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COURT OF APPEALS
DIVISION ONE
FEB 12 2016

No. 93655-2

No. 74024-5-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Roland Killian & Dennis Bailey, Appellants

v.

International Union of Local Operating Engineers, Local 609-A,
Defendant.

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Plaintiffs Roland Killian and Dennis Bailey, by and through counsel Chellie Hammack, requests the Court reverse the orders granting Defendant's Motion for Summary Judgment and denying Plaintiffs' Motion to Amend the Complaint and remand this case for trial. The statute of limitation applicable to the Unauthorized Practice of Law in the state of Washington is three years and there is no reason a labor union acting outside of the scope of their CBA should be given the advantage of a shorter six month statute of limitations. The applicable statute of limitations in the state of Washington for claims not assigned by statute with a specific time is two years pursuant to RCW 4.16.130. In addition, as set out below there are factual issues that should be left to a jury to resolve in Plaintiffs' cases.

Defendant Union, through its representative Mr. McBee, acted outside of the scope of its collective bargaining agreement ("CBA") and worked to settle Plaintiffs' non-union civil claims. Defendant Union did so knowing Plaintiffs were represented by private counsel and after providing assurances to both Plaintiffs and their counsel that Defendant Union would only work to mediate the claims legitimately within the scope of the CBA. The settlement agreement negotiated by Defendant Union did not contain the typical, boiler

plate, release of all claims provision. Defendant Union actually negotiated a specific amount of money allocated to these claims including a portion that was to be paid for private counsel's attorney fees. During his deposition, Mr. McBee acknowledged that Defendant Union had no authority to resolve Plaintiffs' non-union civil claims, that it was outside of the scope of the CBA, but still worked to do so and ultimately presented the amounts offered to Defendant Union's board for approval. Defendant Union's board voted to approve the amounts offered and voted to accept it in resolution of Plaintiffs' grievances. Mr. McBee advised Plaintiffs that the amount offered was a fair amount for their claims and he believed they should accept it. Defendant Union's actions put Plaintiffs in the position of either accepting the amounts offered, that is both the amount to resolve their union grievances and the amount to resolve their non-union civil claims, or losing the right to pursue their grievances. Plaintiffs contract with private counsel also included a provision that they agreed not to work to settle their claims without the assistance of counsel. Accepting the amount would have been a violation of Plaintiffs' contract with counsel. This created a conflict between Defendant Union, including Mr. McBee, and Plaintiffs. Mr. McBee's actions in attempting to negotiate a resolution of Plaintiffs' civil claims was outside of

the scope of the CBA and was the unauthorized practice of law. Mr. McBee is not an attorney, yet he negotiated to settle Plaintiffs' non-union civil claims including arriving at an amount for damages and attorney fees, advised Plaintiffs that the offer was a good one and then recommended Defendant Union's board accept the settlement putting Plaintiffs' in a tenuous position and creating a direct conflict. Defendant Union's actions were outside the scope of the CBA, no Washington case supports Defendant's argument and the applicable statute of limitations to a claim for the unauthorized practice of law is 3 years.

Further, Plaintiffs were never notified of the outcome of their grievance and the decision not to pursue arbitration by Defendant International Union of Operating Engineers, Local 609-A ("Defendant Union"). Both Plaintiffs had heard various stories regarding what Defendant Union's actions would be but receive no notice sufficient to allow them to ascertain with any certainty what the status was. Defendant Union voted at various times to both pursue arbitration and then not to pursue arbitration, they did so within a short time frame and refused to provide Plaintiffs with any written notice of the outcome despite repeated requests to do so. In addition, at one point apparently after actually accepting and signing a

settlement agreement, Defendant Union asked Plaintiffs if they wanted more time to attempt to settle their civil claims before Defendant Union accepted an offer of settlement. At the time Plaintiffs were not aware they had signed a settlement agreement when extending that offer to Plaintiffs but still continued to refuse to provide Plaintiffs any actual notice of the outcome of the grievance process. Plaintiffs were understandably confused and notice was never provided. Regardless, whether or not a reasonable person would find Plaintiffs had notice is a question of fact for a jury and not appropriate for resolution in summary judgment.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Court below erred in entering the order of August 3, 2015 granting Defendant International Union of Operating Engineers, Local 609-A's Motion for Summary Judgement dismissing Plaintiff Roland Killian's & Dennis Bailey's claims for Breach of Contract/Breach of Duty of Fair Representation and Negligent Unauthorized Practice of Law.

2. The Court below erred in entering the order of August 3, 2015 denying Plaintiffs' Killian & Bailey Motion to Amend Complaint holding any CPA claim would in substance be a Duty of Fair Representation claim

and barred by the applicable statute of limitations.

B. Issues Pertaining to Assignments of Error

1. Whether the three year statute of limitations applies to a claim for the Unauthorized Practice of Law when a labor union's actions were outside of its authority granted under the Collective Bargaining Agreement. (Assignments of Error 1).

2. Whether a Consumer Protection Act claim based upon unlawful conduct associated with the unauthorized practice of law relating to conduct engaged in outside of the scope of the Collective Bargaining Agreement is barred by a six month statute of limitations set out in RCW 41.56.160(1) & RCW 41.80.120(1) associated with administrative claims. (Assignment of Error 2).

