

NO. 41780-4-II
(Consolidated with 40924-1-II)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

SWINERTON BUILDERS NORTHWEST, INC.,
A Delaware corporation,

Appellant,

v.

KITSAP COUNTY,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

IONE S. GEORGE
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Catherine W. Smith
1109 First Ave, Suite 500
Seattle, WA 98101
Diane C. Utz
1215 Fourth Ave, Suite 2210
Seattle, WA 98161

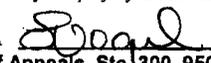
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 26, 2011, Port Orchard, WA 
Original electronically filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iv

FEDERAL CASES iv

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....3

 A. PROCEDURAL HISTORY.....3

 B. FACTS4

III. ARGUMENT9

 A. SWINERTON’S CLAIM THAT THE COUNTY WAS NOT A PARTY TO THE FIRST SUIT IS WITHOUT MERIT AS THE COUNTY WAS CLEARLY A PARTY TO THE FIRST SUIT AND SWINERTON HAS CONSISTENTLY AND REPEATEDLY ACKNOWLEDGED THIS FACT IN THE PAST.....9

 B. SWINERTON’S CLAIM THAT THE STIPULATION AND DISMISSAL ONLY COVERED THOSE CLAIMS THAT EITHER WERE BROUGHT OR COULD HAVE BEEN BROUGHT IN THE FIRST SUIT IS WITHOUT MERIT BECAUSE SWINERTON IGNORES THE PLAIN LANGUAGE OF THE STIPULATION WHICH SPECIFICALLY STATES THAT IT RELEASE ALL CLAIMS, KNOWN OR UNKNOWN, ASSERTED OR UNASSERTED, ARISING FROM THE PROJECT IN ANY MANNER.13

 C. SWINERTON’S CLAIM THAT SUMMARY JUDGMENT WAS INAPPROPRIATE DUE TO AN AGREEMENT TO ARBITRATE IS WITHOUT MERIT BECAUSE: (1) SWINERTON HAD SPECIFICALLY RELEASED ALL CLAIMS

AGAINST THE COUNTY AND THUS HAD NO RIGHT TO ARBITRATION EVEN IF AN ARBITRATION CLAUSE EXISTED; (2) THE CONTRACT, IN FACT, CONTAINED NO ARBITRATION PROVISION; AND, (3) THE TRIAL COURT HAD ALREADY REJECTED SWINERTON'S MOTION FOR ARBITRATION BY THE TIME IT ADDRESSED THE SUMMARY JUDGMENT MOTION.....15

D. SWINERTON'S CLAIM THAT RES JUDICATA DOES NOT APPLY TO THE PRESENT CASE IS WITHOUT MERIT BECAUSE THE DOCTRINE OF RES JUDICATA PRECLUDES THE RELITIGATION OF CLAIMS THAT WERE ADDRESSED IN A PREVIOUS LITIGATION. AS THE STIPULATION IN THE FIRST SUIT SPECIFICALLY RELEASED ALL CLAIMS, KNOW OR UNKNOWN, ASSERTED OR UNASSERTED, ARISING FROM THE PROJECT IN ANY MANNER, THE PLAIN LANGUAGE OF THE STIPULATION DEMONSTRATES THAT ALL CLAIMS WERE SPECIFICALLY RESOLVED IN THE FIRST SUIT. RES JUDICATA, THEREFORE, CLEARLY APPLIES TO THE PRESENT CASE AND PRECLUDES RELITIGATION OF ANY CLAIM ARISING FROM THE PROJECT IN ANY MANNER.....17

E. SWINERTON'S CLAIM THAT THE COUNTY WAIVED THE ISSUES OF WAIVER AND RES JUDICATA BY NOT SPECIFICALLY PLEADING THOSE ISSUES IN ITS ANSWER IS WITHOUT MERIT BECAUSE: (1) WASHINGTON LAW CLEARLY PROVIDES THAT WHEN A FAILURE TO PLEAD AN AVOIDANCE OR DEFENSE DOES NOT CAUSE EITHER SURPRISE OR PREJUDICE, THEN THE FAILURE TO PLEAD CANNOT BE SAID TO AFFECT THE SUBSTANTIAL RIGHTS OF THE PARTIES AND THE NONCOMPLIANCE WILL BE CONSIDERED HARMLESS; AND, (2) ANY FAILURE IN THE PRESENT CASE WAS

CLEARLY HARMLESS BECAUSE SWINERTON SUFFERED NO SURPRISE NOR PREJUDICE AS SWINERTON WAS WELL AWARE OF THE COUNTY'S INTENTION TO SEEK SUMMARY JUDGMENT BASED ON THE COMPREHENSIVE RELEASE AND BECAUSE SWINERTON SUFFERED NO PREJUDICE AS IT WAS ALLOWED TO ATTEMPT TO HAVE THE STIPULATION VACATED AND IT WAS ALLOWED TO FULLY LITIGATE THE SUMMARY JUDGMENT MOTION BELOW.24

IV. CONCLUSION.....32

TABLE OF AUTHORITIES

FEDERAL CASES

Brinkley v. Harbour Recreation Club,
180 F.3d 598 (4th Cir.1999)29

Camarillo v. McCarthy,
998 F.2d 638 (9th Cir.1993)28

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981).....18

Finance Timing Publ'ns, Inc. v. Compugraphic Corp.,
893 F.2d 936 (8th Cir.1990)29

Fli-Fab, Inc. v. United States,
16 F.R.D. 553 (D.R.I.1954)32

Giles v. General Electric Co.,
245 F.3d 474 (5th Cir.2001)29

Hanson v. Hunt Oil Co.,
398 F.2d 578 (8th Cir.1968)32

Howey v. United States,
481 F.2d 1187 (9th Cir.1973)32

Moore, Owen, Thomas & Co. v. Coffey,
992 F.2d 1439 (6th Cir.1993)29

Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.,
380 F.3d 200 (4th Cir.2004)29

Pro v. Donatucci,
81 F.3d 1283 (3d Cir.1996).....28

Rivera v. Anaya,
726 F.2d 564 (9th Cir.1984)28

Saks v. Franklin Covey Co.,
316 F.3d 337 (2d Cir.2003).....28

<i>Sanders v. Department of the Army,</i> 981 F.2d 990 (8th Cir.1992)	29
<i>Stoebner v. Parry, Murray, Ward & Moxley,</i> 91 F.3d 1091 (8th Cir.1996)	29
<i>United States v. IBM Corp.,</i> 66 F.R.D. 223 (S.D.N.Y.1975)	32
<i>Williams v. Ashland Engineering Co.,</i> 45 F.3d 588 (1st Cir.1995)	28

