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NO. 66137-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER, on
behalf of themselves and all persons similarly situated

Respondents/Cross-Appellants,

v.

GARDA CL NORTHWEST, INC., f/k/a AT SYSTEMS, INC. a
Washington Corporation

Appellant/Cross-Respondent.

CROSS-APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This is a certified class action by approximately 300 current and former armored truck employees against Defendant Garda CL Northwest for violations of Washington wage laws. The Plaintiff class claims they are not allowed meal or rest breaks as required by law. After a year and a half of litigation, Defendant asked the trial court to compel Plaintiffs to individually arbitrate their claims. The court granted that motion but found that the arbitration should address all of the claims of the class it had previously certified.

The trial court should not have ordered arbitration for several reasons. First, the request for arbitration came much too late. Garda was not entitled to force Plaintiffs to arbitrate after it had litigated this matter for over 18 months; where it had taken advantage of judicial processes including extensive discovery and motion practice; where a class had been certified and class members had been notified about the particulars of this case; and where trial was less than four months away.

In addition, the contracts upon which Garda relied to seek arbitration do not provide that arbitration is the sole and exclusive method for resolving disputes, and Garda cannot meet its heavy burden of showing that Plaintiffs “clearly and unmistakably” agreed

to waive a judicial forum. Finally, the terms of arbitration set forth in those agreements are unconscionable and could not be enforced in any event.

If the Plaintiffs' claims must be arbitrated, the trial court was correct in ordering class arbitration. Garda misapplies Supreme Court precedent concerning whether a court or an arbitrator must decide whether arbitration may proceed on a class basis, and the trial court had a sound basis to order class arbitration here. The very nature of labor arbitration contemplates class remedies for all affected employees, and Garda's arbitration agreements specifically follow that tradition. And under Washington law, the arbitration agreements would be invalid if they were construed to forbid class actions because they would effectively exculpate Garda from liability for violations of fundamental employee rights.

II. ASSIGNMENTS OF ERROR

1. Did Defendant waive its right to demand individual arbitration after litigating against Plaintiffs for 19 months, where the court had already certified the class, class members had received notice and an opportunity to opt out, and when trial was only four months away?

2. Did the trial court err in compelling arbitration where the alleged agreement to arbitrate was located in a collective bargaining agreement which did not “clearly and unmistakably” waive the right to a judicial forum for statutory wage claims, as required by law?
3. Did the trial court err in compelling arbitration when the arbitration agreement was unconscionable under Washington law and would effectively prevent Plaintiffs from vindicating their statutory rights?
4. If arbitration is appropriate, did the trial court correctly order class-wide arbitration where a class had already been certified, the substantive rights of Plaintiffs could not be vindicated without class adjudication, and it is clear from the history, context, and language of the arbitration agreement that the parties intended to resolve disputes over work and pay practices in collective actions?

III. STATEMENT OF THE CASE

A. Factual Background: Plaintiffs Represent a Class of Hundreds Seeking Relief for Wage and Hour Violations.

Respondents/Plaintiffs are a class of approximately 300 messengers and drivers (“Plaintiffs”) who were employed by Garda CL Northwest (“Garda” or “Defendant”) in the State of Washington

to pick up, transport, and deliver currency in armored trucks for Garda clients. Clerk's Papers at ("CP") 4. Garda currently employs over 100 armored truck crew members in seven branch locations throughout the State of Washington. CP 4, 10. Plaintiffs allege that while working for Garda, they were not allowed meal and rest breaks as required under Washington Industrial Welfare Act, RCW 49.12, and Minimum Wage Act, RCW 49.46. See CP 7.

At each Garda facility in Washington, Garda requires employees to sign a "labor agreement." CP 560 at p. 37. Although the labor agreements are ostensibly "negotiated" between Garda and the "employee associations" at each of Garda's branches, Garda's employee associations are not "unions" in the normal sense. Plaintiffs were not even told the association existed when they started working at Garda, and some did not receive a copy of the applicable labor agreement until months later, if ever. CP 554 at pp. 11-13; CP 559-560 at pp.11, 16; CP 564 at p. 56; CP 565 at p. 74. Employees do not pay dues to the association, and the association has no resources. CP 606-607. The associations are not able to truly "negotiate" with the company and for the most part just have to accept whatever contract is offered. CP 555 at p. 16; CP 561 at p. 39. All of the Plaintiffs testified that they do not know

what the association really is. CP 554 at pp. 11-13; CP 559 at p. 10; CP 564 at p. 57. Although Garda claims to negotiate separately with each branch “association,” the language of all the agreements at each branch is materially identical. See Appellant’s Opening Brief at 3-4.

All of Garda’s labor agreements contain a clause entitled “Grievance and Arbitration.” This clause does not say that employees must arbitrate statutory wage practice claims, or may not bring such claims in court. The clause provides an internal mechanism for resolving employee grievances. See CP 142. It states that a grievance “shall be presented in writing to the company” by the employee and/or the union “within (14) calendar days of the occurrence giving rise to [the] grievance.” *Id.* It does not explicitly address the handling of employer *practices* such as those challenged here, which recur daily.

When a grievance is presented, the company then has 14 days to respond. If the *union* finds this response inadequate, *it* has 14 days to request arbitration. *Id.* Even then, no arbitration shall occur unless, after a “management-union meeting” there still exists “a legitimate as well as significant issue of contract application.” *Id.* Thus, the labor agreements explicitly require arbitration only for

disputes that require resolution of “significant” issues governed by the labor contract.

The contract calls for selection of an arbitrator from the Federal Mediation and Conciliation Service (FMCS), and requires the union to split all costs of arbitration with Garda. Id. It further limits any award an arbitrator can make to between two and four months of pay. CP 142, 165.

