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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellant,

King County Superior Court No. 16-2-27488-9 SEA,
the Honorable Catherine Shaffer presiding

REPLY BRIEF OF APPELLANT
KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2,
D/B/A EVERGREENHEALTH MEDICAL CENTER

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I. INTRODUCTION

Plaintiffs Jeoung Lee and Sherri McFarland are aggrieved by the District's wage and hour practices on rest and meal breaks. They are bound to exhaust their remedies under the collective bargaining agreement ("CBA") between their exclusive bargaining representative and the District governing "wages, hours of work and conditions of employment." CP 514, 525, 625. "If a grievance arises, it shall be submitted to the following grievance procedure." CP 518, 529, 629.

Lee and McFarland seek to evade the CBA by ignoring its existence. Their evidence and testimony, however, expressly and exclusively refer to the CBA's more liberal terms, not the lesser standards under state law. Ignoring the CBA in their complaint doesn't make the contract a legal nullity. They remain bound, despite efforts at artful pleading.

The CBA authorizes nurses a single 30-minute meal period for a 12-hour shift. State law would otherwise require two 30-minute meal periods. As a public employer, the District has the power under RCW 49.12.187 to vary in its CBA from the otherwise applicable wage, rest and meal period provisions of state law. Whether the CBA "varies" from state law requires the CBA's interpretation, a province of an arbitrator, not a court. The trial court erred in denying the motion to compel arbitration

and in concluding that the motion could only be brought as a dispositive motion.

The Court should reverse and remand with instructions to refer the dispute to the CBA's grievance and arbitration procedures.

II. REPLY ARGUMENT

A. The CBA's grievance procedures are mandatory.

WSNA bargaining unit members are bound by the CBA. CP 148-49 (Section 17.1). Lee and McFarland were members of the WSNA during the relevant time period. CP 839. The WSNA is one and the same with its members in being bound by the terms of the CBA – the grievance process can be initiated by “any nurse and/or the Local Unit Chairperson, or designee.” CP 106-07, 147-48, 190. A nurse's ability to bring a grievance also means that she is bound by the results. An employee cannot avoid arbitration by refusing to initiate, either by herself or through a union representative, the grievance process.

B. Public employer arbitration is highly favored. There is no clear implication that the plaintiffs' claims are not covered by the CBA.

Arbitration of disputes is a key part of the Public Employees' Collective Bargaining Act (“PECBA”), Chapter 41.56 RCW. The PECBA is “liberally construed to accomplish [its] purpose.” RCW 41.56.905; *Nucleonics Alliance, Local Union No. 1-369 v. Wash. Pub. Power Supply*

Sys., 101 Wn.2d 24, 29, 677 P.2d 108 (1984); *Municipality of Metro. Seattle v. Pub. Emp't Relations Comm'n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992). Its statutory requirement of liberal construction “is a command that the coverage of an act’s provisions be liberally construed and that its exceptions be narrowly confined.” *Nucleonics*, 101 Wn.2d at 29. The PECBA’s supremacy clause expressly reinforces this requirement. Its provisions “shall control” over any “conflicting statute, ordinance, rule or regulation.” RCW 41.56.905; *Municipality of Metro. Seattle*, 118 Wn.2d at 644.

The PECBA’s specific arbitration preference is bolstered by Washington’s general, strong presumption favoring arbitration. *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996). Washington applies this presumption to employment disputes governed by contractual grievance procedures. “In general, where a collective bargaining agreement establishes grievance and arbitration procedures for the redress of employee grievances, an employee *must exhaust those procedures before resorting to judicial remedies.*” *Lew v. Seattle Sch. Dist. No. 1*, 47 Wn. App. 575, 577, 736 P.2d 690 (1987) (emphasis added). Lee and McFarland cannot bypass the grievance and arbitration process by pretending it does not exist.