STATE CASES

<i>Appliance Buyers Credit Corp. v. Upton,</i> 65 Wash. 2d 793, 399 P.2d 587 (1965).....	32
<i>Bernsen v. Big Bend Electric Cooperative, Inc.,</i> 68 Wash. App. 427, 842 P.2d 1047 (1993).....	26
<i>Boyle v. Clark,</i> 47 Wash. 2d 418, 287 P.2d 1006 (1955).....	25
<i>Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America,</i> 100 Wash. 2d 343, 670 P.2d 240 (1983).....	32
<i>Dixon v. Crawford,</i> __ Wn. App. __, WL 4348058 (Div II, Sept 19, 2011)	27
<i>In re Estate of Palmer,</i> 145 Wash. App. 249, 187 P.3d 758 (2008).....	27
<i>Hayes v. City of Seattle,</i> 131 Wash. 2d 706, 934 P.2d 1179, 943 P.2d 265 (1997)	20
<i>Henderson v. Tyrrell,</i> 80 Wash. App. 592, 910 P.2d 522 (1996).....	27

<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wash. 2d 853, 93 P.3d 108 (2004).....	18
<i>Hogan v. Sacred Heart Medical Center</i> , 101 Wash. App. 43, 2 P.3d 968 (2000).....	26, 27
<i>Kelly-Hansen v. Kelly-Hansen</i> , 87 Wash. App. 320, 941 P.2d 1108 (1997).....	19, 23
<i>King v. Snohomish County</i> , 146 Wn. 2d 420, 47 P.3d 563 (2002).....	32
<i>Kuhlman v. Thomas</i> , 78 Wash. App. 115, 897 P.2d 365 (1995).....	9, 20-21
<i>Le Bire v. Department of Labor & Industries</i> , 14 Wn. 2d 407, 128 P.2d 308 (1942).....	18
<i>Lybbert v. Grant County</i> , 141 Wn. 2d 29, 1 P.3d 1124 (2000).....	32
<i>Mahoney v. Tingley</i> , 85 Wash. 2d 95, 529 P.2d 1068 (1975).....	25-27
<i>Marino Prop. Co. v. Port Comm'rs</i> , 97 Wash. 2d 307, 644 P.2d 1181 (1982).....	17, 23
<i>Pederson v. Potter</i> , 103 Wash. App. 62, 11 P.3d 833 (2000).....	18-19, 21, 23
<i>Schoeman v. New York Life Insurance Co.</i> , 106 Wn. 2d 855, 726 P.2d 1 (1986).....	18, 23
<i>Walsh v. Wolff</i> , 32 Wash. 2d 285, 201 P.2d 215 (1949).....	17

STATUTES

RCW 60.28.011(12).....	13
RCW ch. 60.28	13

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Swinerton's Claim that the County was not a party to the first suit is without merit when the County was clearly a party to the first suit and Swinerton has consistently and repeatedly acknowledged this fact in the past?

2. Whether Swinerton's claim that the stipulation and dismissal only covered those claims that either were brought or could have been brought in the first suit is without merit because Swinerton ignores the plain language of the stipulation which specifically states that it release all claims, known or unknown, asserted or unasserted, arising from the Project in any manner?

3. Whether Swinerton's claim that summary judgment was inappropriate due to an agreement to arbitrate is without merit when: (1) Swinerton had specifically released all claims against the County and thus had no right to arbitration even if an arbitration clause existed; (2) the contract, in fact, contained no arbitration provision; and, (3) the trial court had already rejected Swinerton's motion for arbitration by the time it addressed the summary judgment motion?

4. Whether Swinerton's claim that res judicata does not apply to the present case is without merit because the doctrine of res judicata

precludes the relitigation of claims that were addressed in a previous litigation. As the stipulation in the first suit specifically released all claims, know or unknown, asserted or unasserted, arising from the project in any manner, the plain language of the stipulation demonstrates that all claims were specifically resolved in the first suit. Res judicata, therefore, clearly applies to the present case and precludes relitigation of any claim arising from the project in any manner

5. Whether Swinerton's claim that the County waived the issues of waiver and res judicata by not specifically pleading those issues in its answer is without merit when: (1) Washington law clearly provides that when a failure to plead an avoidance or defense does not cause either surprise or prejudice, then the failure to plead cannot be said to affect the substantial rights of the parties and the noncompliance will be considered harmless; and, (2) any failure in the present case was clearly harmless because Swinerton suffered no surprise nor prejudice as Swinerton was well aware of the County's intention to seek summary judgment based on the comprehensive release and because Swinerton suffered no prejudice as it was allowed to attempt to have the stipulation vacated and it was allowed to fully litigate the summary judgment motion below?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

There have been two lawsuits involving the Appellant, Swinerton Builders Northwest, Inc., and Kitsap County, arising out of a single construction project. The first case (Kitsap County Superior Court cause number 06-2-01941-7, hereinafter the “06 Cause”) was resolved by a written stipulation and order of dismissal in which all the parties, including Swinerton and Kitsap County, agreed to release each other from any and all claims, demands, causes of action and liabilities, known or unknown, asserted or unasserted arising from the construction project in any manner. SJ CP 38-43.¹

However, after the stipulation and dismissal were entered Swinerton served the County with a second lawsuit (Kitsap County Superior Court cause number 08-2-00045-3, hereinafter the “08 Cause”). SJ CP 3-6. Shortly thereafter, Swinerton was informed that the County would be moving for summary judgment based on the stipulation and order of dismissal. SJ CP

¹ The Appellant notes that although the two appeals in the present case have been consolidated, the consolidated occurred after the designation of clerk’s papers. The Appellant cites to the clerk’s papers from the summary judgment appeal, No. 41780-4-II, as “SJ CP.” The County will use this same designation. Where needed, the County will reference the clerk’s papers from the “arbitration appeal,” No. No. 40924-1-II, as “ARB CP.”

49, 265.² The second suit was then stayed for a period of time due to Swinerton's efforts to vacate the stipulation and a subsequent appeal. When the stay was lifted, however, the County filed its summary judgment motion arguing that Swinerton was precluded from filing the second suit due to its release of all claims against the County. ARB CP 222-24. The trial court granted the County's summary judgment motion. RP (1/14/2011) 18.

