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COURT OF APPEAL, DIVISION I
OF THE STATE OF WASHINGTON

King County Superior Court
Cause No. 13-2-23545-5 SEA

DOUGLAS FRECHIN, individually and on behalf
of others similarly situated,

Respondent,

v.

KING COUNTY DEPARTMENT OF TRANSPORTATION,

Petitioner.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

A contract cannot "specifically vary" from or "supersede" something it does not mention – especially when that something is an employee's statutory right to a lunch break. The default rule in Washington is that employees who work more than five consecutive hours are entitled to a 30-minute meal period. WAC 296-126-092. For public employers to qualify for an exemption to this rule, their collective bargaining agreements ("CBAs") must "*specifically vary from or supersede*" the meal period regulation. RCW 49.12.187.

Petitioner King County ("Metro") concedes that it does not provide meal periods for bus drivers, but asks the Court to supply terms to its CBA to allow it to qualify for a retroactive exemption from the WAC. It cites in support of such a request, extrinsic evidence that purports to embody a "long-standing" intent to modify the statutory right to meal periods – an intent that is not, in fact, specifically referenced anywhere in the relevant CBAs. It is not as if compliance with section 187 is particularly onerous; and permitting a public employer like Metro to obtain a variance from state law by saying nothing about the right that is supposedly being superseded or varied defeats the entire purpose of RCW 49.12.187. At a minimum, section 187's requirement that the CBA "specifically vary from or supersede" the meal break requirement ensures transparency so that

employees will be on notice when their individual meal period rights are being affected by a proposed contract, rather than having those rights stripped *sub silentio* as a matter of unexpressed intent. The narrow construction of exemptions from remedial legislation in order to protect employees demands no less.

At bottom, the arguments Metro advances are inconsistent with the liberal construction afforded employee rights legislation, and contrary to black-letter principles of contract interpretation. The court below agreed, and Respondent Doug Frechin respectfully requests this Court affirm that decision.

II. STATEMENT OF ISSUES

1. Does a collective bargaining agreement ("CBA") "specifically vary from or supersede" Washington's meal period regulation so as to qualify for an exemption under RCW 49.12.187 where it is silent as to such right?

2. Did the trial court err when it declined to grant Metro an exemption from the meal period requirement as a matter of law based on evidence that is extrinsic to the CBA?

3. Did the trial court abuse its discretion when it denied Metro's motion for reconsideration, which included additional extrinsic evidence that was available prior to the close of briefing?

III. STATEMENT OF THE CASE

A. Procedural Background

In June 2013, Plaintiff-Respondent Douglas Frechin filed this action against Defendant-Petitioner ("Metro") for its failure to provide 30-minute meal periods to a putative class of bus drivers ("Drivers") in accordance with WAC 296-126-092.[1] CP 1-6. The parties agreed that a threshold legal question in the case existed as to whether Metro qualified for an exemption to the meal period requirement based on RCW 49.12.187. CP 42-45. Metro moved for summary judgment to dismiss Mr. Frechin's claims; Mr. Frechin opposed; and Metro filed a reply brief, to which it appended additional material for the court's consideration not contained in its first submission. CP 48-72 (Mot.); CP 1376-98 (Opp'n); CP 1239-1246 (Reply). After hearing oral argument, the Honorable Julie Spector denied Metro's motion. CP 1320-21.[2]

Not satisfied with the result, Metro moved for reconsideration, accompanied by six new exhibits (including a Wikipedia definition for the term "break") and a second declaration of Laird Cusack – a Metro

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1 WAC 296-126-092(2) provides, inter alia: "No employee shall be required to work more than five consecutive hours without a meal period."

2 Metro highlights that the trial court did not issue an "explanation" on this threshold question of law. Br. at 18. Although the trial court's order, as is common, provides no written analysis, the implication that there was no sound basis for the decision is of course incorrect. Rather, it is safe to assume that the court accepted Mr. Frechin's legal argument – i.e., that a CBA that does not mention the right to meal periods at all cannot qualify for an exemption under RCW 49.12.187.

employee who had already filed a declaration supporting Metro's original motion. CP 1322-68. Metro provided no sound justification for the late submission of this evidence, all of which was available to Metro prior to the close of briefing and hearing on the motion. The trial court denied Metro's motion for reconsideration without ruling on the admission of the additional evidence, and without requiring or permitting a response from Mr. Frechin. CP 1369-70.

Contained in Metro's motion for reconsideration was a request to certify for discretionary review the threshold legal question of whether Metro's CBAs qualify for an exemption from the provision of 30-minute meal periods. CP 1329-31. Mr. Frechin filed a response solely on this issue, and agreed that Judge Spector's order denying summary judgment was appropriate for appellate review because it resolved an issue of first impression that will materially advance the ultimate termination of the litigation. The trial court certified the question for appeal. CP 1369-70.

Metro moved for discretionary review to this Court pursuant to RAP 2.3(b)(1) ("obvious error"), (b)(2) ("probable error") and (b)(4) (the superior court's certification or parties' stipulation). In a written ruling, the Commissioner granted review based solely on the latter provision.

B. Factual Background

Metro concedes that its Drivers do not receive lunch breaks pursuant to WAC 296-126-092, but asserts that its CBAs specifically vary from or supersede the requirements of the State regulation.[3] Br. at 2. Thus, the central question before the Court is whether, as a matter of law, the CBAs satisfy the criteria for a meal period exemption under RCW 49.12.187. The only fact relevant to answering this question of law is this: *the CBAs say nothing at all about meal periods for Drivers.*[4]

1. The Relevant CBAs Are Silent On The Issue Of Meal Periods For Drivers.

There are two CBAs that govern the Drivers' work conditions that are in the record on appeal: one negotiated and signed in 2007 with an expiration of October 31, 2010 (CP 550-828, the "2007 CBA"); and one negotiated and signed in 2010 with an expiration of October 31, 2013 (CP 833-999, the "2010 CBA").[5]

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3 Contracting parties to the CBAs are Petitioner King County and Amalgamated Transit Union, Local No. 587 ("Local 587" or "the Union").

