not barred by res judicata.²⁷

Similarly, in this case, although both lawsuits arose out of the same Project, their subject matter greatly differed. M.B. Diddy sued Swinerton under their subcontract agreement. (See SJ CP 14–24) Most factual allegations and claims in the *M.B. Diddy* lawsuit were against Swinerton, as well as its sureties, and arose strictly out of the work M.B. Diddy performed at Swinerton's direction. The remaining claim was against Kitsap County Administration, but solely in its role as the entity that reserved moneys earned by Swinerton as retainage pursuant to RCW Ch. 60.28.²⁸

Conversely, Swinerton's claims against the County in this lawsuit arise out of the County's breach of the prime contract. (SJ CP 1 – 6) Virtually none of the facts upon which Swinerton relies in its claim against the County are the same as those alleged by the subcontractor in the *M.B. Diddy* lawsuit. Swinerton brought no claims against the County in the *M.B. Diddy* lawsuit, therefore no

²⁷ *Mellor*, 100 Wn.2d at 646.

²⁸ In the *M.B. Diddy* complaint, the plaintiff recites as a party "Defendant Kitsap County Administration is a government entity that holds the retained earnings commonly referred to as "retainage." (SJ CP 16).

claims by Swinerton were adjudicated. As such, res judicata cannot operate as a bar to Swinerton's claims in this lawsuit.

3. Res Judicata Does Not Bar Claims Brought In A Second Proceeding That Are Not Identical To Claims Brought In A Prior Proceeding.

Under the doctrine of res judicata, a prior judgment has preclusive effect only when the party moving for summary judgment in the successive proceeding proves that the two actions are **identical** in four respects: (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made.²⁹ For the doctrine to apply, substantial identity must exist between the successive proceedings, including settlement agreements.³⁰ Dismissal on the basis of res judicata is improper in this case because the County failed to indisputably prove on summary judgment a concurrence of identity between the persons/parties and between the causes of action in the two proceedings.

As discussed above, Swinerton's claims are against Kitsap County because Kitsap County is the sole entity with which

²⁹ *Knuth v. Beneficial Washington, Inc.*, 107 Wn. App. 727, 731, 31 P.3d 694 (2001).

³⁰ *Hadley v. Cowan*, 60 Wn. App. 433, 441, 804 P.2d 1271 (1991).

Swinerton contracted for work on the Project. Defendant Kitsap County's motion completely overlooked the fact that the alleged basis of the res judicata defense is a prior action in which Swinerton was involved (the *M.B. Diddy* lawsuit), but defendant Kitsap County was not. (SJ CP 7-9) Defendant Kitsap County's silence in its motion for summary judgment on this issue speaks volumes: Kitsap County knows that there is a difference between the valid municipal entity, Kitsap County, and the party to the *M.B. Diddy* lawsuit, Kitsap County Administration. Kitsap County knows that because the parties are not the same, res judicata does not apply.

Division One recently considered a very similar issue related to the identity of a party asserting a similar res judicata defense.³¹ In *Thompson*, the court considered a res judicata defense based on the argument that the plaintiff's complaints were against King County employees in an initial action and King County in a second action.³² However, the *Thompson* court recognized that to the

³¹ *Kirk Alan Thompson v. King County*, No. 65369-5-I, (Div. I Aug. 22, 2011)

³² Courts may view different defendants as the same party as long as they are in privity, and most federal courts have determined that employer-employee or principal-agent relationships may ground a claim

extent that the county was responsible for the actions of its employees other than the two named in the first suit, the County's liability remained to be adjudicated. As a result, King County did not have sufficient identity with the defendants in the first action to permit the application of res judicata.

Similarly, in this case, to the extent that Kitsap County Administration, the entity sued in the *M.B. Diddy* action, and Kitsap County, the entity sued in the *Swinerton* action, are somehow related, Kitsap County Administration had been sued in its limited capacity as the retainage fund holder only pursuant to RCW ch 60.28. In this case, however, Swinerton brought a breach of contract action against Kitsap County in its capacity as a party to the prime contract, and the County's liability has not been adjudicated. As a result, the trial court should have determined that there was not sufficient identity with the defendant in the *M.B. Diddy* action to permit the application of res judicata.

