

No. 74806-8-I

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

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

Plaintiffs – Appellants,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation;  
FRANCISCAN HEALTH SYSTEM, a Washington Corporation;  
FRANCISCAN HEALTH VENTURES, a Washington Corporation;  
FRANCISCAN NORTHWEST PHYSICIANS HEALTH NETWORK,  
LLC, a Washington Corporation; and CATHOLIC HEALTH  
INITIATIVES, a Colorado Corporation,

Defendants – Respondents.

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APPELLANTS' BRIEF

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## I. INTRODUCTION

This case is back in front of the Court of Appeals (COA) for the second time. It is here based on the pretext that the arbitration agreement does not allow for class arbitration and joinder, issues Defendants did not raise until after the COA issued a Mandate. Indeed, Defendants repeatedly argued the opposite in numerous pleadings. The Commissioner granted Appellants' (hereinafter Plaintiffs) Motion for Discretionary Review finding that the Superior Court committed "probable error" by deciding an issue contractually delegated to an arbitrator. The Commissioner also ruled that Defendants' failure to challenge class arbitration and joinder, and their affirmative representations to Plaintiffs and the courts that class claims could be arbitrated, should be reviewed for whether Defendants waived or should be equitably estopped from demanding individual arbitration.

### *Appendix 1.*

Defendants' actions, words, and the Arbitration Agreement itself all prove that joinder and class arbitration was contractually agreed to by the parties. Indeed, it has been nearly three years since Plaintiffs initiated litigation on behalf of themselves and a putative class. Plaintiffs filed "Plaintiffs' Class Action Complaint" on November 13, 2013 after Defendants fired Dr. Michael Romney and Dr. Faron Bauer for demanding wages due to healthcare providers negotiated under their contracts. CP 1-11. Defendants failed to pay wages contractually due to them and hundreds of

health care providers. Class claims have always been a central part of this case.

Instead of challenging class arbitration at the Superior Court, the Court of Appeals (COA), or the Washington Supreme Court, Defendants did exactly the opposite. For over two years Defendants represented that Plaintiffs' claims could remain consolidated and that class claims could be arbitrated under the Arbitration Agreements. They declared repeatedly in numerous pleadings that an arbitrator had the power to certify a class; a power only available when arbitration clauses allow class arbitration; they did so at least 16 times in signed pleadings.

Defendants' attempt to change their position on class arbitration is prohibited by estoppel and waiver. Defendants' conduct continues to cause substantial delay and extreme prejudice to Plaintiffs and the putative class (by extinguishing it). It also forces Mrs. Romney, now widowed, and the other Plaintiffs to arbitrate each of their cases separately in individual arbitration, an absurd result that exponentially raises the costs and risks inconsistent rulings given the substantial overlap in evidence. The Superior Court's order also severs Plaintiffs claims, an issue never raised until after the COA issued its Mandate, one that required arbitration of Plaintiffs' case as pleaded. The Plaintiffs have been denied their right to a just, speedy, and inexpensive resolution guaranteed by Civil Rule 1, and the public policy in Washington favoring arbitration.

Washington law similarly precludes piecemeal litigation which is why all challenges to arbitration must be made in the trial court or on first

review, and why motions (including cross-motions) must include all requests for relief as required by CR 7(b)(1). Equity, through waiver and estoppel, prevents Defendants from changing their position now. The Court must use its equitable powers to remedy Defendants' duplicitous conduct and find that Defendants are equitably estopped and have waived any challenge to class arbitration and consolidated arbitration.

Importantly, Defendants prior statements admitting the arbitrator can certify a class action further reflect that the parties contractually consented to bringing class claims in arbitration. The Arbitration Agreements contain no class action waiver despite explicitly excluding other claims from arbitration. They permit non-parties to the agreement to be bound, as the COA has already ruled. And they are not "silent" as that term was used by the U.S. Supreme Court in *Stolt-Nielsen v. AnimalFeeds*, where parties actually stipulated that their arbitration clause was silent. 559 U.S. 662, 130 S. Ct. 1758 (2010).

The Superior Court erred when it interpreted the arbitration agreements after receiving the COA's mandate. The language contained in the Arbitration Agreements delegate the task of interpreting it, like whether or not class arbitration and joinder can go forward, to the arbitrator. It was legal error for the Superior Court to usurp the arbitrator's duty and make this decision here. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 871 (2009). When the COA found the Arbitration Agreements enforceable, the Superior Court's task was ministerial: compel Plaintiffs' entire class

complaint, as pled, to arbitration, and make no further inquiry. By failing to do so, the Superior Court exceeded the scope of the Mandate. RAP 12.9.

Plaintiffs respectfully ask this Court to reverse the Superior Court and hold that waiver and estoppel prevent Defendants from challenging joinder and the ability to move to certify class claims in arbitration under the Arbitration Agreements. An arbitrator must be permitted to rule on class certification, just as the parties agreed and as Defendants' stated it has the power to do.

## II. ASSIGNMENTS OF ERROR

Appellants Cindius Romney as Personal Representative of the Estate of Dr. Michael Romney, Dr. Faron Bauer, and Dr. Kristen Childress, on behalf of themselves and putative class members, appeal the Order of the Superior Court requiring Plaintiffs to “submit to **individual** arbitration and to arbitrate, **separately**, their claims.” CP 1503.

Plaintiffs assign error to (1) the Superior Court failing to rule that Defendants' waived and are equitably estopped from challenging class arbitration and consolidated claims when they acted inconsistently and duplicitously by stating at least 16 times in signed pleadings that the Arbitration Agreements gave the arbitrator the power to certify a class and then two years later change positions to assert that the Arbitration Agreements do not permit class arbitration; (2) the Superior Court ignoring established WA law by usurping the contractually delegated duty of the arbitrator to interpret the Arbitration Agreement contracts to determine

whether they allow for class claims and whether severing the claims is appropriate; (3) the Superior Court exceeding the Mandate of the COA by failing to compel Plaintiffs' entire consolidated complaint with class claims to arbitration and instead procedurally extinguishing the claims of the putative class.

### **III. STATEMENT OF THE CASE**

#### **A. History of the Case Over More Than Two Years of Litigation.**

For the second time this case is now before the Court of Appeals.

For over two years the parties litigated gateway issues related to the validity and enforceability of the Arbitration Agreements. Plaintiffs filed "Plaintiffs' Class Action Complaint" on November 13, 2013, after Defendants fired Dr. Michael Romney and Dr. Faron Bauer for reporting a physician at their clinic who was physically harming patients, and for demanding wages due to healthcare providers negotiated under their contracts. CP 1-11. Both doctors filed a single class complaint, along with co-Plaintiff and co-class representative, Dr. Kristen Childress, for wage violations on behalf of hundreds of Washington physicians, physician's assistants, advanced nurse practitioners, and nurse midwives. *Id.*

Before Plaintiffs filed their class action complaint, and prior to the Supreme Court decision in *Hill v. Garda CL Northwest Inc.*, 179 Wn.2d 47 (2013), which prompted Plaintiffs to move to invalidate the Arbitration Agreements, the parties had been in discussions to begin arbitration of all claims before a single arbitrator. CP 1540-1550. On July 22, 2013, Plaintiffs

sent a single arbitration demand letter to arbitrate Dr. Romney and Dr. Bauer's claims together in one arbitral proceeding. CP 1526. Defendants were agreeable to this and never indicated or argued that the arbitrations must be individual and separate. CP 1540-1550.

Defendants took no action that would have lead Plaintiffs or the COA to believe that Defendants had any issue with the cases proceeding as pled, and never raised severing the claims. All three Plaintiffs worked in the same clinic, and witnessed the same conduct regarding patient harm and wage violations. CP 38-42, 74-78, 110-113. Each will need to testify for each other, and when Plaintiffs argued this Defendants never raised the issue of severing these claims. Discovery occurred in this case during the appeal under one caption and in one action, and Defendants had no objection to that occurring. Defendants admitted the overlap in facts by arguing that Dr. Bauer could testify as a class representative in lieu of Dr. Romney who was terminally ill, when opposing discovery and lifting the stay. *See infra*. CP 666-678.

