[Cite as *Hussein v. Hafner & Shugarman Ents., Inc.*, 2010-Ohio-4205.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

FADHIL A. HUSSEIN, ET AL.,

PLAINTIFFS-APPELLANTS, **CASE NO. WD-09-020**

v.

HAFNER & SHUGARMAN ENTERPRISES, INC., ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Wood County Common Pleas Court
Trial Court Nos. 2006-CV-0540, 2007-CV-0421 and 2008-CV-0624

Judgment Reversed and Cause Remanded

Date of Decision: August 13, 2010

APPEARANCES:

Theodore M. Rowen and Anastasia K. Hanson **for Appellants**

Eugene F. Canestraro **for Appellee, David Hafner**

Mary Leoffler Mack **for Appellee, Wood County Treasurer's Office**
Peter A. Dewhirst **for Appellee, M&M Heating and Cooling, Inc.**
Hafner & Shugarman **Enterprises, Ltd., Appellee**
James L. Rodgers **for Appellee, Stateline Landscaping**
Joseph D'Angelo **for Appellee, Great Lakes Concrete Restoration, Inc.**
Bradley P. Toman **for Appellee, Wells Fargo Bank, N.A.**
Jeffrey Shugarman, **Appellee**

WILLAMOWSKI, P.J.,

{¶1} Although this appeal has been placed on the accelerated calendar, this court elects to issue a full opinion pursuant to Loc.R. 12(A).

{¶2} Plaintiffs-Appellants, Fadhil Hussein, M.D. and Raya Ahmed, M.D. (together, "the Homeowners" or "Plaintiffs"), appeal the order of the Wood County Court of Common Pleas modifying and correcting an arbitration award. The trial court set aside the findings of personal liability against Defendants-Appellees, David Hafner ("Hafner")[1] and Jeffrey Shugarman ("Shugarman") (or jointly, "the Individual Defendants"), finding that the arbitrator exceeded his authority when he ruled on claims directed against them in their personal capacity. For the reasons set forth below, the judgment is reversed.

{¶3} This case has a lengthy history beginning in 2002 when the Homeowners, who are husband and wife, purchased lots from Hafner & Shugarman Enterprises, Inc., dba Hafner Crafted Homes and dba Hafner Homes (hereinafter, "H&S").

[1] On July 20, 2009, the Homeowners filed a motion to dismiss David Hafner, only, with prejudice, representing that on May 8, 2009, Hafner had filed a Chapter 7 personal bankruptcy action and a "Notice of Bankruptcy Filing and Operation of Stay." This motion was denied. On November 6, 2009, pursuant to the bankruptcy court's order, the automatic stay was lifted and this matter was reinstated to the court's active docket.

{¶4} Pursuant to the terms of the purchase agreement, the Homeowners were required to use H&S as the general contractor if they decided to build a home on the lots. In July 2004, the Homeowners contracted with H&S to construct a $1.4 million dollar home that was to be completed by October 2005. The contract was signed by Jeffrey Shugarman, vice-president of Hafner Crafted Homes.

{¶5} There were numerous problems and delays with the construction of the home and the Homeowners were not able to move in until July 2006. By that time, they had paid $1.7 million to H&S; the home was still incomplete; there were numerous defects; the city had refused to issue an occupancy permit; the home had serious foundation problems; the Homeowners had not been informed that the foundation footers failed inspection by the county building department; subcontractors were not paid, resulting in liens against the property; and there were violations of Ohio EPA and Army Corps of Engineer regulations concerning work done on the floodplain below the home.[2] The Homeowners were forced to hire another contractor to complete the home and correct the defects.

[2] Shugarman and Hafner have not filed an appellees' brief in this appeal. Pursuant to App.R. 18, in determining this appeal, this Court may accept the appellants/Homeowners' statements of the facts and issues as correct and reverse the judgment if the appellants/Homeowners' brief reasonably appears to sustain such action.

{¶6} As a result of the above problems, on August 21, 2006, the Homeowners filed suit against H&S, Hafner, and Shugarman (all three, collectively, "the Defendants") setting forth the following nine counts: 1) fraud in the factum; 2) fraud; 3) breach of contract; 4) breach of express warranty; 5) breach of a novation; 6) unjust enrichment; 7) negligence; 8) violation of Ohio's consumer Sales practices Act ("OCSPA" or "CSPA") and 9) piercing the corporate veil. Each claim was asserted against the contracting company, H&S, and against Hafner and Shugarman individually.