B. FACTS

As outlined above, the first lawsuit (the "06" cause) was dismissed with prejudice after the parties (including Kitsap County) signed a written stipulation and order of dismissal that had been prepared by attorneys for Swinerton and M.B. Diddy. SJ CP 38-43. The stipulation, prepared by Diddy and Swinerton's attorneys, stated in part,

COMES NOW, Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest ... and Kitsap County Administration, by and through their undersigned attorneys of record, and stipulate that all claims asserted herein, or which could have been asserted herein, by and between them, shall be dismissed with prejudice, without admission of liability, and without costs to any party.

² For instance, in its Petition for Review Swinerton explained that "the County advised Swinerton that it intended to seek summary judgment dismissal of those claims, contending the wording of the Order of Dismissal of Diddy's lawsuit barred Swinerton from pursuing its claims in its own, separate lawsuit against the County. Diddy and Swinerton promptly and jointly moved under CR 60(b)(1) for the stipulated Order of Dismissal to be vacated." CP 265 (internal citation omitted).

The parties to this action hereby release and discharge each other, their employees, officers, agents, successors, assigns, and sureties from any [and] all claims, demands, causes of action and liabilities ..., known or unknown, asserted or unasserted ... arising from the Project in any manner....

SJ CP 38-39.³

The stipulation and order of dismissal were presented to and signed by a superior court judge on January 15, 2008. SJ CP 40. Swinerton then served Kitsap County with a second complaint for breach of contract in the construction of the Kitsap County Administration Building. SJ CP 1-6. In response to this lawsuit, Swinerton was notified of the County's intention to move for summary judgment based on the January 15, 2008 stipulation and order of dismissal. See, SJ CP 49, 265. Swinerton responded by attempting to vacate the stipulation and release, but these attempts were ultimately rejected by the Court of Appeals.⁴ SJ CP 47-55.

³ Likewise, the dismissal order stated, "[A]ll claims asserted herein, or which could have been asserted herein, by and between Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest ... and Kitsap County Administration, are hereby dismissed with prejudice, and without costs to any party." SJ CP 40-42.

⁴ Specifically, Diddy and Swinerton filed a joint motion asking the trial court to vacate the stipulation and order of dismissal, arguing that the stipulation and order of dismissal language releasing claims against Kitsap County constituted a mistake under CR 60(b)(1). SJ CP 50. The trial judge agreed and vacated the stipulation and order of dismissal. The County then appealed, arguing that under Washington law "poorly drafted language" or other errors by an attorney do not constitute sufficient grounds to vacate a judgment under CR 60(b)(1). The Court of Appeals ultimately agreed with the County, reversed the trial court, and held that the trial court abused its discretion in vacating the stipulation and order of dismissal. See, *M.B. Diddy Construction, Inc. v. Swinerton Builders Northwest et al*, 2009 WL 3337249 (Div. I, Oct. 19, 2009), found at SJ CP47-55. After the mandate from the Court of Appeals was issued, the trial court entered an order vacating its prior order vacating the stipulation and order of dismissal. SJ CP 57. Thus, as it now stands, the controlling stipulation and order in

The "08 Cause," which is the case currently before this Court, was stayed while the Court of Appeals decided the appeal in the "06" cause. ARB CP 13-14. After the mandate in the "06" cause came down, both parties filed motions in the "08" cause. As would be expected (and as was specifically mentioned in the Court of Appeals opinion), the County filed a Motion for Summary Judgment once the stay was lifted in the second suit. ARB CP 163, 166, 218. Swinerton, however, filed a Motion to Compel Arbitration. ARB CP 36. In both its motion for Summary Judgment and in its response to Swinerton's motion to compel arbitration the County's arguments were the same. *See*, ARB CP 18, 222-24. Namely, that Swinerton had explicitly waived any and all claims against the County and thus there was no basis upon which Swinerton could pursue its present claims (either through arbitration or through the trial court).

As CR 56 requires 28 days notice for a summary judgment motion (and because there is no such 28 day notice requirement for a motion to compel arbitration) the argument on the motion to compel arbitration came before the trial judge first. The trial court heard arguments on Swinerton's Motion to Compel Arbitration on July 2, 2010 and the trial court denied the motion that day, holding that,

the "06" cause specifically states that Swinerton released any and all claims against the County with respect to the project. SJ CP 38-39.

In reading the language of the stipulation, the order quite clearly states that any and all claims between M.B. Diddy, Swinerton Builders, and Kitsap County is released and dismissed with prejudice. I think that language is very clear, and on that basis I am denying your motion.

RP (7/2/2010) 14. SJ CP 242. Swinerton then filed a notice of appeal regarding the denial of its motion to compel arbitration, and the filing of this notice of appeal stayed all proceedings in the trial court and thereby prevented the trial court from immediately hearing the summary judgment motion. The County, therefore, filed a motion asking this Court to allow the trial court to decide the summary judgment motion since it involved the same issues: namely, Swinerton's release of all claims. This Court granted the County's motion and authorized the trial court to decide the summary judgment motion. *See*, Order Granting Motion to Modify (filed Oct 14, 2010 in case No. 40924-1-II)(allowing trial court to hear and decide the motion for summary judgment).

A hearing on the summary judgment motion was then held on January 14, 2011. Although the plain language of the stipulation stated that it was a release of all claims, known or unknown, asserted or unasserted, Swinerton argued that the release was somehow vague and should only apply to claims "which could have been brought at that time." RP (1/14/2011) 5-6. Second, Swinerton claimed that the named party in the first suit was "Kitsap County

Administration” and that in the second suit the named party was “Kitsap County.” RP (1/14/2011) 6-7. Third, Swinerton argued that the original contract required arbitration. RP (1/14/2011) 7. Finally, Swinerton argued that the County did not plead waiver or res judicata in its answer. RP (1/14/2011) 7-8.

With respect to the actual language of the stipulation, the trial court addressed Swinerton’s counsel and stated,

“Well, what about the language – because I know you quoted certain language in the 2A agreement, but I don’t think I saw that you addressed the language which states to the effect that the parties to the action hereby release and discharge each other, their employees, officers, agents, successors, assigns, and sureties from any and all claims, demands, causes of action, and liabilities known or unknown, asserted or unasserted, arising from the project in any manner.”

RP (1/14/2011) 12. The trial court went on to point out that the release had two paragraphs: one addressing the action itself and one addressing potential future actions. RP (1/14/2011) 12. The trial court also addressed Swinerton’s claim that the County was not a party to the first suit, noting that “I guess I’m not sure how you come up with that.” RP (1/14/2011) 10. Ultimately the trial court granted the County’s motion, holding that, “I’m satisfied that there is no issue of material fact. I believe that summary judgment should issue.” RP (1/14/2011) 18. This appeal followed.

