

NO. 65357-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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FREDERICK AND KATHY KOHOUT,

Appellants,

v.

HOME CURB APPEAL, LLC,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard D. Eadie

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BRIEF OF RESPONDENT

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A. INTRODUCTION

The underlying dispute involves a residential construction project that went awry during the economic downturn when homeowners, Frederick and Kathy Kohout (Kohouts), reneged on an agreement to pay for and provide architectural and structural engineering services. The project would have been built on time and on budget if not for the Kohouts' changing demands and unwillingness to pay design professionals. Instead of allowing then contractor Home Curb Appeal, LLC (HCA) to finish the project, the Kohouts elected to engage in over two years of litigation involving three lawsuits consolidated into one upon their own motion.

This appeal is narrow in scope and largely untethered from any underlying factual dispute. The main legal question is whether the Kohouts waived arbitration by pursuing litigation. After the Kohouts engaged in over 18 months of litigation against multiple parties, including substantial discovery and motion practice, and after nearly all of the Kohouts' claims were dismissed on summary judgment, the Kohouts sought to compel arbitration against HCA. The trial court cited the Supreme Court's recent decision in Otis Housing Ass'n v. Ha, 165 Wn.App 2d 582, 588, 201 P.3d 309 (2009) to deny the Kohouts' second request to compel arbitration. CP 634-35. Having lost on summary

judgment, the Kohouts now seek to relitigate the same issues in a different forum.

B. RESTATEMENT OF THE ISSUES

1. (a) Did the trial court properly rely on Otis Housing to determine the Kohouts waived arbitration by instead choosing litigation, and (b) is Otis Housing binding on this Court?

2. Where a Commissioner of this Court has already ruled the scope of this appeal is limited to review of the April 2010 order, and where the Kohouts did not move to modify that ruling, are the Kohouts barred from expanding this appeal to include issues that might have been raised had the Kohouts appealed a 2008 order?

3. If this Court determines Otis Housing is not controlling, did the Kohouts nonetheless waive arbitration under this Court's decisions in Steele v. Lundgren and Kinsey v. Bradley,<sup>1</sup> where the Kohouts' judicial litigation strategy was inconsistent with an intent to arbitrate and where HCA has been prejudiced by expending substantial resources in responding to judicial litigation?

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<sup>1</sup> Steele v. Lundgren, 85 Wn.App. 845, 850-60, 935 P.2d 671 (1997), rev. denied, 133 Wn.2d 1014 (1997); Kinsey v. Bradley, 53 Wn.App. 167, 169-72, 765 P.2d 1329 (1989).

C. STATEMENT OF THE CASE

1. Relevant facts regarding the underlying dispute.

The material facts relevant to this appeal are undisputed. HCA was a limited liability company managed by John Mulinski. In 2006, HCA, a licensed and bonded general contractor<sup>2</sup>, entered into a series of written contracts with the Kohouts for a substantial residential remodel, including the demolition of part of the existing home (the Project). CP 691-737. There were only two parties to these contracts: (1) HCA, and (2) the Kohouts.<sup>3</sup>

The contract documents contain the following clause:

Any disputes or claims will be resolved by binding arbitration. One arbitrator to be appointed upon five days written notice. Arbitrator may award attorney's fees to prevailing party, and costs and allocated his fee. Washington law will govern.

CP 698.

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<sup>2</sup> The Kohouts' complaint concedes HCA was a licensed and bonded contractor. CP 11, ¶ 10.

<sup>3</sup> The Kohouts incorrectly suggest they "entered into a contract with Home Curb Appeal *and John Mulinski* on April 19, 2009." BOA at 10 (emphasis added). The Kohouts do not, however, seriously dispute that the Mulinskis were not parties to the contract. Although the Kohouts' brief initially implies that John Mulinski was a party to the contract (BOA at 5, 10), a later section regarding "non-signatories to an arbitration agreement" concludes "[t]hus, the mere fact that the Kohouts' [sic] asserted claims against the Mulinskis and the bonding companies can not [sic] constitute a waiver of their right to arbitrate their claims against HCA." BOA at 21.

The parties negotiated a base contract price after HCA applied several credits and deductions. CP 701-703. The price and Project schedule were adjusted numerous times to accommodate the Kohouts' various change orders. CP 695-737. HCA hired subcontractors to complete the majority of the work on the Project. CP 406-413, 414-424, 678-681, 682-684, 685-690, 691-694, 738-741, Supp. CP\_\_ (Sub No. 62, Kidder Roofing, LLCs Answer and Counterclaim). The Kohouts hired an interior designer, and, for a limited time, an architect and structural engineer<sup>4</sup>, but did not enter into any agreements with the subcontractors. CP 691-694, Supp. CP\_\_ (Sub No. 173C, Declaration of Maury Kroontje, Exhibits D, E, and F). In February 2008, the Kohouts fired HCA and would not allow the contractor to return to the property to complete the Project. CP 206.

2. Facts establishing waiver.

In August 2008, attorney Eileen McKillop represented the Kohouts and Patrick Hanis represented HCA. On August 21, 2008, McKillop served Hanis with a claim for damages and a request that the claim against

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<sup>4</sup> The Kohouts stopped paying for architectural and structural engineering services in October 2006. The architect terminated her services as a result of lack of payment on an invoice which is still outstanding. Instead of paying the invoice, the Kohouts commenced a lawsuit against the architect to release the lien the architect placed on their property. See Supp. CP\_\_ (Sub No. 173C, Declaration of Maury Kroontje, Exhibits F and G)

HCA be mediated by September 5, 2010. The Kohouts would otherwise demand arbitration under the arbitration clause in the contract. CP 203-204, 206<sup>5</sup>. The letter acknowledged that the Kohouts entered into a written contract with HCA, but did not mention John Mulinski. On September 3 and 15, 2008, McKillop wrote Hanis to "demand arbitration of [the Kohouts'] claim against Home Curb Appeal, LLC pursuant to the arbitration clause in the contract." CP 201-204. These letters did not mention or make any claims against John Mulinski, did not demand arbitration of any claims against the Mulinskis, and did not assert or imply that Mulinski was a party to the contract or to the arbitration clause.<sup>6</sup> McKillop unilaterally selected Robert Alsdorf of Davis Wright & Tremaine LLP to be appointed as the arbitrator in the case.<sup>7</sup> McKillop

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<sup>5</sup> The August 21, 2008 letter is not part of the record, but Hanis' September 5, 2008 and McKillop's September 15, 2008 letters reference the contents of the August 21, 2008 letter.

<sup>6</sup> The Kohouts' appeal brief, however, is peppered with misleading statements suggesting the Mulinskis *are* parties to the contract: "The Kohouts sought to compel arbitration of only their claims against Home Curb Appeal *and the Mulinskis* pursuant to the arbitration clause in their contract..." BOA at 5 (emphasis added); "The Kohouts entered into a written contract with Home Curb Appeal *and John Mulinski* on April 19, 2006." BOA at 10 (emphasis added).

<sup>7</sup> Alsdorf was a partner at Davis Wright & Tremaine LLP ("DWT") from 2005-2008. DWT entered a notice of appearance in this case on October

also unilaterally asserted that in the event Alsdorf is or becomes unavailable for the arbitration, "the parties should agree on an alternate arbitrator *within three days*" (emphasis added). CP 201-202. McKillop ended the September 15, 2008 letter stating, "If Home Curb Appeals [sic], LLC refuses to submit to binding arbitration of the Kohout's [sic] claims, then we will file a *motion to compel arbitration*." CP 203-204 (emphasis added).

