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SUPREME COURT NO. 84422-4
COURT OF APPEALS NO. 62700-7-1

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SUPREME COURT OF THE
STATE OF WASHINGTON

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community and on behalf of their minor children, NIKLAS and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community, and on behalf of their minor children, COLTON and HANNAH,

Petitioners,

v.

THE QUADRANT CORPORATION, a Washington corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington corporation; and WEYERHAEUSER COMPANY, a Washington corporation,

Respondents.

PETITIONERS' ANSWER TO AMICUS BRIEF OF WASHINGTON
STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. INTRODUCTION

Petitioners respectfully submit this Answer to the Brief of Amicus Curiae Washington State Association for Justice Foundation. The Court of Appeals erroneously compelled the non-signatory Children of the Homeowners to arbitrate their personal injury claims premised on Quadrant's negligence. The Children's claims do not rely on or seek to enforce the Purchase and Sale Agreements ("PSAs") and the estoppel theory applied by the Decision cannot bind non-signatories to an arbitration agreement where none exists. The Decision also erroneously declined to consider all of the evidence of procedural unconscionability offered by the Homeowners in their discrete challenge to the arbitration provisions within the PSAs. The Decision should be reversed and remanded.

II. ANSWER

- A. The Non-Signatory Children Assert Only Claims for Personal Injuries Caused by Quadrant's Negligence And Cannot Be Compelled to Arbitrate Those Claims.

As *amicus* points out, central to this case is the independent nature of the non-signatory Children's claims from those of their parents, the Homeowners. The Children assert only claims for personal injuries caused by Quadrant's negligence. CP 745; 748; 754-55; 759-60; 768; 771; 777-78; 782-83. The Homeowners agree with *amicus* that the duty

Quadrant owed the Children is an independent, common law duty of care distinct from any duty created by contract. The distinct nature of these claims and the independent duty owed to the Children precludes them from being compelled to arbitrate their claims. The reasons stated by *amicus* provide an additional basis for this Court to conclude that the Purchase and Sale Agreements are not “the source of the duty of care” owed by Quadrant and to reverse the Decision.

The Homeowners also agree with *amicus* that the Court of Appeals’ analysis appears to be based on an application of the estoppel exception to the general rule that non-signatories to an arbitration agreement cannot be compelled to arbitrate their claims. An examination of the record and authorities on this issue demonstrate that this exception has no applicability to the claims of the non-signatory Children.

The doctrine of equitable estoppel is founded upon the principle that a party should be held to a representation made (or position assumed) where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81 (1975).

As *amicus* points out, the Supreme Court of Mississippi recently addressed the estoppel exception in the analogous case of Simmons Housing, Inc. v. Shelton, 36 So.3d 1283 (2010). In Simmons,

homeowners and their children brought claims against a homebuilder, alleging that their home was uninhabitable due to mold and mildew. The complaint included causes of action for breach of contract, breach of warranty, strict liability, negligence, misrepresentation, and fraud. Id., at 1285.

The Mississippi Supreme Court rejected the builder's argument that the estoppel exception bound the non-signatory children to the arbitration agreement between the builder and the children's parents. The Court recognized that "[i]n the arbitration context, equitable estoppel prevents a party from embracing the benefits of a contract while simultaneously trying to avoid its burdens." Simmons, 36 So.3d at 1287. The Court concluded that equitable estoppel could not apply, however because there was no evidence that the builder detrimentally relied on any representations or conduct of the non-signatory children. Simmons, 36 So.3d at 1288. The same is true here. Quadrant does not and cannot demonstrate that it relied to its detriment on any conduct or representations of the non-signatory Children that would trigger the equitable estoppel exception.

The Simmons Court also concluded that the children's claims were not based solely on the contract. Id., at 1288. The Court observed,

the Shelton children's claims are not based solely on the retail installment contract. Their claims include strict liability, negligence, and breach of warranties under the Uniform Commercial Code. Such claims are not dependent on the terms of the contract.

Simmons, 36 So.3d at 1288.

