FILED

AUG 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 298892

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

RIVER HOUSE DEVELOPMENT, INC,

Appellant,

v.

INTEGRUS ARCHITECTURE, P.S.,

Respondents.

BRIEF OF APPELLANT

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TIMOTHY B. FENNESSY, WSBA #13809
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I. INTRODUCTION

This case arises out of an AIA contract between River House Development, Inc. (hereinafter "RHD") and Integrus Architecture, P.S. (herein after "Integrus") in connection with a condominium development in Coeur d'Alene, Idaho (hereinafter the "Project."). Pursuant to that contract, Integrus agreed to provide architectural services related to the Project including, without limitation, construction management services. RHD and Integrus agreed that all disputes between them would be resolved through mediation and/or arbitration with the role of a court being limited to entering judgment upon an arbitrator's award.

After a dispute arose, Integrus agreed to an informal exchange of information with an eye towards resolution of RHD's claims through alternative dispute resolution, until the exigencies of the moment made litigation Integrus' preferred track. Despite this State's statutory mandates, preference for alternative dispute resolution, and the parties' unmistakable intent to resolve any and all disputes through mediation and arbitration, the Trial Court endorsed Integrus' about face with a ruling that RHD had waived its contractual right to resolution by mediation/arbitration. This Court should reverse the Trial Court and remand with instructions to order the parties to mediation and arbitration consistent with their agreement.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by failing to stay this action at RHD's request, without further inquiry.

2. The Trial Court erred in deciding that the presumption in favor of arbitration was overcome under the facts presented.

3. The Trial Court erred in applying a multi-factor test not adopted in Washington.

4. The Trial Court erred in finding waiver considering the actions of the Appellant when considering Washington law.

5. The Trial Court erred by failing to estop Integrus from asserting waiver of contractual rights.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does Washington law require enforcement of a contractual agreement to mediate/arbitrate?

2. Did Integrus agree to mediate/arbitrate any and all disputes between these parties?

3. Did RHD's actions constitute waiver of its agreement by being inconsistent with any other intention but to forego a known right?

4. Does the doctrine of equitable estoppel prohibit Integrus from asserting waiver of contractual mediation/arbitration?

III. STATEMENT OF THE CASE

By contract, Integrus agreed to provide RHD with architectural and construction management services for the Project, located in Coeur d' Alene, Idaho. Article 7 of that written agreement clearly establishes specific dispute resolution requirements:

> Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

(CP 224-273) (Dec. Balch in Support of Motion to Reconsider and Motion to Compel Mediation and Arbitration, Ex. H; CP 257) (emphasis added)).

The contract further provides that an award issued by the arbitrator "shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof." (*Id.*; CP 258.) (emphasis added). Indeed, the Parties agreed that any and all disputes between them arising out of the Project must be fully and finally resolved through mediation and arbitration.

In accordance with the contract, on February 17, 2010, counsel for RHD sent a demand letter to Integrus' counsel outlining its claims and providing clear indication that RHD intended to adhere to mediation and arbitration to resolve those claims. (*Id.* at Ex. J; CP 262-267). Specifically, RHD's February 17, 2010 letter states:

> As you are aware, article 7 of the Contract requires mediation and arbitration as conditions precedent to litigation. RHD proposes that the parties enter into a tolling agreement to preserve any claims that might otherwise be subject to bar based on a statute of limitations or an equitable doctrine such as laches, and then attempt to negotiate resolution of these claims short of litigation.

(*Id.* at Ex. J; CP 266-267).

