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NO. 97201-0

IN THE SUPREME COURT FOR THE  
STATE OF WASHINGTON

(COA No. 77694-1-1)

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

Respondents,

v.

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

Petitioner.

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**PLAINTIFF-RESPONDENTS'  
SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

The Respondents are Plaintiffs Lee and McFarland and the certified class of former and current nurses in Defendant Evergreen Hospital Medical Center's Emergency Department. In this lawsuit, Plaintiffs bring statutory claims against Evergreen for failing to provide rest and meal breaks as required under WAC 296-126-092.

There are two independent reasons to affirm the decision of the Court of Appeals denying Evergreen's motion to compel arbitration under its Collective Bargaining Agreement ("CBA"). First, Evergreen waived any right to compel arbitration by zealously litigating in the trial court for nine months and passing obvious opportunities to seek arbitration, at great expense and prejudice to Plaintiffs.

Second, the claims are not arbitrable. The CBA's arbitration provision – which is optional and limited to violations of the express terms of the CBA – does not encompass statutory claims and does not waive nurses' rights to bring those statutory claims in court. Evergreen has admitted this (CP 1147-48). In moving to compel arbitration, Evergreen argues that Plaintiffs' claims are *contractual*, not statutory. As the Court of Appeals comprehensively explained, there is no merit to these arguments. Plaintiffs' rest and meal break claims are and always have been statutory. Evergreen did not expressly modify the statutory meal

break requirements in the CBA such that Plaintiffs' claims became contractual. And Ms. McFarland did not transform them into contractual claims by testifying about the CBA in deposition. Lastly, Plaintiffs did not newly seek "declaratory and injunctive" relief in the Second Amended Complaint. The identical relief was stated in the initial Complaint and each subsequent version, and as Plaintiffs told the trial court repeatedly throughout the litigation, Plaintiffs have never sought prospective relief.

There is no basis for compelling arbitration of Plaintiffs' solely statutory claims. The decision of the Court of Appeals should be affirmed.

## **II. STATEMENT OF THE CASE**

Plaintiffs Jeoung Lee and Sherri McFarland ("Plaintiffs"), on behalf of a certified class of current and former Emergency Department Registered Nurses ("RNs"), bring claims against Evergreen Hospital Medical Center ("Evergreen") for failing to provide proper rest and meal breaks in violation of Washington law.

The only claims in this case are, and have always been, for Evergreen's violation of the requirements in WAC 296-126-092 that workers get one meal break by the fifth hour of work and at least a 10 minute rest break for every four hours of work.<sup>1</sup> Plaintiffs have *not*

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<sup>1</sup> CP 5 (Complaint); 17 (First Am. Complaint); CP 439 (Second Am. Complaint).

brought claims related to RNs working more than five hours *after* a meal break, nor claims that RNs were entitled to a second meal break.<sup>2</sup>

There is no claim for breach of the CBA between Evergreen and the nurses' union, the Washington State Nurses Association ("WSNA"). Nor is WSNA a party to the action.

### **1. The WAC and the CBA's Meal/Rest Break Provisions**

WAC 296-126-092 states, in pertinent part (emphasis added):

(1) Employees shall be allowed a meal period of at least third minutes which commences *no less than two hours nor more than five hours* from the beginning of the shift...

(2) No employee shall be required to work more than *five consecutive hours without a meal period*....

(4) Employees shall be allowed a rest period of *not less than ten minutes*, on the employer's time, *for each four hours of working time*...

The CBA's "Meal/Rest Period" clause (§ 7.7) states (CP 528):

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

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<sup>2</sup> See Complaint, ¶ 18 (CP 3-4) (defining meal break class, in pertinent part, as "All other nurses who missed meal breaks, whose meal break was interrupted and/or *who did not receive a meal break within the first 5 hours* of their shift")(emphasis added). See also CP 15-16 (¶ 18, First Am. Complaint); CP 437-438 (¶ 20, Second Am. Complaint).

The CBA's "Meal/Rest Periods" clause that the union agreed to, on its face, embraced WAC 296-126-092 and did not modify the requirement in WAC 296-126-092(1), (3) of a meal break by the fifth hour and a rest break for every four hours worked.

