

**FILED**

OCT 21 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 298892

---

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

---

**RIVER HOUSE DEVELOPMENT, INC.,**

**Appellant,**

**v.**

**INTEGRUS ARCHITECTURE, P.S.,**

**Respondent.**

---

**REPLY BRIEF OF APPELLANT**

---

JOHN R. LAYMAN, WSBA #13823  
TIMOTHY B. FENNESSY, WSBA#13809  
NIKALOUS O. ARMITAGE, WSBA #40703  
Layman Law Firm, PLLP  
601 S. Division St.  
Spokane, WA 99202  
(509) 455-8883 Telephone  
(509) 624-2902 Facsimile  
Attorneys for Appellant River House Development, Inc.

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. REPLY TO STATEMENT OF THE CASE .....	2
A. RHD Requested Mediation and Explained the Legal Reason for Filing the Companion Suit, Engaged in Long Discussion About Pending Discovery and Then--For the First Time-- Heard an Argument for Waiver. ....	2
III. ARGUMENT IN REPLY .....	3
A. Integrus Has Failed To Satisfy the Burden of Proof that RHD's Conduct Was Inconsistent With Any Intention Other Than Waiver of Contractual Right to Mediation/Arbitration.....	3
B. The Trial Court's Authority is Limited to a Determination of Whether These Parties had Entered an Enforceable Agreement to Mediate. ....	6
C. Controlling Washington Authority including <i>Verbeek</i> Stands for the Proposition That the Court Must Indulge Every Presumption in Favor of Arbitration. ....	9
D. Integrus Certainly Should be Estopped From Attempting to Now Distinguish Use of the Term Mediation From the Contractual Agreement for Alternative Dispute Resolution. ....	12
IV. CONCLUSION .....	13

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page (s)</b>
<i>American Almond Products Co. v. Consolidated Pecan Sales</i> , 144 F.2d 448, 451 (2 <sup>nd</sup> Cir., 1944).....	8
<i>Balfour, Guthrie &amp; Co. v. Commercial Metals Co.</i> , 93 Wn.2d 199, 204, 607 P.2d 856 (1980) .....	8
<i>Boyd v. Davis</i> , 127 Wash.2d 256, 262, 897 P.2d 1239 (1995) .....	4
<i>Finney v. Farmers Ins. Co.</i> , 21 Wash.App. 601, 620, 586 P.2d 519 (1978) .....	9
<i>Godfrey v. The Hartford Casualty Insurance Co.</i> , 142 Wash.2d 885, 15 P.3d 617 (2001) .....	3, 4
<i>Heights at Issaquah Ridge, Owners Association v. Burton Landscape Group, Inc.</i> , 148 Wn.App. 400, 403, 200 P.3d 254 (1999) .....	6
<i>Kinsey v. Bradley</i> , 53 Wn.App. 167, 169, 765 P.2d 1329 (1989) .....	5
<i>Lake Wash. Sch. Dist. No. 414 v. Shoreline Ass'n of Educ. Office Employees</i> , 28 Wash.App. 59, 64, 621 P.2d 791 (1980) .....	9
<i>Moses H: Memorial Hospital v. Mercury Construction</i> , 460 U.S. 1, 24-25, 103 S.Ct. 927 (1983) .....	6
<i>Otis Housing Ass'n v. Ha</i> , 165 Wn.2d 582, 201 P.3d 309 (2009) .....	10
<i>Penn Tanker Co. of Delaware v C.H.Z. Rolimpex, Warza WA.</i> , 199 F.Supp. 716, 718 (1961) .....	8

**TABLE OF AUTHORITIES (cont.d)**

<b>Cases</b>	<b>Page (s)</b>
<i>Price v. Farmers Insurance Company</i> , 133 Wash.2d 490, 496, 946 P.2d 388 (1997) .....	4
<i>Rimov v. Schultz</i> , 162 Wash.App. 274, 280, 253 P.3d 462 (2011) .....	4
<i>Verbeek Properties, LLC v. The Greenco Environmental, Inc.</i> , 159 Wn.App. 82, 46 P.3d 205 (2010) .....	6, 7, 9
<b>Other Authorities</b>	
Uniform Arbitration Act .....	1, 7