{¶7} In response, the Defendants collectively filed a motion to dismiss or, in the alternative, to stay the case pending arbitration of the claims. In their motion, the Defendants stated "the subject contract requires arbitration of *any* controversies arising out of or related to said contract. The construction contract contained the following arbitration clause: "In case any dispute or claim arises between the parties hereto under or growing out of this contract or the performance thereof, such dispute shall be resolved by arbitration by an arbitrator jointly selected by the parties ***." The trial court ruled that only the breach of contract claim was subject to arbitration and did not stay the remaining proceedings. The Defendants appealed that decision to this Court. See *Hussein v. Hafner & Shugarman Ents., Inc.*, 176 Ohio App.3d 127, 2008-Ohio-1791, 890 N.E.2d 356 (hereinafter, "the First Appeal").

{¶8} In the First Appeal, the Defendants argued that "[the] Court should hold that the arbitration clause applies to *all counts* of [the Homeowners'] Complaint" and stay all proceedings pending arbitration. (Defendants' Brief., First Appeal, p. 14, emphasis added.) The Defendants further stated that:

> **the present case involves a very broad arbitration clause which expressly *includes all controversies* relating to the "performance of" the Construction Contract. Consequently, whether cast in terms of breach of contract or tort, *each claim* based in any measure on alleged discrepancies in *Defendants'* performance under the Construction Contract, are subject to arbitration under R.C. 2711.01, et seq.**

(The Defendants' Brief., First trial, pp. 11-12, emphasis added.)

{¶9} On April 11, 2008, this Court filed a decision, affirming in part, reversing in part, and remanding the case for further proceedings. See *Hussein v. Hafner*/First Appeal, supra. The decision affirmed the trial court's finding that the Homeowners' third claim for breach of contract was subject to arbitration, and also held that the Homeowners' fourth, sixth, and seventh claims were "within the scope of the broadly worded arbitration clause" and were subject to arbitration because they specifically related to, or arose from, the performance of the contract. Id. at ¶¶27-40.

> **In summary, we conclude that the trial court did not err when it ordered the breach-of-contract claim to be arbitrated. However, we find that the court erred by not ordering that the breach-of-express-warranty, unjust enrichment, and negligence claims be arbitrated as they clearly, under *Fazio*, could not be maintained without reference to the construction contract. We further find**

that the court did not err when it failed to order that the fraud claims and the CSPA claim be arbitrated.

Id. at ¶43. Furthermore, the trial court was required to stay the proceedings pending the resolution of the arbitrable issues. Id. at ¶47.

{¶10} In April 2008, the trial court issued its order, accepting remand, and staying the proceedings until arbitration was complete.[3] The trial Court's order stated "*Defendants*' motion to compel arbitration is granted ***; and the plaintiffs and *defendants* shall submit the breach of contract, breach of express warranty, unjust enrichment, and negligence claims to binding arbitration by an arbitrator jointly selected by the parties." (Trial Court's Apr. 16, 2008, Order following remand, emphasis added.)

{¶11} Shortly thereafter, in May 2008, the parties' counsel set an October 2008 arbitration date. Retired Judge Richard W. Knepper was selected as the arbitrator ("the Arbitrator" or "Judge Knepper"). The Arbitrator met with the parties' counsel for a pre-arbitration conference on May 29, 2008.

[3] The trial court also consolidated related Case No. 2007-CV-0487 with the current Case No. 2006-CV-0540, and ordered the breach of warranty and counterclaim for breach of contract claims from that case to be included in the binding arbitration, and the remaining non-arbitrable complaints stayed, including counts for tortious interference with contractual relations, interference with contract, assault, intentional infliction of emotional distress, negligent infliction of emotional distress, extortion, breach of contract, foreclosure of mechanic's lien, and additional counterclaims/third-party complaints. On June 25, 2008, the Defendants filed a complaint seeking to enforce their mechanic's liens against the real property in Wood County Common Please Court Case No. 08-CV-0624. On July 23, 2008, the trial court issued an order consolidating that Case No. 08-CV-0624 with the current case, and staying further action in it pending arbitration.