III. ARGUMENT

The sole issue in the present appeal is whether the trial court erred in granting summary judgment below. When reviewing an order of summary judgment, the appellate court must engage in the same inquiry as the trial court, and an order of summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kuhlman v. Thomas*, 78 Wn.App. 115, 119, 897 P.2d 365 (1995).

A. SWINERTON’S CLAIM THAT THE COUNTY WAS NOT A PARTY TO THE FIRST SUIT WITHOUT MERIT AS THE COUNTY WAS CLEARLY A PARTY TO THE FIRST SUIT AND SWINERTON HAS CONSISTENTLY AND REPEATEDLY ACKNOWLEDGED THIS FACT IN THE PAST.

Swinerton first argues that Kitsap County was not a party to the first suit in which the stipulation and release was entered. App.’s Br. at 10. This claim is without merit because Kitsap County was a party to the first suit.

Swinerton asserts that the named party in the first suit involving the release was “Kitsap County Administration” and that the named party in the present case is “Kitsap County.” App.’s Br. at 10-11. Swinerton goes on to claim that “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.” App.’s Br. at 10. Swinerton, however, offers no explanation or support for its bald claim that

“Kitsap County Administration” is somehow separate and distinct from “Kitsap County,” nor does it offer any explanation as to why the inclusion of the word “administration” denotes some different party than “Kitsap County.”

In fact, the inclusion of the word “administration” in the caption of the first lawsuit was of no legal significance. Oxford’s English Dictionary, for instance, defines “Administration” as,

“The management of public affairs; the conducting or carrying on of the details of government: hence, sometimes used for government.”

Oxford English Dictionary, 117 (1981)(Italics in original). The Phrase “Kitsap County Administration,” therefore does nothing other than denote that the party is the Kitsap County *Government* as opposed to, say, the physical geographic area known as Kitsap County. In no way does the use of the word “administration” denote some separate and distinct entity other than “Kitsap County, a Washington municipal corporation.” In addition, Swinerton has offered no argument or basis for its conclusory claim that “Kitsap County Administration” means anything other than “Kitsap County” or that the phrase somehow designates a completely different party. In short, Swinerton’s argument in this regard is clearly without merit.

Furthermore, a cursory review of the history of the present case shows

that Swinerton has consistently represented and acknowledged that Kitsap County was a party to the first suit. For instance, in the Kitsap County Superior Court Swinerton acknowledged that the County was in fact a party to the first suit:

“Now as far as the original cause of action, the M.B.Diddy case versus Swinerton ... **Kitsap County** was listed as a defendant in that lawsuit ...” SJ CP 223-24.⁵

“The reason that **the County** was named as a party in this [the first] lawsuit ...” SJ CP 248.⁶

Similarly, in its briefing filed with the Court of Appeals Swinerton stated that:

“M.B.Diddy and Swinerton filed a stipulation and order of dismissal that **the County** signed...” SJ CP 257.

“M.B. Diddy also named **the County** as a nominal defendant. . . . **The County** also appeared.” SJ CP 258.

“...the County focuses on the resolution of a prior lawsuit in which Swinerton was sued by M.B. Diddy, a subcontractor that had performed work on the Project. The subcontractor alleged breach of contract claims against Swinerton and named **the County** as a defendant ...” SJ CP 272⁷

“The subcontractor’s suit also named **the County** as a defendant ...” SJ CP 275.⁸

⁵ Verbatim Report of Proceedings, transcript of July 2, 2010, oral argument on Swinerton’s Motion to Compel Arbitration.

⁶ Verbatim Report of Proceedings, transcript of September 26, 2008, oral argument on Swinerton/Diddy’s Joint Motion to Vacate the Stipulation and Order of Dismissal.

⁷ Appellant’s Opposition to Respondent’s Motion to Permit Trial Court Action.

⁸ Brief of Appellant, No 40924-II.

Further, in its Petition for Review with the Supreme Court Swinerton stated that:

“Diddy also alleged a claim against Swinerton’s retainage fund, naming **the County** as merely a nominal party ...” SJ CP 264.

“...and because **the County** was also a party of record they had **the County** sign it [the Stipulation and Order of Dismissal].” SJ CP 265.

Finally, in its recitation of the undisputed facts, the Court of Appeals, Division I stated that in the underlying M.B. Diddy action, Diddy “sued Kitsap County.” SJ CP 48.

These repeated acknowledgements by Swinerton to the Kitsap County Superior Court, to the Court of Appeals, and to the Washington State Supreme Court (as well as the Appellate Court’s acknowledgment that it was undisputed that Kitsap was a party to the M.B.Diddy suit) demonstrate that Swinerton’s current claim is without merit.

In summation, there was no material question of fact as to the language and meaning of Swinerton’s release of all claims against the County. Swinerton’s bald assertion that there is a legal distinction between “Kitsap County Administration” (a phrase that simply means the government of Kitsap County) and “Kitsap County, a Washington

municipal corporation” is clearly without merit.⁹ As such, summary judgment dismissal of the present claim was warranted.

B. SWINERTON’S CLAIM THAT THE STIPULATION AND DISMISSAL ONLY COVERED THOSE CLAIMS THAT EITHER WERE BROUGHT OR COULD HAVE BEEN BROUGHT IN THE FIRST SUIT IS WITHOUT MERIT BECAUSE SWINERTON IGNORES THE PLAIN LANGUAGE OF THE STIPULATION WHICH SPECIFICALLY STATES THAT IT RELEASE ALL CLAIMS, KNOWN OR UNKNOWN, ASSERTED OR UNASSERTED, ARISING FROM THE PROJECT IN ANY MANNER.

Swinerton next claims that the stipulation and dismissal “was limited to claims that could have been asserted” in the first lawsuit, and that it could not have asserted its present claims at that time, so they were not included in the release. App.’s Br. at 10-16. This claim is without merit because the clear and unambiguous language of the release clearly states that the parties

⁹ Swinerton’s bold claim that the County was “well aware” that Kitsap County was not a party to the first suit does little more than prove the “maxim that, in appellate briefing, bluster is inversely proportional to merit.” *Nature Conservancy v. Wilder Corp. of Delaware*, --- F.3d ---- (7th Cir.(Ill.) Sep 01, 2011) (NO. 09-2988).