## I. INTRODUCTION

Appellant River House Development, Inc. (“RHD”) and Integrus Architecture, P.S. (“Integrus”) agree that the contract under which Integrus was hired contains a valid dispute resolution clause. The written agreement provides that any claim shall first be mediated, and if mediation is not successful shall then be arbitrated, as conditions precedent to any other form of proceeding by either party. Yet, despite repeated conversations/communications between counsels acknowledging just that, Respondent herein asks this Court to affirm the trial court in holding that RHD waived this valuable contractual right. Integrus contends that RHD’s actions were inconsistent with *any other intention* but to waive RHD’s right to mediation/arbitration. Such an interpretation of the undisputed facts presented by this record is directly in conflict with Washington’s expressed public policy favoring arbitration, Washington case law and the Uniform Arbitration Act. RHD’s intention to proceed through mediation and arbitration to resolve the present dispute was repeatedly and clearly expressed throughout this matter and is without serious question. Under these facts, and the decision of the trial court should be reversed upon *de novo* review.

## **II. REPLY TO STATEMENT OF THE CASE**

### **A. RHD Requested Mediation and Explained the Legal Reason for Filing the Companion Suit, Engaged in Long Discussion About Pending Discovery and Then--For the First Time--Heard an Argument for Waiver.**

On February 17, 2010, RHD made an initial demand for mediation under the terms of the contract, listing a variety of disputes. RHD further notified Integrus of its need to preserve any equitable claims which might be outside the contract and arguably subject to a statute of limitations defense in the event a Tolling Agreement could not be reached. (CP 262-267). Following several e-mails and phone conversations, on April 22, 2010, more than sixty days after RHD's initial demand letter and while acknowledging that he had accepted service of process, Integrus' counsel wrote: "*Rest assured we will continue to discuss the timing of mediation with you as we both move forward with this case.*" (CP 244).

Thereafter, once the matter had been filed in Superior Court, in a letter dated June 11, 2010, counsel for Integrus reiterated: "*Let me assure you that we are not interested in delaying this matter, and Integrus does agree to mediation **per the terms of the parties contract.***" (CP 255, emphasis added). From that point in time, there was very little activity in this file: counsel each had some time out of the office, Rich Robinson passed away forcing a reallocation of law firm resources and Nik

Armitage prepared a Joint Status Conference Report that was shared with Mr. Hyslop (CP 274-277). Mr. Hyslop continued to represent that mediation was the goal and that there was plenty of time to accomplish it. (CP 288-289).

It was not until February 18, 2011, more than one year after RHD initially advised Integrus of the disputes and made its demand for contractual, alternate dispute resolution, that Respondent suddenly abandoned the parties' mutual agreement in an attempt to force the matter into full blown litigation. Over the next twenty-eight days, from February 28 until March 18, despite RHD's best efforts to respond to very formalistic and technical objections to its informal discovery responses, Integrus set the stage to attempt to avoid its contractual obligations. No amount of posturing or historic reconstruction of the record in this matter should be permitted to mislead this Court into affirming the trial court's decision.

### **III. ARGUMENT IN REPLY**

#### **A. Integrus Has Failed To Satisfy the Burden of Proof that RHD's Conduct Was Inconsistent With Any Intention Other Than Waiver of Contractual Right to Mediation/Arbitration.**

Washington courts have expressed a specific public policy favoring arbitration. Godfrey v. The Hartford Casualty Insurance Co., 142

Wash.2d 885, 15 P.3d 617 (2001). In that case, the Supreme Court specifically recognized that, “the very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned ... arbitration is a substitute for, rather than a mere prelude to, litigation.” Godfrey at 892. Arbitration is further attractive as a more expeditious and final alternative to litigation. Boyd v. Davis, 127 Wash.2d 256, 262, 897 P.2d 1239 (1995). Arbitration traces its existence and jurisdiction first to the parties contract and then to the arbitration statute in the state of Washington. Price v. Farmers Insurance Company, 133 Wash.2d 490, 496, 946 P.2d 388 (1997). See also, Rimov v. Schultz, 162 Wash.App. 274, 280, 253 P.3d 462 (2011).

