

**FILED**

SEP 21 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 298892

---

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

---

RIVER HOUSE DEVELOPMENT, INC., an Idaho Corporation,

Plaintiff/Appellant,

v.

INTEGRUS ARCHITECTURE, P.S., a Washington Corporation,

Defendant/Respondent.

---

RESPONDENT INTEGRUS ARCHITECTURE, P.S.'S APPELLATE  
BRIEF

---

WILLIAM D. HYSLOP  
WSBA #11256  
LAURA J. BLACK  
WSBA #35672  
Attorneys for Respondent

**LUKINS & ANNIS, P.S.**  
1600 Washington Trust Financial Center  
717 W Sprague Ave.  
Spokane, WA 99201-0466  
Telephone: (509) 455-9555  
Facsimile: (509) 747-2323

**FILED**

SEP 21 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 298892

---

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

---

RIVER HOUSE DEVELOPMENT, INC., an Idaho Corporation,

Plaintiff/Appellant,

v.

INTEGRUS ARCHITECTURE, P.S., a Washington Corporation,

Defendant/Respondent.

---

RESPONDENT INTEGRUS ARCHITECTURE, P.S.'S APPELLATE  
BRIEF

---

WILLIAM D. HYSLOP  
WSBA #11256  
LAURA J. BLACK  
WSBA #35672  
Attorneys for Respondent

**LUKINS & ANNIS, P.S.**  
1600 Washington Trust Financial Center  
717 W Sprague Ave.  
Spokane, WA 99201-0466  
Telephone: (509) 455-9555  
Facsimile: (509) 747-2323

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE .....	1
A.    RHD INITIATES A LAWSUIT IN SPOKANE COUNTY SUPERIOR COURT.....	1
B.    THE PARTIES ENGAGED IN LENGTHY AND CONTENTIOUS DISCOVERY AND RELATED MOTION PRACTICE IN SUPERIOR COURT. ....	3
C.    RHD RECEIVES ADVERSE TRIAL COURT RULINGS ON THE EVE OF TRIAL AND THEN – FOR THE FIRST TIME – ASSERTS THE RIGHT TO ARBITRATION. ....	4
III. ARGUMENT.....	6
A.    STANDARD OF REVIEW. ....	6
B.    RHD WAIVED THE CONTRACTUAL RIGHT TO MEDIATION AND ARBITRATION THROUGH ITS LITIGATION CONDUCT. ....	6
C.    THE TRIAL COURT HAD AUTHORITY TO DECIDE THE ISSUE OF WAIVER.....	16
1.    RHD Failed to Raise the Issue of the Trial Court’s Authority to Decide the Issue of Waiver Below....	16
2.    In Any Case, Controlling Washington Authority Establishes the Trial Court’s Right to Consider the Issue of Waiver. ....	20
D.    INTEGRUS IS NOT ESTOPPED FROM ALLEGING RHD’S WAIVER.....	26
IV. CONCLUSION.....	28

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>Cases</b>	
<i>B&amp;D Leasing Co. v. Ager</i> , 50 Wn.App. 299, 304, 748 P.2d 652 (1988).	15, 21
<i>Chemical Bank v. Wash. Pub. Power Supply Sys.</i> , 102 Wn.2d 874, 905 (1984).....	27
<i>Cornerstone Equipment Leasing v. MacLeod</i> , 159 Wn.App. 899, 907 (2011).....	27
<i>Demelash v. Ross Stores, Inc.</i> , 105 Wn.App. 508, 527, 20 P.3d 447 (2001) .....	19, 20
<i>Harting v. Barton</i> , 101 Wn.App. 954, 962, 6 P.3d 91 (2000) .....	21
<i>In re Bruce Terminix Co.</i> , 98 S.W.2d 702, 704-05 (1998) .....	15
<i>Ives v. Ramsden</i> , 142 Wn.App. 369, 174 P.3d 1231 (2008). 8, 9, 10, 21, 26	
<i>Kinsey v. Bradley</i> , 53 Wn.App. 167, 169, 765 P.2d 1329 (1989). 7, 8, 9, 10	
<i>Lake Wash. School Dist. No. 414 v. Mobile Modules NW, Inc.</i> , 28 Wn.App. 59, 62, 621 P.2d 791 (1980).....	7, 8, 10, 14, 15, 21
<i>Lindblad v. Boeing, Co.</i> , 108 Wn.App. 198, 207, 31 P.3d 1 (2001)...	19, 20
<i>Otis Housing Ass’n v. Ha</i> , 165 Wn.2d 582, 586-87, 201 P.3d 309 (2009) 6, 7, 8, 21, 22, 23, 24, 25	
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn.App. 290, 299, 38 P.3d 1024 (2002).....	19, 20
<i>Steele v. Lundgren</i> , 85 Wn.App. 845, 849, 935 P.2d 671 (1997) 7, 8, 9, 10, 14, 21	
<i>The Heights at Issaquah Ridge, Owners Association v. Burton Landscape Group, Inc.</i> , 148 Wn.App. 400, 403, 200 P.3d 254 (2009) .....	16, 24, 25
<i>Trueax v. Ernst Home Ctr., Inc.</i> , 124 Wn.2d 334, 339, 878 P.2d 1208 (1994).....	19, 20
<i>Verbeek Properties, LLC v. Greenco Environmental, Inc.</i> , 159 Wn.App. 82, 89, 246 P.3d 205 (2010).....	15, 22, 23, 24, 25
<i>Walker v. J.C. Bradford &amp; Co.</i> , 938 F.2d 575, 578 (5th Cir. 1991) .....	15

<i>Wilcox v. Lexington Eye Institute</i> , 130 Wn.App. 234, 241, 122 P.3d 729 (2005).....	19
<i>Witzel v. Tena</i> , 48 Wn.2d 628, 633, 295 P.2d 115 (1956).....	26
<b>Other Authorities</b>	
RCW 7.04 .....	22
RCW 7.04A.....	25
RCW 7.04A.030(2).....	22
RCW 7.04A.090.....	23
<b>Rules</b>	
RAP 2.5(a) .....	19, 20