On November 15, 2013, Plaintiffs filed a Motion to Void the Arbitration Agreements as unconscionable. CP 12-37. Defendants then filed their own **cross-motion** to compel arbitration on December 23, 2013. CP 169-189. Defendants' cross-motion acknowledged that Plaintiffs were bringing class claims. CP 174. The cross-motion asked the court to "compel Plaintiffs to bring their claims in arbitration" (without excluding class claims). CP 180. The cross-motion never challenged Plaintiffs' ability to bring class claims in arbitration, and Defendants did not move the court to

compel individual or separate arbitrations. CP 169-189. Defendants argued in their reply that “Plaintiffs are bound to arbitrate employment-related claims **such as those brought here.**” CP 235. Plaintiffs’ claims included employment related class claims.

The Superior Court found the Arbitration Agreements unconscionable, void, and unenforceable. CP 255-258. Defendants appealed to this court on March 3, 2014, but did not raise issues related to severance or class arbitrations. CP 554-563.

While the case was pending before the COA, lead Plaintiff and class representative Dr. Michael Romney was diagnosed with terminal cancer. CP 585. To give him an opportunity to participate in the case and in discovery before his death, Plaintiffs successfully moved the COA to lift the stay in the case, and moved the Superior Court to compel discovery, including class discovery. CP 564-576. Dr. Romney passed away and his widow Cindius Romney is pursuing his claims on behalf of his estate. CP 1213. The Order of the Superior Court would force her to arbitrate these claims alone in a separate arbitral proceeding without co-Plaintiffs Drs. Bauer and Childress.

Plaintiffs argued that class discovery was essential and should not be delayed because “[t]he needed [class] discovery must occur regardless of the forum in which this case proceeds (arbitral tribunal or court) and therefore will occur regardless of this Court’s decision on appeal.” CP 588. Defendants never disputed this. In fact, Defendants admitted numerous times in signed pleadings, that the arbitrator had the power to certify a class,

thereby admitting that the Arbitration Agreements permit class claims in arbitration. Defendants repeatedly admitted class arbitration could exist, and did so without a single reference to the newly minted claim that class arbitration and joinder of claims was precluded by the Arbitration Agreements. The following are just a few examples of Defendants' admissions with bracketed facts added for context and emphasis added:

- **Plaintiffs, however, have failed to demonstrate that putative class members would be harmed** in any way should class-related discovery occur after *these issues have been determined by either a court or an arbitrator*. CP 676.
- Should a class be **certified**, those class members would have access to all discovery related to...all claims under the wage statutes, as well as the opportunity to conduct class discovery *in the forum which ultimately presided over this matter*. CP 676;
- Additionally, if this Court orders full discovery and then **compels the parties to arbitration**, FMG may be forced to participate in discovery that is unnecessary for the arbitration, as **an arbitrator could decline to certify the putative class** or narrow other issues in the case. CP 611;
- [In addressing why Dr. Romney's death and as the lead class representative did not require him being able to participate in discovery, Defendant stated].[T]here is no indication that Dr. Bauer will be unable to pursue his individual claims or *proceed as a class representative once the forum is determined and a decision is made as to class certification*. CP 667;
- This court should consider all facts, including whether it is appropriate to allow class discovery when it is *still uncertain as to whether a court or an arbitrator will preside over this matter and whether a class will be certified*. CP 667;
- It is unclear as to *who will preside over this matter [court or arbitrator] and whether a class will be certified*[.] CP 667;

- It is undisputed, however, that **Dr. Bauer is healthy and will be available to assist in the prosecution of [Dr. Romney's] individual claims, and those of any class he may ultimately be allowed to represent, once *the proper forum [court or arbitration] for this matter is determined.*** CP 669-70;
- The discovery Plaintiffs seek is unduly burdensome and potentially unnecessary, as the putative class is not certified, **it is unlikely that Dr. Romney will proceed as a class representative if a class is certified, and Drs. Bauer and Childress remain adequate class representatives.** CP 673;
- Plaintiffs cannot establish that justice requires this Court to permit discovery regarding class claims ***when it is uncertain whether this Court or an arbitrator will determine whether a class exists,*** when no class has been certified, and when Dr. Bauer will be able ***to pursue his individual claims, as well as those of the putative class, once the question of forum is decided.*** CP 674;
- Here, good cause exists to enter a Protective Order because allowing discovery on class claims when it is still uncertain whether this matter will proceed in this court or in arbitration, where it is uncertain **whether a class will even be certified** (and even if one is, it is unlikely that Dr. Romney will be class representative given his medical condition) and where **Dr. Bauer will be able to pursue his individual claims and any class claims once the arbitration issue has been decided,** would be unduly burdensome, expensive, and unnecessary – especially if it is ultimately decided that this matter **should proceed in arbitration and/or that no class should be certified.** CP 675.

Despite aggressively opposing class discovery zealously to the point of arguing that Dr. Romney's cancer and impending death should not be a factor whatsoever, Defendants never claimed that the Arbitration Agreements' precluded class arbitrations or required Plaintiffs to arbitrate individually. Instead, Defendants represented that issues of class certification could be decided by an arbitrator, and that Dr. Bauer and Dr. Childress were adequate class representatives after Dr. Romney succumbed

to cancer. Ultimately, the Superior Court granted Plaintiffs' Motion to Compel discovery and the parties commenced the discovery process, including class discovery. CP 974-976.

While this issue was still on appeal, the parties scheduled a mediation to resolve both individual and class claims. At no point before the COA issued its Mandate did Defendants assert that they believed class claims were precluded.<sup>1</sup> Indeed, at no point in scheduling this mediation did Defendants or their representatives ever raise the issue of the Arbitration Agreements precluding class claims or severing the claims should arbitration go forward.

**B. The COA remanded the entire consolidated complaint, including class claims, to arbitration.**

On February 17, 2015, this Court issued an opinion reversing the decision of the Superior Court. CP 1167-1182. The COA's opinion remanded the entire case to the Superior Court "for an order compelling arbitration." CP 1182. The COA was clear in the opinion that Plaintiffs brought claims "on behalf of themselves and the class of physicians, medical assistants, and nurse practitioners." CP 1168. The COA did not place any limits on the scope of claims that could be brought in arbitration. Instead the COA compelled Plaintiffs entire complaint, as pleaded, to arbitration. CP 1165-1182.

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<sup>1</sup> "Scott, We would never have agreed to mediation if we were not interested in settling with plaintiffs **and the class.**" CP 1569 (emphasis added).

The case was briefed by both parties to the State Supreme Court which declined review on September 30, 2015. CP 1165. Again, Defendants never raised any issue with respect to class arbitrability or severance. The COA issued a Mandate on November 20, 2015 which used the boiler-plate language that “This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.” CP 1166. Thus, the Superior Court was mandated to compel Plaintiffs’ entire consolidated class complaint, to arbitration.

**C. Defendants Failed to Raise Issues Related to Class Arbitration Until After the COA Issued the Mandate.**

On December 14, 2015, before the Superior Court had an opportunity to comply with the Mandate and order arbitration of Plaintiffs’ entire complaint as pleaded, Defendants filed another motion to compel arbitration. For the first time, Defendants asked the Court to compel individual arbitration. CP 1183-1189. Defendants had never before argued to the Court that class claims could not be arbitrated, or that the named Plaintiffs should be severed and required to arbitrate individually. CP 1452. Defendants’ admitted this was so in their Reply in support of the Motion to Compel Individual Arbitration. *Id.* On January 8, 2016, the Superior Court granted Defendants’ new motion to compel individual arbitration. CP 1503-04. The Order, drafted by Defendants, stated that Plaintiffs must “submit to individual arbitration and to arbitrate, separately, their claims.” CP 1504.

Plaintiffs were blind-sided by the court's Order. Defendants' motion purported to ask the Superior Court to enforce the Mandate. Defendants' proposed order – which the trial judge signed without any changes or reasoning – appears to have been written strategically. It added the word “separately.” It goes so far as to require Plaintiffs, “to arbitrate, *separately*, their claims.” (emphasis added). Respondents' briefing was completely devoid of any arguments requesting the court to sever Plaintiffs' consolidated class complaint. CP 1183; 1451. In fact, the idea of “separate” arbitrations appears solely in its proposed order. CP 1503. Moreover, contrary to Defendants' untimely arguments that class arbitration is unavailable, which they waived and should be estopped from making, the Arbitration Agreements include language showing an agreement to arbitrated class claims.