Furthermore, Swinerton briefly notes that in the first lawsuit the County was a named party because it was a retainage fund holder pursuant to RCW ch. 60.28. App.’s Br. at 25. Nothing in RCW 60.28, however, supports Swinerton’s claim that the party named in the first lawsuit was anyone other than Kitsap County, nor does the statute provide any support for Swinerton’s unsupported claim that “Kitsap County Administration” differs in any meaningful way from “Kitsap County.” Rather the statute repeatedly explains that the retainage funds are to be held by the appropriate “public body,” and the term “public body” is defined as follows: “‘Public body’ means the state, or a county, city, town, district, board, or other public body.” See RCW 60.28.011(12)(c). In short, the statute demonstrates that “the County” was clearly the retainage fund holder and the named party in the first suit.

released all claims, demands, causes of action and liabilities, known or unknown, asserted or unasserted, arising from the Project in any manner.

Swinerton argues, as it did below, that the stipulation entered between the parties specifically dismissed all the claims that were asserted in the first lawsuit or which “could have been asserted” in the first lawsuit. App.’s Br. at 10. While it is true that one paragraph of the stipulation and order does contain language that does specifically dismiss with prejudice all the claims that either were asserted or could have been asserted in the first lawsuit, the release does not stop there. Rather, the plain language of the stipulation and release contains a second paragraph, which Swinerton continues to ignore. The trial court explained that the stipulation contained additional language in a second paragraph that was controlling. RP (1/14/2011) 18. That second paragraph states as follows:

The parties to this action hereby release and discharge each other, their employees, officers, agents, successors, assigns, and sureties from any [and] all claims, demands, causes of action and liabilities ..., known or unknown, asserted or unasserted ... arising from the Project in any manner....

SJ CP 39. The language of this release is crystal clear. The parties agreed to release all claims, known or unknown, asserted or unasserted, arising from the project in any manner. Swinerton’s claims that some of its claims were not yet “ripe” and thus not included in the stipulation and release is clearly

without merit given the plain language of the release.

The trial court, therefore, did not err in granting summary judgment, as the plain language of the release clearly covered all claims arising from the project in any manner.

C. SWINERTON'S CLAIM THAT SUMMARY JUDGMENT WAS INAPPROPRIATE DUE TO AN AGREEMENT TO ARBITRATE IS WITHOUT MERIT BECAUSE: (1) SWINERTON HAD SPECIFICALLY RELEASED ALL CLAIMS AGAINST THE COUNTY AND THUS HAD NO RIGHT TO ARBITRATION EVEN IF AN ARBITRATION CLAUSE EXISTED; (2) THE CONTRACT, IN FACT, CONTAINED NO ARBITRATION PROVISION; AND, (3) THE TRIAL COURT HAD ALREADY REJECTED SWINERTON'S MOTION FOR ARBITRATION BY THE TIME IT ADDRESSED THE SUMMARY JUDGMENT MOTION.

Swinerton next claims that the trial court erred in granting summary judgment because the parties had agreed to arbitrate all claims. This claim is without merit because, at the time of the summary judgment motion the trial court had already ruled that Swinerton had waived all claims against the County and was not, therefore, entitled to arbitration.¹⁰

On July 2, 2010, the trial court denied Swinerton's Motion to Compel

¹⁰ As Swinerton had waived all claims against the County, the trial court did not, nor did it need to, reach the issue of whether the contract even contained an arbitration provision (a fact that the County disputed, as the contract itself contained no arbitration provision).

Arbitration. ARB CP 61. Thus, when the trial court heard argument on the County's Summary Judgment Motion on January 14, 2011, it had already rejected Swinerton's claims regarding arbitration. The trial court's ruling in this regard is the subject of the consolidated appeal, and the County hereby incorporates all of the facts and argument from its briefing in the consolidated appeal, which need not be readdressed in full in the present brief. Nevertheless, the argument can be succinctly summarized as follows: because Swinerton had released *all claims* against the County it was not entitled to arbitration even if the construction contract had included an arbitration provision. In addition, Swinerton was not entitled to arbitration because the contract, in fact, contained no arbitration provision.

Given these facts, as argued above and in the consolidated appeal, the trial court did not err in granting summary judgment below.

D. SWINERTON’S CLAIM THAT RES JUDICATA DOES NOT APPLY TO THE PRESENT CASE IS WITHOUT MERIT BECAUSE THE DOCTRINE OF RES JUDICATA PRECLUDES THE RELITIGATION OF CLAIMS THAT WERE ADDRESSED IN A PREVIOUS LITIGATION. AS THE STIPULATION IN THE FIRST SUIT SPECIFICALLY RELEASED ALL CLAIMS, KNOW OR UNKNOWN, ASSERTED OR UNASSERTED, ARISING FROM THE PROJECT IN ANY MANNER, THE PLAIN LANGUAGE OF THE STIPULATION DEMONSTRATES THAT ALL CLAIMS WERE SPECIFICALLY RESOLVED IN THE FIRST SUIT. RES JUDICATA, THEREFORE, CLEARLY APPLIES TO THE PRESENT CASE AND PRECLUDES RELITIGATION OF ANY CLAIM ARISING FROM THE PROJECT IN ANY MANNER.

Swinerton next claims that the doctrine of res judicata does not apply to the present case. App.’s Br. at 18. This claim is without merit because res judicata does apply to the present case and the trial court, therefore, did not err in granting summary judgment.

“The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Marino Prop. Co. v. Port Comm'rs*, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wash.2d 285, 287, 201 P.2d 215 (1949)).

Res judicata has been characterized as “serving vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case.... It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts” *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981) (internal quotations omitted).

The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 865, 93 P.3d 108 (2004). Under Washington law, “[A] final order or judgment, settled and entered by agreement or consent of the parties, is no less effective as a bar or estoppel than is one which is rendered upon contest and trial”. *Le Bire v. Dept. of Labor & Industries*, 14 Wn.2d 407, 418, 128 P.2d 308 (1942). Thus for purposes of res judicata or claim preclusion, a settlement agreement which is approved by the court is considered to be a final judgment on the merits, despite the fact that the issue of liability has not been adjudicated. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 861, 726 P.2d 1 (1986); *Pederson v. Potter*, 103 Wn. App. 62, 71, 11 P.3d 833 (2000), *review denied*, 143 Wn.2d 1006, 25 P.3d 1020 (2001)(confession of judgment is final judgment on the merits). This is because “on the merits” does not require actual litigation. It is sufficient that the parties might have had their suit disposed of in that manner if they had properly presented and

managed their respective cases. *Pederson*, 103 Wn. App. at 70 (citing *CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.*, 220 Ga.App. 394, 469 S.E.2d 466, 469 (1996)).

Res judicata is defined with considerable precision in *Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App. 320, 327-28, 941 P.2d 1108 (1997). Res judicata encompasses the concepts of both claim preclusion and issue preclusion. *Id.* at 327, 941 P.2d 1108. Issue preclusion is grounded in the doctrine of collateral estoppel, when a subsequent action involves a different claim but the same issue. *Id.* Claim preclusion bars litigation of claims that were or should have been decided among the same parties below. *Id.* at 328, 941 P.2d 1108.