RHD's purpose and intent to resolve its claims through mediation and arbitration remained clear in subsequent communications between counsel. On Friday, March 5, 2010, Mr. Brian Balch, counsel for RHD phoned Mr. William Hyslop, counsel for Integrus concerning RHD's request for a tolling agreement while the parties worked to resolve their dispute through mediation and arbitration. (*Id.* at ¶ 3; CP 224-225). On Monday, March 8, 2010, Mr. Hyslop sent a letter to Mr. Layman and Mr. Balch requesting documentation related to RHD's claims, requesting a written explanation of the need for a tolling agreement, and discussing a proposed tolling agreement. (*Id.* at Ex. A; CP 229-231). In response, Mr. Balch sent e-mail correspondence on March 8, 2010 again outlining why RHD desired a tolling agreement and indicated that RHD would work on providing the requested information. (*Id.* at Ex. B; CP 232). On Friday March 12, 2010, Mr. Balch sent Mr. Hyslop a proposed tolling agreement. (*Id.* at Ex. C; CP 236-240). The proposed tolling agreement states, in pertinent part:

> WHEREAS, the contract provides in Article 7 that the Parties will participate in mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings and, in the event mediation is not successful, by arbitration to be conducted in Spokane, Washington, all as a prerequisite to and/or substitute for commencement of litigation....

(*Id.; CP 236*).

Integrus refused to enter into the proposed tolling agreement. On April 7, 2010 Mr. Balch and Mr. Hyslop spoke again by telephone at which time Mr. Hyslop confirmed Integrus' desire to mediate the dispute between the parties as agreed in the Contract. (*Id.* at ¶ 6; CP 225). Mr. Hyslop also confirmed that Integrus was not willing to waive mediation. (*Id.*). On that same day, Mr. Balch sent a letter to Mr. Hyslop confirming said conversation (*Id.* at Ex. D; CP 241-242).

On April 22, 2010, Mr. Hyslop sent Mr. Balch a letter. (*Id.* at Ex. E; CP 243-247). Therein, Mr. Hyslop agreed that the Contract requires mediation but refused to agree to a mediation schedule or to proposed mediators. In response, on April 29, 2010 Mr. Balch replied to Mr. Hyslop and reiterated RHD's desire to select a mediator. (*Id.* at Ex. F; CP 248-251). Once again, counsel for RHD requested that the parties enter into a tolling agreement to avoid the necessity of filing suit to preserve the statute of limitations. (*Id.*). Mr. Balch also indicated that the selection of a mediator may be helpful so as to have a third party neutral available to

review documents or assist the parties to resolve other matters that may arise as they worked to resolve their dispute through alternative methods. (*Id.*).

Given Mr. Hyslop's refusal to enter into a tolling agreement, River House was left with no option but to file suit to avoid the possibility of having any claims barred by the statute of limitations. Conformed copies of River House's filing were sent to Mr. Hyslop on June 2, 2010. (CP 347-350) (Dec. Ahonen in Support of Motion to Reconsider and to Compel Mediation and Arbitration, Ex. A)).

On June 11, 2010, Mr. Hyslop sent a letter to Mr. Balch assuring him, once again, that Integrus was in agreement to mediation pursuant to the terms of the parties' Contract. (CP 224-273) (Dec. Balch, Ex. G)). On August 26, 2010 Mr. Armitage, on behalf of RHD, left a message with Mr. Hyslop to inquire about a stipulation to stay the proceedings such that mediation and arbitration could be completed. (CP 274-317) (Dec. Armitage in Support of Motion to Reconsider and Motion to Compel Mediation and Arbitration at ¶ 4). Mr. Armitage and Mr. Hyslop spoke by telephone on August 27, 2010. (*Id.*). At that time, Mr. Hyslop indicated that he would entertain a stipulated motion in that regard. Mr. Armitage emailed Mr. Hyslop later that day with a proposed stipulation and order. (*Id.* at Ex. B). The proposed stipulation asked the Court to stay the

proceedings pending mediation and arbitration as required by Article 7 of the parties' Contract. (*Id.*). Mr. Armitage's email asked that Mr. Hyslop advise as to his position in advance of the status conference scheduled for the following Friday. (*Id.*).