This contractual arbitration process has *never* been used by any Garda employee in Washington. CP 571. According to the “senior shop steward” in Seattle, the “union” does not even file grievances for employees because it has no money to pay for arbitration. CP 607.

B. Procedural Background: The Parties Litigated in Court for Nineteen Months.

Plaintiffs Larry Hill, Adam Wise, and Robert Miller filed a class action complaint in King County Superior Court on February 16, 2009. CP 3. On behalf of themselves and all other Garda driver/messengers in Washington, they claimed they were not allowed meal and rest breaks as required under Washington law. CP 4-7. Defendant answered on April 23, 2009. CP 9.

The parties actively litigated this case in the Superior Court for 19 months. In July 2009, pursuant to court rule, the Plaintiffs

filed a Confirmation of Joinder under King County Local Civil Rule 4.2, stating that this case “is not subject to mandatory arbitration,” to which Defendant did not respond or object. CP 575. The parties negotiated a protective order that was signed by the court on September 1, 2009. CP 10. Consistent with litigation in superior court, the protective order relies upon and references King County Superior Court rules. CP 784, 787. It limits the use of discovery to this “litigation.” CP 787. It exempts the court and court staff from its restrictions. CP 785. And it refers to “court days” as a notification period. CP 787. The protective order does not contemplate or reference arbitration at all. CP 791-798.

Throughout 2009, the parties actively engaged in discovery. CP 841. By March 3, 2010, the Plaintiffs had propounded five sets of discovery requests, Defendants extensively objected to each request on various grounds (none of which were related to arbitration), and Defendant produced nearly 7,000 thousand pages of documents. CP 567-572, CP 828.

For a short period of time toward the end of 2009, both parties delayed significant investment in prosecuting and defending the case because trial was imminent in a very similar matter, Pellino v. Brinks (King County Superior Court No. 07-2-13469-7-

SEA, Court of Appeals No. 65077-7-l). CP 841. That case was brought by a class of armored car drivers and messengers who, like Plaintiffs here, claimed they were not afforded rest or meal breaks as required by Washington law. In early January, 2010, Judge Michael Trickey issued a verdict for the plaintiff class in Pellino, finding that Brinks denied its employees rest and meal breaks in violation of Washington law. CP 841.

After the Pellino decision was issued, Plaintiffs in this case continued to move forward with discovery, conducting a deposition of Garda's District Manager for Washington in February 2010. CP 841. In March, 2010, the parties filed a joint motion for a continuance of the trial date, from August 2010 to December 2010, which the court granted. CP 799, 802. After 13 months of litigating the case, Defendant indicated in the motion that it believed matter was "properly subject to arbitration." CP 799. However, Defendant continued to take no actions toward enforcing any rights it possessed to an arbitral forum.

Plaintiffs moved for class certification on March 26, 2010. CP 806, 841. Again, Defendant took no action to compel arbitration. Instead, it filed a Motion to Seal as provided under the court's protective order. CP 810. After Plaintiffs moved for class

certification, Defendant agreed to participate in mediation. CP 548. At Defendant's request, Plaintiffs agreed to re-note their motion for class certification to May 28, 2010. CP 548, 815, 851. Plaintiffs agreed to re-note the hearing on the express understanding that this would provide Defendant with sufficient time to respond should the mediation be unsuccessful. CP 548, 851.

Mediation took place on May 6, 2010, and was unsuccessful. CP 841. Despite the previous agreement, Defendant's counsel then asked that Plaintiffs re-note their class certification motion again, to June 4, due to a planned vacation of Defendant's counsel. There was no mention of an intent to seek arbitration. CP 849. Defendant then asked for yet *another* continuance of the class certification motion so they could conduct further discovery—specifically, depositions of each of the named Plaintiffs—before responding to the Motion for Class Certification. CP 851. There was still no mention of arbitration.

Counsel together arranged for the named Plaintiffs' depositions to occur during the two weeks beginning on June 7, 2010. CP 548, 817, 842. All counsel also agreed that Plaintiffs would also be permitted to depose any witnesses whose testimony Defendant intended to rely upon in its opposition to Plaintiffs Motion

for Class Certification. Id. Based on this agreement, Plaintiffs re-noted the class certification motion for a final time to July 16, 2010. CP 817.

Just days later, defense counsel informed Plaintiffs' counsel that Defendant had chosen to retain a new law firm to defend it in this matter. CP 842, 851-852. After its new counsel appeared, Defendant still failed to move to compel arbitration. Instead, Defendant's new counsel stated his intention to seek another continuance of Plaintiffs' class certification motion, in order to take additional discovery and make motions of his own before responding to Plaintiffs' motion. CP 842-43.

Plaintiffs' counsel opposed this, and on June 4, 2010, Defendant filed a motion asking the court to continue the Motion for Class Certification. Its basis for the request was not so it could seek arbitration, but to take more discovery and move for summary judgment. CP 823-824. Again, Defendant did not mention any intent to arbitrate and instead expressly confirmed its intent to continue to litigate *in court*. See CP 828 ("Counsel requires reasonable time to prepare for depositions that are absolutely critical in this representative action. . . . Denying a continuance would effectively deny Garda the opportunity to fairly defend *at this*

critical stage of the case.”); Id. (“Garda’s requested continuance is intended to ensure that unnecessary issues are not litigated on a class-wide basis. If the claims of the named Plaintiffs fail as a matter of law, conducting class-wide discovery on these claims will be entirely unnecessary . . .”). The court denied Defendant’s motion to continue and confirmed that the Motion for Class Certification would be heard July 16 and the trial date would remain December 6, 2010. CP 921-22.

