NO. 97201-0

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

(COA No. 77694-1-I)

JEOUNG LEE and SHERRI MCFARLAND, on their own and on behalf of all persons similarly situated,

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY PUBLIC HOSPITAL DISTRICT #2,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

The Respondents are Plaintiffs Lee and McFarland and the certified class of former and current Evergreen Hospital Medical Center ("Evergreen") nurses in its Emergency Department ("the Class").

II. SUMMARY OF RESPONSE

The only claims in this case are for violation of the requirements in WAC 296-126-092 that workers get one meal break by the fifth hour of work and at least a 10 minute rest break for every four (4) hours of work. The claims are about *when* breaks must be provided under *state* law. There is no claim for breach of the collective bargaining agreement ("CBA") between Evergreen and the nurses' union, the Washington State Nurses Association ("WSNA"). Nor is WSNA a party to the action.

The CBA's arbitration provision *on its face* only applies to a breach of the "*express terms*" of the CBA – not "implied" terms, work rules, employee practices or state law. CP 106, emphasis added. Indeed, in a prior case, WSNA and Evergreen interpreted the CBA as *not* covering state law rest break claims and Evergreen has so admitted in deposition.[1] Nor does the CBA give Evergreen the right to compel arbitration. It only grants the union the right, in its discretion, to compel arbitration. *Id.*

[1] *See, Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 348, 349, 311 P.2d 1253 (2013); and Evergreen testimony, CP 1253-55.

Evergreen admitted in deposition it never negotiated with WSNA for a provision that permits Evergreen to compel arbitration. CP 1253-55.

The CBA's meal/rest break provision *on its face* does not vary or modify the requirements of WAC 296-126-092 that the one 30 minute meal break permitted on a work shift be provided no later than the fifth hour of work. It does not vary or modify the requirement that a rest break be provided for every four hours of work. It varies the number of minutes for the rest break from 10 to 15, but not *when* it must be provided. CP 528. The provision states that breaks "*shall be* administered consistent with state law (*WAC 296-126-092*)." CP 528, emphasis added. Evergreen admitted in deposition it never negotiated with WSNA for an agreement that modified *when* breaks had to be provided. CP 1243-47.

In September 2018, after aggressively litigating the state law claims for more than 10 months, Evergreen moved to compel arbitration, asserting the claims were for breach of the CBA based on McFarland's deposition testimony. The trial court rejected the argument, as it had done weeks earlier when Lee moved to add McFarland as a plaintiff and class representative. It ruled that her claim, like the class claim, was for violation of state law and not subject to the CBA's arbitration provision.

It also denied the motion to compel arbitration because Evergreen waited too long. At that point, the court had denied Evergreen's motion to

dismiss, granted two amendments to the Complaint, granted class certification, approved class notice being sent, and over 99% of the class members chose not to opt out. Trial was 2 months away and Plaintiffs had spent over $140,000 in fees and costs including the cost of notice to the 565 class members. Only 14 opted-out. Plaintiffs and Class would be severely prejudiced if compelled to arbitrate their state law claims then.

In February 2019, the Court of Appeals affirmed. Its decision adheres to the rule that a party cannot be compelled to arbitrate a claim the party did not agreed to arbitrate.[2] It is consistent with *Peninsula Sch. Dist. No. 401 v. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 415, 924 P.2d 13 (1996) ("we look *to the face of the collective bargaining agreement* to determine whether this dispute is arbitrable.")(emphasis added). The CBA on its face does not apply to state law claims or breach of implied terms.

Nor does the Court of Appeals' decision raise any issue about Evergreen's right to vary the requirements of WAC 296-126-092 for *when* breaks must be provided *through bargaining and negotiation* with WSNA, should it so choose. But here, Evergreen admitted in deposition it never negotiated for or got from WSNA an agreement to vary *when* meal and rest breaks had to be provided consistent with WAC 296-126-092.

[2] *See, Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 54 (2013).

CP 1243-47. To the contrary, the break provision states that breaks "s*hall be* administered consistent with state law (WAC 296-126-092)." CP 528 (emphasis added). If Evergreen wants a different deal, it has to negotiate with WSNA and cannot force it upon WSNA or the RNs by judicial *fiat.*

Nor is the decision inconsistent with prior waiver cases. In its Answer to the 2016 Complaint filed the year before it moved to compel arbitration, Evergreen asserted that the claims were subject to arbitration. Petition at 19. The Second Amended Complaint did not raise for the *first time* a "forward looking" claim for injunctive relief that triggered its assertion of the right to arbitrate. The Complaint and First Amended Complaint have similar language. Even so, Plaintiffs told the trial court there was no forward-looking injunctive relief sought. Rather they asked that Evergreen be enjoined from *continuing* to *withhold* wages *due and owing* for *past* unpaid missed breaks to December 31, 2016. CP 17. The Class claims end in December 2016 – there is no forward looking claim.