Based on the pending civil case status hearing, Mr. Armitage also prepared a proposed joint case status report and emailed it to Mr. Hyslop on September 1, 2010. (*Id.* at Ex. C). In the proposed report, Mr. Armitage set forth the parties willingness to mediate and arbitrate, and in the remarks section, Mr. Armitage proposed the following language;

> The parties' contract requires mediation and arbitration. The parties will be pursuing those dispute resolution methods precedent to continued litigation in this Court and may request that the Court stay the matter until such time as those methods have been exhausted.

(*Id.*).

On September 8, 2010, Mr. Hyslop sent correspondence to River Houses' counsel. (*Id.* at Ex. D). With regard to the proposed case status report, Mr. Hyslop insisted on striking the language regarding the mandatory mediation and arbitration. (*Id.*). Furthermore, Mr. Hyslop indicated that Integrus was in the process of preparing discovery responses and that Integrus anticipated "being ready to exchange the responses within a few days." (*Id.*).

Integrus did not provide its responses until January 26, 2011. Although said responses were served more than nine months late under the Civil Rules, RHD never moved to compel in recognition that the Civil Rules did not apply given the parties' agreement to resolve their dispute without the formal rigors and technicalities involved in litigation. River House also provided its responses to Integrus' discovery requests on January 26, 2011.

Dissatisfied with RHD's responses, Integrus filed a motion to compel discovery On February 18, 2011. Integrus filed its Answer to the Complaint that same day--approximately eight months after it was served. Indeed, on February 18, 2011, Integrus took a U-turn and abandoned its previous course towards mediation and arbitration despite its Contract and the prior representations of its counsel.

On the other hand, RHD's path and intent towards alternative dispute resolution never waivered. In sum, and without limitation, RHD:

1) proposed a tolling agreement so the parties could mediate and arbitrate (CP 224-273) (Dec. Balch in Support of Plaintiff' Motion to Reconsider and Plaintiff's Motion to Compel Mediation and Arbitration and to Remove Case from Trial Docket, Ex. B-C));

2) confirmed its intent to mediate and arbitrate in pre-suit correspondence (*Id.* at Ex. D);

3) proposed the appointment of specifically identified pre-suit mediators to assist the parties in resolving the matter pursuant to their contract (*Id.* at Ex. F);

4) received correspondence from Integrus' counsel confirming Integrus' intent to mediate and arbitrate under the contract and agreeing to an informal exchange of documents (*Id.* at Ex. E and G);

5) requested an Order staying this litigation and compelling the parties to engage in alternative dispute resolution as a prayer in its Complaint (CP 3-14);

6) proposed a stipulated stay for the purposes of mediation and arbitration before a trial date was ever assigned (CP 274-317) (Dec. Armitage in Support of Plaintiff' Motion to Reconsider and Plaintiff's Motion to Compel Mediation and Arbitration and to Remove Case from Trial Docket, Ex. B));

7) proposed language in the Joint Case Status Report to advise the court of the parties agreement to mediate and arbitrate precedent to continued litigation (*Id.* at Ex. C);

8) formally requested mediation with the American Arbitration Association (*Id.* at Ex. E); and

9) directed Integrus to its contractual agreements to mediate and arbitrate and the AAA rules upon Integrus' initiation of a discovery dispute (CP 210-215) (Dec. Layman in Support of Plaintiff's Motion to Shorten Time, Ex. A).

IV. ARGUMENT

Given, the enforceable agreement to mediate and arbitrate between the parties, Washington's adoption of the Uniform Arbitration Act, Washington's presumption in favor of arbitration, and RHD's conduct towards resolution of its claims, Integrus failed to satisfy its heavy burden of showing "conduct [by RHD] inconsistent with any other intention but to forego a known right." *See Verbeek Properties, LLC v. Greenco Environmental, Inc.,* 159 Wn.App. 82, 87, 246 P.3d 205 (2010).