Hanis responded on September 5, 2008, and notified McKillop that the Kohouts' claim for damages has been forwarded to HCA's insurers for review. CP 206. Hanis noted the contract provides that an arbitrator be "appointed" upon five days' written notice. He did not accept McKillop's unilateral selection of an arbitrator and stated that Alsdorf "may *ultimately* be a fine choice, but we are *not yet* prepared to agree to select him." CP 206 (emphasis added).

On September 17, 2008, *two days* after McKillop wrote the September 15, 2008 letter demanding arbitration of the Kohouts' claim against HCA, the Kohouts filed a "Complaint for Damages and Upon Contractor Registration Bond and Savings Bond" against HCA, a bond, a

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15, 2008. HCA noted in its briefing in opposition to the Kohouts' second motion to compel arbitration that Alsdorf's appointment would potentially create a conflict of interest.

savings account number, *and the Mulinskis personally*<sup>8</sup>, seeking damages under both contract and tort law. Specifically, the complaint sought damages for breach of contract, breach of warranty, unjust enrichment, fraud and/or misrepresentation<sup>9</sup>, conversion, and violation of the Consumer Protection Act ("CPA")<sup>10</sup>. CP 1-19. In the prayer for relief, the Kohouts requested the matter be stayed, the parties be compelled to arbitrate, that Alsdorf be appointed as an arbitrator, and that arbitration be held within 60 days. The Kohouts simultaneously prayed for judicial relief in the form of judgment against all defendants. CP 18-19.

Two of the subcontractors who worked at the Kohout residence, Harding & Son's, Inc., and Knights Insulation, Inc., filed two lien foreclosure actions against, among others, HCA and the Kohouts. CP 34-

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<sup>8</sup> The Kohouts did not allege facts to establish why the Mulinskis should be parties to the litigation when the Kohouts had contracted with HCA, a limited liability company. The Kohouts also failed to raise any exceptions to the general rule that members and managers of an LLC are not personally liable for the company's debts, obligations, and liabilities. CP 9-19.

<sup>9</sup> In the appeal brief and in opposition to HCA and the Mulinskis' motion for partial summary judgment, the Kohouts argued that the complaint pleads the elements of fraud. BOA at 7; CP 1192-1193. This is not true; the complaint does not plead the elements of fraud. CP 9-19.

<sup>10</sup> In brief response to the Kohouts' attempt to relitigate the fraud and CPA claims in the appeal brief (BOA at 7), HCA notes that complaints filed by others and the claims therein do not constitute "evidence." See also CP 746-766, 816-820, 1174-1201.

40, 59-64. The Mulinskis were not named in the subcontractor lawsuits. Nonetheless, the Kohouts inaccurately state that they (the Kohouts) "alleged cross claims against Home Curb Appeal *and the Mulinskis*."<sup>11</sup> BOA at 4 (emphasis added).

On October 28, 2008, the Kohouts filed a "Motion for an Order of Consolidation and Order Compelling Arbitration and a Stay of These Proceedings." CP 20-29. The Kohouts struck this motion and, on October 29, 2008, filed a "Motion for an Order of Consolidation" seeking only to consolidate the three lawsuits<sup>12</sup>. CP 662-666. The motion was granted on November 14, 2008. CP 32-33, 662-666. On December 3, 2008, close to three months after filing the complaint and only *after* the matters were consolidated and parties and claims not subject to the arbitration clause were involved, the Kohouts filed a motion for an order compelling arbitration. CP 210-218. On December 15, 2008, the trial court denied the motion. CP 257-259. In a detailed decision, the trial court also denied

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<sup>11</sup> See notes 18 and 31, *infra*. The Kohouts inaccurately insert "and the Mulinskis" throughout the appellate brief.

<sup>12</sup> Cause Nos. 08-2-32167-3 SEA (the Kohouts' action), 08-2-28848-0 KNT (subcontractor Harding & Son's, Inc.'s action), and 08-2-34047-3 SEA (subcontractor Knights Insulation, Inc.'s action). CP 1-19, 34-40, 59-64. The Kohouts' brief neglects to mention the Kohouts moved to consolidate the lawsuits. The trial court did not do this *sua sponte*. Compare BOA at 4, with CP 20-29, 662-666.

the Kohouts' motion for reconsideration. CP 262-281, 404-405, Appendix C. The Kohouts did not timely seek appellate review of the December 15, 2008 order.

Throughout the litigation, the Kohouts engaged in extensive motion practice and discovery. The superior court file includes 278 documents in total filed by the time the Kohouts sought appellate review in May 2010.<sup>13</sup> The Kohouts filed the majority of the motions in the case, including, *inter alia*, a motion for prejudgment writ of attachment which was filed on February 1, 2010, stricken after HCA and the Mulinskis submitted their opposition, refiled on February 11, 2010, presented ex parte without proper notice to HCA and the Mulinskis' counsel<sup>14</sup>, re-noted on February 17, 2010, and finally argued in superior court on February 25, 2010. See also Kohouts' motions at CP 20-29, 210-218, 262-281, 432-438, 442-451, 662-666, 852-859, 860-869, 1060-1087. The Kohouts also

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<sup>13</sup> This Court can take judicial notice of the SCOMIS and ACORDS dockets.

<sup>14</sup> An order to show cause was entered by the ex parte Court Commissioner against HCA and the Mulinskis on February 11, 2010 and amended on February 17, 2010.

engaged in extensive discovery and availed themselves of the liberal judicial discovery rules.<sup>15</sup>

The parties to this litigation, including the third party defendant subcontractors, attended a mediation on January 8, 2010. HCA reached settlements with all of the subcontractors in the months following the mediation. All liens previously placed on the Kohouts' property were removed and all subcontractors were dismissed from the lawsuit. CP 780-783, 812-815, 821-823, 845-848, 849-851, 870-873, 914-915.<sup>16</sup>

On February 12, 2010, HCA and the Mulinskis filed a motion for partial summary judgment seeking to dismiss all claims against John and Shannon Mulinski, and to dismiss the Kohouts' claims for breach of warranty, fraud and/or misrepresentation, conversion, and violation of the CPA against HCA. CP 746-766, Supp. CP\_\_ (Sub No. 173C, Declaration of Maury Kroontje). The Kohouts filed an opposition and a cross-motion for partial summary judgment on the same claims. CP 1174-1201. The trial court heard oral argument on March 19, 2010. HCA and the

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<sup>15</sup> For example, the Kohouts took John Mulinski's deposition three times over three days. Discovery documents were not filed with the trial court and are therefore not part of the record.

<sup>16</sup> Third party defendant subcontractor Gemes Construction did not place any liens on the Kohouts' property and did not enter an appearance in the case.

Mulinskis' motion was granted in two orders, one signed March 19, 2010 and one signed April 6, 2010.<sup>17</sup> CP 425-428, 630-633.

The claim to survive summary judgment is the Kohouts' breach of contract claim. The second claim remaining in this lawsuit is the claim against the bond.<sup>18</sup>

The trial date was initially set for March 29, 2010. CP 672-677. On March 8, 2010, the Kohouts served a 14-page witness and exhibit trial list. On March 9, 2010, the Kohouts filed their objections, spanning 19 pages, to HCA's ER 904 offer of documents. CP 1659-1677. On March 17, 2010, they served an amended 22-page witness and exhibit trial list. On March 15, 2010, the Kohouts served a notice of intent to call John

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<sup>17</sup> The trial court requested additional briefing on the Consumer Protection Act claim. The April 6, 2010 order addressed this claim only. CP 630-633.

