

NO. 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,
a Washington municipal corporation

Respondent.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-2-00045-3

AMENDED BRIEF OF RESPONDENT

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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 November 9, 2010, Port Orchard, WA [Signature]

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in considering the issue of whether Swinerton had waived any right to request arbitration, when a trial court has the inherent authority to defend its judgments and to assess whether res judicata applies based on prior orders issued *by the court*?

2. Whether the trial court erred in denying Swinerton's motion to compel arbitration when Swinerton expressly waived any and all claims against Kitsap County?

3. Whether the trial court's denial of the motion to compel arbitration was also proper because Swinerton failed to demonstrate that the parties had ever agreed to arbitrate their disputes?

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. CP 194-99.

However, after the stipulation and dismissal were entered Swinerton filed a second lawsuit (Kitsap County Superior Court cause number 08-2-00045-3, hereinafter the “08 Cause”). CP 205. Swinerton then sought to have the written stipulation and order of dismissal from the first case vacated. CP 205-06. When that effort proved unsuccessful, Swinerton filed a motion to compel arbitration in the second case. CP 36. The County meanwhile, filed a motion for summary judgment in the second case. CP 163.

The County argued below that the motion to compel arbitration was without merit because Swinerton had entered into a written stipulation and order of dismissal in the previous case (the “06” cause) wherein Swinerton had agreed to release any and all claims, demands, causes of action and liabilities against the County. CP 18-19. The trial court agreed and denied the motion to compel arbitration based on the fact that Swinerton had previously released any and all claims against Kitsap County. RP (7/02/2010) 14. Swinerton then filed the present appeal, arguing that the trial court erred in denying its motion to compel arbitration.

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. CP 194-99, 205. 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.

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....

CP 194-95, 205.¹

The stipulation and order of dismissal were presented to and signed by a superior court judge on January 15, 2008. CP 196-98, 205. The following day, Swinerton served Kitsap County with a second complaint for breach of contract in the construction of the Kitsap County Administration Building. CP 1, 205-06. In response to this lawsuit, the County notified Swinerton of its intention to move for summary judgment based on the January 15, 2008

¹ 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

stipulation and order of dismissal. CP 205. Swinerton responded by attempting to vacate the stipulation and release, but these attempts were eventually rejected by the Court of Appeals.²

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. CP 36. After the mandate in the “06” cause came down both parties filed motions in the “08” cause. As would be expected (and as mentioned in the Court of Appeals opinion), the County filed a Motion for Summary Judgment. CP 163-65, 166-214. Swinerton, however, filed a Motion to Compel Arbitration. CP 36-49. 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, CP 16-20, 163-65. 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

with prejudice, and without costs to any party.” CP 196-98, 205.

² 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). CP 205-06. The trial judge agreed and vacated the stipulation and order of dismissal. CP 206. 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 CP 203-11. 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. CP 213-14. Thus, as it now stands, the controlling stipulation and order in the “06” cause specifically states that Swinerton released any and all

through arbitration or through the trial court).

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,

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) 14.³

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN CONSIDERING THE ISSUE OF WHETHER SWINERTON HAD WAIVED ANY RIGHT TO REQUEST ARBITRATION BECAUSE A TRIAL COURT HAS THE INHERENT AUTHORITY TO DEFEND ITS JUDGMENTS AND TO ASSESS WHETHER RES JUDICATA APPLIES BASED ON PRIOR ORDERS ISSUED BY THE COURT.

Swinerton argues that the trial court improperly denied the motion to compel arbitration and claims that issues of waiver or res judicata are for an

claims against the County with respect to the project. CP 194-99, 213-14.

³ The motion to compel arbitration was heard before the County's summary judgment motion, as CR 56 required the County to give 28 days notice of the summary judgment hearing. In addition, Swinerton immediately appealed the trial court's denial of its motion to compel arbitration, and that notice of appeal stayed matters in the trial court. This Court, however, later granted the County's Motion to Allow Trial Court Action, and the motion is now awaiting hearing in the trial court. See this Court's "Order Granting Motion to Modify" (Oct. 14, 2010)(granting the County's motion to allow the trial court to hear and decide the

arbitrator, and not the court, to decide. This claim, however, is without merit. While the proper forum to determine the preclusive effects of an arbitration award may be with an arbitrator, the proper forum for determining the preclusive effects of a prior court order lies in the trial court; the courts have the inherent power to defend their judgments as *res judicata*, including the power to enjoin subsequent arbitrations.

The heart of Swinerton's argument in this regard is their claim that issues such as *res judicata* or waiver are merely "defenses" to a claim, and thus are to be considered by the arbitrator and not by the court. In essence, Swinerton argues that the trial court erred in even considering the issue of whether Swinerton had waived all claims against the County, and that such issues were solely for the arbitrator to decide. While courts have often held that an arbitrator should be allowed to decide whether *res judicata* applies based on prior decisions *by an arbitrator*, courts from across the country have made it clear that the decision on whether *res judicata* applies based on a prior decision *by the court* is most certainly an issue that is proper for the courts, not an arbitrator, to decide.