3. Whether RCW 4.16.130 applies and establishes a two year statute of limitatons to Washington state claims for Breach of Duty of Fair Representation brought against a labor union. (Assignments of Error 1).

4. Whether and when Plaintiffs knew or reasonably should have known of all the essential elements of their causes of action is a question of fact for the jury. (Assignment of Error 1).

5. Whether and when Plaintiffs knew or reasonably should have

known of all the essential elements of their causes of action is a question of fact for the jury (Assignment of Error 1).

6. Whether Plaintiffs claims were tolled during intra-grievance procedures and if so, whether the applicable dates tolled are questions of fact for a jury (Assignment of Error 1).

7. Whether the Court should apply equitable remedies in tolling the statute of limitations when Plaintiffs were not provided written notice of the status of their grievances, were not supplied with the timeline for pursuing arbitration, were told Defendant Union voted to pursue arbitration and then that it had not, and then was told Defendant Union could request an extension of a deadline for pursuing the grievances when it made the statement knowing it had already settled the matter with Seattle Public Schools. (Assignment of Error 1).

III. STATEMENT OF THE CASE

A. Procedural Background

1. Filing of Plaintiff's complaints and consolidation.

These cases were filed as two separate cases on May 29, 2014. CP 1-12 & 974-985. The complaints raise claims against Defendant International Union of Operating Engineers, Local 609-A ("Defendant Union") for Breach

of Contract, Breach of Duty of Fair Representation and Negligent Unauthorized Practice of Law. CP 1-12 & 974-985.

The cases were consolidated by Court order on January, 23, 2015. CP 27-28. The initial complaints included claims against Seattle Public Schools ("SPS"). CP 1-12 & 974-985. SPS was later dismissed as a defendant. CP 29-31.

2. Trial Court's orders dismissing Plaintiffs' claims and denying Plaintiffs' Motion to Amend the Complaint to include a claim for violation of Washington's Consumer Protection Act.

On August 3, 2015, the trial court entered orders granting Defendant Union's Motion for Summary Judgment based upon statute of limitations. CP 966-968.[1] Although the order does not specify it, Defendant Union argued RCW 41.56.160(1), applicable to administrative procedures, applied to civil claims for breach of duty of fair representation against a union. CP 37. The same day the trial court entered an order denying Plaintiffs' Motion to Amend the Complaint to include a claim for violation of Washington's Consumer Protection Act. CP 971-973. As set out in Plaintiffs' initial Motion to Amend, "[t]he allegations supporting the unauthorized practice of law claims raised also support a CPA claim by the Plaintiffs." CPA 826. In denying Plaintiffs'

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1. There was no oral ruling provided in the case during hearing on the matter.

motion the trial court explained, "[a]ny CPA claim would in substance be a Duty of Fair Representation claim, and barred by the applicable statute of limitations." CP 972. Plaintiffs' filed a Notice of Appeal of both of these orders on September 2, 2015.

B. Summary of facts giving rise to Plaintiffs' claims.

1. History of Employment at Seattle Public Schools.

a. Plaintiff Roland Killian's employment with Seattle Public Schools.

In or about May 1999, Plaintiff Roland Killian began his employment with Seattle Public Schools ("SPS"). CP 209 (Dep. Killian, pg. 14:2-3). Plaintiff Killian was employed at SPS for approximately 13 1/2 years working his way up from an apprentice to a gardener to a grounds foreman. *Id.* (pg. 42:18-24). In his position as grounds foreman, he oversaw 15 other grounds personnel, or gardeners. *Id.* (pg. 45:14-47:24). Plaintiff Killian did not have management authority but acted more as a lead in managing the work load. *Id.* Plaintiff Killian's supervisor was Bruce Skowyra. *Id.* There were several gardeners under his lead including Plaintiff Dennis Bailey and Susan Wicker. *Id.* (pg. 47:25-48:6). Prior to September 2011, Plaintiff Killian had never received any disciplinary action during his employment with SPS. CP 161.

b. Plaintiff Dennis Bailey's employment with Seattle Public Schools.

Plaintiff Dennis Bailey began employment with SPS in May, 2006. CP 280 (Dep. Bailey, pgs. 14:24-15:1; 16:2-10). He began with SPS as a part-time employee in the grounds department and then soon thereafter was given a full-time position. *Id.*(pg. 14:2-6). Plaintiff Bailey reported to Roger Starzman. *Id.* (pg. 16:17-22). He was assigned to work with Sue Wicker, another SPS gardener. CP 291(pgs. 57:2-58:15).

2. Plaintiff Bailey lodges a sexual harassment complaint against co-worker Sue Wicker and Sue Wicker retaliates by lodging complaints against Plaintiff Bailey & Plaintiff Killian.

Plaintiff Bailey had been working with Sue Wicker for about 18 months. *Id.*, (pgs. 57:2-58:15). During that time Ms. Wicker made numerous sexual comments to Mr. Bailey that he found harassing and offensive. *Id.* As a result and because he wanted the conduct to end, Mr. Bailey went first to Plaintiff Killian. CP 292 (pg. 60:4-19). Plaintiff Killian then directed him to Bruce Skowyra, both Plaintiff Bailey's and Plaintiff Killian's direct management supervisor. *Id.* (pg. 60:4-18).