When res judicata is used to mean claim preclusion, it encompasses the idea that when the parties to two successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be relitigated.

Id. at 329, 941 P.2d 1108.

Since the purpose of the res judicata doctrine is to ensure the finality of judgments and eliminate duplicitous litigation, dismissal on the basis of res judicata is appropriate where the subsequent action is identical with a prior action 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. *Hayes v. City of Seattle*, 131 Wash.2d 706, 711-12, 934 P.2d 1179, 943 P.2d 265 (1997); *Kuhlman v. Thomas*, 78 Wash.App. 115, 120, 897 P.2d 365 (1995).

In the present case the first test is met because both Swinerton and the County were parties to the two suits, as discussed previously.¹¹ With respect to the remaining tests, the critical fact that guides the analysis in the present case is the comprehensive nature of the stipulation and release in the first suit.

As Swinerton acknowledges in its brief, a “prior judgment is res judicata as to every question that was properly a part of the matter adjudicated.” App.’s Br. at 20, *citing Dept. of Ecology v. Yakima Reservation Ittig. Dist.*, 121 Wn.2d 257, 290, 850 P.2d 1306 (1993).

The stipulation at issue, prepared by Diddy and Swinerton's attorneys, stated in part,

COMES NOW, Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest ... and Kitsap County Administration, by and through their undersigned attorneys of record, and stipulate that all claims asserted herein, or which could have been asserted herein, by and between them, shall be dismissed with prejudice, without admission of liability, and without costs to any party.

The parties to this action hereby release and discharge each other, their employees, officers, agents, successors,

¹¹ Furthermore, even if Swinerton’s argument that “Kitsap County” was somehow distinguishable from “Kitsap County Administration” res judicata would still apply because different defendants in separate suits are the same party for res judicata purposes as long as they are in privity. *Kuhlman v. Thomas*, 78 Wash.App. 115, 121, 897 P.2d 365 (1995).

assigns, and sureties from any [and] all claims, demands, causes of action and liabilities ..., known or unknown, asserted or unasserted ... arising from the Project in any manner....

SJ CP 38-43, 49. Given the language of the stipulation, it is clear that the “matter adjudicated” by the stipulation and order in the first suit was “all claims, demands, causes of action and liabilities ..., known or unknown, asserted or unasserted ... arising from the Project in any manner.” In short, the release was comprehensive and complete, and the breadth of the subject matter covered in the first suit is defined by the plain language of the stipulation and order as all claims arising from the project in any manner.

Turning then to the remaining prongs of the res judicata test it is easy to determine that res judicata should apply here. For instance, with respect to the issues of whether the second suit was precluded by the first suit in terms of “cause of action,” “subject matter,” and “the quality of the persons for or against whom the claim is made,” the question is easily answered by the fact that the stipulation and release signed in the first suit covered “all claims, demands, causes of action and liabilities ..., known or unknown, asserted or unasserted ... arising from the Project in any manner.”¹² As the broad

¹² The determination whether the same causes of action are present includes consideration of (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Pederson v.*

language of the stipulation served to release all claims and causes of action arising from the project in any manner, it is patently apparent that the second suit (involving yet another claim arising from the same project) was barred by res judicata.

Swinerton, however, argues that its claims or permissive cross-claims that could have been brought in the first suit are not precluded by res judicata, and that the second suit arose out of transaction that was separate and distinct from the first suit. App.'s Br. at 18-28. All of these arguments, however, miss the point. The County's res judicata argument was not premised on the claim that Swinerton could have or should have brought certain claims in the first suit. Rather, the argument is that court order in the first suit resolved all claims arising from the project in any manner. Although res judicata can serve as a bar to certain issues that *could have* been litigated (or for which there has been an opportunity to litigate) another facet of res judicata is that it

Potter, 103 Wash.App. 62, 72, 11 P.3d 833 (2000); *Landry*, 95 Wash.App. at 784, 976 P.2d 1274. These four factors are analytical tools; it is not necessary that all four factors be present to bar the claim. *Kuhlman*, 78 Wash.App. at 122, 897 P.2d 365 (“there is no specific test for determining identity of causes of action”).

The fourth element of res judicata simply requires a determination of which parties in the second suit are bound by the judgment in the first suit. *See* 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27, at 464 (1st ed.2007) (explaining that the “identity and quality of parties” requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties).

As Swinerton and the County were both parties to the first suit and the resolution of the case specifically released “all claims . . . arising from the project in any manner,” it is clear that the first suit covered all causes of action and subject matter arising from the suit in any

bars relitigation of matters that *were in fact* litigated in the initial proceeding. *Kelly-Hansen*, 87 Wash.App. at 328; *Marino Prop. Co.*, 97 Wash.2d at 312. In addition, for purposes of res judicata or claim preclusion, a settlement agreement that is approved by the court is considered to be a final judgment on the merits, despite the fact that the issue of liability has not been adjudicated. *Schoeman*, 106 Wn.2d at 861; *Pederson*, 103 Wn. App. at 71.

Thus, as the stipulation and release in the first suit operated to release all claims arising from the project in any manner, the County's argument is not that certain claims could have or should have been addressed in the first suit, but rather, the argument is that by the plain language of the stipulation all claims arising from the project were in fact specifically addressed in the first suit. Swinerton's arguments regarding res judicata's applicability to unraised cross claims, unripe claims and the like, simply ignores the broad and comprehensive language in the release. In short, res judicata applies to the present case not because Swinerton could have or should raised certain claims in the first suit, but rather it applies because the plain language of the release specifically addressed and encompassed all claims, known or unknown, asserted or unasserted, arising from the project in any manner. Swinerton's arguments, therefore, are without merit.

manner. Res judicata, therefore, applied.

Given these facts, the trial court did not err in granting summary judgment below.