Under Washington law, questions of arbitrability are reviewed *de novo*. *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 357, 85

motion for summary judgment while the present appeal is pending).

P.3d 389 (2004). The first task of a court asked to compel arbitration is to determine whether the two parties agreed to arbitrate the particular matter in dispute. *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 712, 959 P.2d 1140 (1998). In addition, RCW 7.04A.060(2) provides that “The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”

1. **Contrary to Swinerton’s claim that res judicata is merely a “defense” that is properly raised only with an arbitrator, numerous courts from around the country (including those cited by Swinerton) stand for one principal conclusion: that courts properly are tasked with the question of deciding the question of whether res judicata applies based on *prior court orders* and arbitrators are left to decide whether res judicata applies based on *prior arbitration awards*.**

As a preliminary matter, Washington law is well settled in several areas that are important in the present case. First, Washington courts have long held that a covenant in a contract providing for arbitration can be waived. *See, e.g., George V. Nolte & Co. v. Pieler Const. Co.*, 54 Wn.2d 30, 34, 337 P.2d 710 (1959), *citing, Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards*, 1 Wn.2d 401, 410, 96 P.2d 257 (1939); *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 620, 586 P.2d 519 (1978)(“It is well established that an arbitration clause can be waived”). Furthermore, a waiver of a condition can be accomplished either expressly or impliedly. *George V. Nolte & Co*, 54 Wn.2d at 34.

Secondly, 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)).

Finally, 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).

Turning then to the issue of whether a court or an arbitrator should decide whether res judicata precludes a request for arbitration, numerous courts have made it clear that a party may not seek to compel arbitration when there has been a previous resolution of the claims against the opposing party in a judicial proceeding, and that it is for the courts (and not an arbitrator) to decide the res judicata effect of such a judgment before allowing subsequent claims based on the same transaction to proceed to arbitration. *See, e.g., In re Y & A Group Securities Litig.*, 38 F3d 380, 382 (8th Cir. 1994)(discussed in detail below); *John Hancock Mutual Life Ins. Co. v. Olick*, 151 F3d 132, 138 (3d Cir. 1998)(court is to decide issue of res judicata defense as it relates to a prior judgment; arbitrator is to decide issue as it relates to prior arbitration); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F2d 494, 499 (5th Cir. 1986)(court can bar a party from seeking relief in arbitration when party would be precluded by res judicata from seeking relief due to prior court judgment); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F2d 1067, 1069 (11th Cir. 1993)(district court, rather than the arbitrator, should determine the res judicata effect of prior litigation, noting that the issue was “not just one of preventing the piecemeal litigation that occurs when parties simultaneously assert claims in several forums, but of

protecting prior judgments”); *Miller v. Runyon*, 77 F.3d 189, 194 (7th Cir.1996)(discussing res judicata as it applies to prior judgments and arbitrations and noting that the general consensus among courts is that “the preclusive effect of a judgment is determined by the tribunal that rendered it”); *Telephone Workers U. of N.J., Local 827 v. New Jersey Bell Telephone Co.*, 584 F.2d 31, 33 (3d Cir.1978) (district court should determine whether prior federal judgment decided issue on which party seeks to compel arbitration); *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe*, 566 F.2d 861, 863 (2d Cir.1977) (district court should determine res judicata effect of foreign judgment on petition to compel arbitration).⁴

Specifically, in the case of *In re Y & A Group Securities Litigation*, 38 F.3d 380 (8th Cir 1994) the Eighth Circuit Court of Appeals affirmed the district court's decision to enjoin arbitration on the grounds that it was precluded by a prior consent judgment. In that case, Neil Valk was an investor who had become a plaintiff in a shareholder class action. *Y & A Group Securities Litigation*, 38 F.3d at 381. Although that class action was eventually resolved by a negotiated settlement and a consent judgment, Valk

⁴ At least one court has recognized an additional reason why courts must be the one's to determine the preclusive effects of prior court order. See, *Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 821 So2d 158, 164 (Ala. 2001)(In which the Supreme Court of Alabama also adopted the position of these federal courts, noting that Alabama has a strong policy against allowing the judgments of its courts possibly to be transformed by arbitrators into advisory opinions, especially when arbitration decisions are virtually immune from judicial review).

