

No. 74806-8-I

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

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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CINDIUS ROMNEY as PERSONAL REPRESENTATIVE for the
ESTATE OF MICHAEL ROMNEY; FARON BAUER; and KRISTEN
CHILDRESS, individually and on behalf of a class of all others similarly
situated,

Plaintiffs – 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,

Defendants – Respondents.

APPELLANTS’ OPPOSITION TO RESPONDENTS’ MOTION FOR
LEAVE TO FILE SUPPLEMENTAL OPPOSITION BRIEF

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I. ARGUMENT

Cindius Romney as personal representative of the Estate of Dr. Michael Romney, Dr. Faron Bauer, Dr. Kristen Childress, and the class of all others similarly situated, request that the Court deny Defendants' Motion for Leave to File a Supplemental Opposition Brief.

The bases for Defendants' proposed supplemental brief are without merit and will not assist the court in addressing the issues raised by Plaintiffs on appeal. First, Plaintiffs cited to *Morris v. Ernst & Young LLP.*, 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), in direct and strict reply to Defendants' Opposition in order to rebut Defendants' unsupported claim that Plaintiffs suffered no prejudice as a result of Defendants' waiver and estoppel. Second, Plaintiffs cited to *Morris* at the first opportunity they could (since the case had not been published when they filed their opening brief) as further evidence that the Arbitration Agreements drafted by Defendants allow class arbitration; an argument timely raised and supported in all relevant briefing by Plaintiffs. Third, there is zero evidence that any of the Plaintiffs were actually supervisors, and that argument would fail as a matter of law. Plaintiffs have proven that the Arbitration Agreements simply do not contain any class arbitration waivers and are thus in conformity with the requirements of the NLRA. Therefore, the issues on appeal are Defendants' waiver and estoppel, an arbitrator's powers to interpret the arbitration contracts, and the trial court's failure to comply with the COA Mandate which unequivocally compelled Plaintiffs' entire class action complaint (filed on November 13,

2013) to arbitration; the exact result that Defendants compelled at the trial court and argued to the COA more than two years ago.

No additional briefing by Defendants is warranted.

A. Plaintiffs' Citation To *Morris* Is Not A New Issue; It Supports The Timely Argument That These Arbitration Agreements Allow Class Claims To Be Arbitrated.

Plaintiffs' citation to *Morris* did not raise a new issue or new argument. *Morris* (which was published after Plaintiffs' opening brief but before Defendants' response) is simply additional legal support for Plaintiffs' timely argument that the Arbitration Agreements do not, and cannot include a class arbitration waiver. This argument was timely raised and is at the heart of this appeal. Defendants could have timely cited to *Morris*, now the federal law in Washington. Defendants could have and should have addressed this case in their response, especially in light of their substantial reliance on other arbitration cases from the Ninth Circuit.

As Plaintiffs argued from the outset, the Arbitration Agreements are not silent on class arbitration; they specifically allow for it. There is substantial evidence that when Defendants drafted these Arbitration Agreements they intended that class claims would be arbitrated. This evidence includes their numerous admissions while Defendants' first appeal was pending. Defendants made at least 16 admissions about arbitrator powers under contracts stating that the arbitrator had the power to rule on class certification. Cases like *Morris* demonstrate that had Defendants included a class arbitration waiver in these agreements (which they did not) they would be subject to further challenge based on

unconscionability and illegality under this important, compelling, and new Ninth Circuit case.

Defendants' actions, words, and the Arbitration Agreement itself all prove that joinder and class arbitration was contractually agreed to by the parties. Indeed, it has been nearly three years since Plaintiffs initiated litigation on behalf of themselves and a putative class. Defendants did not include a class arbitration waiver in these contracts, in part, because such a waiver would have been subject to the same challenges as those that were raised in the cases that the court relied on in *Morris*. Plaintiffs cited to *Morris* in their Reply to rebut Defendants' argument that the Arbitration Agreements contain class arbitration waivers and as further evidence that Defendants intended to arbitrate class claims. The parties were aware that in cases like *Morris*, courts were striking down class arbitration waivers in employment contracts. That is potentially why Defendants did not write a class arbitration waiver into these contracts and waited 25 months to raise it, resulting in waiver and estoppel.

Morris simply highlights issues Plaintiffs could have raised regarding the unconscionability of these Arbitration Agreements during the first appeal, but only if Defendants had timely raised class arbitration waiver as required by law. Plaintiffs did not argue the merits of an NLRA challenge to these Arbitration Agreements then because Defendants never timely raised a class arbitration waiver issue two years ago, as they should have, when compelling arbitration in 2014. Defendants waived, and should be estopped from making any arguments that these Arbitration

Agreements contain what would be an illegal class action arbitration waiver under *Morris*.

B. Plaintiffs Properly Cite To *Morris* In Strict Reply To Defendants' Erroneous Argument That "Petitioners Have Not Been Harmed" By Defendants' Failure To Raise It Until After Remand From Their Appeal.

Plaintiffs established in their briefing that they had no reason to address class action waivers at the trial court. Defendants agreed class arbitration was available under the contract in numerous admissions before the COA and the Superior Court. Defendants alleged that Plaintiffs suffered no prejudice as a result of their failure to raise the issue that class arbitration was precluded under the contracts until after remand from their appeal. In Defendants' Opposition where they discuss estoppel, an entire section is devoted to their premise that: "Petitioners have not been harmed or suffered any prejudice." Opposition at *37.