4 After the court below denied summary judgment, it appears a new CBA went into effect that, for the first time, expressly references the State meal period requirement and reflects the parties' intent to supersede such right with respect to Drivers, by providing them no meal period at all. Br. at 6 (citing 2015 CBA, signed on April 29, 2015). Although Respondent acknowledges that the 2015 CBA likely qualifies for an exemption under RCW 49.12.187, the question is not before the Court, nor should it be. RAP 2.4.

5 Generally speaking, the CBAs cover a three-year period, unless no agreement can be reached prior to the expiration, in which case the operative CBA remains in effect until a new one is signed. See CP 132-33.

Metro cannot dispute that these CBAs are silent on the issue of meal periods for Drivers. A reading of the relevant provisions governing workplace conditions for full-time and part-time Drivers (Articles 15 and 16) makes the point self-evident. That is, the 2007 and 2010 CBAs make no reference to a Driver's legal right to a meal period nor do they refer to the *absence* or *forfeiture* of such right by operation of an exemption, variance, waiver, or the like. CP 628-629; CP 910-911, 930.[6] Meanwhile, the Preamble to the CBAs state that employment rights *not* embodied in the contract remain in full force. CP 560 ("Employees are entitled to fair wages and working conditions as provided in this AGREEMENT, *including all protections preserved by law*.") (emphasis added); CP 844 (same).

2. The CBAs Remained Unchanged Following The Legislature's Amendment To RCW 49.12.187.

As Metro indicates, the Washington State Legislature codified two important changes to the Industrial Welfare Act, RCW 49.12 *et seq.* in 2003: (1) pursuant to amended RCW 49.12.005, public employers must comply with the Act from April 1, 2003 forward (which, in turn, includes meal and rest breaks for employees); and (2) pursuant to amended RCW 49.12.187 ("section 187") public employers may contract around the State's rest and meal break rules.

6 Citations to documents contained in the Clerks Papers are abbreviated "CP."

Metro concedes that the 2003 amendments "had the potential for impacting future arrangements between Metro and Local 587." Br. at 11. And, in its Statement of Facts, Metro repeatedly implies that some kind of dramatic change occurred with the CBAs in response to the legislature's amendment to section 187. Br. at 2 ("After adoption of RCW Section 187, the parties took action to supersede and vary from the [] meal and rest break provisions"); *Id.* at 11-12 ("Soon after the 2003 legislative changes [the parties took action]."). In support of its contention that Metro and the Union "took action" back in 2003, Metro cites exclusively to the 2014 declaration of its lead negotiator, David Levin, and the 2014 deposition of the Union President, Paul Bachtel. Br. at 12 (citing CP 132-33; CP 124).

However, nothing in the CBA signed the very next year (on November 22, 2004), acknowledges the "impact" of the new legal landscape much less "takes action" to respond to it. In fact, it says *nothing at all* about public employees' newly confirmed right to meal periods, nor does it include any contractual changes to the status quo. CP 315-545 ("2004 CBA"). Contrary to what Metro implies, the provisions concerning work conditions for Drivers (Articles 15 and 16) in the 2004 CBA are identical in all material respects to the CBA that predates the legislative

change. *Compare*, *e.g.*, CP 210 (2001 CBA at Article 15.3.H and I) *with* CP 389 (2004 CBA at Article 15.3.H and I).[7]

Even so, Metro implies that, following the 2003 legislative amendments, the parties made changes to the CBA – i.e., by the types of assignments (e.g., "straight runs" and "combos"), the provision of "layovers," and a bidding process based on seniority. Br. at 12 ("Thus, [following the changes in the law] Metro and Local 587 agreed to the 2004 CBA with Driver provisions for [four enumerated changes]."). But again, comparing the actual 2001 CBA to the actual 2004 CBA reveals that these provisions remained exactly the same. *Compare*, *e.g.*, CP 210 (2001 CBA at Article 15.3.I. regarding "layovers") *with* CP 388 (2004 CBA with identical language); *and* CP 211 (2001 CBA at Article 15.4.A.1 regarding "straights") *with* CP 389 (2004 CBA containing identical language).

What is more, a review of Mr. Levin's declaration does not support Metro's portrayal that the contracting parties "took action" following the change in law. In fact, Mr. Levin's declaration reveals that in 2004, the contracting parties decided to "roll over the 2001 CBA" which meant virtually *no changes* to the 2004 CBA despite the profound change in the

7 Confusingly, Metro cites to a "broad range of other rest and meal break provisions" in the 2004 CBA – again, in an apparent attempt to show a dramatic change following the amendment to section 187 – but cites to provisions of the 2010 CBA that govern non-Driver employees. Br. at 12.

law. CP 132. As to the Driver provisions that Metro infers came about in 2004, Mr. Levin attests that no such "changes" were made; rather, the parties "*continued the prior practice* [of, e.g., straight-through schedules, combos, layovers, and seniority-based bidding]." CP 133.

In other words, contrary to the repeated insinuations in Metro's briefing, the contracting parties changed *nothing* in the 2004 CBA (or the 2007 CBA or the 2010 CBA) to evidence they were "taking action" in light of the legislative changes to meal break requirements in 2003. The County had multiple opportunities in several rounds of negotiations to qualify for an exemption, but did nothing. Perhaps Metro or the Union wished to keep their respective bargaining options open, but whatever their intent, no action whatsoever is reflected in the CBAs.