In reaching its conclusion, Simmons looked to the Fifth Circuit Court of Appeals' decision in Fleetwood Enterprises, Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002). In that case, homebuyers and their children sued the home manufacturer alleging strict liability claims for defective design and manufacture of the home; negligence in the design, manufacture, financing, and marketing of the home; fraud due to concealment of known dangers and misrepresentations about habitability; negligent misrepresentation about the home that caused injuries; and various other negligence theories. Id., at 1072. The Fifth Circuit Court of Appeals held that the non-signatory children could not be compelled to arbitrate their claim where they were not attempting to enforce the contract between their parents and the builder:

There is no reason to think that the Texas Supreme Court would adopt a rule requiring non-signatory children to arbitrate on the basis of their parents' arbitration agreement in the absence of third-party beneficiary status or an attempt by the child to enforce the contract. . . . [O]ther jurisdictions that have addressed the question of when non-signatories are bound have only gone a little further than Texas, holding that there are five theories under common law principles of contract and agency law that provide a basis for binding nonsignatories to arbitration agreements: 1) incorporation

by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel. None of these theories would require children to arbitrate simply because they are minors and their claims are related to those of their parents. . . . In sum, because the Gaskamp children are not signatories to the sales contract, are not third-party beneficiaries of the agreement or contract, and are not suing on the basis of the contract, they are not bound by the arbitration agreement signed by their parents.

Gaskamp, 280 F.3d at 1076-77 (quotation marks and citations omitted)

The Simmons and Gaskamp decisions are instructive. The Children's personal injury claims here similarly do not arise because their parents contracted to purchase Quadrant-built homes. They are not based on the PSAs. They arise from Quadrant's negligence in designing and building its homes, failing to warn of and disclose known problems and dangers, and failing to investigate and remediate. CP 759-60; 782-83. The Children's personal injury claims sound in tort—not contract. Id. The Children are not suing to enforce the terms of the PSAs, nor are they suing to enforce a contractual warranty. CP 744-64; 767-87. The cause of action asserted by Children does not rely on or seek to enforce any of the terms of the PSAs. Id. Under these circumstances, the non-signatory Children cannot be compelled to arbitrate under the equitable estoppel exception.

As noted by *amicus*, the Court of Appeals did not explain its determination that the PSAs were the source of Quadrant's duty of care. Nor did the Court of Appeals discuss or apply any of the few, limited

exceptions to the rule that non-signatories cannot be compelled to arbitrate. The Court of Appeals simply stated, “the source of the duty of care Quadrant owed the Homeowners and their children arises from the sale of the home” and therefore “[t]he claims relate to the PSA”. Decision at 17, 18.

This truncated analysis appears similar to that employed in Trimper v. Terminix Int’l Co., 82 F.Supp.2d 1 (N.D.N.Y.2000)—a case heavily-relied on by Quadrant. In Trimper, family members brought claims for bodily injury and property damage arising out of an alleged misapplication of pesticides by an exterminator. The father had contracted with Terminix to apply the pesticide and the agreement provided that any subsequent dispute would be submitted to arbitration. Plaintiffs included children who did not sign the agreement. Finding that that the children’s claims were “derivative of and closely related to” those asserted by their father, the Court determined that the non-signatory children could be compelled to arbitrate their claims. Trimper, 82 F.supp.2d at 5.

The Trimper decision did not discuss the causes of action asserted by the family and is therefore not particularly helpful. The Court’s analysis, however, suggests that the homeowners alleged that Terminix failed to apply the pesticide in the manner called for under the terms of the contract. Trimper, 82 F.supp.2d at 5. Here, neither the Children nor the

Homeowners allege a duty of care arising from the terms of the PSAs. CP 3-27; 744-64; 767-87.

Trimper not only lacks reasoned legal analysis, it is also contrary to the weight of authority declining to bind non-signatories to arbitration. Trimper (and the Court of Appeals Decision) turn on an alternative formulation of the estoppel exception commonly referred to as the “intertwined claims” theory:

Intertwining is where non-arbitrable claims are considered so intimately founded in and closely related to claims that are subject to the arbitration agreement that the party opposing arbitration is equitably estopped to deny the arbitrability of the related claims.

Edwards v. Costner, 979 So.2d 757 (Ala. 2007) (internal quotation marks omitted). But the “intertwined claims” theory of estoppel is not applicable where a signatory attempts to bind a non-signatory to an arbitration agreement:

This exception is applicable when a nonsignatory to the arbitration agreement attempts to claim the benefit of the arbitration agreement and to compel a signatory to arbitrate claims involving the signatory and nonsignatory. It is not applicable, however, when a signatory attempts to compel a nonsignatory third party to arbitrate claims it may have against a signatory.