Defendant then propounded further written discovery and conducted full-day depositions of each of the three named Plaintiffs on all issues related to the case, including class certification. CP 548-549. In July 1, 2010, Defendant filed its opposition to Plaintiffs’ Motion for class certification. On this same date, Defendant filed a Motion to Compel Arbitration or for Summary Judgment and it noted this motion for hearing on August 27, 2010. CP 517-518.

On July 23, 2010, the trial court granted Plaintiffs’ Motion for Class Certification. CP 519-521. On August 6, 2010, the parties submitted briefing to the trial court regarding class notice. CP 862-873, 874-895. Defendant’s briefing did not mention arbitration. CP 862-866. The Court entered an order approving class notice on August 9, 2010. CP 896. Notice was sent on August 16, 2010 to

all 306 class members. CP 549. Also on August 16, 2010, as required by King County Local Civil Rule 26(b), the parties exchanged Disclosures of Possible Additional Witnesses, in further preparation for trial. CP 903.

On August 27, 2010—a mere 14 weeks before trial was to begin—a hearing was held on Defendant’s Motion to Compel Arbitration or for Summary Judgment. CP 517-518. At this hearing, the trial court denied summary judgment but ordered further briefing on arbitration. CP 767. On September 24, 2010, the court ordered class arbitration. *Id.* Defendant appeals the trial court’s decision to compel arbitration on a class-wide basis. Plaintiffs cross-appeal the trial court’s decision to compel arbitration.

II. ARGUMENT IN SUPPORT OF CROSS-APPEAL

A. Standards of Review.

An appellate court reviews trial court decisions on motions to compel arbitration, including the question whether a party has waived arbitration, *de novo*. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004) (citing Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 936 (9th Cir. 2001)); Steele v. Lundgren, 85 Wn. App. 845, 850, 935 P.2d 671 (1997).

B. The Court Erred in Ordering Arbitration.

The trial court should have denied Defendant's Motion to Compel Arbitration for three reasons. First, Garda waived its right to arbitration by litigating this case for nearly 19 months and failing to enforce any rights it possessed until a class had been certified and notified, discovery was nearly completed, and trial was a mere 14 weeks away. Second, because the arbitration agreement Garda relies upon is in a labor agreement, Garda was required to show that Plaintiffs "clearly and unmistakably" waived their right to have statutory claims decided in court, which it cannot do because the labor agreements do not require arbitration as the sole and exclusive means of resolving wage disputes or foreclose litigation concerning statutory rights. Third, the terms of arbitration in Garda's labor agreements cannot be enforced because they are unconscionable under clearly established Washington law.

1. Defendant Waived the Right to Arbitration by Litigating the Case for Nineteen Months, Through Class Certification, to the Eve of Trial.

It is well established law in Washington that a contractual right to arbitration is waived if it is not timely invoked. See Otis Housing Ass'n Inc. v. Ha, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). Thus, "a party to a lawsuit who claims the right to

arbitration must take some action to enforce that right within a reasonable time.” Id. at 588 (quoting Lake Wash. Sch. Dist. No. 414 v. Mobile Modules NW, Inc., 28 Wn. App. 59, 64, 621 P.2d 791 (1980)). “Simply put . . . a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” Id. A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration and (2) acts inconsistent with that right. Steele, 85 Wn. App. at 849.

Defendant had knowledge of an existing right to arbitration from the outset. CP 12. Despite this, for over 19 months, Defendant acted inconsistently with arbitration by litigating this case. It propounded discovery, produced nearly 7,000 pages of documentary evidence, participated in motions practice, conducted testimonial discovery, and moved for summary judgment.

During this time period, Defendant passed up numerous, obvious opportunities to invoke any right it possessed to arbitrate the claims in this case. It failed to move after answering Plaintiffs complaint. It failed to move when Plaintiff propounded its first set of written discovery requests. It proposed and obtained a Stipulated Protective Order, which is expressly predicated on litigation in court. See CP 785. It failed to compel arbitration when Plaintiffs

propounded their second, third, fourth, and fifth sets of discovery requests. It issued its own discovery requests to the three named Plaintiffs. It produced its state District Manager for deposition. During this period, Defendant's actions were entirely inconsistent with arbitration.

On March 10, 2010, when the parties jointly moved to continue the trial date Defendant indicated in the motion that it believed matter was "properly subject to arbitration." CP 799. Nonetheless, even at this obvious opportunity to assert a right to an arbitral forum, Defendant took no action to compel arbitration.

On March 26, 2010, Plaintiffs moved for class certification. CP 806-807. Again, Defendant took no action to compel arbitration. Instead, Defendant began to request continuances of the motion for various reasons—none of which referenced, involved, or hinted at an intent to arbitrate and all of which suggest nothing but an intention to continue to litigate the issues. CP 548, 849.

Then, when Defendant changed counsel, it passed up yet another opportunity to compel arbitration. Instead, it sought *another* continuance of Plaintiffs' Motion for Class Certification. CP 823-831. When Plaintiff refused, Defendant filed a motion with the

Court. Significantly, it did not move to continue so it could pursue arbitration. It sought a continuance so it could *litigate* the merits of Plaintiffs' claims through "a motion for summary judgment seeking dismissal of all or part of this action." CP 823-824. Throughout its motion to continue, Defendant expressed a clear intent to *litigate* the merits of this case *in court*. CP 828. Nowhere in its motion did Defendant indicate any intent to pursue arbitration.

Another obvious opportunity occurred when Defendant's Motion to Continue was denied. CP 921. At this juncture, Defendant was free to file a motion to compel arbitration, which under the civil rules could have been heard long before the Motion for Class Certification was scheduled to be heard. See King County Loc. Civ. Rule (KCLCR) 7 (motions other than for summary judgment must be filed only 6 days before the motion is heard). Instead, Defendant continued to avail itself of the discovery mechanisms afforded by superior court by propounding further written discovery and conducting full-day depositions of each of the named Plaintiffs on all issues in the case. CP 548-549.