1. Standard of Review

This is an appeal as a matter of right under RAP 2.2(a)(3). *See Verbeek,* 159 Wn.App. at 86. The Court's review of an order denying a motion to compel arbitration and is de novo. *Id.*

2. The existence of an enforceable agreement to mediate and arbitrate mandates a stay of this action without further inquiry.

Washington has adopted the Uniform Arbitration Act. RCW 7.04A *et seq.* "On or after July 1, 2006, this chapter governs agreements to arbitrate even if the arbitration agreement was entered into before January 1,2006." RCW 7.04A.030. By statutory mandate, Washington Court's must order arbitration when an enforceable agreement to arbitrate is presented:

> On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall summarily decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate.
>
> ....
>
> The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.
>
> ....
>
> If a party files a motion with the court to order arbitration under this section, the court shall on just terms stay any judicial proceeds that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.
>
> ....

> If the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration....

RCW 7.04A.070.

As the Court stated in *Verbeek*

> the Uniform Arbitration Act envisions a limited role for courts. That role is to decide whether or not there is an enforceable agreement to arbitrate.
> ....
>
> Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. RCW 7.04A.070(1).

Verbeek, 159 Wn.App. at 87-88.

Further, "[i]f the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end." *Heights at Issaquah Ridge, Owners Assoc. v. Burton Landscape Group, Inc.,* 148 Wn.App. 400, 403, 200 P.3d 254 (2009) (emphasis added). All other questions are to be determined by the arbitrator: "The arbitrator should decided allegations of waiver, delay, or a like defense to arbitrability." *Id.* at 406 (emphasis added); *see also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24-25, 103 S.Ct 927 (1983) (holding that "the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.").

In the case at bar, it is undisputed that there is an enforceable agreement between the parties to submit their claims to mediation and

arbitration with the award of the arbitrator being final. That should have ended the Trial Court's inquiry with all other issues are to be resolved by the arbitrator. Even if the Trial Court was permitted to inquire further, it was required to do so mindful of its obligation to resolve any doubts in favor of alternative dispute resolution.

3. Washington Courts must indulge every presumption in favor of arbitration.

Washington has a strong public policy that favors alternative dispute resolution. *Heights,* 148 Wn.App. at 403-04. "Washington courts apply a strong presumption in favor of arbitration." *Id.* at 405 (citing *Peninsula School Dist. No. 401 v. Public School Employees of Peninsula,* 130 Wn.2d 401, 924 P.2d 13 (1996)). Any doubts should be resolved in favor of arbitrability, and "***all*** questions upon which the parties disagree are presumed to be within the arbitration provision unless negated expressly or by clear implication." *Id* (emphasis added). Indeed, "Courts must indulge every presumption in favor of arbitration...." *Id* (citing *Xuver v. Airtouch Commc'ns, Inc.,* 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (quoting *Moses H. Cone Mem'l Hosp.,* 460 U.S. 1, 25, 103 S.Ct. 927 (1983)). That presumption applies "whether the problem at hand is the construction of the contract language itself <u>or an allegation of waiver,</u>

delay, or a like defense to arbitrability." *Verbeek,* 159 Wn.App. at 87 (emphasis added).

4. In finding waiver, the Court applied a multi-factor test that has not been adopted in Washington.

The party "seeking to prove waiver has a heavy burden of proof." *J.L. Steele v. Lundgren,* 85 Wn.App. 845, 852, 935 P.2d 671 (1997). Consistent with the mandates of the Uniform Arbitration Act and Washington's presumption in favor of alternative dispute resolution, waiver of an arbitration clause does not occur unless there is "conduct inconsistent with any other intention but to forego a known right." *Verbeek*, 159 Wn.App. at 87. Indeed, Washington has specifically "declined to follow the federal approach and support(s) the public policy favoring arbitration by adhering to the requirement that waiver cannot be found absent conduct inconsistent with any other intention but to forego a known right." *Lake Washington School. Dist. NO. 414 v. Mobile Modules Northwest, Inc.,* 28 Wn.App. 59, 62, 621 P.2d 791 (1981), emphasis added.