Metro also points to various proposals from the Union that *might* have addressed the 30-minute meal period requirement following changes to the law in 2003. Br. at 14 (citing CP 1338, 1344-1353).[8] Metro's reliance on these proposals is mystifying given that none were accepted or incorporated into a final CBA. *Id.* If anything, they demonstrate that the status of meal periods remained a live and unsettled issue during the 2007 and 2010 CBA negotiations. Indeed, Local 587 President Paul Bachtel

8 Notably, much of the material on which Metro relies was not part of the record on summary judgment, but rather, was filed with Metro's motion for reconsideration. The court need not consider it here, RAP 9.12, but even if it does, none of this extrinsic evidence changes the analysis, as detailed above.

testified that "[i]n every bargaining session" since 2003, the Union has "certainly" taken the "position that there was no waiver of the drivers' rights to meal or rest breaks." CP 1465.[9]

In any event, as discussed below, none of this extrinsic evidence is relevant to construing the four corners of the parties' unambiguously silent CBAs. While Metro asserts that it and the Union "agreed" to specifically vary from or supersede the meal period rules, it does not and cannot point to any language in the CBA itself embodying or expressing such intent.

3. Only After This Lawsuit Was Filed Did Metro Attempt To Specifically Vary From Or Supersede The Meal Period Requirement

In the absence of any relevant language in the controlling CBAs, Metro cites *new* language embodied in a tentative agreement signed in June 2014 – i.e., one year *after* this case was filed. Br. at 15 (citing CP 84 ("Article 3, SECTION (NEW) – NEGOTIATED MEAL AND REST PERIODS"). This "new" language also seems to be included in the most recent CBA, which was apparently signed in April 2015 – after the court below denied Metro's motion for summary judgment. Br. at 6 (citing website for new CBA) ("2015 CBA"). The new provision expressly covers meal periods:

[9] Respondent has included his summary judgment opposition brief and related filings in a supplemental designation of clerk's papers (which includes Mr. Bachtel's deposition testimony), but as of the date of this brief, has not received the corresponding CP numbers.

> ***SECTION 15 – NEGOTIATED MEAL AND REST PERIODS***
>
> The PARTIES agree to continue the long standing agreement to specifically supersede in total the State provisions regarding meal and rest periods for Employees. Full Time Operators, Part Time Operators [Drivers] and First Line Supervisors do not receive a designated meal period. Additionally, Employees in these job classifications will be entitled to meal and rest periods only as described in this AGREEMENT, and not those provided by State law....

CP 84; *see also* http://your.kingcounty.gov/ftp/des/hr/410C0115_scsg.pdf at 13 (last visited August 17, 2015).

This new language demonstrates that the parties know how to create an exemption under RCW 49.12.187 when they wish to do so. In contrast to the CBAs that precede it, this new language references the meal period "provided by State law," and expressly states that Drivers will not get one. Compliance with section 187 is not difficult.

4. Respondent's Adequacy As A Class Representative Is Not At Issue

In its Statement of Facts, Metro reviews in detail Mr. Frechin's route assignments and the process for bidding on such routes. Br. at 9, 15-17. In an apparent attempt to show that Mr. Frechin is not a hard worker or not aggrieved by the violation of the meal period rule, it notes that a number of Mr. Frechin's assignments were comprised of shifts of less than five hours. Br. at 16-17. Respondent does not dispute the fact that an

employee's right to a meal period is triggered only if the shift exceeds five consecutive hours. WAC 296-126-092. To the extent Metro implies, however, that Mr. Frechin is not fit to represent the class or is somehow not harmed by Metro's policy because he typically bid on and was assigned shorter-duration routes, such implication is not appropriate.[10]

Metro does not deny that, for certain three-month stretches, Mr. Frechin worked longer shifts of seven or eight hours. Still, while at once conceding that bus drivers do not get their legally-required 30-minute meal periods when working longer shifts (indeed, it seeks an exemption from the rule), it infers that Mr. Frechin received plenty of break time. That is, it refers to the "significant layover time" included in Mr. Frechin's schedule, Br. at 17, and goes so far as to suggest, without any supporting citation that, "in Driver-speak, layovers are the equivalent to meal and rest breaks." Br. at 3.

Even if the court below had engaged in fact-finding on this point (it did not) and even if the adequacy of Mr. Frechin as a class representative was before the Court (it is not), nothing in the record suggests that Mr. Frechin actually received a legally sufficient 30-minute meal period every day he worked longer than five consecutive hours,

10 Mr. Frechin's adequacy as a class representative was not explored in discovery or raised below, and it is not at issue here on appeal.

notwithstanding the existence of scheduled layovers.[11] In fact, there is considerable doubt in the record that a "layover" (i.e., the scheduled time between two runs) provides reliable breaks at all because such "layover" time is eaten up by traffic or the Driver's other duties, such as driving to the next route or preparing the coach for the next trip. CP 1464-65. While counsel expressed the possibility at oral argument that Drivers may, by virtue of the scheduled layovers, get a de facto rest break from time to time that complies with the WAC (particularly given the permissibility of "intermittent" rest breaks, *see* CP 117-18); whether this in fact occurs is irrelevant. Respondent has not brought a claim for violation of the rest period rule that is also contained in WAC 296-126-092.[12]

5. Whether Drivers "Want" Meal Periods is Not a Decided Issue

Much of the rest of Metro's Statement of the Case is taken up with discussion of such extraneous topics as the number of Metro passengers,

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[11] The Department of Labor and Industries has interpreted the meal break regulation to require that "the employer must make every effort to provide employees with an uninterrupted meal period," even when the meal break is paid and the employee is required to remain at a prescribed work site. CP 116. Metro does not dispute that it made no such effort with respect to Mr. Frechin's shifts or the shifts of any other Driver. Moreover, the total number of scheduled layover minutes for any of Mr. Frechin's shifts is not dispositive, both because those minutes may in fact evaporate due to traffic and other exigencies and because it is unstated how many of those minutes occurred between the second and fifth hours of work, as required for a lawful meal period. *See* WAC 296-126-092.