In the case at bar, there is no dispute that the parties agreed at the time of contracting to resolve any and all disputes arising out of the Project through mediation and arbitration. That agreement continued to be referenced by counsel for both parties in repeated communication: discussing the dispute; detailing RHD’s counsel’s need to preserve any potential claims by serving and then filing a court action in order to avoid application of the statute of limitations; and, in discussing informal discovery and witness identification procedures. Now, despite all the representations by counsel, Integrus argues that it always intended to proceed in the judicial forum and avoid arbitration. See Respondent’s

Brief at p. 14. Integrus now represents that its refusal to sign a tolling agreement was an indication of its intent to proceed in a judicial forum. Yet, that refusal was made at or about the same time as counsel for Integrus wrote that his client still agreed to mediation pursuant to the terms of the parties' contract. It was likewise at the same time that Integrus represented that RHD could rest assured that there would be continued discussion with regard to the *timing* of mediation. (CP 244 and 255). While it is true that RHD did not need permission to invoke the contractual dispute resolution procedures, its efforts, communications and actions are clearly consistent with a continued intent to submit the matter for resolution in accord with the Parties' contractual obligation to mediation.

There is no evidence in the record of "extensive" motion practice until RHD was surprised by Integrus' sudden, aggressive pursuit of a Motion to Compel. Indeed, the only reason that RHD did not "demand" mediation with a formal letter to AAA was to avoid an extra layer of administrative expense and in reliance upon the continued representations given by Integrus about mediation being the proper and appropriate method of resolving disputes. (CP 394-395).

Waiver requires intentional relinquishment of a known right. Kinsey v. Bradley, 53 Wn.App. 167, 169, 765 P.2d 1329 (1989).

*Emphasis added.* At each stage of these proceedings, RHD reiterated its intention to resolve the dispute between it and Integrus through mediation. At no time, did RHD act inconsistently with its intention to proceed to mediation. In fact, quite to the contrary, RHD even included a prayer in the complaint seeking stay of these proceedings pending resolution of the disputes between the parties by mediation/arbitration. (CP 14) To uphold the trial court's ruling, this court would be required to determine that RHD's conduct was inconsistent with any other intention but to forego its known right to mediation. Verbeek Properties, LLC v. The Greenco Environmental, Inc., 159 Wn.App. 82, 46 P.3d 205 (2010).

**B. The Trial Court's Authority is Limited to a Determination of Whether These Parties had Entered an Enforceable Agreement to Mediate.**

Any doubt on the question of the parties' agreement should be resolved in favor of arbitrability and if the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end. Heights at Issaquah Ridge, Owners Association v. Burton Landscape Group, Inc., 148 Wn.App. 400, 403, 200 P.3d 254 (1999). "The *arbitrator* should decide allegations of waiver, delay or a like defense to arbitrability." Heights at Issaquah Ridge, *Id.* at 406, *emphasis added*; See also Moses H: Memorial Hospital v. Mercury Construction, 460 U.S. 1, 24-25, 103 S.Ct. 927 (1983). Both parties to this suit specifically

acknowledge that the agreement contains an alternate dispute resolution clause. Thus, the trial court's inquiry should have stopped at that point and the matter referred to mediation per the underlying contract clause.

Despite Integrus' protestations, this argument was presented to the court below. (CP 832-867). There is no indication that the Court refused to consider this argument. Further, RAP 2.5 permits this Court to hear any claim of error, though it also provides the Court an opportunity to refuse to hear the same.

Integrus asks this court to reject the precedent provided in Verbeek by contending that the trial court had no opportunity to address the issue. Respondent's Brief at p. 19. Absent from this discussion, is the timeline associated with Integrus' argument related to waiver. Integrus first raised the waiver argument in its consolidated response to Plaintiff's motion, served and filed on shortened time only two days prior to the court's hearing. Admittedly, counsel for RHD had not seen the briefing prior to the argument outlined in Integrus' briefing at pages 17 and 18. However, those matters were directly addressed and briefed in RHD's motion for reconsideration and considered by the trial court. Thus, the issue is not first raised before this court and the trial court's lack of authority under the Verbeek case and the Uniform Arbitration Act is properly a matter for this Court to decide on *de novo* appeal.