After the conflict arose between Plaintiff Bailey and Sue Wicker, Sue Wicker lodged a complaint against Plaintiff Bailey. CP 292 - 294 (pgs. 59:5-

10; 64:15-65:12). SPS acted to separate the two employees and assigned them their own vehicles. *Id.* (pg.58:4-12). Eventually SPS began an investigation of Ms. Wicker's complaint but ignored Plaintiff Bailey's complaint, at least initially. CP 287 (pgs. 39:4-40:3). SPS hired an investigator Eddie Hill to conduct the investigation. CP 290 (pg. 51:2-4). Initially, a letter was issued to Plaintiff Bailey indicating the investigation revealed no wrongdoing on his part. CP 291 (pgs. 55:18-58:19); CP 192-193 & 201. Again, ignoring Plaintiff Killian's complaint and with a finding that Sue Wicker's claim was not supported, the two employees were assigned to work together again. CP 292 (pg. 58:8-12). Plaintiff Killian was instructed by Bruce Skowrya to tell both parties that they were to return to work as partners again and would be sharing a truck. CP 221-222 (Dep. Killian, pgs 64:14-65:5). In response, Sue Wicker became angry with Plaintiff Killian and then began lodging not only complaints against Plaintiff Bailey but began attacking Plaintiff Killian as well. CP 232 (pg. 108:11-24). Plaintiff Killian believed he was being targeted by Ms. Wicker because she was angry about the outcome and because she had harbored racial animus. *Id.* Plaintiff Killian was aware that Sue Wicker had made racial remarks in the past and she carried with her a KKK card issued to a relative of hers and frequently

displayed it at work. CP 162.

On September 11, 2011, both Plaintiff Killian and Plaintiff Bailey received notice they were being placed on administrative leave pending the outcome of an investigation of another complaint filed by Sue Wicker. CP 222 (Dep. Killian, pgs. 65:7-66:9); CP 287(Dep. Bailey pgs. 39:17-40:3). Both Plaintiffs remained on administrative leave until December 2012. CP 211 (Dep. Killian, pg. 23:1-5); CP 296 (Dep. Bailey, pg. 73:9-12). In December 2012, both Plaintiffs received notice that they were being terminated from employment. *Id.* Plaintiff Killian and Plaintiff Bailey did not engage in the conduct alleged by Sue Wicker and had evidence showing her allegations were false. CP 226 (Dep. Killian, pg. 84:15-21) & CP 287 (Dep. Bailey, pgs. 39:17-40:3); *See also* CP 162 & CP 192-193.

3. The Grievance Process & Mediation.

a. Defendant Union concludes the investigation was faulty and agrees to pursue a grievance on behalf of Plaintiffs but provides little support and notice of status to Plaintiffs of the grievances over the next year.

Defendant International Union of Operating Engineers, Local 609-A, or Defendant Union, is the collective bargaining unit for classified employees

of SPS including grounds employees. CP 216 (Dep. Killian, pgs. 42:20-43:2). Both Plaintiffs were members of Defendant Union and sought advice from Defendant Union when they were notified of the investigation. CP 222 (Dep. Killian, pgs. 66:17-67:11); CP 290 (Dep. Bailey, pg. 51:11-21). Defendant Union assigned union representative Michael McBee to assist Plaintiffs in the process. CP 357 (Dep. McBee, pg. 84:7-13). Defendant Union's president, David Westburg, was assisting Sue Wicker. CP 358 (Dep. McBee, pgs. 85:23-25-86:4).

When Plaintiffs received notice of their termination in December 2012, both notified Defendant Union and requested that a grievance be pursued. CP 222 (Dep. Killian, pgs. 66:17-67:11) & CP 296 (Dep. Bailey, pg. 74:5-7). They were told by Mr. McBee that he would represent them through the grievance process. CP364 (Dep. McBee, pgs.111:22 -112:22). Unfortunately Plaintiffs were confused with the process as they rarely met with Mr. McBee to discuss their cases. CP 162-163; CP 193. Both Plaintiffs met with Mr. McBee only during times they were to be at SPS for hearings. *Id.* While they were generally aware of what the grievance process entailed, they were frequently lost as to what was occurring and what the outcome of each step was. *Id.* Both Plaintiffs voiced their frustrations to Mr. McBee. *Id.*

Believing they had been wronged and may have other civil claims, in March 2013 Plaintiffs sought the help of outside counsel and retained an attorney to pursue their non-union civil claims. CP 163 & CP 193-194. Finally, they were eventually told by Mr. McBee that the initial steps were concluded and that the next step would be to proceed to arbitration. *Id., See also* CP 370 (Dep. McBee, pgs. 133:16-134:5). Mr. McBee also explained that Defendant Union would be requesting the parties agree to first submit the grievances to mediation with a Public Employees Relations Commission ("PERC") mediator. *Id.*

b. Defendant Union works to settle all Plaintiffs' claims, all claims including non-union civil claims that are outside of the scope of the CBA, without Plaintiffs' knowledge or consent.