The PECBA's dominance is illustrated by *Rose v. Erickson*, 106 Wn.2d 420, 721 P.2d 969 (1986). The Supreme Court held that the grievance procedure in a collective bargaining agreement prevailed over conflicting, otherwise mandatory statutes. The Court presumes "that *all questions* upon which the parties disagree *are arbitrable unless the CBA expressly or by clear implication negates that presumption.*" *Peninsula Sch. Dist.*, 130 Wn.2d at 414 (emphasis added).

The District's CBA neither expressly nor impliedly negates the presumption that plaintiffs' rest and meal break claims are arbitrable. Its language establishes the opposite – the CBA carves out only discrimination claims to be handled outside its grievance and arbitration process. CP 126 (Section 5.1). The CBA also provides that other disputes (while still subject to grievance and arbitration) are subject to variations on its generally applicable grievance procedure. CP 131 (Section 6.6). If the parties had meant to exempt wage and hour claims from the grievance procedure and arbitration, then a similar express carve-out would exist. It does not; therefore, the plaintiffs' claims are presumed to be arbitrable.

"Where a provision of a collective bargaining agreement is subject to two interpretations, the one that would require arbitration should be adopted." *Int'l Bhd. of Elec. Workers Union Local 483 v. City of Tacoma*,

20 Wn. App. 435, 437, 582 P.2d 522 (1978). Here, an interpretation of the CBA requiring arbitration should be adopted.

C. Unlike private employers, the Public Hospital District's collective bargaining agreement can vary from and supersede inconsistent regulations.

RCW 49.12.187 and WAC 296-126-130(8)(b) authorize public employers to enter into collective bargaining agreements with rest and meal break provisions that vary from those set forth in WAC 296-126-092. The District and WSNA did just that. The CBA authorizes 12-hour shifts with “one (1) thirty (30) minute unpaid lunch period and three (3) fifteen (15) minute paid rest breaks.” CP 114, 155, 198. This provision varies from the regulation, which requires two unpaid meal periods for a 12-hour shift and only 10-minute rest breaks. WAC 296-126-092(1), (2) and (4).

In allowing public employment CBA terms to vary from the regulation, there is *no* requirement that such varied terms be “specifically negotiated,” as plaintiffs argue. Plaintiffs’ reliance on *Frese v. Snohomish Cnty.*, 129 Wn. App. 659, 120 P.3d 89 (2005) is misplaced. In *Frese*, the plaintiffs claimed that their employer, the County, violated both the CBA and the regulation by requiring employees to remain on-call and on-premises during 30-minute meal periods for eight-hour shifts. The County argued that the claim under WAC 296-126-092(1) & (2) was barred by the CBA. The trial court and this Court disagreed, holding that the claim was

not barred because the County could not demonstrate that the CBA's terms differed from the regulation. *Frese*, 129 Wn. App. at 668-69. This Court imposed no obligation in *Frese* that varied terms be "specifically negotiated" at each bargaining.

Unlike *Frese*, the District's CBA terms clearly vary from the regulation; instead of a 10-minute rest break every four hours, nurses are entitled to a 15-minute rest break every four hours. Rather than a 30-minute meal period every five hours, nurses get one 30-minute meal period per 12-hour shift. Because the terms of the CBA vary from the regulation, the CBA controls.

Lee and McFarland contort District Vice President Nancee Hofmeister's deposition testimony to support their arguments. Hofmeister never testified that the District did not contract with WSNA regarding breaks. Instead, she testified in her October 12, 2017 deposition that *she* was not involved in negotiations in which break provisions were discussed: "In my negotiations, there have been no discussion of rest and meal breaks," CP __ (Dkt. 298, Ex. F at 23); "We did not discuss Provision 7.7." CP __ (Dkt. 298, Ex. F at 22).¹ The one meal for a 12-

¹ Nancee Hofmeister's second deposition was taken on October 12, 2017, after the District filed its motion to compel arbitration. Plaintiffs rely on this deposition in their response brief therefore the District must respond with a 4th supplement the Clerk's Papers accordingly herewith.

hour shift and 15-minute rest period had been established as a part of the CBA for many years prior to Hofmeister's employment with the District and involvement in CBA negotiations. CP 80, 93.

