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**WASHINGTON STATE
SUPREME COURT**

No. 97429-2
Court of Appeals No. 78356-4-I

IN THE SUPREME COURT OF WASHINGTON

STEVEN BURNETT, individually and on behalf of all others similarly
situated,

Respondent,

v.

PAGLIACCI PIZZA, INC.,

Petitioner.

RESPONDENT'S RESPONSE TO AMICI CURIAE BRIEFS

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I. INTRODUCTION

Mr. Burnett urges the Court to reject the arguments of the Washington Hospitality Association (WHA). WHA's arguments are not based on the facts of this case but on alarmist hypotheticals and overstatements of the Court of Appeals' correct decision. The Court should adopt the persuasive arguments of Public Justice, the Washington State Association for Justice (WSAJ), and the Washington Employment Lawyers Association (WELA).

II. RESPONSE TO BRIEF OF WHA

The Washington Hospitality Association's brief is built on mischaracterizations of the Court of Appeals' decision and overstatements of the decision's reach. It offers no persuasive reasons to rule that Pagliacci's Mandatory Arbitration Policy is enforceable.

WHA points to the strong state and federal policy favoring enforcement of arbitration agreements reflected in both the Washington Arbitration Act and the Federal Arbitration Act. "This policy does not, however, lessen [a] court's responsibility to determine whether the arbitration contract is valid." *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 735, 349 P.3d 32 (2015) (citing *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013)). Mr. Burnett's argument is that no agreement to arbitrate was formed because he never assented to the

arbitration clause or, if an agreement was formed, it is unconscionable. Well-established Washington contract law governs those issues without regard to any presumption favoring arbitration. *See, e.g., Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) (“If the parties contest the existence of an arbitration agreement, the presumption in favor of arbitrability does not apply.”); *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (Arbitration is “a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995))).

In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621–25, 200 L. Ed. 2d 889 (2018), the United States Supreme Court held that the National Labor Relations Act does not bar class action waivers in arbitration clauses in employment contracts, so there is no conflict between the NLRA and the FAA’s requirement that arbitration clauses be enforced according to their terms. But *Epic Systems* acknowledges the well-established rule that Section 2 of the FAA “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses such as fraud, duress, or unconscionability.’” *Id.* at 1622 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742

(2011)). *Epic Systems* does not address unconscionability doctrines. And there are no arguments in this case based on any class action waiver because there is no such waiver in Pagliacci's Mandatory Arbitration Policy.

Moreover, neither Pagliacci nor its amicus establish that the FAA should apply in this case given the Mandatory Arbitration Policy's selection of the Washington Arbitration Act as the governing law.

A. The arbitration clause is procedurally unconscionable because Pagliacci hid it from employees, not merely because it is part of an adhesion contract.

The Court of Appeals correctly recognized that “[a]lthough not determinative, if an agreement constitutes an adhesion contract, that supports a finding that the agreement is procedurally unconscionable.” Opinion at 9 (discussing and quoting *Zuver v. Airtouch Comme 'ns*, 153 Wn.2d 293, 304–305, 103 P.3d 753 (2004)).

WHA says that under *Zuver*, an arbitration clause in an adhesion contract is procedurally unconscionable when the employer “placed undue pressure on [the employee] to sign the agreement without providing [the employee] with a reasonable opportunity to consider the terms” or the “terms of the agreement were set forth in such a way that an average person could not understand them.” WHA Br. at 4 (quoting *Zuver*, 153 Wn.2d at 306–7). This standard is met under the facts of this case.

As the Court of Appeals explained, nothing in the Employee Relationship Agreement Mr. Burnett signed “suggests that the Little Book contains an arbitration clause, and even the Little Book’s own table of contents describes the section in which the arbitration policy appears as the ‘Mutual Fairness *Benefits*’ section, giving no indication to the reader that it might contain a one-way arbitration clause.” Opinion at 12 (emphasis added by court); *see also* CP 58, 62. Furthermore, “Burnett was not afforded an opportunity to review the Little Book before signing the [Employee Relationship Agreement]: Burnett testified that he was told to sign the [Employee Relationship Agreement] to begin work and instructed to read the Little Book at home.” Opinion at 11; *see also* CP 142 at ¶ 8. This instruction was consistent with the Employee Relationship Agreement’s direction that “[o]n your own initiative you [the employee] will learn and comply with the rules and policies outlined in our Little Book of Answers.” CP 58 (Section entitled RULES AND POLICIES). Finally, the Mandatory Arbitration Policy was buried “on page 18 of the 23-page Little Book, in the same font size and with the same formatting as surrounding sections.” Opinion at 11.