E. SWINERTON'S CLAIM THAT THE COUNTY WAIVED THE ISSUES OF WAIVER AND RES JUDICATA BY NOT SPECIFICALLY PLEADING THOSE ISSUES IN ITS ANSWER IS WITHOUT MERIT BECAUSE: (1) WASHINGTON LAW CLEARLY PROVIDES THAT WHEN A FAILURE TO PLEAD AN AVOIDANCE OR DEFENSE DOES NOT CAUSE EITHER SURPRISE OR PREJUDICE, THEN THE FAILURE TO PLEAD CANNOT BE SAID TO AFFECT THE SUBSTANTIAL RIGHTS OF THE PARTIES AND THE NONCOMPLIANCE WILL BE CONSIDERED HARMLESS; AND, (2) ANY FAILURE IN THE PRESENT CASE WAS CLEARLY HARMLESS BECAUSE SWINERTON SUFFERED NO SURPRISE NOR PREJUDICE AS SWINERTON WAS WELL AWARE OF THE COUNTY'S INTENTION TO SEEK SUMMARY JUDGMENT BASED ON THE COMPREHENSIVE RELEASE AND BECAUSE SWINERTON SUFFERED NO PREJUDICE AS IT WAS ALLOWED TO ATTEMPT TO HAVE THE STIPULATION VACATED AND IT WAS ALLOWED TO FULLY LITIGATE THE SUMMARY JUDGMENT MOTION BELOW.

Swinerton next claims that the County waived the issues of waiver and res judicata by not specifically identifying those issues in its Answer. App.'s Br. at 28. This claim is without merit because where failure to plead a defense or avoidance affirmatively does not affect substantial rights of the parties, the noncompliance will be considered harmless. In the present case

Swinerton: (1) was clearly advised of the County's intention to seek summary judgment based on the comprehensive release; (2) was allowed to fully litigate its attempts to vacate the release once it learned of the County's intention; and, (3) was allowed to fully litigate the summary judgment motion below. Given these facts, any failure to affirmatively plead res judicata or waiver was clearly harmless as Swinerton suffered no prejudice or surprise.

Swinerton's waiver argument is based on a strict reading of CR 8(c), similar to the one set forth in our Supreme Court's 1955 decision in *Boyle v. Clark*, 47 Wash.2d 418, 287 P.2d 1006 (1955). But such a strict reading of CR 8 is inconsistent with more recent authority from the Supreme Court and the Court of Appeals.

Twenty years after *Boyle*, our Supreme Court explicitly endorsed a more flexible reading of the CR 8(c) requirement in *Mahoney v. Tingley*, 85 Wash.2d 95, 529 P.2d 1068 (1975). There, the court explained that because the underlying policy of CR 8(c) is to avoid surprise, where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless. *Mahoney*, 85 Wash.2d at 100, 529 P.2d 1068 (citing *Tillman v. Nat'l City Bank*, 118 F.2d 631, 635 (2nd Cir.1941)). Specifically, the *Mahoney* court stated that,

It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal

courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless.

...

There is a need for such flexibility in procedural rules. In the present case, the record shows that a substantial portion of plaintiff's trial memorandum and the entire substance of the hearing on summary judgment concerned the effect of the liquidated damages clause. To conclude that defendants are precluded from relying upon that clause as a defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c), and we refuse to reach such a result.

Mahoney, 85 Wash.2d at 100-01.

More recently, other Washington courts have also followed the *Mahoney* Court's interpretation of CR 8(c). For instance, in *Bernsen v. Big Bend Electric Cooperative, Inc.*, 68 Wash.App. 427, 842 P.2d 1047 (1993), the court affirmed the trial court's decision that the defendant had not waived the defense of failure to mitigate even though it was not raised in the pleadings. *Bernsen*, 68 Wash.App. at 433-34, 842 P.2d 1047 (“[I]f the substantial rights of a party have not been affected, noncompliance is considered harmless and the defense is not waived.”). Likewise, in *Hogan v. Sacred Heart Medical Center*, 101 Wash.App. 43, 2 P.3d 968 (2000), the court concluded that the defendant had not waived its ability to assert release

as an affirmative defense, despite failing to raise it in the pleadings. *Hogan*, 101 Wash.App. at 54-55, 2 P.3d 968. Because the plaintiff suffered from neither surprise nor prejudice as a result of the defendant's delay in asserting the defense, the court reasoned that "the failure to affirmatively plead release did not affect substantial rights of [the plaintiff]." *Hogan*, 101 Wash.App. at 55, 2 P.3d 968. See also, *Henderson v. Tyrrell*, 80 Wash.App. 592, at , 910 P.2d 522 (1996)(quoting *Mahoney* for its holding that where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless).

This Court has also reaffirmed this principal as recently as September of this year. In *Dixon v. Crawford*, __ Wn.App. __ , WL 4348058 (Div II, Sept 19, 2011), this Court rejected a claim that a party had waived an affirmative defense by failing to plead the defense. Specifically, this Court stated:

We reject Dixon's claims that Crawford waived this argument because it is an affirmative defense under CR 8(c) and should have been affirmatively pleaded, and by first raising it in a motion for reconsideration. See *In re Estate of Palmer*, 145 Wash.App. 249, 258, 187 P.3d 758 (2008). Where failure to plead a defense affirmatively does not affect substantial rights of the parties, the noncompliance will be considered harmless. *Mahoney v. Tingley*, 85 Wash.2d 95, 100, 529 P.2d 1068 (1975). Dixon had opportunity to address the argument in his response to the motion for reconsideration, and suffered no prejudice.

Dixon v. Crawford, __ Wn.App. __ , WL 4348058 at note 7.

The Federal Circuit Courts (including the 9th Circuit) that have addressed the same issue under FRCP 8 have reached a similar conclusion. *See, e.g., Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir.1993) (in absence of prejudice, affirmative defense may be raised for first time in summary judgment motion); *Rivera v. Anaya*, 726 F.2d 564 (9th Cir.1984) (absent prejudice to the plaintiff, a defendant may raise an affirmative defense in a motion for summary judgment for the first time; no prejudice shown); *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 593 (1st Cir.1995) (“Rule 8(c)’s core purpose [is] to act as a safeguard against surprise and unfair prejudice.... Where, as here, a plaintiff clearly anticipates that an issue will be litigated, and is not unfairly prejudiced when the defendant actually raises it, a mere failure to plead the defense more particularly will not constitute a waiver.”); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir.2003) (“[A] district court may still entertain affirmative defenses [not pleaded in the answer] at the summary judgment stage in the absence of undue prejudice to the plaintiff, bad faith or dilatory motive on the part of the defendant, futility, or undue delay of the proceedings.”); *Pro v. Donatucci*, 81 F.3d 1283, 1286 n. 2 (3d Cir.1996) (“Our court previously has taken the position that whether an affirmative defense that must be pleaded in the answer is waived will depend on whether the defense was raised at a pragmatically sufficient time and the plaintiff was prejudiced in the ability to respond.” (internal quotation marks