III. RE-STATEMENT OF ISSUES PRESENTED

Evergreen's Petition presents the following issues:

1. Is the Court of Appeals decision consistent with the CBA's meal/rest break provision? Yes. The provision on its face does not vary *when* breaks must be provided. It states that breaks "*shall be* administered consistent with state law (WAC 296-126-092.)" CP 528 emphasis added.

Evergreen admitted it never negotiated for a variance. CP 1243-47.

2. Is the decision consistent with *Peninsula*? Yes. *On its face,* the CBA's arbitration clause only applies to breach of the "*express terms*" of the CBA – not "implied terms," work rules or practices or state law. It does not apply to Evergreen's alleged "implied" modification of the WAC requirement that meal breaks be provided by the fifth hour of work. In deposition, Evergreen admitted it never negotiated with WSNA for an arbitration clause that applied to state law claims. The Court of Appeals was not required to interpret or assume the CBA's meal/rest break clause had an "implied modification" of the WAC to permit meal breaks after the fifth hour of work because a dispute over "implied terms" or work rules is not a subject of arbitration agreed to by WSNA "*on the face"* of the CBA.

3. Is the decision consistent with Washington law on waiver? Yes. Under *Romney v. Franciscan Med. Grp.*, 199 Wn. App. 589 (2017), Evergreen's litigation in court for over 10 months and delay in seeking arbitration waived its right because it would have severely prejudiced Plaintiffs and the Class to now have to arbitrate their claims. The delay cost them over $140,000 in fees and costs and would have required new notice being sent to the Class only two months before trial. Nor did they seek "going forward" injunctive relief for the first time in the Second Amended Complaint. They sought to enjoin Evergreen from withholding

wages for unpaid *past* breaks through December 31, 2016. CP 17.

IV. STATEMENT OF THE CASE – PERTINENT FACTS

A. The CBA's Meal/Rest Break Provision

The CBA's "Meal/Rest Period" clause states, emphasis added:

> 7.7 Meal/Rest Periods. *Meal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092).* Nurses shall be allowed an unpaid meal period of one-half (1/2) hour. Nurses required by the Employer to remain on duty during their meal period shall be compensated for such time at the appropriate rate of pay. All nurses shall be allowed a rest period of fifteen (15) minutes on the Employer's time, for each four (4) hours of working time.

CP 528. WAC 296-126-092, states (emphasis added):

> Meal periods – Rest periods.
>
> (1) Employees shall be allowed a meal period of at least third minutes which commences *no less than two hours nor more than five hours* from the beginning of the shift…
>
> (2) No employee shall be required to work more than *five consecutive hours without a meal period*….
>
> (4) Employees shall be allowed a rest period of *not less than ten minutes*, on the employer's time, *for each four hours of working time*. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work *more than three hours without a rest period*.

The CBA's "Meal/Rest Periods" clause that the union, WSNA, *agreed to,* on its face, did *not* modify the WAC requirements of a meal break by the 5th hour of work and a rest break for every 4 hours worked.

B. Evergreen's Testimony on CBA's Meal/Rest Periods

Pursuant to CR 30(b)(6), Evergreen produced its vice-president, Nancee Hofmeister, to testify on the CBA. She admitted Evergreen had not contracted with WSNA to modify the requirements in WAC 296-126-092 for *when* breaks had to be given, i.e. a meal break by the fifth hour of work and rest breaks for every four hours worked. CP 1243-1247.

Hofmeister testified the only modification in the CBA was increasing the rest break from 10 to 15 minutes. *Id.* But the claim alleged here as set out in the SAC is for the WAC's 10-minute break, not the CBA's 15-minute break. There is no claim for the five-minute difference.

C. The CBA's Grievance and Arbitration Provision

The CBA's Grievance Procedure (CP 518) states emphasis added:

> Definition. A grievance is defined as an alleged breach of the *express terms* and conditions of the Agreement.

The Procedure's arbitration clause (CP 519) says, emphasis added:

> Step 4. Arbitration:
> If the grievance is not settled on the basis of the foregoing procedures, the *Association may* submit the issue in writing to final and binding arbitration….

