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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellant,

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

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

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I. INTRODUCTION

For many years, the employment relationship between King County Public Hospital District No. 2, d/b/a EvergreenHealth Medical Center, and its registered nurses has been governed by a Collective Bargaining Agreement (“CBA”) with the Washington State Nurses Association (“WSNA”). The agreement is comprehensive and includes terms governing nurses’ rest breaks and meal periods. As a public employer, its CBA controls over inconsistent rest and meal period rules. Plaintiffs’ complaint challenges the legality of the Hospital District’s rest and meal period practices, but omits all mention of the governing CBA. The agreement plaintiffs fail to mention includes an express grievance and arbitration provision for disputes.

The Hospital District sought to compel arbitration, but the trial court refused. Instead, it treated the motion as a dispositive motion under either CR 12 or CR 56. Both the trial court’s procedural and substantive rulings on the Motion to Compel Arbitration were wrong. This Court should reverse and order plaintiffs to submit their claims under the grievance and arbitration provisions of the CBA.

II. ASSIGNMENTS OF ERROR

A. **The trial court erred by denying the District's motion to compel arbitration.**

Issues Pertaining to Assignment of Error:

1. Can plaintiffs avoid arbitrating claims that arise under or require interpretation of a collective bargaining agreement by ignoring the CBA in their pleading?

2. Can plaintiffs defeat arbitration of their individual claims by repudiating their own testimony on the nature of their claims?

3. Can plaintiffs avoid arbitration of other class member claims where those individuals' testimony makes clear that their claims are contractual, not statutory?

4. Where the collective bargaining agreement provides a mechanism for reporting missed rest breaks and meals, can plaintiffs avoid arbitration because they sometimes did not use it?

B. **The trial court erred by treating the motion to compel arbitration as a dispositive motion, forcing the District to choose between moving under CR 12 and CR 56 and depriving the District of the right to move under CR 7.**

Issues Pertaining to Assignment of Error:

1. Is a motion to compel arbitration a dispositive motion?

2. Must a motion to compel arbitration be brought only under CR 12(b), CR 12(c), or CR 56?

C. The trial court erred by concluding that arbitration was not proper without WSNA joinder in the litigation.

Issues Pertaining to Assignment of Error:

1. Is joinder by the WSNA required when the collective bargaining agreement provides that a nurse alone may initiate the grievance process, with arbitration as the final step to that process?

2. Where the collective bargaining agreement provides that a member may initiate the grievance process concluding with arbitration, can plaintiffs avoid arbitration by simply refusing to initiate the required grievance process?

III. STATEMENT OF THE CASE

A. Procedural background.

Plaintiff Jeoung Lee filed this lawsuit as a putative class action in November 2016, alleging that she and other registered nurses in the District's Emergency Department ("ED") were denied rest and meal breaks and not paid for missed breaks in violation of Washington wage statutes and regulations. CP 1-6, 13-20. After the trial court certified the case as a class action, CP 250-56, Lee moved to amend her complaint to add Sherri McFarland as an additional class representative on the basis that McFarland was a current employee. CP 257-62. The trial court granted the motion to amend on August 15, 2017. CP 431-34. Plaintiffs' Second Amended Complaint was filed the next day. CP 435-42.

The District filed its motion to compel arbitration two weeks later, on September 1, 2017, noting the hearing without oral argument for September 12. CP 544-56. On September 18, the trial court notified the parties that the motion must be noted on the dispositive oral argument calendar. The District then re-noted the hearing for November 3. Plaintiffs' counsel was unavailable on earlier open dates on the court's calendar. At the November 3 hearing, the court demanded that the District identify the motion to compel arbitration as a motion either under CR 12 or CR 56:

Mr. Breskin: . . . I was quite curious to find out what actual rule is being applied to the defendant's motion to compel arbitration, so –

The Court: Well, I think that's an excellent question that the defendant has simply not responded on. And I think it's kind of your call at this point. I could look solely at the pleadings . . . or I can look to all of the attachments and make a more final ruling today. . . .

Mr. Breskin: Yeah, I think that's fair. And so just for the record, I think I need to object to the argument that counsel made, and –

The Court: Because it relies on matters outside the pleadings.

Mr. Breskin: Exactly.