[12] There is no question that meal periods are distinct from rest breaks, with different regulatory requirements and different L&I guidance. *Compare* WAC 296-126-092(1)-(3) (meal period requirements) *with* 092(4)-(5) (rest break requirements); CP 114-118 (L&I policy discussing separate requirements for each).

the breaks provided *other* Metro employees, the lingo used by the contracting parties, the various assignments available for Drivers to bid, and the like. Respondent has no reason to dispute much of this narrative; however, Metro's assertion that all of its Drivers "want" to work for eight hours without a meal period warrants a response. While some drivers may prefer to skip their meal period (if the alternative is an unpaid break), it is evident that not all would so choose. A 2004 report by Local 587 showed insufficient breaks as the most pressing issue for Drivers, CP 1409, and contained numerous comments from drivers about the desire to eat lunch at some point during their shifts. *E.g.*, CP 1413, 1415-1423, 1433-34; *see also* CP 1456. Little has changed since then; according to Metro's own personnel, breaks for Drivers remained the "number one issue" nine years later in 2013. CP 1460.[13]

IV. ARGUMENT

A. Standard of Review

Appellate review of an order denying summary judgment is reviewed de novo. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn. 2d 402,

13 In addition to being misleading, Metro's portrayal of the Drivers' supposed collective wish to work without breaks is irrelevant. Metro's logic is akin to saying that there are workers who are happy to work for less than minimum wage. Even if true, it has no effect in applying mandatory wage and hour laws, whose purpose is to protect workers and prevent unfair methods of competition. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301-302 (1985) (requiring employer to pay its "volunteer" work-force minimum wage, despite their objections; "the purposes of the Act require that it be applied even to those who would decline its protections.").

407, 282 P.3d 1069 (2012). The question before the Court requires it to construe a statute (RCW 49.12.187) and interpret an unambiguous CBA. The parties agree that both are questions of law for the Court to resolve. *Enter. Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999) ("Interpretation of a statute is a question of law"); *Matter of Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983) ("The interpretation of an unambiguous contract is a question of law and may be resolved on summary judgment"). Respondent Mr. Frechin respectfully requests that the Court affirm the trial court's decision denying Metro's motion.

Review of the lower court's denial of Metro's motion to reconsider is reviewed for a manifest abuse of discretion. *Perry v. Hamilton,* 51 Wn.App. 936, 938, 756 P.2d 150 (1988); *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). Respondent Mr. Frechin requests that the Court uphold the decision denying reconsideration of the parties' question of law as well within the trial court's discretion.

B. Section 187's Exemption From The Meal Period Regulation Must Be Narrowly Construed.

At issue here is Metro's compliance with the meal period provision of WAC 296-126-092 ("Meal Periods – Rest Periods"), which provides, *inter alia*:

> No employee shall be required to work more than five consecutive hours without a meal period.

WAC 296-126-092(2). The "shall" language, cited above, imposes a "mandatory obligation on the employer" to provide lawful breaks. *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 688, 267 P.3d 383 (2011). As the Supreme Court recently explained:

> It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time. *Id.* at 691, 267 P.3d 383 (quoting *White v. Salvation Army,* 118 Wn. App. 272, 283, 75 P.3d 990 (2003)). A workplace culture that encourages employees to skip breaks violates WAC 296–126–092 because it deprives employees of the benefit of a rest break "on the employer's time." *Id.* at 679, 267 P.3d 383.

Demetrio v. Sakuma Bros. Farms, – Wn.2d –, No. 90932-6, 2015 WL 4366459, at *4 (Wash. July 16, 2015).

The Industrial Welfare Act ("IWA"), RCW 49.12 – under which the meal break rule is promulgated – evinces a "strong legislative intent that employees be afforded healthy working conditions and adequate wages." *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). The IWA contains "emphatic" language regarding the protection of workers: "[t]he welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health." *Id.* at 852 (citing RCW 49.12.010). In

addition, the IWA broadly states: "[i]t shall be unlawful to employ any person in any industry or occupation within the state of Washington under conditions of labor detrimental to their health...." *Id.* (citing RCW 49.12.020). As the Court of Appeals recognized in *Pellino*, the regulations adopted by the Department Labor and Industries ("L&I") in WAC 296-126, including the meal break requirement, were enacted "to protect employee health, safety, and welfare as authorized under chapter 49.12 RCW." 164 Wn. App. at 685.

Washington courts liberally construe remedial statutes protecting employee rights in favor of workers. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000). Meanwhile, *exemptions* from those protections are narrowly construed. *Id.* The burden rests with the *employer* to prove that an exemption to remedial legislation applies. *Id.*; *see Pellino*, 164 Wn. App at 697 (holding that waiver is an affirmative defense that requires employer to show that employees voluntarily and knowingly waived known right to meal and rest break). Against this backdrop, the trial court correctly determined that Metro failed to satisfy the criteria for an exemption to the State's meal period requirement.

C. The CBAs Do Not Qualify For An Exemption Because They Do Not Satisfy the Criteria Set Forth In RCW 49.12.187.

Metro claims an exemption from the meal period regulation under RCW 49.12.187. Section 187 reads in its entirety:

> [R]ules adopted under this chapter regarding appropriate rest and meal periods as applied to employees in the construction trades may be superseded by a collective bargaining agreement negotiated under the national labor relations act, 29 U.S.C. Sec. 151 et seq., if the terms of the collective bargaining agreement covering such employees specifically require rest and meal periods and prescribe requirements concerning those rest and meal periods.
>
> Employees of public employers may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that *specifically vary from or supersede*, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.

RCW 49.12.187 (emphasis added). As Metro indicates, this exemption was added in 2003, at the same time the legislature re-defined the term "employer" to include public agencies. *See McGinnis v. State*, 152 Wn.2d 639, 642, 99 P.3d 1240 (2004). The amendment to the IWA was a legislative response to an unfavorable trial court ruling in *McGinnis* enforcing meal and rest break provisions for employees working "straight-eights" within the Departments of Corrections and Social and Health Services. *Id.* The legislature purported to "clarify" the law, making certain applications of the IWA effective as of the date the bill was passed (rather than retroactive). *Id.* This "fix" allowed the State to avoid paying millions

in back-pay to State employees. CP 97-101. After the legislation passed, the trial court reversed its earlier ruling, and the Supreme Court affirmed. *McGinnis*, 152 Wn.2d at 646.

In order to qualify for an exemption under amended section 187, the following criteria must be met: for construction workers, the CBA must "specifically require rest and meal periods and prescribe requirements [for the same]." RCW 49.12.187; *Lowry v. Ralph's Concrete Pumping, Inc.*, 2013 WL 2099519, *3 (W.D. Wash. May 14, 2013). For public employees, the CBA must "specifically vary from or supersede" the rest and meal period regulations in part or in total. RCW 49.12.187.

The terms "specifically," "vary," and "supersede" are not defined in the statute or regulation, thus courts discern the plain meaning of such nontechnical terms from their ordinary dictionary definitions. *See State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). The dictionary defines the terms as follows:

> **specifically**: in a specific manner; definitely; particularly.
> **vary**: to change in form, appearance, nature, substance, etc.; to alter, to modify.
> **supersede**: to cause to be set aside or dropped from use as inferior or obsolete and replaced by something else.

WEBSTER'S NEW 20TH CENT. DICTIONARY (1983); *accord* CP 127-130 (Ex. G to Madden Decl.) (BLACK'S LAW DICTIONARY (10th ed.) (defining supersede as: "To annul, make void, or repeal by taking the place of")

(defining vary as: "To change in some usu. small way; to make somewhat different.")).

Only two cases have construed this statutory exemption, both of which Metro relegates to footnotes. In the first, *Lowry v. Ralph's*, Judge Jones of the Western District of Washington addressed the interplay between section 187 and a construction worker's right to meal and rest breaks:

> Here, the choice of language and a condition subsequent – the requirement of rest and meal periods in a CBA – militates against finding that the right at issue was created by Ralph's [defendant's] labor contracts. *If Ralph's CBAs were silent with respect to rest and meals periods or did not prescribe the rest and meal requirements, the right to rest and meal breaks would still exist*, as codified in WAC 296–126–092. Thus, the right at issue came into existence entirely independently and "is vested in [Washington's] employees directly, not through the medium of [Ralph's CBAs]." *Burnside,* 491 F.3d at 1064. Read as Ralph's suggests, RCW 49.12.187 would impermissibly disadvantage a construction employee simply for being covered by a CBA because a failure to negotiate for rest and meal breaks would result in their forfeiture.

Lowry, 2013 WL 2099519 at *2-3 (emphasis added). At issue in *Lowry* was whether the worker's right to rest and meal periods derived from state law (triggering remand to state court) or the CBA (triggering federal preemption). Judge Jones reasoned that it was the former because the worker's right to meal and rest breaks would exist – even if the CBA omits any mention of them. *Id.*; *accord Burnside v. Kiewit Pac. Corp.*, 491

F.3d 1053, 1064 (9th Cir. 2007) ("[If the CBA says nothing at all about pay for travel time, the right to be paid for that time still exists."). This is entirely consistent with the principle under Washington law that employee rights cannot be forfeited by silence. *Pellino*, 164 Wn. App. at 696-97 (waiver of meal break right requires an express agreement or unequivocal act evincing intent to waive).

Said another way, contrary to what the County urges, a public employee's right to a meal period exists *unless and until* a CBA meets the criteria for an exemption. CP 115 (L&I Policy ES.C.6); *Pellino*, 164 Wn. App. at 696-97; *accord Burnside* ("[A]s a matter of pure logic, a right that inheres unless it is waived exists independently of the document that would include the waiver, were there [such] a waiver."). On this point, although Metro quotes liberally from the Department of Labor's guidance on meal period requirements for public workers, Br. at 20, it manages to excise the one sentence that matters:

> If public employers do not [meet the criteria for an exemption], then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

Id.

The only other case construing amended section 187 is *Frese v. Snohomish County*, 129 Wn. App 659, 120 P.3d 89 (2005). The *Frese* court denied summary judgment to the County, reasoning that the CBA at

issue there did not "vary from or supersede" the WAC meal period requirements *even though the CBA contemplated a meal period. Id.* at 668-69. Because the CBA failed to specify *how* exactly its meal periods were "different from what the regulation provides," the court held that the employees' claim for violations of WAC 296-126-092 could not be dismissed on summary judgment. *Id.* at 669.[14] The result can be no different here, where the CBA omits any reference to meal periods for Drivers at all.

In light of the analysis in *Lowry* and *Frese*, and given the Court's task to narrowly construe exemptions from remedial legislation in favor of employees, Metro cannot show that it qualifies for an exemption under section 187, and thus the Drivers' right to a meal period remains intact.

1. Nothing In The CBAs "Supersede" State Meal Period Rules.

Metro principally argues that the 2007 and 2010 CBAs meet the criteria for an exemption because the contracting parties say that is what they meant to do. *E.g.*, Br. at 2, 4, 13-15, 23-25. However, unexpressed, subjective intent does not meet the definition of "specifically vary from or supersede" for purposes of qualifying for an exemption under RCW 49.12.187; nor is subjective intent (conveyed through extrinsic evidence)

14 The CBA at issue in *Frese* provided meal periods but required the employees to be on call during their lunch break. 129 Wn. App. at 661.

relevant to interpreting the CBAs under basic principles of contract interpretation.

To qualify for an exemption under the "supersedes" prong of RCW 49.12.187, the CBA has to *do* something; namely, it has to *set aside* the meal period rule and *replace it with something else*. Metro's CBAs do neither. They do not mention the public employees' right to a meal period nor communicate that such right is being replaced with something else. Under a straight-forward application of section 187, Metro cannot "supersede" an individual's rights it never mentions. This conclusion is consistent with *Frese*, where the CBA failed to "specify" *how* its meal break arrangements were "different" from what the regulations provided. 129 Wn. App at 669. Assuredly, if the *Frese* CBA did not qualify for an exemption at summary judgment, Metro's silent CBAs cannot.

This conclusion is also consistent with the requirement that an individual waiver of meal period rights cannot be inferred from ambiguous statements or circumstances. *See Pellino*, 164 Wn. App. at 696-97. At a minimum, RCW 49.12.187 should require that equally clear and unequivocal action, so that employees know when their meal break rights are being superseded by a proposed CBA.

Because it cannot point to anything within the four corners of the CBAs that "supersede" state meal period rules, Metro urges the court to

look outside the agreement and consider the supposed subjective intent of the contracting parties. Metro does so without citing a single contract case.[15] Washington's objective manifestation theory of contracts does not permit alteration of the parties' written word. *Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503, 342 P.2d 612 (2005). The focus is on "the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Id.* Words in the contract are assigned their "ordinary, usual, and popular" meaning unless the agreement "clearly demonstrates a contrary intent." *Id.* at 503-04. If the parties' intent can be divined from the actual words within the four corners of the document, courts do not consider extrinsic evidence – i.e., evidence *outside* the contract, such as information about contract formation. *Id.*

A contract that is silent on a particular topic, as here, does not create ambiguity that permits the Court to turn to extrinsic evidence. *See Urban Const. Co. v. Seattle Urban League*, 12 Wn. App. 935, 936, 533

15 A CBA is construed like any other contract. *Davis v. State*, 138 Wn. App. 811, 817 (2007). Ignoring this, as it did on reply below, Metro cites the Public Employee Relations Commission ("PERC") decision in *City of Ocean Shores v. Teamsters Local 252* to suggest that bargaining history is always relevant to CBA interpretation. Br. at 27. PERC decisions, handed down by arbitrators (not judges) in the unique area of labor law are not binding on this Court. In any event, Metro's citation to the decision is misleading; the *Ocean Shores* arbitrator considered bargaining history in the context of a claim that the union *refused to bargain* in good faith – a statutory requirement that is unique to labor law and not at issue here. Moreover, on the page prior to the one Metro cites, under the heading "contract interpretation," the arbitrator refers unequivocally to the objective manifestation theory of contracts as the rule in Washington. *City of Ocean Shores*, Decision 10670 at 4, n.1 (citing *Berg v. Hudesman*, 115 Wn.2d 657 (1990) (decision available at http://www.perc.wa.gov/databases/ulp/10670.htm) (last visited August 17, 2015).

P.2d 392 (1975); 17A Am.Jur.2d Contracts § 331 (2004) ("Ambiguity in a written agreement does not arise from silence, but from what was written so blindly and imperfectly that its meaning is doubtful."). Courts turn to extrinsic evidence to determine the meaning of "specific words or terms used" within the contract. *Hearst*, 154 Wn.2d at 502-03 (clarifying application of *Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990)). Courts cannot use extrinsic evidence to show an intention that is independent from what is expressed in the contract or to "vary, contradict, or modify the written word." *Id.*; *In re Marriage of Schweitzer,* 132 Wn.2d 318, 327 (1997).

Here, the CBA is silent on the question of meal periods for Drivers. The words "meal" or "lunch" do not appear anywhere in Articles 15 or 16; neither do variations on the word "supersede," "vary," "exempt," "replace." There is nothing ambiguous about this silence, and the trial court properly declined to read terms into the contracts the parties chose not to include. *See Davis*, 138 Wn.App. at 819 (declining to read into unambiguous CBA a "custom" of not paying ferry workers during shift changes); *Hearst*, 154 Wn.2d at 504 (Washington courts "do not interpret what was intended to be written but what was written").

What Metro seeks here is similar to what the plaintiff-newspaper company sought in *Hearst*. There, the plaintiff sought to introduce

undisputed evidence of the contracting parties' desire to maintain two newspapers in the Seattle region; the Court declined to do so and considered such intent irrelevant to construing the contract where "nowhere in the text of the [contract] is there language supporting this theory." 154 Wn.2d at 502-03. As in *Hearst*, there is nothing in the actual text of the CBAs that supports Metro's theory that the parties shared an intent to qualify for an exemption under RCW 49.12.187. *Accord Davis*, 138 Wn. App. at 818-20.

The CBA's silence leaves meal period rights where the parties left them: protected under WAC 296-126-092. *See Urban Const. Co.*, 12 Wn. App. at 936 ("A contract silent as to sales tax responsibility is not ambiguous. As a matter of law, the buyer must pay the tax.").

2. The CBA Provisions Do Not "Specifically Vary From" The Meal Period Rule.

Metro argues that its CBAs not only supersede the meal period requirement, but also "specifically vary" from it. It cites in support various other CBA provisions, including provisions that have nothing to do with Drivers. Br. at 26-29, 33-35. But as with the definition of "supersedes," to qualify for an exemption under the "specifically varies" prong of section 187, the CBA has to *do* something and do it unequivocally; namely, definitely or particularly change, alter or modify ("specifically vary") the

State's default meal period rule. Metro baldly asserts that various contractual provisions change the "form, appearance, nature and substance" of meal periods (apparently, beyond all recognition), when in fact, they do not address meal periods at all.