Further, RHD did point the trial court to relevant authority for this position on March 28, 2011 with its Motion for Reconsideration of the first Order with regard to discovery entered on March 18. There, the relevant contractual language was quoted and the facts associated with the history of the matter were laid out. The clear argument was made that:

The Court cannot compel River House to participate in pre-mediation and pre-arbitration discovery in the absence of exceptional circumstances. The plain language of the Contract between River House and Integrus shows that the parties shared a clear intent to submit all disputes relating to the Contract to mediate and arbitration. In its initial correspondence to Integrus regarding this matter, River House demanded that the claims be mediated. Washington courts have recognized that the purpose of alternative dispute resolution is “the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial.” Penn Tanker Co. of Delaware v C.H.Z. Rolimpex, Warza WA., 199 F.Supp. 716, 718 (1961)(cited with approval in Balfour, Guthrie & Co. v. Commercial Metals Co., 93 Wn.2d 199, 204, 607 P.2d 856 (1980). Retaining expert witnesses and engaging in substantial discovery are precisely the type of formal and technical preparation that mediation and arbitration seek to avoid. (CP 361).

RHD went on to point out that under the holding in Balfour, once alternative dispute resolution methods are accepted by parties to a contract, the third party neutral should determine the nature and scope of discovery. (CP at 363). Finally, the Court was apprised at that time of Judge Learned Hand’s holding in American Almond Products Co. v.

Consolidated Pecan Sales, 144 F.2d 448, 451 (2<sup>nd</sup> Cir., 1944) wherein he said:

Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

Thus, the trial court was aware of RHD's position before notice was ever had on the question of waiver.

C. **Controlling Washington Authority including *Verbeek* Stands for the Proposition That the Court Must Indulge Every Presumption in Favor of Arbitration.**

The right to arbitration may be waived by a party's conduct. Finney v. Farmers Ins. Co., 21 Wash.App. 601, 620, 586 P.2d 519 (1978). However, the waiver must be by conduct inconsistent with any other intent and the "party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time." Lake Wash. Sch. Dist. No. 414 v. Shoreline Ass'n of Educ. Office Employees, 28 Wash.App. 59, 64, 621 P.2d 791 (1980). Not only were the actions of RHD inconsistent with any alleged intent to waive the contractual right to arbitrate, but from the outset of this case RHD asked the trial court to stay

the proceedings pending resolution of the disputes between the parties by mediation/arbitration. (CP 14). Again, upon learning of Integrus' changed posture on the topic during the Motion to Compel, only 10 days passed before RHD filed a Motion to Compel Mediation and Arbitration. (CP 377-386). These actions were intended to enforce the arbitration clause within a reasonable time and certainly before the trial court had determined the merits of any issue presented by the facts of this case.

Integrus cites to Otis Housing Ass'n v. Ha, 165 Wn.2d 582, 201 P.3d 309 (2009), as the only Washington Supreme Court authority on the issue of waiver of arbitration provisions and binding on this Court. Respondent's Brief at page 22. Interestingly, that decision does not contain one reference to *Steele* or any "factors" to be weighed in consideration of the question. Instead, the Court, both in the five Justice majority opinion and in the four Justice dissent, notes that "waiver" of this important contractual right requires "conduct inconsistent with any other intent ... ." Otis Housing Ass'n. v. Ha, 165 Wn2d at 588 and at 592.

From that agreed statement of the law, the majority held as follows:

Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate. OHA's conduct of submitting its claim that it exercised its option as a defense to the unlawful detainer action was completely inconsistent with an intent to arbitrate. We hold that OHA did waive any claim it may have had to arbitrate by presenting the same issue – whether it had successfully exercised the

option to purchase – before the unlawful detainer court. Having lost on that issue, it may not later seek to relitigate the same issue in a different forum.

Id. at 588, emphasis added. Yet, the minority was unprepared, even under those facts, to hold that there had been a waiver of the contractual arbitration procedure. Id. at 591-592.

