No. 84422-4

STEPHENS, J. (concurring/dissenting)—I dissent from that part of the lead opinion ordering arbitration of the children's claims.[1] It is well-established that nonsignatories to a contract are not bound by an arbitration clause. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009). Under principles of equitable estoppel, however, a party who knowingly exploits a contract for benefit cannot simultaneously avoid the burden of arbitrating. *See id.* at 811 n.22; *see also Woodall v. Avalon Care Ctr.—Fed. Way, LLC*, 155 Wn. App. 919, 923-24, 231 P.3d 1252 (2010). The lead opinion holds equitable estoppel requires arbitration of the Lehtinen and Sigafoos children's injury claims because the complaint includes the children as "plaintiffs" and among the plaintiffs' claims are allegations of breach of warranty and a request for rescission. Lead opinion at 10-

[1] On the separability issue, I agree with the lead opinion that this case presents a different situation from that in *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008), because the contracting plaintiffs challenged the purchase and sale agreement as a whole, not simply the arbitration provision. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

11. This is hardly a sufficient basis for applying equitable estoppel.

Importantly, the lead opinion rejects the Court of Appeals' holding that the children must arbitrate because "the source of the duty of care Quadrant owed the Homeowners and their children arises from the sale of the home." *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 888, 224 P.3d 818 (2009). Without doubt, Quadrant owed the children an independent duty that does not arise from the purchase and sale agreement. The children assert personal injury claims, the precise scope of which the trial court will decide, but which are not grounded in the contract. This court has recently emphasized the independent duty of building professions to individuals who foreseeably sustain personal injuries as a result of negligent acts or omissions. *See Affiliated FM Ins. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010) (lead and concurring opinions recognizing common law duty); *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007) (rejecting contract-based defense rooted in privity and recognizing deterrent effect of tort liability). Accordingly, it is a misnomer to label the duty at issue here a contractual duty.

Having rejected the Court of Appeals faulty reasoning, the lead opinion should have reversed the order compelling arbitration of the children's claims. Instead, the lead opinion focuses narrowly on the complaint's assertion of a rescission and a breach of warranty claim to reach the remarkable conclusion that the children "knowingly exploit[ed] the terms of the contract." Lead opinion at 11.

This conclusion ignores the crux of the children's claims, which sound in tort and allege personal injuries. True, the parents are obliged to arbitrate their tort claims along with their contract claims, but this is because the arbitration agreement in the contract they signed says so. It does not follow that nonsignatories are bound to arbitrate tort claims that do not arise out of the contract. In the end, the lead opinion's reasoning sweeps aside the full facts and reduces the children's action to the sum total of only two claims. This is a wholly insufficient basis for concluding the children have exploited the benefits of the contract and are therefore estopped from having their tort claims heard in court.

There being no sufficient factual basis for applying equitable estoppel, I would rely on the general rule that nonsignatories to a contract are not bound by the contract's arbitration clause. I would reverse the Court of Appeals on this issue.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Charles W. Johnson

Justice Tom Chambers

Justice Charles K. Wiggins

Justice Mary E. Fairhurst