

FILED
Court of Appeals
Division II
State of Washington
4/6/2018 11:17 AM

No. 50970-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PUCCINI-ONE, LLC,
Appellant

v.

ECP COLLEGE WAY, LLC,
Respondent.

RESPONDENT'S BRIEF

Aric S. Bomszyk, WSBA #38020,
Attorney for ECP College Way, LLC
BAROKAS MARTIN & TOMLINSON
1000 Second Avenue, Suite 3660
Seattle, Washington 98104
206.621.1871
asb@bmatlaw.com
klk@bmatlaw.com

TABLE OF CONTENTS

	Page
I. Introduction	1
II. Statement of Issues	6
III. Statement of the Case	6
a. General Background	6
b. Amended Complaint and ECP's CR 12(b)(6) Motion	9
c. Appellants' Second Amended Complaint & ECP's Amended CR 12(b)(6) Motion	10
d. Appellants' Objection To ECP's Amended CR 12(b)(6) Motion	11
e. ECP's Reply on ECP's Amended CR12(b)(6) Motion	13
f. Oral Argument	14
g. Discovery	16
h. Partial Summary Judgment Moving Papers & Appellants' Opposition to Summary Judgment	18
i. ECP's Reply In Support of Partial Summary Judgment	21
j. Oral Arguments At Partial Summary Judgment	21
k. Motion to Compel Arbitration	22
IV. Argument	
a. The Law Governing the Invoking of Arbitration	24
b. The Law Disfavoring Waivers of Arbitration	27
c. The Factual Record & Appellants' Heavy Burden	29
d. Evaluating the Facts & Case Law	41
e. Appellants Cannot Claim Prejudice	42
f. ECP is Entitled to Its Attorney Fees	45
V. Conclusion	46

TABLE OF AUTHORITIES

Cases

<i>Adler v. Fred Lind Manor</i> , 153 Wash. 2d 331, 342, 103 P.3d 773, 779–80 (2004)	28
<i>Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Cent. Ltd.</i> , 154 F.3d 404, 409 (7th Cir.1998)	28
<i>B & D Leasing Co. v. Ager</i> , 50 Wn. App. 299, 303, 748 P.2d 652, 654 (1988)	27, 36
<i>Boyd v. Davis</i> , 127 Wash.2d 256, 262, 897 P.2d 1239 (1995)	26
<i>Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP</i> , 179 Wn. App. 289, 298, 322 P.3d 1229, 1234 (2013)	27
<i>Davidson v. Hensen</i> , 135 Wash. 2d 112, 118, 954 P.2d 1327, 1330 (1998)	26
<i>Deutsche Bank Nat. Tr. Co. v. Slotke</i> , 192 Wn. App. 166, 177, 367 P.3d 600, 606, review denied sub nom. <i>Deutsche Bank Nat'l Tr. Co. v. Slotke</i> , 185 Wash. 2d 1037, 377 P.3d 746 (2016)	25, 26
<i>Fisher v. A.G. Becker Paribas Inc.</i> , 791 F.2d at 694 (9th Cir.1986)	28
<i>Grange Ins. Ass'n v. Roberts</i> , 179 Wn. App. 739, 771, 320 P.3d 77, 95 (2013)	26
<i>Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.</i> , 148 Wn. App. 400, 403, 200 P.3d 254 (2009)	25, 28
<i>International Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wash.2d 29, 51, 49 P.3d 1265 (2002)	24
<i>Lake Washington Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.</i> , 28 Wn. App. 59, 62, 621 P.2d 791, 794 (1980)	27, 36

<i>McGugart v. Brumback</i> , 77 Wash. 2d 441, 444, 463 P.2d 140, 142 (1969)	34
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)	28
<i>Munsey v. Walla Walla College</i> , 80 Wn. App. 92, 96, 906 P.2d 988 (1995)	24, 25
<i>Naumes, Inc. v. City of Chelan</i> , 184 Wn. App. 927, 932, 339 P.3d 504, 507 (2014)	28
<i>Otis Hous. Ass'n, Inc. v. Ha</i> , 165 Wash. 2d 582, 588, 201 P.3d 309, 312 (2009)	27, 36
<i>In re of Rapid Settlements, Ltd's</i> , 189 Wn. App. 584, 359 P.3d 823 (2015)	26
<i>Rimov v. Schultz</i> , 162 Wn. App. 274, 285, 253 P.3d 462, 468 (2011)	28
<i>River House Dev. Inc. v. Integrus Architecture, P.S.</i> , 167 Wn. App. 221, 237, 272 P.3d 289, 297 (2012) citing <i>Steele v. Lundgren</i> , 85 Wn. App. 845, 935 P.2d 671 (1997) <i>Fisher v. A.G. Becker Paribas Inc.</i> , 791 F.2d 691, 694 (9th Cir.1986)	28
<i>Saili v. Parkland Auto Ctr., Inc.</i> , 181 Wn. App. 221, 222, 329 P.3d 915, 916 (2014)	28, 30
<i>Saleemi v. Doctor's Assocs., Inc.</i> , 176 Wash. 2d 368, 387, 292 P.3d 108, 117 (2013)	43
<i>Schuster v. Prestige Senior Mgmt., L.L.C.</i> , 193 Wn. App. 616 (2016)	28
<i>Shepler Const., Inc. v. Leonard</i> , 175 Wn. App. 239, 248–49, 306 P.3d 988, 993 (2013)	36
<i>Thompson v. Lennox</i> , 151 Wn. App. 479, 491, 212 P.3d 597, 603 (2009); citing <i>W. Coast Stationary Engineers Welfare Fund v. City of Kennewick</i> , 39 Wn. App. 466, 477, 694 P.2d 1101, 1108 (1985)	46
<i>Townsend v. Quadrant Corp.</i> , 153 Wn. App. 870, 881,	

224 P.3d 818 (2009)	24, 25, 26, 37, 39, 40
<i>Verbeek Properties, LLC v. GreenCo Envtl., Inc.</i> , 159 Wn. App. 82, 87, 246 P.3d 205, 207 (2010)	1, 27, 36
<i>Zuver v. Airtouch Commc'ns, Inc.</i> , 153 Wash. 2d 293, 301, 103 P.3d 753, 759 (2004)	28

Rules	
RAP 10.3(c)	26
RAP 18.1	46
RAP 18.1(a) &(b)	45, 46
RCW 7.04A.070(1)	24

I. Introduction

The Appellant’s Opening Brief (Appellants’ Brief), asks this Appellate Court to reconsider the Trial Court’s evaluation of whether Respondent ECP College Way LLC (ECP) waived its right to arbitration—and the Trial Court’s ultimate decision that ECP did *not* waive this right.

Washington’s law is well established that the crux of any waiver analysis centers upon whether there was “voluntary and intentional relinquishment of a known right.” *Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205, 207 (2010) It is similarly well established that, in the specific context of arbitration, “the right to arbitrate is waived by “conduct inconsistent with *any other intention* but to forego a known right.” *Id.* (emphasis added)

In stark contrast to Washington’s firm and uncontroverted law, Appellants’ Brief falls far short of being an accurate statement of the Trial Court’s record. Appellants’ Brief misstates what the Appellants, Puccini-One LLC (Puccini) and SOB LLC (SOB), *told* ECP and the Trial Court. What actually happened, is what Appellants’ Trial Counsel admitted in open court; Appellant staked one factual position and then changed the factual position. *RP May 13, 2016, 25-26*¹

¹ ECP has supplemented the Report of Proceedings for May 13, 2016 to include the entire proceeding, both argument of trial counsel and the Trial Court’s Opinion. ECP’s cites to

Indeed, Appellants' Trial Counsel first "announced" an apparent change in position within Plaintiffs' Response to Defendant's Motion For Partial Summary Judgment. *CP 1177-1192* Appellants' Trial Counsel then confirmed there was a change in position at Partial Summary Judgment Oral Arguments—and the operative "lease" at issue was actually not what Appellants had previously stated. *RP May 13, 2016, 25-26* This announcement and confirmation occurred after fourteen (14) months of litigation. Once Appellants announced and confirmed the *changed* factual position and what the actual "lease" was at issue, the right to arbitrate became *known* to ECP. ECP promptly moved to compel arbitration. *CP 1439-1447*

In brief summary Appellants' two positions were as follows:

- From February 23, 2015 to April 29, 2016 The Appellants took the position that an April 6, 2013 email (April 2013 Email) constituted a new commercial lease in and of itself. This position is referred to herein as the "Abandoned Position"
- On May 13, 2016: The Appellants confirmed a switch of their position. Their new position was that, in fact the April 2013 Email was simply a series of modifications to be made to a prior commercial lease that was executed in 2007 (SOB Lease) which, *inter alia*, constituted an assignment from SOB to Puccini. This position is referred to herein as the "Changed Position."

the Report of Proceedings for May 13, 2016 are for the complete version that ECP filed on April 4, 2018.