In the case at bar, the Court instead chose to apply a multi-factor test from the Tenth Circuit[1] that was mentioned in *Steele* but never adopted there or in any subsequent Washington decisions. In applying the

[1] *See Peterson v. Shearson/American Express, Inc.,* 849 F.2d 464, 467-68 (10th Cir. 1988).

inappropriate standard, the Court made an error of law, failed to do substantial justice, and rendered a decision clearly contrary to the decisions of this state. *See* CR 59.

5. No waiver occurred here.

Counsel for RHD and Integrus exchanged numerous letters and emails citing their mutual intent to mediate and arbitrate. RHD proposed specific mediators, proposed a tolling agreement and a stipulated motion to stay. Counsel for RHD even suggested language in the Joint Case Status Report advising the Court of the aforementioned contractual agreement. RHD's intent has been clear since its initial demand letter to Integrus in February 2010: this action should be decided through alternative dispute resolution under the parties' contract.

a) Filing this lawsuit does not constitute waiver

On April 15, 2011, the Trial Court provided further comment on its ruling that mediation and arbitration had been waived. Specifically, Judge Sypolt indicated that the act of filing the complaint was, in and of itself, contrary to the parties' agreement and indicative of RHD's engagement of the judicial process as opposed to alternative dispute resolution.

Initially, it must be noted that "*[t]here is no requirement that formal initiation of an arbitration must precede filing a lawsuit in order to avoid waving the contractual right to arbitration.*" *Verbeek*, 159 Wn.App.

at 89 (emphasis added). Even the act of "omitting a demand for arbitration from the initial pleadings in a lawsuit is not an affirmative election to forgo arbitration." *Id.* at 90. Consistent with Washington's presumption in favor of alternative dispute resolution, the *Verbeek* Court ultimately reversed the lower court's finding that arbitration had been waived. *Id.* at 93. According to the Court, the party opposing arbitration had not met the considerable burden required to show inconsistency with the intent to arbitrate. *Id.* Indeed, after filing suit for breach of contract, Verbeek sent correspondence offering to stay the action pending arbitration. *Id.* at 86. Only upon receipt of correspondence from the defendant's counsel stating its refusal to arbitrate did Verbeek move to stay the litigation. *Id.*

Here, similar to the plaintiff's actions in *Verbeek,* RHD repeatedly and consistently exchanged correspondence with the Integrus communicating its desired adherence to the contractually agreed upon methods for resolving this case. Adherence to the contract was reciprocal by both parties at least until March 30, 2011 when, for the first time, Integrus took the position that arbitration had been waived. (*See* Integrus Architecture P.S.' Consolidated Response to River House Development,

Inc.'s Motions)[2]. Moreover, RHD only filed this lawsuit because of its concern about possible statutes of limitations subsequent to Integrus' refusal to enter into a tolling agreement and to select mediators. (CP 224-273) (Dec. Balch in Support of Motion to Compel Mediation and Arbitration). Further, RHD commenced this action first through filing without service until the 90 day reprieve that corresponds with filing had nearly expired. Indeed, RHD did all it could to avoid advancing this action within the Court's jurisdiction.

When RHD was finally forced to file this action, its Complaint expressly sought "an order staying this litigation and compelling the parties to engage in alternative dispute resolution as provided in the Contract." (CP 3-14). Although, as *Verbeek* made clear, a party does not waive its right to compel mediation and arbitration by omitting reference to arbitration in its initial pleading, RHD's inclusion of such a prayer is entirely consistent with its unmistakable intent that this case must be decided by methods prescribed by the parties' contract.