On July 1, 2010—after nearly 17 months of litigation—Defendants finally moved to compel arbitration. CP 15. But even then, Defendant was carefully balancing the strategic benefits of

continuing to litigate the case and moving to compel arbitration. This is clearly exhibited by its choice to combine its motion to compel with a motion for partial summary judgment, and to set a hearing date long *after* the court ruled on Plaintiffs' Motion for Class Certification. CP 517; See KCLCR 56.

Under Washington law, these missed opportunities demand a finding of waiver, and the trial court erred by compelling arbitration under these circumstances. See Ives v. Ramsden, 142 Wn. App. 369, 383-84, 174 P.3d 1231 (2008) (defendant waived arbitration where he "answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial"); See Naches Valley Sch. Dist. No. JT3, 54 Wn. App. 388, 395-96, 775 P.2d 960 (1989) (defendants waived right to arbitrate by filing motion for summary judgment).

One Washington case, Steele, 85 Wn. App. at 935, is particularly instructive. There, an employer moved to compel arbitration 10 months after suit had been filed, and this Court affirmed that waiver had occurred. As in this case, the employer had engaged in extensive written discovery and motion practice without invoking arbitration. Id. at 847-48. As in this case, the

defendant had retained new counsel who intended to move to compel arbitration, but still delayed making the motion, “a fact that suggests he continued to weigh his options even then.” Id. at 848. Like the defendant in Steele, instead of making a motion to compel arbitration, Garda continued to take full advantage of the judicial forum by taking extensive civil discovery and engaging in heated motion practice.

Indeed, the facts in this case more clearly establish waiver than those in Steele. Here, Garda took multiple depositions and filed a motion to delay class certification on the pretense that it intended to conduct more litigation in superior court, never mentioning arbitration. Then Garda conducted *additional* discovery under the guise of litigation—discovery that was unlikely to have been permitted in the arbitral forum, which suggests that Garda likely benefited from its own delay. See CP 549 at ¶13 (FMCS arbitration service rules contain no mention of civil discovery).

Finally, the trial court’s error in permitting Garda to invoke arbitration at the final stages of litigation severely prejudiced Plaintiffs and the class.¹ As a direct result of this choice to litigate,

¹ This Court has held that prejudice is not required in order to find a waiver of the right to arbitrate. Lake Wash. Sch. Dist., 28 Wn. App. at 62;

Garda has litigated several key legal issues and lost, including class certification. See Steele, 85 Wn. App. at 858-59 (prejudice results when a party loses a motion and then attempts to relitigate the issue by invoking arbitration); Lake Wash. Sch. Dist., 28 Wn. App. at 62. In addition, Plaintiffs invested a tremendous amount of resources in litigating this case, including completing discovery, obtaining class certification, and notifying the entire class that their interests were represented by class counsel. CP 892. As a result of Garda's choice to litigate, hundreds of class members have been notified that their rights are at stake in litigation in King County Superior Court. If the trial court's erroneous decision to compel arbitration only weeks before the trial date is permitted to stand, it could deprive class members of the benefits afforded to them under the trial court's prior orders, nullify the class notice they received from the Court, and/or further delay injunctive and monetary relief from Garda's unlawful employment practices. See Steele, 85 Wn. App. at 859 (a party's delay in invoking arbitration that causes his adversary to incur unnecessary delay or expense supports a determination of waiver).

but see, Steele, 85 Wn. App. at 856-57 (reconsidering but declining to decide question).

Garda had numerous opportunities to assert arbitration, but it nonetheless chose to litigate every step of the way. Only when class certification was imminent and trial was just around the corner did Garda take any action to assert any right to compel arbitration. When it finally chose to assert it, trial was only five months away, almost all documentary discovery had been completed, depositions of class representatives were completed, class certification had been fully briefed and was imminent, and trial witness lists had been exchanged. And Garda continued to litigate the case as it moved to compel arbitration by simultaneously, and in the alternative, requesting for a ruling on the merits of the case in a partial summary judgment motion. CP 15.

Under these facts, as in Steele, “there can be no doubt that, by failing to assert arbitration at the outset and by passing up several obvious opportunities to move for arbitration, [defendant] effectively chose to litigate in superior court, which is inconsistent with arbitration.” Id. at 855. The trial court erred when it failed to find, under these circumstances, that Garda waived its right to arbitration.

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2. Garda Cannot Show Plaintiffs “Clearly and Unmistakably” Waived Their Right to Bring Their Statutory Wage Claims in Court, as Required by Law.

Even if the right to arbitration was not waived, because the arbitration clause in this case is found in a collective bargaining agreement (“CBA”) rather than an individual contract, Garda must show that Plaintiffs “clearly and unmistakably” waived their right to have their claims decided in court. Brundridge v. Fluor Fed. Servs., Inc., 109 Wn. App. 347, 356, 35 P.3d 389 (2001).

Collective bargaining agreements, while beneficial in many respects to both the worker and the employer, may be less than optimum in meeting the individual needs of particular workers. With collective bargaining arbitration, the interests of the individual may be subordinated to the collective interests of all employees. In recognition of that inherent tension, federal courts have established that an arbitration clause in a CBA will not waive an employee’s right to a judicial forum unless such a waiver is clear and unmistakable.

Id. at 355 (citations omitted).

A clear and unmistakable waiver of the right to a judicial forum can occur in only two ways: the agreement must contain an explicit statement that all causes of action arising out of employment must be arbitrated, or it must contain a provision that makes it “unmistakably clear” that the statutes that are the basis for the asserted claims (here, Washington’s Industrial Welfare and

Minimum Wage Acts) must be arbitrated. Id. Neither can be found here.