<sup>18</sup> The Kohouts' title page and various arguments regarding the Mulinskis and subcontractors' liens are misleading. The Mulinskis were dismissed on summary judgment and Harding & Son's, named in the Kohouts' caption, voluntarily dismissed all claims against the Kohouts (CP 914-915) and entered into a stipulation and order of dismissal of all claims between HCA and Harding & Son's (CP 845-848). All subcontractors have settled and have been dismissed. None of the orders of dismissal or the order dismissing all claims against the Mulinskis on summary judgment are under review in this appeal.

Mulinski at trial.<sup>19</sup> On March 19, 2010, the trial court dismissed all claims against the Mulinskis and the claims for breach of warranty, fraud and/or misrepresentation, and conversion against HCA. CP 425-428. That same day, the Kohouts filed motions in limine and also filed a motion to continue the trial date. CP 860-869, Supp. CP\_\_ (Sub Nos. 219 and 220, Kohouts' Motions in Limine and Declaration of Eileen McKillop). On March 22, 2010, the Kohouts and HCA filed their respective trial briefs and jury instructions. Supp. CP\_\_ (Sub Nos. 238, 239, 240, and 242, Kohouts' Trial Brief and Jury Instructions, HCA's Trial Brief and Jury Instructions). Also on March 22, 2010, on the eve of trial, after more than eighteen months of litigation, and while the trial court was deciding whether to dismiss the CPA claim against HCA<sup>20</sup>, the Kohouts filed another motion for an order compelling arbitration. On March 23, 2010,

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<sup>19</sup> The Kohouts did not file their March 8 and March 17, 2010 witness and exhibit trial lists and they did not file the notice of intent to call John Mulinski at trial.

<sup>20</sup> The Kohouts incorrectly state that "[i]t was only after the trial court dismissed the Kohouts' claims against... HCA for... violation of the Consumer Protection Act, that the Kohouts filed a second motion to compel arbitration of the one remaining claim for breach of contract against HCA." BOA at 15-16. The Kohouts filed their second motion to compel arbitration on March 22, 2010. CP 429-431, 432-438, 439-441, 442-451, 452-533. The trial court dismissed the CPA claim on April 6, 2010. CP 630-633. The Kohouts also incorrectly state that there is one claim remaining. Two claims remain: the breach of contract claim against HCA and the claim against the bond.

the trial court entered an order continuing the matter to November 22, 2010. CP 911, 912-913. On April 6, 2010, the court dismissed the CPA claim against HCA. CP 630-633.

On April 9, 2010, the court denied the Kohouts' second motion to compel arbitration and stay the proceedings. The order cited the Supreme Court's decision in Otis Housing v. Ha, *supra*. CP 634-35.

3. Facts regarding appeal.

After the trial court denied the Kohouts' "Motion for: (1) CR 54(b) Final Judgment; (2) Stay of Order and Proceedings Pending Appellate Decision; and/or (3) RAP 2.3(b)(4) Certification" on May 3, 2010, the Kohouts filed their notice of appeal on May 5, 2010. CP 636-661, 1060-1087, 1105-1107. The notice sought review of eight orders: the 2008 and 2010 orders denying the motions to compel arbitration, two orders denying motions for reconsideration, two orders relating to subcontractor Harding & Son's, and the two orders granting HCA and Mulinskis' motion for partial summary judgment. CP 636-661.

This Court accepted review of only the April 9, 2010 order denying the Kohouts' second motion to compel arbitration (CP 634-635, Appendices A and B). The notation ruling by Commissioner Verellen entered on June 17, 2010 states:

[t]he scope of the appeal does not extend to the 2008 order denying [the Kohouts'] first motion to compel arbitration or to other intervening partial summary judgments and rulings of the trial court.

Appendix A. The Kohouts did not move to modify this ruling.

D. ARGUMENT

Citing Otis Housing as controlling authority, the trial court ruled the Kohouts waived arbitration. CP 634-35. Curiously, the Kohouts' brief does not mention Otis Housing. Under an Otis Housing analysis, the record supports the trial court's ruling because the Kohouts (1) elected to litigate instead of arbitrate and (2) aggressively litigated for over eighteen months the same issue they now seek to arbitrate, *i.e.* the contract claim against HCA. The Kohouts' involvement in litigation in the last two years is uncontested.

If this Court applies a different analysis than Otis Housing, the record still shows the Kohouts waived arbitration. Waiver is supported under Steele v. Lundgren (totality of the circumstances analysis) and Kinsey v. Bradley<sup>21</sup> (three-prong waiver test) where (1) the Kohouts acted inconsistent with the right to arbitrate, and (2) HCA has been prejudiced

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<sup>21</sup> Steele v. Lundgren, 85 Wn.App. 845, 850-60, 935 P.2d 671 (1997), rev. denied, 133 Wn.2d 1014 (1997); Kinsey v. Bradley, 53 Wn.App. 167, 169-72, 765 P.2d 1329 (1989).

and will be prejudiced if the parties now change from a jury trial to an arbitral forum more than two years after the Kohouts filed this lawsuit.

The Kohouts claim the trial court erred in entering its April 9, 2010 order denying their motion to compel arbitration and stay the proceedings. To support this claim, the Kohouts cite settled authority on general arbitration principles (BOA at 9-11), rely on Nelson v. Westport Shipyard, Inc.,<sup>22</sup> for the notion that failing to seek review of an order denying a first motion to compel arbitration does not preclude an appeal from an order denying a second motion to compel arbitration<sup>23</sup> (BOA at 13-15), and allege they did not waive the arbitration clause because (1) the Contractor Registration Act required them to sue HCA, the two bonding entities, and the Mulinskis in Superior Court (BOA 17-19) and (2) the assertion of claims against non-signatories to an arbitration agreement does not preclude a stay as to the arbitrable claims (BOA 19-23). The Kohouts'

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<sup>22</sup> Nelson v. Westport Shipyard, Inc., 140 Wn.App. 102, 163 P.3d 807 (2007), rev. granted, 163 Wn.2d 1033 (2008), later dismissed by parties' agreed motion.

<sup>23</sup> The Kohouts also cite to two cases from Indiana and Minnesota (BOA at 14-15), but neither case is persuasive. International Creative Management holds that the trial court's orders denying petitions to compel arbitration were appealable as a matter of right, that the appeals were timely taken, and that the arbitration provision was enforceable. Lindsey is an unpublished opinion granting in part and denying in part two motions to compel arbitration brought, respectively, by two different parties. Neither these cases nor Nelson address waiver of the right to *arbitrate* (as opposed to the right to *appeal*).

three main arguments are not persuasive and do not address the narrow issue on appeal.

1. THE SCOPE OF THIS APPEAL IS LIMITED TO THE 2010 ORDER DENYING ARBITRATION.

Review is limited to the trial court's 2010 order denying arbitration. Appellants' brief misidentifies the scope of the appeal and muddles the right to appeal and the right to arbitrate. BOA at 13-14.<sup>24</sup> The right to appeal the 2010 order denying arbitration is not at issue.

The trial court denied the Kohouts' first motion to compel arbitration on December 15, 2008. It also denied reconsideration of the order. The 30-day appeal period ended in January 2009. RAP 5.2(a). The Kohouts chose not to appeal the December 15, 2008 order.

Nonetheless, in the notice of appeal filed in May 2010, more than a year later, the Kohouts sought to appeal the 2008 order. Given the obvious delay, this Court set a routine court's motion to determine appealability. The Kohouts' response claimed the right to appeal the 2008 order could be revived by appealing the 2010 order. By ruling dated June

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<sup>24</sup> The Kohouts' second argument heading, "The Kohouts Have Not Waived Their *Right to Arbitrate* by not Immediately Appealing Their First Motion to Compel Arbitration" is followed by the sentence, "The Kohouts' *right to appeal* of the order denying their second motion to compel arbitration has not been waived because they did not immediately appeal the trial court's earlier order denying their motion to compel arbitration." BOA at 13 (emphasis added).