had also independently started an arbitration action that was based on other acts than those involved in the class action. *Id.* Eventually the defendant moved to dismiss the arbitration action as precluded by the class action judgment, but the arbitration panel rejected the argument that arbitration was precluded. *Id.* at 381. Rather than waiting for the arbitration to come to a conclusion, the defendant asked the federal district court judge presiding over the class action to issue a preliminary injunction against the arbitration. *Id.* The court granted the injunction, and the Eighth Circuit upheld the injunction. *Id.* at 381-82. In affirming the injunction even after the arbitration panel had rejected the waiver claim, the Eighth Circuit necessarily determined not only that a district court should determine the res judicata issue, but that it could also override an arbitrator's decision on that issue. *Id.* at 383. Rejecting the appellant's argument that the district court was not permitted to reconsider the arbitration panel's decision, the Eighth Circuit noted that the panel's decision was ultimately based on its interpretation of the settlement agreement incorporated in the district court's final judgment. *Id.* Therefore, it was “[t]he district court, and not the arbitration panel, [who was] the best interpreter of its own judgment,” and who had the final say in the matter. *Id.* In addition, the Eighth Circuit was mindful of the broad public policy favoring arbitration, but noted that one problem with Valk’s argument was that it turned the purposes of arbitration “on its head,”

That purpose is the “speedy disposition of disputes without the expense and delay of extended court proceedings.” *Aerojet-General Corp. v. American Arbitration Ass’n*, 478 F.2d 248, 251 (9th Cir.1973). It is this fear of needlessly prolonging disputes which has made courts reluctant to stay or enjoin ongoing arbitrations in favor of court proceedings. This concern is unwarranted here, however, for, in a twist, the court proceedings were completed first, resulting in a final judgment. See *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 562 (8th Cir.1990) (citing to other instances where court proceedings concluded before arbitration did), *cert. denied*, 500 U.S. 905, 111 S. Ct. 1683, 114 L. Ed. 2d 78 (1991). It is important to distinguish cases like this from more usual ones, in which arbitration is the quickest route to resolution. E.g., *Peabody Coalsales Co. v. Tampa Electric Co.*, 36 F.3d 46 (8th Cir.1994); *Merrill Lynch, Pierce, Fenner & Smith v. Hovey*, 726 F.2d 1286 (8th Cir.1984). If Valk had his way, the litigation of his claims would be needlessly prolonged by arbitration.

Y & A Group Securities Litigation, 38 F.3d at 382. The Eighth Circuit also concluded that,

No matter what, courts have the power to defend their judgments as *res judicata*, including the power to enjoin or stay subsequent arbitrations.

Id. at 382, citing *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir.); *Miller Brewing Co. v. Ft. Worth Distributing Co.*, 781 F.2d 494 (5th Cir.1986).

The Washington Court of Appeals recently recognized the *Y & A Group Securities Litigation* case, and acknowledged that although there are no Washington cases on point, numerous federal cases have held that when

the objection to arbitration is based on a prior court judgment, the question of arbitrability is for the court and that the court could properly look to those federal cases for guidance on the issue. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App.304, 325-27, 237 P.3d. 316 (2010).

In the *Yakima County* case, a sheriff's deputy filed a grievance and then a civil suit alleging, among other things, wrongful termination and gender discrimination. *Yakima County*, 157 Wn. App. at 313. While the civil suit was pending the local sheriff's guild filed a grievance in a separate action and sought to compel arbitration, and the superior court ordered arbitration. *Id.* at 313-14. Later, the County moved for, and obtained, summary judgment in the civil suit and the civil suit was dismissed. *Id.* at 314. Several months later the guild's grievance proceeded to a hearing before the arbitrator, and the arbitrator rejected the County's claim that guild's grievance was now barred by res judicata. *Id.* at 314. When the arbitrator ultimately ruled against the County the County refused to comply with the arbitrator's decision and petitioned for review in the superior court. *Id.* at 317. The superior court vacated the arbitrator's award and ruled that the arbitrator had exceeded his authority based on a number of grounds, including res judicata. *Id.* at 317.

On appeal, the Court of Appeals considered a number of issues, one of which was the superior court's ruling that res judicata barred the arbitrator's ruling. *Id* at 325-31. The Court of Appeals began by noting that,

A threshold question not specifically addressed by the parties is whether res judicata and collateral estoppel are procedural issues for the arbitrator or whether, instead, they touch on the question of arbitrability itself and are therefore questions of law for the court. We find no Washington case addressing these questions. We look then to federal case law for guidance. *See Clark County Pub. Util. Dist.*, 150 Wn.2d at 246, 76 P.3d 248.

Yakima County, 157 Wn. App. at 325. The Court of Appeals then noted that,

Several federal courts have held that when the objection to arbitration is based on a prior court judgment from the same jurisdiction (res judicata), the question of arbitrability is for the court. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1134 (9th Cir.2000); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137-38 (3d Cir.1998); *Miller v. Runyon*, 77 F.3d 189, 194 (7th Cir.1996); *In re Y & A Group Sec. Litig.*, 38 F.3d 380, 382 (8th Cir.1994); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 498-99 (5th Cir.1986). The courts typically reason that federal courts must protect the finality and integrity of prior judgments. *See John Hancock*, 151 F.3d at 138.