Dismissal on the basis of res judicata also is improper in this case because there is no relationship between the causes of action in the *M.B. Diddy* litigation and the *Swinerton* litigation. While there

preclusion defense *Thompson*, No. 65369-5-I, slip op. at 7 - 9 (citing *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995)).

is no specific test for determining identity of causes of action, the following criteria should be considered:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented at the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.³³

Here, the subject matter in Swinerton's claims against the County is not the same as the subject matter in M.B. Diddy's claims against Swinerton. Although both claims are for breach of a contract related to the same Project, they absolutely are not for breach of the same contract. M.B. Diddy's claims were based on alleged breaches of its subcontract agreement with Swinerton. In contrast, Swinerton's claims against Kitsap County arise out of Swinerton's prime contract agreement with Kitsap County. Consequently, the evidence required to prove the two cases is substantially different. Similarly, the two suits do not arise out of the same transactional nucleus of facts because the two separate contracts are two separate transactions between separate entities.

³³ *Kuhlman*, 78 Wn. App. 115 at 122 (quoting *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)).

Finally, the two suits do not involve infringement of the same rights. M.B. Diddy brought suit against King County Administration in its role as the holder of the statutory required retainage fund on the Project pursuant to RCW Ch. 60.28. Conversely, Swinerton's suit was brought against Kitsap County as the entity with which Swinerton had contracted and that breached its contractual obligations with Swinerton.

4. Res Judicata Does Not Bar Claims That Were Not Brought In A Prior Action Because Those Claims Had Not Yet Accrued.

If a cause of action has not accrued at the time of the first lawsuit, the cause of action is not the same cause of action and is not barred by res judicata.³⁴ "A cause of action that did not exist at the time of a former judgment" cannot be foreclosed by the prior judgment:

While it is admitted, there can be but one recovery upon the same cause of action. This does **not mean the subject-matter of a cause of action can be litigated but once**. It may be litigated as often as an independent cause of action arises which, because of its subsequent creation, could **not have been litigated** in the former suit, as **the right did not then exist. It follows from the very**

³⁴ *Johnson v. National Bank of Commerce*, 152 Wash. 47, 50-51, 277 P. 79 (1929).

nature of things that a cause of action which did not exist at the time of a former judgment could not have been the subject-matter of the action sustaining that judgment.³⁵

Here, there is an issue of material fact whether Swinerton's causes of action against defendant Kitsap County accrued before or after M.B. Diddy, Swinerton and Kitsap County Administration settled and dismissed the *M.B. Diddy* lawsuit. As explained above, Swinerton had not yet exhausted the administrative requirements of the contract. Under Washington law, Swinerton's right to bring a claim against Kitsap County arose after settlement and therefore is not the same cause of action and not barred by res judicata, even if the lack of identity between the parties is somehow overlooked or ignored. There are at a minimum disputed issues of material fact concerning the consequence of the earlier lawsuit that should have prevented summary judgment on the grounds of res judicata.

D. The County's Res Judicata and/or Waiver Defenses Are Barred Because These Defenses Were Not Pled In The County's Answer To The Complaint.

Affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion made pursuant to

³⁵ *Harsin v. Oman*, 68 Wash. 281, 283-84, 123 P. 1 (1912) (emphasis added).

CR 12(b), or (3) tried by the express or implied consent of the parties.³⁶ CR 8(c) requires that release, res judicata, and waiver be specifically pleaded:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, **release**, **res judicata**, statute of frauds, statute of limitation, **waiver**, and any other matter constituting an avoidance or affirmative defense.

In this case, the County failed to plead release, res judicata, or waiver. In addition, the County did not assert any of these affirmative defenses in a prior CR 12(b) motion. Finally, Swinerton has never expressly nor impliedly consented to the trial of these defenses and Swinerton will not do so over two years after the County's answer was filed.³⁷ Therefore, the County's current defenses of res judicata and waiver have been waived under Washington law and CR 8.

Most notably, the fact that the County did not plead these affirmative defenses speaks volumes as to what the County's

³⁶ *Bernsen v. Big Bend Elec. Coop., Inc.*, 68 Wn. App. 427, 434, 842 P.2d 1047 (1993).