## **I. INTRODUCTION**

Plaintiff River House Development, Inc. (“RHD”), commenced this action by service of process in March 2010. One year later and after being ordered to answer interrogatories and requests for production which RHD had originally agreed to answer and then later refused to answer, RHD tried to avoid the Court’s order by bringing on a motion to stay this action to compel arbitration and mediation. RHD was not happy that the court ordered it to answer the discovery and that the court precluded RHD from being able to call expert witnesses without asking for an enlargement of the Court’s scheduling order for the case. RHD had known about the arbitration and mediation issue since at least February 2010 when it demanded payment of alleged damages from Integrus, but RHD did nothing in more than a year to compel arbitration or mediation until it was facing an adverse ruling from the Court. Furthermore, RHD did nothing to compel arbitration until just before a discovery cutoff date and shortly before the trial in this case. The trial court correctly ruled that RHD has waived its right to compel arbitration and mediation. The decision of the trial court should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. RHD Initiates a Lawsuit in Spokane County Superior Court.**

This case involves the design and construction of a condominium development by RHD in Coeur d’Alene, Idaho (“the Project”). RHD hired Integrus for certain architectural services related to the design and

construction administration of the Project.<sup>1</sup> RHD hired others for other design and engineering services. RHD hired Walker Construction, Inc., as the general contractor for the Project. Construction of the Project reached substantial completion in the summer or fall of 2008. CP at 40.

During construction, RHD and Walker Construction brought claims against one another in 2007. CP at 40 and 132. An arbitration action was instituted by Walker over RHD's refusal to pay Walker, RHD counterclaimed over Walker's performance, and the parties eventually settled their claims in the summer of 2009. CP at 40 and 132.

In February 2010, RHD sent a demand letter to Integrus seeking \$3.7 million in damages from Integrus related to Integrus' work on the Project.<sup>2</sup> CP at 40, 132, and 448. In March 2010, RHD served Integrus with its Complaint regarding these claims. CP at 15 and 448. RHD filed the Complaint in the Spokane County Superior Court in June 2010. CP at 5, 40, 132, and 448. The action alleges claims for breach of contract, fraud, negligence, and negligent misrepresentation. CP at 5-14.

---

<sup>1</sup> RHD asserts in its appellate brief (page 1) that Integrus was hired for "construction management services." While not part of the record, this is an incorrect statement. Instead, per the parties' contract, Integrus was hired for certain design services and certain contract administration services. RHD had its own managers and representatives and RHD hired other parties directly for other design and engineering services beyond what Integrus was to provide.

<sup>2</sup> CP 40 reports the RHD demand at \$3.2 million. RHD has pointed out that RHD actually demanded \$3.7 million in damages (CP at 266).

**B. The Parties Engaged in Lengthy and Contentious Discovery and Related Motion Practice in Superior Court.**

After receiving RHD's over \$3 million demand in early 2010, and then the Complaint for Damages in March 2010, Integrus repeatedly attempted to obtain specific information regarding RHD's unspecified and undefined claims for breach of contract, negligence, negligent misrepresentation, and fraud. CP at 40.

In early May 2010, RHD initiated discovery under the Civil Rules by serving interrogatories and requests for production directed to Integrus. CP at 449. In June 2010, Integrus sent its own set of discovery requests to RHD. CP at 40, 132, and 449.

In September 2010, RHD and Integrus participated in a Court Scheduling Conference which set pretrial cutoff dates including a discovery deadline of May 9, 2011, and a July 11, 2011, trial date. CP at 18 and 449. Per the Scheduling Order, RHD served its Plaintiff's Designation of Lay and Expert Witnesses on December 13, 2010; RHD named 32 lay witnesses, but failed to specifically name any expert witnesses. CP at 18 and 19-29.

On January 26, 2011, by agreement, Integrus and RHD traded and exchanged their respective responses to the discovery. CP at 41, 133, and 449. However, RHD's responses were wholly inadequate and nonresponsive. After detailed deficiency letters, lengthy CR 26(i) discovery conferences, and requests that RHD supplement its responses, all in an attempt to receive adequate information, Integrus moved forward

with a Motion to Compel discovery responses from RHD. CP at 38-127. Integrus' Motion was set for hearing on March 4, 2011. CP at 131 and 450. On the eve of the hearing of the Motion to Compel, RHD served supplemental discovery responses and, therefore, Integrus canceled the hearing date. CP at 131 and 450. However, when it became apparent that RHD's supplementary discovery responses were still deficient and non-responsive, Integrus renoted its Motion to Compel discovery responses. CP 131-204. In response, RHD did not move for a protective order on any discovery issues. CP at 205. Even more important, at no time did RHD assert the contractual right to arbitrate in response to Integrus' request for supplemental discovery responses or in response to Integrus' Motion to Compel Discovery; RHD filed no response to Integrus' motion argued on March 18, 2011.

C. **RHD Receives Adverse Trial Court Rulings on the Eve of Trial and Then – For the First Time – Asserts the Right to Arbitration.**

After argument and briefing on Integrus' Motion to Compel, the Court ruled on March 18, 2011, in pertinent part, that Integrus' discovery requests were relevant and proper and RHD was ordered to provide responses within ten days. CP at 205. The Court also held that RHD could not name and call expert witnesses at trial without first seeking an enlargement of the scheduling order, and that Integrus was entitled to an award of its attorneys' fees. CP at 205.

In contempt of the trial court's March 18, 2011, Order, RHD did not produce supplemental discovery within ten days. CP at 451. Instead, on March 25, 2011, RHD filed a motion to shorten time for hearing, a motion for protective order (CP at 207), and, on March 28, 2011, RHD filed three separate motions upon shortened notice: (1) Motion for Reconsideration (CP at 374), (2) Motion for Protective Order (CP at 371), and (3) Motion to Compel Mediation and Arbitration and to Remove Case from Trial Docket. CP at 377. These belated motions were filed one year after RHD had served its Complaint, ten months after RHD had served its discovery requests upon Integrus and just one month before the discovery cutoff date of May 9, 2011. CP at 18. RHD also filed a motion to shorten time for hearing and a motion for voluntary dismissal on March 31, 2011 (CP at 536-540), and another motion to shorten time for hearing of its other motions on March 31, 2011 (CP at 558-560 and 564-570).

The Court heard all the motions on shortened notice<sup>3</sup> on April 1, 2011 (CP at 589, 742-749, and 877-879) and denied RHD's motions. CP at 746. In the course of denying RHD's Motion to Compel Mediation and Arbitration and to Remove Case from Trial Docket, the Court held that RHD had waived any right to contractual arbitration and mediation. CP at

---

<sup>3</sup> As RHD had not complied with the Court's March 18, 2011, Order to answer Integrus' discovery responses by March 28, 2011 (CP at 205), Integrus filed its motion for sanctions against RHD and asked for a hearing on shortened notice at the same time as the hearing of RHD's motions (CP at 403-433).

877-879. RHD then filed a motion for reconsideration (CP at 851-867) which was also denied (CP at 927, 928-929).

Not only did RHD significantly delay in asking for an order to compel arbitration and mediation and fail to make such a request until it received adverse rulings, but it also delayed until essentially the eve of the discovery cut-off and trial to make its requests. At the time RHD first moved the Court for arbitration, trial was scheduled for July 11, 2011, and RHD was up against the Court's fast-approaching May 9, 2011, discovery cutoff deadline (CP at 18).

### **III. ARGUMENT**

#### **A. Standard of Review.**

Appeal of an order denying a motion to compel arbitration is *de novo*. *Otis Housing Ass'n v. Ha*, 165 Wn.2d 582, 586-87, 201 P.3d 309 (2009). The party opposing arbitration bears the burden of showing that the arbitration clause is inapplicable or unenforceable. *Id.* at 587.

#### **B. RHD Waived the Contractual Right to Mediation and Arbitration Through its Litigation Conduct.**

RHD argues that its conduct in initiating this court proceeding in the Spokane County Superior Court in the spring of 2010 and throughout the year-long litigation of this case, including discovery and motion practice, is not inconsistent with the assertion of its contractual right to arbitration.

To the contrary, RHD's litigation actions throughout this case were entirely inconsistent with the right to arbitrate. *For an entire year, RHD*

*proceeded toward trial and failed to take any actions toward compelling mediation or arbitration until after it received damaging trial court rulings just before the discovery cutoff and on the eve of trial.* RHD’s gamesmanship and blatant attempt to forum shop are precisely the type of conduct that the doctrine of waiver is intended to avoid.

Waiver is an intentional relinquishment of a known right. *Kinsey v. Bradley*, 53 Wn. App. 167, 169, 765 P.2d 1329 (1989). While Washington applies a presumption in favor of arbitration, a party may nonetheless waive an otherwise effective arbitration clause when that party: (1) has knowledge of an existing right to compel arbitration; and (2) acts inconsistent with that right. *Steele v. Lundgren*, 85 Wn. App. 845, 849, 935 P.2d 671 (1997); *Lake Wash. School Dist. No. 414 v. Mobile Modules NW, Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980) (“Parties to an arbitration contract may waive [arbitration], however, and a party does so by failing to invoke the clause when an action is commenced and arbitration is ignored”); *Otis Housing Ass’n*, 165 Wn.2d 582 (it is well established that “the contractual right to arbitration may be waived if it is not timely invoked.”).

Washington courts have not hesitated to find waiver of the right to arbitrate, where a litigant’s conduct is clearly inconsistent with the assertion of that right. For example, in *Steele*,<sup>4</sup> following ten months of

---

<sup>4</sup> RHD argues that the “multi-factor test” from *Steele* is not the proper standard for this Court to consider. However, *Steele* has never been overruled and is still binding precedent. Likewise, the standards announced in *Steele* and *Kinsey* are consistent with other Washington

litigation initiated by the plaintiff, the *defendant* moved to compel arbitration under an employment contract. The Court held that arbitration was waived because the *defendant* engaged in extensive litigation and discovery. *Steele*, 85 Wn. App. at 855. In addition, the Court noted that the *defendant* “passed up several opportunities to move for arbitration,” and “effectively chose to litigate in superior court, which is inconsistent with arbitration....”. *Id.*

Similarly, in *Kinsey*, 53 Wn. App. at 169, the Court found waiver where the *defendant* engaged in “extensive” motion practice, in which the *defendant* “never sought arbitration even though its own agreement provided for it.” *Kinsey*, 53 Wn. App. at 172. Thus, the Court found the defendant “manifested a clear intent to utilize the judicial process rather than seek non-judicial resolution of arbitrable issues.” *Id.*

A more recent Division Two opinion, *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008), is also in accord. In *Ives*, the Court found that the *defendant* waived the contractual right to arbitration where he:

answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial. Through all of this, Ramsden

---

cases deciding the issue of waiver. *See, e.g., Verbeek Properties, LLC v. Greenco Environmental, Inc.*, 159 Wn. App. 82, 246 P.3d 205 (2010) (“The right to arbitrate is waived by ‘conduct inconsistent with any other intention but to forego a known right....’”); *Lake Wash. School Dist. No. 41 v. Mobile Modules NW, Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980) (showing of prejudice not required); *Otis Housing Ass’n v. Ha*, 165 Wn.2d 582, 586-87, 201 P.3d 309 (2009).

did not propose a court order to stay the action or allow the parties to arbitrate....Then on the eve of trial, Ramsden argued for the first time that the arbitration agreement foreclosed trial. In short, Ramsden’s conduct was “inconsistent with any other intention but to forego” his right to arbitration.

*Id.* at 384 (emphasis added).

These courts easily found waiver of the right to arbitrate, even though the defendants in *Steele*, *Kinsey*, and *Ives* had not even initiated the litigation in court. Rather, these parties were each simply defending actions initiated in court by other parties and acted inconsistent with the intention to arbitrate the case.

The rule of waiver is even more applicable here, where RHD is the *plaintiff* now seeking to avoid the trial court forum, chose to file suit in the Superior Court, took advantage of the Civil Rules by initiating discovery, allowed and participated in the case being scheduled for trial, failed to demand that a reference to arbitration be included on the case scheduling order, answered discovery (albeit deficiently), engaged in contentious discovery-related motion practice, and only demanded arbitration after the court entered adverse rulings just prior to the discovery cutoff date and just prior to trial.

These and other Washington cases also establish factors that Washington courts consistently look for in finding waiver of the right to arbitration: (1) knowledge of the right to arbitrate<sup>5</sup>; (2) initiating a lawsuit

---

<sup>5</sup> *Steele*, 85 Wn. App. at 849; *Lake Wash. School Dist. No. 414*, 28 Wn. App. at 62.

in a judicial forum<sup>6</sup>; (2) delay in bringing a motion to compel arbitration<sup>7</sup>; (3) voluntarily engaging in discovery practice<sup>8</sup>; (4) initiating discovery practice<sup>9</sup>; (5) engaging in motion practice<sup>10</sup>; (6) failing to raise the issue of arbitration until the eve of trial<sup>11</sup>; (7) passing up specific opportunities to assert the right to arbitration<sup>12</sup>; (8) failing to initiate the arbitration process, even though it is allowed by contract<sup>13</sup>; and (10) preparing for trial.<sup>14</sup> RHD is guilty of each of these litigation-related behaviors.

At the beginning of RHD's initiation of its claims against Integrus, in March 2010, when it served its Complaint, RHD was entitled, by contract, to initiate mediation and arbitration processes with the American Arbitration Association within a "reasonable time" by simply filing a

---

<sup>6</sup> *Steele*, 85 Wn. App. at 855 (party seeking arbitration "effectively chose" to litigate in a judicial forum).

<sup>7</sup> *Lake Wash. School Dist. No. 414*, 28 Wn. App. at 64 ("Delay in bringing a motion to compel arbitration may be evidence of an intent to litigate....").

<sup>8</sup> *Steele*, 85 Wn. App. at 855.

<sup>9</sup> *Id.*; *Ives*, 142 Wn. App. at 384.

<sup>10</sup> *Steele*, 85 Wn. App. at 855; *Kinsey*, 53 Wn. App. at 169.

<sup>11</sup> *Kinsey*, 53 Wn. App. at 169.

<sup>12</sup> *Steele*, 85 Wn. App. at 855.

<sup>13</sup> *Kinsey*, 53 Wn. App. at 169.

<sup>14</sup> *Ives*, 142 Wn. App. at 384.

request for mediation and/or demand for arbitration with Integrus and the AAA and paying the AAA filing fees:

Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association....

\*\*\*

The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association....

CP at 257-261. Despite this clear contractual right, RHD chose not to proceed with mediation or arbitration and, instead, filed its claims in court.<sup>15</sup>

RHD was well aware of its contractual right to mediation and arbitration prior to filing suit in the Spokane County Superior Court. RHD raised the issue in its initial demand letter of February 17, 2010, in which RHD references and asserts the alternative dispute resolution process. CP at 266-267. RHD was also involved in an arbitration/mediation action from 2007 to 2009 with its contractor. CP at 408.

Despite this clear knowledge, RHD elected to serve its Complaint in March 2010, and filed suit in Spokane County Superior Court in June 2010, instead of filing a demand for mediation and/or arbitration with the AAA.

---

<sup>15</sup> As RHD correctly points out, it did raise the issue of arbitration in its Complaint (CP at 14), but it is undisputed that RHD took no steps toward exercising this asserted right.

RHD's conduct since filing the Complaint is also inconsistent with an intent to arbitrate its claims. RHD initiated discovery, materially participated in this lawsuit, participated in the case scheduling conference setting a July 2011 trial date (with no objection to a *trial*), filed and served its witness list in compliance with the Case Scheduling Order, participated in extensive written discovery, and engaged in discovery-related motion practice without ever raising the issue of mediation or arbitration with the Court for an entire year:

- For an entire year, RHD did not file a motion to stay the trial court proceedings. CP at 377.
- For an entire year, RHD did not file a motion to compel arbitration. CP at 377.
- For an entire year, RHD did not initiate the simple, contractual process for arbitration. CP at 448-451.
- In May 2010, *RHD initiated the discovery process* by propounding interrogatories and requests for production to Integrus, for which it has had the benefit of the discovery rules, and for which it has received full responses. CP at 449.
- RHD responded (albeit deficiently) to Integrus' discovery requests without raising the issue of arbitration. CP at 449-450.
- In September 2010, RHD participated in the drafting of a Joint Status Certificate, which was submitted without any reference to arbitration. CP at 449. Even if the parties did not agree, nothing

prevented RHD from demanding that a reference to arbitration be included in the Joint Status Certificate.

- In December 2010, RHD filed its list of 32 *lay trial witnesses* in preparation for trial, without asserting the right to arbitration. CP at 19-29.

- In January 2011, the parties exchanged their respective discovery responses by agreement. CP at 449.

- In February and March 2011, the parties conferred on RHD's deficient discovery responses per CR 26(i), RHD promised supplementation, declined to do so, and then eventually provided supplemental (but still deficient) discovery responses on March 3, 2011, on the eve of the scheduled hearing on March 4, 2011. CP at 449-450.

- In response to Integrus' Motion to Compel, heard on March 18, 2011, RHD failed to file for mediation or arbitration with AAA, seek any stay proceedings, or object to the Motion on the basis of the arbitration provision.

RHD only raised the arbitration issue as a last-ditch means of avoiding the implications of the Court's Order to answer the discovery by March 28, 2011, and limiting RHD's right to present expert testimony to support its case at trial. In sum, RHD engaged in litigation practice and proceeded toward the impending July 11, 2011, trial date without ever asserting the right to mediation or arbitration, until just a month before the May 9, 2011, discovery cutoff date and just months before trial. Even more telling, RHD failed to move for arbitration until after this Court

entered its March 18, 2011, Order. The Order not only compelled RHD to produce discovery regarding the nature and basis of its claims and damages, but also eliminated RHD's ability to produce expert witnesses at trial.<sup>16</sup> CP at 205.

RHD now disingenuously attempts to blame Integrus for RHD's own delayed request for arbitration. These arguments are irrelevant. RHD is responsible for its own conduct. *The test for waiver looks solely at RHD's conduct and whether this conduct is inconsistent with an intention to arbitrate.* See e.g., *Steele*, 85 Wn. App. at 849; *Lake Wash. School Dist. No. 414*, Wn. App. at 62, 621 P.2d 791. In any case, the evidence relied upon by RHD (Integrus' refusal to sign a tolling agreement, Integrus' purported refusal to voluntarily move forward with mediation, Integrus' refusal to include a statement in the Joint Status Report regarding mediation and arbitration), simply highlights the fact that RHD was on notice that Integrus intended to proceed in the very judicial forum where RHD filed its action and, yet, RHD did nothing to initiate the arbitration process.

Under the Agreement, RHD does not need Integrus' permission or participation to invoke the contractual dispute resolution procedures. Rather, the Agreement clearly provides that RHD could have initiated the

---

<sup>16</sup> RHD's inability to present expert testimony to support its claims that Integrus negligently designed and supervised the construction project at issue in this case is extremely damaging, if not fatal, to these claims. RHD's change of heart only after these rulings and on the eve of trial is unquestionably motivated by a desire to "start over" in a different forum.

proceedings by simply filing a request for mediation and/or demand for arbitration with Integrus and AAA. CP at 257-260. Similarly, RHD clearly does not need Integrus' consent to file a motion to compel arbitration. Nonetheless, RHD failed to do either within the last year. RHD had every opportunity to invoke the contractual mediation and arbitration procedures, chose to not do so, and is now looking to improperly place blame on Integrus for RHD's own failure to assert and protect RHD's own rights.

RHD cites *Verbeek Properties, LLC v. Greenco Environmental, Inc.*, 159 Wn. App. 82, 89, 246 P.3d 205 (2010), for the proposition that a party does not waive the right to arbitration simply by filing a lawsuit. See Appellate Brief at p. 15. RHD also cites cases in support of the notion that simply engaging in limited discovery does not constitute waiver. See Appellate Brief at p. 18 (citing *Lake Washington*, 28 Wn. App. at 60-61; *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991); *In re Bruce Terminix Co.*, 98 S.W.2d 702, 704-05 (1998)). Finally, RHD argues that delay in asserting the right to arbitration, alone, is not sufficient to find waiver. See Appellate Brief at p. 21 (citing *B&D Leasing Co. v. Ager*, 50 Wn. App. 299, 304, 748 P.2d 652 (1988); *Lake Wash.*, 28 Wn. App. at 63).

RHD misses the point. It is not simply the single act of RHD's filing this lawsuit, the single act of engaging in discovery, or the single act of delaying its request to arbitrate for a year that compels a finding of waiver. It is the totality of all of these actions (and others outlined at

length above) which are entirely inconsistent with an intent to enforce the contractual mediation and arbitration provisions. In fact, it should be clear to the Court that RHD intended to try this case all along and only belatedly sought to arbitrate the claims on the eve of trial in order to avoid the detrimental impact of the trial court's March 18, 2011, Order. In sum, the totality of RHD's actions clearly indicate that RHD waived the contractual right to mediation and arbitration.

**C. The Trial Court Had Authority to Decide the Issue of Waiver.**

RHD also argues that the Court did not have the authority to decide the issue of whether RHD waived the right to mediation and arbitration, relying primarily on a Division One opinion, *The Heights at Issaquah Ridge, Owners Association v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 403, 200 P.3d 254 (2009).

RHD's argument should be rejected because: (1) this argument was not presented to the trial court and is improperly and impermissibly raised for the first time on appeal; and (2) Washington law, including recent Washington State Supreme Court authority, clearly establishes the right of the trial court (and now this Court) to decide the issue of whether waiver has occurred.

**1. RHD Failed to Raise the Issue of the Trial Court's Authority to Decide the Issue of Waiver Below.**

RHD conveniently omits from its appellate briefing the fact that it wholly and completely failed to brief the issue of waiver for the trial court

and, more specifically, failed to raise the issue of the trial court's authority to decide the issue of waiver, orally or otherwise. RHD's attempt to belatedly raise this issue for the first time on appeal should be rejected.

In response to RHD's Motion to Compel Arbitration (CP at 377), Motion for Protective Order (CP at 371), and Motion for Reconsideration of the Court's March 18, 2011, Order granting Integrus' Motion to Compel discovery responses (CP at 374), Integrus argued that RHD was not entitled to mediation or arbitration because RHD had waived that right through its own litigation conduct. CP at 438-442. However, RHD's counsel ignored Integrus' Response and waiver argument and completely failed to brief a response.

At the time of oral argument, RHD claimed surprise of Integrus' waiver argument and erroneously argued that the issue had not been raised by Integrus:

THE COURT: ....I know – I expect Mr. Hyslop is going to get up and say there's been a waiver here of the rights set out by the contract. And I would bet he's going to cite the fact that your client is the plaintiff, and despite the fact that the case was filed in June of last year, there's been really no visible effort to get it into a mediation track. In fact, to the contrary. The parties have gone along with the discovery track. So I just put that out, and you can respond to that. And I'm sure Mr. Hyslop will make his points as he wants.