D. Whether the CBA varies from the regulation requires interpreting the CBA and is not a question before this Court.

Although the District has distinguished *Frese* and corrected the plaintiffs' misstatements of Hofmeister's testimony, whether the CBA's break provisions vary from WAC 296-126-092 is *not* a question for this Court. Questions of the CBA's interpretation with respect to the regulation are improper on an appeal for a motion to compel arbitration. That question is for the arbitrator. *United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994) ("Further inquiry would require us to delve into an area of contract interpretation which the Supreme Court has clearly mandated as the arbitrator's realm.").

[T]he court should *not* look to substantive provisions of a collective bargaining agreement except insofar as it is necessary to consider exclusions to an arbitration clause.... Thus ... it was proper for the court to look beyond the arbitration clause to a substantive provision of the agreement, but only because the latter contained an express exclusion from arbitration....

In contrast, where there are no such exclusions from arbitration, we have limited our inquiry to the arbitration clause itself and *refused to consider* substantive provisions.

Westinghouse Hanford Co. v. Hanford Atomic Metal Trades Council, 940 F.2d 513, 521 (9th Cir. 1991) (emphasis added); *see also Geldin Meat Co.*, 13 F.3d at 1369 (“[W]here the contract is susceptible to more than one interpretation, it is up to the arbitrator, not the District Court, to apply principles of contract law in interpreting the CBA ... even where the District Court finds no merit to the union’s underlying grievance.”). In *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960), the Supreme Court stated that

the judicial inquiry ... must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance An order to arbitrate the particular grievance should not be denied unless it may be said with ***positive assurance*** that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id. at 582-83 (emphasis added).

Geldin Meat Co. reversed a denial of a motion to compel arbitration, finding that the trial court exceeded its authority by interpreting substantive contract provisions. 13 F.3d at 1370. In that case, the union moved to compel arbitration of a grievance regarding medical benefits. The employer argued that the CBA’s language supported a finding that it only agreed to submit disputes over employee discipline to

arbitration.² The court found the plaintiff failed to meet its burden under *United Steelworkers* to show with “positive assurance” that the CBA was not susceptible of an interpretation covering the dispute. Instead, the court held that the CBA language was:

readily susceptible to an interpretation that it was intended to cover any dispute not specifically excluded in the CBA, and thus falls squarely within the ambit contemplated by the Supreme Court in *Warrior & Gulf*. Further inquiry would require us to delve into an area of contract interpretation which the Supreme Court has clearly mandated as the arbitrator’s realm.

Id.

E. The CBA’s terms cover plaintiffs’ claims.

The question before this Court is whether the CBA covers plaintiffs’ claims. It does. It sets forth “the understanding reached between the parties with respect to wages, hours of work and conditions of employment.” CP 122. The CBA covers rest and meal breaks. CP 133. Plaintiffs’ claims of missed and unpaid rest and meal periods are indeed issues of “wages, hours of work and conditions of employment” and pertain to the CBA’s rest and meal break provisions. Further, the testimony from Lee and McFarland and all nurses in this case exclusively

² “Geldin asserts that a plain reading of this language shows that only disciplinary actions are at issue, because the language addressing grievance procedures immediately follows the language addressing employee disciplinary actions.” *Geldin Meat Co.*, 13 F.3d at 1368.

relates to the CBA's 15-minute rest break, and not the lesser standard under WAC 296-126-092(4). CP 22, 26-27, 209-10, 213-14, 217-18, 221, 225, 229-30, 233, 237, 565, 567-77, 574-74, 578, 581, 585-88, 591-92, 594-95, 596-98, 881.

Only claims of discrimination are expressly excluded from arbitration:

5.1 Equal Opportunity. The Employer and the Association agree that conditions of employment shall be consistent with applicable state and federal laws regarding nondiscrimination. If a charge based on an alleged violation of this section is filed with a federal, state or local agency, the charge shall be handled exclusively through that agency and not through the grievance procedure of this Agreement.