As negotiated and on its face, the clause only grants the union, the Washington State Nurses Association, the right to submit a grievance to arbitration, not Evergreen and it leaves to the union's discretion whether to do so. It does *not* give Evergreen the right to compel RNs to arbitrate.

D. Evergreen's Deposition on the Arbitration Provision

Ms. Hofmeister testified that Evergreen did not contract with WSNA for a grievance procedure that covers state law claims or waives the rights of RNs to sue Evergreen over state law violations. CP 1253-54. It did not contract for a clausee that *requires* WSNA to arbitrate or permits Evergreen to compel arbitration. CP 1254-55. It could have but did not.

In fact, WSNA sent RNs a letter about the "class action lawsuit, *Lee v. Evergreen Hosp.*, Case No. 16-2-27488-9 SEA filed in November 2016." WSNA told RNs: "The new *Lee* case was not filed by WSNA. *You are free* to participate in the case." CP 1221, emphasis added.

And, in *Pugh*, 177 Wn. App. at 352, WSNA sued Evergreen for violating *state law* by not giving 10-minute rest breaks. It did not sue for breach of the CBA. Evergreen did not demand arbitration. The parties to the CBA acted as though state law claims were not subject to arbitration.

E. Evergreen Litigated Without Demanding Arbitration

In November 2016, Lee filed this Class action alleging Evergreen violated RCW 49.12 by not giving 10-minute rest breaks and 30-minute meal breaks in the manner required by WAC 296-126-092. In December 2016, Evergreen filed an Answer asserting an Affirmative Defense that the claim was subject to the CBA's arbitration clause and had to be arbitrated. CP10. But Evergreen chose to litigate and take its chances in the court.

In January 2017, Lee filed a First Amended Complaint ("FAC"). The FAC alleged a Class damages claim for ED nurses who had "missed" 10-minute rest breaks and 30-minute meal breaks from May 1, 2011 to present. CP 13. Evergreen again chose to litigate in court and moved to dismiss the original complaint even though Lee had filed the FAC. It argued that Lee lacked standing to sue because she was no longer a current Evergreen RN. It did not allege that the claims had to be arbitrated. CP 13.

The same day, February 3, Lee moved to certify the Class state law claims. Evergreen opposed the motion but did not say the claims were governed by the CBA or seek arbitration. Nor did it ask the court to stay certification until it could decide if the claims had to be arbitrated. CP 799.

On March 8, the court certified the Class claim for "missed breaks" from May 1, 2011 to August 29, 2016 under CR 23. CP 1344. On March 20, Evergreen moved for reconsideration arguing the class period should be narrowed. It did *not* assert that the claim had to be arbitrated. CP 1349.

On April 21, *Evergreen* asked the court to approve *its* proposed Class Notice. Its Notice told Class members that the claims in the action were based on alleged violations of Washington law. It did *not* tell them the claims were governed by the CBA or subject to arbitration. CP 1353.

Lee also moved for approval of her Notice, which was approved. CP 645. The court-approved Notice told Class members the claim was for

violation of Washington law, not breach of the CBA. Plaintiffs' counsel sent the Notice *at their expense* to 565 RNs. *Id.* Evergreen did not oppose sending the Notice because the claim had to be arbitrated. *Id.*

On July 11, 2017, Evergreen took Lee's deposition instead of moving to compel arbitration. Over two weeks later, on July 26, it took McFarland's deposition, instead of moving to compel arbitration. She was a class member not a plaintiff at the time. CP 480. She mistakenly said she thought the requirement for meal breaks by the fifth hour was in the CBA but it is not. It's in the WAC. The CBA does not say meal breaks are given at the mid-point of a 12-hour shift or the CBA overrides state law. It says the opposite: breaks "shall be administered in accordance with state law (WAC 296-126-092)." Ms. McFarland was not asked and did not testify that her claim was for breach of the CBA. CP 480-498. She said that she frequently was not given rest breaks *at all,* i.e. she was not even given the minimum 10-minute break required by state law. CP 482.

On July 31, Lee moved to continue the November 6, 2017 trial date to March 5, 2018. Evergreen opposed the motion arguing it would be prejudiced if the class state law claims were not tried November 6. It did *not* say that the claims to be tried only 90 days later had to be arbitrated.

On August 4, Lee moved for leave to file a Second Amended Complaint ("SAC") to add McFarland as a Class representative and to

expand the Class period to December 31, 2016. CP 438-39. Evergreen opposed the motion arguing it would be prejudiced if the Class claim went to December 31, 2016 because its experts had analyzed the WAC meal and rest break claims through August 29, 2016. CP 276. It also argued that McFarland was not a proper Class representative because her claim was for breach of the CBA, had to be arbitrated and was not "typical" of the Class claim because the class claim was for violation of state law. CP 283.