This case involves disputes about the performance of contractual duties by Integrus (be they design, construction administration or construction management services makes no difference). The trial court has never been asked to hear any of the merits of the case. In addition to praying for a stay of the proceedings in its Complaint, RHD renewed its request to Compel Mediation and Arbitration within days of learning that Integrus was changing its tact and attempting to force a trial. (CP 377 – 386). Further, RHD’s Motion to Compel Mediation and Arbitration was served and filed before Integrus even asked the trial court to address the potential waiver issue. RHD never intentionally waived its contractual rights and its actions throughout the process have been consistent with an intent to proceed with the alternative dispute resolution process.

Integrus even attempts to argue that RHD is seeking to forum shop because of the court’s ruling of March 18, 2011, with regard to expert witnesses. However, that argument ignores the fact that the court determined that all parties were beyond the time for naming experts and

that there would be no experts if this matter proceeds to trial. (CP 722-723). This case has been slowly developed by both sides for a variety of reasons. It was not contentious, though, until Integrus attempted to change course from the mandated mediation, with associated informal, limited discovery and no live testimony, to full blown litigation under the Civil Rules. Immediately upon recognizing that shift, RHD asked the Court to stay these proceedings and require the parties to return to the agreed forum.

**D. Integrus Certainly Should be Estopped From Attempting to Now Distinguish Use of the Term Mediation From the Contractual Agreement for Alternative Dispute Resolution.**

Almost astoundingly, Integrus further contends that it has made no statement indicating an intention to arbitrate this case. (See Respondent's Brief at p. 27). Insisting that none of its communications mentioned the word "*arbitration*," Integrus insinuates that it always intended to be clear that this case was going to trial in the Superior Court. See Respondent's Brief at 27-28. Though clearly beside the point since the question presented is about RHD's intent, such an argument should be accompanied by at least one contemporaneous refusal by Integrus to the contractually mandated meditation/arbitration process. Instead, Integrus waited until this appellate brief to contend that there was a difference

between its repeated use of the term mediation in regard to dispute resolution with RHD and arbitration, under the circumstances presented. RHD's right to mediation and interest in mediation has been communicated to Integrus from the very outset (by the demand letter, in the Complaint, in discussing the Joint Status Report and in the Motion to Compel). The entire conversation has been grounded in the contractual obligation between these parties. Integrus' current position appears to be that it should be permitted to intentionally mislead RHD by agreeing to mediate, without also pointing out that it never intended to arbitrate under the contract. Such sharp practice should not be countenanced by this court and, in any event, clearly mitigates against any argument of knowing waiver by RHD.

#### **IV. CONCLUSION**

Washington courts have expressed a strong public policy in favor of contractual arbitration. Arbitration traces its existence and jurisdiction to the parties' contract and then, if necessary, to the arbitration statute itself. In this matter, RHD has consistently worked toward presentation of this dispute per the terms of its contract with Integrus. RHD urges this Court to reverse the trial court and remand this matter with instructions that contractual mediation and arbitration should follow.

DATED this 21<sup>st</sup> day of October, 2011.

LAYMAN LAW FIRM, PLLP

A handwritten signature in black ink, reading "Timothy B. Fennessy". The signature is written in a cursive style and is positioned above a horizontal line.

JOHN R. LAYMAN, WSBA #13823

TIMOTHY B. FENNESSY, WSBA #13809

NIKALOUS O. ARMITAGE, WSBA #40703

Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21<sup>st</sup> day of October, 2011, I served a true and correct copy of the foregoing Reply Brief of Appellant by delivering the same to the following attorney of record, and individuals by the method indicated below addressed as follows:

<input type="checkbox"/>	U.S. Mail, postage prepaid	William D. Hyslop, Esq.
<input checked="" type="checkbox"/>	Hand Delivery	LUKINS & ANNIS
<input type="checkbox"/>	Legal Messenger	717 West Sprague Ave.,
<input type="checkbox"/>	Email	Suite 1600
<input type="checkbox"/>	Overnight Mail	Spokane, WA 99201
<input type="checkbox"/>	Facsimile	<i>Attorney for Respondent</i>

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

Signed at Spokane, Washington this 21<sup>st</sup> day of October, 2011.

  
Nancy E. Kidwell