Both Plaintiffs were initially confused by Mr. McBee's recommendation that they participate in a PERCs mediation. CP 163 & CP P193-194. Because they had concerns, they had signed a fee agreement with their private counsel indicating they would not attempt to settle their claims without counsel's involvement, they did not want to participate in a mediation that would include resolutions of all their claims without the involvement of counsel. *Id.,* CP 238-239 (Dep. Killian, pgs. 132:20-

133:1),CP 306 (Dep. Bailey, pg. 114:2-9), CP 372 (Dep. McBee, pgs. 142:6-143:11). After Plaintiffs raised these concerns, they were told by Mr. McBee and the attorney representing Defendant Union, that the mediation was intended to address only the union claims. CP 372 (Dep. McBee, pgs. 142:6-143:11) & CP 431-433. Defendant Union's counsel, Ms. Barnard provided assurances to Plaintiffs' counsel and to Plaintiffs that should a discussion of resolution of all claims be presented by SPS, the mediation would cease and Plaintiffs' counsel would be notified. *Id.* With this understanding, Plaintiffs agreed to engage in the mediation. CP 163 & CP 193-194.

There were two mediation sessions held between SPS, Defendant Union, with Plaintiffs participating, and a PERCs mediator. CP 372 (Dep. McBee, pgs. 149:23-150:22). The first session occurred in August 2013. *Id.* During that session the parties discussed the matter but no agreement was reached. *Id.* Plaintiffs did have concerns as it appeared to them that there were attempts by SPS to include a discussion of resolution of all of their claims, including their non-union civil claims. CP 163 & 194. When this came up, Plaintiffs again reminded Mr. McBee and SPS that it had retained private counsel and they could not resolve those claims as they would be responsible for attorney fees and it would result in a breach of their contract.

Id., See also CP 370-371 & 387-388 (Dep. McBee, pgs. 137:24 - 139:5 & 200:6-201:10. However, the discussion did not progress very far and the mediation was rescheduled to September 9, 2013. CP 374 (Dep. McBee, pgs. 149:23-150:22).

During the September 9th mediation, SPS made an offer to settle and provided a copy of a proposed settlement agreement. CP 164 & 166-170; *See also* CP 386-387 (Dep. McBee, pgs. 199:13-201:10). The settlement agreement was not complete, in that the figures were not filled in, however, it contained the following provision:

> 2. Consideration. In exchange for Killian withdrawing his grievance and fully releasing all known and unknown claims against the District, and the other promises contained in this Agreement, the District agrees to the following:
>
> 2.1 Gross Settlement Amount. The District will pay Killian the gross sum of _____($_____) ("Total Settlement Amount") in full settlement of his grievance and all known and unknown claims by or before April 19, 2013.
>
> 2.2 Settlement Characterization. _____($_____) of this Total Settlement Amount will be considered a settlement of 9disputed) wage claims ("Back Wages Settlement Amount"). _____($)_____) of this Total Settlement Amount will be considered a settlement of (disputed non-wage claims for general/compensatory

> damages, including emotional distress, etc., and for Killian's costs ("General Damages Settlemetn Amount").

CP 164 & 166-170.; *See also* CP 375 (Dep McBee, pgs. 153:7-155:1). When Plaintiffs received this during the mediation they were again concerned. CP 164 & 194. When the discussions began regarding the settlement of all claims, Plaintiffs again reminded Mr. McBee and the others involved that they had a private attorney and could not resolve the non-union claims without her involvement as it would be contrary to the contract they signed and they would be required to pay attorney fees. *Id.*; *See also* CP 370-371, 377 & 386-387 (Dep. McBee, pgs. 136:9-136:23; 137:24-139:5; 161:10-162:13 & 200:6-201:10). Mr. McBee responded indicating that their counsel could not participate in the PERCs mediation, it was solely between SPS, Defendant Union and the Plaintiffs. *Id.* However, in looking at the proposed settlement, it included a provision for general damages and payment of costs. *Id.* Plaintiffs were confused, not sure of what this meant but knew the only costs they had incurred at the time and discussed were private counsel's attorney fees. CP 164 & 194. Plaintiffs were told that the provision was intended to cover their attorney fees. *Id.* Regardless, because they could not reach a settlement amount that was acceptable to anyone, the mediation

ended. CP 164 & 194; CP 375 (Dep. McBee, pgs. 153:7-156:22). Plaintiffs were told by Mr. McBee that Defendant Union would continue to represent them and they would be moving to arbitration. *Id.,See also* CP 377-378 (Dep. McBee, pgs. 164:11-165:2).

4. After mediation in September 2015, Defendant Union votes to pursue arbitration on behalf of Plaintiffs.

Defendant Union held regular meetings for its members monthly. CP 340 (Dep McBee, pgs. 15:24-16:16). After the mediation on September 9, 2013, the Defendant Union Board met and voted to pursue arbitration on behalf of the Plaintiffs. CP 361-362 (Dep. Of McBee, pgs. 100:3-101:22). Both Plaintiff Killian and Plaintiff Bailey were told that the Board had voted and their arbitrations would be pursued. CP 164 & 194. However, they were not provided with any formal notice. CP 162-164, CP 193-194, CP 241-242 (Dep. Killian, pgs. 144:24-145:22) & CP 302 (Dep. Bailey, pgs. 98:21-99:25). Both had heard the information from other parties and Mr. McBee had indicated Defendant Union would pursue arbitration on their behalf. *Id.*

5. After the vote to pursue arbitration, without Plaintifs' knowledge or consent, Defendant Union negotiates a settlement with SPS, including a settlement of Plaintiffs'

non-union civil claims.