The Court: You want me to rule on the pleadings.

Mr. Breskin: I think that's the appropriate approach, though, I would say this: Again, you know, it's very confusing because there is no Washington case that actually

describes this. So going back to basics, . . . it doesn't seem like it's a proper Rule 12 motion, because Rule 12 expressly limits the matters that can be raised by motion So that's not this motion, so technically it's not a 12 motion, so that would be improper for them to bring under that rule. That leaves Rule 56, which they don't mention, and it's not a rule that they have subscribed to

VRP 8:14 – 10:3.

Mr. White: . . . I will respond to the question on what rule the motion is brought under. This is a general motion under Rule 7. It's a motion to compel arbitration. This does not resolve any of the factual issues brought under the complaint

The Court: Yes, but if I grant a motion to compel arbitration, I have to know whether I'm doing that based on the pleadings or whether I'm doing this on the additional materials you submitted to me. If you want me to rely on the additional materials you've submitted, the effect this is also summary judgment on this topic. That's the effect. You know, I agree with you that you can bring a general motion under 7, but that doesn't change the fact that we have one or another kind of dispositive motion in front of me. . . . [I]f you want me to issue a ruling based on what you attached to your pleadings, I think Mr. Breskin has it right, there has got to be a Rule 56 decision. . . .

VRP 12:8 – 13:9.

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

The Court: I can, and that converts into a Rule 56.

Mr. White: And if the Court feels that it would have to provide an opportunity for Mr. Breskin to submit additional

pleadings, or have additional briefing, we'll go with the Rule 12.

The Court: No, he's not asking for that, he's asking for me to make you tell us, basically, which one we are under, 12 or 56. . . .

VRP 14:6-21.

Forced to choose, the District's counsel told the trial court that it may proceed under Rule 12 and the court denied the motion to compel:

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

VRP 15:1 – 16:15; CP 745-48.

B. Factual background.

The District is a public hospital district organized under Chapter 70.44 RCW, serving northeast King and southeast Snohomish Counties. Lee worked as a registered nurse in the ED from February 2010 until August 2016. She was fired for violating patient privacy rights. CP 32-33, 1087. McFarland worked as a registered nurse in the ED from July 2015 until August 2017. She quit promptly after the court appointed her a class representative. CP 880, 672.

1. The collective bargaining agreement governs the terms and conditions of plaintiffs' employment.

Collective bargaining agreements between the District and WSNA have governed registered nurse employment for many years. CP 79-207. The CBAs govern “with respect to wages, hours of work and conditions of employment.” Specific provisions address time reporting, rest breaks and meal periods. CP 82, 122,¹ 165. The CBA has a long course of conduct under its terms.

WSNA is the “sole and exclusive bargaining representative for all regularly scheduled full-time, regularly scheduled part-time and per diem registered nurses engaged in patient care at the Hospital, excluding supervisors, nursing care coordinators, temporary nurses, students, and all other employees.” CP 82, 122, 165 (¶1.1). The CBA’s terms were the result of the parties’ negotiations:

17.1 The parties acknowledge that during the negotiations which resulted in this Agreement all had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. . . .

CP 108, 148, 191.

¹ The date at the top of the 2012-2015 CBA is incorrect. *Compare* CP 122 *with* CP 120 *and* CP 149.

Because WSNA recognized that the District “has the obligation of serving the public with the highest quality of patient care, efficiently and economically,” WSNA agreed that the District reserved “the right to promulgate, revise, and modify rules, regulations and personnel policies.” CP 84, 124, 167 (¶ 3.1). Further, the parties agreed that the District’s reserved rights included all rights “inherent to the management function” and that “[a]ll matters not covered by [the CBA] shall be administered by the [District] on a unilateral basis in accordance with such policies and procedures as it from time to time shall determine.” CP 84-85, 125, 167-68 (¶ 3.2).

Rest and meal breaks in the ED are administered under the CBA’s terms, not WAC 296-126-092, as McFarland and Lee both acknowledged. CP 569-70, 581. WAC 296-126-092(4) requires only a ten-minute paid rest break for every four hours worked. The CBA provides a 15-minute rest break for every four hours worked: “All nurses shall be allowed a rest period of fifteen (15) minutes on the Employer’s time, for each four (4) hours of working time.” CP 93, 133, 176 (¶ 7.7).