Because Pagliacci directed Burnett to sign an agreement that said nothing about arbitration yet claimed that his signature on that document formed an agreement to arbitrate, Pagliacci presented the arbitration clause

in a way that an average person could not understand it. Pagliacci also pressured Mr. Burnett to sign the purported agreement without giving him a reasonable opportunity to consider the arbitration clause by instructing him to sign the Employee Relationship Agreement at orientation in the pizzeria but read the Little Book of Answers, the only document to reference arbitration, at home.

In short, the Court of Appeals' Opinion does not rely "primarily" upon the fact that the Mandatory Arbitration Policy is part of an adhesion contract to find it unconscionable. *See* WHA Br. at 5. The court correctly applied *Zuver* and *Adler*, which hold that the "key inquiry for finding procedural unconscionability" is whether the employee "lacked meaningful choice." *Zuver*, 153 Wn.2d at 305; *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 348–49, 103 P.3d 773 (2004). Mr. Burnett never assented to the Mandatory Arbitration Policy because Pagliacci drafted the new-employee documents and set up an employee onboarding process that hid the arbitration clause from him.

The two unreported authorities cited by WHA have no relevance to the factual or legal issues in this case. In *Oakley v. GMRI, Inc.*, No. CV-13-042-RHW, 2013 WL 5433350, at *1 (E.D. Wash. Sept. 27, 2013), the employee signed a "Dispute Resolution Process Acknowledgement," which included a full paragraph acknowledging that disputes would be

subject to the company's "DRP." The "DRP handbook"—not a general employment handbook—contained additional details about the policy. *Id.* By contrast, the Employee Relationship Agreement Mr. Burnett signed merely said he would "learn and comply with the rules and policies outlined in our Little Book . . . including those that relate to . . . FAIR Policy." *See* Opinion at 2; CP 58. And the *Oakley* court did not address the unconscionability arguments raised by the employee because the arbitration clause contained an express delegation clause delegating the issue to the arbitrator. *Id.* at *2. There is no delegation clause in Pagliacci's Mandatory Arbitration Policy.

As for *Turner v. Vulcan, Inc.*, 190 Wn. App. 1048 (2015) (unpublished), that decision concerns an arbitration agreement presented in a stand-alone letter and has no relation to the facts presented here. *Id.* at *7. *Turner* simply applied *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 897, 28 P.3d 823 (2002), which the Court of Appeals' Opinion distinguishes at length. *See* Opinion at 12.

Finally, WHA contends that if Pagliacci's Mandatory Arbitration Policy is deemed procedurally unconscionable, employers will be "vulnerable" to arguments that "even standalone agreements presented on the first day of employment can never be enforced." WHA Br. at 6 (punctuation altered). This makes no sense. The key fact upon which Mr.

Burnett's procedural unconscionability arguments are built is that he never signed an agreement containing an arbitration clause. As WELA advocates, employers may avoid the procedural unconscionability that infects Pagliacci's agreement by clearly presenting arbitration clauses in standalone documents signed by employees. *See* WELA Br. at 14-15.

B. Pagliacci's F.A.I.R. Policy is not a mere pre-claim dispute resolution procedure.

WHA maintains the Court of Appeals' Opinion implies that "any pre-claim mandatory dispute resolution procedure is only advantageous to the employer and 'shocking to the conscience.'" WHA Br. at 9. But the court's decision addresses only the internal dispute resolution procedure Pagliacci established. That procedure involves a two-step process, whereby an employee is required to first "report the matter and all details" to his or her supervisor. Opinion at 3; CP 70. There is no exception for cases in which the supervisor has denied the employee the ability to take breaks, demanded off-the-clock work, discriminated against, or harassed the employee. Second, the employee must initiate non-binding Conciliation. *Id.* Then, "the F.A.I.R. Administrator will designate a responsible person at Pagliacci (who may be its owner) to meet face-to-face with you in a non-binding Conciliation." *Id.* There is no limit on how long this process may take. Finally, the F.A.I.R Policy contains a

“Limitations of Actions” section, which bars employees from bringing a claim in any forum, including arbitration, if the employee does not comply with “a step, rule or procedure in the F.A.I.R. Policy with respect to a claim.” *Id.* The Limitations of Actions further provides: “The limitations set forth in this paragraph shall not be subject to tolling, equitable or otherwise.” *Id.*

The Court of Appeals correctly concluded that the Limitations of Actions and Mandatory Arbitration Policy combine to act as “a complete bar to arbitration and suit” for former employees like Mr. Burnett because former employees cannot complete the first step of reporting to a supervisor. Opinion at 23. WHA does not argue that the plain language of Pagliacci’s policies is subject to any other interpretation. And it fails to explain how the “valid goal of promoting open workplace relations” is served by an informal pre-claim dispute resolution process that wholly deprives employees of their ability to bring a claim if they fail to satisfy a “step, rule or procedure” that is part of such a process. While other processes may benefit employers and employees, the prerequisites to arbitration Pagliacci created “unreasonably favor Pagliacci by limiting employees’ access to substantive remedies and discouraging them from pursuing valid claims.” Opinion at 1–2. The Court of Appeals correctly

found these provisions substantively unconscionable as required by this Court's precedent.