The Trial Court judge, Hon. Mary Wilson, recognized this switch from the Abandoned Position to the New Position for what it was—not necessarily nefarious, possibly dilatory, but absolutely consequential. *RP July 29, 2016, 26-27* Since Appellants’ factual assertion unequivocally changed, once this *new* factual assertion was known, ECP was entitled to employ new defenses that *could not have been known* to ECP prior.

The Oral Ruling from the Trial Court sums up the core law and issue before this Appellate Court as aptly as anything else:

“And I’m basically searching for whether there has been conduct by the defense that’s been inconsistent with the prospect of going to arbitration and/or whether the clause has not been timely invoked.

Based on the facts here and as things have unfolded, and given the back and forth on summary judgment and discovery, I do think that this [the demand for arbitration] was timely invoked and that there hasn’t been inconsistent conduct. I have been presiding over this case for a year-and-a-half, I think, and we’ve had two substantive motions in front of the court. It’s been clear to me that the defendant has understood a particular theory and has been addressing that theory, and that the alternative theory of the 2007 lease being in effect and having been modified arose in the last few months. And given the timing of it and the way it came up in response on summary judgment from the plaintiff, I don’t think that the defense was inconsistent in their conduct or was delayed in anyway to invoke the arbitration clause.”

RP July 29, 2016, pg. 26-27

The Oral Opinion of the Trial Court clearly summarizes exactly what ECP claim is: There can be no “intentional” and “voluntary”

“relinquishment” of a right that is actually unknown. There can be no conduct evincing an *intention* to abandon a right because intent requires knowledge. Finally, any blame cast upon ECP for not “knowing” of a right to arbitrate should be quickly deflected back on Appellants considering:

- Appellants filed a ninety nine (99) page Amended Complaint complete with twenty three (23) exhibits without stating the Changed Position or including the operative SOB Lease as an exhibit. *CP 76-175*
- ECP then filed a Motion To Dismiss Pursuant To CR 12(b)(6) *CP 367-374*
- In response, Appellants filed a ninety nine (99) page Second Amended Complaint with twenty three (23) exhibits without stating the Changed Position or including the operative SOB Lease as an exhibit. *CP 375-476*² *See also, Appellants' Brief, pg. 2*
- Upon receiving ECP's Amended CR 12(b)(6) Motion³, Appellants wrote an eight (8) page opposition against ECP's Amended Motion To Dismiss Pursuant To CR 12(b)(6)⁴ and partook in oral argument on May 22, 2015 without announcing, or even alluding, to the Changed Position. *RP May 22, 2015, 3-21* Indeed, when challenged, the Appellants repudiated the Changed Position. *CP 691, 692, 693-694, 694*
- Appellants engaged in discovery giving no indication that the Changed Position had replaced the Abandoned Position. Indeed, when asked the Appellants repudiated the Changed Position. *CP 1623, 1642* Regardless, when specific Interrogatories which should have caused Appellants' Trial Counsel to set forth the Changed Position, the Interrogatories were an exemplar of obscurity. *CP 1642-1643*

² Indeed, as set forth below, the Second Amended Complaint more clearly referenced the Abandoned Position

³ *CP 680-689*

⁴ *CP 690-698*

- Appellants allowed ECP to file a Partial Motion For Summary Judgment based on the Abandoned Position, which was the only position that ECP was actually aware of. *CP 1083-1096*
- Appellants allowed the discovery cut off to pass without otherwise announcing the Changed Theory. *Appellants' Brief pg. 1*
- Only in opposition to ECP's Motion for Partial Summary Judgment, and realizing the weakness of the Abandoned Theory, did the Appellants appear to try to save themselves by announcing within their Plaintiffs' Response to Defendant's Motion For Partial Summary Judgment, that the Appellants may have chosen to abandon the Abandoned Position and change it with the Changed Position *See generally CP 1177-1192*
- Appellants then admitted in oral arguments, on May 13, 2016 that they had, indeed changed to the Changed Position. *RP May 13, 2016, 25-26*

Given this record, it is no wonder why the Trial Court found that ECP's conduct did not evince a desire to forego arbitration and, given the circumstances, ECP timely exercised the right to arbitration. *RP July 29, 2016, 26-27, CP 1697-1698*

Thus, respectfully, ECP asks this Appellate Court to affirm the Trial Court's ruling and not disturb the Trial Court's Order confirming the arbitration award and judgment summary. *CP 1802-1804*

II. Statement of the Issues

1. Did ECP intentionally and voluntarily relinquish a known right to arbitrate the dispute between ECP and the Appellants?
2. Did ECP undertake conduct inconsistent with any other intention but to forego a known right?
3. Should the Appellate Court and indulge every presumption in favor of arbitration and against waiver?
4. If the Trial Court's order rejecting Appellants' waiver contention was erroneous, did the Appellants' suffer any prejudice by being compelled to submit to arbitration?

III. Statement of the Case

To understand why ECP would have neither actual, nor constructive knowledge, of an applicable arbitration clause, it is helpful to review all the times in the case where the Appellants had ample opportunity to state the relatively simple Changed Position—but either failed to do so or took a position inconsistent with the Changed Position.

a. General Background

On or about December 12, 2007, SOB entered in to a lease with College Way, the then owner of the Property (SOB Lease) for a commercial restaurant premises (Premises) at the property commonly known as 5500 Corporate Center Loop SE, Lacey Washington (Property). *CP 935, 937-1017* The SOB Lease was entered into by College Way Commercial Plaza, LLC (College Way) as lessor, and SOB, as lessee, for the space described

therein (Leased Space). *CP 935, 938* Under the SOB Lease, SOB was obligated to pay monthly rent in the amount of \$3,555 plus common area charges, sign rental and contributions to the promotional fund. *CP 938, 940, 957-958* The SOB Lease also contained a provision, Article XXXIII, that provided right to arbitration.⁵ *CP 988-989*

SOB defaulted on its obligations under the SOB Lease by, among other things, failing to pay the monthly rent and other charges. *CP 935, 1021-1032* In November 2012, SOB and Mr. Donald Huber, on behalf of College Way, entered into negotiations regarding SOB's failure to pay the monthly rent due under the SOB Lease and a possible reduction in that monthly rent (November 2012 Proposal). *CP 376, 384-385, 386-388* Mr. Huber's November 2012 Proposal provided Mr. Huber would seek approval from College Way's lender for a one-year modification of the SOB Lease that would, among other things, reduce the rent to \$2,200 per month. *Id.* Mr. Huber's November 2012 Proposal was subject to various conditions precedent including, but not limited to, SOB's execution of a promissory note in the amount of the unpaid rent. *Id.* Regardless, according to the Second Amended Complaint, the November 2012 Proposal was only

⁵ ARTICLE XXXIII-ARBITRATION states in relevant part: "Any dispute between the parties hereto (except for any Event of Default or dispute regarding the payment of Rent, for which Landlord shall be entitled to its remedies under Article XX hereof) may be determined by arbitration." *CP 988*

preliminary. *CP 376* According to the Second Amended Complaint, “final approval” was given pursuant to an email attached as Exhibit 3 to the Second Amended Complaint. *CP 376, 390*

As of November 12, 2013, SOB had failed to pay College Way monthly rent and other charges totaling \$51,383.68. *CP 381, 445-452, 935, 1022-1029*

ECP is a limited liability company licensed to do business in Washington. *CP 376* On July 11, 2014, the Property was foreclosed pursuant to that Deed of Trust executed by College Way Commercial Plaza, LLC (College Way), as Grantor, and Cascade Bank as Beneficiary, dated August 21, 2007. *CP 1034, 1036-1078* The Deed of Trust was recorded on August 30, 2007. *CP 1036*⁶ ECP was the successful bidder at the foreclosure sale, and the Trustee under the Deed of Trust executed a Trustee’s Deed in favor of ECP dated July 17, 2014.⁷ *CP 1034, 1080-1082*

According to Appellants, on September 4, 2014, Puccini, Mr. Faraz Saleemi and Ms. Jennifer Oakley entered into a “Business Opportunity Purchase and Sale Agreement” (Sale Agreement) for the purchase and sale of the business commonly known as “Puccini’s Venetian Subs” which was

⁶ This was of record in Thurston County Washington as Doc. 3954617, as amended by Amendment to Deed of Trust recorded under Thurston County Recording Number 4098453 (Deed of Trust). *CP 1034, 1036-1078*

⁷ This Trustee’s Deed is of record in Thurston County, Washington as Doc No. 4401629 *CP 1034, 1080-1082*

located in the Premises. *CP 378, 403-433* Puccini alleged that the Sale Agreement expired on January 16, 2015, and Ms. Oakley did not close the purchase of Puccini's business because the new five-year lease between ECP and Puccini had never been drafted, let alone executed. *CP 380*

It is undisputed that neither SOB nor Puccini paid \$2,200 for the months of October 2013, May 2014, October 2014, December 2014 and January 2015.⁸ *CP 381, 474* Moreover, after April 6, 2013, the date of the most critical April 2013 Email, neither SOB nor Puccini paid any common area charges, sign rental or promotional fund contributions.⁹ *CP 381, 444-452, 935, 1021-1032*

b. Amended Complaint and ECP's CR 12(b)(6) Motion

Plaintiffs' Amended Complaint claimed that ECP breached the lease evidenced by Mr. Donald Huber's April 6, 2013 e-mail to College Way's counsel asking that she draft a new five-year lease between Puccini and College Way. *CP 77* The length and detail of the Amended Complaint is certainly impressive. It contained ninety nine (99) pages and *twenty three (23)* exhibits. *CP 76-175* The SOB Lease, upon which the Appellants base their Changed Theory, was not attached as exhibit along with the other

⁸ Puccini expressly admitted this and proposed to reduce its damages by \$11,000 to account for this failure.

