

No. 74806-8-I

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

Cindius Romney as Personal Representative of the Estate of Dr. Michael Romney, Dr. Faron Bauer, and Dr. Kristen Childress,
individually and on behalf of all others similarly situated,

Petitioners,

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,

Respondents.

**RESPONDENTS' SUPPLEMENTAL
OPPOSITION BRIEF**

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STATE OF WASHINGTON

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I. INTRODUCTION

Petitioners argue for the first time in their reply brief that they have a right to arbitrate their grievances with Franciscan on a class basis because the National Labor Relations Act (“NLRA” or “Act”) invalidates any express or implied terms of their employment agreements prohibiting collective actions. This is not a new or novel theory: similar arguments have been made with varying results in state and federal courts throughout the country, and in front of and by the National Labor Relations Board (“NLRB”), for years. Accordingly, this Court should not consider Petitioners’ newly-hatched argument.

Further, Petitioners have failed to address whether the NLRA even applies to them. As shown below, it does not due to their status as supervisors and managers at Franciscan. Thus, even if this Court elects to consider Petitioners’ untimely argument, it immediately fails.

II. ARGUMENT

A. **Petitioners are precluded from making an argument for the first time in their reply brief.**

It is well-settled that “[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) (citing *In re Marriage of Sacco*, 114 Wn. 2d 1, 5, 784 P.2d 1266 (1990)).

Accordingly, this Court “does not consider issues raised for the first time in a reply brief.” *DaVita Healthcare Partners, Inc. v. Wash. State Dep’t of Health*, 192 Wn. App. 102, 119 n.8, 365 P.3d 1283 (2015). Here, Petitioners did not argue for protection under the NLRA until they filed their reply brief, which is too late to warrant consideration by this Court.

Petitioners also neglected to raise this issue and argument at the trial court when they opposed Respondents’ Motion to Compel Individual Arbitration, thus failing to preserve the issue for appeal.

B. The issue of whether class waivers in arbitration agreements clash with the NLRA is not new or novel.

Perhaps anticipating Franciscan’s objection that their NLRA argument comes too late, Petitioners suggest that the Ninth Circuit’s decision in *Morris v. Ernst & Young LLP*, --- F.3d ---, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for cert. filed*, (U.S. Sept. 8, 2016) (No. 16-300) represents a new development, which they could not have anticipated. *See* Petitioners’ Reply Brief at 6, 7 n.2.¹ This suggestion is inaccurate. *Morris* is merely the latest in a series of recent decisions in which federal circuit courts have split on the question of whether class

¹ Petitioners base their entire argument that arbitration agreements in employment contracts that preclude class actions violate the NLRA on the principles announced in *Morris*. *See* Petitioners’ Reply Brief at 6–10.

action waivers in arbitration agreements clash with the NLRA. *Compare Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (waiver of class or collective action in an arbitration agreement does not violate the NLRA), *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015) (arbitration agreements requiring employees to resolve all employment-related claims through individual arbitration are lawful), *Owens v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013) (class arbitration waivers in arbitration agreements are lawful), and *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (an employee can waive the ability to proceed collectively in an arbitration agreement), *with Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1154–56 (7th Cir. 2016) (arbitration agreements that preclude employee class actions are impermissible under the NLRA).²

Petitioners seem to suggest that *Morris* is dispositive, yet neglect to mention that it is decidedly in the minority of circuit courts to address the issue, a minority that the dissenting judge in *Morris* calls “directly contrary to Supreme Court precedent” and “the wrong side of a circuit split.” *Morris*, 2016 WL 4433080, at *11. The Ninth Circuit’s decision in *Morris* was immediately appealed to the U.S. Supreme Court. Should the

² *Lewis* was decided more than two months *before* Petitioners filed their opening brief.

Supreme Court decide to take on the issue—and there is a strong possibility it will due to the circuit split—*Morris* may well be reversed.