First, Metro argues that the CBAs qualify for an exemption because the "entire structure of the straight-through work day" shifts is "inherently inconsistent" with the provision of 30-minute meal periods. Br. at 26, 27. Thus, Metro's argument goes, it is obvious that the CBAs specifically vary from the meal period rule...because Drivers do not receive meal periods. First, that working conditions for Drivers may be "inconsistent" with what state law provides (i.e., in violation of the WAC) is not a condition precedent to qualify for an exemption under section 187. To conclude otherwise would render the term "specifically vary" mere surplusage, and would impermissibly permit CBAs to waive employee rights by silence. *State v. Riles,* 135 Wn.2d 326, 340, 957 P.2d 655 (1998) ("Courts should not construe statutes to render any language superfluous."). The legislature intended the contracting parties to do more.

Notably, the CBA's "inconsistency" with state law is nowhere spelled out in the CBA for Drivers to find, nor is it an obvious conclusion to draw simply by reading the definition of the term "straight." The stated definition of "straight" in the CBA is: "straight-through work which is at

least seven hours and eleven minutes including platform, report and travel time." CP 912. "Straight-through work" by the County's own estimation, does *not* mean that the Driver is always on-duty working every minute of the seven hours and eleven minutes. CP 912. In fact, the County takes the opposite position; namely, that Drivers receive "reasonable breaks" during occasional "layovers." Metro cannot have it both ways. Just as the definition of a straight-shift assignment does not "by definition" mean the Driver is actively working the entire shift, it cannot definitely change, alter, or modify ("specifically vary") a meal period it never mentions. Further, the term "straight run" in the CBAs is used in contradistinction to a "combo" (i.e., a split shift that may be separated by several hours) and *not* to indicate anything about the availability of meal periods (or lack thereof), paid versus unpaid meal periods, or the like.

Metro cites the "straight-through shifts" at issue in *McGinnis* as an example of contractual terms that are "inherently inconsistent" with the meal break regulation – shifts that were shielded from liability via a legislative fix. Purely for comparison sake, the CBA that covers those DOC/DSHS workers now reads:

> The Employer and the Union agree to paid meal periods that vary from and supersede the paid meal period requirements of WAC 296-126-092. Employees working straight shifts will not receive a paid meal period, but will

> be permitted to eat intermittently as time allows during their shifts while remaining on duty.

CP 1469. In other words, compliance with section 187 is easy: the DOC/DSHS Agreement specifically references the meal period rule, and then changes it. Metro's CBAs do not – or, at least, did not until after this lawsuit was filed.

Next, along the same lines, Metro argues that the contracting parties specifically varied from the meal period rule by agreeing to replace them with layovers (which, in turn, incorporate the term "reasonable breaks"). First, the Union President acknowledges that a layover is not the same thing as a bona fide break. Further, even if Metro and Union officials will testify today that they intended to replace meal periods with layovers, it is nowhere manifested in the CBAs. Simply assigning a new term of art ("meal period") to stand in for an entirely different term of art ("layover") does not make it so. Metro's tortured attempt to conflate meal periods with rest breaks in hopes of combining them both within the concept of a layover is unavailing. Second, whether it is called a lunch break or something else, a 30-minute meal period is a legal requirement that stands separate and apart from the employer's obligation to provide a 10-minute rest break for every four hours worked; employers must provide both in a given shift lasting longer than five hours, and the two cannot be mixed and

matched. WAC 296-126-092; CP 114-118 (L&I Administrative Policy ES.C.6 discussing separate requirements for each). For example, while L&I has indicated that intermittent rest breaks may be appropriate, CP 117, it indicates that employers must ensure that workers are "completely relieved" from duty for the duration of any 30-minute unpaid lunch break; absent that, employers must pay the worker *and* still make "every effort" to provide an uninterrupted 30-minute meal period. CP 116. 117 (ES.C.6 Policy at 3, 4).

More to the point, the parties' supposed shared subjective intent to have layovers stand in for meal periods is irrelevant to contract interpretation; and it is debatable. As stated, Local 587 President Paul Bachtel testified that "[i]n every bargaining session" since 2003, the Union has "certainly" taken the position that drivers' rights to meal periods remained an unsettled issue. This remarkable admission conflicts with Metro's assertion that there was a clearly expressed intent by Metro and the Union to replace Drivers' meal break rights with layovers, and underscores the hazard of relying on post-hoc expressions of intent in contravention of the unambiguous text of the CBAs.

Finally, Metro confusingly argues that the express reference to meal periods for *other* classes of workers in the CBAs somehow shows that Drivers are not entitled to receive them, and thus, the criteria for an

exemption is met. Br. at 27, 34-35. Again, remaining silent as to the Drivers' right to a meal period means that the individual right, conferred by state law, remains intact. Second, the fact that the CBAs provide *other* Metro employees with meal periods is not probative of whether Metro qualifies for an exemption for its Drivers. If anything, it underscores the *absence* of any specific variance for the Drivers, and highlights the fact that the parties know how to address meal periods when they want to. The County's citation to two cases involving statutory construction does not change the analysis. Br. at 27, n.11 (citing *City of Kent v. Beigh*, 145 Wn.2d 33, 45-46, 32 P.3d 258 (2001); *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998)). *Beigh* and *Millay* involve cannons of construction, not interpretation of an unambiguous contract.[16]

D. Individual Driver Assignments Are Not "Employment Agreements."

Lastly, Metro contends that Drivers entered into binding individual "agreements" with the County when they selected (or rather, were assigned) routes without meal periods. To characterize the shift selections as "mutually agreed-to employment agreements" under RCW 49.12.187 is flatly wrong. First, such direct dealings with union members would violate Washington labor laws. *Tacoma Police Union v. City of Tacoma*, Decision

16 Both cases stand for the noncontroversial principle that a court does not borrow language from one provision of a statute, to add to another. *Beigh*, 145 Wn.2d at 46; *Millay*, 135 Wn.2d at 202.