⁹ Regardless of Puccini's proposal to reduce damages for failure to pay base rent, Puccini never proposed to reduce its damages for this failure to pay the sundry of other NNN charges that would have been due under the SOB Lease. *CP 935, 1021-1029*

twenty three (23) exhibits to the Amended Complaint. *Id.* In fact, the Amended Complaint appears to allege that Puccini and Mr. Saleemi entered into a lease with “then landlord Donald Huber.” *CP 77* This was later corrected. *CP 376*

Given the specificity and numerous exhibits, ECP moved for dismissal pursuant to CR 12(b)(6). *CP 375-476* Instead of responding to ECP’s Motion To Dismiss Pursuant To CR 12(b)(6) Plaintiffs amended and filed their Second Amended Complaint. *CP 477-489*

c. Appellants’ Second Amended Complaint & ECP’s Amended CR 12(6)(6) Motion

Appellants’ Second Amended Complaint was largely the same except for a notable switch of Plaintiffs from Faraz Saleemi to SOB LLC and a reworking of Paragraph IV of the Amended Complaint. *CP 376* It also totaled ninety nine (99) pages with *twenty three (23)* exhibits. *CP 375-476* ECP again moved for early dismissal with their Amended Motion To Dismiss Pursuant To CR 12(b)(6). *CP 680-689* ECP stated the following, *inter alia*:

- i. “On April 6, 2013, Mr. Huber e-mailed brockman@mpba.com and asked that the recipient of the e-mail draft a proposed new lease between Mr. Huber and Puccini. The April 6, 2013 e-mail set forth certain basic terms to be included in the draft lease including, but not limited to, a five-year term. The Complaint is devoid of any allegation that the new five-year lease referenced in Mr. Huber’s e-mail was ever executed or acknowledged. To the

contrary, the Complaint alleges that, despite Puccini's repeated requests, the new five-year lease was never even drafted." *CP 682-683*

- ii. "Despite Plaintiffs' repeated requests to ECP's agent, Mr. Petramalo, no draft of the new five-year lease between ECP and Puccini, which was referenced in Mr. Huber's April 6, 2013 e-mail, was ever provided to Puccini and/or Mr. Saleemi let alone executed or acknowledged." *CP 684*
- iii. "The Complaint is devoid of any allegation that the SOB Lease was ever assigned to Puccini." *CP 686*
- iv. "Rather than a claim for breach of the SOB Lease, Plaintiffs' actual claim is that neither ECP nor its predecessor entered into the *new* five-year lease with Puccini, which was described in Mr. Huber's April 6, 2013 email. According to the Second Amended Complaint, had ECP entered into a *new* five-year lease with Puccini, Puccini and Mr. Saleemi would have been able to close the transaction contemplated by the Sale Agreement. Plaintiffs repeatedly allege that Mr. Huber agreed to this *new*-five year lease with Puccini, that Mr. Huber instructed someone to prepare a draft of the *new* five-year lease and that, despite repeated requests, the *new* five-year lease with Puccini was never drafted let alone executed and/or acknowledged. Plaintiffs' allegations and the e-mail correspondence amount to nothing more than an agreement to agree." *CP 373* (emphasis added)

d. Appellants' Objection To ECP's Amended CR 12(b)(6) Motion

Appellants' nine (9) page Plaintiffs' Response to Defendants' Amended Motion To Dismiss announced the Abandoned Position as the Appellants' factual position. It also made statements in direct contravention to the later Changed Position. *CP 690-698* Examples of Appellants' Trial Counsel's exact verbiage follow:

- i. SOB and Puccini acted through their owner/agent Faraz Saleemi. In April, 2013, the negotiations resulted in an agreement by College to (1) forgive debt owed to it by SOB (2) **cancel the existing lease with SOB** and (3) lease the premises to Puccini. *CP 691* (emphasis added)
- ii. “ECP moves to dismiss the claim asserted by Puccini because Puccini was not a party to the 2007 SOB lease. Amended Motion, pg. 7 *This argument fails because is not suing for breach of the 2007 lease. Instead, Puccini alleges that it leased the premises from College in 2013, and that ECP, as the legal successor of College breached the 2013 agreement. Because Puccini alleges that ECP breached the 2013, not the 2007 lease,* it does not matter whether Puccini’s has standing to sue for breach of the 2007 SOB lease. Instead, the issue is whether Puccini’s allegations and exhibits would permit proof that Puccini leased the premises from College in 2013, and that ECP breached the 2013 lease.” *CP 692* (emphasis added)
- iii. “The evidence appended to the SAC does not foreclose the possibility that Puccini and College were parties to a lease. To the contrary, the appended evidence enhances that possibility. Significantly, in Exhibit 3, Mr. Huber the agent of College, relates the terms of the lease between Puccini and College as follows Please draft a new lease for the existing Puccini space....”¹⁰ *CP 693-694*
- iv. “That communication, which is dated April 6, 2013¹¹, expresses all of the essential terms of a lease agreement, including the parties, location, rental rate and duration. It follows that the evidence appended to the SAC supports, rather than refutes, that

¹⁰ So that this Appellate Court has a full copy of the email, the entire email, Exhibit 3 to the 2nd Amended Complaint, *CP 390* and referenced in response to the Amended CR 12(b)(6) Motion to Dismiss, *CP 694*, reads as follows “Please draft a new lease for the existing Puccini, space I’m going to forgive his current debt (do we need a separate document just stating that for the record) and start him out with a new life. Terms: 1, [sic] name on lease Puccini 1 LLC, 2. Size of space 1180 +30 of common building 3. Type of use, sandwich shop, also they will have the right to bake and sell whole sale BREAD. 4. No guarantee except from the manager of Puccini 1 LLC 5. 5 year lease 6. Options 3-5 year negotiated rent 7. Rental payments First 16 months at \$1646 plus C.A. Next full year \$2621 plus CA next full year through the term of lease rental to increase by 3%”

¹¹ The email referenced is the email in FN 10

Puccini and College were parties to a lease. Although Mr. Huber instructed someone to draft a formal lease, nothing in his message or instructions suggest, let alone compels the conclusion, that the new lease agreement was contingent on execution of a formal writing....A contract can be formed through informal writings even if the negotiating parties contemplate that a subsequent formal contract will be executed.”
CP 694

- v. “SOB alleges that College, through Mr. Huber, agreed to cancel the 2007 lease with SOB....ECP asserts that SOB’s failure to pay rent under the 2007 lease was a material breach that excused ECP’s obligations under that agreement as a matter of law. The premise of this argument is that the 2007 lease between SOB and College was never cancelled, and that SOB is suing for a breach of that lease. ***That is not the claim. SOB’s claim is that College cancelled the 2007 lease*** in April 2013, and that ECP breached the cancellation agreement by demanding payments from SOB.”
CP 696 (emphasis added)

Even though Thurston County Local Rule 10 provided Appellants twenty five (25) pages to explain their theory of the case, Appellants *never stated* that the 2013 Lease was actually just a modification of the 2007 Lease per the April 2013 Email itself. *CP 690-698* Appellants made it clear they were suing on a lease that was the April 2013 Email itself. Conversely, Appellants made it clear that they were not suing on the SOB Lease.

e. ECP’s Reply on ECP’s Amended CR12(b)(6) Motion

Given the positions taken in the Appellants Response to ECP’s Amended Motion To Dismiss Pursuant To CR 12(b)(6), ECP reiterated its argument that “The April 6, 2013 email from Mr. Huber requesting that an unidentified person draft a lease and inquiring about the agreements needed

to release SOB does not constitute an enforceable agreement or lease. The April 6, 2013 e-mail is, at most, an unenforceable agreement to agree.” *CP* 699

f. Oral Argument

At oral argument, the Appellants conceded that they went in to very specific facts in their Second Amended Complaint—far more than notice pleading required. *RP May 22, 2015, pg. 10-11* The Court likewise recognized this was such a specific pleading.¹² *RP May 22, 2015, pg. 11* The Trial Court also engaged in the following colloquy with the Appellants’ Trial Counsel:

THE COURT: So help me more with that because I'm not sure that you should have alleged more. I hear them saying given what you've alleged that the contract is reflected in that April 13 email, that I need to think of conceivable facts consistent with that email.

