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SUPREME COURT  
STATE OF WASHINGTON  
12/6/2019 3:51 PM  
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CLERK

Supreme Court No. 97429-2

SUPREME COURT OF THE STATE OF WASHINGTON

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STEVEN BURNETT, Respondent,

v.

PAGLIACCI PIZZA, INC., Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER PAGLIACCI PIZZA, INC.

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## I. INTRODUCTION

Can Pagliacci's statutorily-favored arbitration policy be voided as substantively unconscionable based on a hypothetical unfair outcome on a provision neither party invoked? And can Pagliacci's statutorily-favored **"MANDATORY ARBITRATION POLICY"** (bold and all-caps in original) be voided as procedurally unconscionable because it was contained in an employee handbook that the employee was given, agreed to follow, and given the opportunity to review at home? The answer should be "no," and this Court should reverse the decision of the Court of Appeals.

This Court has confirmed Washington's strong presumption favoring arbitrability. The United States Supreme Court also repeatedly affirmed that agreements to arbitrate are statutorily favored. Nonetheless, the Court of Appeals invalidated Petitioner Pagliacci Pizza's clear, conspicuous and plain-English arbitration agreement in the employee handbook on procedural and substantive unconscionability grounds.

This decision upends formation of all arbitration agreements across Washington. Steven Burnett received Pagliacci's Little Book of Answers (the "Handbook") during new hire orientation. He contemporaneously signed an Employee Relationship Agreement incorporating the Handbook. He did not ask for more time to review, nor asked questions. The courts below held these steps were not enough to require arbitration. Left standing,

Washington employers will wonder how much time they must allow employees to review the handbook to bind them to terms of employment. If statutorily-favored arbitration agreements require special procedures to be enforced, must this higher standard apply to all other employment handbooks which do not enjoy such statutory favor?

The lower courts struck down the arbitration agreement as substantively unconscionable based upon dispute resolution that neither party invoked and a hypothetical outcome that did not arise. This opens the door to attacks on any contract containing a term that hypothetically *could* be unfair, even if the hypothetical is based on a contract provision having nothing to do with the dispute. The vast expansion of substantive unconscionability will flood the courts with challenges, not just to statutorily-favored arbitration clauses, but to all contracts.

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

Pagliacci is a pizzeria chain that employs hundreds of employees at dozens of locations in the greater Seattle, Washington area. CP 21. Burnett started as a delivery driver in October 2015. CP 58. During a 40-60 minute orientation, he received the Handbook and was told to read it at home. CP 142 at ¶ 8. The Handbook's arbitration policy is clear and conspicuous:

**-----MANDATORY ARBITRATION POLICY-----**  
The company has a mandatory arbitration policy with which you must comply for binding resolution of disputes without lawsuits. If

you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.

CP 71 (bold/all-caps in original). Burnett signed the Employee Relationship Agreement, agreeing he would “learn and comply with the rules and policies outlined in” the Handbook. CP 58. Burnett began and continued his employment thereafter. CP 3 at ¶ 3.1.

After Burnett’s termination, he sued Pagliacci claiming wage and hour violations on behalf of himself and a putative class of delivery driver employees. CP 1-20. Pagliacci moved to compel arbitration based on the Mandatory Arbitration Policy. CP 39-48. The trial court denied the motion. CP 227. Pagliacci moved for reconsideration, which was denied. CP 321-22. The Court of Appeals found an agreement to arbitrate, but held that it was procedurally and substantively unconscionable. *Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192, 202, 442 P.3d 1267, 1271 (2019).

### **III. ARGUMENT**

The Federal Arbitration Act (FAA) applies to all employment agreements except for limited jobs that do not apply here. *Zuver v. Airtouch Comm’ns*, 153 Wn.2d 293, 301, 103 P.3d 753, 759 (2004). The United

States Supreme Court has confirmed the strong policy favoring arbitration agreements. *KPMG LLP v. Cocchi*, 565 U.S. 18, 21, 132 S. Ct. 23, 25, 181 L.Ed.2d 323, 326 (2011); *see also Zuver*, 153 Wn.2d at 301, 103 P.3d at 758. Courts must apply a presumption favoring 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.” *Zuver*, 153 Wn.2d at 301, 103 P.3d at 758. (internal citation omitted). Arbitrability questions must be addressed with a “healthy regard for the federal policy favoring arbitration.” *KPMG*, 565 U.S. at 21, 132 S. Ct. at 25, 181 L.Ed.2d at 326 (internal citations omitted). Courts review motions to compel arbitration *de novo*. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 602, 293 P.3d 1197, 1199 (2013). Burnett, as the party opposing arbitration, bears the burden of proving that the arbitration agreement is not enforceable. *See Zuver*, 153 Wn.2d at 302, 103 P.3d 759.

**A. The Court of Appeals Created Unique New Obstacles to Arbitration by Imposing a Heightened Requirement to Enter into a Statutorily-Favored Arbitration Agreement.**

The touchstone for procedural unconscionability is whether the party lacked meaningful choice. *Adler*, 153 Wn.2d at 348-49, 103 P.3d at 783. Where an employee receives a copy of an employment handbook, training, and signs an agreement to comply with such policies, he has a meaningful choice to accept or reject its terms. *See Gaglidari*, 117 Wn.2d

at 433-34, P.2d 1366-67; *Romney*, 128 Wn. App. at 738, 349 P.3d at 37. The higher standard set by the Court of Appeals for arbitration shifted the burden from a party challenging to the party enforcing arbitration.

To prove procedural unconscionability, an employee must show, *at minimum*, that (1) the employer refused to respond to questions or concerns; (2) the employer placed undue pressure on the employee to sign the agreement without providing reasonable opportunity to consider the terms; or (3) that the terms of agreement were set forth in such a way that an average person could not understand. *Zuver*, 153 Wn.2d at 306-307, 103 P.3d at 761 (agreement held procedurally fair and enforceable). Burnett proves none of these facts. He could have asked questions during orientation. He could have asked for more time to review the handbook or delayed his start date. Pagliacci placed no undue pressure on him. The lower courts held the policy is written in plain English and easy to understand. *Burnett*, 9 Wn. App. 2d at 205, 442 P.3d at 1273; RP 24-25. Burnett failed to prove procedural unconscionability based on the *Zuver* test.

As with Burnett, in *Gaglidari*, actual receipt of the handbook, plus a signed acknowledgment of the handbook was enough to bind the employee. 117 Wn.2d at 435-36, 815 P.2d at 1367-68 (Plaintiff signed a form saying she read it and understood handbook). Many years into employment, Denny's notified her of an updated handbook. *Id.* at 435, 815

P.2d at 1367. This Court did not require proof that Ms. Gaglidari actually read this updated version; Ms. Gaglidari's "receipt of the handbook satisfied the requisites of contract formation." *Id.* Consideration was her continuation of employment. *Id.*; see also *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 768-69, 145 P.3d 1253, 1257 (2006).

Burnett was physically given a copy of the Handbook during a forty minute to one hour new employee orientation before he started working. CP 142 at ¶ 8; CP 60-73. The arbitration policy is two sentences long, in its own section with the header **MANDATORY ARBITRATION POLICY**. CP 71. It is written in plain English. *Burnett*, 9 Wn. App. at 205, 442 P.3d at 1273. It is on the same page, in the same font, as Pagliacci's "Unlawful Harassment Policy." CP 71. To hold in Burnett's favor, this Court would create a heightened standard for arbitration in violation of the FAA and prior precedent. Or the Court could overrule *Gaglidari* by holding the handbook constitutes "fine print." Employees would not have to arbitrate, but Pagliacci could not require employees to attend Preventing Harassment training. CP 71. This absurd result is contrary to public policy.

Burnett signed the Employee Relationship Agreement, then worked for Pagliacci with a copy of the Handbook in his possession until his employment was terminated two years later. The Court of Appeals correctly held the Handbook was incorporated by reference. *See Burnett*, 9 Wn. App.

2d at 201, 442 P.3d at 1271 (citing, *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000)). Burnett never claimed any undue influence, pressure or coercion. See *Retail Clerks Health & Welfare Tr. Funds v. Shopland Supermarket*, 96 Wn.2d 939, 944, 640 P.2d 1051, 1054 (1982) (duress must result from the other's wrongful or oppressive conduct; the mere fact that a contract is entered under stress or pecuniary necessity is insufficient). The Court of Appeals held that it was irrelevant that Burnett had access to the handbook during his employment if he was not given a reasonable opportunity to review it before he signed the Employee Relationship Agreement into which the Handbook was incorporated. *Burnett*, 9 Wn. App. at 205, 442 P.3d at 1273. In other words, the Mandatory Arbitration Policy was held to a higher standard than *Gaglihari*, directly violating Washington and federal law.