11097, 2011 WL 2446477, *2 (PECB, 2011) (citing RCW 41.56.030(4)). That is, the shift selections cannot lawfully constitute separate "employment agreements" between Metro and individual Drivers because the Union is the sole bargaining agent for the Drivers. CP 562, 842. The *only* way that Metro can alter, modify, or revise the CBA is by way of a modification process spelled out in the CBA. CP 718, 996. It is absurd to suggest that Drivers enter into separately negotiated instruments with Metro when they select a shift (or whatever shift is available, based on their rank); this selection process merely implements the terms of the CBA.[17]

E. The Effect Of Non-Compliance With RCW 49.12.187.

Metro contends that the absence of any reference to meal periods, the WAC, or RCW 49.12.187 is insignificant because "CBAs tend to be written in language that is commonly understood by the employees in the bargaining unit" and, goes so far as to say, there is "no evidence that Drivers were confused by the language of their CBAs." Mot. for Disc. Rev. at 16 n.7. However, there is ample evidence that people in even the highest ranks of Metro and Local 587 have remained confused for years as to whether Drivers were entitled to meal breaks under the WAC. As late as

[17] This argument also ignores the fact that not all Drivers have a choice among all routes. Most Drivers will have "choices" significantly limited by the bids of more senior Drivers, undermining any assertion that they voluntarily choose long routes without meal breaks.

December 2011, the Metro Transit Operations Manager emailed Metro's lead negotiator to ask why Drivers were not covered by the meal break rules addressed in the *Pellino* case. CP 1472-1473. That same year, the Streetcar Operation and Maintenance Chief emailed the lead negotiator that he was not certain whether rest and meal breaks for his employees were covered by the WAC or the CBA. CP 1476. The negotiator responded that he himself had "never personally figured out how all the meal and beak stuff works in the CBA." *Id.* And the Union apparently used the right to meal periods as a bargaining chip for a decade or more. None of this would be possible if the waiver of meal periods could be "commonly understood" from the language of the CBA.

Permitting a public employer to supersede or obtain a variance from State law by saying nothing about the right that is supposedly being superseded or varied not only defeats the purpose of RCW 49.12.187, it creates problems in application. The *Frese* and *Lowry* courts correctly focus on the extent to which CBAs communicate their effect on the rights of the individual worker. Here, because the CBAs are silent on the question of meal periods, Drivers are not told what their rights are and how (or if) the CBA modifies those rights. Section 187's bare-bones requirement that the CBAs "specifically vary from or supersede" the meal break rule ensures that employees will be on notice and know when their

individual meal period rights are being affected by a proposed contract, rather than having their rights stripped *sub silentio* as a matter of unexpressed intent.

If, as Metro asserts, the bargaining parties really desired to vary or supersede the meal break requirements for Drivers pursuant to RCW 49.12.187, it was a very simple matter for them to do so. They simply had to say so, clearly and specifically. No "magic or talismanic language" was required, just a simple and clear statement of what the bargaining parties were agreeing to do. Absent such an objective manifestation of intent, the trial court properly denied Metro's motion for summary judgment because Metro's CBAs do not satisfy the criteria for an exemption pursuant to RCW 49.12.187.

F. The Trial Court Was Well Within its Discretion to Deny Metro's Motion for Reconsideration.

Finally, the trial court was well within its discretion to deny Metro's motion for reconsideration. Metro provided no sound justification for the late submission of additional material – all of which was available to Metro prior to the close of briefing and hearing on the motion. The trial court properly denied reconsideration without ruling on the admission of this additional evidence, and without inviting a response by Respondent pursuant to King County Local Civil Rule 59(b). *See Wagner Dev., Inc. v.*

Fid. & Deposit Co. of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 (1999) ("If the evidence was available but not offered until after [the summary judgment hearing] passes, the parties are not entitled to another opportunity to submit that evidence.") (citing *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) ("The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.")).

In any event, the evidence submitted with Metro's motion for reconsideration amounts to additional extrinsic evidence that the Court need not and should not consider when interpreting an unambiguous contract.

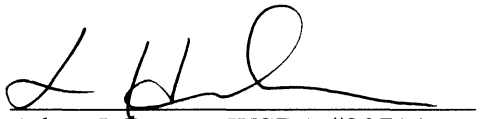
V. CONCLUSION

For the foregoing reasons, the Court should affirm the decision below, and remand for further proceedings.

DATED this 18th day of August, 2015.

Respectfully submitted,

SCHROETER GOLDMARK & BENDER



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NO. 72750-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

King County Superior Court
Cause No. 13-2-23545-5 SEA

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DOUGLAS FRECHIN, individually and on behalf of others similarly situated,

Respondent,

v.

KING COUNTY DEPARTMENT OF TRANSPORTATION,

Petitioner.

DECLARATION OF SERVICE OF BRIEF OF RESPONDENT

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ORIGINAL

DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on August 18, 2015, I caused to be delivered via email and placed in the US mail, first class, postage prepaid, a true and correct copy of Brief of Respondent and a true and correct copy of this Declaration of Service to counsel for defendant, as follows:

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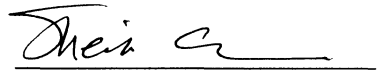
DATED at Seattle, Washington this 18th day of August, 2015.



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