Plaintiffs argued under Washington law that the Arbitration Agreement must be interpreted by the arbitrator, not the court. Plaintiffs moved for reconsideration, and for oral argument, after the case was transferred to a new judge. CP 1506-1519. After several weeks of delay, the original judge summarily denied Plaintiffs' motion for reconsideration and did not request additional briefing. CP 1616-1620.

**D. The Parties' Agreed to Arbitrate Class Claims, as Evidenced by the Arbitration Agreements and the Subsequent Acts and Conduct of the Parties.**

The parties here have broad, binding Arbitration Agreements, drafted by Defendants, where they agreed that,

All Claims between You and FMG, including all Claims You have against any employee of FMG and all claims any employee of FMG has against You, shall be exclusively decided by arbitration governed by the Federal Arbitration Act before ONE NEUTRAL ARIBTRATOR AND NOT BY A COURT OR A JURY.

Claims' means **all disputes arising out of or related to** the Employment Agreement, your employment by FMG, and/or your separation from employment with FMG. Claims' includes, but is not limited to, any claim arising under the Employment Agreement, under federal, state, or local law, under a statute such as Title VII of the Civil Rights Act of 1964, under a regulation or ordinance or under the common law, including but not limited to ANY CLAIM OF DISCRIMINATION, SEXUAL HARASSMENT, RETALIATION, NEGLIGENCE, UNPAID WAGES OR WRONGFUL DISCHARGE.

CP 63-64 (Dr. Romney), CP 99-100 (Dr. Bauer), CP 135-136 (Dr. Childress)<sup>2</sup> (emphasis added). The Arbitration Agreements do not contain a waiver of class claims. *Id.* Defendants did not exclude class claims but did explicitly exclude certain other claims from arbitration:

'Claims' does not include disputes related to worker's compensation claims or health benefits. 'Claims' also does not include, at the option of FMG, any claim by FMG against You based upon Your actions arising out of any claims against FMG by a third party brought in another legal proceedings, and as to which FMG desired to join its claim against You into that third party proceeding. 'Claims' also does not include claims that arise out of or are subject to matters covered by the FMG Peer Review Policy.

CP 63.

Arbitration under the contracts is governed by the American Arbitration Association's (AAA) National Rules for the Resolution of Employment Disputes. *Id.* The Arbitration Agreements also incorporate by

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<sup>2</sup> The Arbitration Addendums are substantively identical and for this brief will be referred to as the "Arbitration Agreements" and only Dr. Romney's will be cited to for reference.

reference the AAA Supplementary Rules for Class Arbitrations, which apply “where a party submits a dispute to arbitration on behalf of or against a class or purported class[.]” CP 1357. The Arbitration Agreements and the AAA Rules allow Plaintiffs to bring class claims in arbitration.

As such, Plaintiffs sought review of the Superior Court’s erroneous ruling requiring Plaintiffs’ claims to be arbitrated individually and separately. The Commissioner granted Discretionary Review under RAP 2.3(b)(2) finding the Superior Court committed probable error by ordering individual arbitration instead of leaving the issue to the arbitrator, and ruling that “review of the issue whether [Defendants’] waived or is equitably estopped from demanding individual arbitration is warranted.”

*Appendix 1.*

#### **IV. ARGUMENT**

This case must be arbitrated in the manner agreed to by the parties which includes the ability of Plaintiffs to bring class claims and to arbitrate their individual claims together in a single arbitral proceeding. Through Defendants’ conduct in this litigation and representations made to the courts and to Plaintiffs in this case, Defendants waived their ability to challenge class arbitration, and should be equitably estopped from making such arguments now. For over two years Defendants represented that class claims could be arbitrated. Had Defendants truly believed that the arbitration agreements precluded class arbitration and joinder, they

would have raised it. They did not because the Arbitration Agreements do not require Plaintiffs to arbitrate individually or preclude class arbitration. These experienced defense lawyers would have argued that had it been true. Equity, under both waiver and estoppel preclude them from doing it here. The Superior Court committed legal error when it ruled that Plaintiffs must arbitrate their claims individually and separately because controlling Washington law requires that an arbitrator review the Arbitration Agreements to determine whether class claims and joinder is permitted. Moreover, the Superior Court exceeded the scope of the mandate.

**A. The Standard Of Review Is De Novo On Orders Granting Or Denying Motions To Compel Arbitration.**

“Reviewing courts review a trial court's order granting a motion to compel or deny arbitration de novo.” *Satomi Owners Ass'n v. Satomi. LLC.*, 167 Wn.2d 781, 797, (2009) (citing *Adler v. Fred Lind Manor.*, 153 Wn.2d 331, 342, (2004)). “[A] person can be compelled to arbitrate a dispute only...in the manner in which, he has agreed to do so.” *Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199, 202 (1980).<sup>3</sup>

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<sup>3</sup> Although *Balfour* is a case where the court declined to compel consolidated arbitration, the present case is easily distinguishable because it involved three separate entities with two completely separate arbitration clauses each with different forum selection clauses in separate states and the claims did not arise out of the same transaction or occurrence. 93 Wn.2d 199. Here, the Arbitration Agreements are nearly identical and the claims are based on the same set of facts and are inherently inseparable. Indeed, all three plaintiffs worked in the same clinic and observed the same illegal conduct by Defendants.

Here, Plaintiffs all have virtually identical arbitration contracts and claims, and have brought their claims together, as they can as masters of their complaint. The COA ruled this was proper when it ordered the entire class complaint with multiple parties to arbitration. *Romney v. Franciscan Group*, 186 Wn. App. 728, 747 (2015) (“Where claims are based on the same set of facts and inherently inseparable, the court may order arbitration of claims against the party even if that party is not a party to the arbitration agreement.”). The Superior Court ignored *Romney*.

The actions giving rise to Plaintiffs’ claims all arise out of the same transaction or occurrence or series of transactions or occurrences and have the same nucleus of operative facts. Drs. Romney and Bauer were wrongfully terminated for demanding wages that were negotiated and owed to them and other health care providers, the putative class. Dr. Childress witnessed this same harm at the same clinic, and also was denied wages owed to her and others.

The class claims arise from the fact that Defendants failed to pay Plaintiffs and the putative class for time worked under the Employment Agreements. Defendants fired Dr. Romney and Dr. Bauer only days before a scheduled meeting before a committee to challenge the wrongful withholding of wages. CP 39-40, 75-76. Plaintiffs initiated this class action to vindicate the rights of hundreds of healthcare professionals who have been cheated out of wages owed by Defendants.

Defendants convinced the Superior Court to err and forever extinguish the rights of these punitive class members as this case has thus

far tolled the statute of limitations for them. They further extinguished the individual class members ability to pursue a consolidated case in arbitration against them in one forum. They did not bargain for this, since the Arbitration Agreement allows both.

**B. Defendants Waived The Ability To Challenge Class Arbitration By Failing To Raise It Prior To Remand After First Review By The Court Of Appeals, And This Court Should Find Litigation Waiver Here.**

The Superior Court committed legal error by ruling on an argument which Defendants' waived by (1) not asserting it timely, and (2) affirmatively stating the opposite to the trial and appellate courts multiple time, including representing that: "*an arbitrator could decline to certify the putative class.*" *Supra*. "Courts review the issue of waiver de novo, applying the legal test for waiver to the facts established in the trial court." *Hill v. Garda*, 169 Wn. App. at 690.

It is a legal truth that courts can decide issues of waiver in the arbitration context, and a party can waive its right to arbitrate by acting inconsistent with that right during litigation. *See River House Development Inc., v. Integrus Architecture*, 167 Wn. App. 221 (2012) (discussing application of waiver and equitable estoppel to questions of whether right to arbitration was waived by litigation conduct.). Thus, a party can waive a challenge against a type of arbitration, like class arbitration. The issue of waiver can be decided by the courts because it requires an analysis of Defendants' conduct and representations in litigation.

Under the doctrine of waiver, defenses will be considered to have been waived by a defendant as a matter of law if defendant's assertion of the defense is inconsistent with the defendant's previous behavior, or defendant's counsel has been dilatory in asserting the defense. *Lybbert*, 141 Wn.2d at 39 (citing, *Romjue v. Fairchild*, 60 Wn. App. 278, 281 (1991), and *Raymond v. Fleming*, 24 Wn. App. 112, 115 (1979)). Here, Defendants did not raise severance or question the arbitrability of class claims to the courts prior to the Mandate. Indeed, Defendants admitted in their post-Mandate reply brief to the trial court that they failed to raise issues relating to “separate” arbitrations (precluding consolidation of the claims in one arbitral proceeding), or any opposition to arbitration of class claims, until *after* the Mandate. CP 1452.