On August 15, the trial court rejected Evergreen's arguments. It granted Lee's motion and added McFarland as an additional Class representative. Evergreen did not seek review of the August 15 order. Nor did it seek review of the court's August 8 order that granted the motion to continue the November 6 trial and ordered "no further trial continuances will be granted *for any reason.*" CP 1403, emphasis is original. Instead, on September 1, it filed a motion to compel arbitration and dismiss the action or stay proceedings. CP 555. A stay would have meant a continuance of the November 6 trial date only 65 days away.

On November 3, the court denied the motion to compel arbitration. It did not alter its prior ruling that the claims were for state law violations. VRP 25-26. It doubted the "right parties" were in front of it to compel arbitration because the union was not a party. VRP 16. It noted that Evergreen had engaged in "quite a long history of litigation in this court

instead of any effort to enforce the right to arbitration." *Id.*

F. Evergreen violated the WAC's Break Requirements

The WAC requires that meal breaks be given not more than five hours into a shift. But RNs testified they did not get meal breaks until after the 5th hour of work. CP 1385, 1427. Evergreen also did not train RNs to report late meal breaks as "missed" so that they could get paid. CP 1415, 1432. Instead, RNs were told that they got their meal break if they got a 30-minute break *any time in their shift*. CP 1479. This false information was one of the reasons why RNs did not report "late" breaks as "missed."

The WAC also mandates one 10-minute break for every four hours worked. For a 12-hour shift that means at least *three* 10-minute rest breaks. But RNs testified that they did not get *three* breaks on 12-hour shifts because Evergreen's practice was to have RNs *combine* two breaks into a single longer break. CP 889-91, 1251-52. By combining two rest breaks into one, the RN was necessarily denied at least one 10-minute break for every four hours worked and three 10-minute breaks on a 12-hour shift. The RN necessarily worked more than three hours without a break in violation of the WAC. Evergreen admitted that it did not contract with WSNA to modify the WAC requirement to allow combining two rest breaks into one. CP 1252. No such modification is stated in the CBA.

V. LEGAL ARGUMENT

A. The Court of Appeals Decision is Consistent with *Peninsula*

This Court has stated: "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[3] In *Peninsula*, 130 Wn. 2d at 415, it stated the *Steel Workers* rule that "we look to the face of the collective bargaining agreement to determine whether this dispute is arbitrable."

On its face, the CBA here does not make claims for state law violations subject to arbitration. CP 106. Its arbitration clause is very narrow and covers only claims for breach of the "*express terms*" of the CPA, not "implied terms," work rules, or standard practices. *Compare* CP 106 with CBA clause in *Romney*, 199 Wn. App. at 599 (arbitration required of "claims" defined in CBA "as 'all disputes arising out of or related to the Employment Agreement, your employment by FMG, and/or your separation from employment with FMG.'"). Indeed, "[p]arties may choose which issues they want to arbitrate…." *Romney*, *supra.*

Notably, in opposing Lee's motion to add McFarland as a Class representative, Evergreen argued that while the class claim alleged by Lee was for *violation of the WAC*, not the CBA, McFarland's claim based on

[3] *Hill*, 179 Wn. 2d at 54; *See, also, Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ*., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989).

her deposition testimony was different. It was for breach of the CBA and had to be arbitrated. But in granting leave to file the SAC, the trial court rejected this argument. It ruled McFarland's claim was typical of the Class claim for violation of the WAC and she was a proper "Class representative." Evergreen did not appeal that order but now makes the same argument to this Court that McFarland's deposition shows her claim is for breach of the CBA. The argument is baseless. The only certified class claim is for violation of the requirements of WAC 296-126-092.

Plaintiffs are the "master of their complaint" and can limit their claims to violations of state law. *See Burkhardt v. Swedish Health Servs.*, 2017 U.S. Dist. LEXIS 74711 at *10 (W.D. Wash. May 16, 2017):

> Even if plaintiff, as a member of the bargaining unit, had substantial rights under the CBA and could have brought suit under § 301, she remains master of her complaint and chose not to do so."). On its face, *as written,* the CBA's arbitration clause does not apply.