...

[T]his argument skips over the critical and essential element of estoppel as the basis for the theory of intertwining. Here, [the nonsignatory] has never agreed to arbitrate anything and, therefore, it is not estopped from avoiding arbitration.

Edwards, 979 So.2d at 764 (quoting Ex parte Tony's Towing, Inc., 825 So.2d 96, 97 (Ala. 2002) (internal citations omitted and emphasis added)).

As the Alabama Supreme Court explained in Edwards, federal appellate courts confirm the narrow application of the intertwining theory of estoppel to circumstances in which a non-signatory seeks to bind a signatory to its own arbitration agreement:

With reference to the second theory of equitable estoppel, appellants rely on a series of cases in which signatories were held to arbitrate related claims against parent companies who were not signatories to the arbitration clause. In each of these cases, a signatory was bound to arbitrate claims brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations.

...

Appellants recognize that these cases bind a signatory not a non-signatory to arbitration, but argue that this is a distinction without a difference. They are wrong.

...

Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so.

Edwards, 979 So.2d at 764-65 (emphasis in original) (quoting E.I. DuPont de Nemours & Co. v. Rone Poulenc Fiber & Resin Intermediaries, S.A.S., 269 F.3d 187, 201-02 (3d Cir. 2001) (quoting Thompson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995))).

Emphasizing that “the duty to arbitrate is a contractual obligation and that a party cannot be required to submit to arbitration any dispute that he did not agree to submit”, Edwards concluded that a passenger injured in a car collision when the brakes failed could not be bound to arbitrate his personal injury claims pursuant to the purchase and sale agreement between the dealership and the car’s owner: “[w]e cannot compel Costner to arbitrate his claims against Edwards and Edwards Motors ‘without rewriting or, indeed, creating a contract calling for arbitration where none exists.’” Edwards, 979 So.2d at 765 (quoting Ex parte Tony’s Towing, Inc., 825 So.2d at 99).

The same analysis applies here. The Decision improperly compelled the non-signatory Children to arbitrate their claims where no such agreement exists between the Children and Quadrant. The Court of Appeals misapplied the estoppel exception, which does not operate to bind non-signatories where no such agreement has been reached, and the Decision should be reversed.

B. Procedural Unconscionability Alone Invalidates an Agreement Under Washington Law.

The Homeowners agree with *amicus* that procedural unconscionability alone may invalidate an agreement under Washington law. As the Homeowners argued in the Court of Appeals, Washington law

has long recognized both procedural and substantive unconscionability as distinct defenses to the validity and enforceability of contracts. Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 303 (2004). Consequently, either form of unconscionability alone is sufficient to invalidate an agreement to arbitrate. As this Court explained in Zuver,

We have not explicitly addressed whether a party challenging a contract must show both substantive and procedural unconscionability. Our decisions in Nelson and Schroeder, however, analyze procedural and substantive unconscionability separately without suggesting that courts must find both to render a contract void.

Zuver, 153 Wn.2d at 303 n. 4. As the Zuver Court also observed, decisions of both this Court and federal courts applying Washington law hold that a party may establish unconscionability on either procedural or substantive grounds. Zuver, 153 Wn.2d at 303 n. 4.¹

The Decision of the Court of Appeals correctly rejected the assertion that procedural unconscionability alone is insufficient to invalidate an agreement. This Court should do the same in order to clarify

¹ Citing Luna v. Household Fin. Corp. III., 236 F.Supp.2d 1166, 1173 (W.D. Wash. 2002) (“under Washington law a contract may be invalidated on procedural unconscionability or substantive unconscionability grounds”) and Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 898 (2001) (party seeking to avoid enforcement of an arbitration agreement on grounds of procedural unconscionability only).

the law of this State and to give effect to the distinct doctrine of procedural unconscionability.

C. The Court Can and Should Consider Evidence of Contract Formation In Determining a Procedural Unconscionability Challenge to an Arbitration Clause.

The Homeowners agree with *amicus* that the determination of whether a procedural unconscionability challenge relates to an arbitration clause or the contract containing it requires a case-by-case analysis of the record. The Homeowners respectfully submit that in making this determination, the Court should base its analysis on consideration of the nature of the challenge to the arbitration clause and the context in which it is made.