Moreover, the Uniform Arbitration act as adopted by Washington in RCW 7.04A *et seq.* explicitly contemplates the notion that a dispute may come under the purview of the Court before it is ultimately stayed for

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[2] Counsel from RHD was not aware that this response had been filed until it was discussed during the hearing on April 15, 2011. *See* Dec. Ahonen, Armitage, Crockett, Layman, Balch, Fennessy.

the purposes of arbitration. To wit, RCW 7.04A.070 states that if there is an enforceable agreement to arbitrate, the court "shall order the parties to arbitrate" and "shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration...." If the simple act of filing a lawsuit constituted waiver, then RCW 7.04A.070 would be rendered meaningless. In light of *Verbeek,* RCW 7.04A *et seq.,* and RHD's pre-suit efforts to avoid filing this action, RHD's filing of its Complaint does not provide any support for the "heavy burden" of Integrus in asserting waiver of contractual rights.

b) Use of discovery does not constitute waiver.

Integrus also argued that RHD's limited participation in discovery is evidence of waiver. This argument has been clearly rejected by case law and Washington decisions. To wit, in *Lake Washington,* one of the parties asserted a counter claim with reference to the arbitration clause, and engaged in limited discovery before filing a motion to compel arbitration. 28 Wn.App. at 60-61. The Court stated that the "limited use of discovery was not inconsistent with its right to compel arbitration. RCW 7.04.120 authorizes the use of depositions in arbitration proceedings...." *Id.* at 64. Other jurisdictions have agreed. *See Walker v. J.C. Bradford & Co.,* 938 F.2d 575, 578 (5th Cir. 1991) (noting that "When only a minimal amount of discovery has been conducted, which may also

be helpful for the purpose of arbitration, the court should not ordinarily infer waiver based upon prejudice to the party opposing the motion to stay litigation."); *see also In re Bruce Terminix Co.,* 98 S.W.2d 702, 704-05 (1998) (holding that propounding one set of discovery was insufficient to find waiver).

Even in *Steele,* 85 Wn.App. at 855, the case inappropriately relied upon by both Integrus and Judge Sypolt, the Court of Appeals rejected the use of discovery as evidence of waiver despite on "overly aggressive" approach. There, the party seeking arbitration initiated discovery with 49 multi-part interrogatories and 20 requests for production and insisted on a hearing when the opposing party sought a protective order. *Id.* The Court of Appeals ultimately found that the moving party's use of discovery was not inconsistent with arbitration because it was comparable with the discovery it would have been allowed under the applicable arbitration procedures. *Id.* at 854. Indeed, it was not the moving party's use of discovery that supported waiver in *Steele*, but rather the moving party's "litigious strategy" including, without limitation, its refusal to concede that the trial court inadvertently signed the wrong order subsequent to a hearing. *Id.* at 855.

Here, RHD has not engaged in any similar "litigious strategy." When Integrus failed to file an Answer to the Complaint for nearly eight

months, RHD did not make a motion for default. When Integrus did not provide documents or answers to RHD's discovery requests for more than six months, RHD did not file a motion to compel. When it became necessary to file a Joint Case Status Report, RHD sought to include language to advise the Court that the action was subject to mediation and arbitration and that the parties "would be pursuing those dispute resolution methods precedent to continued litigation in this Court and may request that the Court stay the matter...." (CP 274-317) (Dec. Armitage in Support of Motion to Reconsider and to Compel Mediation and Arbitration, Ex. C). In fact, the only motions and documents filed by RHD in this action are consistent with its Motion to Compel Mediation and Arbitration and to Remove Case from Trial Docket, or those made necessary for Orders to be presented and entered by the Trial Court.