MR. FENNESSY: Well, Your Honor, first of all, *if that's in fact an argument, it certainly hasn't been presented in any pleadings. It's not the matter of any motion that's currently before the Court.*

RP at 39-40 (emphasis added). In fact, the issue of waiver had been specifically raised by Integrus' pleadings and was properly before the trial court (CP at 438-442), but RHD had simply failed to read Integrus' brief or otherwise respond to the argument. *See* RP at 39-40.

RHD proceeded to generically make the argument that waiver was not warranted under the circumstances; *i.e.*, RHD made an argument against waiver of the right to mediation and arbitration based on the facts and circumstances of the case. However, notably absent from RHD's limited statements at oral argument was any argument that the trial court lacked the statutory authority to decide the issue of waiver. As RHD argued:

But if that is an argument that Mr. Hyslop wants to make, I would point out [sic] to the materials that indicate we were in constant communication between February and late May or early June of this past year, 2010, at which time I know that Your Honor is well aware that Mr. Rich Robinson passed away, and there was some delay in then further addressing this matter to the Court. But there certainly has not been any action of waiver.

In our pleading we asked for the relief to be stayed so that we could go through the contractually required alternative dispute resolution steps. We took no steps to file a motion for default. We took no steps to enforce further matters under this Court's docket number or to bring the matter up on the Court's docket. We simply attempted to work with Mr. Hyslop in an informal way, as Mr. Balch indicated, avoiding the additional layer of administration and costs presented by filing with the actual AAA.

RP at 39-40. This passage represents the entirety of RHD's argument as to waiver, prior to its later filed motion for reconsideration.

From the limited argument made by RHD, it is clear that RHD did not argue in the trial court, as it does herein, that the arbitrator – not the trial court – should decide the issue of waiver.

Where an argument is not raised in the trial court below, the appellate court may refuse to review that argument for the first time on appeal. RAP 2.5(a); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 299, 38 P.3d 1024 (2002) (“Where the trial court had no opportunity to address the issue, we decline to consider it”); *Lindblad v. Boeing, Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (“We will not review an issue, theory, argument, or claim of error not presented at the trial court level.”); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001) (“We generally will not review an issue, theory, or argument not presented at the trial court level.”). “The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” *Demelash*, 105 Wn. App. at 527.

Notably, a general objection or exception is not sufficient to raise an issue at the trial court level “because the objection must be sufficient to apprise the trial judge of the nature and substance of the objection.” *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). Moreover, an appellate court “does not consider statements made in motions for a new trial or reconsideration.”<sup>17</sup> *Id.* at 340.

---

<sup>17</sup> This is consistent with the prohibition against raising issues for the first time in a motion for reconsideration. See *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (“CR 59 does not permit a plaintiff to propose new theories of the case that could have been

It is clear that RHD failed to present to the trial court the issue of whether the trial court lacked authority to decide the issue of waiver. Thus, RHD cannot now raise the issue for the first time on appeal. *See* RAP 2.5(a); *Sorrel*, 110 Wn. App. at 299; *Lindblad*, 108 Wn. App. at 207; *Demelash*, 105 Wn. App. at 527. RHD’s half-hearted argument against the *substantive merits* of waiver at oral argument is insufficient to raise the issue because this argument failed to apprise the trial court of the argument now being made on appeal for the time by RHD. *See Trueax*, 124 Wn.2d at 339. Finally, the fact that RHD subsequently raised this issue in a motion for reconsideration is similarly insufficient to preserve the issue for review. *Id.* at 340.

In sum, the issue of whether the court (as opposed to an arbitrator) should properly decide the issue of waiver was not presented to the trial court, and this Court should decline to consider that issue for the first time on appeal.

2. **In Any Case, Controlling Washington Authority Establishes the Trial Court’s Right to Consider the Issue of Waiver.**

RHD argues that, under Washington’s Uniform Arbitration Act, chapter 7.04A RCW, a trial court’s authority to act is limited to “order[ing] arbitration when an enforceable agreement to arbitrate is presented.” *Appellant’s Brief at p. 11*. Thus, RHD argues, the trial court

---

raised before entry of an adverse decision...Wilcox offers no explanation for why these arguments were not timely presented”).

was not allowed to consider or rule on the issue of waiver. The glaring problem with RHD's argument is that Washington courts, both before and after the enactment of the current version of chapter 7.04A RCW, have consistently and repeatedly treated waiver as an issue of *enforceability of the arbitration agreement* to be decided by the trial court, or to be decided by the appellate court exercising *de novo* review.

Washington courts have repeatedly upheld a trial court's decision on the issue of waiver, even when considering a facially valid arbitration provision. *See Steele v. Lundgren*, 85 Wn. App. 845, 849, 935 P.2d 671 (1997); *Lake Wash. School Dist. No. 414 v. Mobile Modules NW, Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980); *Ives v. Ramsden*, 142 Wn. App. 369, 382-83, 174 P.3d 1231 (2008) (security broker impliedly waived the right to arbitration by not raising it in his answer to the complaint); *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000) (failure to pursue mediation waived the issue); *B&D Leasing Co. v. Ager*, 50 Wn. App. 299, 303, 748 P.2d 652 (1988) ("parties to an arbitration contract may expressly or impliedly waive that provision...by failing to invoke that provision when an action is commenced").