Here, the Homeowners offered specific evidence relating to the arbitration clauses which was neither discussed nor analyzed by the Court of Appeals. See Decision at 14-15². This included testimony that Quadrant failed to identify or discuss the arbitration clauses within the PSAs or misrepresented the significant effect of the clause:

- I have no recollection of Quadrant's representative ever discussing or explaining the terms of the purchase and sale agreement with us. Specifically, I have no recollection that Quadrant ever even identified the arbitration provision. Had Quadrant identified

² The Court of Appeals erroneously stated that "[t]he only facts relating specifically to the arbitration clause are that it was a boilerplate provision and could not be deleted from the agreement." Decision at 15. This is contrary to the evidentiary record.

this provision, I would have demanded to know why it was included in the agreement if Quadrant was promising that it fixed the problems in Quadrant homes. [CP 140 (emphasis added)]

- “When Quadrant presented us with its purchase and sale agreement, no arbitration clause was ever mentioned.” [CP 674]
- “The arbitration clause of the purchase and sale agreement was never mentioned by Quadrant.” [CP 680]
- “Specifically, we were told that the arbitration clause was “standard stuff” and “just part of the process”. [CP 134]

The Homeowners further testified that they asked Quadrant about prior lawsuits and defect claims and were given false or misleading information. They further testified that they specifically would not have agreed to an arbitration clause if they had been told the truth:

- We asked Quadrant for an explanation of the lawsuits and what had happened. . . . Quadrant’s representative told us . . . that the cases were about a problem with one of Quadrant’s subcontractors but that Quadrant had fixed the problem and resolved it. . . .Had we known that mold and excessive moisture had been investigation [sic] and found in hundreds of Quadrant homes, that Quadrant’s defective construction of homes was not limited to the few that resulted in the previous litigation, and the construction process had not been fixed or changed to prevent continued defects, we would have never have signed-up to wait for a Quadrant home **let alone to enter a purchase and sale agreement to buy a Quadrant home that contained an arbitration clause.** [CP 132-33 (emphasis added)]
- I asked Quadrant for an explanation about the lawsuits. We were told by Quadrant that the problems had been fixed and that they would not happen again in other Quadrant homes. . . . Had we known that mold and excessive moisture had been investigated and found in hundreds of Quadrant homes, that Quadrant’s defective

construction of homes was not limited to the few that resulted in the previous litigation and the construction process had not been fixed or changed to prevent continued defects, **I would have never agreed to the terms of the purchase and sale agreement (including the arbitration clause).** [CP 139 (emphasis added)]

Two Homeowners testified that Quadrant withheld material information about the known problems with its homes—an omission which bore directly on whether the Homeowners would have agreed to any contract containing an arbitration clause:

- During these discussions, Quadrant emphasized repeatedly that it builds quality homes that are healthy and safe for habitation by families. . . . Based on Quadrant's representations, I believed that Quadrant homes were built soundly and without widespread defects and that our home would be built without such defects. . . . **Had we known that harmful particulate matter, mold and excessive moisture had been investigated and found in many Quadrant homes we would never have agreed to purchase a Quadrant home, let alone enter a purchase and sale agreement to buy a Quadrant home that contained an arbitration clause.** [CP 673-74 (emphasis added)]
- During our conversations and interactions with Quadrant and its representatives, they concealed and failed to disclose to us that the company had investigated hundreds of Quadrant homes for excessive moisture and mold Based on Quadrant's representations, I believed that Quadrant homes were built soundly and without widespread defects and that our home would be built without such defects. . . . **Had we known that mold and excessive moisture had been investigated and found in hundreds of Quadrant homes, that Quadrant's defective construction of homes was not limited to the few that had resulted in litigation, and that the construction process had not been fixed or changed to prevent continued defects, we would never have decided to buy a Quadrant home much less enter a purchase and sale agreement that contained an arbitration clause.** [CP 679-80 (emphasis added)]

The record also contains significant evidence regarding the questionable circumstances surrounding the formation of the PSAs containing the arbitration provisions. Courts properly consider evidence of formation of the PSAs in determining whether a party had a meaningful choice in assenting to an integrated arbitration clause. The well-reasoned decisions of this Court and other courts establish that such evidence is to be considered by the judiciary.

The Ninth Circuit employed the proper analysis in its *en banc* decision in Nagrampa v. MailCoups, Inc., 469 F.3d 1257 (9th Cir. 2006). The Court explained that the relevant inquiry is whether “the crux of the complaint” challenges the validity or enforceability of the agreement containing an arbitration provision or the provision itself. Nagrampa, 469 F.3d at 1263-64 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).

Based on an examination of the claims and the context in which the procedural unconscionability challenge was brought, the Ninth Circuit concluded that Nagrampa’s challenge to the arbitration clause was for the court to determine, even if substantive state law requires an examination of the making of the entire contract as part of that analysis:

[T]he crux of Nagrampa's complaint is a challenge to the arbitration provision itself. When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA. The federal courts cannot shirk their statutory obligation to do so simply because controlling substantive state law requires the court to consider, in the course of analyzing the validity of the arbitration provision, the circumstances surrounding the making of the entire agreement.

...

Where, as here, there is no claim to invalidate the entire agreement, federal courts must decide claims attacking the validity of the arbitration provision, even if substantive state law requires an examination of the making of the entire contract as part of that analysis.

Nagrampa, 469 F.3d at 1264, 1271.

Determining the "crux of the complaint", according to the Ninth Circuit, requires an analysis of the precise nature of Nagrampa's claims, her challenge to the arbitration clause, and the context in which they arose. The Court emphasized that Nagrampa asserted causes of action that specifically and exclusively challenged the validity of the arbitration provision alone and that she did not assert that the entire agreement was unconscionable or invalid and did not seek any form of relief from the agreement as a whole. Nagrampa, 469 F.3d at 1264, 1270. The Ninth Circuit also examined the context giving rise to Nagrampa's challenge to the arbitration clause, noting that "the genesis of Nagrampa's complaint can be found in the arbitration proceedings" because she brought her

lawsuit in response to the defendant's efforts to compel arbitration in a manner she believed to be improper. Nagrampa, 469 F.3d at 1271.

The same holds true here. Like Nagrampa, the Homeowners also assert a cause of action specifically challenging the arbitration provisions of the PSAs alone. CP 26; 763; 786 (alleging “[t]he arbitration clause is invalid, unconscionable, and unenforceable”). The Homeowners do not allege or seek invalidation of the PSAs themselves.³ In direct response to Quadrant's motion to compel arbitration, the Homeowners argued that arbitration provisions themselves (not the PSAs) are procedurally unconscionable—the Homeowners did not seek to invalidate the PSAs as a whole. CP 83; 87-90; 122-26; 691-96; 711.

The Homeowners supported their procedural unconscionability challenge to the arbitration provisions with specific evidence related to the arbitration clauses and evidence of the questionable circumstances surrounding the formation of the PSAs—evidence that directly bears upon whether the Homeowners had a meaningful choice to agree to arbitration.

³ The Homeowners' complaints include a cause of action for “rescission”, but these claims do not assert that the PSAs should be rescinded based on invalidity or unenforceability of the agreements themselves and do not relate to the Homeowners' unconscionability challenge. These claims are alternative requests for rescission of the sales of the affected homes in the event that no amount of remediation or repair can provide an adequate remedy. CP 24-25; 761-62; 784-85.

CP 132-33; 139-40; 673-74; 679-80. This evidence, which was not considered by the Court of Appeals, included

- Testimony that Quadrant instructed the Homeowners the terms of the PSAs were “not negotiable” and that they had to agree to all of the terms [including the arbitration provision] in order to purchase a Quadrant home. CP 133-34; 140; 674; 680-81.
- Testimony that when Homeowners asked about the provisions of the PSAs, Quadrant stated they were simply “standard” and “boilerplate”. CP 133-34; 674; 680.
- Testimony that Homeowners were denied the opportunity to read, review, and question the terms of the PSAs [including the arbitration provision] before signing them. CP 133-34; 140; 674-75; 680-81.
- Testimony that Homeowners were only shown an electronic version of the PSA displayed on a computer screen at the Quadrant representatives’ desks and were not given a hard copy to read, ask questions about, mark-up, or take for review. CP 132-33; 140.
- Testimony that Quadrant’s sales representatives failed to discuss the terms and provisions of the PSAs. CP 140.
- Testimony that the Homeowners were subjected to high pressure sales tactics, including being instructed that they had to agree immediately (during the initial sales appointment) to purchase a home on Quadrant’s terms [CP 133-34; 140; 673-74; 680-81] and that if they did not agree, they would lose the chance to purchase a home altogether. CP 133; 674; 681.
- Testimony that Quadrant “created a sense of extreme urgency and rushed us through the execution [of the PSA] process” and informed a Homeowner that if she “hesitated” to agree to all of the terms of the PSA during the initial sales appointment, Quadrant would bump her to the end of the sales list and raise the price of the home by \$5,000 to \$10,000. CP 674.
- Testimony that “Quadrant’s representative explained that if we did not sign a purchase and sale agreement that day, she expected that