MR. BARAN: Consistent with that email. The email says here, here is the lease. It's not -- it's not saying we're going to have a lease and we're waiting for the writing for this to be a lease. It is definitive. It is in the present tense. It is here's the lease, here's the terms, and we're going to want to memorialize it, but as of right now that's forgiven. We have debts forgiven. We have a lease.

THE COURT: I'd agree with you if it says here's a new lease and the terms are following, but it says to whomever it's directed, please draft a new lease.

¹² The Trial Court stated “And so what I hear defendant saying is given that you didn't do a general pleading but you did a specific, that given your specific allegations, there's no way to prove a case here and it largely gets down to did we have a 2013 contract lease or not.” *RP May 22, 2015, pg. 11*

MR. BARAN: But the terms were agreed to. All that is, that's all that's required to create a contract, that is the parties reach a meeting of the minds on the terms and the terms were agreed to and they contemplated that there's going to be a memorialization, but there wasn't any.

RP May 22, 2015, pg. 11-12

At no time did Appellants correct ECP's impression of what the case was about—or likewise correct the Trial Court's impression.¹³ *RP May 22, 2015, pg. 10-17* The Trial Court understood the Appellants' allegations exactly as ECP did because that is what the Appellants told them both. Similarly, like ECP, the Trial Court recognized that despite Second Amended Complaint's ostensible girth, its legal thinness, was what ultimately made the biggest impression:

THE COURT: And here we have the parties agreeing that the focus here is whether there was a contract or lease in April of '13, or thereabouts. So what's the nature of the April 2013 email? Does it amount to an agreement to disagree or does it amount to a reflection of an agreement with all the basic terms?

And I'll tell if you this was summary judgment, I could forecast that I would probably be ruling for the defense because, looking at this, it's hard for me to find a contract. But this is a 12(b)(6) and nobody has asked me to go beyond a 12(b)(6), so I'm going to deny the motion *but invite a subsequent summary judgment*, because I do think looking at the facts it's hard for me to conclude that there are disputed facts that are going to establish that there was a contract applying the *Plumbing* standard.

¹³ At various times during Oral Argument, ECP's counsel made statements such as “[The April 6, 2013 email] is the basis for their complaint. That is what they allege. We allege that it is not a contract, it is simply an agreement to agree.” *RP May 22, 2015, pg. 5*

RP May 22, 2015, pg. 20 (emphasis added)

g. Discovery

In response to ECP's discovery requests, Appellants again made it clear that the allegation was that ECP breached a "new" lease based on the April 2013 Email. Appellants also made it clear the SOB Lease was not in play. Indeed, what Appellants represented was that that the SOB Lease had been *terminated* and that there was no lease between SOB and ECP. For instance, the following interrogatories to SOB were asked and answered as follows:

INTERROGATORY NO. 7: Identify any and all businesses owned or operated by SOB during the period January 1, 2007, to present, including, but not limited to, the nature of the business, the location of the business and the assets used in the operation of the business.

ANSWER: *Until the SOB lease termination alleged in the second amended complaint,* the only businesses operated by SOC was the restaurant that is the subject of this action. SOB did not operate any business after the alleged lease termination.

CP 1623(emphasis added)

In addition, Appellants propounded the following interrogatories to

Puccini. Puccini again affirmed the Abandoned Position:

INTERROGATORY NO. 22: Identify any contract, agreement, or lease that you claim ECP breached and damages you claim to have suffered as a result of such breach.

ANSWER: Puccini objects because interrogatory practice devoted to identifying documents that may be discoverable pursuant to CR 34 is unduly burdensome and contrary to CR. CR 33(c) confirms that interrogatory practice is not a substitute for a request for production under CR 34. Without waiving any objection, **Puccini is suing for breach of the lease agreement alleged in, and reflected in the communications attached to, the second amended complaint.** Puccini is seeking \$244,000 of damages which it sustained because the breach of lease by defendant prevented Puccini from selling its business as alleged in the second amended complaint.

CP 1642

INTERROGATORY NO. 23: For any contract, agreement or lease identified in response to the preceding interrogatory, identify the date of such contract, agreement or lease, the parties to such contract, agreement or lease, the terms of such contract, agreement or lease and the nature of alleged breach.

ANSWER: Pursuant to CR 33(c), Puccini refers defendant to the documents attached to the Second Amended Complaint, and to the documents referenced in those communications.

CP 1642-3

Again, the SOB Lease was not attached to the Second Amended Complaint. Furthermore, Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 10, Exhibit 11, all refer to a new lease. *CP 390, 392, 394, 435, 437*

The Appellants' Brief points to two Interrogatories No. 14 and Interrogatory No. 15 signed on September 10, 2015. *Appellants Brief, pg. 5, CP 1639, 1645-1646* However, Appellants Brief neglected to include

Appellants' *response* to these two Interrogatories. Thus, ECP has provided the complete Interrogatory and Answer below:

INTERROGATORY NO. 14: Identify any and all facts you contend support your allegation that, on or about November 6, 2012, Puccini and College Way negotiated a lower rent and to substitute Puccini as the new lessee under the SOB Lease.

ANSWER: Same as for Interrogatory No. 12. *Puccini also objects because this Interrogatory misstates the allegations.* (emphasis added)

INTERROGATORY NO. 15: Identify any and all facts that you contend support your allegation that, on or about April 6, 2013, College Way gave final approval to with [sic] respect to "reducing the final charges, writing off all previously owed rent and debt of Puccini and substituting Puccini as the lessee" under the SOB Lease.

ANSWER: Same as for Interrogatory No. 14

CP 1639

h. Partial Summary Judgment Moving Papers & Appellants' Opposition To Partial Summary Judgment

ECP moved for partial summary judgment on January 29, 2016 which was eleven (11) months after the commencement of litigation. *CP 1083* ECP moved for partial summary judgment based only the Abandoned Position. The points on which ECP initially moved for in Partial Summary Judgment are indicative of what Appellants informed ECP's and the Trial Court as to what Appellants' factual position case was to that lease. ECP stated, *inter alia*,

- “Puccini was not a party to the SOB Lease, and neither SOB nor Puccini allege that ECP breached the SOB Lease” *CP 1086*
- “In Puccini’s Discovery Response, Puccini asserts that it was party to a lease other than the SOB Lease, that ECP breached this other lease and that Puccini suffered \$244,000 in damages. In its discovery requests, ECP asked Puccini to identify the lease or contract that ECP allegedly breached.

INTERROGATORY NO. 22: Identify any contract, agreement or lease that you claim ECP breached and the damages you claim to have suffered as a result of such a breach.

Puccini responded, in relevant part, as follows:

ANSWER:.... Without waiving any objection, Puccini is suing for breach of the lease agreement alleged in, and reflected in, the communications attached to the second amended complaint. Puccini is seeking \$244,00 of damages which it sustained because the breach of lease by defendant prevented Puccini from selling its business as alleged in the second amended complaint.”

CP 1086-1087

- “ECP also asked Puccini to provide certain basic information regarding the lease or contract that ECP allegedly breached.

INTERROGATORY No. 23: For any contract, agreement, or lease identified in response to the preceding interrogatory, identify the date of such contract, agreement or lease, the parties to the contract, agreement or lease, the terms of such contract, agreement or lease and the nature of the alleged breach.

Puccini responded, in relevant part, as follows

ANSWER: Pursuant to CR 33(c), Puccini refers defendant to the documents attached to the Second Amended Complaint, and to the documents referenced in those communications.”

*CP 1087*¹⁴

- “Plaintiffs’ actual claim is that neither ECP, nor its predecessor entered into the new five-year lease with Puccini, which was referenced in Mr. Huber’s April 6, 2013 email. Plaintiffs’ allegations and the email correspondence amount to nothing more than an agreement to agree.”

