

FILED

No. 367924

SEP 23 2019

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

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DAVID TERRY INVESTMENTS, LLS-PRC, a Washington State limited liability company, and DAVID TERRY, married individual,

Plaintiff-Respondents,

v.

HEADWATERS DEVELOPMENT GROUP, LIMITED LIABILITY COMPANY, a Washington State limited liability company, STONERIDGE CONTRACTORS, LLC, a Washington State limited liability company, SG SPADY CONSULTING & CONSTRUCTION MANAGEMENT, LLC, a Washington State limited liability company, PARK ROAD COMMONS, LLC, a Washington State limited liability company, and STEVE SPADY, an individual,

Defendants-Appellants.

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

The Honorable Raymond Clary, Judge

BRIEF OF APPELLANTS

NIKALOUS O. ARMITAGE, WSBA #40703
Armitage & Thompson, PLLC
220 W. MAIN
Spokane, WA 99201 | 509-252-5048 | noa@law-wa.com

ORIGINAL

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE	3
A. The parties and their roles in the joint venture	3
B. The contracts.....	4
C. Plaintiffs' breach.....	8
D. Procedural posture	8
IV. ARGUMENT	9
A. Standard of Review	9
B. Analytical framework.....	9
C. Arbitration is favored under Washington law	10
D. The language in the parties' contracts is broad and requires arbitration.....	12
E. All claims are subject to the agreement to arbitrate	14
F. All parties should be ordered to arbitration	18
1. Agency.....	19
2. Consent	20
G. Waiver	21
H. The Superior court should not have reached the motion to amend or the motion to compel discovery.....	23
V. COSTS.....	24
VI. CONCLUSION	24
DECLARATION OF SERVICE.....	26

TABLE OF AUTHORITIES

Cases	Page
<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 829 P.2d 1087 (1992)	11
<i>CKP, Inc. v. GRS Const. Co.</i> , 63 Wn. App. 601, 821 P.2d 63 (1991)	19
<i>Clearwater v. Skyline Constr. Co.</i> , Wn.App. 305, 835 P.2d 257 (1992), <i>review denied</i> , 121 Wn.2d 1005 (1993)	11
<i>Hanford Guards Union of Am. Local 21 of Int’l Guards Union of Am. v. Gen. Elec. Co.</i> , 57 Wn.2d 491, 358 P.2d 307 (1961)	11
<i>Herzog v. Foster & Marshall, Inc.</i> , 56 Wn.App. 437, 783 P.2d 1124 (1989)	23
<i>In re Jean F. Gardner Amended Blind Trust</i> , 117 Wn.App. 235, 70 P.3d 168 (2003).....	15
<i>In re Marriage of Pascale</i> , 173 Wn.App. 836, 295 P.3d 805 (2013)	10, 11
<i>Jones v. Jacobson</i> , 195 Cal.App.4 th 1, 125 Cal.Rptr.3d 522 (2011)	15
<i>King Cnty. v. Boeing Co.</i> , 18 Wn.App. 595, 570 P.2d 713 (1977)	11
<i>Kramer v. Toyota Motor Corp.</i> , 705 F.3d 1122, 1132 (9 th Cir. 2013)	15, 16
<i>Lake Washington School Dist. No. 414 v. Mobile Modules Northwest, Inc.</i> , 28 Wn.App. 59, 621 P.2d 791 (1980)	22

TABLE OF AUTHORITIES (cont'd)

Cases	Page
<i>Local Union No. 77, Int'l Bhd. Of Elec. Workers v. Pub. Util. Dist. No. 1, Grays Harbor Cnty.,</i> 40 Wn.App. 61, 696 P.2d 1264 (1985)	14
<i>Munsey v. Walla Walla College,</i> 80 Wn.App. 92, 906 P.2d 988 (1995)	11
<i>Perez v. MidCentury Ins. Co.,</i> 85 Wn.App. 760, 934 P.2d 731 (1997)	11
<i>Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC,</i> 199 Wn.App. 534, 400 P.3d 347 (2017)	19
<i>Romney v. Franciscan Medical Group,</i> 186 Wn.App. 728, 349 P.3d 32 (2015)	19, 20
<i>Saleemi v. Doctor's Assocs., Inc.,</i> 176 Wn.2d 368, 292 P.3d 108 (2013)	12
<i>Satomi Owners Ass'n v. Satomi, LLC,</i> 167 Wn.2d 781, 225 P.3d 213 (2009)	19, 24
<i>Stein v. Geonerco, Inc.,</i> 105 Wn.App. 41, 17 P.3d 1266 (2001)	23
<i>Townsend v. Quadrant Corp.,</i> 153 Wn.App. 870, 887, 224 P.3d 818 (2009), aff'd on other grounds, 173 Wn.2d 451, 268 P.3d 917 (2012).....	13, 15
<i>Townsend v. Quadrant Corp.,</i> 173 Wn.2d 451, 268 P.3d 917 (2012)	15, 18