“The doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote the just, speedy, and inexpensive determination of every action.” *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 39 (2000) (citing to CR 1(1)). “If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised.” *Id.* The common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it including the Washington Supreme Court and all three divisions of the Washington Courts of Appeal. *Id.* at 38.

1. *Defendants Acted Inconsistently By Admitting That The Arbitrator Would Have The Power To Certify A Class Which Necessarily Means That Class Claims Could Be Brought In Arbitration.*

Defendants have admitted that they never raised a challenge to class arbitration prior this Court remanding the case after the Washington Supreme Court declined to accept review. CP 1452. It is indisputable that Defendants were aware that Plaintiffs were bringing class claims when Plaintiffs' filed their Class Action Complaint on November 13, 2013. Defendants did not raise a challenge to class arbitration until December 14, 2015. Nor did they ever argue that the claims needed to be arbitrated separately before that date.

On December 23, 2013, Defendants filed their Motion to Compel Arbitration, asking the court to compel Plaintiffs' entire class complaint to arbitration. Not only did Defendants fail to challenge class claims in their motion to compel arbitration, for the next two years they represented and acted consistent with the agreement's language and the intent of the parties to arbitrate class claims and proceed collectively in a single forum. From Defendants litigation strategy and representations to the trial court, the COA, and Supreme Court, their intent that class claims could be arbitrated under the Arbitration Agreement is clear.

This is most evident when focusing on Defendants' opposition to Plaintiffs attempt to commence with class discovery while this case was pending before the Court of Appeals the first time and Plaintiffs moved to begin discovery, including class discovery. *Supra*. In their opposition,

Defendants admitted numerous times that class claims could exist in arbitration and be certified by the arbitrator.

In addition, one argument Defendants make is that class arbitration cannot occur because other class members are not parties to Plaintiffs' Arbitration Agreements; that they are between "You and FMG". Answer to Motion for Discretionary Review at 15. This is in direct contradiction to Defendants' argument to the COA on first review, when they specifically argued that non-signatory parties to the Arbitration Agreements could enforce and participate in any arbitration. CP 1447. Defendants want their non-signatory parties to be allowed to participate in arbitration but ask the court to bar class members' participation because they are non-signatory parties to the Arbitration Agreements. This is blatantly contradictory and further demonstrates Defendants' waiver.

As one of the largest healthcare providers in the nation with experienced counsel, Defendants would have said class arbitration was precluded if that were true. It would have been their most powerful argument against class discovery. Instead, they asserted precisely the opposite. As the saying goes, actions speak louder than words. The Arbitration Agreements contain an agreement to arbitrate class claims, and Defendants agreed.

By failing to challenge class claims at the trial court or on first review, and affirmatively representing at least 16 times that class arbitration could exist, Defendants waived the ability to dispute that the Arbitration Agreements include an agreement to arbitrate class claims.

Equity demands that Defendants must be prevented from changing their position now at this late stage of litigation to gain a tactical advantage which would severely prejudice Plaintiffs.

2. *Defendants Delay Is Also Evidence Of Waiver.*

The waiver doctrine “is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage.” *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). Defendants cannot raise a new issue challenging a manner of arbitration on remand. “Washington courts do not permit a party to ignore an issue on the first appeal only to raise the issue on remand when it becomes apparent the initially ignored issue is critical to the party’s case.” *State v. Ramos*, 163 Wn.2d 654, 663, 184 P.3d 1256 (2008). “Parties cannot use the accident of remand as an opportunity to reopen waived issues.” *State v. Fort*, 190 Wn. App. 202, 228-29, 360 P.3d 820 (2015) (finding that Defendant waived his constitutional right to a public trial by failing to raise the issue in his first appeal). A party must raise objections to arbitration in the trial court or on first review or risk having waived the issue. *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54 (2013) (citing *Zuver*, 153 Wn.2d at 312 (declining to hear *Zuver*’s challenges to arbitration that were not raised below or in a motion for discretionary review)).

Defendants had every incentive and opportunity to challenge class claims or request severance, but they did not. If Defendants truly believed

what they are now asserting, that class claims cannot be arbitrated under the contracts, they were required to raise that in the first Cross-Motion to Compel Arbitration filed on December 23, 2013. Motions “shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” CR 7(b)(1).

The relief sought by Defendants in their cross-motion was to simply, “compel Plaintiffs to bring their claims in arbitration.” CP 180. It is undisputed this was a class action complaint with consolidated claims. As they further represented in signed pleadings, “Plaintiffs are bound to arbitrate employment-related claims *such as those brought here[.]*” CP 235 (*emphasis added*). The “employment-related claims brought here” included the claims of putative class members **specifically pled**.

The COA granted Defendants’ requested relief, and directed the Trial Court to order it. On remand, Defendants impermissibly made a second motion to compel arbitration with new arguments that could have been raised more than two years earlier. Defendants had every incentive and reason to raise them had these arguments been true. Defendants’ failure to do so is waiver. This quite simply precludes the Superior Court from revisiting these issues on remand.

The law does not require explicit rejection of an issue for waiver to apply. A party need not declare “I waive these arguments,” as Defendants have argued for a court to find a party has committed waiver.<sup>4</sup> In *River*

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<sup>4</sup> In *State v. Fort* the court found that Defendant waived his constitutional right to a public trial even under a heightened standard that does not exist here. The same

*House Development Inc., v. Integrus Architecture*, 167 Wn. App. 221, 239 (2012) the Washington Supreme Court found waiver purely by the parties' conduct. It held 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." The law treats strategic choices by a party – such as what issues to address and course of action to pursue – as intentional acts. As such, not addressing class arbitration or severance prior to remand is deemed by law as an intentional act by Defendants. Acting as though there was an agreement to arbitrate class claims was also an intentional act and results in waiver.

Defendants filed their cross-motion to compel arbitration, their appeal, and other pleadings omitting any arguments against class arbitration or for severance. They have acted inconsistently and were dilatory in asserting that class claims could not be arbitrated. Thus, Defendants have waived any argument that the Arbitration Agreements prohibit class claims or requires that the claim be arbitrated separately.

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was true in *Central Wn. Bank v. Mendelson*, where the Court made clear that "intent to waive" can be inferred when (as Plaintiffs have properly informed the court under the *Lybbert* standard) a party is dilatory or acts inconsistently. 113 Wn.2d 346, 353, 779 P.2d 697, 700 (1989).

**C. The Court Should Hold That The Doctrine Of Equitable Estoppel Prevents Defendants From Changing Their Position Regarding Arbitrability Of Class Claims.**

Washington law precludes piecemeal litigation and rewarding parties for lying-in-wait (or changing legal positions) in order to encourage prompt speedy and inexpensive litigation as mandated in CR 1. “The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation.” *Barnett v. Hicks*, 119 Wn.2d 151, 160 (1992). Defendants deliberately ignored these principles, and forced this case back in front of the Court.

The doctrine of judicial estoppel “prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Pegram v. Herdrich*, 530 U.S. 211, 228 n. 8 (2000); accord *Anfinson v. FedEx Ground Package Sys.*, 174 Wn.2d 851, 864, (2012). The purpose of the doctrine is “preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time.” *Anfinson*, 174 Wn.2d at 861.

“Equitable estoppel is based on the notion 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.” *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 35 (2000) (citing, *Kramarevcky v. Department of Soc. & Health Servs.*, 122 Wn.2d 738, 743 (1993)). “The elements of equitable estoppel are: “(1) an admission, statement or act inconsistent with a claim

afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.” *Id.* (citing, *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 551 (1987)).

*1. Defendants Acted Inconsistently.*

For over two years Defendants asserted that one arbitrator would have the power to certify a class if the case was compelled to arbitration. *Supra* at \*5-6. The only way that an arbitrator could certify a class is if the Arbitration Agreements allowed Plaintiffs to assert class claims in arbitration. Defendants consistently argued that power over class certification was vested in the arbitrator. Only after the COA remanded this case, including class claims to arbitration, did Defendants first allege that class claims were precluded in arbitration altogether. Defendants’ previous representations to the contrary in briefing were “admissions, statements, and acts inconsistent with” the afterward asserted claim that class arbitration was prohibited by the contracts. *Lybbert*, 141 Wn.2d at 35.