CP 1090

In response to ECP’s Partial Summary Judgment, Appellants appeared to change from the Abandoned Position to the Changed Position. *See e.g. CP 1179-1181, 1149, 1151-52, 1174* Appellants claimed for the *first time*, a completely new theory of what the alleged “lease” at issue was. Appellants appeared to abandon the position that the April 2013 Email was the lease at issue. The Appellant appeared to change their position to being that the SOB Lease was the lease at issue. The Appellants appeared to allege as follows (i) that the SOB Lease was orally modified to substitute and assign SOB for Puccini as the tenant under the SOB Lease (ii) that the SOB Lease was orally modified to reduce rent and extend its term and (iii) *both* ECP and Puccini were bound by the SOB lease. *Id.*

¹⁴ The allegedly modified SOB Lease was not attached to the Second Amended Complaint

i. ECP's Reply In Support of Partial Summary Judgment

In ECP's Reply In Support of Motion For Partial Summary Judgment, ECP made it clear that ECP and the Trial Court just learned that SOB Lease, and all its terms was *apparently* lease that was breached. ECP stated its surprise as follows:

“In their Second Amended Complaint, Plaintiffs’ Puccini-One LLC and SOB LLC (Plaintiffs) claimed that ECP breached the lease evidence by Mr. Huber’s April 6, 2013 e-mail to College Way’s counsel asking that she draft a new five-year lease between College Way and Puccini. *Plaintiff’s appear to have abandoned their argument that the New Lease is enforceable. Instead, Plaintiffs now claim that, in August 2013, discussions between Mr. Huber and Mr. Saleemi resulted in an agreement to modify the SOB Lease to reduce the rent and extend its term.*”

CP 1430 (emphasis added)

This is the first time that Appellants stated that the SOB Lease, with a few modifications to party, price and duration *and otherwise all its other provisions intact*, was the operative instrument they were suing upon.

j. Oral Arguments At Partial Summary Judgment

At Partial Summary Judgment Oral Arguments, the Appellants’ Trial Counsel *conceded* that they had changed their theory:

THE COURT: And I take it, from your explanation, that you don't view that you've been changing your theory, as the defense argues.

MR. BARAN: They have -- it has changed. When this complaint was filed, it was looking at one set of e-mails without the context. We have now deposed Mr. Petramalo, we have now

deposed Mr. Huber, we've now deposed Mr. Cann. And I have a much clearer picture of how this relationship between all of these various parties operate.

RP May 13, 2016, pg. 25-26

To that point, ECP's counsel expressly stated that the original position left it so that ECP did not know what the terms of the alleged lease were.¹⁵ *RP May 13, 2016, pg. 5-6*, The Court ultimately ruled that whether the SOB Lease was modified, or not, was an issue of fact precluding summary judgment. *RP May 13, 2016, pg. 33* In addition, the Court also refused to rule on any point raised on reply by ECP, but stated that "[the Court] would be open to subsequent briefing on that topic so the parties can fully flesh it out." *RP May 13, 2016, pg. 35*

k. Motion To Compel Arbitration

Soon after learning, and receiving conformation, of the Appellants' Changed Position which would include a right to arbitrate, ECP moved to

¹⁵ This Court may review ECP's counsel's argument to better appreciate what the Appellants informed ECP and the Trial Court. For example, "MR. JONES: Okay. Your Honor, as you will recall, originally the argument was made, the second amendment was made, and also in the plaintiff's discovery responses that the lease at issue here was the so-called new lease, the April 6, 2013, e-mail. That was the subject of our original motion to dismiss on the grounds of, that was an agreement to agree, and it also violated the statute of frauds. Since the discovery responses and since the filing of the amended complaint, that argument has changed. That argument now is that in August of 2013, that there was e-mail communications between Mr. Huber and Mr. Saleemi that said we're not going to do a new lease. Instead, we're going to consider this to be a modification to the then-existing SOB lease. So that occurred in August of 2013." *RP May 13, 2016, 5-6* See also "MR. JONES: Originally, Your Honor, the position was that it was this new lease, and we didn't know what its terms were. It was the so-called new lease April 6, 2013. That was the lease we had an e-mail that outlines some terms. We had nothing else. We don't know what the other terms of that lease were." *RP May 13, 2016, 26*

compel arbitration. *CP 1439-1447* Two (2) declarations were submitted by the attorneys of record which stated that this New Theory was never taken before in any depositions or communications. *CP 1448-1449*

Appellants' Trial Counsel did not take the opportunity to respond to the allegation that the Changed Position was indeed that—a "changed" position that repudiated the Abandoned Position. *CP1647-1690*

Appellants' Trial Counsel's argument, was much like what they conceded at Oral Arguments for Partial Summary Judgment. *RP May 13, 2016, pg. 25-26* Appellants explained that the New Position had arisen after (i) depositions that had taken place the week of March 1, 2016 and (ii) after Puccini had, itself, produced emails in its own possession PUC 00023 and PUC 00027 on March 24, 2016. In addition, Appellants' Trial Counsel claimed that ECP had at least constructive notice that there *could* be an arbitration by the date of the production of the emails. *CP 1650-1654*

The Trial Court did not find this persuasive. The Trial Court sent the matter to arbitration, where, ultimately, the arbitrator ruled substantively against Appellants. *CP 1700, 1789-1793* This Appeal followed. *CP 1805-1808*

IV. Argument

a. The Law Governing The Invoking of Arbitration

The law regarding invoking arbitration is well established. *RCW*

7.04A.070(1) provides as follows:

On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

RCW 7.04A.070(1)

“[T]he burden of [avoiding arbitration] is on the party seeking to avoid arbitration.” *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 878, 224 P.3d 818 (2009) This is because “Washington public policy favors arbitration.” *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 51, 49 P.3d 1265 (2002). Public policy favors arbitration because arbitration “eases court congestion, provides expeditious method of resolving disputes and is generally less expensive than litigation.” *Munsey v. Walla Walla College*, 80 Wn. App. 92, 95, 906 P.2d 988 (1995)

“Courts resolve the threshold legal question of arbitrability of a dispute by examining an arbitration agreement without inquiry into the

merits of the dispute; if the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end.” *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 403, 200 P.3d 254 (2009)

Once a court determines that an arbitration clause covers a dispute, the proper interpreter is the arbitrator, not superior court. *Munsey* at 96, *See also Townsend* at 881 (“[I]f the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration.”) Thus, “[a]lthough it is a court's duty to determine whether parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which on its face is governed by the contract.” *Heights at Issaquah Ridge* at 405.

Having not raised any objection or argument to Article XXXIII-Arbitration's applicability to Appellants and ECP in the Appellants' Brief, the Appellants have foregone any objection that ECP actually possessed a right to arbitrate this dispute. They may not now revisit this issue. “[A]n issue raised and argued for the first time in a reply brief is too late to warrant consideration” *Deutsche Bank Nat. Tr. Co. v. Slotke*, 192 Wn. App. 166,

176, 367 P.3d 600, 606, *review denied sub nom. Deutsche Bank Nat'l Tr. Co. v. Slotke*, 185 Wash. 2d 1037, 377 P.3d 746 (2016)¹⁶

Appellants' *only* argument is that ECP waived the arbitration right it possessed—not that the right did not exist at all. Again, *but for* the issue of ECP's alleged waiver, Appellants have not challenged the Trial Court's determination that there was an applicable arbitration clause. Thus, "all issues covered by the substantive scope of the arbitration clause must go to arbitration." *Townsend* at 881. Having raised no objection for this Appeal, this issue is similarly resolved. *Deutsche Bank* at 177.¹⁷

Finally, Appellants must concede that unequivocal case law and public policy favors the arbitration of disputes. Plentiful authority reiterates the public policy to "encourage" and "favor" arbitration *over* open court.¹⁸ Indeed, the Trial Court rightfully considered and invoked this stating "the

¹⁶ See also *In re of Rapid Settlements, Ltd's*, 189 Wn. App. 584, 598-99, 359 P.3d 823 (2015), *as amended on denial of reh'g* (Oct. 29, 2015). (Rule stating that appellate court will not consider contention presented for the first time in a reply brief applies even to challenges regarding personal jurisdiction. RAP 10.3(c)) *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 771, 320 P.3d 77, 95 (2013) ("Further, we do not consider issues argued for the first time in the reply brief.")

¹⁷ *Id.*

¹⁸ See *Davidson v. Hensen*, 135 Wash. 2d 112, 118, 954 P.2d 1327, 1330 (1998) ("Washington law generally favors the use of alternative dispute resolution such as arbitration where the parties agree by contract to submit their disputes to an arbitrator.") *Boyd v. Davis*, 127 Wash.2d 256, 262, 897 P.2d 1239 (1995) (noting "encouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society").

case law is clear . . . arbitration is highly favored” when determining that this matter should be sent to arbitration. *RP July 29, 2016, pg. 26-27*

b. The Law Disfavoring Waivers of Arbitration

“The determination of whether a party waived arbitration by conduct depends on the facts of the particular case and is not susceptible to bright line rules.” *Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 298, 322 P.3d 1229, 1234 (2013)

Notwithstanding the foregoing, the *legal standard* regarding whether one has waived arbitration *is* clear and well elucidated. In general, waiver is a “voluntary and intentional relinquishment of a known right.” *Verbeek Prop.* at 87 The right to arbitrate is only waived by “conduct inconsistent with *any other intention* but to forego a known right.” *Id.* This exact language “inconsistent with *any other intention*” appears in at least three other additional cases. *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wash. 2d 582, 588, 201 P.3d 309, 312 (2009); *B & D Leasing Co. v. Ager*, 50 Wn. App. 299, 303, 748 P.2d 652, 654 (1988); *Lake Washington Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791, 794 (1980)