³⁷ *Bernsen*, 68 Wn. App. at 434.

counsel thought of the scope of the order and dismissal in the *M.B. Diddy* case at the time the County's counsel signed and submitted the County's Answer in this action. Ambiguities in a settlement agreement can be resolved by looking at post- contract actions.³⁸ The actions of both Swinerton and the County clearly show that neither believed the *M.B. Diddy* order was intended to release the claims brought by Swinerton against the County in the current lawsuit. Swinerton clearly did not hold the belief that it had released claims against the County, as demonstrated by the pursuit of Swinerton's claims in its lawsuit against Kitsap County. Similarly, the fact that the County did not plead the affirmative defenses of waiver or res judicata in July 2008, six months after the signing of the stipulation by the County's counsel on behalf of "Kitsap County Administration," is evidence that neither the County nor the County's counsel held a subjective belief that Swinerton had waived or dismissed Swinerton's claims against Kitsap County.

This conclusion is further strengthened when the close proximity between the order of dismissal in the *M.B. Diddy* claim

³⁸ See, *Berg v. Hudesman*, 115 Wn.2d 657, 665, 801 P.2d 222 (1990); *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005).

and the filing of the County's Answer in this lawsuit is examined. If the County maintained a subjective belief that the County had received a full release and waiver of all claims by Swinerton as a result of a mediation in which it did not even participate, the County would have immediately asserted the County's rights. Allowing the County to now raise these affirmative defenses two and a half years later renders CR 8(c) meaningless.

The trial court should have denied the County's motion for summary judgment because the County failed to plead waiver and res judicata as affirmative defenses and because such failure is evidence that waiver of Swinerton's claims against Kitsap County in this case was not contemplated in the stipulated dismissal in the *M.B. Diddy* lawsuit between M.B. Diddy, Kitsap County Administration, and Swinerton. At a minimum, under the standard for summary judgment, and construing all facts in the light most favorable to Swinerton, it cannot be said that no genuine issues of material fact exist when questions as to the identity of the parties and the relationship between defendant Kitsap County and Kitsap County Administration were never raised or discussed in the County's summary judgment motion. Viewed in the light most

favorable to Swinerton, defendant Kitsap County is a different entity than Kitsap County Administration and any alleged release of Kitsap County Administration cannot be viewed as a release of defendant Kitsap County.

V. CONCLUSION

Procedurally, the County's summary judgment motion should have never been heard or ruled upon by the trial court because it is an issue for an arbitrator to decide under the Swinerton/Kitsap County contract's arbitration provisions. By allowing the summary judgment motion to be ruled upon by the trial court, Swinerton was deprived of its right to an immediate appeal of the denial of its motion to compel arbitration under Washington law.³⁹ The trial court should have considered the substantive merits of the summary judgment motion only if (and after) this Court had determined that the trial court had jurisdiction to do so in the arbitration appeal. Even then, however, there are genuine issues of material fact that should have precluded the trial court from granting the summary judgment motion and dismissing Swinerton's claims against the County. Accordingly, this Court should reverse and remand with

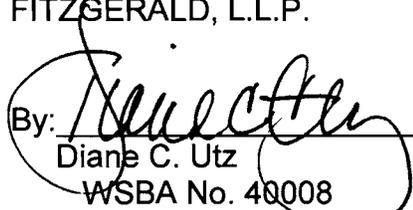
³⁹ See *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 43-44, 17 P.3d 1266 (2001).

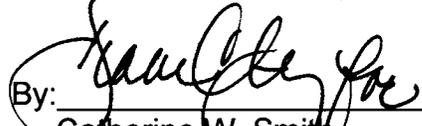
instructions that the trial court shall deny the motion for summary judgment.

Dated this 20 day of August, 2011.

WATT, TIEDER, HOFFAR &
FITZGERALD, L.L.P.

SMITH GOODFRIEND, P.S.

By: 
Diane C. Utz
WSBA No. 40008

By: 
Catherine W. Smith
WSBA No. 9542

Attorneys for Appellant

STATE OF WASHINGTON
 BY: *K*
 JUDGE

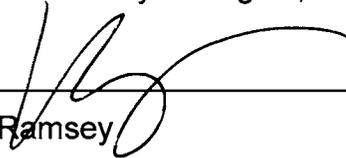
DECLARATION OF SERVICE

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

That on the 25th day of August, 2011, I arranged for service of the foregoing Second Brief of Appellant as follows:

Office of the Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Ione S. George Kitsap County Prosecuting Attorney's Office 614 Division Street, MS 35-A Port Orchard, WA 98366	<input type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Catherine W. Smith Smith Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101	<input type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington on the 25th day of August, 2011.



 Lana S. Ramsey