{¶12} In late July and September of 2008, the Defendants' two law firms submitted motions to withdraw.[4] The trial court granted the motions but issued an order stating that Defendants had fourteen days from the September 17, 2008, order to obtain representation and notify the court.

{¶13} In mid-September 2008, Shugarman contacted the Arbitrator, stating that he believed no personal claims against him were to be arbitrated. The matter was discussed with the Homeowners' counsel, who maintained that the arbitration included all the parties. The Arbitrator agreed to consider the position of both sides. The Homeowners submitted a position statement; none of the Defendants made a submission. On October 20, 2008, the Arbitrator issued an opinion finding that "the Court of Appeals has determined that all issues brought forth in Trial Court Case Number [0]6-CV-540 are to be arbitrated by all parties, against all parties, except the C.S.P.A. claims and fraud claims which were stayed pending completion of the arbitration" and that arbitration was to go forward starting at 9:00 a.m. on the previously scheduled dates of October 27-31, or until completed. (Arbitrator's Oct. 20, 2008 letter, emphasis in original.)

[4] Attorneys from Handwork & Kerscher, L.L.P. filed a motion on July 23, 2008, to withdraw from representation of all the Defendants "as requested by Defendants to avoid duplication of efforts" with those of the attorneys from Barkan & Robon, Ltd., who also represented the Defendants. This motion was granted on July 25, 2008. On September 9, 2008, Barkan & Robon filed a motion to withdraw because "irreconcilable differences have arisen between the two (2) shareholders, it appears the corporation cannot continue operating and promises to counsel have not been carried out." The Homeowners opposed this withdrawal. On September 17th, Barkan & Robon clarified its motion, stating that it was only withdrawing from its representation of Hafner and H&S, but that it still intended to represent Shugarman.

{¶14} On Friday, October 24, 2008, at 4:15 p.m., Shugarman's counsel sent a letter via FAX stating that he would not be attending the Monday morning arbitration and requesting that it be postponed because he had scheduled depositions with several out-of-town attorneys. The Homeowners' counsel immediately responded, indicating that the arbitration which had been scheduled for more than six months would go forward as scheduled.

{¶15} The arbitration was held on October 27 and 28th, pursuant to the parties' prior agreement. None of the Defendants nor counsel for any of the Defendants attended either day of arbitration. Prior to taking testimony, the Arbitrator ruled on the failure of the Defendants or their counsel to appear and held that all parties had adequate notice of the arbitration and the issues that would be arbitrated.

{¶16} The Arbitrator issued an award on December 9, 2008, which contained detailed findings of fact and conclusions of law based on the issues before it: 1) breach of contract; 2) breach of warranty; 3) negligence; and 4) unjust enrichment. The Arbitrator found that the "Defendants failed to perform work on the house in a craftsmanlike manner, as required by the Contract, or in a workmanlike manner, as required by Ohio law ***." He further found:

> **Defendants breached the construction contract and its express warranties by performing shoddy, substandard work (or as Plaintiff's expert *** testified, work that was "amateurish, at best"); by failing to pay their subcontractors, laborers, and**

> **materialmen while at the same time they were lying on construction loan affidavits to continue to receive payment from Plaintiffs' bank; by failing to comply with applicable laws, rules and regulations ***, and by failing to deliver the home on time as promised.**
>
> **Individual Defendants [Shugarman] and Hafner did not appear at the arbitration and did not file answers or denials in the litigation to the facts found above and therefore this arbitrator finds that the individuals [Shugarman] and Hafner are individually liable for the actions of Hafner and [Shugarman] Enterprises Inc. as it has never been shown that any of these acts were authorized by Hafner and [Shugarman] Enterprises Inc.**
>
> **[T]he evidence supports the conclusion that Defendants, Jeff [Shugarman] and David Hafner acted with actual knowledge that they were causing injury to the Plaintiffs. Defendant [Shugarman]'s false execution of the final affidavit of original contractor; his decision to lie to Dr. Hussein about the content of the foundation fill, and his initial denial of the foundation failure, are evidence from which knowledge and conscious disregard can be inferred and are inferred**.

{¶17} The Arbitrator awarded the Homeowners $332,254.55 as compensatory damages and $191,761.01 in attorney fees and costs. The arbitration amount totaled $524,015.56 and was awarded in favor of the Homeowners and against all the Defendants, individual and corporate. The Arbitrator specifically found that the Individual Defendants were personally liable for the amounts awarded.