Unknown to Plaintiffs, Mr. McBee continued negotiations with SPS after the Board had voted to pursue the arbitration. CP 164, CP 194-195 & CP 240 (Dep. Killian, pg. 137:14-21); *See also* CP 382-384 (Dep McBee, pgs. 181:3-191:7). From what Plaintiffs have been able to ascertain thus far, SPS extended an offer to Defendant Union, through Mr. McBee that included this provision:

> 2. Consideration. In exchange for Killian withdrawing his grievance and fully releasing all known and unknown claims against the District, and the other promises contained in this Agreement, the District agrees to the following:
>
> 2.1 Gross Settlement Amount. The District will pay Killian the gross sum ofone hundred thousand dollars ($100,000) ("Total Settlement Amount") in full settlement of his grievance and all known and unknown claims by or before October 18, 2013.
>
> 2.2 Settlement Characterization. Forty-nine thousand five hundred dollars ($49,500) of this Total Settlement Amount will be considered a settlement of disputed) wage claims ("Back Wages Settlement Amount").Fifty thousand five hundred dollars ($50,500) of this Total Settlement Amount will be considered a settlement of (disputed) non-wage claims for general/compensatory damages, including emotional distress, etc., and for Killian's costs ("General Damages Settlement Amount").

CP 164 & 171-175 & CP 381-383 (Dep. McBee, pgs. 180:6-185:2). On

September 17, 2013, Mr. McBee called the Plaintiffs and told them the offer had been extended, that it was a "good" offer and that they should accept it. CP 164 & CP 194-195. As Plaintiff Bailey described it, Mr. McBee had told him previously that once the offer is made if it is not accepted it is gone. CP 305 (Dep. Bailey, pg. 110: 1-9).

According to records received from Defendant Union, Mr. McBee notified the Board by email and an email vote regarding acceptance of the offer began on September 17, 2013. CP 387 (Dep. McBee, pgs. 204:12-22 CP 424-430. Plaintiff Bailey attended the next members meeting that occurred and was present when it was announced that the Board had voted to accept an offer extended by SPS. CP 195. Records produced by Defendant Union show that a settlement agreement was signed by Defendant Union on, Friday, September 20, 2013. CP 424-430 (Dep. McBee, Exhibit 12), *See also* CP 385-386 (Dep. McBee, pgs. 195:10-196:19; 198:15-21). The settlement agreement was altered in that the provisions outlined above dividing the payments into categories was omitted and a lump settlement sum was included in its place. *Id.*

6. Plaintiffs were provided no notice of the outcome of their grievance - The confusing reports relayed to Plaintiffs, Defendant Union's refusal to communicate and Defendant

Union's counsel Ms. Barnard's confusing and contradictory communications.

a. Lack of adequate notice to Plaintiffs by Defendant Union of the outcome of their grievances.

During the mediation, Plaintiffs' counsel had conversations with Defendant Union's counsel wherein the Plaintiffs were assured Defendant Union would not work to attempt to settle their non-union civil claims. CP 431-433. Those communications continued throughout the process. CP 202-203. With the information from Plaintiff Bailey that an announcement was made that a settlement was accepted, both Plaintiffs were confused. CP 202-203, CP 164-165 & CP 195. They were told both that the Board had voted to pursue their arbitration and then that it had voted to accept an offer extended by SPS. *Id.* In an attempt to clarify what the status was of the grievances, on October 11, 2013, Plaintiff Killian sent an email to Mr. McBee requesting a response and information regarding the status. CP 164-165 & 176-177. In his email, Mr. McBee refused to respond indicating all further communication was to go through counsel. *Id.* From that point on Mr. McBee refused to speak with both Plaintiffs. *Id.*; CP 195.

b. Confusing communications from Defendant Union's counsel and continued refusal to provide notice of outcome of grievances.

In response to the email, Plaintiffs counsel again sent communications to Defendant Union's counsel, Ms. Barnard. CP 431-433. **On October 11, 2013, Ms. Barnard responded with the following: "[i]f Mr. Killian and Mr. Bailey have not agreed to the settlement offer and are still in negotiations over resolution of their public law claims, Local 609 is willing to request an extension on the grievance resolution deadline from the District."** CP 434-437. Later, during this litigation Plaintiff learned that a settlement agreement was signed by Defendant Union on September 20, 2013. CP 203 (Dep. McBee, Exhibit 12); *See also* CP 385-386 (Dep. McBee, pgs. 195:10-196:19; 198:15-21). Plaintiffs did not know that at the time. CP 164, 195 & 203. Both Plaintiffs and their counsel were confused given the contradictory Board decisions and the communication from Ms. Barnard. *Id.* Plaintiffs through counsel, repeatedly asked for written notice of the status of their grievance through counsel and each time it was requested, a response was not forthcoming. *Id.* The last request was made on March 31, 2014 and still, no response was forthcoming. CP 438-441. Plaintiffs' counsel has represented other employees of SPS and it is typical that months can pass without any progress being made in a grievance. CP 203. Plaintiffs believed that the Board could change its mind and pursue their

arbitration and still believed that prior to filing suit. CP 164-165 & CP 195. Again, at the time they had no knowledge that a settlement agreement had been signed and Defendant Union flat out refused to provide Plaintiffs with written notice of the status of their grievance. CP 203. To date Plaintiffs have not received the requested written notice. *Id.*

7. During his deposition, Mr. McBee acknowledged Defendant Union had no authority to settle Plaintiffs' non-union civil claims.