17, 2010, Commissioner Verellen rejected<sup>25</sup> the claim and limited this appeal to review of the 2010 order. Appendix A.

The Kohouts did not move to modify the ruling. RAP 17.7. It is now the law of this case. Nelson v. Westport Shipyard, Inc., 140 Wn.App. at 110 n.5; Hough v. Ballard, 108 Wn.App. 272, 277-78, 31 P.3d 6 (2001) (citations omitted); Gould v. Mutual Life Ins. Co. of New York, 37 Wn.App. 756, 758, 683 P.2d 207 (1984), overruled on other grounds, Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 744 P.2d 1032 (1987).

Although the June 17, 2010 ruling is now the law of this case, the Kohouts nonetheless repeat the arguments this Court already rejected. BOA at 13-16. As Commissioner Verellen clarified, Nelson

does not hold or suggest that an appeal from an order denying a second motion to compel arbitration allows the appellant to reach back to challenge an order denying the first motion to compel arbitration entered two years earlier when at that time the litigation included several parties who had not even signed or seen the arbitration agreement.

Appendix A.

Despite the clarification, the Kohouts persist in the attempt to reach back and challenge the 2008 order denying arbitration, as well as the 2010 orders granting HCA and the Mulinskis' motion for partial summary

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<sup>25</sup> The appellants' brief attributes the ruling to "the Court of Appeals' Court Clerk [sic][.]" BOA at 13.

judgment. BOA at 14, 23-24. The Kohouts argue as if the subcontractors and the Mulinskis are still parties to the litigation and as if these are the issues on appeal.<sup>26</sup> Their claims overlook the scope of the appeal and a clear record that shows the subcontractors have settled and been dismissed, all liens have been removed, and all claims against the Mulinskis have been dismissed on summary judgment.

The only issue is whether the trial court correctly denied the Kohouts' second motion to compel arbitration on the contract claim against HCA. The short answer is yes.

2. THE TRIAL COURT PROPERLY RELIED ON OTIS HOUSING IN RULING THE KOHOUTS WAIVED ARBITRATION.
  - a. Otis Housing held a party waives the right to arbitrate if it elects to litigate.

Citing Otis Housing, the trial court ruled the Kohouts waived the right to arbitrate and denied the Kohouts' second motion to compel arbitration and a stay of the proceedings:

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<sup>26</sup> "Because the two lien foreclosure claims are not severable, the Court should have granted the Kohouts' *first* motion to compel arbitration, and stayed the entire action, including the two lien foreclosure actions, pending the outcome of the arbitration. At the very least, *the court should have compelled arbitration of the Kohouts' claims against HCA and the Mulinskis, and allowed the two lien foreclosure actions to proceed...* Accordingly, it was obvious error for the court to deny the Kohouts' *second* motion to compel arbitration of their breach of contract claim against HCA." BOA at 23-24 (emphasis added).

It Is Hereby Ordered, Adjudged and Decreed that Plaintiffs' Motion for an Order Compelling Arbitration and a Stay of These Proceedings *must be, and* is hereby Denied.

CP 634-35 (emphasis added). The court handwrote the words in italics and its citation to Otis Housing, 165 Wn.2d at 588. The Kohouts fail to address Otis Housing and the trial court's ruling on waiver.

In Otis Housing, the Supreme Court restated settled authority that the right to arbitrate is waived by conduct inconsistent with any other intent. It held it is enough that a party elect litigation over arbitration to demonstrate conduct inconsistent with the intent to arbitrate:

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 that issue, it may not later seek to relitigate the same issue in a different forum.

Otis Housing, 165 Wn.2d at 588.

Otis Housing follows in a long line of cases establishing that a party to an arbitration clause may waive its enforcement by conduct inconsistent with the intent to arbitrate. Otis Housing, 165 Wn.2d at 587-588; Ives v. Ramsden, 142 Wn.App. 369, 382-383, 174 P.3d 1231 (2008); Steele v. Lundgren, 85 Wn.App. 845, 850-860, 935 P.2d 671 (1997);

Kinsey v. Bradley, 53 Wn.App. 167,169-172, 765 P.2d 1329 (1989); Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw, Inc., 28 Wn.App. 59, 61-64, 621 P.2d 791 (1980). This line of authority, culminating in Otis Housing, supports the trial court's holding that the Kohouts' undisputed involvement in aggressive and protracted litigation showed an intent to litigate instead of arbitrate.

The trial court properly relied on Otis Housing. Otis Housing Association (OHA) rented a hotel from John and Min Ha with the hope of purchasing it. OHA and the Has negotiated a sale price and option to purchase the hotel. The option contained an arbitration clause. OHA and the Has entered into subsequent agreements extending the option, the last of which stated the option must be exercised no later than December 1, 2004, and would expire if no sale closed by December 31, 2004. The option expired and OHA stopped paying rent. The Has then brought an unlawful detainer action. Id. at 585-86.

OHA did not seek arbitration during the unlawful detainer action. Instead, it unsuccessfully argued it had exercised its option, thereby converting the lease and option agreements into a purchase and sale agreement and conveying to OHA the right to retain possession of the hotel. The trial court rejected OHA's claim and awarded possession to the Has. Several days later, OHA sent a letter to the Has demanding

arbitration. The Has declined to arbitrate. OHA then filed a separate action to compel arbitration. OHA also noted a motion to compel the Has to appoint an arbitrator. Id. at 586.

The trial court denied the motion to compel arbitration, finding OHA had failed to timely exercise and/or close the option to purchase and that the right to seek arbitration under the option no longer existed and had lapsed. Id. at 586. The Court of Appeals affirmed on the same grounds. Id.

The Supreme Court affirmed on different grounds. It reiterated the longstanding Washington rule that the contractual right to arbitration may be waived if not timely invoked.<sup>27</sup> It further held arbitration may be waived by a party's conduct. Id. at 588; Finney v. Farmers Ins. Co., 21 Wn.App. 601, 620, 586 P.2d 519 (1978); Pedersen v. Klinkert, 56 Wn.2d 313, 352 P.2d 1025 (1960).

The Court held the following conduct establishes waiver: (1) electing to litigate instead of arbitrate and (2) presenting the same issue in litigation a party later seeks to arbitrate. Otis Housing, 165 Wn.2d at 588.

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<sup>27</sup> Id. at 587; Ives v. Ramsden, 142 Wn.App. 369, 382-83, 174 P.3d 1231 (2008); Harting v. Barton, 101 Wn.App. 954, 962, 6 P.3d 91 (2000); B & D Leasing Co. v. Ager, 50 Wn.App. 299, 303, 748 P.2d 652 (1988); Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc., 28 Wn.App. 59, 621 P.2d 791 (1980).

The Court concluded OHA's conduct of submitting the claim that it exercised its option as a defense to the unlawful detainer action "was completely inconsistent with an intent to arbitrate." Id. Reasoning OHA defended the unlawful detainer action "by raising as a defense *the very same issue it now seeks to arbitrate*" (*i.e.* whether the option to purchase had been properly exercised) the court held, "OHA did waive any claim it may have had to arbitrate *by presenting the same issue...* before the unlawful detainer court. Having lost that issue, it may not later seek to relitigate the same issue in a different forum." Id.

- b. The Kohouts chose to litigate the same issue they seek to arbitrate.

Under Otis Housing, the Kohouts waived arbitration by electing to aggressively litigate the contract claim they now seek to arbitrate.