omitted)); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir.1999) (“[T]here is ample authority in this Circuit for the proposition that absent unfair surprise or prejudice to the plaintiff, a defendant’s affirmative defense is not waived when it is first raised in a pre-trial dispositive motion.”); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 205 n. 3 (4th Cir.2004) (“It is well established that an affirmative defense is not waived absent unfair surprise or prejudice”); *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 491-92 (5th Cir.2001) (“Although failure to raise an affirmative defense under rule 8(c) in a party’s first responsive pleading generally results in a waiver, where the matter is raised in the trial court in a manner that does not result in unfair surprise technical failure to comply with Rule 8(c) is not fatal.” (internal quotation marks, brackets, and ellipses omitted)); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir.1993) (“It is well established, however, that failure to raise an affirmative defense by responsive pleading does not always result in waiver.”); *Fin. Timing Publ’ns, Inc. v. Compugraphic Corp.*, 893 F.2d 936, 944 n. 9 (8th Cir.1990) (affirmative defense not waived when other “notices were sufficient to avoid unfair surprise”); *Sanders v. Dep’t of the Army*, 981 F.2d 990, 991 (8th Cir.1992) (per curiam) (finding that the district court did not abuse its discretion by allowing an affirmative defense to be raised for the first time in a motion to dismiss); *Stoebner v. Parry, Murray, Ward &*

Moxley, 91 F.3d 1091, 1093-94 (8th Cir.1996)(same).

In the present case Swinerton has made no specific claim of prejudice in its briefing, and the record clearly demonstrates that there was neither surprise nor prejudice. Rather, the record shows that, Swinerton has been aware of the County's intention of raising the release contained in the Stipulation and Order of Dismissal as a defense since shortly after this lawsuit was filed. For instance, Division One's summary of the undisputed facts involved in this case included the following:

The stipulation and order of dismissal were presented to and signed by a superior court judge on January 15, 2008.

On the following day, Swinerton served Kitsap County with a second complaint for breach of contract in the construction of the Kitsap County Administration Building. **In response to this lawsuit, the County notified Swinerton of its intention to move for summary judgment dismissal based on the January 15, 2008 stipulation and order of dismissal. Diddy and Swinerton then jointly moved the court to vacate the stipulation and order of dismissal**, arguing that the stipulation and order of dismissal language releasing claims against Kitsap County constituted a mistake under CR 60(b)(1).

SJ CP 49-50 (emphasis added).

Similarly, Swinerton has acknowledged in its previous pleadings that the County advised Swinerton early on that it would seek summary judgment

litigate this issue fully.¹³ Ultimately, however, Swinerton did not prevail on this issue. In addition, Swinerton was allowed to fully litigate the summary judgment motion below. Swinerton simply cannot, therefore, demonstrate either surprise or prejudice from the fact that the County sought summary judgment based on the broad language of the stipulation and release once Swinerton's efforts to vacate the stipulation were concluded.

IV. CONCLUSION

For the foregoing reasons, the trial court's order granting summary judgment should be affirmed.

¹³ Moreover, those cases where failure to specifically plead an affirmative defense has been deemed waiver of that defense have involved intentionally evasive tactics with resultant prejudice to the plaintiff, dilatory conduct, or conduct inconsistent with asserting the defense. *See, e.g. King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002), *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000). No such conduct has occurred here, nor has Swinerton identified any prejudice (or surprise) due to the fact that the County's claim that the second suit was precluded by the Stipulation and Order of Dismissal was not specifically articulated in the County's Answer.

Furthermore, the same lack of prejudice and absence of evidence of ill intentions would justify allowance of Amendment of the County's Answer at this time, if this Court deemed necessary. The purpose of pleadings is to "facilitate a proper decision on the merits . . . and not to erect formal and burdensome impediments to the litigation process. Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken, was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result. CR 15 was designed to facilitate the same ends." *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 100 Wash.2d 343, 349, 670 P.2d 240 (1983)(internal citations omitted). Delay in proposing an amendment constitutes grounds to deny a motion to amend "only where such delay works undue hardship or prejudice upon the opposing party." *Id. citing, Appliance Buyers Credit Corp. v. Upton*, 65 Wash.2d 793, 800, 399 P.2d 587 (1965). Many courts, including our own State Supreme Court have held that delay, excusable or not, in and of itself is not sufficient reason to deny the motion. *Id., citing, Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir.1978); *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir.1973); *Hanson v. Hunt Oil Co.*, 398 F.2d 578 (8th Cir.1968); *United States v. IBM Corp.*, 66 F.R.D. 223 (S.D.N.Y.1975); *Fli-Fab, Inc. v. United States*, 16 F.R.D. 553 (D.R.I.1954). *See also* 6 C. Wright & A. Miller, Federal Practice § 1488 (1971).

based on the stipulation and release and that this advisement was the reason Swinerton sought to have the stipulation vacated. For instance, in its Petition for Review, Swinerton stated acknowledged that,

In Summer 2008, the County advised Swinerton that it intended to seek summary judgment dismissal of those claims, contending that the wording of the Order of Dismissal of Diddy's lawsuit barred Swinerton from pursuing its claims in its own, separate lawsuit against the County. CP 77. Diddy and Swinerton promptly and jointly moved under CR 60(b)(1) for the stipulated Order of Dismissal to be vacated.

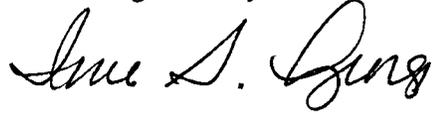
SJ CP 265.

As the record clearly shows that shortly after the present lawsuit was filed in 2008 the County promptly advised Swinerton that it would be seeking summary judgment based on the stipulation and release (a fact which Swinerton has acknowledged and never disputed), Swinerton could not reasonably argue that it was surprised that when the stay was lifted in 2010 the County promptly filed a summary judgment motion asking that the case be dismissed based on the stipulation and release. In short, Swinerton has not (nor could it) reasonably argue that it was surprised that the County planned to assert it was released by the stipulation and release. Similarly, Swinerton has not alleged prejudice, nor could it, since the County notified Swinerton of its intention to seek summary judgment based on the broad language of the release shortly after the present case was filed in 2008, and Swinerton immediately sought to vacate the stipulation. Swinerton was then allowed to

DATED September 26, 2011.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Ione S. George".

IONE S. GEORGE
WSBA No. 18236
Deputy Prosecuting Attorney

DOCUMENT1

KITSAP COUNTY PROSECUTOR

September 26, 2011 - 1:31 PM

Transmittal Letter

Document Uploaded: 417804-Respondent's Brief.pdf

Case Name: SWINNERTON BLDRS V KITSAP COUNTY

Court of Appeals Case Number: 41780-4

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Lori A Vogel - Email: lvogel@co.kitsap.wa.us