When asked about his authority to negotiate a settlement of Plaintiffs' non-union civil claims, Mr. McBee testified as follows: "[i]t was not our position that we were settling any civil claims." CP 372 (Dep McBee, pgs. 143:9-10, *see also* 142:6-143:11). However, Mr. McBee acknowledged that the only damages he was seeking were for back wages, benefits and return to position and that he had no knowledge of what "general damages" were. *Id.*, CP 370 (Dep. McBee, pg. 136:9-23). Mr. McBee did understand that the in the $100,000 he had negotiated for Mr. Killian, was included a specific amount of $50,500 designated as non-wage claims and for payment of attorney fees. CP 386 (Dep. McBee, pg. 200:1-22). In his deposition he indicated that the final settlement he signed was different, as if that remedied

the issue. *Id., See also* CP 377 (Dep. McBee, pgs. 161:10-162:13).

A copy of the bylaws produced in discovery by Defendant Union are attached hereto. CP 438-441. A copy of the Union Contract with SPS is attached hereto. CP 178-190.

8. SPS and Defendant Union failed to investigate Plaintiff Bailey's complaints about Sue Wicker - later investigation by SPS revealed large amounts of sexually explicit emails and emails containing derogatory racial content on Wicker's SPS email account.

During his deposition, Mr. McBee acknowledged that after Defendant Union accepted the settlement of grievances, he represented Sue Wicker on a related grievance. CP 367 - 368) (Dep. McBee, pgs. 124:11-126:16); *See also* CP 365-367 (Dep. McBee, pgs. 116:15-123:23). Ms. Wicker had indicated her complaints lodged against Plaintiffs resulted in retaliation against her. *Id.* In SPS investigation of her complaint, it finally began to look more closely at Plaintiff Bailey's allegations and the allegations of racial animus lodged against Ms. Wicker. *Id.* In doing that SPS discovered the emails. *Id.*

IV. ARGUMENT

A. STANDARD OF REVIEW - DE NOVO

Orders on summary judgment proceedings are reviewed de novo. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000). In reviewing a summary judgment decision, the facts and all reasonable inferences are viewed in the light most favorable to the nonmoving party. *Samis Land Co. v. City of Soap Lake*, 143 Wn. 2d 798, 803, 23 P.3d 477 (2001).

The standard of review on appeal of a trial court's denial of a motion to amend a pleading is '"manifest abuse of discretion."' *Herron v. Tribune Pub. Co.,* 108 Wn.2d 162, 165 (1987) *citing Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878 (1986) (other citations omitted). However, in this case the trial court's ruling was based upon its application of a six month statute of limitation set by its order on summary judgment. CP 973. The trial court did not rule that the motion was untimely or that prejudice would result pursuant to CR 15. *See Herron* at 165. Therefore, the standard applied is inapplicable and the relevant issues are reviewed de novo.

B. THE APPLICABLE STATUTE OF LIMITATIONS ON PLAINTIFFS UNAUTHORIZED PRACTICE OF LAW CLAIMS IS THREE YEARS.

The negligent and unauthorized practice of law carries a statute of limitation of three years. RCW 4.16.080(2). Defendants have never raised an argument that Plaintiffs do not have a claim for the unauthorized practice of law but only argue that this Court should apply a six month statute of limitations to the claims. RCW 41.56.160(1).

In *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 371 (1994), the Court held civil claims for discrimination, that is non-union civil claims, are outside the scope of a CBA. The issue in that case was whether the statute of limitations on a discrimination claim was tolled during the grievance process invoked by the CBA. *Id.* The Court held it was not, as it was an action independent of the plaintiff's rights under the CBA. *Id.* The Court noted that *International Union of Electrical, Radio & Mach. Workers v. Robbins & Myers, Inc.,* 429 U.S. 229, 236 (1976) ". . . held that the independent origins of the contractual rights under a CBA and the statutory rights under Title VII foreclose any argument for tolling of the statute. *Id.,* at 372. Further, the Washington Supreme Court has explained, "[i]t is our duty to protect the public from the activity of those who, because of lack of

professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar. *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 61 (1978) (citation omitted).

In this case Mr. McBee acknowledged that he had no authority represent Plaintiffs in their non-union civil claims. There is no issue here that his actions in negotiating a specific amount for settlement of Plaintiffs' non-union civil claims, including costs or attorney fees, was outside of the scope of the CBA. Defendant has argued that *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985) applies. This argument is in error. Plaintiff's claims for the unauthorized practice of law do not arise out of Mr. McBee's actions in pursuing the grievances. To clarify the point, if Mr. McBee had walked into the mediation and shot one of the Plaintiffs, there would be no issue that his actions had nothing to do with the grievances pursued under the CBA. While the example may be a bit extreme, it is equally applicable in this case. Mr. McBee did something he had no authority to do under the CBA, he negotiated a specific amount for resolution of Plaintiffs' non-union civil claims. He presented that amount, along with the amount negotiated to resolve the grievance, to Defendant Union Board for approval. The Board

approved it, both the sums for resolution of the grievance, or back pay and the sums for resolution of Plaintiffs' non-union civil claims. Defendant Union had no authority to settle Plaintiffs' non-union civil claims. There is no issue regarding this fact.