As Otis shows, mere participation in litigation is inconsistent with arbitration. Otis Housing, 165 Wn.2d at 588. The Kohouts not only participated in litigation; they initiated it and dominated it, filing the majority of motions, conducting extensive discovery, and preparing fully for trial. From the day they filed suit, through the more than eighteen months of aggressive motion practice, contentious discovery tactics, and full trial preparation, the Kohouts' intent to litigate has been clear. The

record is undisputed on the Kohouts' active involvement in litigation spanning two years.

Although the Kohouts may have initially showed a desire to compel arbitration, they elected to file suit within a matter of days, while HCA was still reviewing the Kohouts' claim package and considering the Kohouts' offer to mediate. The Kohouts changed the offer to mediate to a demand to arbitrate the claims against HCA, which days later transformed into a lawsuit against HCA, the bonding entities, and the Mulinskis. The Kohouts rushed to litigate. By comparison, they waited more than a year to appeal the order denying the first motion to compel arbitration, but still not until after the parties had fully prepared for trial (the Kohouts filed motions in limine, jury instructions, a trial brief, detailed objections to HCA's ER 904 submission, and moved to change the trial date on the eve of trial). This record compellingly shows an intent to litigate rather than arbitrate.

Although the Kohouts assert statutory law required suit against the bond, no statute required suit against HCA or the Mulinskis. The Contractor Registration Act (CRA) does not require anyone to commence litigation. RCW 18.27.040 says that "the surety issuing the bond shall be named as a party *to any suit upon the bond.*" RCW 18.26.040(3) (emphasis added). The Kohouts erroneously claim the CRA required

them to sue HCA, the two bonding entities, and the Mulinskis in Superior Court. BOA at 18. While the statute requires the issuing bond be named as a party to any suit upon the bond, it does not require the members of an LLC and their spouses, *i.e.* the Mulinskis, be named as parties. The Kohouts chose to sue HCA, the bonding entities, and the Mulinskis; the CRA statute did not require this. Nor were the Kohouts required to move to consolidate other parties and claims not subject to the arbitration clause. The Kohouts were also in no danger of missing any statutes of limitations, so that potential issue does not explain their rush-to-litigation strategy.

The facts in Otis Housing were more sympathetic to OHA, yet the Supreme Court still held arbitration was waived. OHA filed an action to compel arbitration under former RCW 7.04 *et seq.*<sup>28</sup> It also filed a motion to compel the Has to appoint an arbitrator. Even so, the Supreme Court held OHA's conduct was inconsistent with an intent to arbitrate. The Kohouts stated they would file a motion to compel arbitration against HCA, but instead chose to file a judicial complaint, raising claims and naming parties not subject to arbitration. They then moved to consolidate two more cases involving additional parties and claims not subject to

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<sup>28</sup> RCW 7.04A *et seq.* is the current chapter on the Uniform Arbitration Act.

arbitration<sup>29</sup>. Only after consolidation did they move for an order compelling arbitration, but when that order was denied in December 2008, they did not appeal it. The Kohouts' conduct in the more than 25 months following the complaint's filing has been consistent only with an intent to litigate and to do so aggressively and without regard to concerns of judicial economy.

If the intent was to arbitrate rather than litigate, the Kohouts had the option of filing an action to compel arbitration under RCW 7.04A at the outset instead of filing a judicial complaint for damages containing claims and parties not subject to arbitration. The Kohouts could have moved for summary judgment on the issue of arbitrability. They also had the option of *not* consolidating other claims and parties not subject to arbitration.

For over eighteen months, the parties litigated the contract claim the Kohouts now seek to arbitrate. HCA and the Mulinskis prepared vigorously and fully for a jury trial on the merits to commence March 29, 2010. After losing multiple claims and parties on summary judgment, however, the Kohouts sought on March 22, 2010 to start over in an

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<sup>29</sup> Initially, the Kohouts moved to consolidate *and* to compel arbitration on October 28, 2008. On October 29, 2008, they refiled and moved only to consolidate, reserving the motion to compel arbitration for later (December 3, 2008).

arbitration forum while simultaneously extending the trial date for the judicial litigation.

This record shows the Kohouts consistently sought to have it both ways: they first chose litigation and then when litigation did not succeed, they sought arbitration; because they did not succeed on the merits in the trial court, they now seek to relitigate the issues on appeal. The record indicates a pattern of attempts to seek alternative relief and relitigation of issues already determined (via arbitration, appellate review, and various motions for reconsideration).

The Kohouts did not genuinely seek relief under the arbitration clause. At most, the Kohouts sought arbitration as a potential alternative. Even at the outset, the complaint's prayer sought relief both within the arbitration framework and within the litigation framework. On the eve of trial, the Kohouts did it again: they filed a trial brief, jury instructions, and motion to continue the trial date together with a second motion to compel arbitration.

The analysis under Otis Housing is clear. The Kohouts waived arbitration by electing to litigate instead of arbitrate and by litigating the same issue - the contract claim against HCA - they now seek to arbitrate more than two years later. The trial court properly denied the Kohouts' motion.

c. The trial court did not abuse its discretion in denying a stay.

The Kohouts separately address the trial court's decision not to grant a stay. The brief contends "[t]he presence of non-arbitrable claims, or the presence of parties who are not signators to the agreement to arbitrate, does not preclude a stay to allow for arbitration of those disputes that are arbitrable." BOA at 19. As the Kohouts acknowledge, the trial court has discretionary authority to stay the judicial proceedings. BOA at 20, 21, 23. The decision to grant or deny a stay is reviewed only for abuse of discretion. King v. Olympic Pipeline Co., 104 Wn.App. 338, 348, 16 P.3d 45 (2000). In the order denying the Kohouts' motion for reconsideration of the 2008 order denying the Kohouts' first motion to compel arbitration, the trial court reasoned:

The court has discretion to stay the litigation with the subcontractors but declines to do so primarily for the reasons set forth in the arguments of the subcontractors in their briefs in response to the motion to stay.<sup>30</sup> It is fundamentally unfair to require subcontractors with relatively small claims to defer their claims while the litigation between the Kohout family and Home Curb Appeal proceeds and in addition incur the potentially substantial expense of monitoring and participating in that litigation.

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<sup>30</sup> Knights' Insulation, Inc. and Harding & Son's argued they were not parties to the contract between the Kohouts and HCA, their claims were not subject to arbitration, and a stay would be contrary to RCW 6.04 *et seq.* which was intended by the Legislature to protect lien claimants. CP 678-681, 682-684, 685-690, 738-741.

Plaintiffs make a reasonable argument that separating the Curb Appeal and the Mulinski litigation *may not be efficient*, but if that is a compelling consideration *it supports denial of the motion to arbitrate* because it appears that the Mulinski family, as non-parties to the arbitration agreement cannot be compelled to arbitrate.<sup>31</sup>

If this case was strictly between the Kohout family and Curb Appeal arbitration might be appropriate... However the longer those issues [relating to non-signatories to the arbitration agreement] are unresolved the greater the risk that other issues may arise that would render arbitration inappropriate.

CP 404-05, Appendix C (emphasis added). In making its decision, the trial court weighed considerations of fairness to the parties, judicial economy, avoidance of confusion, and possible inconsistent results. The trial court exercised its discretion again when it made its second decision not to stay the proceedings. The Kohouts offer no persuasive argument that the trial court abused its discretion in denying a stay.

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<sup>31</sup> This again demonstrates how the Kohouts have sought to have it both ways. The Kohouts claimed a desire to arbitrate against HCA, but simultaneously aimed to force the Mulinskis to arbitrate when the Mulinskis were not parties to the arbitration agreement. The Kohouts' overriding strategy was not arbitration of the dispute, but rather to keep the Mulinskis as parties in the lawsuit due to the Kohouts' concern, frequently stated in briefing, that no remedy would be available against HCA. CP 1060-1087, 1099-1104, Kohouts' response to this Court's motion to determine appealability. The Kohouts transparently continue this theme on appeal, erroneously referencing the Mulinskis in the caption and throughout the brief as if they were still parties to the dispute. All claims against the Mulinskis have been dismissed, CP 425-428, and the trial court's determination on that point is not under review. Appendix A.