This outcome conflicts with other appellate decisions. In *Tjart v. Smith Barney, Inc.*, the Court upheld an arbitration clause contained in an “application” that she was “told to sign” after her employment began. 107 Wn. App. 885, 896-97, 28 P.3d 823, 829 (2001). The arbitration provision appeared in three different documents, but Ms. Tjart never received copies of her signed forms, and she signed the documents “relatively rapidly.” *Tjart*, 107 Wn. App. at 896, 28 P.3d at 829. The *Tjart* court reaffirmed the longstanding contract principle that “ignorance of the contents of a contract

does not affect the liability of the one who signs it.” *Id.* at 897, 28 P.3d at 829. Further, it did not matter whether Ms. Tjart had actually read the terms before assenting to them. *Id.* at 896, 28 P.3d at 829.

While Pagliacci’s arbitration policy remained throughout Burnett’s employment, even an employer’s unilateral policy change becomes effective upon “reasonable notice” uniformly given to affected employees, and “actual notice is reasonable notice.” *Govier*, 91 Wn. App. at 501, 957 P.2d at 817 (citing *Gaglidari*, 117 Wn.2d at 435, 815 P.2d at 1367). Ms. Govier received a substantively new employee agreement two years after she started working. *Govier*, 91 Wn. App. at 496, 957 P.2d at 814. Because Ms. Govier received the new agreement, her actual notice of its terms constituted sufficient notice to enforce it. *Id.* at 502, 957 P.2d at 816. Burnett had actual notice of the handbook, and it should be enforced.

The Court of Appeals’ decision is not limited to employment arbitration. The decision is a fundamental departure from the way all contracts are formed across the country. Does every contract now need a minimum review period to ensure the parties read all the terms? The Court of Appeals opens the door to such arguments and undermines all contracts if the enforcing party cannot prove that the other party actually read its terms. This is despite acknowledgment by the U.S. Supreme Court that “the times in which consumer contracts were anything other than adhesive are

long past.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47, 131 S. Ct. 1740, 1750 (2011) (enforcing arbitration agreement).

The Court of Appeals held that the particular circumstances surrounding the formation of this contract were procedurally unconscionable based, in part, on an interpretation of *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010). In *Mattingly*, the plaintiffs signed an agreement with Palmer Ridge to construct a home on a plot of land. 157 Wn. App. at 381-82, 238 P.3d at 507. They signed an application to enroll in a warranty program, acknowledging they had read a sample copy of the “warranty booklet.” *Id.* at 383, 238 P.3d at 508. Unlike Burnett, the Mattinglys did *not* receive any warranty booklet when they signed the agreement. Also unlike Burnett’s at-will employment, the Mattinglys were not free to walk away from the contract. *Mattingly* does not apply in a situation where, as here, the individual was given all of the pertinent documents but never read them and could walk away.

Burnett claims the takeaway for employers from the Court of Appeals decision is simple – that arbitration provisions must be placed in separate documents or otherwise conspicuously disclosed, and not in a handbook. This dual standard violates Washington and Federal law. Moreover, employees sign standalone documents without reading them. Standalone agreements often fail to describe terms in the plain English used

by Pagliacci. Handbooks, on the other hand, are the essential place where employment-related policies reside. Invalidating the Mandatory Arbitration Policy in Pagliacci’s Handbook would create the absurd result of invalidating the entire Handbook, voiding the free food option, paid time off rights and other benefits therein. Both employers and employees need the handbook to understand employment requirements. The Court of Appeals’ holding — that there needs to be *more* than actual notice to enforce the contract — would be disruptive and impractical.

**B. Employee Handbooks are Vital to Explaining Terms and Conditions of Employment to Employees, and Pagliacci’s Arbitration Requirement Therein Must be Enforced.**

Handbooks are the backbone of employee/employer communication. Why? Like Pagliacci’s, handbooks are written in common language. Handbooks encourage clarity. Employers expect employees to find answers to questions by looking at the primary place where policies are found—the handbook. Consequently, courts favor written policies like handbooks because businesses must be “adaptable and responsive to change.” *Govier*, 91 Wn. App. at 500-501, 957 P.2d at 816. If an employer was required to renegotiate each of its policies with each employee, it could find itself “obligated in ways that would lead to confusion and uncertainty,” “resulting [in] confusion and uncertainty would not be conducive to harmonious labor-management relations.” *Id.* Handbooks should be

encouraged. They should not (and for arbitration, cannot) be subject to dual standards as occurred below. *Burnett*, 9 Wn. App. 2d at 208-09, 442 P.3d at 1275.

Burnett consented to the Handbook by signing the one-page Employee Relationship Agreement, taking the job, and accepting benefits of employment. He asserts no facts supporting coercion. *See* CP 141-142. Burnett should be bound even if he did not read the Handbook during employment. Otherwise, employers will speculate what is required to bind employees to its workplace policies. Unlike other contracts, a forty minute to one-hour new hire orientation training will be insufficient to enforce absent proof that the employee read each section. Employees like Burnett will be able to circumvent rules by claiming they received but did not read the agreement. Is an employer now required to obtain proof, such as video evidence, that its employees read all of the terms of its employee documents? Must employees verbally confirm that they understand each section? The burden of proof effectively shifts from the employee challenging a provision to the employer to prove that employee agreements are binding. This is also a burden on employees. If an employer cautiously requires employees to possess the Handbook for a week before starting employment, workers receive one week less wages and benefits.

Pagliacci's policy is in plain view, separately bolded, in the best communication tool. If a handbook states, e.g., that vacation time will be paid upon termination, Washington law requires such payment. *See Walters v. Ctr. Elec.*, 8 Wn. App. 322, 322, 506 P.2d 883, 884 (1973). Just as employees will consult the handbook for vacation rights, the Handbook also creates the arbitral remedy.

If there is a distinguishing factor, it is that arbitration must be favored, not held to a tougher standard. Our highest courts have repeatedly enforced arbitration agreements, emphasizing the strong public policy in favor of arbitration. *See e.g., Epic Systems*, 138 S.Ct. 1612, 1621, 200 L. Ed. 2d 889, 899; *AT&T Mobility*, 563 U.S. 333, 131 S. Ct. 1740. “[C]ourts may not rely on the uniqueness of agreements to arbitrate as justification for imposing special requirements.” *Zuver*, 153 Wn.2d at 315 n.12, 103 P.3d at 766 (citing *Perry v. Thomas*, 482 U.S. 483, 492, 107 S. Ct. 2520, 2526-27 (1987)); *see also, Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773, 779-80 (2004); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (FAA's purpose is to place arbitration agreements on the same footing as other contracts). Arbitration agreements must be treated at least the same as other contracts, and otherwise presumed. The same legal standard must apply to all other provisions in Pagliacci's handbook. Invalidating based on procedural

unconscionability will undermine employee handbooks as binding terms and conditions of employment for employers and employees.

**C. Pagliacci’s Internal Dispute Resolution Policy Was Not Invoked as a Defense to Arbitration and Cannot Void an Entire Arbitration Agreement as Substantively Unconscionable Based on Hypothetical Outcomes that Did Not Occur.**

Requiring an internal dispute resolution policy before arbitration cannot void an entire arbitration agreement as substantively unconscionable. But the Court of Appeals held exactly that—speculating that Pagliacci’s F.A.I.R. Policy was unconscionable because it might bar terminated employees from bringing claims or shorten the time period to bring claims. *Burnett*, 9 Wn. App. 2d at 214, 442 P.3d at 1278. The lower court focused on a provision was not invoked by either Burnett or Pagliacci. Had Pagliacci tried to prevent arbitration based on this policy, the default remedy is to sever and enforce arbitration.

The F.A.I.R. Policy requires existing employees to report concerns to a supervisor before submitting claims to arbitration. CP 70. If the supervisor does not resolve the matter to the employee’s satisfaction, the employee can request a conciliation with another person. *Id.* Separately, the Mandatory Arbitration Policy provides that an employee must submit any disputes in accordance with the F.A.I.R. Policy before submitting the dispute to binding arbitration before a neutral arbitrator. CP 71.

The F.A.I.R. Policy is not the type of provision this Court has held substantively unconscionable. In *Zuver*, this Court held that the arbitration clause unfairly barred *Zuver* from seeking punitive or exemplary damages, but permitted the employer to collect such damages. 153 Wn.2d at 318-319, 103 P.3d at 767 (footnote omitted). The dissent in *Zuver* warned this analysis would open the door to claims whenever only one party to an employment arbitration agreement was constrained under one term, and that it would lead to the erosion of arbitration agreements in the employment context. *Id.* at 323, 103 P.3d at 770. The solution was to sever the unconscionable term and enforce the remainder. *Id.* at 320, 103 P.3d at 768. In *Adler*, the arbitration agreement contained a fee-splitting provision this Court held effectively prohibited *Adler* from bringing his claims. 153 Wn.3d 331, 352-353, 103 P.3d 773, 785. Again, this Court severed the unconscionable terms. *Adler*, 153 Wn.2d at 359-60, 103 P.3d at 788-89. In *Gandee*, the agreement required arbitration in California, which this Court held was prohibitively expensive. 176 Wn.2d 598, 604-605; 293 P.3d 1197, 1200. In *Hill v. Garda CL Northwest, Inc.*, this Court held an arbitration clause substantively unconscionable because it reduced the statute of limitations from three years to fourteen days, imposed a limit on employees' ability to recover back pay, and imposed arbitration cost-sharing requirements that effectively eliminated the employees' ability to litigate

their claims. 179 Wn.2d 47, 55-58, 308 P.3d 635, 638-40 (2013). Even in cases where this Court held that severance would have effectively rewritten the contract, or left little of what was agreed, it acknowledged “severance is the usual remedy for such unconscionable terms.” *Gandee*, 176 Wn.2d at 607, 293 P.3d at 1201-1202; *Hill*, 179 Wn.2d at 58, 308 P.3d at 640.

Does a mandatory internal dispute process shock the conscience? Pagliacci’s policies limit no substantive rights, remedies, damages, costs, nor statute(s) of limitation. The F.A.I.R. Policy merely requires current employees to attempt internal resolution before bringing a claim in arbitration. Courts should encourage such internal dispute resolution policies as a matter of public policy to encourage direct employer/employee communication to resolve disputes, and reduce court or arbitral litigation. Washington’s legislature established alternative dispute resolution programs to provide forums in which individuals could resolve disputes in an “informal and less adversarial atmosphere.” *See* Revised Code of Washington 7.75.010; *see also* RCW 7.70.100 (mandatory mediation of healthcare claims); CR 53.4 (procedures implementing same). Certain civil actions must be brought to arbitration. *See* RCW 7.06.010. Numerous counties require pretrial mediation. *See* King County LR 16(b). Even if such internal dispute process could shorten the statute of limitations here, if the employer engaged in fraudulent or misleading conduct, a court or arbitrator

could equitably toll the limitations period. *See e.g., Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791, 797 (1998) (internal citation omitted). Alternative dispute methods or mediation do not shock the conscience.

The Court of Appeals held that the F.A.I.R. Policy barred claims for terminated employees and would reduce the time limit in which employees could bring claims if the internal dispute process outlasted the statute of limitations. But as this Court has held, where it is “mere speculation” to assume a potential outcome, the term cannot be substantively unconscionable. *See Zuver*, 153 Wn.2d at 312, 103 P.3d at 764 (holding it was mere speculation to assume that an arbitrator would disregard case law to deny Zuver’s attorney’s fees.) Instead, courts should read contracts with a practical and reasonable interpretation, not one that would lead to absurd results. *See Forest Mktg. Enters. V. Dep’t of Natural Res.*, 125 Wn. App. 126, 132, 104 P.3d 40, 43 (2005). The only reasonable interpretation here is that the F.A.I.R. Policy applies to current employees for whom they have a supervisor to report. Burnett’s argument that it would limit a former employee’s ability to sue is inapposite because he filed his lawsuit without resorting to the F.A.I.R. Policy. Pagliacci never argued that Burnett had to invoke the internal dispute policy before suing. It was impossible for the statute of limitations to have run even if he filed a claim at the start of his employment because he was employed for less than the three year

limitations period. *See* RCW 4.16.080(2). Courts should not find contract provisions unconscionable because of a hypothetical outcome where the opposite actually occurred. Other courts have rejected this analysis. *See Zaborowski v. MHN Gov't Servs.*, 936 F. Supp. 2d 1145, 1156 (N.D. Cal. 2013); *Wallace v. Red Bull Distrib. Co.*, 958 F. Supp. 2d 811, 825-26 (N.D. Ohio 2013). If the lower court decision stands, all contracts could be invalidated upon speculation that a provision might be abused by a party acting in bad faith, even if those events did not or could never occur.

Even if this internal dispute resolution policy is substantively unconscionable, the proper remedy is severance. *See Zuver*, 153 Wn.2d at 320, 103 P.3d at 768-69. This Court severed two substantively unconscionable provisions and enforced an arbitration agreement, holding: “the primary thrust of [the parties’] agreement is the agreement to arbitrate. . . . we can sever the unconscionable attorney fees and limitations provisions without disturbing the primary intent of the parties to arbitrate their disputes.” *Adler*, 153 Wn.2d at 359-60, 103 P.3d at 788-89. “[Pagliacci] has a mandatory arbitration policy with which you must comply for binding resolution of disputes without lawsuits.” CP 71. The strong public policy favoring arbitration and this Court’s prior rulings compel enforcement.

**D. A Mandatory Arbitration Policy is Not Substantively Unconscionable Simply Because It is Limited to Claims Only the Employee is Likely to Bring.**

Burnett raised a new issue in its Response to Pagliacci's Petition for Review that the Court of Appeals misread *Zuver*, and Pagliacci's Mandatory Arbitration Policy is unconscionable because it requires the weaker party to arbitrate its claims, while permitting the stronger party to take any claim to court. Response to Petition for Review for Respondent at 17. This is precisely the type of argument the dissent warned of in *Zuver*. 153 Wn.2d at 323, 103 P.3d at 770. *Zuver* held that identical obligations are not required. *Zuver*, 153 Wn.2d at 317, 103 P.3d at 766-67. The United States Supreme Court upheld limited-scope arbitration. *KPMG*, 565 U.S. at 22, 132 S. Ct. at 26, 181 L.Ed.2d at 327.

Once a Pagliacci employee files an arbitration claim, Pagliacci must arbitrate it. The requirement to arbitrate the identified claims is borne by both parties and is necessarily mutual. *See Govier*, 91 Wn. App. at 499, 957 P.2d at 815. An employee agrees to bring only certain specified claims into arbitration; the employee is free to bring any unidentified claims in a court of law. As the U.S. Supreme Court confirmed, parties are required to litigate simultaneously in separate forums if certain claims are arbitrable and others are not. *KPMG*, 565 U.S. at 19, 132 S. Ct. at 323, 181 L.Ed.2d at 325.

Contrary to *KPMG* and *Zuver*, Burnett contends that the absence of identical language bars enforcement. But parties to an agreement are not required to have “identical” or “mirror” obligations. *Zuver*, 153 Wn.2d at 317 n. 16, 103 P.3d at 766-67; *Romney*, 186 Wn. App. at 742, 349 P.3d at 39. The Court of Appeals correctly analyzed this issue, and this Court should affirm that holding. It should not contravene *Zuver* and *Gaglidari* based on since-abrogated, non-Washington cases on which Burnett relies. See e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669 (2000), *abrogated by AT&T Mobility*, 563 U.S. 333, 131 S. Ct. 1740. This Court rejected a comparable argument in *Adler*. 153 Wn.2d at 344, n.6, 103 P.3d at 781. This Court should rule consistently with the Court of Appeals and U.S. Supreme Court decisions that a lack of identical or mirror obligations does not render an arbitration provision substantively unconscionable.

**E. The Court of Appeals Correctly Found No Arguments Were Waived.**

The Court of Appeals properly addressed the issues presented on the merits. Citing new case law or replying to an argument raised for the first time by Burnett does not constitute a waiver. See *Wilcox v. Lexington Eye Inst.*, 128 Wn. App. 234, 241, 122 P.3d 729, 732 (2005).

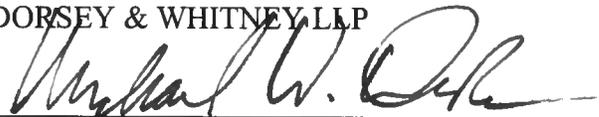
#### IV. CONCLUSION

This Court has repeatedly emphasized Washington's strong public policy and a presumption favoring arbitrability. The United States Supreme Court enforced arbitration agreements nineteen times since 2000. Pagliacci's simple, plain-English arbitration provision, incorporated by the one-page Employee Relationship Agreement, created a binding duty to arbitrate. The unique new standard set below violates State and Federal law, and undermines the strong public policy favoring arbitration. Burnett's proposed new standard would fatally undermine rights of all parties to enter into binding contracts on procedural grounds alone. Further, Pagliacci's fair internal dispute resolution policy should also be encouraged as a way of reducing claims brought in court or arbitration. If mandatory mediation shocks the conscience, the requirement should be easily severed from this two-sentence arbitration clause. Pagliacci respectfully requests that Burnett be ordered to arbitrate his claims.

DATED December 6, 2019.

Respectfully submitted,

DORSEY & WHITNEY LLP



Michael W. Droke, WSBA #25972  
*Attorneys for Petitioner Pagliacci  
Pizza, Inc.*

## **APPENDIX**

1. Pagliacci Mandatory Arbitration Policy
2. Pagliacci Employee Relationship Agreement Signed by Steven Burnett

## MANDATORY ARBITRATION POLICY

The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.

## UNLAWFUL HARASSMENT POLICY

The company has a mandatory policy with which you must comply concerning unlawful discrimination and harassment which is printed here in full. In accordance with applicable law, Pagliacci Pizza prohibits discrimination and harassment because of sex, race, color, national origin, ancestry, religion, creed, physical or mental disability, age, sexual orientation, gender identity or any other basis protected by federal, state or local law. All such conduct is unlawful and will not be tolerated. All employees are required to attend a Preventing Harassment in the Workplace class within the first 3 months of their employment.

### SEXUAL HARASSMENT DEFINED

Applicable state and federal law defines sexual harassment as unwanted sexual advances, requests for sexual favors or visual, verbal or physical conduct of a sexual nature when: (1) submission to the conduct is made a term or condition of employment; or (2) submission to or rejection of the conduct is used as basis for employment decisions affecting the individual; or (3) the conduct has the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile or offensive working environment. This definition includes many forms of offensive behavior. The following is a partial list: (a) unwanted sexual advances; (b) offering employment benefits in exchange for sexual favors; (c) making or threatening reprisals after a negative response to sexual advances; (d) visual conduct such as leering, making sexual gestures or displaying sexually

suggestive objects, pictures, cartoons or posters; (e) verbal conduct such as making or using derogatory comments, epithets, slurs, sexually explicit jokes or comments about any employee's body or dress; (f) verbal sexual advances or propositions; (g) verbal abuse of a sexual nature, graphic verbal commentary about an individual's body, sexually degrading words to describe an individual or suggestive or obscene letters, notes or invitations; (h) physical conduct such as touching, assault or impeding or blocking movements; and (i) retaliation for reporting harassment or threatening to report harassment. It is unlawful for males to sexually harass females or other males, and for females to sexually harass males or other females. Sexual harassment on the job is unlawful whether it involves coworker harassment, harassment by a manager or by persons doing business with or for Pagliacci Pizza.

### OTHER TYPES OF HARASSMENT

Prohibited harassment on the basis of race, color, national origin, ancestry, religion, creed, physical or mental disability, age, sexual orientation or any other protected basis, includes behavior similar to sexual harassment, such as (a) verbal conduct such as threats, epithets, derogatory comments or slurs; (b)

visual conduct such as derogatory posters, photographs, cartoons, drawings or gestures; (c) physical conduct such as assault, unwanted touching or blocking normal movement; and (d) retaliation for reporting harassment or threatening to report harassment.

## PAGLIACCI PIZZA'S COMPLAINT PROCEDURE

Pagliacci Pizza's complaint procedure provides for an immediate, thorough and objective investigation of any employee's claim of unlawful or prohibited discrimination or harassment, appropriate disciplinary action against one found to have engaged in prohibited conduct and appropriate remedies for any employee who is a victim of the conduct. A claim of harassment may exist even if the employee has not lost a job or some economic benefit. (A) If you believe you have been harassed or discriminated on the job, or if you are aware of such harassment or discrimination of others, you must provide a written or verbal complaint to one or more of the following persons as soon as possible - any operations manager of Pagliacci Pizza, the Pagliacci Pizza Legal Counsel or to the owners of Pagliacci Pizza. Your complaint must be as detailed as possible, including the names of individuals involved, the names of any witnesses, direct quotations when language is relevant, and copies of any documentary evidence (notes, pictures, cartoons, etc). (B) Applicable law also prohibits retaliation against any employee by another employee or by Pagliacci Pizza for using this complaint procedure or for filing, testifying, assisting or participating in any manner in any

investigation, proceeding or hearing conducted by a governmental enforcement agency. Additionally, Pagliacci Pizza will not knowingly permit any retaliation against any employee who complains of prohibited discrimination or harassment or who participates in any investigation. (C) All such incidents of prohibited discrimination or harassment that are reported will be investigated. Pagliacci Pizza will immediately undertake or direct an effective, thorough and objective investigation of the allegations. The investigation will be completed and a determination regarding the allegations will be made and communicated to the employee who complained and to the accused person(s). (D) If Pagliacci Pizza determines that prohibited discrimination or harassment has occurred, Pagliacci Pizza will take effective remedial action commensurate with the circumstances. Appropriate action will also be taken to deter future discrimination or harassment. If a complaint is substantiated, appropriate disciplinary action, up to and including discharge, will be taken. The fact that action is taken against the accused will be communicated to the employee who complained.

### LIABILITY FOR HARASSMENT

Any employee of Pagliacci Pizza, whether a coworker or manager, who is found to have engaged in prohibited discrimination or harassment is subject to disciplinary action, up to and including discharge from employment. Any employee who engages in prohibited discrimination or harassment, including any manager who knew about it but took no action to stop it, may be held personally liable for

monetary damages. Pagliacci Pizza does not consider conduct in violation of this policy to be within the course and scope of employment or the direct consequences of the discharge of one's duties. Accordingly, to the extent permitted by law, Pagliacci Pizza reserves the right not to provide a defense or pay damages assessed against employees for conduct in violation of this policy.