In addition, during the first appeal Defendants themselves specifically argued that non-parties to the Arbitration Agreements are bound by and can enforce the arbitration clause. CP 1447. Defendants argued for it, and the COA ruled that non-parties could be bound. CP 1182 Now, Defendants are acting inconsistently with this argument by

claiming that because class members are not parties to the specific Arbitration Agreements there can be no class claims in arbitration. This is duplicitous and further illustrates Defendants' inconsistent acts.

2. *Plaintiffs' Reasonably Relied On Defendants' Representations That Class Claims Could Be Arbitrated.*

Plaintiffs relied on Defendants' admissions, statements, and acts that class claims could be arbitrated. Had Defendants properly or timely raised this issue, Plaintiffs could have addressed it on the first appeal. Plaintiffs undoubtedly would have pointed out the numerous times Defendants conceded that the arbitrator could decide issues related to the class. Plaintiffs would have incorporated the waiver of class claims issues into their arguments that the Arbitration Agreements were unconscionable. Plaintiffs expended considerable time and resources into class issues and class discovery including filing two motions. CP 564-576. It could have been resolved expeditiously on the first appeal.

3. *Plaintiffs Have Been Injured And Suffer Prejudice From Defendants' Inconsistencies.*

Plaintiffs have already been injured and will be prejudiced further if Defendants are allowed to flip-flop on this issue at this late stage of the case. Plaintiffs have been prejudiced by the significant delay which Defendants' change in position has already caused and which it will continue to cause. The Mandate from the COA sending Plaintiffs entire class complaint to arbitration was filed in November 2015.

Had Plaintiffs been aware of this supposed waiver of the right to bring class claims, they may not have signed the Agreements in the first place. From the face of the Arbitration Agreements, there is absolutely no indication that by signing, Plaintiffs would be waiving their ability to bring class claims. This was an omission of a material fact as to the contract. This is, or would have been, another basis to find that the Arbitration Agreements are procedurally unconscionable or otherwise void, which Plaintiffs would have argued to the court when moving to void the Arbitration Agreements. Instead, Defendants waited for the COA to find the Arbitration Agreements enforceable and only then argued they required individuals, separate, arbitrations.

Similarly prejudiced are the rights of the putative class, who have had their claims procedurally extinguished. Plaintiffs estimate the putative class of doctors and physicians assistants and nurse practitioners to be in the hundreds, possibly over 300.

Moreover, by being forced to arbitrate individually and separately, the Plaintiffs will further suffer prejudice because their claims have been severed despite all arising out of the same set of facts which are inherently inseparable. Plaintiff Cindius Romney, widow of Dr. Romney, will be forced to arbitrate her claims alone without the support of Dr. Romney's co-workers who worked at the same clinic and witnessed the same conduct. The law and judicial economy mandate the claims being heard in one proceeding. Plaintiffs worked in the same facility in Gig Harbor, for the same employer. Requiring Plaintiffs to arbitrate separately is grossly

inefficient and prejudicial. It will subject Plaintiffs to extreme prejudice, including but not limited to, at least three filing fees, costs and expert fees in three cases, three times the discovery, three times the testimony from the same witnesses. Most of these witnesses are highly compensated healthcare professional who would be forced to miss substantial amount of time from work to testify in or attend separate arbitral proceedings. There is also the potential for three inconsistent arbitrator rulings, not to mention three times the attorney's fees and costs.<sup>5</sup>

If the Court does not find waiver and preclude Defendants from contradictorily arguing class arbitration is not available, the parties will be back in front of the appellate court a third time, since the AAA process allows the arbitrator's Clause Construction Award to be reviewed creating even more delay.<sup>6</sup> Finding waiver and estoppel is appropriate to guarantee Plaintiffs rights to a "just, speedy and inexpensive resolution" under CR1, and the policy favoring arbitration because it is less formal and more expeditious. *Boyd v. Davis*, 127 Wn.2d 256, 262-63 (1995) ("The very

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<sup>5</sup> In an extreme case, the ambiguity in the Order could even be read to require Petitioners to arbitrate each *claim* they have separately. This would exponentially raise costs and cause extreme delay, should the arbitrator interpret the Court's Order as requiring Petitioners to first arbitrate their wrongful discharge claims, and then subsequently arbitrate their wrongful withholding of wages claims. The supposed benefit of arbitration is reduced costs and increased efficiency. This is seriously frustrated by forcing three arbitral proceedings for these nearly identical cases.

<sup>6</sup> The AAA Supplementary Rules for Class Arbitrations incorporated by reference in the contracts state: "The arbitrator shall stay all proceedings following the issuance of the clause construction award for a period of 30 days to permit any party to move a court of competent jurisdiction to confirm or vacate the clause construction award." CP 1357.

purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation.” (quoting *Barnett v. Hicks*, 119 Wn.2d 151, 160 (1992)).

**D. The Class Claims Can Proceed In Arbitration Under The Language of the Arbitration Agreements.**

The parties agreed to arbitrate class claims. Defendants’ conduct and representations provide powerful and additional proof of the parties’ mutual “consent” to arbitrate class claims. Indeed, Washington has recognized that context, including “**subsequent acts and conduct of the parties**” can be examined in interpreting the meaning of contracts. *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990); It is only now, after more than two years of conduct consistent with that agreement to arbitrate class claims, that Defendants inconsistently and impermissibly assert the opposite. Plaintiffs never agreed to waive their ability to bring class claims; the Arbitration Agreements do not include explicit class action waivers but exclude other claims. Both parties agreed in these contracts that class claims can be arbitrated. Those agreements were made using broad language and terms which created the contractual right and expectation that an arbitrator could consider certifying a class in arbitration. If there were any dispute – and there should not be – that dispute must be decided by the arbitrator, as also agreed by the parties.

1. *The Arbitration Agreements Evidence An Agreement And Intent To Arbitrate Class Claims.*

The Arbitration Agreements commit all claims to arbitration using language that other courts and arbitrators have found to allow the arbitration of class claims. See, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003); *Oxford Health Plans v. Sutter*, 133 S.Ct. 2064, 186 L.Ed.2d 113 (2013). Whether a case can be brought to arbitration as a class-action is a matter of consent, and an arbitrator may employ class procedures if agreed to by the parties. *Oxford Health Plans L.L.C. v. Sutter*, 133 S.Ct. 2064, 2066, 186 L.Ed.2d 113 (2013). When construing an arbitration clause, “courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties.’” *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)).

If, after interpretation of the contractual language, the arbitrator determines class arbitration is available, courts have explicitly stated that class arbitration is consistent with the Federal Arbitration Act. *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 992 (9th Cir. 2007) (“[W]e read [*Bazzle*], as an implicit endorsement by a majority of the [Supreme] Court of class arbitration procedures as consistent with the [FAA]...the plurality made it clear that a class arbitration proceeding would be permissible if the arbitrator interpreted the contracts to allow for class arbitration procedures. [citation omitted]”). Supplying the fifth vote

in support of the judgment of the Court, Justice Stevens explicitly stated that class arbitration is consistent with the [FAA]: ‘there is nothing in the FAA that precludes the determination...that under state law class action arbitrations are permitted if not prohibited by the arbitration agreement.’” (quoting *Green Tree*, 539 U.S. at 454-55)).

To interpret the meaning of a contract's terms, Washington courts (or an arbitrator applying Washington law) employ the context rule. *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990). “The context rule requires that we determine the intent of the parties by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, **subsequent acts and conduct of the parties**, the reasonableness of the respective interpretations advanced by the parties, **and statements made by the parties** during preliminary negotiations, trade usage, **and/or course of dealing**.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351 (2004) (emphasis added). This supports both that the Arbitration Agreements include an agreement to arbitrate class claims. Defendants’ subsequent conduct and statements is powerful admissible evidence of the parties’ intent to allow class arbitration and consolidated claims.

Importantly, there is absolutely no legal requirement for arbitration contracts to incant the words “class arbitration” in order to form an agreement to arbitrate class claims. “There is no bright line rule that class arbitration is allowed only under an arbitration agreement that incants ‘class arbitration’ or otherwise expressly provides for aggregate procedures.”

*Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 222 (3d Cir. 2012), as amended (Apr. 4, 2012), *aff'd*, 133 S. Ct. 2064 (2013) (citing *Stolt–Nielsen v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1776 n. 10; *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir.2011) (holding that an arbitrator did not exceed her powers by ruling that class arbitration was allowed under an agreement lacking an express class provision)), *see also Stolt-Nielsen*, at 1783 (Ginsberg, J., dissenting) (“[T]he court does not insist on express consent to class arbitration.”). The same holds true here, where the contracts, drafted by Defendants, use language that commits “all disputes arising out of or related to” the contracts to arbitration.

Here, the contracts are explicit on which types of claims are excluded; they do not explicitly exclude class claims. *See, ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739 (1993) (“Absent an express provision excluding a particular type of dispute, “only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail.”). The prejudice suffered by Plaintiffs and the putative class is immense. Allowing the Superior Court Order to stand would provide an incentive to businesses, corporations and employers, to write ambiguous arbitration contracts that never mention class claims in any way to induce consumers and employees to sign them without having any indication that they were giving up their ability to pursue class claims.

2. *The Arbitration Agreements Are Not “Silent” On Class Claims, And Stolt-Nielsen Does Not Bar Class Arbitration.*

The state of the law has been clarified since this Court ruled in *Hill v. Garda*, 169 Wn. App. 685 (2012), *reversed on other grounds*, 179 Wn.2d 47 (2013). In that case, the COA compelled individual arbitration based on a lack of clarity surrounding *Stolt-Nielsen*. *Hill* was decided without the benefit of the Supreme Court’s clarifications in *Oxford Health v. Sutter*, 133 S.Ct. 2064, 186 L.Ed.2d 113 (2013).

In *Oxford*, the arbitration agreement did not explicitly provide for the availability of class arbitration. 133 S. Ct. at 2067. The issue was addressed by the arbitrator who noted that the question turned on the construction of the parties’ agreement. *Id.* The arbitrator interpreted the contractual language and determined the parties had consented to class arbitration.<sup>7</sup> The Supreme Court ruled that the arbitrator did not abuse his discretion by finding the broad language of the contracts to contain an agreement to arbitrate class claims. *Id.* at 2071.

In reaching its decision in *Oxford*, the Supreme Court clarified its decision in *Stolt-Nielsen*. In that case, the parties specifically *agreed* through a signed stipulation that their arbitration agreement was “silent” on the issue of class claims. As the Oxford Court noted, “[t]he parties in *Stolt–Nielsen* had entered into an **unusual stipulation** that they had never

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<sup>7</sup> The arbitration contract at issue in *Oxford* stated, “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.” *Oxford*, 133 S. Ct. at 2067.

reached an agreement on class arbitration. *See* 559 U.S., at 668–669.” *Oxford*, 133 S. Ct. at 2069 (emphasis added). “This stipulation left no room for an inquiry regarding the parties’ intent[.]” *Id.* at 676.

Even the *Stolt-Nielsen* court explicitly recognized that “the term ‘silent’ did not simply mean that the clause made no express reference to class arbitration.” *Stolt-Nielsen*, 559 U.S. at 668-69. The word “silent” – as it was used in *Stolt-Nielsen* – does not mean what Defendants twist it to mean. *Stolt-Nielsen* was primarily about the powers of an arbitrator to interpret arbitration contracts, and the standards under the FAA which allow a court to overturn an arbitrator’s Clause Construction Award.<sup>8</sup>

Here, like in *Oxford*, the parties have broad Arbitration Agreements that allow Plaintiffs to bring class claims in arbitration. They are not silent, and Plaintiffs have never agreed that they are. Instead, they include language allowing for class arbitration that is consistent with Defendants’ conduct through over two years of litigating this case, subsequent acts that must be considered as context under *Berg*.

3. *The Language Of The Arbitration Agreements Allow For Class Arbitration.*

Defendants excluded certain claims and certain types of litigation from arbitration without excluding class actions. In addition to drafting

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<sup>8</sup> The AAA Supplementary Rules for Class Arbitrations, incorporated by reference into the Arbitration Agreements, state that “Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the Clause Construction Award).” CP 1358.

broad language requiring the parties to arbitrate “all claims” arising out of or related to the employment contract, Defendants explicitly excluded certain claims from arbitration. Defendants explicitly excluded “workers comp claims or health benefits...any claim by FMG against You based upon Your actions arising out of any claims against FMG by a third party...or matters covered by the FMG Peer Review Policy.” CP 63. Despite these explicit exclusions, Defendants did not include a class action waiver, which they had every opportunity to do while carving out other claims. Ambiguity should be construed against the drafter. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) (“Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt.”)

Plaintiffs did not agree to waive class claims and had no reason to believe they were doing so under the parties’ contract. To conclude otherwise under these facts would have enormous and disastrous consequences. Explicit class action waivers give employees and consumers notice, so they are not tricked into unknowingly waiving class claims and being blindsided when asserting them.

Defendants drafted these Arbitration Agreements and explicitly stated that Wage and Hour claims and claims under Title VII and other Anti-Discrimination statutes must be brought in arbitration, without any mention of Wage and Hour class actions being precluded. As a sophisticated employer, one of the largest nationwide healthcare providers, Defendants were aware that claims brought under wage and hour statutes

are regularly brought as class actions. Defendants argued many times to the court that fact and stating explicitly that “Arbitration Addenda...allow Plaintiffs to pursue their claims as they would in the judicial system and receive the same relief that a judge or jury could award.” CP 235. The explicit inclusion of claims which regularly are brought as class actions, and as consolidated claims in the courts such as multiparty claims is additional evidence that Defendants agreed to arbitrate class claims in the Arbitration Agreements.

4. *Defendants Cannot Credibly Dispute That The Arbitration Agreements Permit Arbitration Of Class Claims After Stating That It Does In Signed Pleadings.*

The COA previously considered the impact of these Arbitration Agreements and ruled that non-signatory parties can be bound to arbitrate in a single arbitral proceeding in the first appeal of this case. *Romney v. Franciscan Group*, 186 Wn. App. 728, 747 (2015). The COA found that where claims are based on the same set of facts and are inherently inseparable, the court may order arbitration of claims against a party “even if that party is not a party to the arbitration agreement.” *Id.* In fact, Defendants made this very argument that non-parties to the arbitration agreements can be bound by them. CP 1447. They now attempt to argue the opposite to deny Plaintiffs’ ability to vindicate the rights of other employees through class arbitration yet they do not dispute the fact that each one of these employees signed arbitration agreements.

Here, the class claims are all based on the same set of operable facts and are inherently inseparable. Class members were promised compensation at a contractually determined rate and were never paid for it. They were also all prevented from recording all the hours that they worked in furtherance of Defendants business practices and were not paid for actual hours worked. Additionally, the putative class members have also signed Arbitration Agreements with Defendants.

Similarly, it is not a credible argument to say that the Arbitration Agreements preclude class arbitration because they are written in the singular as being between “You and FMG.” Contracts are always written in the singular and it has never been a bar to bringing class actions in the courts. Businesses and employers are not apt to write a contract using anything other than this form language employed by Defendants here. “You” can be used as both a singular and plural pronoun, and this technical argument is nothing but a grasp at straws where every other indication is that these Arbitration Agreements allow for the arbitration of class claims.

The Arbitration Agreements use broad language to commit possible claims by Plaintiffs to arbitration. Claims specifically addressed that must be arbitrated include those under statutes that are regularly brought as class actions. Non-signatories to the agreements can be bound by them where the claims arise out of the same series of transactions or occurrences. And, certain claims are explicitly excluded from arbitration, but Defendants did not include a class action waiver. Class claims can be

arbitrated, and this is supported by Defendants conduct and representations during litigation.

**E. Washington Law Requires That The Issue Of Class Arbitration Be Decided By The Arbitrator.**

Under controlling Washington law, since the COA found that the parties have enforceable Arbitration Agreements, the courts must end their inquiry into the case and send all disputes covered by the substantive scope of the Arbitration Agreements to arbitration for rulings by the arbitrator. “Courts resolve the threshold legal question of arbitrability of the dispute by examining the arbitration agreement without inquiry into the merits of the dispute.” *Marcus & Milichap Real Estate Inv. Serv. of Seattle, Inc., v. Yates, Wood & MacDonald*, 192 Wn. App. 645, ( 2016) (citing *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 871 (2009)). Washington law holds that “[i]f the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end.” *Id.*

The parties have arbitration contracts which require arbitration of “all disputes arising out of or related to the Employment Agreements.” This would include a dispute over what type of arbitration was agreed to. The Arbitration Agreements vest the power of contractual interpretation with the arbitrator, and encompasses every dispute related to the contract. “An arbitration clause that encompasses any controversy ‘relating to’ a contract is broader than language covering only claims ‘arising out of’ a contract.” *Townsend v. Quadrant Corp.*, 153 Wn. App. at 887.