TABLE OF AUTHORITIES (cont'd)

Cases	Page
<i>Verbeek Properties, LLC v. GreenCo Environmental, Inc.</i> , 159 Wn.App. 82, 246 P.3d 205 (2010)	9, 10, 12, 21, 22
<i>Zuver v. Airtouch Commc 'ns, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004)	14
Court Rules	Page
RAP 2.2.....	23
RAP 14.2	24
Statutes	Page
RCW 7.04A.060	9, 10, 12
Secondary Sources	
“over.” <i>Merriam-Webster.com</i> . 2019. https://www.merriam-webster.com	13

I. INTRODUCTION

This case involves a commercial dispute over contracts that contain arbitration clauses. The dispute originates from joint venture agreements to develop real property in the Spokane area. That property is/was owned by defendant Headwaters Development Group, LLC. The first property that the parties intended to develop was on Park Rd. The other properties were on Dakota St. and Market St. respectively. Plaintiffs-Respondents (hereinafter “Plaintiffs”) do not and did not own title in any of the real property. Rather, Plaintiffs’ role in the joint venture was to provide financing and/or funding so the real property could be developed. Defendants-Appellants’ (hereinafter “Defendants”) role was to provide construction knowledge and labor. These disputes arose when Plaintiffs breached their contracts and failed and refused to provide the promised financing and funding.

Ignoring their contractual obligations that required arbitration, Plaintiffs filed suit in Spokane County Superior Court. All of the parties named in Plaintiffs’ complaint are either signatories to a contract that requires arbitration, or agents of a signatory to a contract that requires arbitration. Additionally, all of the claims alleged by Plaintiffs are intertwined with the contracts and cover the same nucleus of facts concerning the parties’ performance of the promises contained in those contracts.

Based on those incontrovertible facts, Defendants moved the Superior Court to compel arbitration. The Superior Court granted Defendants' motion in part and denied Defendants' motion in part. In doing so, the Superior Court failed to indulge Washington's presumption and strong public policy in favor of arbitration. Despite the risk of conflicting and irreconcilable results in separate forums, the Superior Court bifurcated the case and ordered the parties to litigate the contract claims in arbitration and the non-contract claims before the court.

In this appeal, Defendants seek to remedy that untenable result. Defendants ask that this Court reverse the partial denial of Defendants' motion to compel arbitration, enforce the parties' contractual agreements, and order all parties and all claims to arbitration.

II. ASSIGNMENTS OF ERROR & LEGAL ISSUES

A. Assignments of Error

1. The Superior Court erred in denying in part Defendants' motion to compel arbitration.
2. The Superior Court erred in, thereafter, granting Plaintiffs' motion to amend their complaint and motion to compel discovery.

B. Legal Issues

1. Do the parties' contractual agreements require that the disputes alleged in this case be resolved through arbitration?

2. Are the Superior Court's orders granting Plaintiffs' motion to amend their Complaint and motion to compel discovery void as matters that should be reserved to the arbitrator?

III. STATEMENT OF THE CASE

A. The Parties and their roles in the joint venture

Steve Spady is the managing member of Headwaters Development Group, LLC (hereinafter "Headwaters"), SG Spady Consulting & Construction Management, LLC (hereinafter "SG Spady"), Stoneridge Contractors, LLC (hereinafter "Stoneridge"), and Park Road Commons, LLC (hereinafter "PRC"). (CP 23).

Headwaters is Mr. Spady's development company and owned the real property that the parties intended to develop on Park Rd., Dakota St., and Market St. (CP 33; CP 49; CP 69).

SG Spady's role in the parties' joint venture was to provide construction management and consulting advice. (CP 23-24; CP 27-30; CP 41-45; CP 57-58).

Stoneridge's role in the joint venture was to act as the licensed General Contractor for purposes of the construction involved in the planned developments. (CP 96).

PRC was formed by the parties with the thought that it would act as the holding company/property management company once the real property at Park Rd. was developed. (*Id.*). Of course, Plaintiffs breached, repudiated,

and abandoned the joint venture which made PRC unnecessary. PRC was eventually administratively dissolved by the Secretary of State. (*Id.*).

David Terry is the managing member of David Terry Investments, LLS-PRC (hereinafter “DTI”). Plaintiffs’ role in the joint venture was to provide financing for the development of the property at Park Rd., Dakota St., and Market St. (CP 96, CP 33-34; CP 49-51; CP 69-71).

B. The contracts

DTI executed three contracts with SG Spady. The first was signed on July 1, 2013 related to SG Spady’s construction and consulting work at Dakota St. (CP 41-45). The second was also signed on July 1, 2013, this time for Market St. (CP 60-64). Lastly, SG Spady and DTI signed a contract for Park Rd. on October 29, 2013. (CP 27-31). Each of those contracts contained identical arbitration clauses which stated:

- *DISPUTES CLAUSE: Arbitration of Disputes Among Members: In a dispute over this Agreement, the dispute shall be submitted to arbitration before a local Spokane Arbitrator who is mutually agreed amongst the parties. Arbitration shall be governed under the rules outlined under the Uniform Arbitration Act unless the parties agree otherwise. A written request for arbitration, stating the nature of the dispute shall be sent to all parties. All parties to the dispute shall share costs equally.*
- *ALTERNATIVE DISPUTE CLAUSE: If the Dispute Clause above (11) is mutually waived by both parties and the Alternative Dispute Clause is accepted, the modification of contract will be modified by an attachment to the contract and signed by all parties.*

- *Alternative Dispute Method of Resolution ... both parties may agree to a mutually acceptable Arbitrator that has knowledge of such disputes. The mutually agreed upon Arbitrator will be given a one time "position statement" from each party in the dispute. The Arbitrator will have time to review and call for a dispute hearing where each party will be given the opportunity to speak and convey any additional information to the Arbitrator for his use in issuing a final decision that will be binding on all parties. Any or all parties subject to this dispute cannot challenge this Alternate Dispute Method. All parties to this Dispute that the Arbitrators final decision is binding and final. The Arbitrators final binding decision will be issued within 10 days of the hearing.*

(Id.).

DTI also execute three contracts with Headwaters. The first was dated September 10, 2013 for the Park Rd. joint venture. (CP 33-39). The second was dated December 5, 2013 covering the Dakota St. joint venture. (CP 49-56). The final contract was signed December 15, 2013 related to the Market St. joint venture. (CP 69-76). As before, all of these contracts contained identical arbitration language. The clauses stated:

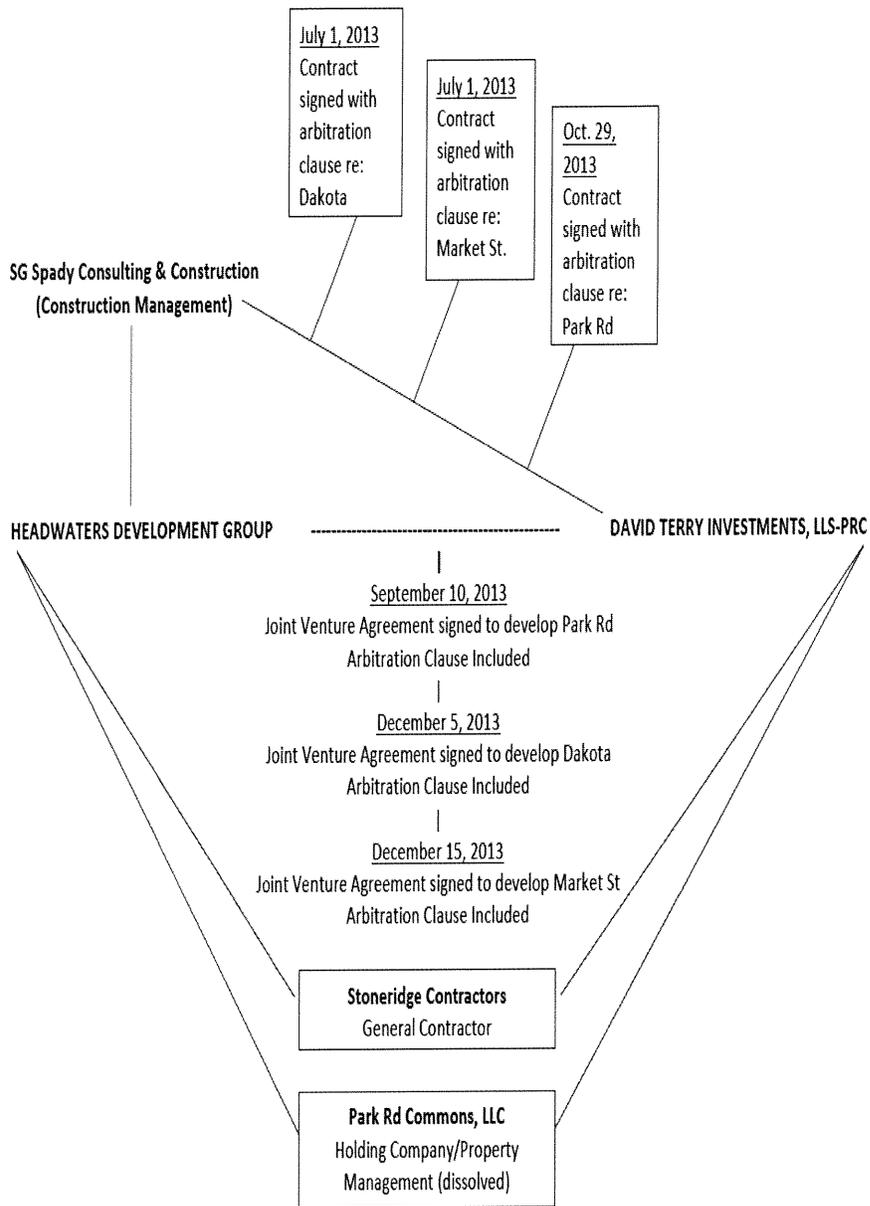
- *In a dispute over this Agreement, the dispute shall be submitted to arbitration before a local Spokane Arbitrator who is mutually agreed amongst the parties. Arbitration shall be governed under the rules outlined under the Uniform Arbitration Act unless the parties agree otherwise. A written request for arbitration, stating the nature of the dispute shall be sent to all parties. All parties to the dispute shall share costs equally.*
- *As an alternative to arbitration as outlined above, both parties may agree to a mutually acceptable Arbitrator that*

has knowledge of such disputes. The mutually agreed upon Arbitrator that has knowledge of such disputes. The mutually agreed upon Arbitrator will have time to review and call for a dispute hearing where each party will be given the opportunity to speak and convey any additional information to the Arbitrator for his use in issuing a final decision that will be binding on all parties. This Alternate Dispute Method can not [sic] be challenged by any or all parties subject to this dispute. All parties to this dispute agree that the Arbitrators final decision is binding and final. The Arbitrators final binding decision will be issued within 10 days of the hearing.

- *In no event may parties attempt arbitration under both Article (j) and Article (k). Instead, one type of arbitration must be chosen and said arbitration shall be binding on the parties.*

(Id.).

The schematic on the following page summarizes the parties and their contracts:



In short, all of the parties in this case were either direct signatories to a contract that required arbitration, or an agent of one or multiple parties to a contract that required arbitration.

C. Plaintiffs' breach

The joint venture agreements all required DTI to finance or fund the development projects. (CP 33-35; CP 49-51; CP 57; CP 69-71). DTI failed to obtain financing pursuant to the Joint Venture Agreements and instead attempted to self-fund the work. (CP 24). Of course, large scale development projects are expensive and take a long time. DTI had never been involved in a development before and became displeased with how much it was costing and how long it was taking. As a result, part way through the Park Rd. development, DTI stopped funding the project cold turkey. At this time, the development work under the joint venture agreements had not yet commenced at Dakota St. or Market St. On August 21, 2018, Defendants, pursuant to their contracts, sent a written request for arbitration to DTI and David Terry. (CP 78). They never responded. (CP 24).

D. Procedural posture

Rather than responding to the arbitration request, Plaintiffs filed suit in Spokane County Superior Court. (CP 3). On September 21, 2018, Defendants moved to compel arbitration. (CP 11-12). On October 9, 2018, Plaintiffs filed their First Amended Complaint. (CP 99). That complaint alleged causes of action for fraud, unjust enrichment, conversion, and breach of contract (CP 99-107).

The motion to compel arbitration was set for hearing on April 12, 2019. On that same day, Plaintiffs scheduled a motion to compel discovery and a motion to amend the complaint to add Laura Koger. The Superior Court granted in part and denied in part the motion to compel arbitration. (CP 364-367). Specifically, the Superior Court compelled Plaintiffs' breach of contract claims against Headwaters to arbitration but retained jurisdiction as to all remaining claims and parties. (*Id.*).

Immediately thereafter, the Superior Court granted Plaintiffs' motion to compel discovery (CP 368-370), and motion to amend the complaint to add Laura Koger as a party. (CP 371-373).

Defendants' Notice of Appeal timely followed. (CP 388-400).

IV. ARGUMENT

A. Standard of Review

Appeals from an order that denies arbitration may be filed as a matter of right. *Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn.App. 82, 86, 246 P.3d 205 (2010). The Court's review of such an order is de novo. *Id.*

B. Analytical framework

An agreement contained in contract to submit to arbitration is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract." RCW 7.04A.060(1). "The court shall

decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” RCW 7.04A.060(2).

A Court’s analysis of the issue should be framed by Washington’s strong public policy in favor of arbitration, and the required presumption in favor of arbitration. *See Verbeek Properties, LLC*, 159 Wn.App. at 87.

Here, presented with contracts containing agreements to arbitrate, the Superior Court’s analysis broke down when it failed to apply this presumption. Instead, the Superior Court applied a narrow reading to the agreements to arbitrate in a way to exclude non-signatories and tort claims even though the non-signatories were agents of the signatories, and despite the fact that the tort claims were inextricably intertwined with the contracts and their performance. It is on these issues that this brief will rest its primary focus. It is on these issues that this brief will rest the its primary focus.

C. Arbitration is favored under Washington law

The arbitrability of a dispute is determined by examining the arbitration agreement between the parties. *In re Marriage of Pascale*, 173 Wn.App. 836, 842, 295 P.3d 805 (2013).

It is settled law that:

[I]f the parties have promised to submit the subject matter to arbitration, the court should not consider the merits, but should enforce the mutual promises and leave consideration even in the clearest cases to the arbitrator. It is the evaluation and conclusion of the arbitrator, and not those of the courts,

that the parties have promised to abide by. **There is no reason why, in the face of their solemn agreement, the parties should be given an alternative of invoking the time consuming and costly machinery of the courts in lieu of the relative expedience of an arbitration proceeding If the parties have promised to arbitrate, the court should not refuse to enforce the contract because the solution seems simple.**

Id. (emphasis added) (citing *Hanford Guards Union of Am., Local 21 of Int'l Guards Union of Am. v. Gen. Elec. Co.*: 57 Wn.2d 491, 498, 358 P.2d 307 (1961).

If the reviewing court “can fairly say that the parties’ arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration.” *Id.* at 842. Any doubts regarding the applicability of an arbitration agreement should be resolved in favor of arbitration. *Id.*

There is strong public policy in Washington State favoring arbitration of disputes.¹ An agreement for parties to submit to arbitration

¹ *Perez v. MidCentury Ins. Co.*, 85 Wn.App. 760, 765, 934 P.2d 731 (1997) (recognizing a strong public policy in Washington state favoring arbitration of disputes); *Clearwater v. Skyline Constr. Co.*, 67 Wn.App. 305, 314, 835 P.2d 257 (1992), *review denied*, 121 Wn.2d 1005 (1993); *Munsey v. Walla Walla College*, 80 Wn.App. 92, 94-95, 906 P.2d 988 (1995) (recognizing the strong public policy favoring arbitration of disputes and noting arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation); *King Cnty. v. Boeing Co.*, 18 Wn.App. 595, 602-03, 570 P.2d 713 (1977) (and cases cited therein); *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087

when there is an existing or subsequent controversy, “is valid, enforceable, and irrevocable.” RCW 7.04A.060(1); *see also Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 375, 292 P.3d 108 (2013).

The party that opposes arbitration bears the burden of showing that the arbitration provision is unenforceable. *Verbeek Properties, LLC*, 159 Wn.App. at 86-87. “Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 87.

Here, it is undisputed that contracts with arbitration clauses were signed by Headwaters, SG Spady, and DTI. Nonetheless, the Superior Court only ordered Headwaters and DTI to arbitration. In doing so, the Superior Court failed to indulge every presumption in favor of arbitration and failed to give due regard to Washington’s strong public policy in favor of arbitration.

D. The language in the parties’ contracts is broad and requires arbitration

When construing a contract to determine whether or not to compel the parties to arbitration, Courts must apply the presumption in favor of

(1992) (noting the object of arbitration is to avoid the formalities, delay, expense and vexation of ordinary litigation).

arbitration to the contract's terms and resolve doubts and ambiguities in favor of arbitration. *Id.*

Here, the language of the contracts require arbitration for disputes "over" the agreements. Defendants have not identified other cases with this exact language. That said, cases where the contracts stated that the arbitration clause would apply to claims "arising from" and "relating to" the contract were held to be sufficiently broad to encompass non-contract tort claims. *See Townsend v. Quadrant Corp.*, 153 Wn.App. 870, 887, 224 P.3d 818 (2009), *aff'd* on other grounds, 173 Wn.2d 451, 268 P.3d 917 (2012).

Disputes "over" a contract must be read with at least the same breadth. "Over" is an expansive term. Merriam-Webster says that "over" is used as an expression meant to "cover the whole surface." "over." *Merriam-Webster.com*. 2019. <https://www.merriam-webster.com>. The dictionary also says that "over" is used to indicate breadth in the same way as the word "throughout" or the phrase "all through." *Id.*

Thus, based both on the meaning of the word "over" and the presumptions and rules of construction that apply to this problem, the contracts at issue in this case must be read to broadly cover all of the parties' disputes that bear any relation to the contracts and/or their performance. The Superior Court erred by instead taking a narrow view of the contractual

language. This err led the Superior Court to only order signatories and contract claims to arbitration.

E. All claims are subject to the agreement to arbitrate

The claims in this case are breach of contract, fraud, unjust enrichment, and conversion. Rather than construing ambiguities in favor of arbitration as required by the proper analytical framework, the Superior court seemed concerned with who drafted the contracts and the rules of contraction interpretation and construction that would flow therefrom. (RT 45:12-14). That caused the Superior Court to exclude the non-contract claims from its order to arbitrate even though the non-contract claims were based on the same nucleus of facts and issues as the contract claims. The Superior Court's decision in this regard was in err.

To engage in the proper analysis when determining whether an agreement to arbitrate covers a certain dispute, “[c]ourts must indulge in every presumption in favor of arbitration.” *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 301-02, 103 P.3d 753 (2004). If no provision in the contract excludes a particular issue from arbitration, then “only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail.” *Local Union No. 77, Int’l Bhd. Of Elec. Workers v. Pub. Util. Dist. No. 1, Grays Harbor Cnty.*, 40 Wn.App. 61, 64-66, 696 P.2d 1264 (1985). Extracontractual claims may be ordered to arbitration if not excluded by the

contract. *Townsend*, 153 Wn.App. at 887 (ordering claims of outrage, fraud, and negligence to arbitration); *In re Jean F. Gardner Amended Blind Trust*, 117 Wn.App. 235, 235-36, 70 P.3d 168 (2003) (affirming the trial court's decision to compel arbitration of negligence and breach of fiduciary duty claims).

On this same principal, estoppel may apply to preclude a party from "claiming the benefits of a contract while simultaneously attempting to avoid the burdens that the contract imposes." *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012). Equitable estoppel applies where a signatory raises allegations of concerted misconduct by both a nonsignatory and a signatory. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1132 (9th Cir. 2013). On an estoppel theory, a nonsignatory may invoke an arbitration clause to compel arbitration when:

The causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations.... This requirement comports with, and indeed derives from, the very purpose of the doctrine: to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of the same agreement.

Id. at 1129 (quoting *Jones v. Jacobson*, 195 Cal.App.4th 1, 20, 125 Cal.Rptr.3d 522 (2011)). For estoppel, the issue ultimately comes down to whether or not the plaintiff would have a claim independent of the contract,

or whether the plaintiff must rely on the terms of the contract in asserting the claims. *Id.* at 1131.

On this issue, we start with the allegations in the complaint. Specifically, we look at the Amended Complaint filed October 9, 2018 as that was the version of Plaintiffs' allegations that was before the Court when it heard the motion to compel arbitration on April 12, 2019. That complaint makes clear that all of the claims are irretrievably intertwined with the contract and its performance. The Amended Complaint lays out a series of factual allegations that, distilled to their essence, start with the existence of the joint venture contracts and end with Defendants being accused of violating those contracts and misusing Plaintiffs' funds that flowed from its initial attempted performance of those contracts. (CP 99-102).

What is ultimately clear from the Amended Complaint is that the facts Plaintiffs rely on to support their breach of contract claims are indistinguishable from those that they rely on to support their non-contract claims. At paragraph 3.12, after alleging that Defendants engaged in tortious conduct relative to Plaintiffs' funding, Plaintiffs state: "Spady's and Headwaters's misues, misappropriation, and mishandling of DTI and Terry's funds *also* constitutes breaches of the three Joint Venture Agreements." (CP 103) (emphasis added). Then, after first alleging their non-contract claims in paragraphs 4.1-4.18 in the "Causes of Action"

section, Plaintiffs say in paragraph 4.20 that the same conduct that underlies the non-contract claims serves as the basis for the breach of contract cause of action. (CP 104-107). Plaintiffs state:

4.20 Through the conduct described above, Headwaters has breached the three Joint Venture Agreements (to the extent that these are valid agreements). *These breaches included the improper use of funds contributed by DTI.*

(CP 106) (emphasis added).

This leaves us with a set of facts and claims that are inextricably intertwined with the contracts and the parties' performance of those contracts. In defense of Plaintiffs' claims, Defendants will argue and present evidence that they substantially performed all promised services through Plaintiffs' repudiation, and used Plaintiffs' funds consistent with the joint venture to develop the real property. Based on those defenses and the allegations to which they respond, we are forced to evaluate the parties' mutual performance of the contracts. If Defendants were performing construction and the promised related services and using the funds consistent with those purposes, then they could not have possibly misused the funds in a way to support the non-contract claims. Stated differently, for every expenditure Plaintiff may complain about, the trier of fact will have to decide if that expenditure related to the development ventures and the costs and labor associated therewith. That means that the interpretation of

the contracts and the parties' performance of those contracts is and will be at the heart of every issue in this case. As a consequence of this interrelatedness, all of the claims must be determined via arbitration.

Were it to be otherwise, the parties will, as the Superior Court has ordered, be sent down a path toward bifurcated litigation where the same exact facts will be evaluated in arbitration on the contract claims as those that will be evaluated in Superior Court to determine the non-contract claims. That sets up a potential for divergent and contradictory results. One forum could decide that Defendants' conduct and use of Plaintiffs' funds comported with the contract, and the other could conceivably determine that the same conduct and expenditures were tortiously unlawful. Of course, given the interrelated nature of the claims, it cannot be both ways. Thus, to avoid this potential for absurd results, Washington courts have made clear that a party cannot on one hand rely on the terms of a written agreement in asserting their claims, and on the other escape the dispute resolution process that the agreement prescribes. *See Townsend, supra*. Because that is exactly what the Superior Court's order calls for, it must be reversed.

F. All parties should be ordered to arbitration

The Superior Court's resistance to ordering all parties to arbitration was, in part, also ostensibly centered on the idea that Stoneridge and PRC were not signatories to the contracts that included arbitration clauses.

Relying on that fact is inconsistent with the policies and presumptions in favor of arbitration, and runs afoul of directly on point cases.

1. Agency

A “nonsignatory may be bound to an arbitration agreement through contract or agency principles.” *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC*, 199 Wn.App. 534, 541, 400 P.3d 347 (2017) (ordering a non-signatory defendant to arbitration based on his status as an agent of a signatory); *see also Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009); *Romney v. Franciscan Medical Group*, 186 Wn.App. 728, 41-42, 349 P.3d 32 (2015) (compelling non-signatory agents to arbitration, and noting that “a party may consent to arbitration without signing an arbitration clause.”). An agency relationship exists where one party acts in some material degree under the direction and control of the other. *CKP, Inc. v. GRS Const. Co.*, 63 Wn.App. 601, 607, 821 P.2d 63 (1991).

Here, the only parties that are not signatories to a contract requiring arbitration are PRC and Stoneridge. However, both PRC and Stoneridge are agents of signatories. The plan for PRC was to have it act as the property manager/holding company once the Park Rd. development was finished. Of course, at significant cost and harm to Defendants, Plaintiffs repudiated, breached, and abandoned the contracts prior to completion at Park Rd.

making PRC's existence no longer necessary. (CP 96). More to the point, PRC's contemplated role was indisputably to act on behalf of and at the direction and control of DTI and Headwaters once Park Rd. was developed. This made PRC an agent of DTI and Headwaters. Given that the contract between DTI and Headwaters indisputably requires arbitration, all claims against their agents, including PRC, also requires arbitration.

As for Stoneridge, to complete construction, the parties needed a licensed General Contractor. The parties employed Stoneridge to fill that role. (CP 96). Stated differently, Stoneridge worked on behalf of and under the direction of DTI and Headwaters. Thus, Stoneridge was an agent of DTI and Headwaters. Accordingly, the court erred in refusing to send the claims against Stoneridge to arbitration.

2. Consent

Importantly, a non-party can be ordered to arbitration if it consents to that method of dispute resolution. *Romney, supra*. As parties that joined in the motion to compel arbitration, Stoneridge and PRC unequivocally consented. To the extent arbitration was denied based on the nonsignatory status of PRC and Stoneridge, the Superior Court usurped their choice to consent. That runs afoul of Washington's preference for arbitration and the parties' freedom to define the method by which their disputes will be resolved.

Indeed, this is not a case where a non-signatory is being hauled into arbitration against their will. If that were the case, we would, of course, need to concern ourselves with an affront to constitutional guarantees. But here, we are presented with a signatory having sued signatories and non-signatories in a single action. The non-signatories have agreed to have their rights in that action determined in arbitration with the signatories. That choice comports with the interrelated nature of the claims and /facts in this case and Washington’s law favoring arbitration, and should, therefore, not be disturbed.

G. Waiver

Although not endorsed by the Superior Court as a defense to arbitrability (RT 45: 21-22; RT 48: 9-13), we address waiver because it was raised by Plaintiffs below.

First, Plaintiffs did not file a cross appeal that asserts error in the Superior Court’s rejection of the waiver defense. That alone should end the analysis. Even if it were otherwise, a cursory review of the facts and law makes clear that a finding of waiver cannot be sustained in this case.

The party claiming waiver bears the burden of proving it. *Verbeek*, 159 Wn.App. at 86-87. “Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense

to arbitrability.” *Id.* at 87. To find waiver, the Court must determine that Defendants’ conduct was “inconsistent with any other intention but to forego” the right to arbitration. *Id.*

Although Defendants filed their motion to compel arbitration within 30 days after the case was commenced, Plaintiffs’ waiver argument below was based on delay. While it is true that the motion to compel arbitration ultimately went undecided until April 2019, that gap was not attributable to Defendants. In truth, what the record shows, and what the Superior Court ostensibly found in rejecting the waiver argument, was that the delay flowed from the disqualification of Defendants’ first attorney and the subsequent health and personal issues of Defendants’ second attorney. (RT 45:21-48:20).

In any event, substantially longer delays than are at issue here have been found to not constitute waiver. *See Lake Washington School Dist. No. 414 v. Mobile Modules Northwest, Inc.*, 28 Wn.App. 59, 64, 621 P.2d 791 (1980) (citing cases where no waiver was found after as much as two years of delay). Simply put, Plaintiffs have not and cannot sustain their burden to prove waiver as a defense to arbitrability.

H. The Superior Court should not have reached the motion to amend or the motion to compel discovery

Orders that deny a motion for stay pending arbitration are immediately appealable as a matter of right under RAP 2.2(a)(3). *Herzog v. Foster & Marshall, Inc.*, 56 Wn.App. 437, 445, 783 P.2d 1124 (1989). The reason for this rule is that the denial of a motion to stay and compel arbitration affects a substantial right and discontinues the arbitration action. *Stein v. Geonerco, Inc.*, 105 Wn.App. 41, 44, 17 P.3d 1266 (2001). Appeal as a matter of right in these circumstances is vitally important because “the benefits of arbitration will be irretrievably lost without interlocutory right to appeal.” *Id.* Moreover, without the appeal as of right, “the party seeking arbitration must proceed through costly and lengthy litigation before having the opportunity to appeal by which time such an appeal is too late to be effective.” *Id.* A contrary rule would “frustrate the strong public policy favoring arbitration as well as the parties’ own arbitration agreement.” *Id.*

Based on these principles, if it is determined on this appeal that the Superior Court erred in failing to order all parties and all claims to arbitration, then the Superior Court should not have considered Plaintiffs’ motion to amend the complaint to add Laura Koger, and should not have considered or Plaintiffs’ motion to compel discovery. Those are matters that

should be left to the arbitrator, and the Superior Court's orders should therefore be deemed void ab initio.

V. COSTS

Costs on appeal will be awarded to the party that substantially prevails on review. RAP 14.2. An award of costs is appropriate where a party successfully appeals the denial of a motion to compel arbitration. *See Satomi Owners Ass'n*, 167 Wn.2d at 817.

In accordance with this authority, Defendants request an award of costs incurred for this appeal in amounts to be determined in subsequent briefing.

VI. CONCLUSION

The Superior Court erred in failing to grant in all respects Defendants' motion to compel arbitration in all respects.. Consistent with the foregoing, Defendants ask that the Superior Court's partial denial of the motion to compel arbitration be reversed, and that all parties and all claims be ordered to arbitration.

Further, Defendants ask that the Superior Court's orders granting Plaintiffs' motion to amend the complaint to add Laura Koger, and Plaintiffs' motion to compel discovery be reversed and deemed void ab initio as matters that should be left to the authority of the arbitrator. Defendants also request costs as the prevailing party in this appeal.

DATED this 23 day of September 2019.



NIK ARMITAGE, WSBA #40703
Attorney for Petitioners-Defendants

DECLARATION OF SERVICE

I hereby declare that on September 23, 2019, in Spokane, Washington, I caused the foregoing affixed document to be served on the following parties in the manner indicated:

Michael A. Maurer Lukins & Annis, PS 717 W. Sprague Ave., Ste. 1600 Spokane, WA 99201	VIA FIRST CLASS MAIL <input type="checkbox"/> VIA EMAIL <input type="checkbox"/> VIA HAND DELIVERY <input checked="" type="checkbox"/> VIA FACSIMILE <input type="checkbox"/>
Todd Startzel Kirkpatrick & Startzel, P.S 108 N. Washington St., Ste. 201 Spokane, WA 99201	VIA FIRST CLASS MAIL <input type="checkbox"/> VIA EMAIL <input type="checkbox"/> VIA HAND DELIVERY <input checked="" type="checkbox"/> VIA FACSIMILE <input type="checkbox"/>

I DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.



NIK ARMITAGE