{¶18} The Homeowners subsequently filed an application for an order confirming the arbitration award with the trial court. Hafner then filed an objection and request to vacate, modify and correct the arbitration award.

{¶19} On February 25, 2009, the trial court issued its order, noting that "[u]nder R.C. 2711.10 and 2711.11, the court may vacate or modify an arbitration award if the arbitrators have awarded upon a matter not submitted to them or if they exceeded their powers." The trial court held that:

> **[t]he arbitrator exceeded his powers and decided an issue that was not submitted to him. *** Defendants Hafner and Shugarman were not parties to the agreement in their personal capacity and the claims against them were improperly arbitrated. *** The Court will uphold the amount of the arbitration award. However, the finding of personal liability against individual defendants will be set aside.**

(Feb. 25, 2009, Order Modifying and Correcting Arbitration Award, pp. 2-3.) The trial court further stayed the entry of judgment on the arbitration award until a trial or settlement is had on the remaining claims in the case.

{¶20} The Homeowners timely appealed this decision, raising the following assignment of error and issues for our review:

> **The Trial Court improperly vacated the Arbitration Award against the Individual Defendants in violation of R.C. 2711.10 because the Individual Defendants were equitably and judicially estopped from challenging the Award.**

{¶21} The Homeowners maintain that, in the First Appeal, Hafner and Shugarman argued that *all claims* (except those for fraud and violation of OCSPA) should be arbitrated. It was only after the Arbitrator entered an award adverse to the Individual Defendants that Hafner moved to vacate, repudiating his position in the First Appeal. The Homeowners maintain that the Individual Defendants are

equitably and judicially estopped from making one argument to this Court and another to the trial court. The Homeowners complain that "[the Defendants] have scorned the legal process, taken steps to delay this litigation (now almost three years old), and refused to attend or participate in arbitration."

{¶22} The Homeowners assert that when a party "volunteers to submit a claim to arbitration," that party "is generally estopped from denying the arbitrator's authority after an adverse award has been issued," quoting *E.S. Gallon Co., L.P.A. v. Deutsch* (2001), 142 Ohio App.3d 137, 141, 754 N.E.2d 291. In further support of their argument for equitable estoppel, the Homeowners quote,

> **[f]irst, the application of estoppel in such a case prevents a party from taking two bites of the same apple, i.e., submitting the case for arbitration and raising the arbitrator's lack of authority to hear the issues only in the event that an adverse award is rendered. Second, by applying estoppel to such a case a party is prevented from subjecting its opponent to a costly arbitration procedure only to later assert that the arbitrator has no jurisdiction over the dispute.**

Id., quoting *Vermilion v. Willard Constr. Co.*, 9th Dist. No. 94CA006008, 1995 WL 434371. The Homeowners maintain that the trial court erred in its modification of the arbitration award when it failed to consider the doctrine of equitable estoppel.

{¶23} Additionally, the Homeowners claim that the Individual Defendants are also judicially estopped from challenging the award. The Homeowners state that Hafner & Shugarman's pleadings in the First Appeal, wherein they argued

that "each and every claim" should be arbitrated, contradict the position that Hafner raised in the trial court when he argued that the Arbitrator's decision did not apply to the Individual Defendants. The Homeowners argue that the "doctrine of judicial estoppel forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding,'" quoting *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 330, 2007-Ohio-6442, 879 N.E.2d 174, ¶25 (citations omitted.). "Courts apply judicial estoppel in order to 'preserve [ ] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.'" Id. (citations omitted.) The Homeowners maintain that Hafner and Shugarman are now judicially estopped from reversing the course they originally pursued before the trial court and before this Court.

{¶24} The basis of the trial court's decision modifying the arbitration award was that the Arbitrator exceeded his powers when he included the claims against Hafner and Shugarman in the arbitration proceedings and found them to be personally liable. The trial court stated that that "Hafner and Shugarman were not parties to the agreement in their personal capacity and the claims against them were improperly arbitrated," relying upon *Teramar v. Rodier Corp.* (1987), 40 Ohio App.3d 39, 40, 531 N.E.2d 721, 722-23 (holding that the president of the

franchisee was not personally bound by the arbitration clause in the franchise agreement because a party cannot be compelled to arbitrate any dispute to which he has not agreed to submit.) Therefore, the primary issue before this Court is whether the Arbitrator exceeded his authority in ruling on claims directed against the Individual Defendants rather than limiting his review and award to only the claims against the corporate defendant, H&S.