See also Hinterberger v. Catholic Health, 2008 U.S. Dist. LEXIS 96105 (W.D. N.Y. Nov. 25, 2008 at *19-20):

> Plaintiffs' allegation that they worked during their unpaid lunch period sets forth an independent statutory right under section 162 of the NYLL4 [the New York Wage Statute]. As a result, any provisions *in the CBA* discussing meal periods are irrelevant to Plaintiffs' claim.

Washington courts enforce contracts *as written* and may not "add to, subtract from, modify, or contradict the terms of a fully integrated

written contract…." *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327 (1997). If the CBA's grievance procedure on its face does not apply to plaintiff's claim, the court enforces the CBA's clause as written and denies arbitration. *Int'l Union of Operating Eng'rs Local 148, AFL-CIO v. Gateway Hotel Holding, Inc.*, 956 F. Supp. 2d 1071 (E.D. Mo. 2013). Because the CBA that Evergreen negotiated with WSNA, *as written*, does not mandate arbitration of claims for violation of the WAC, the court properly denied the motion to compel arbitration of the state law claims.[4]

B. The Decision Below Does Not Affect Any Right to Modify

Evergreen argues the Court of Appeals' decision ignores a public employer's right to modify the WAC requirements for *when* meal and rest breaks must be given and adversely affects Evergreen's ability to modify such requirements given existing work practices. But Evergreen admitted in deposition, it never *tried to negotiate* with WSNA for any modification of *when* meal and rest breaks had to be given under the WAC. The CBA does *not* say meal breaks are given at the "mid-point" of a 12-hour shift or by the sixth hour of work. Had Evergreen wanted to modify the WAC requirement of a meal break by the fifth hour of work in the CBA, it had

[4] Evergreen repeatedly cites to extrinsic evidence that is irrelevant. WSNA is not a party and extrinsic evidence applicable to interpretation of a contract does *not* include the subjective and unilateral intent of one of the parties. *See, Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn. 2d 678, 684, 871 P.2d 146 (1994).

to bargain for *WSNA's* agreement to modify the requirement and that modification had to be *expressly* stated in the CBA to be arbitrable. It admitted through Ms. Hofmeister it did not do so. CP 1247. The CBA has no such modification. Instead, it says breaks "*shall be* administered" consistent with WAC 296-126-092. CP 528. "Shall" is mandatory.

Equally, while public employers can modify WAC requirements by *agreement* with the union, the modification has to be clearly set out in the CBA to comply with public policy. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 583-84 (2017) (waivers of worker's statutory protections are disfavored and must be clearly stated.).[5] Here, Evergreen admitted in deposition the only modification in the CBA relating to meal breaks is eliminating one of two breaks required under the WAC for a 12-hour shift. There is no modification in the CBA's break clause for *when* the one break permitted must be given. Instead it says breaks shall be administered consistent with the WAC. The WAC requires the break by the 5th hour of work. If Evergreen thinks that makes its compliance with the WAC impossible or its position untenable, its remedy is to negotiate with WSNA for a change. It cannot ask this Court to impose it on WSNA by fiat.

Evergreen also admitted in deposition the CBA has *no provision*

[5] *See, also* RCW 49.12.187; L&I Guidance, E.S.C. 6 at p. 3. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300-01, 996 P.3d 582 (2000).

on "intermittent" breaks. CP 1249-50. So whether the WAC requirement of a 10-minute rest break can be satisfied by "intermittent rest" will be governed by regulations implementing the Wage statute, not by the CBA.

Because the CBA's break clause is clear in requiring compliance with the WAC for *when* breaks must be administered, there is no need for contract interpretation. Nor under the arbitration clause is the conduct of the parties to the CBA (Evergreen and WSNA) relevant, because arbitration only applies to a claim for breach of the CBA's *express* terms.

C. Evergreen has no Right to Compel Arbitration

The CBA is interpreted under the rules of contract interpretation. *Hill, supra.* Washington courts interpret contracts "*as written*" and not as *one* of the parties "wishes" it had been written. *In re Marriage of Schweitzer,* 132 Wn. 2d at 327. Here the CBA's Arbitration clause, Step 4, says the "Association" (WSNA) "may" request arbitration. It does not say Evergreen can compel RNs to arbitrate. Ms. Hofmeister admitted this in deposition. CP 1254-55. Evergreen could have *tried* to contract with WSNA for such a right. But did *not do so* and cannot do so by judicial fiat.