CP 86, 126, 169. The absence of a similar express exclusion for disputes regarding rest and meal breaks means that they are arbitrable and covered by the CBA's broad language: "If a grievance arises, it shall be submitted to the following grievance procedure." CP 147 (Section 16.1). "A grievance is defined as an alleged breach of the express terms and conditions of the Agreement." *Id.* Rest and meal periods are an express term of the CBA. CP 505, 517, 528 (Section 7.7).³ The final step of the

³ In construing the express terms of the CBA, the arbitrator must consider the parties' objective manifestation of intent, through their long-standing practice regarding rest and meal breaks. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

grievance procedure is arbitration. CP 147. Disputes over rest and meal breaks must therefore be submitted to the grievance procedure because the subject is covered in the CBA and there is no express exclusion for rest and meal break claims from the grievance process.

F. Plaintiffs cannot avoid the CBA’s arbitration requirement by ignoring or avoiding it through artful pleading.

McFarland’s testimony establishes that her claims are based solely on the breaks provided by the CBA and not the regulation. CP 596-98; 881. In refusing to acknowledge the CBA in their pleadings, plaintiffs engage in improper artful pleading. They plead a different case from their evidence to avoid the arbitration forum.

Even a “master of the complaint” cannot resort to artful pleading to avoid the proper forum. In the context of federal removal, a plaintiff cannot avoid the proper forum by characterizing claims “intertwined with the collective bargaining agreement” as state law terms. *Joy v. Kaiser Aluminum & Chem. Corp.*, 62 Wn. App. 909, 911, 816 P.2d 90 (1991) (“Artful pleading as a state law claim will not avoid preemption.”); *see also Harper v. San Diego Transit Corp.*, 764 F.2d 663, 666-67 (9th Cir. 1985) (“A complaint that is ‘artfully pleaded’ to avoid federal jurisdiction may be recharacterized as one arising under federal law.”) (*quoting Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1472 (9th Cir. 1984)).

In *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988), the complaint failed to disclose a collective bargaining agreement that formed the basis for the plaintiff's action. The court held that the claims were preempted by section 301 of the Labor Management Relations Act and that the plaintiff could not avoid removal by "artfully pleading" his claims.⁴ Likewise, in *Sheeran v. Gen. Elec. Co.*, 593 F.2d 93, 96-97 (9th Cir. 1979), the court held that although former employees did not refer to collective bargaining agreements in their complaint seeking increased pension benefits, they alleged a violation of their pension contract which was an integral part of the agreements; therefore, the case was properly removed to federal court.

Lee and McFarland rely on *Caterpillar Inc. v Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) for the proposition that they are the "master of the complaint." *Caterpillar* is inapposite – it specifically held that "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract

⁴ "Hyles argues that, because no federal question appeared on the face of his complaint, removal was improper. The court concluded that Hyles' state action was really a claim for breach of the CBA, and was thus preempted by section 301. We agree with that conclusion." *Hyles*, 849 F.2d at 1215. Lee's and McFarland's similar argument here is equally unavailing.

relied upon is *not* a collective-bargaining agreement.” *Id.* at 396 (emphasis in original). The rights asserted here are not independent of the WSNA CBA, so *Caterpillar* does not apply.

Similarly, Lee’s and McFarland’s reliance on *Burkhardt v Swedish Health Servs.*, No. 2:17-CV-00350-RSL, 2017 U.S. Dist. LEXIS 74711 at *10 (W.D. Wash. May 16, 2017) is misplaced for two reasons. First, *Burkhardt* involved a private employer, not a public employer. Under RCW 49.12.187 and WAC 296-126-130(8)(b), public employers’ CBAs, like the District’s, can override statutory requirements. Second, the rule against artful pleading, as discussed in federal removal cases, trumps the “master of the complaint” rule. See *Hyles v. Mensing*, *Sheeran v. Gen. Elec. Co.*, *Joy v. Kaiser Aluminum & Chem. Corp.* and *Harper v. San Diego Transit Corp*, *supra*.

To ensure that a plaintiff is not engaging in improper artful pleading, a court may “properly look[] beyond the face of the complaint to determine whether the ... claim was in fact a section 301 claim for breach of a collective bargaining agreement ‘artfully pleaded’ to avoid federal jurisdiction.” *Young v. Anthony’s Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987).