Yakima County, 157 Wn. App. at 326. The Court then determined that the "County adequately preserved res judicata for judicial review," and then addressed whether res judicata appropriately applied to the facts. *Id.* at 327. Ultimately, however, the court found that res judicata did not apply because the guild had not been a party in the deputy's civil suit and because the guild

and the deputy were not in privity in the civil suit. *Id.* at 330.

Thus after Yakima County, there is no question that: (1) Washington courts can look to federal cases for guidance on the issue of whether questions of arbitrability are for a court to decide (that is, whether res judicata applies due to an earlier court order or judgment); and (2) The wealth of federal caselaw holds that a party may not seek to compel arbitration when there has been a previous resolution of the claims against the opposing party in a judicial proceeding, and that it is for the courts (and not an arbitrator) to decide the res judicata effect of such a judgment before allowing subsequent claims based on the same transaction to proceed to arbitration.⁵

2. **The cases by Swinerton do not hold or imply that res judicata as it relates to *prior court orders* is a matter to be decided by an arbitrator. Rather, the cases cited by Swinerton merely hold, consist with other cases cited by the County, that claims of res judicata based on *prior arbitration awards* are properly decided by an arbitrator.**

Swinerton argues that res judicata is a matter that is to be considered and decided by an arbitrator, but in so arguing Swinerton failed to distinguish or even acknowledge the wealth of federal cases outlined above or the

⁵ One could argue that Division Three did not definitively answer the ultimate question of whether arbitrability is a question for the courts (but rather, merely assumed that it was for the sake of argument in that case). Nevertheless, the opinion unquestionably recognizes that numerous federal cases have held that the question of arbitrability is for the court to decide when the objection to arbitration is based on a prior court judgment and that Washington courts may look to those federal cases for guidance. In addition, the Court of Appeals mentioned no authority at all reaching the opposite conclusion, nor did the Court suggest that it was in any way endorsing a holding that an arbitrator should decide whether res judicata

Yakima County case. Rather, in support of this claim, Swinerton cites to an Idaho case and argued that the opinion supported its claim that the trial court in the present case should not have considered the issue of waiver or res judicata. Swinerton's argument is misleading, and the case it has cited does not stand for the broad proposition that Swinerton suggests. Rather, the Idaho case cited by Swinerton, *Storey Cons. Inc v. Hanks*, 224 P.3d 468 (2009), is entirely consistent with the federal authorities cited in the previous section above (holding that court decide whether res judicata applies based on prior court orders), because in *Storey* the court merely held that issue of the preclusive effect of a prior *arbitration award* was best left to an arbitrator. *Storey*, 224 P.3d at 478 (holding that, "It is for the arbitrators to decide whether the claims alleged in the demand for arbitration were arbitrated in the first arbitration"). The other cases cited by Swinerton likewise all involve situations where the issue was whether an arbitrator could properly be tasked with deciding whether res judicata applied based on a *prior arbitration award*; not one of Swinerton's cases address the issue of whether a court can decide whether res judicata applies based on a *prior judicial proceeding*.⁶

applied as a result of a prior court order.

⁶ The cases cited by Swinerton were: *North River Ins. Co. v. Allstate In. Co.*, 866 F.Supp 123 (S.D.N.Y. 1994); *Chiron Corp. v Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126 (9th Cir 2000); *Transit Mix Concrete Corp. V. Local Union No. 282*, 809 F.2d 963 (2nd Cir 1997); and *Sharp v. Ryder Truck Lines Inc.*, 465 F.Supp. 434 (E.D.Tenn. 1979). See App.'s Br. at 18. Each of these cases, however, specifically dealt with the issue of what preclusive effect is to be given to a prior decision *by an arbitrator*. None of these cases state or imply that an

The issue in the present case, however, has nothing to do with the preclusive effects of a prior arbitration award. Rather the stipulation and order of dismissal in the present case was entered as part of a lawsuit in the Kitsap County Superior Court. The court, therefore, is in the best position to address the preclusive effects of the stipulation and order of dismissal in the present case.

The County acknowledges that Washington courts have recognized that the entire purpose of arbitration is to enable parties to avoid the formalities, delay, expense, and vexation of litigation in the courts. *See, e.g., Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992); *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997). In some instances such as in the present case, a party's request for arbitration fails to serve this purpose and serves only to delay what would otherwise be an efficient resolution of the matter by the courts. The Fifth Circuit Court of Appeals, for instance, emphasized a similar point when it stated,

[A]rbitration is ordinarily preferable to litigation, but to allow arbitration on top of the protracted litigation in this case would be to add insult to injury. The doctrine of res judicata... [has] probably done more to prevent useless and wasteful litigation than arbitration ever could.