D. There is no Dispute between Evergreen and WSNA at Issue

The right to compel arbitration requires agreement. So the party seeking to compel arbitration must *first* show there is a contract with *that party* requiring arbitration of *that claim*. *Volt Info. Scis, Inc., supra.*

Evergreen's CBA is a contract with WSNA, not with the RNs. CP 1264-65. Because RNs are not parties to the CBA, Evergreen's cited cases saying that "all questions upon which *the parties* disagree are presumed to be within the arbitration provision unless negated by clear implication," do not apply. This Class action does not involve a question upon which the *parties* to the CBA, Evergreen and WSNA, disagree. To the contrary, WSNA sent the RNs a letter telling them they were "free to participate" in this action. The case involves a disagreement between Evergreen and its RNs over whether Evergreen has complied with the WAC, not the CBA.

Evergreen admitted in deposition, it did not contract with WSNA to waive the rights of RNs to sue it for violations of the WAC. CP 1254. Nor did it contract for an arbitration clause requiring RNs to arbitrate. *Id.*

Indeed, when WSNA sued Evergreen in a prior case for not giving rest breaks, it alleged a violation of the WAC's 10-minute break requirement, just as Plaintiffs have done here. Evergreen did not demand arbitration of WSNA's claim. Instead, it paid the claim. *Pugh*, 177 Wn. App. at 352. So, if one considers the conduct of the parties to the CBA, it shows Evergreen and WSNA believe claims for violation of WAC 296-126-092 are *not* subject to the CBA's grievance and arbitration clause.

E. Evergreen waived any Alleged Right it had to Arbitrate

Even if Evergreen had a right to compel arbitration of the claims in

this Class action under the CBA, which it did not, it waived that right by actively litigating in court and taking its chances on the court's rulings for 10 months before moving to compel arbitration. In doing so, it imposed on Plaintiffs over $140,000 in fees and costs. Such conduct waives a right to compel arbitration. *See, Steele v. Lundgren*, 85 Wn. App. 845 (1997) (delay of 10 months before seeking to compel arbitration after litigating in court and taking discovery depositions, sufficient to support court's ruling that party waived right to compel arbitration.); *see, also Romney*, 199 Wn. App. at 601; *Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016) (the policy favoring arbitration is that arbitration provides *a quick and inexpensive* means to resolve individual claims and disputes. When a party actively litigates in court and imposes on the other party both delay in resolving the dispute and extensive fees, the very basis for the rule favoring arbitration and the benefit to the party of arbitration no longer exist).

Evergreen admits it alleged the claims were subject to arbitration under the CBA from the *very beginning* in its Answer. It now says it did not mean it, which violates it duty under CR 11. It argues it had to assert an "arbitration" place-holder, but CR 12 does not waive the defense of arbitration if not stated in the Answer. It also argues that the delay was justified by Plaintiffs' Second Amended Complaint ("SAC")'s request for injunctive relief. But that language was in the 2016 Complaint and First

Amended Complaint and Plaintiffs stated that the relief it sought was not forward looking and had nothing to do with future changes in Evergreen's practices that had to be negotiated with the union. *See,* SAC at CP 17:

> Plaintiffs request injunctive relief barring Evergreen from continuing to withhold payment of wages due and overtime pay for missed rest and meal breaks over the class period. These wages and pay are owed to Plaintiff ad the class members.

The class period, as noted, ended December 31, 2016 or *21 months before* Evergreen moved to compel arbitration in September 2018.

VI. CONCLUSION

Now that it has been sued by RNs for violating WAC 296-126-092, Evergreen is unhappy with two provisions in its CBA. It wants a *post facto* modification of the meal/rest period clause that requires breaks "be administered consistent with WAC 296-126-092" in order to permit a meal break after the fifth hour of work and an expanded grievance/arbitration clause that applies to breach of the CBA's "implied terms," work rules, or employee practices, rather than only express terms.

Stripped of its baseless assertions, Evergreen's Petition for Review boils down to Evergreen asking this Court to impose new CBA clauses on WSNA and nurses that are to its liking without the trouble of negotiating with WSNA and getting its consent. WSNA is not a party to this action, but if it were, that is not this Court's role. The Petition should be denied.

DATED: June 12, 2019

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on this date I electronically filed the foregoing document via the Washington State Appellate Courts' Portal which caused service on all counsel of record.

DATED this 12th day of June, 2019, at Seattle, Washington.

s/Nerissa Tigner
Nerissa Tigner, Paralegal

BRESKIN JOHNSON TOWNSEND PLLC

June 12, 2019 - 4:24 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97201-0
Appellate Court Case Title:	Jeoung Lee and Sherri McFarland v. King County Public Hospital District #2
Superior Court Case Number:	16-2-27488-9

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