In fact, the Washington State Supreme Court recently considered this exact issue and held, while exercising *de novo* review, that a party's litigation conduct waived the right to arbitration. In *Otis Housing Ass'n v. Ha*, 165 Wn.2d 582, 586-87, 201 P.3d 309 (2009),<sup>18</sup> the Court considered

---

<sup>18</sup> RHD has previously argued that the cases that predate the Legislature's passage of Washington's Uniform Arbitration Act, RCW

whether a housing association waived the right to contractual arbitration through its conduct; namely, failure to raise the issue of arbitration at a show cause hearing in an unlawful detainer action. *Id.* at 588. The *Otis Housing* Court did not hesitate to decide the issue of waiver, citing the general rule that “[a]rbitration may be waived by the parties by their conduct.” *Id.* (citations omitted). The Court went on to hold that the association had waived the right to arbitrate by “elect[ing] to litigate instead of arbitrate.” *Id.* The Court did not question the trial court’s authority (or its own authority on *de novo* review) to consider and decide whether the conduct in question constituted waiver, and the Court did not relegate the decision to the authority of an arbitrator. *See id.* *Otis Housing* is the only Washington Supreme Court authority on the issue of waiver of arbitration provisions, and it is binding on this Court.

Similarly, the most recent Washington case considering the issue of waiver of an arbitration provision, *Verbeek Properties, LLC v. Greenco Environmental, Inc.*, 159 Wn. App. 82, 246 P.3d 205 (2010), relies heavily on the *Otis Housing* decision and firmly establishes the trial court’s ability (and the ability of an appellate court exercising *de novo* review) to

---

7.04A *et seq.*, in 2006, are inapplicable. However, *Otis Housing* was decided in 2009, long after the current version of RCW 7.04A was enacted. RCW 7.04A.030(2) states that “on or after July 1, 2006, this chapter [*i.e.* the current statutory provisions] governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.” Thus, the current version of chapter 7.04 RCW was applicable to the 2009 decision in *Otis Housing*.

consider and decide the issue of whether a party has waived the right to arbitration.

In *Verbeek*, the Court decided the precise issue raised herein: whether the party opposing arbitration “me[t] its burden of showing conduct by [the party seeking arbitration] inconsistent with the intent to arbitrate.” *Id.* at 93. Relying on the decision in *Otis Housing*, the Court ultimately decided the issue of waiver on *de novo* review and found that “none of the four grounds advanced by [the defendant] establish waiver by [the plaintiff].” *Id.* at 87 (relying on the “general rule” from *Otis Housing*: “the contractual right to arbitration may be waived if it is not timely invoked”). Notably, the Court did not hold that an arbitrator, as opposed to the trial court or appellate court sitting in *de novo* review, should decide the ultimate issue of whether waiver had occurred. To the contrary, the appellate court in *Verbeek* – not an arbitrator – decided that waiver had not occurred in that case. *See id.*

Indeed, the *Verbeek* Court considered, in detail, each of the trial court’s bases for finding waiver of the right to arbitrate. *See id.* at 88-93. Of the trial court’s five reasons for finding waiver, the *Verbeek* Court found that only one of the trial court’s rulings fell within the purview of the arbitrator to decide because it was a “procedural issue” – the issue of whether the arbitration demand was properly initiated by the plaintiff. *Id.* at 87-88 (“The act does set forth procedures for initiating arbitration in RCW 7.04A.090. But the question of compliance with these procedures

must be left to the arbitrator....*the trial court exceeded its authority by ruling on this procedural issue.*") (emphasis added).

However, the *Verbeek* Court went on to consider the trial court's additional bases for finding waiver (*i.e.*, failing to demand arbitration in the complaint, a preliminary attempt to remove a lien, seeking relief that an arbitrator could not provide, and actions inconsistent with the intent to arbitrate), and ultimately decided that the plaintiff had not waived the right to arbitration. *Id.* at 87. The *Verbeek* Court's consideration of and decision on the issue of waiver is wholly incompatible with RHD's position that the issue must solely be decided by the arbitrator.

RHD's argument that only the arbitrator is allowed to decide issues of waiver is not only completely contrary to well-established Washington law, including binding Supreme Court authority, but also finds no support in the case cited by RHD. In support of its argument, RHD cites to one Division One case, *The Heights at Issaquah Ridge, Owners Association v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 200 P.3d 254 (2009), a case decided before the *Verbeek* and *Otis Housing* decisions were issued.<sup>19</sup>

The decision in *The Heights* dealt with whether the trial court properly determined that the case was not subject to arbitration because of the 21-day time limit for filing the arbitration claim, a *procedural prerequisite*. The Court went on to find:

---

<sup>19</sup> RHD also relies on *Verbeek, supra*, to make its argument. As outlined above, this reliance is clearly misplaced.

[W]hether or not time limits act as a bar to arbitration should be decided by the arbitrator as a threshold question....Questions of procedural arbitrability, those “concerning the procedural prerequisites to arbitration,” should be resolved by an arbitrator.... Federal courts have also interpreted time limits within which to bring a claim to arbitration to be within the purview of the arbitrator.

*Id.* at 405 (emphasis added). Thus, the Court concluded, “procedural issues concerning the merits of the case” should be decided by the arbitrator. *Id.* at 408.

This is entirely consistent with the *Verbeek* decision. While the *Verbeek* Court held that the procedural issue of whether the plaintiff had properly invoked arbitration under chapter 7.04A RCW should have been decided by an arbitrator, the ultimate issue of waiver was decided by the Court. *See Verbeek*, 159 Wn. App. at 87-88.