Miller Brewing Co. v. Fort Worth Distrib. Co. Inc., 781 F.2d 494, 497 n.3

arbitrator should be allowed to decide what preclusive effect is to be given to a *prior decision*

(5th Cir. 1986). Similarly, as succinctly stated by the Eleventh Circuit Court of Appeals, “[c]ourts should not have to stand by while parties re-assert claims that have already been resolved.” *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir.1993). Finally, as the Supreme Judicial Court of Maine explained when addressing the exact issue raised in the present case,

The broad presumption favoring the substantive arbitrability of disputes is in no manner diminished by a court's threshold determination in a summary judicial proceeding that arbitration of the dispute is or is not barred by a prior judgment.

Macomber v. MacQuinn-Tweedie, 834 A.2d 131, 138 (Me.2003).

3. ***The conclusion that a court is the proper forum for addressing the issue of express waiver or res judicata based on a prior court order is consistent with the well-established Washington rule that that parties to an arbitration contract may impliedly waive that provision, and that a party does so by failing to invoke the clause when an action is commenced and arbitration has been ignored.***

In addition, the trial court’s ruling that the Swinerton had expressly waived all claims against the County through the stipulation and dismissal was consistent with Washington cases in which the courts have stated that a court may properly find that a party has impliedly waived its right to arbitration and is therefore precluded from arbitration.

of a court.

As stated above, it is well established under Washington law that a party to an arbitration clause may waive its enforcement. *See, e.g., George V. Nolte & Co. v. Pieler Const. Co.*, 54 Wn.2d 30, 34, 337 P.2d 710 (1959), *citing, Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards*, 1 Wn.2d 401, 410, 96 P.2d 257 (1939); *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 620, 586 P.2d 519 (1978) (“It is well established that an arbitration clause can be waived”); *Ives v. Ramsden*, 142 Wn. App. 369, 382-83, 174 P.3d 1231 (2008)(same). Furthermore, a waiver of a condition can be accomplished either expressly or impliedly. *George V. Nolte & Co.*, 54 Wn.2d at 34.

Furthermore, the Washington Supreme Court has recently reaffirmed the well-established principle that a denial of a motion to compel arbitration is appropriate when the facts show that the party requesting arbitration has impliedly waived its rights under an arbitration clause by failing to invoke the clause when an action is commenced and arbitration has been ignored. *Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 588, 201 P.3d 309 (2009)(affirming denial of motion to compel arbitration). As the Supreme Court noted, “Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Id* at 588; *See also, Steele v. Lundgren*, 85 Wn. App. 845, 935 P.2d 671 (1997) (affirming trial court conclusion that defendant waived contractual arbitration provision by litigating the plaintiff's

claims for a period of time before seeking to compel arbitration); *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 586 P.2d 519 (1978)(request for arbitration appropriately denied when party failed to request arbitration until after lawsuit had begun as “It is well established that an arbitration clause can be waived”).⁷

The holding of all of these cases evidences one basic point: that it is proper for a court to find that a party has impliedly waived their right to arbitration in certain circumstances.⁸ In the present case, even if one assumes

⁷ See also, *B & D Leasing Co. v. Ager*, 50 Wn. App. 299, 303, 748 P.2d 652 (1988)(“parties to an arbitration contract may expressly or impliedly waive that provision ... by failing to invoke the provision when an action is commenced”); *Shoreline School Dist. No. 412 v. Shoreline Ass'n of Educational Office Emp.*, 29 Wn. App. 956, 958, 631 P.2d 996 (1981)(“A party may waive arbitration by failing to invoke an arbitration clause when legal action is commenced”); *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 62, 64, 621 P.2d 791 (1980)(The right to arbitrate is waived by conduct inconsistent with any other intent and “a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time”).

⁸ Swinerton, however, implies that the Washington Supreme Court has held that all issues of “waiver” are for an arbitrator to decide. App.’s Br. at 19, citing *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004) and *Moses H. Cone Memorial Hosp. V. Mercury Const. Corp.*, 460 U.S. 1, 25, 103 S. Ct. 927 (1983). The *Adler* case itself, as well as numerous other authorities show that although issue of delay or waiver due to a parties failure to comply with time limits contained in the arbitration clause itself are appropriately addressed by an arbitrator, other issues of waiver (be it implied or express) are appropriately addressed by the court. For instance, in *Adler* the Court did note that defenses to arbitrability such as “waiver” or “delay” are to be decided by an arbitrator. *Adler*, 153 Wn.2d at 342, citing *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25. The Court in *Adler*, however, went on to specifically address the issue of whether a party had waived its right to arbitration based on its actions that were inconsistent with a desire to arbitrate and thus did not defer these issues to an arbitrator. See, *Adler*, 153 Wn.2d at 362. Thus, the Washington Supreme Court’s actions in *Adler* demonstrate that there is a distinction between “waiver” based on failing to comply with the procedural requirements of an arbitration clause and “waiver” based on others acts that are inconsistent with the desire to arbitrate. Numerous federal courts have found this same distinction.

It is true that in the *Moses H. Come Memorial Hosp.* opinion, and in the later opinion of *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002),

that there had been an arbitration clause, Swinerton did more than just impliedly waive any right to arbitration. Rather, the waiver in the present case was express, as the stipulation and order of dismissal stated in no uncertain terms that Swinerton waived all claims arising from the project in any manner. It would be absurd to conclude that a trial court may properly find an *implied* waiver of a right to arbitrate but that a court is somehow powerless to rule on an *express* waiver of that right.

the United States Supreme Court has stated that generally questions of “waiver, delay, or a like defense to arbitrability” are presumed to be issues for the arbitrator rather than a court. In neither of those cases, however, did the Court address a question of whether litigation-conduct constituted a waiver. Federal appellate courts that have considered this issue have concluded that the Supreme Court’s use of the term “waiver” referred to a party’s lack of compliance with contractual conditions precedent to arbitration, rather than “waiver” based on prior litigation or conduct inconsistent with the right to arbitrate, which has traditionally been ruled upon by the court. *See, e.g., Ford Motor Credit Co. v. Cornfield*, 918 N.E.2d 1140, 1154 (Ill. App. Ct. 2009); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217-19 (3d Cir.2007); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir.2005). Specifically, the United States Court of Appeals for the Third Circuit addressed the broad “waiver” language in as follows:

Properly considered within the context of the entire opinion, however, we believe it becomes clear that the Court was referring only to waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, and not to claims of waiver based on active litigation in court.

Ehleiter, 482 F.3d at 219. *See also, JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir.2008)(holding that the Supreme Court’s “waiver” language discussed above did not disturb the traditional rule that the courts presumptively resolve waiver-through-inconsistent-conduct claims, and that the Court was referring only to defenses arising from non-compliance with contractual conditions precedent to arbitration); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 464 (5th Cir. 2003) (noting that despite the Supreme Court’s “waiver” language discussed above, the courts, rather than arbitrators, should decide questions of arbitrability “where contracting parties would likely have expected a court to have decided the gateway matter,” and because courts are in the better position to decide whether litigation conduct constitutes a waiver, the parties would expect a court to make such a determination); *See also, American Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 552 (Ky. 2008) (acknowledging the Supreme Court’s “waiver” language discussed above, but holding that “questions of whether a party’s litigation conduct amounts to a waiver of its arbitration rights are generally issues for courts, not arbitrators”);

For all of these reasons the trial court did not err in deciding to address the issue of whether Swinerton had waived any right to seek to compel arbitration (even assuming that such a right ever existed).

B. THE TRIAL COURT DID NOT ERR IN DENYING SWINERTON'S MOTION TO COMPEL ARBITRATION BECAUSE SWINERTON EXPRESSLY WAIVED ANY AND ALL CLAIMS AGAINST KITSAP COUNTY.

As outlined above, the issue of whether Swinerton had expressly waived any right to compel arbitration was properly before the trial court. Given the clear language of the written stipulation and dismissal order entered by the court in the previous litigation, the trial court below properly found that Swinerton had waived any and all claims against the County, and thus the court properly denied the motion to compel arbitration.

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,

Perry Homes v. Cull, 258 S.W.3d 580, 587 (Tex., 2008)(same).

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....

CP 194-95, 205.⁹ As the trial court noted,

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.

Given the plain language of the stipulation and order, the trial court's conclusion was clearly proper. Swinerton, however, attempts to claim that the language of the dismissal only applied to claims that "could have been asserted" in the first lawsuit and that the language is "ambiguous." App.'s Br. at 15-16. This argument, however, is clearly without merit.

The language of the stipulation and dismissal could not be clearer. The parties, including Swinerton and Kitsap County, expressly agreed and stipulated that all claims asserted in the first suit (or which could have been asserted in that suit) shall be dismissed with prejudice. The stipulation,

⁹ 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." CP 196-98, 205.

however, did not stop there. Rather, it continued and expressly provided that

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....

CP 194-95, 205. There is nothing ambiguous about this language. Rather, the parties clearly relinquished their rights to any and all claims, known or unknown, asserted or unasserted, “arising from the Project in any manner.” Any claim that this language is ambiguous (or that it represents anything other than a complete release of all claims) is absurd.

Furthermore, Swinerton’s argument that this language is somehow ambiguous essentially invites this Court to question the finality of any suit ever settled in this State and would make it essentially impossible for parties to effectuate broad and comprehensive releases and settlement agreements. This Court should decline that invitation.

C. THE TRIAL COURT’S DENIAL OF THE MOTION TO COMPEL ARBITRATION WAS ALSO PROPER BECAUSE SWINERTON FAILED TO DEMONSTRATE THAT THE PARTIES HAD EVER AGREED TO ARBITRATE THEIR DISPUTES.