{¶25} The scope of judicial review of a binding arbitration proceeding is limited, and R.C. 2711.10 confines a trial court's review of an arbitration award to claims of fraud, corruption, misconduct, an imperfect award, or that the arbitrator exceeded his authority. R.C. 2711.10; *Goodyear Tire & Rubber Co. v. Rubber Workers Local 200* (1975), 42 Ohio St.2d 516, 330 N.E.2d 703, paragraph two of the syllabus; *Sparks v. Barnett* (1992), 78 Ohio App.3d 448, 450, 605 N.E.2d 408. The arbitrator is the final judge of both law and facts, and an award will not be set aside except upon a clear showing of fraud, misconduct or some other irregularity rendering the award unjust, inequitable, or unconscionable." *Goodyear*, 42 Ohio St.2d at 522. Absent any evidence of material mistake or extensive impropriety, an appellate court cannot extend its review to the substantive merits of the award, but is limited to a review of the trial court's order. *Cooper v. Secs. Serv.*, 6th Dist. No. L-09-1127, 2010-Ohio-463, ¶11. The standard of review on appeal is whether the court below erred as a matter of law. *Union Twp. Bd. of Trustees v. Fraternal*

Order of Police, Ohio Valley Lodge No. 112, 146 Ohio App.3d 456, 459, 2001-Ohio-8674, 766 N.E.2d 1027, ¶6.

{¶26} It has long been the policy of the law to favor and encourage arbitration. *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn*. (1986), 22 Ohio St.3d 80, 84, 488 N.E. 872. Arbitration awards are generally presumed valid. *Bowden v. Weickert*, 6th Dist. No. S-05-009, 2006-Ohio-71, ¶50.

{¶27} However, despite the presumption in favor of enforcing an arbitration clause, it is generally established that a court cannot compel parties to arbitrate disputes that they have not agreed in writing to arbitrate. See, e.g., *Teramar*, supra; *Irby v. Strang*, 6th Dist. No. E-09-180, 2010-Ohio-180, ¶8. Third persons who are not parties to a contract containing an arbitration clause, and who are not claiming under or through such parties, ordinarily are not bound by the arbitration agreement. *ACRS, Inc. v. Blue Cross & Blue Shield* (1998), 131 Ohio App.3d 450, 455, 722 N.E.2d 1040. However, there are exceptions to this general rule.

{¶28} Most federal and state courts, including Ohio courts, have recognized limited exceptions to the rule that a person cannot be compelled to arbitrate a dispute that he did not agree in writing to submit to arbitration. "Well-established common law principles dictate that in an appropriate case a

nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH* (C.A.4 2000), 206 F.3d 411, 416-17 (exploring a multitude of instances wherein courts have found nonsignatories could be bound by arbitration clauses.)

{¶29} "These situations were elucidated in *Thomson-CSF, S.A. v. Am. Arbitration Assn*. (C.A.2, 1995), 64 F.3d 773, which states: '[W]e have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.' Id. at 776." *Cleveland-Akron-Canton Advertising Coop. v. Physician's Weight Loss Ctrs. of Am., Inc.* , 184 Ohio App.3d 805, 2009-Ohio-5699, 922 N.E.2d 1012, ¶15. Ohio courts have added to the *Thomson-CSF* categories by including a third-party beneficiary exception, stating that "nonsignatories can be 'bound to an arbitration agreement via the theories of incorporation by reference, assumption, agency, veil-piercing/alter ego, and third-party beneficiary.'" *Houses on the Move*, 177 Ohio App.3d 585, 2008-Ohio-3552, 895 N.E.2d 579, ¶31, quoting *Peters v. Columbus Steel Castings Co.*, 10th Dist. No. 05AP-308, 2006-Ohio-382, ¶13.