Lee’s and McFarland’s complaint assiduously avoids mentioning the CBA. They attempt to bypass and undermine its required grievance

and arbitration process. Permitting them to go forward would require re-writing the CBA to either (1) delete the grievance provision or (2) add an express exception for claims regarding rest and meal breaks. Both changes to the CBA are impermissible and highlight the arbitrability of plaintiffs' claims.

If arbitration is not compelled here, there is nothing to stop the next union member from omitting mention of the CBA to avoid its grievance and arbitration process. The CBA is clear – all “disputes,” except discrimination claims for which there is an express exception, CP 126, are to be handled through the grievance process. The PECBA’s supremacy clause is additional authority that requires plaintiffs to arbitrate. RCW 41.56.905.

G. Plaintiffs’ Second Amended Complaint conforms to the evidence.

Even if not expressly mentioned, the second amended complaint is based on McFarland’s CBA claims because it is deemed to conform to the evidence thus far presented. *Matthews v. Calhoun*, 192 Wn. 544, 545, 73 P.2d 1329 (1937) (courts have the power to deem a complaint amended to conform to the proof); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766, 733 P.2d 530 (1987) (where negligence claim was argued by both parties and ruled on by trial court, the claim should have been treated as if

raised in pleadings). In *Fowlkes v. Int'l Bhd. of Elec. Workers, Local No. 76*, 58 Wn. App. 759, 795 P.2d 137 (1990), *amended*, 808 P.2d 1166 (1991), the court held that although the plaintiff did not specifically allege a breach of the collective bargaining agreement, his suit was authorized under the Labor Management Relations Act because it was brought to protect rights conferred by the collective bargaining agreement or agreements supplementary to the collective bargaining agreement.

Under CR 15(b), a court on its own motion may amend pleadings to conform to the evidence and issues actually litigated before the court in order to avoid the necessity of a new trial and multiplying of lawsuits. *Harding v. Will*, 81 Wn.2d 132, 136, 500 P.2d 91 (1972). The pleadings may be amended to conform to the evidence, at the discretion of the court, at any stage in the action, including at the conclusion of trial or even after judgment. *MacCormack v. Robins Constr.*, 11 Wn. App. 80, 83, 521 P.2d 761 (1974). The rule states that while a party may move to conform the pleadings to the evidence at any time, “failure to so amend does not affect the result of the trial of these issues.” CR 15(b). A trial court may amend the pleadings to include an unpleaded claim. *Harding*, 81 Wn.2d at 137; *Green v. Hooper*, 149 Wn. App. 627, 636, 205 P.3d 134 (2009).

The CBA controlling meal breaks has already been construed to override the regulation for 12-hour shifts. CP 929-32 (regarding identical language from the 2009-2012 CBA).

H. Whether WSNA is a necessary party to resolving a dispute through the CBA grievance procedure is irrelevant to whether bargaining unit members are bound by the negotiated dispute resolution provisions of the CBA.

The WSNA is the “sole and exclusive bargaining representative for all regularly scheduled full-time, regularly scheduled part-time and per diem registered nurses engaged in patient care at the Hospital, excluding supervisors, nursing care coordinators, temporary nurses, students, and all other employees.” CP 82, 122, 165 (Section 1.1). A union certified by the Public Employment Relations Commission to represent a majority of the public employees in a bargaining unit is obligated to fairly represent the interests of *all* its members. RCW 41.56.080; *Allen v. Seattle Police Officers’ Guild*, 100 Wn.2d 361, 374, 670 P.2d 246 (1983) (emphasis in original). The CBA’s terms were the result of the parties’ negotiations. CP 108, 148, 191 (Section 17.1). WSNA members are bound by the dispute resolution provisions of the CBA. Lee and McFarland may not usurp the WSNA’s exclusive position by ignoring the union.