Swinerton also argues that the parties’ contract “clearly incorporated an arbitration provision,” and that the trial court therefore should have

granted the motion to compel arbitration. App.'s Br. at 7-11. This claim is without merit because the contract did not contain an arbitration provision and the record does not show that any arbitration clause was incorporated by reference.

The trial court in the present case never specifically addressed whether the contract between the parties did or did not contain an arbitration provision. Rather, the trial court ruled that the language of the stipulation was "very clear" and that Swinerton had waived any and all claims against the County. RP (7/2/2010) 14. An appellate court may use any valid ground to affirm the trial court's conclusion, even if the appellate court's reasoning differs from that of the trial court. *See State v. Williams*, 93 Wn. App. 340, 347-48, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999) (*citing Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986)). This Court should affirm the trial court's decision as it was the correct result given the plain language of the stipulation and order of dismissal. In addition, even if one were to ignore the waiver issue, the trial court's denial of the motion to compel would still be the correct outcome because the record does not demonstrate that the parties ever entered into a valid agreement to arbitrate.

As arbitration is a matter of contract, parties cannot be compelled to arbitrate unless they agreed to do so. *Weiss v. Lonquist*, 153 Wn. App. at

510; *Todd v. Venwest Yachts, Inc.*, 127 Wn. App. 393, 397, 111 P.3d 282 (2005) (quoting *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 19 (2d Cir.1995)). Thus, the threshold inquiry for a court is whether the parties entered into a valid agreement to arbitrate. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 394, 191 P.3d 845 (2008) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)). Furthermore, RCW 7.04A.060(2) specifically provides that the “court shall decide whether an agreement to arbitrate exists.”

The burden of proving the existence of a contract is on the party asserting its existence. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 765, 162 P.3d 1153 (2007) (citing *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)). Thus, under Washington law a party seeking to compel arbitration “has the burden of proving the existence of the purported agreement to arbitrate.” *Weiss v. Lonquist*, 153 Wn. App. 502, 515, 224 P.3d 787 (2009).

Under Washington law, “[f]or a contract to exist there must be mutual assent to its essential terms.” *Jacob's Meadow Owners Ass'n*, 139 Wn. App. at 765 (citing *Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993)). “In determining the mutual intention of contracting parties, the unexpressed, subjective intentions of the parties are irrelevant; the mutual assent of the parties must be gleaned

from their outward manifestations.” *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 854, 22 P.3d 804 (2001) (citing *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981)).

There is no dispute that the Capital Project Contract in the present case does not contain an arbitration clause. Rather, the contract states that,

Absent agreement to alternative dispute resolution, all claims, counterclaims, disputes and other matters in question between the OWNER and the CONTRACTOR that are not resolved between the OWNER’S REPRESENTATIVE and the CONTRACTOR will be decided in the Superior Court of Kitsap County, Washington.

CP 66-67; App.’s Br. at 1-2. In addition, there is no arbitration clause (or any other agreement to utilize alternative dispute resolution) found in the “Capital Project Contract” or in the “General Conditions for Kitsap County Facility Construction” (hereinafter the “General Conditions”) that were entered into by the parties. See CP 54-72, 74-109.

Swinerton, however, claims that a footnote found in multiple change orders “unequivocally incorporates” another document (namely, the “AIA A201”) into the contract, and that this document contains an arbitration provision. App.’s Br. at 2-3, 10. Swinerton, however, never mentions Washington law regarding incorporation by reference nor offers any authority in support of its claim that an arbitration clause was incorporated into the

contract.

Washington law regarding incorporation by reference does not support Swinerton's bald assertions in the present case, as Swinerton cannot show that the incorporation by reference was clear and unequivocal. Incorporation by reference allows the parties to a contract to incorporate contractual terms by reference to a separate agreement to which they are not parties. *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (*quoting* 11 Williston on Contracts § 30:25, at 233-34 (4th ed.1999)), *review denied*, 143 Wn.2d 1003, 21 P.3d 292 (2001). The burden of proving incorporation by reference is on the party claiming it. *State v. Ferro*, 64 Wn. App. 195, 198, 824 P.2d 500 (1992) (*citing Baarslag v. Hawkins*, 12 Wn. App. 756, 760, 531 P.2d 1283 (1975), *review denied*, 86 Wn.2d 1008 (1976)).

In order for incorporation by reference to be effective, it must be clear and unequivocal. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 845, 194 P.3d 221 (2008) *citing Ferrellgas*, 102 Wn. App. at 494, 7 P.3d 861 (*citing Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994)); see also Williston, at 234). It must be clear that the parties to the contract had knowledge of and assented to the incorporated terms. *Ferrellgas*, 102 Wn. App. at 494-95 (*citing* Williston, at 234).

In the present case Swinerton acknowledges that the written contract between the parties states that the parties agreed that proper forum for the resolution of their disputes was the Kitsap County Superior Court, absent an agreement to some form of alternative dispute resolution. App.'s Br. at 1-2, CP 66-67. Nevertheless, Swinerton argues that a note in each of several change orders "unequivocally" incorporated an arbitration clause into the contract. App.'s Br. at 10. The record (and Washington law), however, does not support Swinerton's assertion.