Evergreen's CR 30(b)(6) representative admitted that Evergreen had not contracted with WSNA to modify the requirements in WAC 296-126-092 for when breaks had to be given, i.e. a meal break by the fifth hour of work and rest breaks for every four hours worked. CP 1096-1097. She testified the only modification in the CBA was increasing the rest break from 10 to 15 minutes. *Id.* The claim alleged in this lawsuit is for the WAC's 10-minute break, not the CBA's 15-minute break. There is no claim for the five-minute difference.

## **2. The CBA's Grievance and Arbitration Provision**

The CBA's grievance procedure defines a grievance as "an alleged breach of the *express terms* and conditions of the Agreement." CP 106 (emphasis added). The arbitration clause states (CP 107, emphasis added):

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

The clause only grants the union the right to submit a grievance to arbitration, not Evergreen, and it leaves to WSNA's discretion whether to do so. It does not give Evergreen the right to compel RNs to arbitrate. The

arbitration procedure does not refer to or include statutory claims.

Evergreen admitted through its 30(b)(6) representative that the CBA's grievance procedure does not cover state law claims nor waive the rights of RNs to sue Evergreen over state law violations. CP 1253-54. It does not *require* WSNA to arbitrate nor permit Evergreen to compel arbitration. CP 1254-55. It could have, but did not.

In fact, WSNA sent RNs a letter at the outset of this case stating that they are "free to participate in the case." CP 1221. And, in *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 348, 352, 311 P.2d 1253 (2013), WSNA sued Evergreen for violating *state law* by not giving 10-minute rest breaks. It did not sue under the CBA. Evergreen did not demand arbitration. The parties to the CBA acted as though state law claims were not subject to arbitration.

### **3. Evergreen's Nine Months of Active Litigation**

In November 2016, Lee filed this Class action alleging Evergreen violated RCW 49.12 by not giving 10-minute rest breaks and 30-minute meal breaks in the manner required by WAC 296-126-092. CP 5. In December 2016, Evergreen filed an Answer asserting an Affirmative Defense that the claim was subject to the CBA's arbitration clause CP 10. Nonetheless, Evergreen chose to litigate.

In January 2017, Lee filed a First Amended Complaint ("FAC")

alleging the same claims under Washington law. CP 17. In the FAC, Lee amended her request for class certification from CR 23(b)(2) to CR 23(b)(3). *Id.* Evergreen again chose to litigate and moved to dismiss. It argued Lee lacked standing to sue because she was not a current employee. It did not allege the claims had to be arbitrated. CP 1129.

The same day, February 3, 2017, Lee moved for class certification. CP 782. Evergreen opposed the motion but did not say the claims were governed by the CBA, required interpretation of the CBA, nor did it seek arbitration. Nor did it ask the court to stay certification until it could decide if the claims had to be arbitrated. CP 799.

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

On April 21, *Evergreen* asked the court to approve *its* proposed form of Class Notice. It did not tell the Court notice should not go out because it would be moving to compel arbitration. Its Notice did *not* tell class members the claims were governed by the CBA or subject to arbitration. CP 1367. Lee also moved for approval of her Notice, which the court approved. CP 645. The court-approved Notice told Class members the claim was for violation of Washington law, not breach of the

CBA. Plaintiffs' counsel sent the Notice *at their expense* to 565 RNs. *Id.*

On July 11, 2017, Evergreen took Lee's deposition instead of moving to compel arbitration. Over two weeks later, on July 26, it took Sherri McFarland's deposition instead of moving to compel arbitration. She was a class member, not a plaintiff at the time. CP 480.

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

On August 4, Lee moved for leave to file a Second Amended Complaint ("SAC"). CP 257. The motion made clear that Plaintiff was making *only two discrete* changes to the claims: 1) adding Ms. McFarland as a class representative; and 2) extending the class period four months until December 31, 2016. *Id.* The amendment did *not* change the relief requested to a request for prospective injunctive relief. Evergreen opposed the motion, arguing it would be prejudiced if the class period was expanded because its experts had analyzed the WAC meal and rest break claims through August 29, 2016. CP 276. It also argued that McFarland was not a proper Class representative because her claims were contractual, had to be arbitrated, and thus she was not "typical" of the Class claim

because the class claim was for violation of state law. CP 283.

On August 15, the trial court rejected Evergreen's arguments. It granted Lee's motion and added McFarland as an additional Class representative. Evergreen did not seek review of the August 15 order. Nor did it seek review of the court's August 8 order that granted the motion to continue the November 6 trial and ordered "[n]o further trial continuances will be granted for any reason." CP 1403, emphasis is original. Instead, on September 1, it filed a motion to compel arbitration. CP 555.

On November 3, Judge Shaffer denied the motion to compel arbitration. The court did not alter its prior ruling that the claims were for state law violations and the addition of McFarland as a class representative in the Second Amended Complaint did not alter the claims. VRP 25-26. It doubted the "right parties" were in front of it to compel arbitration because the union was not a party and was not seeking arbitration. VRP 16. It noted that Evergreen had engaged in "quite a long history of litigation in this court instead of any effort to enforce the right to arbitration." *Id.*

#### **4. The Court of Appeals Decision**

On February 11, 2019, the Court of Appeals, Division I, issued a thorough, well-reasoned decision affirming the trial court's decision, holding that 1) "on its face, the CBA...does not waive union members' abilities to enforce their statutory rights in a judicial forum"; and 2)

Evergreen waived any right to compel arbitration under the CBA by actively litigating for nine months and passing obvious opportunities to assert its right to compel arbitration. Opinion (“Op.”) at 1-2. Evergreen petitioned for review, which this Court granted.

### III. ARGUMENT

#### 1. Evergreen waived any right to compel arbitration.

The Court of Appeals correctly concluded that Evergreen waived any right to compel arbitration. “Simply put...a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Otis House Ass’n. v. Ha*, 165 Wn.2d 582, 586, 201 P.3d 309 (2009). A party who claims the right to arbitration “must take some action to enforce that right within a reasonable time.” *Id.* at 588. A party waives any right to arbitrate by acting inconsistently with that right, including seeking decisions on the merits of issues in the litigation and passing up “obvious opportunities to move for arbitration.” *Steele v. Lundgren*, 85 Wn. App. 845, 935 P.2d 671 (1997).

##### a. Evergreen litigated for nine months, passing up obvious opportunities to compel arbitration and prejudicing Plaintiffs.

Washington courts have held that a party waives the right to arbitration where it has “answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial.” *Ives v. Ramsden*, 142 Wn.App. 369, 384, 174

P.3d 1231 (2008). Here, as outlined above at § II(3), Evergreen has done all of these. It actively litigated for nine months, requesting and taking its chances on the court's substantive rulings rather than seeking to compel arbitration. Evergreen moved to dismiss (and lost), fully litigated class certification (and lost), and then moved the court to approve its proposed form of notice to the Class, which did not mention any contractual claims or arbitration. Evergreen even specifically argued against granting Lee a trial continuance, because it was "fully prepared to try this case on November 6, 2017." CP 1793. As the Court of Appeals concluded, "[p]ut simply, Evergreen elected to litigate and missed an obvious opportunity to assert its right to arbitrate." Op. at 19.

Plaintiffs would be prejudiced if Evergreen's eleventh-hour motion were granted, having spent \$140,000 in fees and costs, including the cost of multiple experts and class notice to 565 class members. *See Romney v. Franciscan*, 199 Wn.App. 589, 607, 399 P.3d 1220 (2017) ("To determine whether there has been prejudice, "we consider the extent of the delay, the degree of litigation preceding the motion to compel, the resulting expenses, and other surrounding circumstances.")

As the Ninth Circuit explained in *Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016), the policy favoring arbitration is that it provides a *quick and inexpensive* means to resolve individual disputes. When, like here, a

party actively litigates and imposes on the other party both delay in resolving the dispute and extensive fees, the basis for the rule favoring arbitration and the benefit to the parties of arbitration no longer exist. *Id.*

**b. Evergreen’s argument that Ms. McFarland and the Second Amended Complaint transformed the class claims and implicated the CBA is meritless.**

In the face of its clear choice to litigate rather than move to compel arbitration, Evergreen argues that its motion to compel arbitration was not untimely because the claims in the case were “completely changed” by snippets of Ms. McFarland’s deposition testimony and then her inclusion in the case with the Second Amended Complaint. This position is absurd and contrary to law and the Court of Appeals correctly rejected it.

Ms. McFarland’s deposition, taken as a class member before she was even a class representative, did not and could not change the statutory claims in this lawsuit into claims under the CBA. As the Court of Appeals stated, a party cannot “recast one party’s claims at the behest of the opposing party based on highly disputed characterizations of cherry-picked deposition testimony.” Op. at 8 n. 21. *See Yi v. Kroger*, 2 Wn.App.2d 395, 400-402, 409 P.3d 1191 (2018) (holding that the court must look to the claims “actually asserted” in the lawsuit, and finding that plaintiff’s discovery responses referencing a CBA’s wage rates did not transform the claims from statutory into contractual claims).

Moreover, it was *after* McFarland’s deposition that Evergreen opposed granting Lee a trial continuance on the ground that Evergreen was “prepared to try the case,” and adding a “second class representative adds nothing to the present case.” CP 1793, 1798. This is inconsistent with Evergreen’s later position that McFarland’s testimony fundamentally altered the nature of the claims, and was an “obvious opportunity” for Evergreen to assert its right to arbitrate, which it passed up.

Evergreen further argues that when Plaintiffs filed their Second Amended Complaint (“SAC”), the addition of claims for declaratory and injunctive relief transformed the claims in the lawsuit and implicated the CBA for the first time. This is wrong for a number of reasons.

First, it is patently false that the SAC “fundamentally changed the nature of the lawsuit” through adding declaratory and injunctive relief. Pet. at 19. The request for declaratory and injunctive relief has been identical in each iteration of the Complaint. *See* CP 5; CP 17; CP 269. If this request somehow implicated the terms of the CBA, Evergreen’s clock in moving to arbitrate ran from the filing of the first Complaint.<sup>3</sup>

Second, Evergreen vaguely argues that the forward-looking claims “would affect the terms and conditions of the nurses’ employment with the

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<sup>3</sup> Moreover, Plaintiffs repeatedly told the trial court there was no forward-looking injunctive relief sought. Rather they asked that Evergreen be enjoined from continuing to withhold wages due and owing for past unpaid missed breaks to December 31, 2016.

District, requiring arbitration under the CBA,” Pet. at 20, but does not argue *how* that implicates the CBA or requires arbitration.

The SAC, just like the two operative complaints before it, makes claims solely under the statute. The claims in the SAC are also *identical* to the prior iterations, with the exception of adding Ms. McFarland and extending the class period by 4 months. In moving to amend the complaint, Plaintiffs made clear that they only sought to change the claims in those two discrete ways. CP 257. As the trial court correctly concluded in denying Evergreen’s motion to compel (11/3/2017 VRP at 15):

[T]his claim has been brought from the get-go under the statute, it was pled initially under the statute, every reiteration of the complaint that the Court has allowed has been under the statute, none of it has been under the Collective Bargaining Agreement.

There was nothing new in the SAC that gave Evergreen an excuse, after litigating for nine months, to finally “evaluate what defenses were appropriate.” Pet. 19. This Court should affirm the appellate court’s decision and can do so solely based on this threshold finding that Evergreen waived any right to arbitrate.

## **2. Plaintiffs’ claims are not arbitrable**

Even had Evergreen not waived its right to compel arbitration, its motion was correctly denied because it has no right to compel arbitration. The appellate court correctly concluded that Plaintiffs’ meal and rest break

claims are *statutory* and are not arbitrable. Its decision should be affirmed.

**a. Plaintiffs' rest and meal break claims are statutory.**

Plaintiffs' claims are, and have always been, statutory. They claim Evergreen violated WAC 296-126-092 by failing to provide a meal break before the end of the fifth hour of work and failing to provide a 10-minute rest break for each four hours worked. *See* Complaints, CP 5, 17, 439.

**b. The arbitration clause is optional and narrow and does not "clearly and unmistakably" waive statutory claims.**

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *See, Hill v. Garda*, 179 Wn.2d 47, 54 (2013); *Volt Info. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248 (1989).

Where, like here, an arbitration clause is contained in a CBA rather than in a bilateral employment contract, an employee retains the ability to enforce her statutory rights in court unless the CBA's arbitration clause "explicitly states" in "clear and unmistakable language" that employees have waived their ability to enforce statutory rights in court. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80, 119 S.Ct. 391 (1998). The usual "presumption" in favor of arbitration does not apply to statutory claims, on which labor arbitrators possess no special expertise. *Id.* at 78. And in fact, the opposite presumption applies in cases involving statutory rights; the right to a judicial forum is *preserved* unless it is "clearly and

unmistakably” waived. *Id.* at 79-80 (“not only is petitioner’s statutory claim not subject to the presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear”).

The arbitration clause in this CBA between WSNA and Evergreen is *narrow and optional*. The CBA’s grievance procedure narrowly limits grievances to “an alleged breach of the *express terms* and conditions of the *Agreement*.” CP 106 (emphasis added).<sup>4</sup>

And the CBA’s arbitration clause is *optional*, to be invoked by the union *at its discretion*. CP 107 (“If the grievance is not settled on the basis of the foregoing procedures, the *Association may* submit the issue in writing to final and binding arbitration”)(emphasis added).<sup>5</sup>

Notably, there is *no real dispute* that the CBA’s arbitration agreement does not mention, let alone waive state law claims. As both the trial court and Court of Appeals correctly held, *and Evergreen itself admits*, the CBA’s grievance and arbitration procedure on its face only applies to claims for breach of the CBA, *not* to claims for violations of

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<sup>4</sup> *Cf. Matthews v. Denver Newspaper*, 649 F.3d 1199, 1207 (11th Cir. 2011)(holding that it could not “be argued that the arbitration agreement required submission of statutory claims...[where by] its own terms, the arbitration agreement applied only to disagreements ‘as to the interpretation, application or constructions of *this contract*’”(emphasis in original).

<sup>5</sup> Compare to *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258-59, 129 S.Ct. 1456 (2009)(finding arbitration agreement waived ability to enforce statutory claims in court because CBA’s arbitration procedure explicitly referenced the ADEA and set up “arbitration procedures...as the sole and exclusive remedy for violations”).

Washington law. See CP 1147-48, 30(b)(6) deposition of Evergreen:

Q: Has Evergreen ever negotiated with WSNA to include within the grievance definition violations of state law?

A: No.

Q: To your knowledge, has Evergreen ever negotiated with WSNA to waive the WSNA employees' rights to sue Evergreen over violations of state law?

A: I have no knowledge of that.

**c. The PECBA does not apply nor change the outcome**

Evergreen attempts to flip the burden and argue that since statutory claims were not expressly *excluded* from the arbitration agreement, they must be included. Evergreen argues that, as a public entity, its CBA is subject to the Public Employee Collective Bargaining Act (“PECBA”) and under the PECBA, there is a presumption in favor of arbitration. Pet. at 16-17. Evergreen argues this Court articulated this principle in *Peninsula*.<sup>6</sup>

Evergreen is wrong for a number of reasons. First, the Court of Appeals correctly held, *relying directly on* (rather than contrary to) *Peninsula*, that the PECBA is not implicated where “only statutorily created private rights” are allegedly harmed by the employer’s conduct, rather than collective bargaining rights, which are the stated focus of the PECBA. Op. at 15 (citing *Peninsula*, 130 Wn.2d at 412).

Second, *Peninsula* did not flip the burden in favor of arbitration; rather, it reiterated the “*Steelworkers’ Trilogy*” rule which governs the

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<sup>6</sup> *Peninsula Sch. Dist. v. Pub. Sch. Emps.*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996).

analysis of whether a dispute is arbitrable pursuant to a CBA's grievance procedures. Importantly, under the "*Steelworkers' Trilogy*" rule, the court looks to the face of the CBA to determine whether the parties have agreed to arbitrate the particular claim. *Peninsula*, 130 Wn. 2d at 414. On the face of this CBA, the parties have not agreed to arbitrate statutory claims and arbitration of *any* claim is optional at the discretion of the union.

**d. Evergreen's arguments that Plaintiffs' claims are contractual are meritless.**

Because the CBA, on its face, does not encompass or require arbitration of statutory claims, Evergreen argues that Plaintiffs' claims are in fact contractual, not statutory. It claims that: 1) Ms. McFarland, through deposition, transformed the statutory claims in this lawsuit into claims under the CBA; and 2) Evergreen, as a public entity, modified the rest and meal break provisions in its CBA such that Plaintiffs' claims arise under the CBA. The Court of Appeals correctly rejected both arguments.

As to the first argument – that Ms. McFarland's testimony transformed the statutory claims in the case into contractual claims – a class member cannot transform the source of legal claims through deposition testimony, as discussed *infra* at Section III(1)(b). The only source that Evergreen cites for such a proposition is CR 15(b). The Court of Appeals properly concluded that a party cannot, under the guise of CR 15(b), "recast one party's claims at the behest of the opposing party based

on highly disputed characterizations of cherry-picked deposition testimony.” Op. at 8 n. 21.

Evergreen’s second argument fares no better. As a public entity, Evergreen is allowed under RCW 42.12.187 to “specifically vary from or supersede” the rest and meal break requirements in the WAC. Evergreen argues that the language in § 7.7 of the CBA, that “Nurses shall be allowed an unpaid meal period of one-half (1/2) hour” is an “inherent” modification, for nurses working 12-hour shifts, of WAC 296-126-092(2)’s timing requirement that a nurse not work more than five hours before or after a meal break. Pet. at 14-15.

First, an “inherent” modification of the statutory rest and meal requirement does not meet the requirement under RCW 42.12.187 that any modification be “specific.”<sup>7</sup> Thus, the Court of Appeals properly concluded that any “inherent,” implied modification does not affect Plaintiffs’ statutory claims under the WAC.

Second, the question facing the Court here is whether arbitration is *required* and should have been compelled. To determine this, the Court looks first and foremost to what disputes the parties *agreed* to submit to arbitration in the CBA. *Hill*, 179 Wn.2d at 54. The parties did not agree,

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<sup>7</sup> See *Frese v. Snohomish Cty.*, 129 Wn. App. 659, 669 (2005).

in this CBA, to submit to arbitration violations of “inherent” provisions of the CBA. The CBA covers only grievances as to “violations of the *express* terms of the Agreement.” CP 107. And even then, arbitration is *optional, not mandatory*. Thus, an inquiry into what various provisions of the CBA might “inherently” or by implication mean is irrelevant to the question of whether arbitration is required.<sup>8</sup>

Third, even if it were true that Evergreen could and did “inherently” modify WAC 296-126-092 by (1) limiting RNs to only one meal period per shift and (2) changing the timing of that meal period, this would modify only the *second* provision of WAC 296-126-092, which states that “(2) No employee shall be required to work more than five consecutive hours without a meal period.”

Plaintiffs’ meal period claim arises only under the *first* provision of WAC 296-126-092, which states that “(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift.”

Nothing in the CBA suggests a modification to this requirement.

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<sup>8</sup> Additionally, because WSNA and Evergreen specifically limited the arbitrator to deciding “allegations of express violations of the Agreement,” Evergreen is incorrect that the question of whether § 7.7 “inherently” conflicts with the WAC is a question of contract interpretation which must be submitted to arbitration. The arbitrator has no such authority under this CBA. And regardless, Evergreen is wrong. There is no interpretation needed relevant to the claims in this case. Evergreen has already admitted through its 30(b)(6) representative that it did not modify the timing of meal breaks. CP 1096-1097.

The only statutory claim Plaintiffs bring regarding the timing of a meal break is for RNs who did receive their meal break “*within the first 5 hours of their shift.*” SAC ¶ 20, CP 268 (emphasis added). The provision in the CBA, § 7.7, that “Nurses shall be allowed an unpaid meal period of one-half hour” on its face does not conflict with or modify this statutory requirement; it is consistent with WAC 296-126-092. This is especially so given the CBA’s prefatory statement that “Meal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092).” The provisions are coextensive, meaning that the contractual right does not displace the statutory right it mimics. *Wright*, 525 U.S. at 79.<sup>9</sup>

Evergreen urges this Court to go down various rabbit holes and beneath the express terms of the CBA. But the question facing the trial court, the Court of Appeals, and now this Court is whether the CBA’s arbitration provision requires the parties to arbitrate the claims in this case. It does not. The arbitration provision is *optional, not mandatory*, it allows arbitration only of allegations of “violations of the express provisions of the Agreement,” and it does not clearly and unmistakably waive the statutory claims that Plaintiffs bring in this case.

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<sup>9</sup> See also *Pyett*, 556 U.S. at 263 (holding that giving the arbitrator “authority to resolve only questions of contractual rights,” does not preclude bringing statutory claims in court “regardless of whether certain contractual rights are similar to, duplicative of, the substantive rights secured by [statutes].”).

#### IV. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

DATED: December 6, 2019

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**CERTIFICATE OF SERVICE**

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

DATED this 6th day of December, 2019, at Seattle, Washington.

*s/Rachael Tamngin*  
Rachael Tamngin, Legal Assistant

**BRESKIN, JOHNSON & TOWNSEND**

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