3. THE TRIAL COURT'S RULING THAT THE KOHOUTS WAIVED ARBITRATION IS CONSISTENT WITH KINSEY AND STEELE.

The Kohouts do not discuss Otis Housing, but instead cite pre-Otis decisional law. This Court, like the trial court, is bound by the Supreme Court's decision in Otis Housing.<sup>32</sup> If this Court nonetheless departs from an analysis under Otis Housing, the trial court's ruling remains consistent with Kinsey and Steele's analysis of waiver.

The Kinsey court adopted the federal standard for waiver: to establish waiver, the party opposing arbitration must demonstrate (1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that right, and (3) prejudice. Kinsey v. Bradley, 53 Wn.App. 167, 169, 765 P.2d 1329 (1989) (citing Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1187 (9th Cir. 1986)).

Waiver is generally defined as "voluntary and intentional relinquishment of a known right." Lake Wash. Sch. Dist., 28 Wn.App. at 61. Since 1971, this Court has recognized "[t]he requirements for waiver vary with the circumstances." Id. (citing Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co., 4 Wn.App. 695, 700, 483 P.2d 880 (1971)).

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<sup>32</sup> State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

In Steele, this Court applied a "totality of the circumstances" approach in holding that a supervisor's acts in litigating an employee's claims for ten months before seeking to compel arbitration were inconsistent with arbitration, and that the employee was prejudiced by the delay resulting from ten months of litigation. Steele, 85 Wn.App. at 853-60. Reasoning "[t]he waiver determination necessarily depends upon the facts of the particular case and is not susceptible to bright line rules," the Steele Court cited a list of factors formulated by the Tenth Circuit:

In determining whether a party has waived its right to arbitration, this court examines several factors: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g. taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.

Id., 85 Wn.App. at 851.

Whether applying the Tenth Circuit factors or the Kinsey test, the Kohouts waived arbitration. The two contested prongs of the Kinsey test are (2) acts inconsistent with a right to arbitrate and (3) prejudice. As discussed *supra*, the record shows the Kohouts acted inconsistent with an intent to arbitrate. The record also shows HCA has been and will be

prejudiced if the case is moved to an arbitral forum after more than 25 months of litigation and rigorous trial preparation. The litigation machinery had been substantially invoked, the parties were well into preparation for jury trial, the Kohouts filed a motion for partial summary judgment on the merits and did not raise the issue of arbitration or ask for a stay at that time, and the Kohouts availed themselves fully of judicial discovery procedures and access to information not available or otherwise deemed confidential in arbitration.<sup>33</sup> Only after those judicial proceedings were exhausted, and on the eve of trial, did the Kohouts file the second motion seeking arbitration.

- a. The Kohouts acted inconsistent with the intent to seek arbitration.

In Steele, an employer invoked an arbitration clause after ten months of lengthy and aggressive litigation in superior court against a former employee. The Court focused on the employer's litigious strategy, his "overly aggressive" conduct in discovery, and his failure to invoke the arbitration clause before ten months of litigation had passed. Based on the

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<sup>33</sup> In arbitration, an arbitrator could have permitted discovery, in his or her discretion, only to the extent appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding *fair, expeditious, and cost-effective*." RCW 7.04A.170(3) (emphasis added). The arbitrator would also have permitted depositions of witnesses, in his or her discretion, to the extent it would have made the proceedings "*fair, expeditious, and cost effective*." RCW 7.04A.170(2) (emphasis added).

totality of the circumstances, the employer acted inconsistent with the intent to seek arbitration. Steele, 85 Wn.App. at 853-56.

As discussed, *supra*, the Kohouts elected to litigate instead of arbitrate when they rushed to file suit while HCA was still reviewing the Kohouts' claim and demand for arbitration. Another critical act inconsistent with an intent to seek arbitration was the Kohouts' choice not to appeal the 2008 order denying the motion to compel arbitration.<sup>34</sup> The Kohouts acknowledge the decision not to appeal the 2008 order and preemptively dedicate significant briefing in an effort to minimize that decision's effect. BOA 13-16. The tactical reason for the Kohouts' persistence is plain: they seek to avoid the natural consequences of the decision not to appeal the 2008 order. The Kohouts' complaints that the trial court should have allowed arbitration against HCA in 2008, while staying the consolidated lawsuits, are waived as issues that could have been but were not brought to this Court.

The pattern of conduct is clear. The Kohouts filed suit including claims and parties not subject to arbitration and moved to consolidate additional claims and parties not subject to arbitration. Then, after consolidation, they moved for an order compelling arbitration. The

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<sup>34</sup> They also did not move to modify Commissioner Verellen's ruling that this appeal is limited to review of the 2010 order denying the second motion to compel arbitration.

Kohouts aggressively litigated for eighteen months and were in the midst of full preparations for trial. Then, on the eve of trial, they moved again for an order compelling arbitration. The Kohouts cannot have it both ways. They do not get another bite at the apple just because they did not like the result at the trial court level. The case law makes it clear the Kohouts do not now get to seek arbitration as an alternative when the parties have litigated the contract claim for over eighteen months.

The Kohouts filed suit within days of notifying HCA of its wish to arbitrate, but waited for over a year to appeal the 2008 order denying the first motion for an order compelling arbitration and stay of the proceedings. Now, they seek to reach back to 2008 and claim the initial invocation of the arbitration clause as evidence that the second invocation was timely. But 15 months passed between the time the Kohouts filed their motion for reconsideration of the first order denying arbitration and the time they filed their second motion compelling arbitration, during which there was no mention of arbitration or action taken by the Kohouts consistent with an intent to arbitrate. On the contrary, the Kohouts engaged in aggressive litigation, filing the majority of motions, conducting extensive and contentious discovery, and preparing rigorously for trial.

Though the Kohouts may have initially contemplated arbitration, they waived that avenue and sealed shut any opportunity to arbitrate by

taking actions that are entirely inconsistent with an intent to arbitrate. Taken individually or as a whole, these actions over two years of aggressive litigation strongly indicate the Kohouts' intent to litigate.

- b. HCA has been prejudiced by more than two years of aggressive litigation, and would be prejudiced if the parties now changed forum after having vigorously prepared for a jury trial.

The Supreme Court did not specifically address the prejudice prong of the Kinsey test in Otis Housing. In 1980, this Court declined to require a showing of prejudice before a party may be found to have waived its right to demand arbitration. Lake Wash. Sch. Dist., 28 Wn.App. at 62. In 1989, the Kinsey court applied federal law and adopted prejudice as a distinct prong of the waiver test, but noted that prejudice is not required under state law. Steele, 85 Wn.App. at 856; Kinsey, 53 Wn.App. at 169. In Steele, this Court noted it would not reconsider the appropriateness of the requirement of prejudice adopted by Kinsey, but devoted half of its decision to the prejudice prong of the Kinsey test and concluded the trial court's ultimate finding of prejudice was not in error. Steele, 85 Wn.App. at 856-57.

The trial court in Steele found prejudice grounded in delay and expense. Specifically, it found the former employee had to incur significant expense in justifiable resistance to employer's discovery tactics,

an expense that would have been avoided if the matter had promptly proceeded in an arbitral forum. Steele, 83 Wn.App. at 857. Based on counsel's billing records, the court determined that "\$10,000 of the fees and costs are easily attributable to court-related litigation, and constitute significant prejudice to plaintiff." Id. The trial court also considered ten months of litigation to constitute delay which "deprives the plaintiff of a result, either good or bad, and if the result is good, delay deprives the plaintiff of the award."