{¶30} Nonsignatories can be compelled to arbitrate if they are bound to an arbitration agreement "under ordinary contract and agency principles." *Javitch v.*

First Union Securities, Inc. (C.A.6, 2003), 315 F.3d 619, 629. Traditional agency theory can bind a non-party agent to an arbitration agreement if the agent's actions served as the basis for his potential liability. *Manos v. Vizar*, 9th Dist. No. 96 CA 2581-M, 1997 WL 416402 (where the court found that the broad language in the arbitration clause, which was similar to the language in the case before us now, indicated an intent on behalf of the parties "to provide a single arbitral forum to resolve all disputes arising as a result of the home inspection"); *Genaw v. Lieb*, 2nd Dist. No. Civ.A. 20593, 2005-Ohio-807, ¶16.

{¶31} This Court has recently held that, pursuant to the equitable estoppel doctrine, a nonsignatory can be bound by an arbitration clause when the nonsignatory seeks a declaratory judgment as to the signatories' rights and obligations under the contract containing the arbitration clause. *Gerig v. Kahn*, 6th Dist. No. L-00-1135, 2001 WL 336444. This decision was affirmed by the Supreme Court of Ohio in *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381.

{¶32} Under an estoppel theory, a nonsignatory who knowingly accepts the benefits of an agreement is estopped from denying a corresponding obligation to arbitrate. *Thomson-CSF*, 64 F.3d at 778. Several federal circuits recognize an alternate estoppel theory, where arbitration may be compelled by a nonsignatory against a signatory due to the "'close relationship between the entities involved, as

well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract * * * and [the fact that] the claims were "intimately founded in and intertwined with the underlying contract obligations.' " Id., 64 F.3d at 779, *quoting Sunkist Soft Drinks, Inc. v. Sunkist Growers* (C.A.11, 1993), 10 F.3d 753, 757. Courts have held that because the individual defendants' wrongful acts related to their actions as agents of the company that was a party to the arbitration agreement, the nonsignatory agents should also have the benefits of the arbitration agreements made by their principal. See, e.g., *Arnold v. Arnold Corp*. (C.A.6, 1990), 920 F.2d 1269; *Letizia v. Prudential Bache Securities, Inc.* (C.A.9, 1986), 802 F.2d 1185; *Genaw v. Lieb*, 2005-Ohio-807, at ¶¶13-15.

{¶33} Furthermore, "a nonsignatory may be bound by an arbitration clause if its subsequent conduct indicates that it assumed the obligation and intends to be bound by the arbitration clause." *I Sports v. IMG Worldwide, Inc.*, 157 Ohio App.3d 593, 2004-Ohio-3113, 813 N.E.2d 4, ¶13. A nonsignatory to an arbitration agreement can be compelled to arbitrate based upon the conduct of the nonsignatory. *In re Transrol Navegacao S.A.* (S.D.N.Y. 1991), 782 F. Supp 848, 851 (finding that "where parties intend to arbitrate, it is not unjust to expect them to arbitrate, and where, in their conduct, they manifest that intent to their opposing party who relies on that manifestation of intent, and proceeds to dispute resolution through arbitration, it is unjust to discredit the arbitration"); *Gvozdenovic v. United*

Air Lines, Inc. (C.A.2, 1991), 933 F.2d 1100, 1105 (holding that flight attendants' conduct manifested intent to arbitrate). Cf. *Kamakazi Music Corp. v. Robbins Music Corp*. (C.A.2, 1982) 684 F.2d 228, 231 noting that "[e]ven if the arbitration clause did not encompass [the party's] claims, it is hornbook law that parties by their conduct may agree to send issues outside an arbitration clause to arbitration.)

{¶34} It is clear that the Individual Defendants' actions in the First Appeal manifested their intent to be included in the arbitration process. While it is generally true that a party cannot be compelled to arbitrate any dispute that he has not agreed to submit to arbitration, all of the Individual Defendants' actions demonstrate that they not only agreed to submit all of the claims to arbitration, they actively sought to have the arbitration clause enforced on behalf of all the parties. This is not a case where a signatory to a contract is trying to force an unwilling nonsignatory to submit to arbitration. In this case, the nonsignatories, Hafner and Shugarman, brought their case to this Court and argued that "all claims" were subject to arbitration. See First Appeal. They prevailed on their appeal but now they seek to change their position.

{¶35} We acknowledge that the decision in the First Appeal did not clearly specify which parties were to be included in the arbitration. However, that was not the issue that was brought before this Court. *All three* of the Defendants jointly appealed to this Court seeking to have the arbitration clause enforced. The

only issue that they raised was which of the substantive claims were to be arbitrated; they were asking to have all of the claims made subject to arbitration for all of the parties.