I. The District did not waive its right to arbitration.

Waiver of a contractual right to arbitration is disfavored, and a party seeking to prove waiver has a heavy burden of proof. *Steele v.*

Lundgren, 85 Wn. App. 845, 852, 935 P.2d 671 (1997). The District has always invoked the possible application of the CBA's grievance procedures in this case. Plaintiffs' defective pleadings and claims under their abandoned complaints do not preclude arbitration under Lee's and McFarland's most recent complaint.

Lee filed her original complaint on November 10, 2016. The complaint was defective because it sought class certification under CR 23(b)(2) but requested damages as well as injunctive relief. CP 1-6. The District objected to the complaint on these grounds and Lee abandoned it, filing an amended complaint on January 17, 2017 to seek certification under CR 23(b)(3). CP 13-20. The Court's March 8, 2017 class certification order did *not* include class-wide claims for injunctive or declaratory relief or for late or interrupted meal breaks. CP 250-53. On July 26, 2017, McFarland was deposed, which made clear that her claims relied on the CBA, not the regulation. CP 414-23, 480-98.

On August 3, 2017, Lee moved to amend the complaint to add McFarland as a representative plaintiff for all class members. CP 257-72. The second amended complaint also sought to resurrect claims for injunctive and declaratory relief. CP 269-70. Whether the District's rest and meal break practices under the CBA violate the cited statutes and regulations (CP 269) necessitates interpreting the CBA's terms. In its

response to the motion to amend, the District argued that McFarland's claims are based on the CBA and thus subject to the grievance procedure. CP 284-85.

On August 15, 2017, the trial court granted Lee's motion to add McFarland as a representative plaintiff. CP 431-34. On August 16, Lee and McFarland filed the Second Amended Complaint. CP 435-42. Two weeks later, on September 1, the District moved to compel arbitration. CP 544-58.⁵ The above timeline shows that the District acted swiftly in response to evidence that plaintiffs' claims were based on the CBA. There was no waiver.

In *Hill v. Garda CL Nw. Inc.*, 169 Wn. App. 685, 281 P.3d 334 (2012), *rev'd on other grounds*, 179 Wn.2d 47, 308 P.3d 635 (2013), the class plaintiffs argued that the defendant had "waived its right to arbitration by engaging in **19 months** of litigation before filing the motion to compel." *Id.* at 690 (emphasis added). During the 19 months, the defendant engaged "in discovery and in motions practice, taking depositions of the named plaintiffs, and moving for summary judgment." *Id.* at 691. This Court disagreed, stating that an amended complaint

⁵ The District originally filed the motion with a request for dismissal. CP 443-58. After receiving plaintiffs' objection, the District struck the motion and filed a new motion requesting a stay pending arbitration. CP 544-58.

presents an “obvious opportunity” to assert the right to compel arbitration. *Id.* at 692. That is what the District did here – it filed its motion to compel arbitration 15 days after the second complaint was filed.⁶

J. The trial court erred in refusing to proceed under CR 7, forcing the District to choose between CR 12 and CR 56 for its motion to compel.

The District did not accept any trial court ruling that its motion to compel be considered a dispositive motion. It merely complied with the court’s direction regarding scheduling of the motion to compel. The District originally noted its motion to compel on the six-day motions calendar under CR 7. CP 443, 544. Plaintiffs’ attorneys argued in emails to the court bailiff, without citation to authority, that the District’s motion was dispositive and should be noted on the 28 day calendar. The trial court agreed with plaintiffs and scheduled the District’s motion on a 28 day calendar, leaving the District with the choice of submitting to the court’s scheduling discretion or losing the opportunity to have its motion heard. This was not the District’s acceptance of the motion as a dispositive motion.⁷

⁶ The District filed its motion to compel arbitration 9 months and 22 days after the original defective complaint and 7 months and 15 days after the first amended complaint was filed.

⁷ The District’s original motion to compel asked the trial court to “dismiss or stay” the litigation. CP 454. After plaintiffs objected to the dismissal language without noting the motion on a 28-day calendar, the

When ruling on the District's motion, the trial court looked only to the second amended complaint – it did *not* consider declarations and attached exhibits and deposition transcripts:

MR. WHITE: ... I will respond to the question on what rule the motion is brought under. This is a general motion under Rule 7. It's a motion to compel arbitration....