Garda's labor agreements do not clearly and unmistakably require that *all* disputes be arbitrated. In fact, the clause expressly limits the types of grievances that must go to the arbitrator to those involving "a legitimate as well as significant issue of contract application." CP 142. Under this limitation the Plaintiffs' claims for violations of the wage statutes are *not* subject to arbitration because they do not involve any significant issue under the agreement.² Furthermore, the agreements do identify specific types of disputes which *must* be arbitrated. For example, Article 3(m) states that all *disciplinary* matters "shall be reviewed in accordance with the grievance and arbitration procedure set forth in this Agreement." CP 141. There is no such requirement as to statutory wage claims.

Garda's labor agreements do not make arbitration mandatory for such claims, or state that arbitration is the sole and

² While Garda's labor agreements contain provisions addressing rest and meal breaks, Plaintiffs' allegations do not challenge these provisions. Plaintiffs challenge Garda's practice of failing to provide its employees with *any* rest or meal periods, in violation of Washington law as set forth in the IWA and WAC 296-126-092. This suit does not call for any "significant" interpretation or application of the labor agreements.

exclusive method for resolving claims. CP 142. In fact, they do not mention private lawsuits or the public court system at all, or state that employees cannot take legal action in order to enforce their legal rights. CP 142-143. At most, they provide a process for resolving certain workplace issues. Their boilerplate language does not “clearly and unmistakably” waive the right to a judicial forum. As Brundridge makes clear, a “boilerplate arbitration provision is not sufficiently specific [when] it does not clearly and unmistakably waive the right to a judicial forum for [] claims arising independently of the CBAs.” Brundridge, 109 Wn. App. at 356.

Because the arbitration clause in Garda’s labor agreements do not apply to the claims raised by Plaintiffs and because they do not contain a clear and unmistakable waiver of Plaintiffs’ rights to a judicial forum for state wage law claims, the trial court erred when it compelled arbitration.

3. The Arbitration Provision is Unenforceable Because it is Permeated with Unconscionably One-Sided Terms.

Even if Garda could show that Plaintiffs unmistakably waived a judicial forum for their claims, its arbitration clause is still not enforceable against Plaintiffs in this case, because it is substantively unconscionable under Washington law. The trial

court erred by compelling arbitration despite a number of unconscionable provisions that would effectively prevent Plaintiffs from vindicating important statutory rights.

The policy generally supporting arbitration is based on the proposition “that arbitration allows litigants to avoid the formalities, expense, and delays inherent in the court system.” Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 464, 45 P.3d 594 (2002). “But avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable.” Id. at 465. The critical question is “whether the arbitral forum will afford the plaintiff an opportunity to vindicate his or her statutory claim.” Id. at 461. Substantive unconscionability exists where a contract provision is “overly one-sided or harsh.” Id. at 459. Almost all the provisions in the Arbitration and Grievance section in Garda’s contracts fit this description, and the terms would effectively preclude employees like the Plaintiffs from vindicating their statutory rights.

First, Garda’s arbitration provision requires employees to file a claim within 14 days of the “occurrence” giving rise to the claim. CP 142 at (b). The Washington Supreme Court has held that an arbitration provision that requires employees to commence claims

within 180 days is substantively unconscionable because it substantially shortens the applicable statute of limitations, unreasonably favoring the employer and effectively depriving the employee of his statutory rights. Adler v. Fred Lind Manor, 153 Wn.2d 331, 356-57, 103 P.3d 773 (2004). Here, Garda's 14-day claim-filing deadline is far more harsh and one-sided than the one in Adler.³

Second, Garda's arbitration provision requires the employee to pay half of all costs of an arbitration, including "the hearing room, the reporter's fee, per diem, and the original copy of the transcript for the arbitrator." CP 142-143 at (d).⁴ These costs would be substantial, and would easily dwarf the amounts at stake for an individual employee. The named Plaintiffs' own claims, with interest, are worth approximately \$15,000 each. CP 549. The Federal Mediation and Conciliation Services (FMCS) reports that the arbitrator's per diem alone averages over \$900 per day, and the "average" cost of an arbitration last year was nearly \$5,000. CP

³ Garda's most recent contracts require the "union" to submit claims on the employee's behalf, which would further burden the exercise of statutory rights because there is no real union to which an employee can put his or her request. CP 165.

⁴ The provision calls on the union to pay the employee's half, but that is unrealistic given that the "union" here is not a true entity with any resources. CP 606-607.

599. This figure represents the cost of a case that took only *four hours* to resolve; the true cost in a case like the Plaintiffs' would likely be ten or twenty times this amount, i.e., \$50,000 to \$100,000, plus attorney fees and costs. Id.

Washington courts have repeatedly held that arbitration clauses that impose prohibitive costs on plaintiffs are unconscionable. Zuver v. Airtouch Comm's, Inc., 153 Wn.2d 293, 309, 103 P.3d 753 (2004); Mendez, 111 Wn. App. at 465. Plaintiffs provided ample testimonial and factual support that Garda's cost provision would impose prohibitive costs on Plaintiffs in this case. CP 598-609. Indeed, not a single employee has ever used it. CP 571. Under Zuver, this provision is substantively unconscionable and unenforceable under Washington law.

Third, Garda's arbitration clause also severely limits any recovery an employee may obtain in the arbitration to two months back pay, "unless *specifically mandated* by federal or state statute or law." CP 143 (emphasis added). This limitation on remedies "blatantly and excessively favors the employer" and is therefore unenforceable. Zuver, 153 Wn.2d at 318.⁵

⁵ The provision prevents the arbitrator from "disregard[ing]" any provisions of the Agreement, even those that are contrary to state law. CP 143.