Further, Petitioners’ argument is one that has been advanced before and by the NLRB itself for years. *See, e.g., Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016); *PJ Cheese, Inc.*, 362 NLRB No. 177 (2015); *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). Indeed, Petitioners acknowledge that “*Morris* is the most recent decision flowing from *D.R. Horton*, 357 NLRB No. 184 (2012).” Reply at 6 n.1.³ So, as far back as 2012, this specific issue—whether class waivers in arbitration agreements violate the NLRA—has been making its way through the courts and the NLRB. It is therefore absurd for Petitioners to bring this issue up for the first time in their reply brief and claim that it is somehow new.

C. The NLRA does not apply to Petitioners due to their status as supervisors and managers.

Even if Petitioners were not precluded from arguing that their Agreements violate the NLRA, *Morris* simply does not apply to Petitioners because, as supervisors and managers, they are excluded from protection under the Act.

³ Petitioners fail to acknowledge, however, that the NLRB’s decision in *D.R. Horton* was reversed in major part by the Fifth Circuit. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (holding that the use of class action procedures is not a substantive right under the NLRA).

Section 2(3) of the NLRA excludes any individual “employed as a supervisor” from the Act’s scope. A “supervisor” under the Act is:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

See Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006).

Managerial employees are also “excluded from the categories of employees entitled to the benefits of” the NLRA. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 674, 100 S. Ct. 856 (1980). The NLRB has held that staff physicians may be managers if their “activities on behalf of their employer fall outside the scope of decision-making routinely performed by similarly situated health care professionals and that is primarily incident to their treatment of patients.” *FHP, Inc.*, 274 NLRB No. 168 (1985).

Here, Drs. Romney and Bauer, as well as ARNP Childress, assigned and directed other employees, and did so using independent judgment in the interests of their employer, Franciscan. They thus qualify as “supervisors” under the NLRA. *See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713, 121 S. Ct. 1861 (2001). Petitioners’ exercise of independent judgment in directing patient care is further proof of their

supervisory status. *See id.* at 721, 121 S. Ct 1861; *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 583–84, 114 S. Ct. 1778 (1994).

Drs. Romney and Bauer also clearly qualify as managerial employees under the standards set forth by the NLRB: their activities running their clinic on behalf of Franciscan were primarily incident to their treatment of patients, which fell outside the decision-making routinely performed by similarly situated health care professionals.

Petitioners' Agreements further prove their status as supervisors and managerial employees under the NLRA. For instance, the Agreements for Drs. Romney and Bauer state: "Physician shall at all time [SIC] exercise *independent medical judgment and control* over all his/her professional activities and services." CP 46, 82 (emphasis added). And that "[n]othing in this Agreement shall be construed to give FMG any authority over Physician's medical judgment or to direct the means or methods by which Physician practices medicine." *Id.*

The Agreement for ARNP Childress states: "Nothing in this Agreement shall be construed to interfere with or otherwise affect the rendering of clinical services by [Childress] in accordance with [her] *independent professional judgment.*" CP 117 (emphasis added).

The Agreements for Drs. Romney and Bauer further state that Drs. Romney and Bauer will, among other things:

- “Supervise mid-levels, nurses and other personnel in accordance with FMG policies, procedures and applicable laws.”
- “Treat patients according to, and perform such clinical procedures as are consistent with, Physician’s licensure, clinical specialty and privileges, practice and training.”
- “Cooperate and participate with FMG in the recruitment of other physicians and medical personnel and participate in the supervision of physicians and medical personnel staff, as required.”

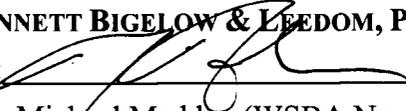
CP 51–52, 87–88. These are the types of duties and responsibilities associated with supervisors and managerial employees.

III. CONCLUSION

The Court should disregard Petitioners’ arguments based on *Morris*, both because they were not timely raised and because they lack substantive merit.

Respectfully submitted this 18th day of October, 2016

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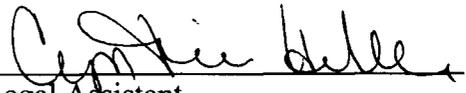
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing document to be served this date, in the manner indicated, to the parties listed below:

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Dated this 18th day of October, 2016 at Seattle, Washington.



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