“If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration.” *Id.* at 881. “As a rule, a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute.” *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 46 (2001) (citing *Kamaya Co. v. American Property Consultants, Ltd.*, 91 Wn. App. 703,714 (1998)). “Courts must indulge every presumption in favor of arbitration, whether the problem at hand is construction of the contract language itself...or a like defense to arbitrability.” *Zuver v. Airtouch Comm’ns, Inc.*, 153 Wn.2d 293, 302 (2004).

When the COA determined that the parties had enforceable arbitration agreements, the Superior Court should have placed the parties in the same position as if they had never entered the court system. Had the parties gone directly to arbitration, the arbitrator, not a court, would have interpreted the Arbitration Agreements and issued a Clause Construction Award under the AAA Supplementary Rules for Class Arbitrations determining if the Arbitration Agreements include an agreement to arbitrate class claims. Courts decide so-called “gateway” issues, and interpreting the contracts to find an agreement to arbitrate class claims is not a gateway issue in Washington.

Gateway issues involve the validity and enforceability of arbitration agreements. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402(2003). In *Bazzle*, the question was whether the contracts forbid

class arbitration. 539 U.S. at 452. The Court found that questions over the type of arbitration agreed to was not a gateway issue for the courts to decide because, “[i]t concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties.” *Id.* In such situations, the relevant question is “what kind of arbitration proceeding the parties agreed to.” *Id.* It is a question that “concerns contract interpretation and arbitration procedures.” *Id.* “[A]rbitrators are well suited to answer that question.” *Id.* at 453. “Given these considerations, along with the sweeping language concerning the scope of the questions committed to arbitration, [the] matter of contract interpretation should be for the arbitrator, not the courts, to decide. (citation omitted).” *Id.* *Bazzle* held the broad language of an arbitration agreement which was almost identical to the language used by Defendants in this case, vested power in the arbitrator to interpret the contracts and decide issues regarding class claims. Justice Stevens, concurring in judgment, agreed stating “Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court.” (citation omitted). 539 U.S. at 455.

Additionally, the AAA rules incorporated by the Arbitration Addenda mandate that the arbitrator decide whether class claims can exist in arbitration. That includes the AAA’s Supplementary Rules of Class Arbitration, which apply “whenever a court refers a matter *pleaded as a class action* to the AAA for administration[.]” CP 1357 (emphasis added). The AAA’s policy regarding class arbitration states that “the American Arbitration Association will administer demands for class arbitration

pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.” CP 1364. According to §3 of the Supplementary Rules, “Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”

Here, the Superior Court decided a non-gateway issue when it effectively ruled that Plaintiffs could not maintain class arbitration and must arbitrate their claims individually and separately. It usurped the power delegated to an arbitrator by the Arbitration Agreements.

Importantly, this does not mean that courts are fully precluded from addressing issues related to class arbitrations entirely. Washington courts can use their equitable powers to compel class arbitration when a party has waived the ability to demand individual arbitration, or where a party has represented that class arbitration is available under the contracts in one part of a case. A court can find that party is estopped from changing its position at a later point to gain a tactical advantage and prejudice the other party. This is what the Court must do here because of the conduct of Defendants at prior stages of this litigation.

**F. The Superior Court Committed Legal Error By Exceeding The Mandate From The Court Of Appeals.**

The Superior Court erred by exceeding the Mandate.<sup>9</sup> This Court issued a Mandate, “[F]or an order compelling arbitration.” CP 1182. The Mandate unequivocally remanded the entire case to arbitration. This leaves all other issues, like class arbitration and severance to the arbitrator.

The Court of Appeals never discussed severing Plaintiffs’ cases or otherwise placed limits on the scope of arbitration in its written opinion or when it issued the Mandate. CP 1165-1182. Questions that “*might have been determined had they been presented will not be considered by the Court of Appeals.*” *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) (emphasis added). The trial court is bound by the appellate court’s Mandate upon remand – “the decision of the appellate court establishes the law of the case and it must be followed by the trial court on remand.” *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 58, 366 P.3d 1246 (2015).

The COA opinion included boilerplate language used for drafting Mandates, which states, “This case is mandated to the Superior Court from which the appeal was taken for further proceedings **in accordance with the attached true copy of the decision.**” The only “proceeding” the Trial Court had authority to conduct, was issuing an order sending Plaintiffs claims, including class claims, to arbitration. If the COA intended the court to do anything other than send the entire case, as pled, to arbitration, it would

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<sup>9</sup> RAP 12.9 states, “The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case.” This provides the Court with the authority to recall the Mandate.

have said so explicitly. On remand, “when the court [of appeals] intends that a specific issue shall alone be tried, it will give instructions to that effect in unmistakable language” *Godefroy v. Reilly*, 140 Wash. 650 (1926).

Here, the COA Opinion did not authorize the Trial Court to (1) interpret the contracts; (2) sever Plaintiffs’ claims, or (3) usurp the power of the arbitrator to determine if class claims could be arbitrated. Once the Supreme Court declined review and this Court issued the Mandate, the Superior Court’s task was ministerial. “Upon issuance of the mandate by the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court[.]” RAP 12.2. Defendants cannot legally wait until a remand to move for a new order that is in contravention to the final decision of the Court of Appeals. Defendants knew that all claims, including class claims could be addressed in one arbitration and the Superior Court erred by granting Defendants’ motion.

## V. CONCLUSION

For the foregoing reasons the Court must find that Defendants were dilatory, acted inconsistently, and prejudiced and injured Plaintiffs, and that equity and justice demands that Defendants’ waived and should be estopped from challenging class arbitration and Plaintiffs’ consolidated complaint. The Court must also find that the Superior Court committed legal error when it exceeded the scope of the mandate and wrongfully

interpreted the Arbitration Agreements and compelled individual arbitration because that was a duty delegated to an arbitrator under the contracts and clear Washington law.

DATED this 1<sup>st</sup> day of August, 2016.

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**DECLARATION OF SERVICE**

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

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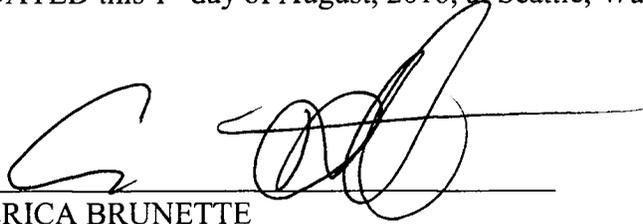
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CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON  
CE

DATED this 1<sup>st</sup> day of August, 2016, at Seattle, Washington.

A handwritten signature in black ink, consisting of a stylized 'E' followed by a series of loops and a horizontal line extending to the right.

ERICA BRUNETTE  
Paralegal

# Appendix

*The Court of Appeals*  
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*Court Administrator/Clerk*

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CASE #: 74806-8-1

Estate of Dr. Michael Romney, et al., Appellants v. Franciscan Medical Group, et al.,  
Respondents

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on May 3, 2016, regarding Petitioner's motion for discretionary review:

In this matter plaintiffs/petitioners Dr. Kristen Childress, Dr. Faron Bauer, and the estate of Dr. Michael Romney seek review of a January 6, 2016 trial court order granting defendant/respondent Franciscan Medical Group's motion to stay judicial proceedings and to compel individual arbitration, and a January 29, 2016 order denying reconsideration. For the reasons stated below, review will go forward.

Childress, Bauer and Romney are former employees of the Franciscan Medical Group. Each entered into an employment contract that included an agreement to arbitrate "all disputes arising out of or related to the employment agreements" between the parties, with a few specified exceptions. Neither the agreement nor the addendum mention class claims or class arbitration.