Fourth, while the arbitration clause does not prohibit class arbitration, Garda has clearly and vigorously argued that it should be interpreted to prevent Plaintiffs from pursuing their claims on a class basis. CP 616. As discussed more fully below, this position is at odds with Washington law. See infra pp. 33-35. In Scott v. Cingular Wireless, 160 Wn. 2d 843, 854, 161 P.3d 1000 (2007), the Supreme Court held that because class actions are a vital part of protecting statutory rights, to preclude class actions is to effectively exculpate the defendant from “a large class of wrongful conduct.” In Scott, the Supreme Court struck down a contractual ban on class actions because “in effect,” it would exculpate the defendant “from any wrong where the cost of pursuit outweighs the potential amount of recovery.” Id. at 855. The same is true here. As noted above, Plaintiffs’ individual stake in this case is very small in comparison to the costs of adjudicating individual claims in any forum, and, as in Scott, no Garda employee in Washington has brought any claim to it through the grievance and arbitration mechanism. Id.; CP 571, CP 606-607.

In addition, the procedural circumstances surrounding the arbitration agreement cannot be ignored. The agreement is thrust upon employees through an “employee association” that lacks by

design the resources or authority to enforce it. CP 606-607. The agreements are drafted by Garda and Garda limits what parts of the agreement may be negotiated. Id. Thus, the purpose and effect of Garda's arbitration clause is to deter employees from enforcing their legal rights, both as individuals and as members of a "collective bargaining" body.

The arbitration clause should be stricken entirely and not enforced. Its unconscionable terms so permeate the agreement that severance of individual provisions would essentially require a rewrite of the entire section, and would only encourage overreaching by employers who author such one-sided "agreements" like this one.⁶ The trial court erred when it compelled arbitration under these circumstances.

⁶ It is well established that Courts cannot sever unconscionable provisions where those provisions pervade an agreement. McKee v. AT&T Corp., 164 Wn.2d 372, 403, 191 P.3d 845 (2008) (concluding severance was not appropriate when agreements are sufficiently tainted by unconscionable terms in part because "If the worst that can happen is the offensive provisions are severed and the balance [between the parties] enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions."); see also Alexander v. Anthony Int'l, 341 F.3d 256, 271 (3d Cir. 1993) (refusing to sever provision of an arbitration agreement because the unconscionability permeated the agreement between the parties and employee was given no real choice but to accept arbitration on the employer's terms which tainted the central purpose of requiring the arbitration of employment disputes.); Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 788 (9th Cir. 2002) (finding that arbitration agreement so permeated with unconscionable clauses that the Court could not remove the unconscionable taint by

Alternatively, if this Court concludes that unconscionable terms do not permeate the agreement, it should at the very least strike those terms that are clearly unconscionable as just described.

III. ARGUMENT IN RESPONSE TO APPEAL

A. **If the Order Compelling Arbitration is Upheld, the Order Requiring Class Arbitration Should Also be Affirmed.**

If this Court were to conclude arbitration is appropriate in this case, it should affirm the trial court's decision to order arbitration of the entire class's claims. Garda asks the Court to hold that it is entitled to a "do-over" on class certification with a labor arbitrator, and to ask the arbitrator to force individual employees to separately arbitrate their identical claims concerning Garda's meal and rest break practices. This argument is not only legally incorrect, but would produce a senseless and unjust result.

The foundation of Garda's position, Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003), by its own terms,

severance); Graham Oil Co., 43 F.3d 1244, 1247 (9th Cir. 1994) (concluding that three objectionable clauses were not severable from the arbitration agreement as a whole); ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (concluding because an arbitration agreement contained numerous one-sided provisions, the entire arbitration agreement was unconscionable and therefore, unenforceable). The trial court erred by failing to strike the arbitration agreement under these circumstances.

does not support the conclusion that the trial court lacked authority to order class arbitration in this case. Unlike in Bazzle, the arbitration clause here did not commit that question to the arbitrator, and unlike in that case, forbidding class arbitration here would not be valid under state law.

In addition, Garda misconstrues Bazzle. As the Court subsequently clarified in Stolt-Nielsen v. Animal Feeds Int'l, Corp., 130 S. Ct. 1758, 276 L. Ed. 2d 605 (2010), Bazzle lacked a majority opinion, and courts *can* decide whether class arbitration is available. Here, it is clear that class arbitration must be permitted because (1) the arbitration agreement does not expressly preclude class arbitration and expressly contemplates group remedies, (2) the arbitration clause is in a “labor agreement” which clearly contemplates class adjudication, consistent with a long history of class arbitration of wage and hour claims under such agreements; and (3) there is uncontroverted evidence that Plaintiffs’ statutory rights cannot be vindicated through individual adjudication, which would make the agreement invalid under Washington law.

If the trial court was correct to order arbitration in this case, it was correct to order class arbitration, and should be affirmed.

///

1. *Bazze* Does Not Preclude a Trial Court from Ordering Class Arbitration.

Defendant relies primarily on Bazze, 539 U.S. at 452-53, for the proposition that an arbitrator must decide whether a contract permits class arbitration. First, by its own terms, Bazze is distinguishable from this case. Bazze involved two actions brought in state court regarding claims arising out of contracts with similarly phrased arbitration clauses. In one case, the trial court certified a class action and entered an order compelling arbitration. Id. at 499. In the second action, the parties chose an arbitrator who certified the class in arbitration and awarded damages to plaintiffs. Id. The South Carolina Supreme Court upheld both awards. Id. at 450.

The United States Supreme Court granted certiorari to determine whether this was consistent with the Federal Arbitration Act (FAA). Id. at 447. However, the case produced a fractured decision and no clear majority. A plurality of Justices focused on a threshold question of whether the arbitration agreements at issue were in fact silent regarding class arbitration or forbade class arbitration. Id. The plurality found the parties had committed *that* particular question to the arbitrator to decide. Bazze, 539 U.S. at 451. Accordingly, a plurality of the Court concluded that *under the terms of the agreement*, the arbitrator should decide the issue.

But unlike the agreement in Bazzle, the labor agreements at issue in this case do not delegate interpretation questions to the arbitrator. CP 142. In fact, the only issue delegated to an arbitrator is one of contract “application.” CP 142.⁷ Accordingly, by its own terms, the arbitration clause in this case does not commit to the arbitrator the issue of class arbitration, as in Bazzle.

Furthermore, in Bazzle, the question whether class arbitration was allowed did not affect the *validity* of the agreement. As the Supreme Court observed, there was no argument or implication that an arbitration agreement that forbade class adjudication would be invalid under South Carolina law. 539 U.S. at 450 (state court “neither said nor implied that it would have authorized class arbitration had the parties’ arbitration agreement forbidden it”). That is not true in Washington. Washington courts have stricken class action bans from arbitration clauses in cases, like this one, where it can be shown that such a provision would exculpate a party from violations of important statutory rights. See McKee, 164 Wn.2d at 402. And, as the Bazzle plurality confirmed, an agreement’s validity under state law is the type of “gateway”

⁷ The agreements even specifically *deny* the arbitrator any authority in matters that Garda “has retained sole discretion.” CP 143.

question that should be decided by courts, not arbitrators. Id. at 452 (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)); accord, Woodall v. Avalon Care Center, 155 Wn.App. 919, 936 ¶ 69, 231 P.3d 1252 (2010).

Under Washington law, class actions are considered a vital part of protecting statutory rights when plaintiffs' individual stake is very small in comparison to the costs of adjudicating the claims, and to preclude class actions is to effectively exculpate the defendant from "a large class of wrongful conduct." Scott, 160 Wn. 2d at 854.⁸ In Scott, the court struck down a ban on class actions because "in effect," it would exculpate the defendant "from any wrong where the cost of pursuit outweighs the potential amount of recovery." Id. at 855. There is a strong public policy in Washington against depriving small claimants of the class action mechanism for seeking relief for wrongdoing.⁹ Id. at 851; see also, McKee, 164

⁸ The wage statutes under which Plaintiffs brought this action, like the Consumer Protection Act discussed in Scott, embody an extremely important public policies in Washington. The Supreme Court has often pointed to the state's "long and proud history of being a pioneer in the protection of employee rights." Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 299, 996 P.2d 582 (2000). Accordingly, Washington's wage laws are liberally construed in favor of employees and limitations are "narrowly confined." Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002).

⁹ Federal courts agree that statutory claims—like those in this case—are arbitrable only "so long as the prospective litigant effectively may

Wn.2d at 386; Dix v. ICT Group, Inc., 160 Wn.2d 826, 836-837, 161 P.3d 1016 (2007); Brown v. Brown, 6 Wn. App. 249, 253, 492 P.2d 581 (1971) (“a primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group.”).¹⁰

vindicate its statutory cause of action in the arbitral forum.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). “By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum.” Id. at 628. See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

¹⁰ The Supreme Court’s recent decision in AT&T Mobility LLC v. Concepcion, 563 U.S.—, 131 S.Ct. 1740, 179 L. Ed. 2d 742 (2011), does not undermine the trial court’s decision to order class arbitration under the circumstances in this case. The question presented in Concepcion was whether the FAA would preempt a state law that invalidates a ban on class actions in arbitration agreements where class-wide treatment is “not necessary to ensure the parties to the arbitration agreement are able to vindicate their claims.” Petition for Writ of Certiorari, AT&T Mobility, LLC v. Concepcion, No. 09-893 (U.S. Jan. 25, 2010), 2009 U.S. Briefs 893, at *i (emphasis added). Unlike the plaintiffs in Concepcion, the plaintiffs in this case offered uncontested evidence that denial of class adjudication would prevent Plaintiffs from vindicating their claims. Concepcion, 179 L. Ed. 2d at 750, 758; CP 598-609. And unlike the “Discover Bank” rule invalidated by the Court in Concepcion, Washington’s law on unconscionability is consistent with the FAA.

In any event, Concepcion does not apply in cases brought in state court because only four justices from the majority opinion would even apply the FAA to proceedings in state court. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting) (because the FAA does not apply in state courts, “in state court proceedings, the FAA cannot be the basis for displacing state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law); Bazzle, 539 U.S. at 460 (Thomas, J., dissenting).

As in Scott, Plaintiffs in this case offered uncontested evidence that no driver/messenger employee of Garda would likely ever challenge Garda's policy and practice of forcing employees to work through meal and rest breaks, if he had to do so alone. Indeed, just as in Scott, no individual Garda employee in Washington has ever brought any such claim until the Plaintiffs brought this class action. CP 567-573, 606-607.

Based on this clear Washington authority and the evidence before it, the trial court properly exercised its authority to order class arbitration, because unlike in Bazzle, the parties' agreement does not require the arbitrator to decide that question, and the availability of class adjudication would affect the agreement's validity under Washington law.

2. *Stolt-Nielsen* Rejects Defendant's Interpretation of *Bazzle* and Affirms the Trial Court's Authority to Order Class Arbitration.

In addition, Bazzle is not binding precedent on whether a court or arbitrator must decide if class arbitration is permitted. As the Supreme Court unequivocally stated in Stolt-Nielsen, the opinion in Bazzle that purports to answer that question did not command a majority. Stolt-Nielsen, 130 S. Ct. at 1171-1172 (“Bazzle did not yield a majority opinion on any of the three

questions” posed thereby, including “which decision maker (court or arbitrator) should decide the issue of class arbitration.”¹¹ The Court then proceeded to decide that very question itself in that case, i.e., the *Court* decided whether class arbitration was permissible. *Id.* at 1770 (“Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.”). The Court may similarly do so here.

In Stolt Nielsen, the plaintiff brought a maritime class action suit in federal court that the parties eventually agreed was subject to arbitration. *Id.* at 1763. The parties also agreed that the arbitrator must decide the issue of whether class arbitration was permissible under the arbitration agreement, which was silent on the issue. *Id.* at 1773. The arbitrators determined that class arbitration was appropriate, and the Court of Appeals agreed. *Id.* at 1766.

¹¹ Defendant completely ignores Stolt-Nielsen. The two cases Defendant cites in support its application of Bazzle preceded the decision in Stolt-Nielsen, which plainly contradicts them. See also, Employers Ins. Co. of Wausau v. Century Indem. Co., 443 F.3d 573, 580 (7th Cir. 2006) (refusing to rely on Bazzle because “we cannot identify a single rationale endorsed by a majority of the Court”).

On review, the Supreme Court reversed the decision. As an initial matter, the Court recognized that Bazzle appeared to have “baffled the parties” who, like Garda here, erroneously believed that Bazzle requires an arbitrator, not a court, to decide whether class arbitration was appropriate. Id. at 1772. Because there was no majority opinion in Bazzle, it did not provide a definitive rule.

The Court then went on to explain what rules should be applied to determine whether class arbitration is permitted. It reiterated the axiom that interpretation of an arbitration agreement, like any other type of contract, is “generally a matter of state law.” Id. at 1773. It held that ultimately, the job of the court or the arbitrator is to “give effect to the contractual rights and expectations of the parties.” Id. at 1773-74 (quoting Volt Inf. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989)). It concluded that in the case before it, the parties clearly had *not* agreed to permit class arbitration. Id. at 1775. In addition to the fact that the parties had stipulated that they had not reached any agreement on the subject, the Court found there was no contractual basis to conclude the parties consented to class arbitration because there was “no tradition of class arbitration in maritime law.” Id.; see also, Concepcion, 179 L. Ed. 2d at 756 (“In [Stolt Nielsen], we held that

an arbitration panel exceeded its power . . . by imposing class procedures based on policy judgment rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation.”). Thus, Stolt-Nielsen holds that whether class arbitration is appropriate depends on state law and can be decided by a court rather than an arbitrator.

In this case, it is clear class arbitration *is* appropriate. First, there is a long tradition of class arbitrations arising from collective bargaining agreements. As the leading commentator on labor arbitration law states, “It is widely accepted that a union has standing to file a group grievance that affects a significant portion of the bargaining unit.” ELKOURI & ELKOURI, HOW ARBITRATION WORKS 212 (Alan Miles Rubin, 6th ed. 2003). Indeed, the very nature of a “labor agreement” is to establish rights and responsibilities for *all* employees as a group, not for individual employees. “With collective bargaining arbitration, the interests of the individual may be subordinated to the collective interests of all employees. Brundridge, 109 Wn. App. at 355 (citing Gilmer, 500 U.S. at 34). Any determination in arbitration concerning Garda’s wage practices would presumably apply to all employees, just as any determination in a class action applies to all class members. See Imre S. Szalai,

Aggregate Dispute Resolution: Class and Labor Arbitration, 13

Harv. Negotiation L. Rev. 399, 407 (2008) (“Class arbitration shares a general similarity with labor arbitration in that both involve aggregate dispute resolution.”).

The labor agreements at issue here reflect this; they expressly allow the “union” to bring grievances on behalf of its members and expressly state that “[t]he decision of the arbitrator shall be binding upon the grievant *and all parties to this Agreement.*” CP 143.¹² The trial court already concluded that class-wide common issues predominate with respect the practices at issue here, and Garda does not and cannot challenge that finding. CP 520. Garda cannot reasonably contend that it intended any challenges to its company-wide wage practices would be resolved through individual arbitrations, one employee at a time.

Based on the language, nature, and context of the parties’ agreements, it is clear that Garda’s labor agreements must permit “class” arbitrations. If this case must be resolved through

¹² Garda requires all of its driver/messengers to personally sign its labor agreements. See CP 156.

arbitration, it should be a class arbitration, and the trial court's decision should be affirmed in that respect.¹³

IV. CONCLUSION

For the foregoing reasons, Plaintiffs ask that the Court reverse the trial court's order compelling arbitration and remand for further proceedings in the Superior Court. If this Court does not reverse, Plaintiffs ask that it strike the unconscionable provisions in Garda's arbitration agreement and affirm the trial court's order requiring class arbitration, consistent with its previous order certifying a class.

Dated this 23rd day of May, 2011.

BRESKIN JOHNSON TOWNSEND, PLLC

By: 

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Attorneys for Respondents/Cross-Appellants

¹³ As noted above, several provisions in the arbitration provision are unconscionable under state law and should have been stricken. *Supra* at pp. 24-26.

CERTIFICATE OF SERVICE

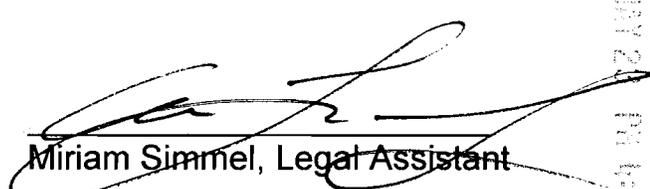
I, Miriam Simmel, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 23rd day of May 2011, I served true and correct copies of the document to which this Certificate is attached on the following in the manner listed below.

Clarence M. Belnavis, WSBA #36681
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- VIA FACSIMILE
- Via First Class Mail
- Via Electronic Filing
- Via Email**
- Via Messenger

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.


Miriam Simmel, Legal Assistant

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