Further, RHD's use of discovery has been limited. No depositions have been taken. No subpoenas have been issued. Although Integrus has attempted to point the finger at RHD as the party initiating discovery, it is unmistakably clear that Integrus made the first request for documents and information in this matter on March 8, 2010, only after Mr. Hyslop asked for copies of numerous documents pertaining to the underlying project and prior litigation arising from that project. (CP 224-273) (Dec. Balch in Support of Motion to Compel Mediation and Arbitration, Ex. A). In

response, RHD confirmed the parties mutual "desire to exchange information by agreement and informally," (*Id.* at Ex. D) (emphasis added), and sent Mr. Hyslop six discs containing the requested documents before even receiving any discovery requests from Defendant. Consistent with that informal process and the American Arbitration Association rules on discovery, RHD likewise sent discovery limited to twenty (20) interrogatories seeking basic information, and twenty three (23) requests for production seeking basic documentation. Such limited use of discovery is "not inconsistent with its right to compel arbitration." *See Lake Washington,* 28 Wn.App. at 64.

c) RHD's Motion to Compel Mediation and Arbitration was timely.

Integrus also argues that RHD has waived its contractual rights by virtue of an alleged delay in seeking to compel mediation and arbitration. Substantially longer delays than any at issue here have been held not to constitute waiver. *See B&D Leasing Co. v. Ager,* 50 Wn.App. 299, 304, 748 P.2d 652 (1988) (nine months); *see also Lake Washington,* 28 Wn.App. at 63 (one year). Additionally, in circumstances on point with those now presented, the Court, in *B&D Leasing* noted the moving party's nine month delay but stated as follows:

> However, since respondent's complaint *expressly requested arbitration,* the appellants' conduct prior to moving for

response, RHD confirmed the parties mutual "desire to exchange information by agreement and informally," (*Id.* at Ex. D) (emphasis added), and sent Mr. Hyslop six discs containing the requested documents before even receiving any discovery requests from Defendant. Consistent with that informal process and the American Arbitration Association rules on discovery, RHD likewise sent discovery limited to twenty (20) interrogatories seeking basic information, and twenty three (23) requests for production seeking basic documentation. Such limited use of discovery is "not inconsistent with its right to compel arbitration." *See Lake Washington,* 28 Wn.App. at 64.

c) RHD's Motion to Compel Mediation and Arbitration was timely.

Integrus also argues that RHD has waived its contractual rights by virtue of an alleged delay in seeking to compel mediation and arbitration. Substantially longer delays than any at issue here have been held not to constitute waiver. *See B&D Leasing Co. v. Ager,* 50 Wn.App. 299, 304, 748 P.2d 652 (1988) (nine months); *see also Lake Washington,* 28 Wn.App. at 63 (one year). Additionally, in circumstances on point with those now presented, the Court, in *B&D Leasing* noted the moving party's nine month delay but stated as follows:

> However, since respondent's complaint *expressly requested arbitration,* the appellants' conduct prior to moving for

> arbitration is not necessarily consistent only with a waiver of the arbitration provision. Appellants could reasonably have been under the impression that the pending "action", as outlined by the complaint, was actually destined for arbitration, and therefore there was neither a need to request arbitration nor reason to believe that further defaults would result in trial (as opposed to the arbitration requested in the complaint). Thus, appellants conduct was not consistent only with a waiver of the right to arbitration, and therefore no waiver occurred.

B&D Leasing, 50 Wn.App. at 304 (emphasis and parenthesis in original).

Washington Court's have also held that no waiver occurred even where a party delayed in seeking to compel arbitration until after its motion for summary judgment was denied. *See Townsend v. Quadrant Corp.,* 153 Wn.App. 870, 890, 224 P.3d 818 (2009). Similarly, courts from other jurisdictions have rejected delay as grounds for waiver where the delay exceeds any at issue here. *See Hilti, Inc. v. Oldach,* 392 F.2d 368 (1s Cir. 1968) (two years); *Lumbermans Mut. Cas. Co. v. Borden Co.,* 268 F.Supp. 303 (S.D.N.Y. 1967) (two years); *Babcock v. Sol Corp. of Maine,* 118 N.H. 340, 386 A.2d 1259 (1978 (ten months); *Green v. W.R.M. & Assoc., LTD,* 174 F.Supp.2d 459 (N.D. Miss. 2001) (thirteen months); *Walker v. J.C. Bradford & Co.,* 938 F.2d 575 (Fifth Cir. 1991).