THE COURT: Yes, but if I grant a motion to compel arbitration, I have to know whether I'm doing that based on the pleadings or whether I'm doing this on the additional materials you submitted to me.... [I]f you want me to issue a ruling based on what you attached to your pleadings, ... there has got to be a Rule 56 decision. Or not.

MR. WHITE: Well, your Honor, any Rule 12 motion, the Court is permitted to consider matters outside the pleadings.

THE COURT: I can, and that converts into a Rule 56.

MR. WHITE: You can, and the pleadings [our] answer raised, that this is subject to arbitration under the collective bargaining agreement.

THE COURT: I hear you.

MR. WHITE: And if the Court feels that it would have to provide an opportunity for Mr. Breskin to submit additional pleadings, or have additional briefing, we'll go with the Rule 12.

THE COURT: No, he's not asking for that, he's asking for me to make you tell us, basically, which one we are under, 12 or 56. And he is indicating that he has got a few 56(d) requests of his own. That's what I'm hearing from him.

District struck the original motion and filed a new motion, specifying that it was asking the court to stay the litigation pending the arbitration. CP 544, 555.

But he's certainly not making – I mean, the best I heard him say is, “Sure, rule on the pleadings.”

MR. WHITE: The Court may proceed under Rule 12, your Honor.

THE COURT: Okay. We're all in agreement with that. *And makes all the deposition extraneous to this discussion.*

MR. WHITE: Then we're done, your Honor.

THE COURT: All right. Okay. Under Rule 12, *I do not believe that I have a basis under these pleadings to dismiss this complaint in favor of arbitration....*

VRP 12-15 (emphasis added).⁸

The court's order was drafted by plaintiffs and contained plaintiffs' stock language. CP 745-48. The order expressly states that the court “considered the pleadings,”⁹ but does not state that the court considered matters outside the pleadings. The transcript makes clear that only the pleadings were considered and none of the attachments submitted by the District for its motion to compel.

K. Plaintiffs' request for injunctive relief in the Second Amended Complaint effectively re-writes the CBA, rendering the claims arbitrable.

The Second Amended Complaint seeks forward-looking relief in the form of an injunction. CP 269-70. If enforced, the injunction would

⁸ The District was not requesting dismissal. CP 544, 555.

⁹ CR 7(a) defines “pleadings” as “a complaint and an answer; a reply to a counterclaim ...; an answer to a cross claim ...; a third party complaint ...; and a third party answer.” “Pleadings” do not include “[m]otions and [o]ther [p]apers.” CR 7(b).

require nurses to adhere to the 10-minute break rule in the regulation and take away their bargained-for and more generous 15-minute rest break. The injunction would have the effect of amending the CBA terms and substituting less favorable terms at the request of a former employee (McFarland) no longer subject to it. The fact that plaintiffs' requested injunctive relief would amend the CBA requires that the claims be resolved through the contractual grievance process. It would also supplant the entire bargaining process with the nurses' "sole and exclusive" representative. CP 514, 525, 625.

L. No attorneys' fees are warranted.

Plaintiffs' request for attorneys' fees should be denied. The District's motion and appeal are not frivolous.

An appeal is "frivolous," as basis for awarding attorney fees to appellee as sanctions against appellant, if, considering the entire record, the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.

Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 579, 245 P.3d 764 (2010). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Id.* Raising at least one debatable issue precludes finding that the appeal as a

whole is frivolous. *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 443, 730 P.2d 653 (1986).

Whether plaintiffs' claims are covered by the CBA and are subject to its mandatory grievance and arbitration is a debatable issue, as supported by the numerous arguments in the parties' briefs and by Judge Schapira's order in prior litigation between the parties.

III. CONCLUSION

The CBA governs Lee's and McFarland's "wages, hours of work and conditions of employment." It requires recourse to its grievance and arbitration procedures. Both general and specific state law favors arbitration over litigation. This Court should reverse the trial court's order that ignores both the CBA and state law.

Respectfully submitted this 18th day of May, 2018

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