While the federal circuits generally demand proof of prejudice to the objecting party before finding waiver, Washington courts<sup>35</sup> do not require proof of prejudice to find waiver. The Steele Court recognized the Seventh Circuit holds prejudice is "inherent in an effort to change forums in the middle... of a litigation," and merely invoking judicial process is therefore a presumptive waiver of a right to arbitrate. Steele, 83 Wn.App. at 856 (citing Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995)). That circuit also held that "where it is clear that a party has foregone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party." St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Products Co., 969 F.2d 585, 590 (7th Cir. 1992). The Steele Court also noted that in the

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<sup>35</sup> In Kinsey, Division Three applied federal law.

D.C. Circuit, "waiver may be found absent a showing of prejudice." Steele, 83 Wn.App. at 856 (citing National Foun. for Cancer Res. v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 777 (D.C. Cir. 1987)). The Fifth Circuit found waiver where the moving party "initiated extensive discovery, answered twice, filed motions to dismiss and for summary judgment, filed and obtained two extensions of pre-trial deadlines, all without demanding arbitration." Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156 (5th Cir. 1986).

The Steele Court concluded that ultimately "the finding as to prejudice is dependent on all the varying circumstances of the individual case." Steele, 85 Wn.App. at 858. In Steele, the employer's contentious strategy in discovery set him apart. Id. Ultimately, the trial court's finding of prejudice was based on its findings of delay and expense. This Court examined the findings of delay and expense to ensure that they were supported by substantial evidence and found they were. The Court found the Second Circuit instructive on the issue of delay. Steele, 85 Wn.App. at 858. That Circuit acknowledges delay amounts to prejudice when there is no good excuse for it:

Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, *or it can be found when a party too long postpones his invocation of his contractual right to arbitration,*

*and thereby causes his adversary to incur unnecessary delay or expense.*

Steele, 85 Wn.App. at 859 (citing Com-Tech Assoc. v. Computer Assoc. Int'l, Inc., 938 F.2d 1574, 1576 (2nd Cir. 1991); Rush v. Oppenheimer & Co., 779 F.2d 885, 887-88 (2nd Cir. 1985)). As the Steele Court clarified,

[n]o bright line defines this second type of prejudice - neither a particular time nor dollar amount automatically results in such a finding - but it is instead determined contextually by examining the extent of the delay, the degree of litigation that has preceded the invocation of arbitration, the resulting burdens and expenses, and the other surrounding circumstances.

Steele, 85 Wn.App. at 859.

In this case, the record shows prejudice based on delay and expense. Instead of arbitrating from the outset the arbitrable claims against HCA only, the Kohouts rushed to file suit and, with every party and claim added, with every motion filed, and every aggressive discovery tactic used, opted for protracted and expensive litigation. HCA has incurred significant expense in justifiable resistance to the Kohouts' motion practice and discovery tactics, expense that would not have been incurred if the Kohouts and HCA had proceeded to an arbitral forum.

Moving to an arbitral forum now after more than two years of litigation would involve significant expense as well as changes to strategy considerations developed over the last two years in preparation for a jury trial. Preparing for a jury trial is different from preparing for arbitration.

It is different not only in terms of who the fact-finder is and what information can reach that fact-finder, but also in terms of the process leading up to a determination. An arbitrator conducts arbitration in a manner "so as to aid in the fair and expeditious disposition of the proceeding." RCW 7.04A.150. Discovery in the arbitration forum is focused on making the proceedings "fair, expeditious, and cost-effective." RCW 7.04A.170. As such, it is more limited than discovery in the judicial context. Judicial litigation is often neither expeditious nor cost-effective. The discovery process and motion practice are the most expensive components of judicial litigation. HCA has been preparing for a jury trial since September 2008. Had the Kohouts' claims against HCA been submitted to arbitration, the process would not have taken over two years.

HCA has been prejudiced both substantively (by the Kohouts' attempts to relitigate issues lost on motions on the merits) and procedurally (by the Kohouts' invocation of arbitration after more than eighteen months of litigation) and will be further prejudiced if the parties change forums at this stage of the litigation. The trial court's ruling is fully supported by Steele and Kinsey, and should be affirmed.

4. THE KOHOUTS ARE NOT ENTITLED TO ATTORNEY FEES AND COSTS INCURRED AT THE TRIAL COURT LEVEL AND ON APPEAL.

The Kohouts claim attorney fees and costs incurred at the trial court level and on appeal under RAP 18.1(a). BOA at 24-25. RAP 18.1(a) states the following:

*If applicable law grants* to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RAP 18.1(a) (emphasis added). The Kohouts then cite the arbitration clause, treating it as the "applicable law" allegedly supporting the sweeping request: "Arbitrator *may* award attorney's fees to *prevailing party*." CP 698 (emphasis added).

Several problems plague the Kohouts' request. First, no final judgment has been rendered in the Kohouts' favor, therefore, the Kohouts are not prevailing parties under the definition in Herzog. BOA at 24; Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn.App. 188, 192, 692 P.2d 867 (1984). Nor has an arbitration award been entered. Second, had the case been considered by an arbitrator, the arbitrator would have had discretion to award fees within the arbitration framework. The contract between the Kohouts and HCA does not contain a provision

"*providing for the payment of attorneys' fees.*" BOA at 25. The provision simply grants an arbitrator discretion to award fees once the prevailing party is determined. Third, although no declaration accompanies the Kohouts' claim, the Kohouts appear to request fees for over 25 months of litigation involving claims and parties not subject to arbitration as well as fees for an appeal in which they sought review of eight orders, only one of which is within the scope of review. Lastly, the prevailing party cannot be determined until the merits of the underlying claims are properly determined.

These four arguments, however, assume the arbitration clause applies. As shown in arguments 2-3, *supra*, the arbitration clause, like the option contract in Otis Housing, was waived by the Kohouts and is not controlling after over two years of litigation. What the arbitrator *may* have awarded *if* the Kohouts had prevailed in the arbitration is pure speculation as to what the Kohouts should now be awarded, if anything, after two years of litigation with no final judgment rendered.

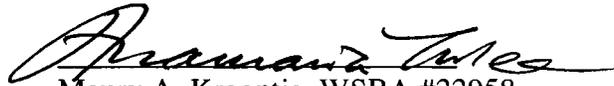
E. CONCLUSION

This Court should affirm the trial court's order (CP 634-35, Appendix B) and deny the Kohouts' request for fees.

DATED THIS 22nd day of November, 2010.

Respectfully submitted,

KROONTJE LAW OFFICE, PLLC

A handwritten signature in cursive script, appearing to read "Anamaria Turlea".

Maury A. Kroontje, WSBA #22958  
Anamaria Turlea, WSBA #40138  
1411 Fourth Avenue, Suite 1330  
Seattle, WA 98101  
(206) 624-6212

APPENDIX A

No. 65357-1-I

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals  
of the  
State of Washington*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

June 23, 2010

**Kroontje Law Office PLLC**  
1411 Fourth Avenue, Suite 1330  
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Received date: **JUN 24 2010**

Maury A. Kroontje  
Anamaria Turlea  
Aric Bradford Newlon  
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Seattle, WA, 98101-2250

Eileen I. McKillop  
Oles Morrison Rinker & Baker LLP  
701 Pike St Ste 1700  
Seattle, WA, 98101-3930

CASE #: 65357-1-I

Frederick Kohout, Appellant v. Home Curb Appeal, LLC, Respondent

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on June 17, 2010, regarding court's motion to determine appealability:

"The question presented is whether the trial court order denying a second motion to compel arbitration is appealable as a matter of right. This litigation arises out of a home remodel dispute. Frederick and Kathy Kohout (the homeowner) and Home Curb Appeal LLC (the contractor) entered into a contract containing an arbitration provision. Ultimately, the homeowner terminated the contractor from the project, subcontractors filed liens and lien foreclosure actions, the homeowner made a demand for arbitration, and then sued the contractor, the individual owner of the contractor, and a bonding company. Other lawsuits for lien foreclosures were all consolidated with the homeowner's lawsuit. In 2008, the trial court denied the homeowner's first motion to compel arbitration. The homeowner did not appeal. After a series of partial summary judgments, the only remaining claim in the litigation is a breach of contract action by the homeowner against the contractor. The homeowner filed a second motion to compel arbitration and on April 9, 2010, the trial court denied that motion.