III. RESPONSE TO BRIEF OF PUBLIC JUSTICE

As shown in Public Justice's brief, many jurisdictions have held that wholly one-sided arbitration clauses like Pagliacci's are substantively unconscionable. Mr. Burnett agrees these persuasive authorities from around the country provide additional reasons to adopt the substantive unconscionability rule for which he advocates.¹ Self-serving arbitration schemes that allow the stronger, drafting party to take any claims it may have to court while requiring the weaker party to arbitrate its most valuable claims are unfairly one-sided and unconscionable. *See, e.g., Cordova v. World Fin. Corp. of N.M.*, 146 N.M. 256, 265, 208 P.3d 901 (2009).

In its objection to Public Justice's motion to file an amicus brief, Pagliacci argued that Public Justice's brief cited non-Washington cases taking differing approaches to the issue of one-way arbitration clauses. But the analysis in many of the cases Public Justice cites is consistent with

¹ Mr. Burnett understands that in identifying the decision of the "lower court" finding Pagliacci's Mandatory Arbitration Policy unenforceable because it is one-sided (Public Justice Br. at 1), Public Justice is referring to the trial court's decision on this issue. *See* CP 288 (Tr. 26:10-17 (describing the arbitration clause as "very, very one-sided" and stating it is "very unfair and wrong for one party to a contract to require that only the other side has to arbitrate, and that's what this does").

this Court's analysis in prior cases. In *Zuver*, for example, this Court reaffirmed that Washington does not require mutuality of obligation under a contract for the contract to be enforceable. 153 Wn.2d at 317. The Court nonetheless invalidated the challenged provision, a one-sided waiver of punitive damages, because the effect of the provision "is so one-sided and harsh that it is substantively unconscionable." *Id.* at 318; *see also Adler*, 153 Wn.2d at 351–52 (assuming arbitration agreement applying only to disputes brought by employees would be substantively unconscionable but finding agreement before it was not unilateral).

The West Virginia Supreme Court similarly addressed mutuality of obligation in *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 289, 373 S.E.2d 550 (2012). The court reasoned that while such mutuality is not required to form a contract, "an obligation that could be called unilateral, unbalanced, or non-reciprocal" may still be held unconscionable. In other words, the modern doctrine—that a lack of mutuality of obligation does not mean a contract is not supported by adequate consideration—in no way precludes a determination that a completely one-sided agreement is unconscionable.

The Restatement itself also recognizes the analytical difference between adequacy of consideration for purposes of formation and one-sidedness in the context of unconscionability. Under Section 79, "[i]f the

requirement of consideration is met, there is no additional requirement of . . . mutuality of obligation.” See *Restatement (Second) of Contracts* § 79(c). Section 79 is entitled “Adequacy of Consideration; Mutuality of Obligation” and is in Chapter 4 of the Restatement, dealing with “Formation of Contracts—Consideration.” But Section 208—the section addressing unconscionability—provides that while “[i]nadequacy of consideration does not itself invalidate a bargain . . . gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance.” *Restatement (Second) of Contracts* § 208 cmt. c. The Restatement supports Mr. Burnett’s position.

Even if this Court does not adopt a rule that precludes enforcement of all adhesion contract terms limiting only one party’s access to the courts, it should consider the one-sided nature of the arbitration clause as part of its substantive unconscionability analysis. The Tennessee Supreme Court, for example, uses a “flexible, case-by-case approach” to determine whether a one-way arbitration clause is unconscionable. See *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 755–56 (Tenn. 2015). In *Berent*, the Tennessee high court affirmed its earlier ruling in *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004), that a “*completely* one-sided” arbitration clause in an adhesion contract was unconscionable. *Id.* at 754–56 (emphasis in

original). But the court found the agreement before it was not completely one-sided; rather, the agreement required both parties to take their claims to arbitration but contained a carveout allowing both parties to seek injunctive relief. Accordingly, the court concluded the carveout was not unconscionable even though the stronger party was more likely to take advantage of it. *Id.* at 756–57. Here, by contrast, the arbitration clause *is* completely one-sided.