Further, there are strong policy arguments against adopting such a short limitation period. There is no reason why Defendant Union should be provided a shorter statute than any other party violating this law. The Washington Supreme Court is taxed with the responsibility of assuring that the public is protected and to limit the statute of limitations would impact their ability to do so. Plaintiffs' claims for the unauthorized practice of law carry a three year statute and there is no reason for the Court to adopt a different statutory period.

C. PLAINTIFFS' SHOULD BE ALLOWED TO AMEND THE COMPLAINT TO INCLUDE A CPA CLAIM.

The CPA claim Plaintiffs attempted to pursue in amending their complaints were based upon the unlawful acts associated with the unauthorized practice of law. Any CPA claim also involves claims against Defendant Union for conduct outside of the scope of the CBA. For the same reasons set out above, Plaintiffs request the Court reverse the order denying Plaintiffs' motion

to amend.

D. PLAINTIFFS' CLAIMS FOR BREACH OF DUTY OF FAIR REPRESENTATION ARE NOT TIME BARRED.

1. When Plaintiffs Knew or Reasonably Should Have Known Of All the Essential Elements of Their Causes of Action Is A Question of Fact For The Jury.

Washington law recognizes a duty of fair representation imposed upon unions. *See Allen v. Seattle Police Officers' Guild,* 100 Wn.2d 361, 371-72 (1983). There is one case, *Imperato v. Wenatchee Valley Coll.,* 160 Wn. App. 353 (2011, Div. 3), wherein Division III of the Court of Appeals held that the applicable statute of limitations for claims of breach of duty of fair representation is six months relying upon RCW 41.56.160(1) & RCW 41.80.120(1) and federal law. Defendant acknowledges that a discovery rule applies and adopts the rule as set out in *Galindo v. Stoody Co.,* 793 F.2d 1502, 1509 (9th Cir. 1986). As set out in *Galindo,* a claim for breach of duty of fair representation accrues, ". . . when the employee 'discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation].'" *Id., citing Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 614 (11th Cir. 1984) (other citations omitted). Under Washington

law, "...[the] common-law discovery rule applies to all statutes of limitation, in the absence of legislation limiting the application of the rule." *Funkhouser v. Wilson*, 89 Wn. App. 644, 666 (1998). Under Washington's common-law discovery rule, "'a cause of action accrues when a claimant knows, or in the exercise of due diligence should have known, all the essential elements of the cause of action..." *Id.,* at 667. "The question of whether a plaintiff was duly diligent in pursuing a legal claim is a question of fact for the jury unless reasonable minds could reach but one conclusion." *Id., citing Allen v. State,* 118 Wn.2d 753, 760 (1992). "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action." *Allen v. State*, 118 Wn.2d 753, 758 (1992). Plaintiffs do not agree that the 6 month statute of limitations applies in this case but even accepting Defendant's argument, there are issues of material fact surrounding when Plaintiffs had reasonable notice that Defendant Union was no longer pursuing their grievances and when Plaintiffs knew all essential elements of the cause of action.

As set out in the facts section, in September 2013, Defendant Union's Board voted to pursue arbitration on behalf of both Plaintiffs. This vote was announced and presented to the members for ratification at the meeting that month. Both Plaintiffs were told that their grievances would move forward

to arbitration. Plaintiffs had no knowledge that there were continuing talks between Mr. McBee and SPS. Further, there is no explanation as to why Mr. McBee would continue negotiations once the Board voted and the vote was subject to the members approval during the September meeting as required by the Union's bylaws. Mr. McBee did relay to Plaintiffs that another offer was made and Mr. Bailey did hear it announced at the meeting in October that the Board had accepted an offer. However, this was after it was already decided to pursue arbitration and it was put before the members as provided for in the bylaws. Plaintiffs were understandably confused. Given this confusion, Plaintiff Killian inquired of Mr. McBee requesting that he supply him with notice of the status of his grievance but Mr. McBee refused. Plaintiffs' counsel continued to request numerous times that written notice be provided but again, none was provided. On October 11th, Defendant Union's counsel even inquired as to whether the Plaintiffs wanted the Union to request an extension of the grievance resolution deadline from SPS. This was after the announcement that Plaintiff Bailey heard and unknown to Plaintiffs until receiving discovery in this litigation, it was after Defendant Union signed the settlement agreement with SPS. Offering to extend a grievance deadline indicates the parties had no yet settled the matter. Further,

at the time Defendant Union was aware that Plaintiffs believed they had been treated wrongly and were objecting to Defendant Union's actions. Plaintiffs believed Defendant Union could still act to fix the error given they had already voted to pursue arbitration. The last request that notice be provided was made through counsel on March 31, 2014. To date no written notice was provided to Plaintiffs.