{¶36} The Defendants' appellate brief in the First Trial, requesting arbitration, was submitted in the name of *all* of the Defendants ("Brief of *Appellants*, Hafner & Shugarman Enterprises, Inc., *et al*."), and throughout the brief, they consistently referenced "all counts of [the Homeowners'] Complaint" and referenced the appeal and arguments as being made on behalf of "the Appellants" or "the Appellants'," i.e., always using the *plural* or the *plural possessive* in referencing the appealing *parties*. The Defendants argued in their First Appeal,

> **It is apparent from [the Homeowners'] Complaint, that had there not been a Construction Contract between the parties, there would not have been any basis for any of their claims against [the Defendants]. Therefore, *each and every claim of* [*the Homeowners*], *arises from the Construction Contract, grew out of the contract or the performance thereof,* and cannot be decided without reference to the contractual relationship at issue.** (The Defendants appellate brief, First Trial, p. 12, emphasis added.)
>
> **[The Homeowners'] claims each incorporate the general allegations at paragraphs 7 through 13, which are explicitly based upon the Construction Contract and [the Defendants'] alleged defective performance thereof.** (Id. at p. 9.)

{¶37} Not one time, neither at the trial level nor in their First Appeal, did the Defendants indicate that only the claims against H&S should be subject to

arbitration or that the claims against Hafner and Shugarman in their individual capacity were not subject to arbitration. The Defendants argued that "each and every claim" arose out of the construction contract and was subject to its arbitration clause. The Homeowners complaint clearly included the claims against Hafner and Shugarman *in their individual capacities*, so it can only be concluded that in granting their appeal to require arbitration of "each and every" claim, those claims would include the arbitrable claims against the Individual Defendants, too.

{¶38} Hafner and Shugarman did not file an answer or deny any of the claims that were made against them in their individual capacity in the Homeowners' complaint. After this Court decided in their favor, they made arrangements to arbitrate and had a preliminary meeting with the Arbitrator. It was not until the eleventh hour, just prior to the long-scheduled arbitration, that the Individual Defendants changed their theory concerning the scope of the arbitration clause and raised the issue for the first time. We note that the first time this issue was raised was at the same time their counsel represented that "irreconcilable differences have arisen between the two shareholders [and] it appears the corporation cannot continue operating." (Sept. 9, 2008, Barkan & Robon Ltd. Memorandum in support of motion to withdraw.) Furthermore, when Hafner and Shugarman were given the opportunity to submit support for their

position to the Arbitrator prior to arbitration, they did nothing. Nor have they filed a brief in this appeal.

{¶39} There are numerous instances where courts have found that nonsignatories may be bound by an arbitration clause. The claims against Hafner and Shugarman could be subject to the contract's arbitration clause under several of the above concepts, notably: ordinary contract and agency principals, assumption, and equitable estoppel. Furthermore, once the Individual Defendants argued and sought arbitration before the court, we agree with the Homeowner's premise that they were judicially estopped from contradicting their previous position.

{¶40} We realize that the trial court specifically reserved the issue of piercing the corporate veil for trial. However, the Arbitrator did not have to address that issue in order to find that Hafner and Shugarman were liable in their individual capacities. The Individual Defendants actively sought to have the personal claims against them included in the arbitration and, therefore, assumed the rights and obligations under the contract. Furthermore, as agents of H&S, the claims against them arose from the contract and the arbitration provision encompassed those claims; Hafner and Shugarman individually performed some of the work and did some of the acts that were the subject of the complaint; and finally, the Arbitrator found that Hafner and Shugarman were individually

responsible for misconduct that could not be shown to have been authorized by the corporation (i.e., misrepresentation and lying on affidavits). The Arbitrator's finding that the specified claims were arbitrable among all of the parties was correct. The trial court erred as a matter of law when it held that a party could not be bound by an arbitration clause unless it was a signatory to the contract. While that is usually the rule, there are exceptions to that maxim that are applicable to the specific facts in this case.

{¶41} Based on the above, we find that the Homeowners' assignment of error is well taken and is affirmed. The judgment of Wood County Court of Common Pleas is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judgment Reversed and
Cause Remanded

ROGERS and SHAW, J.J., concur.

/jlr

Judges John R. Willamowski, Richard M. Rogers and Stephen R. Shaw, from the Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio