Supreme Court No. _____

Court of Appeals No. 74806-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Cindius Romney as Personal Representative of the Estate of Dr. Michael Romney, Dr. Faron Bauer, and Dr. Kristen Childress, individually and on behalf of all others similarly situated,

Respondents,

v.

Franciscan Medical Group, a Washington Corporation,
Franciscan Health System, a Washington Corporation,
Franciscan Health Ventures, a Washington Corporation,
Franciscan Northwest Physicians Health Network, LLC, a Washington Corporation, and
Catholic Health Initiatives, a Colorado Corporation,

Petitioners.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners are Franciscan Medical Group and the related entities identified in the caption (collectively "FMG").

II. DECISION FOR REVIEW

FMG seeks review of a published Court of Appeals ("COA") opinion, Case No. 74806-8-I, filed July 10, 2017, which terminated review in this matter and is reproduced in the Appendix ("Appx.").

III. ISSUES PRESENTED

Under controlling law, a party cannot be forced to arbitrate with a class unless it specifically agreed to do so. Here, although it held that FMG did not agree to class arbitration, the COA nevertheless ruled that FMG waived its right to object to class arbitration by failing to timely assert that right. The latter ruling presents the following issues of substantial public interest under RAP 13.4(b)(4):

A. Can a right to class arbitration, which does not otherwise exist, be created under the doctrine of litigation waiver, similar to when a party fails to timely move to compel arbitration in a civil action?

B. To avoid litigation waiver, must a party object to relief (class arbitration) that has not been requested, and may not ever be

requested, by the opposing party, or is it sufficient to object when the contested relief is actually requested?

C. Are comments made in pleadings and argument where the right to class arbitration was not an issue sufficient to waive objection to a later request for class arbitration?

D. Can prejudice sufficient to support a holding of litigation waiver be based on speculation that the other party might have acted differently if an earlier objection to class arbitration had been made?

IV. STATEMENT OF THE CASE

Plaintiffs[1] are physicians and a nurse practitioner formerly employed by FMG. As a condition of employment, they signed agreements requiring them to arbitrate all employment-related disputes.[2] Notwithstanding the Agreements, Plaintiffs commenced an action in superior court, alleging wage and hour claims on a class basis, as well as other individual claims. CP 1–11.

Because the Agreements barred their lawsuit, they immediately asked the superior court to void them. CP 12–37. FMG opposed and, before answering, filed a cross-motion to compel arbitration. CP 169–89.

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[1] Respondents Romney, Bauer, and Childress are collectively referenced as "Plaintiffs" in this petition.

[2] CP 45–71, 81–107, 116–36 (the "Agreements").

The superior court granted Plaintiffs' motion. CP 255–58. On appeal, the COA reversed, holding that the Agreements were valid. CP 1167–82. Plaintiffs unsuccessfully sought review by this Court and the matter was remanded to superior court for further proceedings. CP 1165–66. At no time during these proceedings did Plaintiffs request class arbitration.

After this Court denied review, FMG invited Plaintiffs to propose arbitrators to preside over their individual cases. After Plaintiffs insisted on class arbitration, FMG moved to compel individual arbitrations, which Plaintiffs opposed. CP 1183–89; 1326–39. The superior court granted FMG's motion. CP 1503–04. Plaintiffs' request for discretionary review was granted by the COA.

In the decision that is the subject of this petition, the COA held that the court, not an arbitrator, must decide whether the Agreements permit class arbitration. Appx., p. 3. It also held that class arbitration is permitted only by agreement and the Agreements in question do not provide for class arbitration. *Id.* at 5–10. Accordingly, it concluded that "FMG had a contractual right to avoid class arbitration." *Id.* at 10.

Notwithstanding these holdings, the COA held that a right to class arbitration arose under the doctrine of waiver based on FMG's litigation conduct. *Id.* at 10–15. Contradicting its other holding that a right to class arbitration cannot be implied or inferred, *id.* at 7, the COA based its

waiver holding on the presumption in favor of arbitration and Plaintiffs "impliedly asserting" a right to class arbitration. *Id.* at 11, 15. However, it cited no authority supporting a presumption in favor of class arbitration or requiring a party to object to an "implied assertion." *Id.* at 11–12.

The COA also treated the issue as akin to waiver of "a contractually created affirmative defense," *id.* at 11 n.10, while ignoring the fact that, during the initial phases of this litigation, Plaintiffs never requested class arbitration, and the matter was never in a posture where FMG was required to plead affirmative defenses to such a request. The COA also faulted FMG for "being content to litigate against a putative class" when it "wanted a determination on the right to compel arbitration," *id.* at 12 n.10, while ignoring the fact that Plaintiffs never moved for class certification and the rule that an uncertified class action is no different than an individual action. *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1013 n.1 (9th Cir. 2000).

Applying these three concepts, the COA concluded that FMG knew it had a right to compel individual arbitrations, but that its litigation conduct was inconsistent with an intent to object to class arbitration. *Id.* at 12. In this regard, it first faulted FMG for not waiting to file its motion to compel arbitration until after a decision on Plaintiffs' motion to void the Agreements, *id.* at 13, thereby ignoring the fact that the superior court

voided the Agreements and the only reason to move to compel arbitration at that point would be to create a right to appeal under RAP 2.2(a)(2). CP 1460–1502. Instead, so the matter could proceed more expeditiously, FMG cross-moved in direct response to Plaintiffs' motion to void.

Second, the COA found that certain statements by FMG during the initial phase of the litigation, which it viewed as holding open the possibility of class arbitration, were sufficient to constitute waiver. Appx., pp. 13–15. In so holding, it ignored the context in which the statements were made. The first set of statements came after Plaintiffs sought leave to conduct class discovery, which occurred after the superior court's initial ruling and before the COA's first decision. FMG opposed that request, stating that class discovery ought not to be allowed unless and until there was a decision that the case could proceed on a class basis—regardless of forum. The second statement was made during argument before the COA, when, in response to Plaintiffs' claims that they were unable to bear the cost of arbitration, FMG's counsel pointed out that they were well-paid medical professionals who had engaged prominent counsel willing to undertake class action litigation on a contingent basis. *Id.* at 14–15.

Third, the COA found prejudice sufficient to support its waiver holding based on delay resulting from FMG's appeal of the superior court's order voiding the Agreements. Despite the fact that Plaintiffs

initially achieved exactly what they wanted—avoiding arbitration in favor of superior court litigation and an interlocutory ruling allowing them to conduct class discovery—the COA concluded that Plaintiffs would (or might) not have expended the time, energy and resources that they have on this litigation if FMG had initially moved to compel individual arbitrations. *Id.* It cited no evidence for this illogical conclusion.

V. ARGUMENT FOR ACCEPTANCE OF REVIEW

A. Litigation waiver should not be applied so as to create a right that otherwise does not exist.

Without citing to any applicable precedent, the COA mixed together the presumption in favor of arbitration and CR 8(c)'s requirement to raise affirmative defenses in one's answer to create a right to class arbitration, which right does not otherwise exist. The COA's conclusion is flawed because of the fundamental differences between the two rights—FMG's right to compel Plaintiffs' to comply with their contractual obligation to arbitrate, which by contract were individual in nature, and FMG's right to object to Plaintiffs' later efforts to arbitrate on a class basis. The former is, as the COA acknowledged, essentially, a "contractually created affirmative defense." Appx., p. 11 n.10. The right to object to class arbitration is different, however. Plaintiffs acknowledged their agreement to arbitrate, but contested its validity. At that point, FMG

was obligated to move to compel arbitration, but it was not obligated to respond to or defend against an asserted right to class arbitration, because that claim had not been made. Under CR 8, FMG had no legal obligation to object to class arbitration or move to compel individual arbitration until Plaintiffs claimed the right to arbitrate on a class basis. FMG complied with that obligation by timely moving to compel individual arbitration.

This situation is analogous to cases analyzing Washington's pre-suit claim-filing requirement for suits against government parties. In *Mercer v. State*, 48 Wn. App. 496, 497, 739 P.2d 703 (1987), for example, the plaintiff filed a complaint without first presenting a tort claim to the State. She later obtained a voluntary dismissal and re-filed her complaint after more than a year had passed. *Id.* In its answer to the second complaint, the State raised the claim-filing defense for the first time. *Id.* The failure to raise the defense earlier did not constitute waiver because the State was not obligated to raise the defense until it answered. *Id.* at 501–02. In contrast, cases such as *Miotke v. City of Spokane*, 101 Wn.2d 307, 337, 678 P.2d 803 (1984), and *Dyson v. King County*, 61 Wn. App. 243, 245, 809 P.2d 769 (1991), held that the defense was barred because the defendant failed to plead it in answer and allowed significant litigation to occur before raising it. Here, the COA ignored the key question of whether FMG was obligated to specifically object to class arbitration in

response to Plaintiffs' motion to void or their subsequent request for class discovery, both of which assumed there would be no arbitration. There was no reason for FMG to object to class arbitration at those times because Plaintiffs were not seeking it.

As additional support for its position, the COA states that "[b]y participating in class adjudication to resolve issues of arbitrability before asserting a right to avoid class adjudication, FMG evinced its intent to waive that right in the same way it would have if it had litigated the issues in a court and then asserted a right to arbitrate those issues." Appx., p. 12 n.10. But FMG did not *participate* in class adjudication; it never filed an answer to Plaintiffs' class action complaint, never engaged in any class proceedings such as certification, and never sought court intervention on any class issues.[3] Instead, FMG litigated the enforceability of the Agreements of the ***three individual Plaintiffs***, not the class (CP 174, 180, 182), which cannot be considered class adjudication.

In sum, it is inappropriate to apply the arbitration waiver standard in this way to hold that FMG waived its right to compel *individual* arbitration. To the contrary, FMG behaved reasonably in response to Plaintiffs' attempts to void the Agreements and litigate their claims in

superior court. Parties should not be obligated, and trial courts should not be burdened, to raise defenses and objections to claims that were never made.

B. FMG's litigation conduct cannot create a right that otherwise would not exist.

The COA found that "FMG waived its contractual right to compel individual arbitration because its conduct was inconsistent with an intent to assert the right." Appx., p. 10. This finding is deficient, however, because it is based on incorrect legal principles. When assessed under the accepted waiver doctrine, as set forth by Washington law, it is clear that FMG did not waive its right to object to class arbitration.

1. The Court of Appeals ignored Washington precedents imposing a heavy burden of proof on those asserting waiver.

This Court has clearly defined the waiver concept and explained its application:

> A waiver is the intentional and voluntary relinquishment of a known right, or conduct as warrants an inference of the relinquishment of such right . . . It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver . . . He must intend to relinquish such right, advantage, or

[3] Plaintiffs sought court intervention to conduct class discovery, but FMG vehemently opposed any such discovery, believing it was unnecessary and unwarranted. *See* Section V.B.2.i, below.

> benefit; and his actions must be inconsistent with any other intention than to waive them.

Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Implied waiver must be proved by a party's "unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors." *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Waiver is disfavored, and a party claiming waiver must prove the intention to relinquish the right or advantage. *Id.* at 241–42.

2. *FMG's conduct was consistent with the intent to assert a right to compel individual arbitration.*

The COA's premise that FMG's original motion to compel should have specified individual arbitration puts the cart before the horse; the *presumption* under the Agreements is for individual arbitration, which implies that no objection to class arbitration was necessary. The posture of the case at that time was that Plaintiffs filed a class action complaint and, on the very same day, sought a ruling that the Agreements were void. Plaintiffs never demanded any form of arbitration—class or otherwise—because they did not intend to arbitrate at all. FMG's response simply met them on the battlefield they chose, cross moving to compel arbitration under the terms of the Agreements (which, again, *presume* individual arbitration). The question of class versus individual arbitration was a non-issue, particularly where the issue would have been moot if the

Agreements were void as Plaintiffs contended. Therefore, it was appropriate—and certainly not inconsistent with the right to later ask for individual arbitration—for FMG to move to compel arbitration without specifically demanding individual arbitration.

If Plaintiffs had simply filed a class action complaint without concurrently moving to void the Agreements, the analysis might be different. But, as the COA notes, "[w]hether a party waived its right 'by conduct depends on the facts of the particular case and is not susceptible to bright line rules.'" Appx., p. 11 (quoting *Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 298, 322 P.2d 1229 (2013)). The procedural machinations of Plaintiffs from the very beginning of this case drew FMG into a dispute over the enforceability of the Agreements, which is an entirely separate issue from whether the Agreements permit class arbitration.[4]

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[4] It is also important to note that FMG's intent to arbitrate with the three named Plaintiffs individually, and not with the class, is clearly shown in FMG's original motion to compel:

- Noting that "each of these ***three individuals*** . . . agreed to arbitrate" all employment-related disputes. CP 174 (emphasis added).
- "[T]his Court should compel the ***three Plaintiffs*** to honor the language of the [Agreements]" by proceeding to arbitration. CP 174 (emphasis added).
- "Each of the ***three*** [***Plaintiffs***] signed an Employment Agreement which contained an Arbitration Addendum providing for arbitration of all

i. FMG's conduct during the discovery dispute between the parties demonstrated its opposition to class arbitration; it is not evidence of waiver.

The COA commented that, during the discovery dispute between the parties while the first appeal was pending, "FMG never hinted that it believed that class arbitration was unavailable under the [Agreements]." Appx., p. 13. What is odd about that statement is that Franciscan vehemently opposed Plaintiffs' efforts to engage in class discovery, arguing repeatedly that "only limited discovery relating to Dr. Romney's ***individual claims*** [should] be allowed," and that classwide discovery was unnecessary, unwarranted, and improper. CP 600, 612, 667 (emphasis added). Indeed, FMG sought a "Protective Order preventing Plaintiffs from obtaining discovery relating to the putative class' claims." CP 667–68. In two of its pleadings on the issue, FMG stated its intent to engage in discovery related to Romney's ***individual claims*** more than 30 times. CP

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employment-related claims made by either ***the employee*** or the employer." CP 175 (emphasis added).

- "[A]ll ***three*** **[*Plaintiffs*]** chose to sign the Agreements . . . without alteration." CP 175 (emphasis added).
- "The arbitration provisions contained in the Agreements of all ***three Plaintiffs*** require both Plaintiffs and FMG to arbitrate all claims related to Plaintiffs' employment." CP 180 (emphasis added).
- Referring to "each of the ***three*** Employment Agreements." CP 182 (emphasis added).

600–14; CP 666–79. The following statements by FMG make its position clear:

> Because FMG has already agreed to engage in discovery relating to Dr. Romney's individual claims, and ***discovery relating to Plaintiffs' class claims . . . is unnecessary*** and burdensome at this point, FMG would be unduly prejudiced if forced to engage in full, class-wide discovery during the appeals process.

CP 611–12 (emphasis added).

> ***Discovery on class issues . . . is unduly burdensome, potentially unnecessary, and unwarranted*** at this time.

CP 667 (emphasis added).

FMG's conduct during the discovery dispute was not inconsistent with the right to later ask for individual arbitration. To the contrary, FMG's objections to Plaintiffs' class discovery requests were consistent with an intent to arbitrate individually.

ii. FMG's arguments on appeal were driven by the disputed issue—the enforceability of the Agreements; they are not evidence of waiver.

The COA further posits that "FMG's argument during its first appeal is inconsistent with an intent to assert the right to compel individual arbitration." Appx., pp. 14–15. Once again, the COA is putting the cart before the horse. The sole issue argued on appeal was whether the Agreements were enforceable. Because FMG lost on that critical issue in the superior court, FMG was at risk of being forced to litigate in court a

case it knew belonged in arbitration. Consequently, FMG's arguments on appeal focused on whether the Agreements were enforceable, not whether they contemplate individual or class arbitration. The position of the parties never changed throughout the litigation.

In sum, FMG's conduct when it initially moved to compel arbitration, during the discovery dispute, and on appeal, was consistent with an intent to arbitrate individually.

3. *FMG's argument is supported by case law in Washington and elsewhere.*

FMG's position is bolstered by numerous cases in which the individual versus class arbitration issue was raised at varying times, including after parties had moved to compel arbitration generally, after discovery, and even after class certification, without a court ever finding waiver of the right to compel individual arbitration.

In one notable Washington case, certain employees filed a class action complaint against their employer in February 2009. *Hill v. Garda CL Nw. Inc.*, 169 Wn. App. 685, 688, 281 P.3d 334 (2012), *rev'd on other grounds*, 179 Wn.2d 47, 308 P.3d 635 (2013). In its April 2009 answer, the employer, Garda, asserted that the employees' claims must be resolved by arbitration, but did not specify the nature of that arbitration. *Id.* at 688–89. The parties then engaged in discovery for close to a year before the

employees moved for class certification in March 2010. *Id.* at 689. After engaging in a failed mediation, Garda moved to compel arbitration on July 1, 2010, but again did not specify the nature of the arbitration proceedings it sought. *Id.* The trial court certified the class on July 23, 2010, and then, on August 28, 2010, at the hearing on Garda's motion to compel, ordered supplemental briefing on its authority to order class arbitration. *Id.* After briefing, the trial court ordered class arbitration. *Id.* The COA reversed and remanded for individual arbitration, holding that "no contractual basis existed allowing the court to order class arbitration." *Id.* at 699. The COA also found that Garda's conduct "did not demonstrate the extensive or aggressive litigation behavior found to be indicative of waiver." *Id.* at 694. *Garda*'s holding is flatly inconsistent with the result here: if Garda did not waive the right to compel arbitration by engaging in litigation for more than a year before bringing its motion to compel, FMG could not possibly have waived its right to compel *individual* arbitration in this case.

In another compelling case, this one in the U.S. Supreme Court, a physician filed a class action complaint in New Jersey Superior Court against Oxford Health Plans for breach of contract. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013). Oxford moved to compel arbitration, but did not specify the nature of the arbitration proceedings it was seeking. *Id.* The state trial court granted Oxford's motion and referred

the suit to arbitration. *Id.* The parties initiated arbitration and ultimately agreed that the arbitrator should decide whether their contract authorized class arbitration. *Id.* The arbitrator determined that it did. *Id.* Oxford eventually obtained U.S. Supreme Court review of that decision. *Id.* at 2067–68. The Court affirmed, not because Oxford had waited too long before raising the issue, but because it had agreed to allow the arbitrator to decide the issue. *Id.* at 2071.

Henderson v. U.S. Patent Commission, Ltd., 188 F. Supp. 3d 798 (N.D. Ill. 2016), is also relevant. There, the plaintiff filed a class action complaint and concurrently moved to certify a class. *Id.* at 800 The defendants promptly moved to compel arbitration without identifying the type of arbitration—individual or class—they were seeking. *Id.* The court granted the motion. *Id.* Once in arbitration, the defendants filed a motion in district court to direct the plaintiff to proceed to arbitration on an individual, rather than class, basis. *Id.* The district court granted the motion, despite the fact that the original motion did not specify individual arbitration. *Id.* at 810.[5]

[5] *See also Crook v. Wyndham Vacation Ownership, Inc.*, Case No. 13-cv-03669-WHO, 2015 WL 4452111, at *1 (N.D. Cal. July 20, 2015) (no waiver found when employer moved for individual arbitration after its prior motion to compel arbitration had been granted).

4. *FMG prevails on the waiver issue even under the incorrect standard announced by the COA.*

Even if the COA's waiver principles are correct, it misapplied those principles to the facts of this case. According to the COA, waiver requires (1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that right, and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. Appx., pp. 10–11. The second element is discussed above in Section V.B.2, and the third element will be discussed below in Section V.C. On the "knowledge" element, the COA's statements are suspect and incomplete. *Id.* at p. 11. It is true that FMG is presumed to know its rights under the Agreements, and that includes the right to compel individual arbitration, but FMG is also presumed to know that, because the Agreements are silent on the issue of class arbitration, the Agreements ***presume*** individual, not class, arbitration. FMG was thus not obligated to move to compel individual arbitration because the *presumption* is individual arbitration. FMG understandably presumed that if the superior court held that the Agreements were enforceable, the next step would be individual arbitration of Plaintiffs' claims.

C. The Court of Appeal's prejudice finding is unsupportable.

The COA held that FMG's failure to demand individual arbitration "when Romney moved to the void the agreements" caused "significant prejudice" to Plaintiffs in the form of "time, energy, and resources [expended] on this litigation." Appx., p. 16. This finding misapplies Washington precedent and lacks any evidentiary or logical foundation.

The COA cited *Wiese v. Cach, LLC*, 189 Wn. App. 466, 481, 358 P.3d 1213 (2015), for the proposition that "a party waives its right to arbitration when it has substantially invoked 'the judicial process to the detriment or prejudice of the other party.'" Appx., p. 12 n.10. Here, it was Plaintiffs who invoked the judicial process in a vain attempt to avoid arbitration. FMG merely responded by seeking to compel arbitration. FMG did not need to specify individual arbitration when there was no indication Plaintiffs were seeking to arbitrate as a class. Furthermore, there is no reason to believe the superior court or Plaintiffs would have done anything different if FMG had added that specification to it motion to compel. To the contrary, logic tells us the superior court still would have voided the Agreements, FMG still would have appealed, and Plaintiffs still would have sought class discovery during that appeal. The same "time, energy, and resources" would have been expended.

Additionally, the COA ignored that portion of *Wiese* which describes prejudice supporting waiver as "the inherent unfairness . . . that occurs when the party's opponent forces it to litigate an issue *and later seeks to arbitrate that same issue*." *Wiese*, 189 Wn. App. at 481 (internal quotations omitted) (emphasis in original). There was no such course reversal here; FMG consistently sought to arbitrate Plaintiffs' claims and, with equal consistency, Plaintiffs resisted FMG's efforts. Plaintiffs never showed the slightest interest in class arbitration until after FMG had prevailed in *Romney I*.

Further, the COA, citing *Steele v. Lundgren*, 85 Wn. App. 845, 850, 858, 935 P.2d 671 (1997), notes that "delay amounts to prejudice when there is no good excuse for it." *Id.* at p. 16. Here, the record shows that there is a good excuse for FMG's delay in requesting individual arbitration: Plaintiffs' motion to void the Agreements prompted a two-year long dispute concerning enforceability of the Agreements. That dispute was not resolved until the COA issued its mandate directing the superior court to order arbitration. Immediately after the mandate had been issued, FMG asked the superior court to order individual arbitrations for each of the three Plaintiffs. Clearly, FMG had good reason to wait to make such a request while the courts resolved the enforceability issue.

The COA also determined that Plaintiffs were prejudiced because they engaged in costly litigation over the availability of class discovery. Appx., p. 16. But nothing FMG did compelled or forced Plaintiffs to seek class discovery. In fact, FMG repeatedly resisted Plaintiffs' attempts at class discovery and argued continually that only discovery related to Romney was necessary. Plaintiffs are to blame for expending time, energy, and resources on class discovery before it was prudent. It would be improper to conclude that FMG waived its right to compel individual arbitration based on circumstances created by Plaintiffs' own conduct.

In summary, Plaintiffs were not prejudiced because FMG failed to specify that it was moving to compel individual arbitration.

VI. CONCLUSION

The COA decision applied incorrect legal standards, misapplied Washington precedents, and unreasonably penalized reasonable litigation conduct. If it stands, the decision will compel parties to raise every remotely conceivable issue or defense, thereby burdening courts with unnecessary litigation.

Respectfully submitted this 9th day of August, 2017

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By:_____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing document to be served this date, in the manner indicated, to the parties listed below:

Scott C.G. Blankenship, WSBA No. 21431 Richard E. Goldsworthy, WSBA No. 40684 The Blankenship Law Firm, P.S. 1000 Second Ave, Ste. 3250 Seattle, WA 98104 Fax: (206) 343-2704 Email: sblankenship@blankenshiplawfirm.com rgoldsworthy@blankenshiplawfirm.com	☒ ☐ ☐ ☒	Hand Delivered Facsimile U.S. Mail Email

Attorneys for Plaintiffs

Dated this 9th day of August, 2017 at Seattle, Washington.

Cynthia Hehnke
Legal Assistant

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CINDIUS ROMNEY as PERSONAL REPRESENTATIVE for the ESTATE OF MICHAEL ROMNEY; FARON BAUER; and KRISTEN CHILDRESS, individually and on behalf of all others similarly situated, Appellants, v. FRANCISCAN MEDICAL GROUP, a Washington corporation; FRANCISCAN HEALTH SYSTEM, a Washington corporation; FRANCISCAN HEALTH VENTURES, a Washington corporation; FRANCISCAN NORTHWEST PHYSICIANS HEALTH NETWORK, LLC, a Washington corporation; and CATHOLIC HEALTH INITIATIVES, a Colorado corporation, Respondents.	No. 74806-8-I DIVISION ONE PUBLISHED OPINION FILED: July 10, 2017

TRICKEY, A.C.J. — Michael Romney and several other medical professionals (collectively Romney)[1] sued their former employer, Franciscan Medical Group (FMG), individually and on behalf of a putative class. In the first appeal in this case, Romney argued that the arbitration agreements the employees had signed were unconscionable. We disagreed. On remand, the superior court granted FMG's motion to compel individual arbitration rather than class arbitration.

Romney argues in this second appeal that FMG waived its right to compel individual arbitration. Because FMG's conduct in the superior court and during the first

[1] For ease of reference, we refer to Michael Romney, the individual plaintiff, as Dr. Romney and the putative class as Romney. Dr. Romney passed away during the litigation. His wife, Cindius Romney, is participating in the case as the personal representative of his estate.

appeal was inconsistent with a right to compel individual arbitration, and the delay in asserting the right prejudiced Romney, we agree. Accordingly, we reverse.

FACTS

We summarized the facts preceding the first appeal in Romney v. Franciscan Medical Group, 186 Wn. App. 728, 349 P.3d 32, review denied, 184 Wn.2d 1004, 357 P.3d 666 (2015).

> Plaintiffs-respondents Michael Romney, MD, Faron Bauer, MD, and Kristen Childress, ARNP, are former employees of defendant-appellant Franciscan Medical Group (FMG). Each entered into an employment contract with FMG that included agreements to arbitrate all employment related disputes between the parties. The employees brought suit against FMG for damages, statutory penalties, and equitable relief for wage violations on behalf of themselves and the class of physicians, medical assistants, and nurse practitioners. Romney and Bauer brought individual claims for being fired in retaliation for whistle-blowing and for losing their hospital privileges.
>
> Romney, Bauer, and Childress filed suit in King County Superior Court and at the same time requested the court to find the arbitration agreement[s] signed by each of the parties to be unconscionable. FMG moved to compel arbitration. The trial court found the arbitration addendum unconscionable, invalidated it, and denied FMG's motion to compel arbitration. FMG timely appeal[ed].

Romney, 186 Wn. App. at 733-34 (footnote omitted).

While the first appeal was pending, Dr. Romney was diagnosed with terminal cancer. Romney sought to engage in discovery, including discovery for the putative class. FMG agreed to discovery for Dr. Romney's individual claims, but opposed class discovery at that time. FMG argued that class discovery was premature because the superior court or an arbitrator might decline to certify the class.

On February 17, 2015, this court held that the agreements were not unconscionable and reversed the superior court. Romney, 186 Wn. App. at 733. Romney

petitioned the Supreme Court for review. On September 30, 2015, the Supreme Court denied review. Romney v. Franciscan Med. Grp., 184 Wn.2d 1004, 357 P.3d 666 (2015).

On October 2, 2015, Romney attempted to start the arbitration process by reaching out to an arbitrator the parties had discussed using before Romney filed suit in superior court. FMG responded a few days later by inviting Romney to propose "three different arbitrators for the three individual arbitrations."[2] Because the parties disagreed about the availability of class arbitration, they returned to the courts.

This court issued its mandate terminating the first appeal on November 13, 2015.

On December 14, 2015, FMG moved to compel arbitration. This time, it asked the court to compel individual arbitration, arguing that the arbitration agreements did not indicate consent to class arbitration. The superior court granted the motion. Romney appeals.

ANALYSIS

Superior Court's Authority

Romney argues that the superior court erred by determining whether the arbitration agreements permit class arbitration. Romney contends that the availability of class arbitration is an issue for the arbitrator. We conclude that it is a threshold issue of arbitrability for the court to decide.

While courts enforce a liberal policy favoring arbitration, the courts should usually decide threshold questions of arbitrability. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).[3] The court should decide questions

[2] Clerk's Papers (CP) at 1558-59.
[3] The Federal Arbitration Act, 9 U.S.C. §§ 1-16, governs these arbitration agreements. Romney, 186 Wn. App. at 734. Accordingly, we must apply substantive federal law concerning arbitration. See Romney, 186 Wn. App. at 734.

where the

> contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Howsam, 537 U.S. at 83-84.

By contrast, procedural questions, which the court refers to an arbitrator, "'grow out of the dispute and bear on its final disposition.'" Howsam, 537 U.S. at 84 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964)). Courts will also refer to arbitration any dispute which the parties have clearly and unmistakably agreed to submit to arbitration. See Howsam, 537 U.S. at 83.

The Supreme Court has not yet determined whether the availability of class arbitration is a threshold question of arbitrability for the court or a procedural question for the arbitrator. In Green Tree Financial Corp. v. Bazzle, a plurality of the United States Supreme Court held that the arbitrator should decide whether an agreement permitted class arbitration. 539 U.S. 444, 453, 123 S. Ct. 2402, 2407, 156 L. Ed. 2d 414 (2003). Since then, in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., the Supreme Court has pointed out that, in Bazzle, only a plurality agreed on that point. 559 U.S. 662, 680-81, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). But, in Stolt-Nielsen, the Court did not revisit the issue because, there, the parties had expressly agreed to have an arbitration panel decide whether the agreement permitted class arbitration. 559 U.S. at 680.

The trend in federal courts since Stolt-Nielsen has been that the court should decide whether class arbitration is available. All federal circuits that have addressed this

issue in published opinions have arrived at this same conclusion.[4] Most recently, the Fourth Circuit concluded that a court should determine the availability of class arbitration because of the "significant distinctions between class and bilateral arbitration." Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867, 874-75 (4th Cir.), cert. denied sub nom. 137 S. Ct. 567 (2016). The Fourth Circuit noted that class arbitration would reduce or eliminate nearly all the benefits of bilateral arbitration. Dell Webb, 817 F.3d at 875. It reasoned that the Supreme Court was "but a short step away" from announcing that this was a question for the courts. Dell Webb, 817 F.3d at 875.

We conclude that the availability of class arbitration is a gateway issue of arbitrability. The differences between class arbitration and bilateral arbitration are significant enough that we cannot assume that the parties expected an arbitrator to decide whether it was allowed. The question does not arise out of the underlying dispute over wage violations and retaliation claims. The resolution of the issue should not impact the final disposition of the dispute for each plaintiff. Thus, absent an agreement by the parties, the issue of whether class arbitration is available is a gateway issue of arbitrability properly decided by the superior court.

Romney argues that Washington law requires a different outcome. In Washington, courts must order the arbitration of all disputes "covered by the substantive scope" of an enforceable arbitration agreement. Townsend v. Quadrant Corp., 153 Wn. App. 870, 881, 224 P.3d 818 (2009). But Romney's argument assumes that the availability of class

[4] See Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 597-99 (6th Cir. 2013) (concluding that the courts should decide the question and suggesting that the Supreme Court was close to completing its "puzzle" on the issue); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 332 (3d Cir. 2014); see also Eshagh v. Terminix Int'l Co., L.P., 588 F. App'x 703, 704 (9th Cir. 2014)).

arbitration is *within the scope* of the agreements. We disagree because the question whether the agreements permit class arbitration is a question *about the scope* of the agreements itself. Therefore, Washington law does not dictate that an arbitrator decide the question.

Here, Romney claims that the parties agreed in the arbitration agreements to submit to arbitration the issue of whether class arbitration was available. The agreements incorporated the American Arbitration Association (AAA) rules. The supplemental rules for class arbitration provide:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award.[5]

These rules apply

> where a party submits a dispute to arbitration on behalf of or against a class or purported class. . . . These [rules] shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration.[6]

The rules, by their own terms, apply only when the dispute is already submitted to arbitration, not when the case is pending in front of a court. The rules also allow the parties to seek judicial review immediately after the arbitrator's decision on this issue. The availability of judicial review suggests that the parties did not intend to have an arbitrator make the final decision on this issue.

We conclude that the parties' agreement to have an arbitrator decide the question

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[5] CP at 1358.
[6] CP at 1357.

under some circumstances is not a clear and unmistakable agreement to have the court refer the question to an arbitrator. Accordingly, it was not error for the superior court to determine if the agreements permitted class arbitration.

Availability of Class Arbitration

Romney argues that the arbitration agreements permit class action.[7] Romney contends that consent to class arbitration is implied by the failure to exclude class actions explicitly from the arbitration agreements, despite specifically including employment claims that are frequently brought as class actions. We conclude that the agreements do not permit class arbitration because they are silent on the issue and we cannot infer consent to submit to class arbitration from silence.

"[A]rbitration is a matter of consent." Stolt-Nielsen, 559 U.S. at 684. Arbitrators derive their power "from the parties' agreement to forgo the legal process and submit their disputes" to arbitration. Stolt-Nielsen, 559 U.S. at 682. As with any contractual dispute, the parties' intentions control. Stolt-Nielsen, 559 U.S. at 682. Parties may choose which issues they want to arbitrate and with whom they wish to arbitrate. Stolt-Nielsen, 559 U.S. at 683. Therefore, the court cannot compel parties to participate in class arbitration without a contractual basis for concluding that they agreed to do so. Stolt-Nielsen, 559 U.S. at 684.

An agreement to arbitrate disputes does not imply that the party agreed to class arbitration of those disputes, because class arbitration significantly changes the nature of

[7] As FMG points out, Romney did not raise this issue in their motion for discretionary review. They also did not assign error to the superior court's ruling on this issue, in violation of RAP 10.3. But Romney did list this as a separate argument in their table of contents and devote several pages to that argument in their brief. Romney also raised the issue below in their motion for reconsideration to the trial court. Accordingly, we review the issue under RAP 12.1(a) and RAP 1.2(a).

arbitration. Stolt-Nielsen, 559 U.S. at 685. When the arbitration agreement contains "'no agreement'" on the class arbitration question, the court cannot compel the parties to submit to class arbitration. Stolt-Nielsen, 559 U.S. at 687.

In Reed Elsevier, the Sixth Circuit held that an agreement did not permit class arbitrations because it did not mention class actions at any point and limited its scope to "claims 'arising from or in connection with *this Order,*' as opposed to other customers' orders." 734 F.3d 594, 599 (6th Cir. 2013). The court agreed with the plaintiff that the agreement did not "expressly exclude the possibility of classwide arbitration," but held that was not enough in light of Stolt-Nielsen. Reed Elsevier, 734 F.3d at 600.

Here, the parties agreed to arbitrate all of their claims. The agreements defined claims as "all disputes arising out of or related to the Employment Agreement, your employment by FMG, and/or your separation from employment with FMG."[8] The agreements cover claims related to wage violations, which are frequently brought as class actions. The agreements explicitly exclude certain types of claims, such as worker's compensation claims, or third-party claims that FMG might bring against Romney if a party sued FMG because of Romney's behavior. The parties agree that the arbitration agreements do not mention class actions at any point.

FMG argues that the agreements were intended to allow only individual arbitration because they repeatedly refer to the employee in the singular and concern the rights of individual signatories. Romney contends that these arguments are overly technical since "you" can be singular or plural and this court has already ruled that the court could order arbitration of claims against a nonsignatory when the claims were inherently inseparable.

[8] CP at 63.

See Romney, 186 Wn. App. at 747. But, while Romney has shown that the class members' claims are similar, they have not shown that their claims are inherently inseparable. Moreover, when viewed in context, the "You" in the agreements is clearly singular.[9]

Romney also points out that class action lawsuits are generally available even though contracts are usually written in the singular. But class action lawsuits, unlike class arbitration, do not rely on the parties' consent. Thus, the similarity between these agreements and agreements that often form the basis of class action lawsuits is not evidence of FMG's consent to class arbitration.

Romney attempts to distinguish this case from Stolt-Nielsen by analogizing it to Oxford Health Plans LLC v. Sutter, __ U.S. __, 133 S. Ct. 2064, 2067-71, 186 L. Ed. 2d 113 (2013). Reliance on Oxford Health cannot help Romney. There, an arbitrator held that an arbitration agreement that was silent on the subject of class arbitration permitted class arbitration. Oxford Health, 133 S. Ct. at 2067. The Court explicitly refused to approve of the arbitrator's interpretation of the contract. Oxford Health, 133 S. Ct. at 2070. It affirmed because the parties sought review of the arbitrator's construction of the agreement and the Court could not correct the arbitrator's mistakes. Oxford Health, 133 S. Ct. at 2070-71. A concurrence by Justice Samuel Alito even noted that, if the Court were reviewing the arbitrator's decision de novo, it "would have little trouble concluding that [the arbitrator] improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" Oxford Health, 133 S. Ct. at 2071 (Alito, J., concurring) (alterations in original) (quoting Stolt-Nielsen, 559 U.S.

[9] For example, at the top of the agreement, "You" is the name given to the singular "Physician." CP at 63.

at 685).

Finally, Romney argues that FMG's delay in asserting a contractual right to compel individual arbitration is evidence that it consented to class arbitration via the agreements. A party's "subsequent acts and conduct" may be of aid in interpreting that party's intent. Berg v. Hudesman, 115 Wn.2d 657, 677-78, 801 P.2d 222 (1990). In Berg, a tenant offered proof that its landlord had accepted rent payments for years to argue against the landlord's interpretation of their lease agreement. 115 Wn.2d at 677. In Adler v. Fred Lind Manor, the court noted that conduct was relevant to determining intent, but looked only at the conduct surrounding the formation of the contract. 153 Wn.2d 331, 351-52, 103 P.3d 773 (2004).

Romney does not cite any cases where the court determined the meaning of a contract by looking at a party's conduct during the litigation of the contract dispute. FMG's conduct during litigation is appropriate evidence for waiver, discussed next, but not relevant to establishing its intent at the formation of the agreements.

In short, Romney has not shown that FMG consented to class arbitration. Accordingly, under Stolt-Nielsen, the trial court's interpretation of the agreement was not erroneous; FMG had a contractual right to avoid class arbitration. But, in order to enforce that right, FMG had to timely assert it.

Waiver

Romney argues that FMG waived its contractual right to compel individual arbitration because its conduct was inconsistent with an intent to assert the right and its delay in asserting the right prejudiced Romney. We agree.

"To establish waiver of the right to arbitration, the party opposing arbitration must

demonstrate '(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.'" Wiese v. Cach, LLC, 189 Wn. App. 466, 480, 358 P.3d 1213 (2015) (internal quotation marks omitted) (quoting Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1187 (9th Cir. 1986)). "Waiver of an arbitration clause may be accomplished expressly or by implication." Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP, 179 Wn. App. 289, 297, 322 P.2d 1229 (2013). Whether a party waived its right "by conduct depends on the facts of the particular case and is not susceptible to bright line rules." Canal Station, 179 Wn. App. at 298.

We review a waiver determination de novo. Steele v. Lundgren, 85 Wn. App. 845, 850, 935 P.2d 671 (1997). Washington has a strong presumption in favor of arbitration. Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 405, 200 P.3d 254 (2009). Accordingly, the party opposing arbitration bears a "'heavy burden'" of showing that another party has waived its right to arbitrate. Wiese, 189 Wn. App. at 479 (internal quotation marks omitted) (quoting Steele, 85 Wn. App. at 852).

Although the question here is whether FMG waived the right to compel a specific type of arbitration, we approach this question the same way we would analyze whether a party waived its right to compel arbitration in general. It is logical to analyze the right to compel individual arbitration this way because it also stems from the arbitration agreement.[10]

[10] The right to compel arbitration is, essentially, a contractually created affirmative defense. See CR 8(c); Schuster v. Prestige Senior Mgmt., LLC, 193 Wn. App. 616, 634, 376 P.3d 412 (2016). The difference between compelling arbitration of certain claims and compelling a certain type of arbitration changes the analysis in some ways, but should lead to the same conclusions. For

Knowledge

This court presumes that someone who signs a document knows and understands its contents. Kinsey v. Bradley, 53 Wn. App. 167, 171, 765 P.2d 1329 (1989). Here, FMG's right to compel individual arbitration stems from the arbitration agreements. No one disputes that FMG prepared or signed the arbitration agreements. Therefore, we presume that FMG knew its rights under the arbitration agreements.

Inconsistent Acts

FMG's conduct was inconsistent with the intent to assert a right to compel individual arbitration. First, FMG's original motion to compel arbitration did not include any objections to class arbitration. When Dr. Romney and the other plaintiffs filed this action, they purported to act "individually and on behalf of all others similarly situated" and titled their complaint "PLAINTIFFS' CLASS ACTION COMPLAINT."[11] Romney used the putative class caption again when they moved to void and invalidate the arbitration addendums. In response, FMG filed a motion to compel arbitration. FMG's motion adopted Romney's caption and did not mention individual arbitration.

FMG argues that it was proper to wait until the dispute over the enforceability of

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example, a party waives its right to arbitration when it has substantially invoked "the judicial process to the detriment or prejudice of the other party." Wiese, 189 Wn. App. at 480 (internal quotation marks omitted) (quoting Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999). FMG did not invoke the judicial process to decide the legal and factual issues it now seeks to arbitrate.

But, when FMG wanted a determination on the right to compel arbitration of those issues, it was content to litigate against the putative class. Thus, FMG was able to establish the enforceability of the arbitration agreements against all three named plaintiffs in one action, rather than in three individual actions. By participating in class adjudication to resolve issues of arbitrability before asserting a right to avoid class adjudication, FMG evinced its intent to waive that right in the same way it would have if it had litigated the issues in a court and then asserted a right to arbitrate those issues.

[11] CP at 1.

the agreements was resolved before raising the issue of individual arbitration.[12] This argument would be more persuasive if FMG had waited to compel arbitration until the court had determined whether the agreements were unconscionable. But FMG did not wait. It moved to compel arbitration at the same time that it opposed Romney's motion to invalidate the agreements.

Second, when Dr. Romney's illness forced the parties to address discovery while the first appeal was pending, FMG never hinted that it believed that class arbitration was unavailable under the arbitration agreements. Instead, FMG referred repeatedly to the putative class and opposed class discovery on the ground that the court or the arbitrator might decline to certify the class.[13] FMG concedes that it "acknowledged that an arbitrator

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[12] FMG cites Oxford Health, for the proposition that it is appropriate to wait until after a court has determined whether an arbitration agreement is enforceable to raise any issues about class arbitration. See 133 S. Ct. at 2067. There, the parties decided the class issue after the arbitration issue, but there is nothing to indicate when the defendant first raised the issue. Oxford Health, 133 S. Ct. at 2067.

[13] For example, FMG's briefing to this court and the superior court included the following statements:

> Additionally, if this Court orders full discovery and then compels the parties to arbitration, FMG may be forced to participate in discovery that is unnecessary for the arbitration, as an arbitrator could decline to certify the putative class or narrow other issues in the case.

CP at 611.

> [T]his Court should consider all facts, including whether it is appropriate to allow class discovery when it is still uncertain as to whether a court or an arbitrator will preside over this matter and whether a class will even be certified.

CP at 667.

> Plaintiffs cannot establish that justice requires this Court to permit discovery regarding class claims when it is uncertain whether this Court or an arbitrator will determine whether a class exists, when no class has been certified, and when Dr. Bauer will be able to pursue his individual claims, as well as those of the putative class, once the question of forum is decided.

CP at 674.

> Plaintiffs, however, have failed to demonstrate that putative class members would be harmed in any way should class-related discovery occur after these issues have been determined by either a Court or an arbitrator. Should a class be certified . . .

CP at 675-76.

has the power to *certify* a class."[14] An arbitrator has only the powers granted to it by an arbitration agreement. Stolt-Nielsen, 559 U.S. at 682. Therefore, the arbitrator would have the power to certify a class only if the agreement permits class arbitration.

FMG contends that it would be "absurd" to use its statements during a discovery dispute as evidence that it waived a right to compel individual arbitration because, at the time, it "was facing the very real possibility of the case being litigated in court."[15] This argument would be persuasive if all of FMG's arguments during class discovery had assumed that FMG would lose the appeal and have to litigate the matter in court. But FMG's arguments, which discussed which forum might ultimately hear the case, and how a superior court or an arbitrator might decline to certify the class, attempted to demonstrate why, win or lose the appeal, class discovery was premature. One would have expected FMG to argue that, if it won the appeal, class arbitration would not be available at all. Yet FMG's arguments revolved around whether the class was viable, not whether class arbitration was available.

Third, FMG's argument during its first appeal is inconsistent with an intent to assert the right to compel individual arbitration. At oral argument, FMG used the fact that Romney was bringing a putative class action, and had engaged counsel for the class on a contingent-fee basis, to reassure the court that the agreements' provision requiring plaintiffs to share in the costs of arbitration, unless they showed they could not afford it, was not unconscionable. Counsel for FMG's response to the court's concern about the plaintiffs having to prove they cannot afford to pay arbitration costs was

> [w]ith respect to the cost-shifting . . . the test is, does the imposition of the costs of the arbitration effectively prohibit the plaintiffs from bringing it. Well,

[14] Br. of Resp'ts at 23.
[15] Br. of Resp'ts at 24.

> here you have med- established medical professionals who are seeking to represent a class and who propose as class counsel a well-established plaintiffs' law firm that's undertaken this on a contingent-fee basis.[16]

If FMG had intended to assert a right to compel individual arbitration, it would not have used the fact that Romney filed a putative class action complaint and hired class counsel in their defense of the arbitration agreements.

We conclude that these actions show that FMG's conduct was inconsistent with an intent to compel individual arbitration.

FMG argues that Romney cannot show that it waived its right to compel individual arbitration because Romney cannot show that FMG consented to class arbitration. FMG relies on the standard for determining whether a contract permits class arbitration. See Stolt-Nielsen, 559 U.S. at 684. This argument fails because whether there is evidence that FMG consented to class arbitration is not the same question as whether FMG waived a right to compel individual arbitration.[17]

FMG also argues that it did not have to raise the issue of class arbitration because it was "equally incumbent upon [Romney] to make the argument that class arbitration was appropriate."[18] But, by bringing their claim as a putative class action, seeking class discovery, and actively promoting the interests of the putative class at every turn, Romney was impliedly asserting that they believed class adjudication of the dispute was available, regardless of the forum.

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[16] Wash. Court of Appeals oral argument, Romney v. Franciscan Med. Grp., No. 71625-5-I (Nov. 17, 2014), at 10:34:42 – 10:35:27 (on file with court).

[17] By way of analogy, compare consent to personal jurisdiction via a contract with a waiver of an objection to lack of personal jurisdiction by conduct during litigation. C.f. Kysar v. Lambert, 76 Wn. App. 470, 485, 887 P.2d 431 (1995) (examining consent to personal jurisdiction) with Boyd v. Kulczyk, 115 Wn. App. 411, 415, 63 P.3d 156 (2003) (noting that a party may waive a lack of personal jurisdiction).

[18] Br. of Resp'ts at 32.

Prejudice

To determine whether there has been prejudice, "we consider the extent of the delay, the degree of litigation preceding the motion to compel [arbitration], the resulting expenses, and other surrounding circumstances." Wiese, 189 Wn. App. at 481. "[D]elay amounts to prejudice when there is no good excuse for it." Steele, 85 Wn. App. at 858. But, delay caused by the conduct of one party, is not "evidence of waiver by the other party." Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc., 28 Wn. App. 59, 63, 621 P.2d 791 (1980).

Here, FMG's failure to raise the issue caused prejudice to Romney in the form of delay and litigation costs. There was an approximately two-year delay between when Romney brought their suit and when FMG first asserted its right to individual arbitration. Romney filed their class-action complaint in November 2013. FMG informed Romney that it would be seeking individual arbitration via e-mail in October 2015. FMG did not assert a right to compel individual arbitration in any court document until December 2015.

FMG argues that the Romney caused the delay by seeking to void the arbitration agreements and pursue class discovery. But the main reason for the delay is that FMG appealed the superior court's order voiding the arbitration agreements before raising the issue of individual arbitration.

Because FMG failed to assert its right to individual arbitration when Romney moved to void the agreements, Romney expended time, energy, and resources on this litigation, including a direct appeal and petition to the Washington State Supreme Court. Romney also engaged in costly litigation over the availability of class discovery. Thus, Romney suffered significant prejudice from FMG's delay in asserting its right.

We conclude that FMG waived its right to object to the putative class preceding to arbitration. Because of our resolution of this issue, we do not address whether FMG would be equitably estopped from asserting a right to compel individual arbitration or whether the trial court exceeded the mandate by entering an order compelling individual arbitration.

We remand for the trial court to enter an order sending the putative class to a single arbitrator under the terms of the agreements.

Trickey, ACJ

WE CONCUR:

Schindler, J.

Cox, J.

BENNETT BIGELOW & LEEDOM

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