Courts are mandated to “indulge” every presumption in favor of arbitration. *Verbeek Props.*, at 87 (“[Courts] must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay,

or a like defense to arbitrability.”) This precise mandate to “indulge every presumption” in favor of arbitration is also found in at least six (6) different cases. *Naumes, Inc. v. City of Chelan*, 184 Wn. App. 927, 932, 339 P.3d 504, 507 (2014); *Heights at Issaquah Ridge* at 407; *Saili v. Parkland Auto Ctr., Inc.*, 181 Wn. App. 221, 225, 329 P.3d 915, 917 (2014); *Rimov v. Schultz*, 162 Wn. App. 274, 285, 253 P.3d 462, 468 (2011); *Adler v. Fred Lind Manor*, 153 Wash. 2d 331, 342, 103 P.3d 773, 779–80 (2004); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash. 2d 293, 301, 103 P.3d 753, 759 (2004).¹⁹

To be clear, all seven (7) of these cases state that the Courts must “indulge every presumption” in favor of arbitration when analyzing *the issue of waiver*. Additionally, the case law is clear that “waiver of a contractual right to arbitration is disfavored,” and a party seeking to prove waiver has “a heavy burden of proof.” *River House Dev. Inc. v. Integrus*

¹⁹ To that point, Washington is not an outlier. The consensus about resolving any “doubts” in favor of arbitration appears nationwide—including the United States Supreme Court. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d at 694 (9th Cir.1986).” *Schuster v. Prestige Senior Mgmt., L.L.C.*, 193 Wn. App. 616 (2016) (“In part because of a strong policy favoring arbitration, waiver is not a favored defense to compelling arbitration. Courts wish to encourage parties to resolve their legal disputes by arbitration. *Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Cent. Ltd.*, 154 F.3d 404, 409 (7th Cir.1998). Therefore, a party seeking to prove waiver has a heavy burden of proof. *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir.1986).”

Architecture, P.S., 167 Wn. App. 221, 237, 272 P.3d 289, 297 (2012) *citing*
Steele v. Lundgren, 85 Wn. App. 845, 852, 935 P.2d 671 (1997)

Therefore, despite the factual inquiry *uniquely particular* to each case, each case is *uniformly governed* by one (1) clear legal standard and two (2) clear presumptions. Trial Court considered and articulated this when delivering the Trial Court's Opinion:

“And then the question is, has the defense, through conduct, waived that opportunity. As you both know, the case law is clear that waiver is disfavored and arbitration is highly favored. And the question of waiver is fact dependent. And I'm basically searching for whether there has been conduct by the defense that's been inconsistent with the prospect of going to arbitration and/or whether the clause has been not timely invoked.

RP July 29, 2016, pg. 26

c. The Factual Record & Appellants' Heavy Burden

The Appellants' Statement of the Case was a series of fragmentary anecdotes. The Appellate Court now has fuller representation of the Trial Court record. By reading ECP's cited Verbatim Reports of Proceedings, *supra*, the Appellate Court has better insight as to the tenor and totality of what occurred. More importantly, what was conceded by Appellants' Trial Court Counsel on May 13, 2016

The simple truth: The Appellants changed their theory. They started out suing on the April 2013 Email as the operative lease. They changed to

the SOB Lease being the operative lease. Upon this “change” in leases, ECP became aware of an arbitration right and invoked the same.

Given that ECP’s knowledge arose so late in the litigation, cases like *Saili* are of limited analytical value because they presuppose that the party favoring arbitration knew about a right to arbitrate. *Saili v. Parkland Auto Ctr., Inc.*, 181 Wn. App. 221, 329 P.3d 915 (2014) *Saili* and similar cases cannot be used to analyze “intent” to waive arbitration because the analyzing of any conduct or intent of a party is against the backdrop of a *known* right. However, ECP’s conduct and intent cannot be viewed through *Saili’s* lens because there was no known right—at least until fourteen (14) months in to the litigation.

To that point, the Appellants have two arguments in regard to waiver. They are temporally divided by (i) conduct before April 29, 2016 and (ii) conduct after April 29, 2016. April 29, 2016 is the date that Appellants filed their Response to Partial Summary Judgment

(i) Waiver due to conduct prior to April 29, 2016

With the Respondent’s Brief, and fuller Trial Record, Appellants isolated anecdotes are clearly exactly that—isolated anecdotes.

First, this Appellate Court should disregard anything ECP should have “devined” from the Amended Complaint. The Amended Complaint was modified with the filing of the Second Amended Complaint. The

Appellant's Brief concedes that "[the Second Amended Complaint] became the *operative pleading* from which all discovery and motion practice followed." *Appellants' Brief*, pg. 2 In fact, the *only* thing that this Appellate Court should take from the Amended Complaint is that it was amended and still failed to state the Changed Theory.

Second, this Appellate Court can read Second Amended Complaint itself and sift through its twenty three (23) exhibits and understand why ECP would have no idea what the Changed Theory was. Indeed, the very simple Changed Theory is just not set forth. Would it have been so difficult to clearly convey: "the April 2013 email was a series of modifications to be made to a prior commercial lease that was executed in 2007 (SOB Lease)?" Instead, the Appellants charge ECP with a duty to somehow derive this by wading through the Second Amended Complaints' imprecise language, conflicting statements about a "new lease"²⁰ and sort through disjointed emails and text messages attached as exhibits. Most tellingly, the Appellants' Trial Counsel did not simply include the SOB Lease, which was allegedly modified, but for a few terms, along with the approximately eighteen (18) exhibits of disorganized emails and text messages.

²⁰ See in particular Exhibit 4, Exhibit 5, Exhibit 10, Exhibit 11, all refer to a new lease. CP 392, 394, 435, 437

Appellants' Counsel also fails to address that the Second Amended

Complaint states as follows:

“On April 6, 2013, College gave final approval with regards to reducing the final charges, writing off all previously owed rent and debt of Plaintiffs of SOB and substituting Puccini as the lessee.” See Exhibit 3.”

CP 376

And, Exhibit 3, to be clear states that there will be a “*new*” lease and not a modification or amendment.²¹ *CP 390* Moreover, Exhibit 4, Exhibit 5, Exhibit 10, Exhibit 11, all refer to a *new* lease. *CP 392, 394, 435, 437* The bevy of communications attached, for all intents and purposes, state that a new lease would be forthcoming.

After reviewing the Second Amended Complaint, Appellants' Brief casually describes the unfolding of the CR 12(b)(6) proceeding. *Appellants' Brief, pg. 4.* Appellants' Brief fails to address that *even if* the Second Amended Complaint's imprecise and contradictory language and jumble of exhibits alluded to the “Changed Position,” the specific positions taken by Appellants' Opposition to ECP's Amended Motion To Dismiss

²¹ The email reads as follows “Please draft a new lease for the existing Puccini space I'm going to forgive his current debt (do we need a separate document just stating that for the record) and start him out with a new life. Terms: 1, [sic] name on lease Puccini 1 LLC, 2. Size of space 1180 +30 of common building 3. Type of use, sandwich shop, also they will have the right to bake and sell whole sale BREAD. 4. No guarantee except from the manager of Puccini 1 LLC 5. 5 year lease 6. Options 3-5 year negotiated rent 7. Rental payments First 16 months at \$1646 plus C.A. Next full year \$2621 plus CA next full year through the term of lease rental to increase by 3%” *CP 694*

Pursuant to CR 12(b)(6) completely contradicted the Changed Position's "modification" theory. Instead, Appellants' CR 12(b)(6) Opposition professed that the April 2013 Email allegedly constituted a "new" lease in and of itself. Specifically, this Appellate Court should review the Appellants' 12(b)(6) Opposition language set forth above. *See Statement of the Case II(d)(i)-(vi), supra.*

The Appellants' Brief reviews the discovery propounded and exchanged. However, Appellant makes two serious omissions which mislead this Court. First, the Appellants point to language used in Interrogatory No. 14 and Interrogatory No. 15 to state "ECP would not have propounded these interrogatories if it did not understand that to be a basis of Puccini's claim." *Appellant's Brief, pg. 12* However, to the extent that these two Interrogatories indicate any "understanding," Puccini corrected ECP by asserting these Interrogatories "misstate[d] the allegations." *CP 1639* With this correction, any possible inkling of understanding was duly extinguished.

Appellants also extinguished whatever "understanding" by answering *other* Interrogatories in a manner inconsistent with the Changed Position. For instance, Interrogatory 7, states that the SOB Lease was "terminated." *CP 1623* Interrogatory 22 & Interrogatory 23 state that the "lease agreement" is what is reflected in the "communications attached to

the second amended complaint.” *CP 1642-3* These communications reference a “new” lease and the SOB Lease was never attached.