2. Plaintiffs claims were tolled during the time period Plaintiffs pursued intra-union grievance procedures.

Under the Collective Bargaining Agreement there is no deadline set for requesting arbitration after a failed mediation. CP 178-190 (Article XVIII, § C, ¶ 5). Further, the contract provides, "[t]imelines contained in this Article for submission to arbitration, shall be held in abeyance until termination of the mediation process." *Id.* (f), pg. 44. Under *Galindo v. Stoody Co.,* 793 F.2d 1502, 1510 (1986), the cause of action is tolled during the time the employee seeks to pursue his grievance rights.

While Plaintiff Bailey had heard the announcement that Defendant Union would accept the settlement at the member's meeting, counsel for Defendant Union represented it could delay any timelines set. The CBA is vague at best, it does not set a deadline from which a party has to request

arbitration after a failed mediation and it provides that all deadlines are suspended until termination of the mediation. Plaintiffs were never provided notices by Defendant Union of when any deadlines occurred, let alone the deadline that may have existed to request arbitration. This coupled with Defendant Union's inconsistent actions and what appears to be false representations regarding its ability to request additional time, led Plaintiffs to believe that the process was continuing. As far as Plaintiffs' were aware, Defendant Union could have still decided to pursue the matter through arbitration. Given the time frame the grievance had taken, at that time over a year, it was reasonable for Plaintiffs to believe that Defendant Union could have taken action up until at least January 1, 2014. However, that determination is a factual question that should be resolved by a jury.

3. Plaintiffs were never provided an written notice and were misled by Defendant Union's conduct - the doctrine of equitable tolling and/or equitable estoppel apply.

Federal cases have recognized application of both equitable tolling and equitable estoppel in a case involving breach of duty of fair representation. *See Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 149-150 (9th Cir. 1987). Under Washington law, equitable estoppel applies, "'[w]hen a party unjustly contrives to put another in a dilemma and to subject

him to necessity and distress and he acts one way, it is not for the wrongdoer to insist that he should have acted another.'" *Moar v. Beaudry,* 62 Wn.2d 98, 104 (1963) *quoting* 21 C.J., Estoppel § 116, p. 1113; *adopted by Strand v. State,* 16 Wn.2d 107 (1943) (other citations omitted). To apply estoppel there must be,

> (1) An admission, statement or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.

Id., at 105, *quoting Kessinger v. Anderson*, 31 Wn. 2d 157, 170 (1948). "'The doctrine of equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.'" *State v. Littlefair,* 112 Wn. App. 749, 759 (2002), *quoting State v. Duvall,* 86 Wn. App. 871, 874 (1997). "Appropriate circumstances generally include 'bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff." *Finkelstein v. Sec. Props., Inc.,* 76 Wn. App. 733, 739-40 (1995); *See also State v. Littlefair,* 112 Wn. App. at 759.

As indicated above, Defendant Union's actions in pursuing Plaintiffs' grievances were contradictory. Defendant Union represented to Plaintiffs that

arbitration would be pursued and then put the matter before its members. While Defendant Union later made an announcement, Defendant Union's counsel made statements indicating it could extend the grievance deadline. Plaintiffs were never provided with any written notice of any deadlines or the outcome of their grievances despite repeated requests. Given the facts in this case, if the statute of limitations ran, equitably tolling and/or estoppel applies.

4. RCW 4.16.130 should apply to Washington state claims of breach of duty of fair representation.

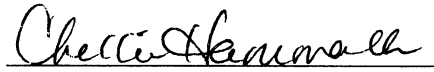
In *Imperato v. Wenatchee Valley Coll.*, 160 Wn. App. 353, 358-364 (Div. III, 2011), Division III of the Court of Appeals relied upon federal law as set out in *DelCostello v. Int'l Bhd. Of Teamsters*, 462 U.S. 151 (1983) in large part, in holding that a six month statute of limitation applied to claims of breach of duty of fair representation. The issue of the applicable statute of limitations in DelCostello arose in part because the Court could not find an appropriate state statute of limitation to apply to breach of duty of fair representation claims. *Id.,* at 165 (finding the claim had no close analogy in ordinary state law from which a statute of limitation could be drawn). Imperato drew upon this reasoning at least in part, in adopting the six month statute of limitation. However, there is an applicable state statute that sets a

statute of limitations on claims where one is not explicitly provided for in other statutes. RCW 4.16.130 provides for a two year statute of limitations on claims that are not provided with an applicable statute of limitations by statute. Plaintiffs believe the two year statute of limitations is the most appropriate and argues that *Imperato* decision is in error. Regardless, even if the Court finds the six month statute applies, there are triable issues of fact that should be resolved by a jury.

V. CONCLUSION

For the reasons stated above, Plaintiffs request this Court reverse the orders entered by the trial court and remand this case back for trial.

Respectfully submitted,



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Certificate of Service

I, Chellie Hammack, attorney for Appellant certify that on February 12, 2016, I placed a true and correct copy of the Appellant's Brief and this Certificate of Service for hand delivery via legal messenger service and/or for delivery by email to:

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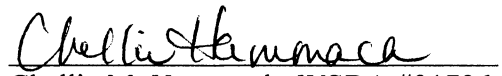

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