It must be reiterated that Integrus consistently agreed that this matter should be resolved through mediation and arbitration and did not waiver from that stance until seeking to invoke the Trial Court's Civil

Rules related to discovery on its motion to compel heard March 18, 2011. Integrus' about face came on the heels of waiting eight months to file an Answer (that demanded a stay of this action pursuant to the contract), and six months to provide RHD with its documents—conduct clearly consistent with the parties' agreement to resolve this case through informal exchanges before moving to contractual methods of alternative dispute resolution. Having agreed to resolve this matter in accordance with the parties' contract at all junctures prior to March 18, 2011, no dispute existed that would necessitate a formal Motion to Compel Mediation and Arbitration. Merely ten (10) days later, RHD filed its Motion to Compel Mediation and Arbitration and to Remove Case from Trial Docket. These facts place this case squarely on point with *B&D Leasing.*

RHD's conduct is also consistent with *Verbeek* where the party seeking arbitration did not move to stay the action until being informed by the opposing party that it was refusing to arbitrate. 159 Wn.App. at 86. Indeed, no waiver was asserted in Integrus' February 18, 2011 Answer, and that answer specifically requested a stay of this action pursuant to the parties' contract. (CP 30-37) (Answer to Complaint, pp. 7, ln. 15-17)). On these facts, it was clear error to find that RHD's conduct was "consistent only with a waiver" of its rights to alternative dispute

resolution. Without satisfaction of that heavy burden, no waiver can be found.

6. Estoppel

The doctrine of estoppel presents yet another reason why the Court must reject Integrus' waiver argument. Equity will mandate estoppel where there are:

> (1) acts, statements, or admissions inconsistent with a claim subsequently asserted, (2) action or change of position on the party of the other party in reliance upon such acts, statements, or admissions, and (3) a resulting injustice to such other party, if the first party is allowed to contradict or repudiate his former acts, statements or admissions.

Witzel v. Tena, 48 Wn.2d 628, 633, 295 P.2d 115 (1956).

Moreover,

> where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position.... he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it to be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Lawrence v. Household Bank (SB), N.A., 343 F.Supp.2d 1101, 1114 (M.D. Ala. 2004) (quoting *New Hampshire v. Maine,* 532 U.S 742, 749, 121 S.Ct. 1808 (2001)).

It is abundantly clear that Integrus and its counsel consistently agreed that this case would be resolved pursuant to the parties' contractual agreements to mediate and arbitrate. After its numerous representations in

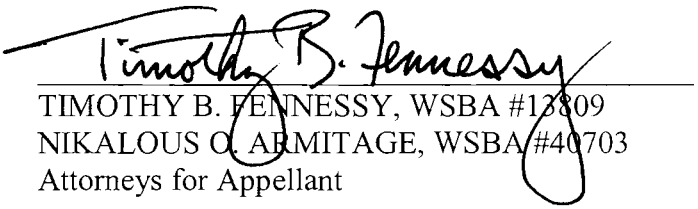
that regard, and after filing an Answer demanding a stay of this action, Integrus cannot be permitted to abandon its prior positions according to the exigencies of the moment. Such conduct is not only disingenuous, but clearly precluded by the doctrine of estoppel.

V. CONCLUSION

Washington law applies a presumption in favor of arbitration and places a "heavy burden" on the party asserting waiver to show that the party seeking to compel alternative dispute resolution engaged in conduct "consistent only with waiver." *See Verbeek, supra.* Integrus failed to satisfy that burden here and the Trial Court erred in finding waiver. RHD urges this Court to reverse the Trial Court and remand with instructions to order the parties to mediation and arbitration.

DATED this 22ND day of August, 2011.

LAYMAN LAW FIRM, PLLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2011, I served a true and correct copy of the foregoing brief by delivering the same to the following attorney of record, and individuals by the method indicated below addressed as follows:

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