Quadrant would increase the purchase price of the home a minimum of \$5,000 each month that we waited.” CP 134.

- Testimony that the Homeowners were not provided with copies of the PSAs even after being pressured to execute them. CP 134; 674; 681. In one instance, the Homeowners did not receive a copy of the signed agreement until 11 days after executing it. CP 134.

Because the Homeowners challenged only the arbitration provisions contained within their PSAs, all of the testimony offered in opposition to Quadrant’s motion to compel arbitration is properly considered by a court—even if some of the evidence would also be relevant to issues surrounding the formation of the PSAs generally.

The decisions of this Court are consistent with Nagrampa. See Homeowners’ Supplemental Brief at pp. 11-13 (discussing McKee v. AT&T Corp., 164 Wn.2d 372, 394 (2008) (analyzing evidence that McKee was not given a copy of the agreement containing the challenged arbitration provision, was not allowed to review it or agree to its terms, or acknowledge his acceptance) and Satomi Owners Association v. Satomi, LLC, 167 Wn.2d 781 (2009) (considering evidence that arbitration clause was contained within a larger contract of adhesion to determine whether the arbitration clause was procedurally unconscionable)).

McKee and Satomi illustrate that where there is a discrete challenge to an integrated arbitration provision, a court should evaluate all of the evidence, even if a portion of that evidence would also be relevant

to issues of contract formation, in determining whether the agreement to arbitrate is procedurally unconscionable. This approach is consistent with RCW 7.04A.060 and the Prima Paint / Buckeye analysis because it limits judicial consideration of procedural unconscionability challenges to the agreement to arbitrate rather than the contract as a whole. This approach also gives proper effect to Washington's substantive law of procedural unconscionability, which requires a court to consider the facts and circumstances surrounding the transaction to determine if there has been impropriety in the formation of the alleged agreement to arbitrate. McKee, 164 Wn.2d at 401-02; Satomi, 167 Wn.2d at 814.

The truncated analysis performed by the Court of Appeals operates to immunize integrated arbitration clauses from proper judicial review by removing important and necessary evidence of procedural unconscionability from judicial consideration. This Court should confirm that Washington law allows and requires a court to consider evidence surrounding formation of a contract containing an arbitration clause when a party seeks to invalidate that clause alone on grounds of procedural unconscionability.

III. CONCLUSION

For all of the reasons set forth above, the Homeowners and the Children respectfully request that this Court reverse the Decision and

remand for jury trial.

Respectfully submitted this 6th day of May, 2011.

LYBECK MURPHY, LLP

By: _____/s/ Brian C. Armstrong_____
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PROOF OF SERVICE

I, Brian C. Armstrong, declare that on May 6, 2011, I caused to be filed with the clerk of the Supreme Court, the foregoing PETITIONERS' ANSWER TO AMICUS BRIEF OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION via email (and copied to counsel of record listed below via email). I also served a copy of the same on counsel of record by email and hand delivery on the date set forth above.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Mercer Island, Washington, this 6th day of May,
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Rec. 5-6-11

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From: Brian Armstrong [<mailto:bca@lybeckmurphy.com>]
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Cc: mrs@hcmp.com; amicuswsajf@wsajf.ORG
Subject: No. 84422-4: Donia Townsend et al. v. The Quadrant Corp., et al. - Petitioners' Answer to Brief of Amicus

Dear Clerk:

Attached for filing is a copy of Petitioners' Answer to the *Amicus* Brief of the WSAJ Foundation in the above-referenced matter.

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Very truly yours,

Brian C. Armstrong (WSBA# 31974)
Counsel for Petitioners

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