The Appellants take no responsibility for their Trial Counsel making a series of contrary statements coupled with other obscurations when responding to discovery. ECP asked Appellants to identify the operative contract and the terms of the contract. *CP 1642-1643* Each time, Appellant’s Trial Counsel refused to state that the SOB Lease as modified by the April 2013 email, with the terms otherwise intact, was the lease at issue. *Id.* This Appellate Court should not award Trial Counsel’s conflicting statements and frustrating opaqueness by imputing any “knowledge” onto ECP. If anybody should bear the blame for ECP being in the dark, it should be Appellants who, when given the opportunity to announce a Changed Position,— continually obscured that there was a Changed Position. The very purpose of discovery and good faith participation is to “eliminate the hide and seek” strategies often employed in litigation and “narrow the issues.” *McGugart v. Brumback*, 77 Wash. 2d 441, 444, 463 P.2d 140, 142 (1969) Appellants should not profit from the misleading impression they delivered.

The Appellants’ final argument is that (i) after depositions occurring the week of March 1, 2016 and (ii) two (2) emails produced on March 24,

2016, ECP should have then “obviously” known Appellants’ had now adopted the Changed Theory. This argument is nonsensical.

First, ECP had already filed its Partial Summary Judgment on January 29, 2016 a month before these depositions and email exchanges occurring on week of March 1, 2016 and March 24, 2016 respectively. *CP 1659-1660*

Second, *none* of these deponents were the Appellant or its principals. The deponents were either the current landlord or persons with disputed agency authority. *CP 934-935, 1033-1034, 1430* How are these individuals supposed to be charged with the duty of notifying ECP’s attorneys that the Appellants had adopted the Changed Theory? More importantly, how was ECP supposed to comprehend these deponents were messengers cloaked with the authority to announce the Changed Theory?

Third, why would this Appellate Court task ECP to comprehend that Appellants’ Trial Counsel intended that these new emails were the harbinger of the Changed Position? These new emails were not included with the approximately eighteen (18) other emails and text messages that were attached to the Second Amended Complaint. If they were so important to the theory, then Appellants should have moved to file a Third Amended Complaint, and attached these new emails as well.

In short, there is nothing in the Trial Court record that, prior to the Reply on Partial Summary Judgment, that ECP would have any notice of the Changed Position. The blame for this falls at Appellants' feet. Appellant's Trial Counsel failed to state the Changed Position. Instead they offered conflicting statements and obscured when ECP legitimately asked questions that would have elicited the Changed Position. More importantly, Appellants Trial Counsel repeatedly took positions advocating the Abandoned Position which expressly contradicted the later Changed Position.

(ii) Waiver due to conduct after April 29, 2016

Addressing the next time period, ECP did not waive the right to arbitration by filing a Reply and appearing for Oral Argument which was the only conduct occurring after the filing of Appellants' Response to Partial Summary Judgment.

First, the standard for waiver of arbitration has been well set for decades. The question is whether ECP engaged in "conduct inconsistent with *any other intention* but to forego a known right"? *Shepler Const., Inc. v. Leonard*, 175 Wn. App. 239, 248–49, 306 P.3d 988, 993 (2013).²² However, and in addition, the Washington State Supreme Court's

²² This exact language "inconsistent with *any other intention*" appears in at least four additional cases. *Verbeek Prop.* at 87; *Otis Hous. Ass'n*, at 588; *B & D Leasing Co.* at 303 *Lake Washington Sch. Dist. No. 414* at 62

Townsend case set an even higher standard regarding waiver in 2012 when they stated “a waiver of arbitration *cannot* be found if there is *conduct suggesting a lack of intention* to forgo the right to arbitrate.” *Townsend* at 462.

In considering these questions, this Appellate Court should recognize that for fourteen (14) months, Appellants had one factual theory in the case. In fact, Appellants were expressly asked “What are the terms of the lease that you claim to be under?” *CP 1642-1643* Appellants refused to answer this question.

Instead, Appellants announced the switch from Abandoned Position to Changed Position, and a new lease at play, using the rather unique vehicle of a Response to a Partial Summary Judgment. However, Appellants’ nonchalant informality was not sufficient to modify the Second Amended Complaint without following CR 15 and/or satisfy its duties to update their (now) incorrect Interrogatories without following CR 26(e). If Plaintiffs changed their Position, they had a duty to undertake the appropriate formal actions to clean up the misleading impressions they had given ECP and the Trial Court. Moreover, Appellants did not even make it explicitly clear that they completely jettisoned the Abandoned Position in favor of the Changed Position.

In reading through ECP's *actual* Reply on Partial Summary Judgment, ECP is uncertain what theory Appellants are advancing. ECP states "Plaintiffs' *appear* to have abandoned their argument that the New Lease is enforceable." CP 1430 ECP then, throughout the entire brief, almost uniformly, addresses any argument to both the Abandoned Position and the Changed Position. Any of ECP's argument regarding the operative lease contains a reference to "New Lease" (the operative document under the "Abandoned Theory") or the "SOB Lease" (the operative document under the "Changed Theory").²³

To that end, given that ECP filed their Partial Summary Judgment solely based on the Abandoned Position, it is unclear why simply following through with the original motion argument was "*inconsistent with any other*

²³ See eg. pg. 3, "College Way could not enter into the New Lease or modify the SOB lease without ECP's written consent." CP 1431 "College Way never obtained ECP's consent to the New Lease or the alleged modification of the SOB Lease." Id. "Neither Puccini nor SOB even attempted to comply with the procedures required for obtaining ECP's consent to the proposed assignment, and ECP had no obligation under the New Lease or the SOB Lease to consent to the proposed assignment. Since ECP had no obligation under the New Lease or the SOB Lease to consent to the proposed assignment, ECP cannot possibly be liable for Puccini's inability to deliver a lease to Ms. Oakley or the fact Puccini's proposed sale to Ms. Oakley fell through." CP 1431-1432 "Assuming *arguendo* that there was a New Lease or the SOB Lease was modified, they did not survive the foreclosure. R.C.W. 61.24.060(1). It is undisputed that the New Lease and the SOB Lease were subordinate to ECP's Mortgage. ECP's Mortgage was of record long before New Lease and the SOB Lease. Moreover, ECP is not party to the New Lease or the SOB Lease and is not bound by any of their provisions." CP 1432 "Assuming *arguendo* that there was a New Lease or the SOB Lease was modified, Plaintiffs materially breached their obligations thereunder in June 2014, and, therefore, College Way and ECP were excused from performance thereunder." CP 1433

intention but to forgo arbitration” when the Reply argument regarding the Abandoned Position and Changed Position were the same. The fact that ECP *continued to* address the Abandoned Position in its Reply means that this Appellate Court can find “conduct suggesting a lack of intention to forgo the right to arbitrate” which *Townsend* states would preclude waiver.

As *Townsend* notes, there is no case that states that a party that moves for summary judgment *necessarily* waives its right to compel arbitration at a later date. *Townsend* at 462 In *Townsend*, the defendants WRECO and Weyerhaeuser moved to compel arbitration promptly after a trial court denied their motion for summary judgment based on their assertions that they had no connection to the lawsuit. *Id.* at 463 The Washington Supreme Court stated:

“Here, WRECO and Weyerhaeuser moved to compel arbitration promptly after the superior court denied their motion for summary judgment based on their assertions that they had no connection to the lawsuit. In our view, this conduct did not evince intent to waive arbitration.”

Townsend at 463

The facts here even are more compelling in ECP’s favor. WRECO and Weyerhaeuser presumably *knew* of a right to arbitrate *before* they moved for summary judgment. Nevertheless, moving for summary judgment and receiving an unfavorable result did not “evince intent” to waive arbitration. In contrast, ECP would not unequivocally be aware of

arbitration rights until Appellants' Trial Counsel expressly conceded at Partial Summary Judgment Oral Arguments that the Appellant's theory had position changed.

The Appellants also accuse ECP of "forum shopping" and "wanting a second bite at the apple in arbitration." This was not an issue in *Townsend*. The same argument that Appellant's Brief makes would have easily applied in *Townsend*.²⁴ In fact, the Trial Court here considered this very prospect of forum shopping in their decision and found it inapplicable to the question before the Trial Court. At very least, the question of "forum shopping" does not override the actual question that needs to be asked regarding waiver. *RP July 29, 2016, 26-27*

Furthermore, it is quite ironic that Appellants would raise the issue of forum shopping when they received an unfavorable result at arbitration and are now seeking to revisit it in a different forum. Certainly, if the arbitrator had found in Appellants' favor, this Appellate Court not would have never seen this Appeal. Finally, it should be noted that the Trial Court simply denied summary judgment and found issues of fact. *CP 1437-1438*,

²⁴ For instance, it could certainly have been argued that "Certainly if the trial court had granted [Party moving to compel arbitration's motion for summary judgment], [party moving to compel arbitration] would not have asked the trial court to compel arbitration. It is only because it was disappointed by the trial court's summary judgment ruling that [party moving to compel arbitration] wanted a second bite of the apple at arbitration." *See Appellant's Brief, pg. 15.*

RP July 29, 2016, pg. 11 The Trial Court awarded nothing dispositive to either ECP or Appellants. The case was simply allowed to proceed in arbitration.