The employees brought suit against Franciscan for damages, statutory penalties, and equitable relief for alleged wage violations on behalf of themselves and a class of physicians, medical assistants and nurse practitioners. Romney and Bauer also brought individual claims alleging they were improperly fired and lost hospital privileges in retaliation for whistleblowing. The employees moved to invalidate/void the arbitration agreement as unconscionable. Franciscan moved to compel arbitration. The trial court found the arbitration agreement unconscionable, invalidated it, and denied Franciscan's motion to compel arbitration.

Franciscan appealed. In a published opinion, this court concluded that the arbitration agreement was not procedurally unconscionable, reasoning that the employees had a meaningful choice in entering the agreement and the arbitration clause is understandable. Romney v. Franciscan Group, 186 Wn. App. 728, 740, 349 P.3d 32 (2015). The court also concluded that the agreement is not substantively unconscionable. The employees argued that the agreement was overly harsh because it required them to arbitrate all claims but allowed Franciscan to seek limited relief in court. The court held that assuming without deciding that these clauses are unconscionable, they are readily severable from the agreement. The court also rejected challenges based on provisions related to limiting exemplary damages, confidentiality, and fee sharing. Romney, 186 Wn. App. at 743-47. Finally, the court addressed the employee's argument that the arbitration agreement improperly attempted to bind parties who are not signatories. Although the issue had not been addressed by the trial court, for the sake of judicial economy this court addressed it, reasoning that where claims are based on the same set of facts and are inherently inseparable, the court may order arbitration of claims against a "party if even that party is not a party to the arbitration agreement." Romney, 186 Wn. App. at 747. The court "revers[ed] the trial court and remand[ed] for an order compelling arbitration." Romney, 186 Wn. App. at 748.

The Supreme Court denied review, and on November 14, 2015, the mandate issued. Several weeks later Franciscan filed a motion to stay judicial proceedings and to compel individual arbitration of all claims. Appendix Q. The employees opposed the motion, arguing that the trial court has no discretion to alter the scope of the mandate on remand, that Franciscan previously could have but did not raise the issue of individual v. class arbitration, and that it lost the opportunity to do so now through waiver and/or estoppel. The employees also argued that the issue of class arbitration was for the arbitrator, not the court, to decide. Appendix S.

Franciscan argued that the mandate allows the trial court to order individual arbitration that the parties never agreed to class arbitration, that Franciscan never indicated an intent to arbitrate collectively, and there was no waiver. Appendix U. Franciscan also argued that the court, not the arbitrator, must decide the class arbitration issue. Franciscan argued that while the U.S. Supreme Court has not yet resolved whether the availability of class arbitration is for the arbitrator or the court to decide, circuit authority supports that it is a question for the court. Appendix U at 5.

The trial court granted Franciscan's motion, stayed judicial proceedings, and compelled the parties to individually arbitrate all claims. Subsequently, the court denied reconsideration.

The employees seek review by appeal under RAP 2.2(a)(3), or by discretionary review under RAP 2.3(b)(2). Franciscan opposes review.

RAP 2.2(a)(3) provides for appeal as of right of "[a]ny written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action." This court has held that the right to arbitration is a substantial right under RAP 2.2(a)(3) and that a court decision that discontinues an "action" for arbitration falls within RAP 2.2(a)(3) because it involves issues wholly separate from the merits of the dispute and because an effective challenge to the order is not possible without an interlocutory appeal. Stein v. Geonerco, 105 Wn. App. 41, 44-45, 17 P.3d 1266 (2001); Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 440, 783 P.2d 1174 (1989). In Hill v. Garda CL Northwest, Inc., 179 Wn.2d 47, 308 P.3d 635 (2013), the Supreme Court discussed this rule and considered the flip side of the appealability issue:

When the trial court declines to compel arbitration, that decision is immediately appealable, in part because "[i]f a trial court does not compel arbitration and there is no immediate right to appeal, 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." [quoting Stein]. While we have never addressed whether the opposite is always true, similar considerations are at play. If the court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a potentially costly arbitration before having the opportunity to appeal.

Hill, 179 Wn.2d at 54. The court in Hill went on to address the unconscionability challenge.

Citing Stein, Herzog, and Hill, the employees argue that they should not be forced to abandon their class claims and arbitrate individually before having an opportunity to appeal, at which time an appeal would be too late to be effective. Franciscan argues that there is no right to appeal, citing Wooh v. Home Insurance Co., 84 Wn. App. 782, 783, 930 P.2d 337 (1997), where the court stated in dicta that an order compelling arbitration is not a final order appealable under RAP 2.2(a). Wooh relies on Teufel Constr. Co. v. American Arbitration Ass'n., 3 Wn. App. 24, 25, 472 P.2d 572 (1970).

There are some reasons that support an immediate appeal here. Wooh and Teufel predate Stein and Hill. In Hill the court acknowledged that it has not resolved the issue of appealability of an order compelling arbitration, but signaled it may be open to allowing an immediate appeal of an order compelling arbitration.

And some (but not all) of the policy reasons for an immediate appeal are present here, where the trial court, in compelling arbitration, has in fact denied class arbitration, the procedure the employees argue they are entitled to. I need not resolve this appealability issue, as the employees have demonstrated that review is warranted.

Review is available under RAP 2.3(b)(2) if the moving party demonstrates probable error that substantially alters the status quo or substantially limits the party's freedom to act. Here, denying class arbitration and compelling the employees to individually arbitrate their claims substantially limits the employee's freedom to act. The issue, then, is whether they have shown probable error.

As they did below, the employees argue that the question of class arbitration is for the arbitrator to decide, not the court. Franciscan has cited cases from other jurisdictions that support its view that the issue of class arbitration is a gateway issue for the court to decide. But there is pertinent Washington contrary authority. See Marcus & Millichap Real Estate Inv. Services, Inc. v. Yates, Wood MacDonald, Inc., 192 Wn. App. 465, \_\_\_ P.3d \_\_\_ (2016), 2016 WL 394007 (if a court finds that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration agreement must go to arbitration), citing Townsend v. Quadrant Corp., 153 Wn. App. 870, 881, 224 P.3d 818 (2009), *aff'd on other grounds*, 173 Wn.2d 451, 268 P.3d 917 (2012). See also Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2002) (the question here – whether the contracts forbid class arbitration – does not fall into the narrow exception of gateway issues to be decided by the court; it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties; the relevant question is what type of arbitration proceeding the parties agreed to; it involves contract interpretation and arbitration procedures, questions well situated for an arbitrator to answer); Stolt-Nielsen v. Animalfeeds Internat'l Corp., 559 U.S. 662, 680, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010) (noting that the decision in Green Tree v. Bazzle, that the question of class arbitration is for the arbitrator, was a plurality decision, but declining to revisit the issue because the parties supplemental agreement specifically assigned the issue to the arbitration panel and no party argued the assignment was impermissible); Oxford Health Plans LLC v. Sutter, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2064, 2068 n. 2, 186 L. Ed. 2d 4382 (2013) (this court has not yet decided whether the availability of class arbitration is a question for the court or arbitrator).

Under this case law, the issue of what type of arbitration the parties agreed to – individual or class arbitration – appears to be a decision for the arbitrator. The fact that the parties have not yet agreed upon who the arbitrator will be does not change the analysis. To the extent the trial court ordered individual arbitration instead of leaving the issue to the arbitrator, the employees have demonstrated discretionary review is warranted.

The employees also argue that Franciscan waived or is estopped from raising the issue of class arbitration by failing to raise it earlier in the litigation and making statements and/or acting inconsistently with the view that class arbitration is unavailable. See Appendix L, listing instances in which Franciscan referred to class arbitration.

Equitable estoppel is based on the notion 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 on the representation or position. Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (discussing application of equitable estoppel and waiver to the belatedly raised defense of insufficient service of process). Waiver involves similar concepts and can occur where a party's late assertion of a position is inconsistent with its previous behavior or the party has been dilatory in asserting the position. Lybbert, 141 Wn.2d at 38-39. See River House Development, Inc. v. Integrus Architecture, PS, 167 Wn. App. 221, 272 P.3d 289 (2012) (discussing application of equitable estoppel and waiver to questions of whether right to arbitration was waived by litigation conduct). See also Hill, 179 Wn.2d at 54 (noting the court has suggested a party must raise objections to arbitration in the trial court or on first review or risk having waived the issue). Review of the issue whether Franciscan waived or is equitably estopped from demanding individual arbitration is warranted.

Therefore, it is

ORDERED that discretionary review is granted, and the clerk will set a perfection schedule.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

CMR