The homeowner filed a notice of appeal challenging both the 2008 and 2010 orders denying the motion to compel arbitration as well as five other orders related to the partial summary judgments issued by the trial court. The homeowners contend that they are entitled to appeal both the 2008 and 2010 orders denying their motions to compel arbitration, and because the 2008 order should have been granted, then all the intervening partial summary judgments should be invalidated.

It is clear that an order denying a motion to compel arbitration is appealable as a matter of right. In Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 441-45, 783 P.2d 1124 (1989), this court held that an order denying a motion to compel arbitration discontinues or determines the "action" to arbitrate and thus under RAP 2.2(a)(3) such an order is appealable as a matter of right. The policy underlying the ruling in Herzog is to avoid losing the benefits of arbitration by allowing an immediate appeal of the ruling that would require the litigation to go forward. The holding of Herzog provides an immediate right of appeal and the normal considerations regarding appeals involving multiple claims between multiple parties, e.g. CR 54(b) and RAP 2.2(d), do not override Herzog. The contractor argues that the homeowner waived the right to arbitrate by pursuing litigation. That is certainly an argument that can be presented in the appeal, but it does not preclude the homeowners from an appeal as a matter of right.

The homeowner argues that the current appeal extends back to the 2008 ruling denying the motion to compel arbitration, relying heavily on Nelson v. Westport Shipyard, Inc., 140 Wn.App. 102, 116, 163 P.3d 807 (2007). But in Nelson, the court merely recited the procedural history that a court of appeals commissioner had ruled that failing to seek review of an order denying a first motion to compel arbitration did not preclude an appeal from the order denying a second motion to compel arbitration, where the first order recited the ruling was "at this stage" of the litigation and the party engaged in discovery that was not inconsistent with its intent to pursue arbitration. The case does not hold or suggest that an appeal from an order denying a second motion to compel arbitration allows the appellant to reach back to challenge an order denying the first motion to compel arbitration entered two years earlier when at that time the litigation included several parties who had not even signed or seen the arbitration agreement.

Page 2 of 3  
Case No. 65357-1-I, Kohout v. Home  
June 23, 2010

Therefore, it is

ORDERED that the Kohout's are entitled to proceed with their appeal of the April 9, 2010 order denying their second motion to compel arbitration. The scope of the appeal does not extend to the 2008 order denying their first motion to compel arbitration or to other intervening partial summary judgments and rulings of the trial court. The clerk shall set a perfection schedule.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

emp

# APPENDIX B

No. 65357-1-I

**FILED**  
KING COUNTY, WASHINGTON

APR 12 2010  
SUPERIOR COURT, CLERK  
BY ANDREW T. FAY, IS  
DEPUTY

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING**

**KNIGHTS INSULATION, INC., a  
Washington Corporation,**

Plaintiff,

v.

**HOME CURB APPEAL, LLC, a  
Washington limited liability company;**

Defendant.

(Abbreviated Caption)

Consolidated under King County  
**CAUSE NO. 08-2-34047-3SEA**

**ORDER DENYING PLAINTIFFS'  
MOTION TO COMPEL  
ARBITRATION AND A STAY OF  
THESE PROCEEDINGS**

This matter, having come on regularly before the undersigned Judge, and having reviewed the record on file herein including the following pleadings:

1. *Plaintiffs' Motion for an Order Compelling Arbitration and a Stay of These Proceedings*, and declarations of counsel in support thereof.
2. *Home Curb Appeal, LLC's Opposition to Plaintiffs' Motion for an Order Compelling Arbitration and a Stay of These Proceedings*

1           3. The Declaration of Maury Kroontje In Support of Defendant's Opposition to  
2 Plaintiffs' Motion for an Order Compelling Arbitration and a Stay of These Proceedings  
3 and exhibits 1-9 attached thereto.

4           Plaintiff's Reply  
5 \_\_\_\_\_  
6 \_\_\_\_\_

8 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for  
9 an Order Compelling Arbitration and a Stay of These Proceedings <sup>must be, and (RE)</sup> is hereby  
10 DENIED. *Otis House Ass'n v Fla 165 Wn.2d 582, 588 (2009).*

12 DATED this 9<sup>th</sup> day of April March, 2010.

13 Richard D Eadie  
14 Judge Richard D. Eadie  
15 Superior Court of Washington

17 Presented by:  
18 KROONTJE LAW OFFICE, PLLC

20 By: \_\_\_\_\_  
21 Maury A. Kroontje, WSBA No. 22958  
22 Aric Newlon, WSBA No. 41013  
23 Attorneys for Defendant Home Curb Appeal, LLC

# APPENDIX C

No. 65357-1-I

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**Kroontje Law Office PLLC**  
1411 Fourth Avenue, Suite 1330  
Seattle, Washington 98101 • Tel 206.624.6212  
Received date: JAN 06 2009

IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY

FREDERICK AND KATHY KOHOUT,  
husband and wife,

Plaintiffs,

v.

HOME CURB APPEAL, et al.,

Defendants.

**NO. 08-2-34047-3 SEA**

**ORDER RE: MOTION FOR  
RECONSIDERATION**

The court has considered the Plaintiff's Motion for reconsideration of the court's order denying Plaintiff's motion to refer this matter to arbitration and to stay the two consolidated cases.

First the court accepts the argument that the right to compel arbitration is based on agreement and that arbitration cannot be compelled against an entity that is not a party to the agreement to arbitrate. From the briefs presented in this case it appears uncontested that the subcontractors and the Mulinski family have not agreed to arbitrate.

The court has discretion to stay the litigation with the subcontractors but declines to do so primarily for the reasons set forth in the arguments of the subcontractors in their briefs in response to the motion to stay. It is fundamentally unfair to require subcontractors with relatively small claims to defer their claims while the litigation

1 between the Kohout family and Home Curb Appeal proceeds and in addition incur the  
2 potentially substantial expense of monitoring or participating in that litigation.

3 Plaintiffs make a reasonable argument that separating the Curb Appeal and the  
4 Mulinski litigation may not be efficient, but if that is a compelling consideration it supports  
5 denial of the motion to arbitrate because it appears that the Mulinski family, as non-  
parties to the arbitration agreement cannot be compelled to arbitrate.

6 If this case was strictly between the Kohout family and Curb Appeal arbitration  
7 might be appropriate. The subcontractor claims, especially since the subcontractors are  
8 plaintiffs, could be tried or disposed of by summary judgment in a relatively brief time,  
9 and the standing of the Mulinski family could be addressed by summary judgment as  
well. However the longer those issues are unresolved the greater the risk that other  
issues may arise that would render arbitration inappropriate.

10 The motion to reconsider is DENIED. The motion for attorney fees and certification  
11 to the court of appeals is DENIED.

12 DATED this 2ND day of January, 2009.

13  
14 **RICHARD D. EADIE**

15 

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RICHARD D. EADIE, JUDGE