In essence, Swinerton's argument is that the note in the change orders is the functional equivalent of an express agreement by the parties that all of the provisions of AIA Document A201 are incorporated into both the change order and contract by this reference and further that the full content of the alternative dispute provisions of A201 are thereby incorporated and are to be applied to any and all disputes arising from the contract.

The actual language of the note in the change order, however, says nothing of the sort. Rather, the language of the note merely says,

This Change Order does not include changes in the Contract Sum or Contract Time which have been authorized by Constructive Change Directive for which the cost or time are in dispute as described in Subparagraph 7.3.8. of AIA Document A201.

CP 114-19. This language says nothing about any express agreement by the

parties to incorporate anything by reference. Rather, it merely indicates what the Change Order “does not include.” The note does not say that document A201, in whole or in part, is in any way incorporated by reference.

The County is aware of no case, either in Washington or elsewhere, where a court has found an “unequivocal” incorporation by reference of an entire document based on a mere reference that something is “not included” in the contract. Nor is the County aware of any case where a court has found that an entire document (such as a 39-page set of general contract provisions) has been effectively and completely incorporated by reference into a contract by a mere reference to one isolated portion of that document, absent any indication that the parties to intend to incorporate the entirety of that document into their written contract. In short, the language of the note in the change orders says only that something is *not included* in the change order (namely, that the change orders do not include changes pursuant to a construction change directive for which the cost or time are in dispute as described by subparagraph 7.3.8. of AIA document A201).

Swinerton, however, argues that subparagraph 7.3.8 addresses the procedures for payment on Change Orders, including costs that may be claimed in accordance with Article 4 of AIA Document A201; that Article 4 addresses the administration of contracts, including claims and disputes, and that pursuant to paragraph 4.6, all claims are subject to arbitration. App.’s

Br. at 3.¹⁰

The note, however, does not even state that the parties were agreeing that disputes about the cost or time adjustments caused by a Constructive Change Directive would be resolved by a dispute resolution process other than the process found in the Capital Project Contract or the General Conditions. That is, the note does not clearly and unequivocally state that the dispute resolution provisions of AIA document A201 (which are not found in subparagraph 7.3.8. of AIA Document A201) are somehow incorporated by reference and are to be applied to the entire contract, nor does the note even state that dispute resolution provisions are incorporated for the limited purpose of resolving disputes about the costs associated with a Constructive Change Directive. This footnote does not demonstrate the parties clearly and unequivocally meant to replace the specific dispute resolution provisions of their written contract with the unnamed and uncited dispute resolution provisions of AIA Document A201.

Swinerton has the burden of proving incorporation by reference, and must show that there has been a clear and unequivocal incorporation by reference. *Ferro*, 64 Wn. App. at 198; *Navlet*, 164 Wn.2d at 845.

¹⁰ In actuality, paragraph 4.6 only allows for arbitration after a claim has been submitted to the Architect and then to mediation. CP 144. Specifically, subparagraph 4.5.2 states that mediation is a “condition precedent to arbitration.” CP 144. Swinerton has never claimed or alleged, nor does the record below show, that Swinerton ever submitted its claims in the

Swinerton, however, falls well short of meeting this burden. Additionally, Swinerton must show that the parties to the contract had knowledge of and assented to the incorporated terms. *Ferrellgas*, 102 Wn. App. at 494-95. The language of the note does not demonstrate that the parties had knowledge of or assented to any and all arbitration provisions that might be found in AIA Document A201. Swinerton's claim, therefore, was without merit.

Regardless, arguments about incorporation by reference are essentially meaningless in the present case because Swinerton expressly waived any and all claims against the County. Thus, even if the Change Orders had expressly stated that the parties agreed to incorporate AIA Document A201 (1997 edition) "in its entirety into the contract" and specifically agreed that "all disputes arising from the project are subject to arbitration," the trial court's denial of the motion to compel would have still been proper because Swinerton later waived any and all claims against the county. The inescapable and incontrovertible fact remains that Swinerton drafted and signed the stipulation and order of dismissal which clearly and unambiguously stated that Swinerton waived any and all "claims, demands, causes of action and liabilities ..., known or unknown, asserted or unasserted ... arising from the Project in any manner...." CP 194-95, 205.

present case to the Architect or sought mediation of its claims, as required under A201.

Given these facts, the trial court did not err in denying Swinerton's motion to compel arbitration. To the contrary, the trial court correctly reached the only possible result, given the clear language of the stipulation and order of dismissal.

IV. CONCLUSION

For the foregoing reasons, the trial court's denial of Swinerton's motion to compel arbitration should be affirmed.

DATED November 9, 2010.

Respectfully submitted,

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