# EMPLOYEE RELATIONSHIP AGREEMENT

## • MY COMMITMENT •

At Pagliacci Pizza respect, dignity and fairness are intended to be a two-way street. The following agreements and their written policies help make that happen and in consideration of my employment by Pagliacci Pizza, I agree to comply with them.

## • YOUR EMPLOYER •

"Pagliacci Pizza" is a trade name. Each location (e.g., the commissary, the phone center, support central, each pizzeria and each delivery kitchen) that uses the trade name "Pagliacci Pizza" is owned by "Pagliacci Pizza, Inc."

## • RULES AND POLICIES •

On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR Policy. We will on occasion change the policies and procedures contained in this employee handbook. The newest handbook supersedes any prior handbook or policy notices issued by Pagliacci Pizza.

## • AT WILL EMPLOYMENT •

Your employment at Pagliacci Pizza is and will remain "at will" meaning that either you or your employer may terminate your employment at any time and in any manner without prior notice or warning and without cause.

## • ACCOUNTABILITY •

If you willfully fail to follow a Pagliacci Pizza rule or policy regarding cash handling, check acceptance, gift certificates, tokens, credit cards, debit cards, or other cash equivalents and as a result have a till shortage (or if you otherwise owe money to Pagliacci Pizza), you hereby authorize the amount thereof to be deducted from your pay (and any unpaid balance thereof to be deducted from your last paycheck). If you do not return non-cash property of Pagliacci Pizza that comes into your possession, you hereby authorize the cost thereof to be deducted from your pay (and any unpaid balance thereof to be deducted from your last paycheck).

## • PRESENT WHILE NOT CLOCKED IN •

If your presence at the work place while not "clocked in" is voluntary (perhaps immediately before or after your shift to, enjoy your FAB Benefits), you are not entitled to be paid for that time. If your presence at the work place while not "clocked in" is at the instruction of your supervisor (perhaps for an employee meeting), you are entitled to be paid for that time. To confirm that your presence while not "clocked in" is at the instruction of your supervisor and to cause payroll to pay you for that time, the practice at Pagliacci Pizza, with which you agree to comply, is to use a "sign-in sheet" which you get from your supervisor and sign and which the supervisor then sends to payroll.

## • INCONSISTENCIES IN HOURS/PAY/BREAKS •

You understand that Pagliacci Pizza wants you to be paid for all time you work (which includes all time your work requires you to be at the work place) and that Pagliacci Pizza wants you to have the breaks described in the FAB package or Basic Package selected by you. You agree to promptly inform Human Resources (phone 206.652.0877) if at any time (a) you do not receive or are encouraged by your supervisor not to take the breaks to which you are entitled, (b) you are not paid for all time you work (which includes all time your work requires you to be at the work place), (c) you are required or encouraged by your supervisor not to clock in for time worked (other than times for which you have signed a sign-in sheet) or (d) you are required or encouraged by your supervisor not to sign a "sign-in sheet" for time you are at the work place at the instruction of your supervisor but not clocked in, or (e) your supervisor precludes or discourages you from having the FAB Benefits to which you are entitled, if any.

## • NO AUTHORITY TO MODIFY •

No persons have the authority to agree to any change in any of the foregoing on behalf of your employer and such authority may be granted only pursuant to specific written joint resolution by the ownership and governing board of your employer.

## • EMPLOYMENT •

Pagliacci Pizza, Inc., agrees to employ you and you agree to work for it. For good and valuable consideration, the receipt of which is hereby acknowledged, you agree to all the foregoing. This agreement is effective from and after the date of your first shift.

• YOU •	• PAGLIACCI PIZZA •
Your name (printed) <u>Stephan B. Bussell</u>	Benefits Administrator <u>[Signature]</u>
Your signature <u>[Signature]</u>	Date <u>10/19/15</u>
Date <u>10/16/2015</u>	

FILE WITH BENEFITS ADMINISTRATOR

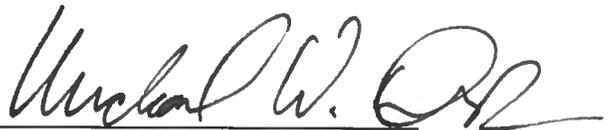
**CERTIFICATE OF SERVICE**

I certify that on December 6, 2019, I caused a true copy of the foregoing Supplemental Brief on the following, by the method indicated:

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DATED this 6<sup>th</sup> day of December, 2019.



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**December 06, 2019 - 3:51 PM**

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