Second, ECP's Partial Summary Judgment remained consistent with addressing of the Abandoned Position which ECP moved on, along with an apparent the Changed Position, which ECP was forced to address as well on Reply.

Third, and most importantly, the Trial Court recognized that simply "the way [notice of the New Theory] came up in response on summary judgment from the plaintiff" weighed in favor of finding that ECP's conduct did not evince intent to waive arbitration. *RP July 29, 2016, pg. 27* The Trial Court recognized the unique circumstances. It found that simply proceeding with what had been already filed did not evince an intent to abandon arbitration. This is even more so because nothing dispositive actually occurred as a result of the Partial Summary Judgment proceeding.

d. Evaluating the Facts & Case Law

Respectfully, ECP has presented considerably more facts and a vastly different interpretation of what actually happened at the Trial Court. The Trial Court Record supports that ECP had no knowledge of any right to arbitration. However, to the extent certain anecdotes would allegedly impart some sort of glint of this right on ECP—Appellants' Trial Counsel

made objective statements to enforce that the Abandoned Position was the Appellants' position.

At *very best*, if even at all, Appellants can only present a conflicting Trial Court record. Moreover, Appellants also cannot point to any objective conduct actually which would be conclusively be inconsistent with "any other intention but to forgo arbitration." Certainly they are not privy to ECP's or ECP's actual attorneys' mindset.

Even if there is a hesitation on this Appellate Court's part, that is not sufficient. Courts must resolve every presumption on the issue of waiver in ECP's favor. Without any conclusive evidence of intent, and ample rejoinder for all Appellants' arguments, all presumptions are to be afforded to ECP. The Appellants have not met their heavy burden.

e. Appellants Cannot Claim Prejudice

Ad arguendo, even if the Trial Court's order compelling arbitration was erroneous, the Appellants fail to show any prejudice.

Instead of immediately seeking discretionary review of the Trial Court's Order compelling arbitration, Appellants opted to participate in arbitration. *CP 1700, 1789-1793* Disappointed with outcome, Appellants now seek to themselves "forum shop" and reverse of the trial court's order compelling arbitration and vacate the arbitrator's award. A party failing to seek review of an order compelling arbitration until after an arbitration

award is known must show prejudice before an appellate court will reach the merits and grant relief. *Saleemi v. Doctor's Assocs., Inc.*, 176 Wash. 2d 368, 387, 292 P.3d 108, 117 (2013).

Although Appellants correctly accept their burden to show prejudice, their claim of prejudice is not in accordance with the guidance of *Saleemi*. *Saleemi* defines what constitutes “prejudice” far different than Appellants Brief does.

In *Saleemi* the Washington Supreme Court found that any showing of prejudice was lacking because the party could not show that the order granting arbitration deprived the appellant of any defense or exposed appellant to damages or relief which would have been otherwise been prohibited but for the order compelling arbitration. *Id.* at 380-387. The Court specifically found that an appellate court need not “reweigh” the arbitrators’ actions outside the face of the award to find prejudice.

“But a court need not reweigh the arbitrator's actions, outside the face of the award, to determine whether the court's order prejudiced a party. Thus, for example, we would not need to examine the record before the arbitrator to determine whether the damages were in excess of those plainly allowed by the contract or that due to a choice of law defense, certain legal defenses could not be raised.”

Id. at 385.

Here, Appellants’ Brief wholly fails to explain how the substantive relief available to the Appellants was somehow different in open court as

opposed to the arbitration they participated in. In either a Thurston County Superior Court trial or an private arbitration, the substantive law was that of Washington, and the substantive rights and remedies available to either party were identical. Instead, Appellants ask this Appellate Court to evaluate the *possibility* that the superior court judge *may* not have granted summary judgment on the same basis as that of the arbitrator.²⁵

Speculation about the predisposition of the decision makers is certainly inconsistent with *Saleemi's* reasoning. As Appellants acknowledge, *Saleemi* prohibits an analysis beyond the face of the award, leaving it difficult to understand how a comparison of the predisposition of the trial judge to that of the arbitrator would be somehow proper. Such a comparison plainly and impermissibly goes beyond the face of the award.

Further, Appellants contend that they have been somehow deprived of the fundamental right to seek appellate review of the arbitrator's decision. First, *Saleemi* expressly rejected an argument based on evaluating the structural differences between the two tribunals was the parties were in. *Id.* at 386. Second, Appellants' failure to seek discretionary review undermines their expressed concern to preserve a right of appellate review. The Order

²⁵ As Appellant points out in its briefing, the trial judge expressly declined to rule on the merits of ECP's defense premised on Section 23 because the trial court viewed it as untimely. Thus, even if Puccini a substantive comparison of the trial court's reasoning to that of the arbitrator's was proper (which it is not), the trial court did not consider the merits of the parties' arguments on that defense.

Granting Defendants' Motion To Compel Arbitration could have been subjected to appellate review. However, it is Appellants' Trial Counsel who forewent a right to appeal and proceeded with arbitration.

In fact, such inaction is precisely why the Washington Supreme Court reasoned that a showing of prejudice is required. If Appellants were truly aggrieved by the Trial Court's order compelling arbitration, and not merely attempting to change the result in retrospect, Appellants should have sought discretionary review. Appellants' belated challenge to the Order compelling arbitration belies any claim of prejudice and newly professed desire for appellate review.

f. ECP Is Entitled To Its Attorney Fees

If ECP is deemed the prevailing party in this instant appeal, ECP formally submits it should be entitled to receive its prevailing party attorney fees pursuant to *RAP 18.1(a) &(b)*. Since now the operative lease is the SOB Lease and the SOB Lease contains a provision for prevailing party attorney fees, if the Appellate Court should rule in favor of ECP, this Appellate Court, respectfully, should grant ECP an award of attorney fees for responding to Appellants' Appeal.²⁶ *CP 1449-1500*. A clause awarding

²⁶ SOB Lease-Article XXVIII—Attorney Fees states, in relevant part, "Should either party commence an action or arbitration against the other to enforce any obligation hereunder, the prevailing party shall be entitled to recover the costs thereof and attorneys' fees actually incurred by such prevailing party...whether or not such litigation is prosecuted to judgment."

attorney fees prior to appeal carries over to an award on appeal. “A contractual provision for an award of attorney's fees at trial supports an award of attorney's fees on appeal under RAP 18.1.” *Thompson v. Lennox*, 151 Wn. App. 479, 491, 212 P.3d 597, 603 (2009); citing *W. Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 477, 694 P.2d 1101, 1108 (1985)

V. Conclusion

For the reasons set forth herein, ECP requests that the Trial Court’s Order Compelling Arbitration be upheld as well as its Judgment Order Confirming the Arbitration Award. Finally, ECP requests its attorney fees incurred on appeal pursuant to *RAP 18.1(a)&(b)*.

DATED: April 6, 2018.



Aric S. Bomszyk, WSBA #38020
Attorney for Respondent
ECP College Way, LLC

DECLARATION OF SERVICE

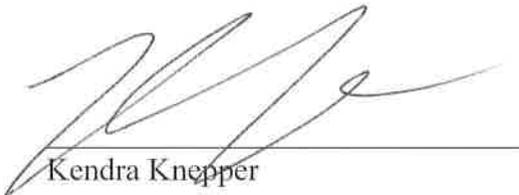
I certify that on April 6, 2018, I caused a true and correct copy of the Respondent's Brief to be served in the following parties in the manner indicated below:

Attorney for Appellant Puccini-One, LLC:

Douglas D. Sulkosky, WSBA #45931
1105 Tacoma Avenue S
Tacoma, Washington 98402
United States
253-383-5346
253-572-6662 (f)
dsulkosky@aol.com

Via Washington Legal Messenger with a delivery date of:
April 9, 2018

DATED: April 6, 2018.


Kendra Knepper

BAROKAS MARTIN & TOMLINSON

April 06, 2018 - 11:17 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50970-9
Appellate Court Case Title: Puccini-One, LLC, et al, Appellants v. ECP College Way, LLC, Respondent
Superior Court Case Number: 15-2-00358-2

The following documents have been uploaded:

- 509709_Briefs_20180406111617D2443170_7318.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 2018.04.06 Respondents Brief.pdf

A copy of the uploaded files will be sent to:

- dsulkosky@aol.com
- klk@bmatlaw.com

Comments:

Sender Name: Kendra Knepper - Email: klk@bmatlaw.com

Filing on Behalf of: Aric Sana Bomsztyk - Email: asb@bmatlaw.com (Alternate Email:)

Address:
1000 Second Avenue, Suite 3660
Seattle, WA, 98104
Phone: (206) 621-1871

Note: The Filing Id is 20180406111617D2443170