Pagliacci drafted an agreement reserving for itself: (1) self-help remedies;² (2) the ability to fire employees at will without any recourse to internal dispute resolution;³ and (3) the ability to bring any claim it may have against an employee in court.⁴ Meanwhile, Pagliacci requires its employees to bring any employment-related claims they may have in arbitration. CP 71. The agreement is completely unequal, and Pagliacci’s motion to compel arbitration (a request for specific performance) was properly rejected by both the trial court and the Court of Appeals. This Court should affirm and clarify that one-sided agreements like Pagliacci’s—imposed by the stronger party on the weaker party—are substantively unconscionable for the reasons set forth in Mr. Burnett’s

² CP 58 (section entitled “Accountability”).

³ CP 58 (section entitled “At Will Employment”) and CP 65 (section entitled “At Will Employment”).

⁴ CP 71 (Mandatory Arbitration Policy).

supplemental brief and the additional reasons set forth in Public Justice's brief.

IV. RESPONSE TO BRIEFS OF WELA AND WSAJ

Mr. Burnett agrees with the briefs filed by WELA and WSAJ. Pagliacci's argument that it may unilaterally impose mandatory arbitration on its employees via handbook must be rejected. As amici demonstrate, Pagliacci's proposed rule would allow employers to enforce not just arbitration clauses, but also onerous non-compete and confidentiality provisions, without obtaining the employee's assent to the terms.

No Washington court has held that a party in a superior bargaining position may impose on the weaker party a waiver of rights—either the right to pursue claims in court or the freedom to work for another company—without obtaining the weaker party's assent. Pagliacci's arguments contravene well-established principals governing the formation and enforcement of contracts.

As demonstrated by amici, Pagliacci's arguments fail to appreciate the fundamental differences between unilateral and bilateral contracts. WELA Br. at 8–12; WSAJ Br. at 7–12. "Contracts come in two forms: bilateral and unilateral. The vast majority of contracts are bilateral, where two parties exchange reciprocal promises and one party's promise provides consideration for that of the other party." *Sorti v. Univ. of Wash.*,

181 Wn.2d 28, 35, 330 P.3d 306 (2014). “[U]nder a unilateral contract, an offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by performance, and the contract then becomes executed.” *Multicare Med. Ctr. v. Dep’t of Soc. & Health Servs.*, 114 Wn.2d 572, 584, 790 P.2d 124 (1990). An agreement to arbitrate future claims is necessarily a bilateral agreement—each party must agree that should a claim falling within the scope of the arbitration agreement arise in the future, it will resolve the claim in arbitration. Pagliacci’s argument that this Court should find a binding agreement to arbitrate without reference to bilateral contract analysis is wrong. *See* Appellant’s Opening Br. at 16.

The determinative issue in this appeal is whether Pagliacci obtained Mr. Burnett’s consent to a one-sided arbitration clause in a manner that deprived him of meaningful choice. WSAJ correctly explains that no agreement to arbitrate was ever formed because Mr. Burnett had no notice of the arbitration clause before he purportedly accepted it by signing the Employee Relationship Agreement. WSAJ Br. at 7–14. And WELA correctly explains that even if an agreement was formed, it was formed in a procedurally unconscionable manner that precludes enforcement. WELA Br. at 12–17. Indeed, Pagliacci’s direction to Mr. Burnett to read at home (and off the clock) the Little Book of Answers was illegal, as well as unfair. *Id.* at 17.

Whether viewed through the lens of contract formation or procedural unconscionability, the result is the same—Pagliacci’s arbitration provision is unenforceable.

V. CONCLUSION

For the foregoing reasons, Mr. Burnett asks the Court to adopt the well-reasoned arguments of Public Justice, WSAJ, and WELA, and reject the unpersuasive and alarmist arguments of WHA. As argued by the majority of amici participating in the case, the decision denying enforcement of Pagliacci’s Mandatory Arbitration Policy should be affirmed.

RESPECTFULLY SUBMITTED AND DATED this 7th day of January, 2020.

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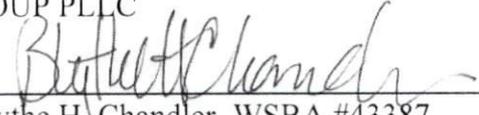
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Attached is Respondent's Response to Amici Curiae Briefs to be filed in *Steven Burnett v. Pagliacci Pizza, Inc.*, Supreme Court Case No. 94229-3.

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