The issue of whether a party has waived the right to arbitration through its conduct in the trial court is not the same as the issue addressed in *The Heights*. Waiver is not a “procedural prerequisite” to arbitration.<sup>20</sup> Rather, waiver falls under the trial court’s purview as an issue of whether the arbitration provision is *enforceable*. *See Otis Housing Assoc., Inc.*, 165 Wn.2d at 587 (considering waiver as an issue of “inapplicab[ility] or unenforcea[bility]”); *Verbeek*, 159 Wn. App. 82 (holding that out of five

---

<sup>20</sup> To the extent that RHD relies on *The Heights* Court’s statements incidentally including “waiver” in a list of procedural issues (not an issue necessary to the decision in *The Heights*), it must be disregarded as dicta and contrary to the Supreme Court’s more recent decision in *Otis Housing*, as well as previous cases cited above deciding waiver.

bases for a finding of waiver, that one was a “procedural” issue to be decided by the arbitrator, but ultimately deciding the ultimate issue of waiver as within its purview on *de novo* review); *Ives*, 142 Wn. App. at 382 (treating the issue of waiver as one of enforceability of an arbitration clause: “The Ives Estate agrees that the parties entered into an arbitration agreement that was *potentially enforceable*, but it argues that Ramsden waived arbitration. We agree with the Ives Estate.”) (emphasis added).

Consistent with well-established Washington authority on this issue, the trial court (and now this Court) has the authority to decide the issue of whether RHD has waived the right to arbitration. RHD has not provided this Court with any valid authority supporting its argument that only an arbitrator is allowed to decide the issue of waiver.

**D. Integrus Is Not Estopped From Alleging RHD’s Waiver.**

Finally, RHD asserts that Integrus should be estopped from alleging that RHD waived the right to arbitrate its claims through its conduct. Estoppel requires: (1) acts, statements, or admissions inconsistent with a claim subsequently asserted; (2) action or change of position on the part of the other part in reliance on such acts, statements, or admissions; (3) a resulting injustice if the first party is allowed to contradict or repudiate former acts, statements, or admissions. *Witzel v. Tena*, 48 Wn.2d 628, 633, 295 P.2d 115 (1956). Under Washington law, equitable estoppel must be proven with clear, cogent, and convincing

evidence. *Cornerstone Equipment Leasing v. MacLeod*, 159 Wn. App. 899, 907 (2011).

Even if RHD had timely asserted the issue of estoppel in the trial court below, which it did not, it cannot meet this burden. Equitable estoppel is applicable only where the defendant makes a representation of fact, regarding which the plaintiff is ignorant and is “destitute of any convenient means of acquiring such knowledge,” and, thus, plaintiff relies on it to its detriment. *Chemical Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 905 (1984).

RHD’s argument is without merit. To date, RHD has not pointed to a single statement by Integrus indicating that it intended to arbitrate the case, *particularly, that Integrus agreed to arbitrate no matter how long RHD delayed in asserting its purported right*. Rather, the sole documents cited by RHD as supposedly supporting its position (*Balch Decl., Exs. E and G*; CP at 243-247 and 252-256) are from April 2010 and June 2010, respectively, long before RHD litigated in court for almost one year. Further, *neither of these documents even mentions arbitration*. Rather, the documents indicate a willingness to participate in *mediation* at some future date.

It is clear that the parties agree that the contract mandates **mediation**, and that **mediation** may be a good process for this case. At this early stage of the case, it is premature to move forward with the selection and appointment of a **mediator**. We want to be sure that when the case is **mediated**, the parties are fully prepared for that important process, and we believe we need to know more about your client’s claims and the evidence in this case before

selecting a **mediator**. Rest assured that we will continue to discuss the time of **mediation** with you as we both move forward in this case.

\*\*\*

As a result, we are not prepared to commit to a schedule that would compel **mediation** on such a short time frame. I'm sure that we both agree that when **mediation** occurs, both sides should feel fully prepared for that session in order that it may be serious and meaningful....

*Balch Decl. at Ex. E (emphasis added); CP at 244 and 246. Further:*

You have asked once again for the appointment of a **mediator** and to schedule a **mediation** by mid-August....it is premature to schedule a **mediation**. It would be useless to have a **mediation** before both sides are properly prepared for that time to be truly helpful in getting the matter resolved.

*Id. at Ex. G (emphasis added); CP at 255.*

Obviously, mediation is not the same as arbitration, and RHD has failed to point to a single statement from Integrus that it intended to *arbitrate* these claims at some future date chosen by RHD after discovery and motion practice had been nearly completed in the trial court. Integrus has never waived and has been consistent throughout this case. RHD cannot establish, through clear, cogent, and convincing evidence, that Integrus should be estopped from claiming that RHD waived its contractual right to arbitrate or mediate.

#### **IV. CONCLUSION**

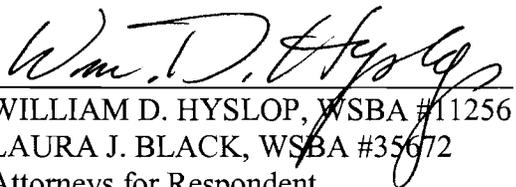
RHD is responsible for its own choices and its own conduct. RHD brought this lawsuit and initiated discovery. RHD fully participated in the

Court's scheduling this case for trial and establishing the pretrial dates. RHD submitted its long list of witnesses in compliance with the Scheduling Order. RHD submitted discovery responses, submitted supplementary responses, and argued against Integrus' Motion to Compel Discovery. It was not until the Court ordered RHD to fully answer that discovery and ruled that RHD may not call an expert witness to testify on its claims that RHD changed its course of action with its motion seeking arbitration. RHD has waived that right.

For the foregoing reasons, Integrus respectfully requests that the Court deny RHD's appeal and remand this case for trial.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of September, 2011.

LUKINS & ANNIS, P.S.

By   
WILLIAM D. HYSLOP, WSBA #11256  
LAURA J. BLACK, WSBA #35672  
Attorneys for Respondent

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of September, 2011, I caused to be served a true and correct copy of the foregoing brief by delivering the same to the following attorney of record, and individuals by the method indicated below addressed as follows:

- U.S. Mail, postage prepaid
- Hand Delivery
- Legal Messenger
- Email
- Overnight Mail
- Facsimile

TIMOTHY B. FENNESSY  
Layman Law Firm, PLLP  
601 South Division Street  
Spokane, WA 99202

  
JANET K. MacFARLANE