In direct reply to Defendants' erroneous prejudice arguments, Plaintiffs answered that they have suffered prejudice for, among other reasons, their inability to challenge the legality of a class arbitration waiver under the legal underpinnings relied on in *Morris*, a decision not decided when Plaintiffs filed their opening brief. This is clear from Plaintiffs' Reply briefing where *Morris* is discussed in Section A(3)(a) under the heading: "Plaintiffs suffered substantial prejudice through delay, and the inability to address Defendants' recent claim of class waiver as unconscionable." Appellants' Reply at *6. In their opening brief, Plaintiffs also specifically raised their inability to challenge the conscionability of

these agreements as part of the prejudice they suffered. Appellants' Brief at *26. In response to Defendants' appeal in 2014, Plaintiffs never addressed class arbitration waiver because (1) it does not exist in the agreements; (2) Defendants made numerous affirmative representations that class arbitration was available; and, (3) Defendants failed to compel individual arbitration at the trial court level.

Plaintiffs were severely prejudiced by Defendants inconsistent and dilatory assertion because they were induced to refrain from including class arbitration waiver as an unconscionable term when (1) moving to void the Arbitration Agreements and (2) opposing Defendants' appeal where Plaintiffs' opposition was based on unconscionable provisions permeating the Agreements. "[E]stoppel exists when the conduct of one party has induced the other party to take a position that would result in harm if the first party's act were repudiated." *Schuster v. Prestige Senior Mgmt., L.L.C.*, 193 Wn. App. 616, 631 (2016). If Defendants had timely claimed that a class arbitration waiver existed, Plaintiffs would have argued that this was an additional unconscionable provision permeating the arbitration agreements. Because of Defendants' conduct, Plaintiffs missed the opportunity to make this additional argument when challenging unconscionability in response to Defendants' first appeal and when requesting review by the Washington Supreme Court.

Moreover, Defendants could have addressed *Morris* in their opposition given that it was decided over a week before their opposition brief was due on August 31, 2016. It was a substantial, significant, and

highly persuasive decision that applies to this case. Instead, Defendants ignored it despite relying on numerous other Ninth Circuit cases in their opposition. Defendants should not be granted additional supplemental briefing to address *Morris* when they could have timely addressed it in their opposition. Plaintiffs simply provided additional evidence of prejudice by highlighting an argument that could have been made had Defendants not spent 25 months claiming that class arbitration was available and otherwise failing to raise it.

C. Plaintiffs Are Not Supervisors Under the NLRA.

Defendants' argument – that the NLRA would not apply to Plaintiffs because they were “supervisors” – is conclusory and wrong and not supported with any evidence of what Plaintiffs actually did during their employment.

Here, Defendants cannot and have not even begun to meet their burden of proof to prove that Plaintiffs were supervisors. Whether an employee is a “supervisor” without the protections of the NLRA, is a fact-intensive inquiry with the burden of proof on the party asserting supervisory status. *Dean & DeLuca N.Y., Inc.*, 338 N.L.R.B. 1046, 1047 (2003). This is because the Act's definition of “supervisor” is intended to distinguish “true supervisors vested with ‘genuine management prerogatives,’ [from] employees such as ‘straw bosses, lead men, and set-up men’ who are protected by the Act even though they perform ‘minor supervisory duties.’” *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 688 (2006) (citation omitted).

Plaintiffs were not supervisors within the meaning of the NLRA and could easily rebut Defendants' skimpy evidence. Defendants' reliance on the parties' employment contracts do not support their erroneous contention that the NLRA does not apply to them. Plaintiffs can easily prove that they were not supervisors or managers exempt from the protections of the NLRA and should be allowed to do so if the Court is going to consider Defendants' untimely and erroneous supplemental briefing. Plaintiffs certainly could prove as a matter of law that they had no supervisory authority, had no direct reports, had no power to hire or fire, and that they were simply medical staff.

II. CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Motion for Leave to File Supplemental Opposition Brief. Plaintiffs did not raise a new issue through *Morris*. It was brought to the attention of the court for three purposes: (1) it is highly persuasive and new authority that is now the federal law in Washington finding class arbitration waivers are illegal, and the COA should see this new and important law; (2) it supports the prejudice suffered by Plaintiffs which justifies a finding of waiver and estoppel against Defendants where Plaintiffs could have challenged the legality of any supposed class arbitration waivers almost three years ago when the issues of unconscionability were timely before this court; and, (3) because it supports Plaintiffs' timely argument that the Arbitration Agreements do not contain class arbitration waivers because a class

arbitration waiver is illegal under the NLRA under federal law in Washington. With this in mind, Defendants' Motion to provide legally-irrelevant and erroneous supplemental briefing must be denied.

DATED this 21st day of October, 2016.

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DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date listed below I caused to be served a copy of the attached document to the following attorneys for Defendants in the manner indicated below:

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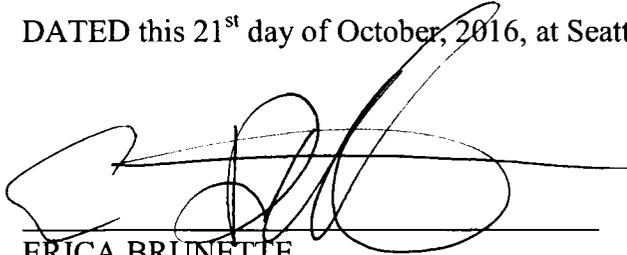
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DATED this 21st day of October, 2016, at Seattle, Washington.

A handwritten signature in black ink, appearing to be 'ERICA BRUNETTE', written over two horizontal lines. The signature is stylized and cursive.

ERICA BRUNETTE
Paralegal