Further, state law permits unscheduled intermittent rest totaling ten minutes as a “break.” WAC 296-126-092(5). In contrast, under the CBA, a nurse may claim and be paid for a “missed” rest break if they do not

receive ten *consecutive* minutes of rest as part of each 15-minute break.
CP 38.

Lee and McFarland worked 12-hour shifts. CP 566-67, 583, 588. The CBA varies from state law, providing that each 12-hour shift “will include *one* (1) thirty (30) minute unpaid lunch period and three (3) fifteen (15) minute . . . paid rest breaks.” CP 114, 155, 198 (emphasis added); *see also* CP 578. Under state law, employees would be entitled to *two* 30-minute meal breaks during a 12-hour shift. WAC 296-126-092(2) (“No employee shall be required to work more than five consecutive hours without a meal period.”). Both plaintiffs confirmed this during their depositions:

Q. So on a 12-hour shift, what is your understanding of how many rest and meal breaks you’re entitled to?

A. So one 30-minute break and then three 15-minute rest breaks.

* * *

Q. . . . And would you agree that per this agreement, you did receive a 30-minute unpaid lunch period and three 15-minute breaks while you were working in the ED?

A. Yes.

CP 569-70, 578; *see also* CP 591.

Under the CBA, disputes concerning rest and meal breaks are subject to a mandatory, four-step grievance process initiated by the aggrieved WSNA member,² which includes, at the last step, arbitration:

. . . A grievance is defined as an alleged breach of the express terms and conditions of the Agreement. . . . If a grievance arises, it shall be submitted to the following grievance procedure.

* * *

If the grievance is not settled on the basis of the foregoing procedures, the Association may submit the issue in writing to final and binding arbitration The arbitrator shall have no authority to add to, subtract from, or otherwise change or modify the provisions of this Agreement, but shall be authorized only to interpret existing provisions of this Agreement as they may apply to the specific facts of the issue in dispute.

CP 106-07, 147-48, 190-91 (¶ 16.1). The CBA also enables a group of employees to file a grievance. CP 108, 148, 191 (¶ 16.2). Neither McFarland nor Lee submitted the contractual claims asserted in this lawsuit to the CBA's grievance and arbitration process. CP 576-77, 893. Lee did, however, submit other disputes, such as racial discrimination

² CP 106-07, 147-48, 190 (“Step 1. Nurse and Manager. If any nurse has a grievance, the nurse and/or the Local Unit Chairperson, or designee, shall first present the grievance in writing Step 2. Nurse, Local Unit Chairperson and Director. If the matter is not resolved to the nurse’s satisfaction at Step 1, the nurse and/or the Local Unit Chairperson, or designee, shall present the grievance in writing Step 3. Nurse, Chief Nursing Officer and Association Representative. If the matter is not resolved to the nurse’s satisfaction at Step 2, the nurse and/or Local Unit Chairperson, or designee, shall present the grievance in writing Step 4. Arbitration”).

claims, to the CBA's grievance process, showing that she knew how to initiate a grievance under the CBA. CP 1203.

2. District policies and procedures allow nurses to take meal and rest breaks and be paid for missed breaks.

Consistent with the CBA's ratifications of the District's reserved management rights, CP 84, 124, 167-68 (§ 3.1), the District has adopted policies governing rest and meal breaks for nurses. The Hours of Work/Overtime and Time & Attendance policies generally states that:

- Employees who are paged or telephoned during a meal break are responsible for communicating that they are on break;
- Scheduled rest periods are not required where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each four hours worked (modified by CBA);
- Employees record their time by clocking in the Laborworkx system;
- Each employee is responsible for submitting accurate time and attendance, and the employee timecard is the legal record of time and attendance;
- Employees are required to record missed rest and meal breaks in the Laborworkx timekeeping system.

CP 337-360. ED departmental policies require that all missed breaks be recorded and paid. CP 361-365.

3. The District educates, trains and instructs nurses on the contract's requirement to record missed breaks. When nurses do so, they are always paid.

The District educates, trains and instructs its nurses to record all missed breaks in the Laborworkx electronic timekeeping system. Recording a missed meal or rest break is easy – employees need only push a button (Code “40”, “62”, “64”, or “66”) when clocking out at the end of their shift. CP 37, 64-71, 374-77, 388. When they do so, they are paid for the missed break. CP 27, 210, 222, 226, 404, 892. McFarland testified that nurses, including herself, are trained and understand how to record a missed break in Laborworkx:

Q. Did you feel that the training that you received from Evergreen was adequate to allow you to understand how to record missed breaks in LaborWorkx?

A. Yes.

CP 891.³ The time records can be corrected at any time. CP 956-57, 959, 989-91, 1085. Nurses experience no pressure from the District to underreport missed breaks. CP 22, 27, 210, 214, 217-18, 221-22, 230, 401.

³ Other nurses' testimony corroborated McFarland's experience. *See also* CP 22 (“I’ve been told that we must record missed breaks. . . . I’m well aware of the ED’s rest and meal break policies Whenever I miss a break, I always log out the missed break on the Laborworkx system.”); CP 27, 47, 214, 217-218, 221, 225 (“The ED management is very clear

The District relies on its nurses to record time worked, including missed meals and breaks. CP 32, 41-43. Accurate reporting is necessary to ensure adequate staffing. CP 32. McFarland understood that it was her responsibility to report missed breaks. CP 891.

Both named plaintiffs knew how to report missed breaks on Laborworkx and did so. During the class period, Lee used Laborworkx to report that she missed 2% of meal breaks and 17% of rest breaks she was entitled to. CP 1127, 1129-30. Likewise, McFarland reported on Laborworkx that she missed nearly 6% of her meal breaks and nearly 13% of her rest breaks. *Id.*

4. Plaintiffs' claims require interpretation of the CBA.

Plaintiffs' complaint alleges that

Defendant's practices under which Plaintiffs and the class did not receive meal and rest breaks violates RCW 49.12 and WAC 296-126-092.

CP 439. For public employers, a CBA can vary from otherwise applicable meal and rest break rules. RCW 49.12.187. The CBA contains terms

that ED nurses must be given their breaks and direct the department's charge nurses to ensure all breaks are given. . . . If I am aware a nurse has missed a break, I tell him or her to record it on the Laborworkx timekeeping system."); CP 233 ("I have been trained to always use the no break code when I miss a break."); CP 237, 383.

regarding meal and rest breaks. Whether the CBA varies from state law will require interpreting the CBA.

The complaint omits any mention of the CBA, but named plaintiffs' testimony relates to relief based directly on contractual rights granted under the CBA. Lee's and McFarland's testimony regarding rest breaks explicitly referred to the contractual 15-minute rest breaks, not the regulation's ten minute breaks:

Q. . . . [A]ll of the rest breaks you have in the ED are 15 minute breaks. . . .

A. Yes.

CP 565; *see also* CP 567-72, 574-75, 578, 581, 585-88, 591-92, 594-95.

McFarland expressly makes a claim for missed breaks where she received the ten-minute break under state law:

Q. If you only received the first ten minutes of a 15-minute rest break –

A. Um-hmm.

Q. – did you consider that you missed the rest break?

A. Yes.

CP 881. A 10-consecutive-minute rest break is created by the CBA, not state law.

Although McFarland testified that she *never* missed meal breaks,⁴ she reported a meal as missed when it was “late” and expected to be paid for it, based on her understanding of the union contract:

Q. . . . When you get your meal break, is it always within the first five hours of your work?

A. No.

* * *

A. I do have something to add about that –

Q. Sure.

A. – that you didn’t ask.

Q. Go ahead.

A. I was – I did ask *because the union contract states that* we’re supposed to get our meal break within the five-hour period.

* * *

Q. Did you attempt to report a late rest break as missed?

A. Again, as I had said, I asked Jennifer about the timetable for taking breaks *that was in the union contract*, and that if I didn’t get it within that time, was I allowed to clock out that I did not get it, and she said no.

Q. Do you think that Jennifer Celms is wrong?

A. I think *if the union contract states that* they’re required to give you a rest break within a certain period of time, then if they do not give you that, they ought to pay you for it, yes.

⁴ CP 582:

Q. Are there occasions where you miss your meal break?

A. I don’t think since my employment at Evergreen that I’ve missed a meal break.

CP 583-84, 589-90 (emphasis added). The CBA must be interpreted to resolve McFarland's claim.

IV. ARGUMENT

A. Standard of review.

A trial court's ruling on a motion to compel arbitration is reviewed *de novo*. *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45, 17 P.3d 1266 (2001).

B. The CBA includes a grievance and arbitration system. Arbitration is strongly favored, particularly for labor disputes involving public employers.

In Washington, there is a strong presumption in favor of arbitrating employment disputes where there is a grievance procedure in a CBA. *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996); *see also Rose v. Erickson*, 106 Wn.2d 420, 424, 721 P.2d 969 (1986) ("We have said that as a matter of policy, arbitration is strongly favored."). "[T]he arbitrability of public sector labor-management disputes is governed" by the "Steelworkers' Trilogy"⁵ which consists of the following rules:

⁵ *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

(1) Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which on its face is governed by the contract.

(2) An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

(3) There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.

Peninsula Sch. Dist., 130 Wn. 2d at 413-14 (quoting *Council of Cnty. & City Emps. v. Spokane Cnty.*, 32 Wn. App. 422, 425, 647 P.2d 1058 (1982)); see also *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 734, 349 P.3d 32 (2015); *Oak Harbor Educ. Ass'n v. Oak Harbor Sch. Dist.*, 162 Wn. App. 254, 262-63, 259 P.3d 274 (2011).⁶

Accordingly, “[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective [bargaining] agreement.” *Mount Adams Sch. Dist. v. Cook*,

⁶ The validity of the arbitration clause cannot be challenged unless the contract is void or the opposing party alleges a particular defect in that clause. *Jillian Mech. Corp. v. United Serv. Workers Union*, 882 F. Supp. 2d 358, 366 (E.D.N.Y. 2012). “A contract is void in its entirety at the execution of the agreement only under extraordinary circumstances, such as fraud.” *Id.* Here, plaintiffs did not allege that the CBA is void or that there is a particular defect in the arbitration clause.

150 Wn.2d 716, 724, 81 P.3d 111 (2003) (*quoting Warrior & Gulf Nav. Co.*, 363 U.S. at 581) (alterations in original). “In the absence of a specific exclusion, the agreement must be held to authorize arbitration over interpretation and application” of the provisions of the CBA. *Spokane Cnty.*, 32 Wn. App. at 426. “The burden of demonstrating that an arbitration agreement is not enforceable is on the party opposing the arbitration.” *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

If an arbitration provision “is susceptible of an interpretation that covers the asserted dispute,”⁷ Washington courts “decline to ‘become entangled in the construction of the substantive provisions of a labor agreement, even though the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.’” *Spokane Cnty.*, 32 Wn. App. at 427 (*quoting Warrior & Gulf Nav. Co.*, 363 U.S. at 585). “As a rule, a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute.” *Stein*, 105 Wn. App. at 45-46. In other words, “[a]ny doubts should be resolved in favor of coverage, and further, all questions upon which the parties disagree are

⁷ “[T]he party seeking arbitration need not convince the court that his suggested interpretation is the correct one.” *Hanford Guards Local 21 v. Gen. Elec. Co.*, 57 Wn.2d 491, 494, 358 P.2d 307 (1961).

presumed to be within the arbitration provisions unless negated by clear implication.” *Heights at Issaquah Ridge Owners Ass’n v. Burton Landscape Grp.*, 148 Wn. App. 400, 405, 200 P.3d 254 (2009).

C. The court’s sole inquiry is to determine whether the parties bound themselves to arbitration by the CBA – merits of the controversy may not be decided.

The court’s “sole inquiry” when presented with a motion to compel arbitration “is to examine the arbitration clause of the collective bargaining agreement and determine whether the parties bound themselves to arbitrate this particular dispute.” *Local Union No. 77, Int’l Bhd. of Elec. Workers v. Pub. Util. Dist. No. 1*, 40 Wn. App. 61, 63, 696 P.2d 1264 (1985). The court “*cannot decide the merits of the controversy*, but may determine only whether the grievant has made a claim which *on its face* is governed by the contract.” *Peninsula Sch. Dist.*, 130 Wn.2d at 413 (quoting *Spokane Cnty.*, 32 Wn. App. at 424-25) (emphasis added). “Where a provision of a collective bargaining agreement is subject to two interpretations, the one that would require arbitration should be adopted.” *Local Union No. 77*, 40 Wn. App. at 64.

Plaintiffs’ claims are subject to arbitration under the CBA. CP 106-07, 147-48, 190-91. Like private employment disputes which are governed by Chapter 7.04 RCW, plaintiffs’ dispute with a public employer is arbitrable. Under RCW 41.56.122(2), a CBA involving public employees

may “[p]rovide for binding arbitration of a labor dispute arising from the application or the interpretation of the matters contained in a collective bargaining agreement.” The Public Employees’ Collective Bargaining Act (“PECBA”), Chapter 41.56 RCW, prevails over conflicting statutes and regulations, and is “liberally construe[d] . . . to accomplish its purpose.” *Municipality of Metro. Seattle v. Pub. Emp’t Relations Comm’n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992); RCW 41.56.905. PECBA’s purpose “is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.” RCW 41.56.010. WSNA is the labor organization representing ED nurses, and this action undercuts WSNA’s role as “the sole and exclusive bargaining representative.”

D. The CBA requires arbitration of Lee’s and McFarland’s individual claims.

Lee’s and McFarland’s individual claims overlap with, but diverge from, the class claims. The class claims are for *missed* rest and meal breaks, CP 254-55, while Lee and McFarland also assert individual claims for late and interrupted meal breaks. CP 436. Their late and interrupted

meal break claims are governed by the CBA and subject to its grievance and arbitration provisions.

Consistent with PECBA, WAC 296-126-092's requirements do not apply to public employers, such as the District, that have entered into collective bargaining agreements. RCW 49.12.187 states:

Employees of **public employers** may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically *vary from or supersede, in part or in total*, rules adopted under this chapter regarding appropriate rest and meal periods.

(Emphasis added); *see also* WAC 296-126-130(8)(b).⁸ Because public employees' right to meal and rest breaks *can* be negotiated, Lee's and McFarland's claims for unpaid or late breaks are *not* "based on nonnegotiable, substantive rights that are not dependent on a collective bargaining agreement." *Wilson v. City of Monroe*, 88 Wn. App. 113, 115, 943 P.2d 1134 (1997). The District is a public employer and resolution of Lee's and McFarland's individual claims in this lawsuit requires

⁸ WAC 296-126-130: "(8) Employers do not require a variance in the following cases:...(b) Public employers that have entered into collective bargaining agreements, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods."

interpretation of the CBA's express language and the parties' past practices.⁹

Although McFarland never missed a meal break, CP 582, both she and Lee assert the right to compensation for "late" meal breaks on their 12-hour shifts.¹⁰ The CBA supersedes the meal break requirements in WAC 296-126-092. The CBA authorizes 12-hour shifts with "*one (1) thirty (30) minute unpaid lunch period and three (3) fifteen (15) minute . . . paid rest breaks.*" CP 114, 155, 198 (emphasis added). This varies from the regulation, which otherwise requires *two* unpaid meal periods for a 12-hour shift: "*No employee shall be required to work more than five consecutive hours without a meal period.*" WAC 296-126-092(2) (emphasis added). The mid-point of a 12 hours shift is six hours; therefore,

⁹ "The work for which overtime is authorized is not specified in the collective bargaining agreement. Thus, whether overtime is authorized for additional travel time when work locations are changed requires an interpretation of the agreement in light of past practices and is a question for the arbitrator." *Spokane Cnty.*, 32 Wn. App. at 425. "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *Warrior & Gulf Nav. Co.*, 363 U.S. at 581-82. Washington courts follow *Warrior & Gulf Nav. Co.* and the "Steelworkers' Trilogy." *Peninsula Sch. Dist.*, 130 Wn.2d at 413.

¹⁰ Both worked only 12-hour shifts. CP 566, 588. McFarland never missed a meal period, but still used the "no lunch" code when clocking out on 6% of her shifts and was paid for an extra 30 minutes that she did not work. CP 1127, 1130. In her deposition, Lee stated that she was not asserting a claim for *late* meal breaks, but only *missed* breaks. CP 307-08.

on a 12-hour shift, the CBA's express terms require more than five hours work before, after, or before and after the meal period. Resolving their "late" meal breaks claim, therefore, requires interpretation of the CBA's provisions.

Lee's and McFarland's individual claims for "interrupted" meal breaks are also governed by the CBA. The CBA expressly reserves to the District the right to establish personnel rules and policies. CP 84, 124, 167. One of those policies requires employees "who are paged or telephoned during the meal period . . . to communicate that they are observing a meal period." CP 353. Lee's and McFarland's claim that they were improperly "interrupted" with work duties directly implicates the District's implementation of the CBA. Lee and McFarland disregarded the District's policy.

McFarland's claim that she should have been released 15 minutes early from her shifts, CP 596-98, when she told her supervisor she had not had all of her breaks, contravenes the CBA. It is also a claim based on the CBA's 15-minute break provisions.

E. The CBA requires arbitration of class claims.

RCW 49.12.187 provides that a public employer's CBA controls, if inconsistent with state regulation of rest and meal periods. The CBA grants nurses 15-minute rest breaks, *not* the 10 minutes provided by WAC

296-126-092(4). Plaintiffs' claims of missed 15-minute breaks, which must be representative of the class under CR 23,¹¹ include "missed breaks" where the state law minimum has been satisfied, either through continuous or intermittent rest during their shifts. CP 881; *see also* CP 565, 567-72, 574-75, 578, 581, 585-88, 591-92, 594-95, 1088. Nurse Laure Anderson would not record a break as missed when she felt she had downtime on her shift.¹² Although permitted under state law, plaintiffs insist that such intermittent breaks constitute missed breaks. CP 428. This further confirms that plaintiffs' "missed break" claims rely on the CBA's ten-minute continuous and 15-minute total standards. CP 38. *Every* reference to rest breaks in ED nurses' testimony is to the CBA's 15-minute breaks. CP 22, 26-27, 209-10, 213-14, 217-18, 221, 225, 229-30, 233, 237. If nurses missed their 15-minute rest breaks and were not paid, that is a "breach of the express terms and conditions" of the CBA and must be

¹¹ CP 438 (¶¶ 22, 23).

¹² CP 635:

Q. On what occasions do you not record a missed rest break?

A. I would say I was not offered a break, but based on – I guess based on the census, there were times that we had downtime where we could – ... it was a more relaxed atmosphere, communicating with other staff, more relaxed, didn't feel – felt that what I would consider a break. I was not leaving the department but I didn't feel like I was missing a break, if that makes sense.

resolved through the CBA's grievance process, culminating in arbitration. CP 106-07, 147-48, 190-91.

Likewise, whether nurses working 12-hour shifts were entitled to one meal period, per the CBA, or two meal periods, per WAC 296-126-092(2), requires interpreting the CBA. As such, the question is subject to grievance and arbitration.

Plaintiffs' discovery requests confirm that their claims will require interpretation of the CBA's terms and conditions. Their Third Set of Interrogatories and Requests for Production requested documents relating to the CBA negotiations between the District and WSNA and relating to nurses' rights under the CBA's staffing restructure provisions. CP 638-40. During an August 2017 CR 26(i) discovery conference, plaintiffs' counsel stated that he needed discovery on the extent to which WSNA and the District bargained around the meal and rest break provisions of WAC 296-126-092. CP 560. Again, such bargaining is expressly permitted for public employers by RCW 49.12.187.

F. The trial court compounded its error by requiring the District to make its motion under CR 12 or CR 56; plaintiffs cannot avoid arbitration through artful pleading.

Without citing any authority, plaintiffs argued that the District's motion to compel arbitration was a dispositive motion under either CR 12 or CR 56 and must be noted on a 28-day motion calendar. CP 649; VRP

8:14 – 10:3. The trial court adopted plaintiffs’ position, even though plaintiffs’ counsel admitted that the motion did not fit under CR 12 and was not filed under CR 56.¹³ VRP 9:11 – 10:3, 12:23-25.

They are wrong. The District’s motion was not dispositive – it sought no judgment on plaintiffs’ claims under CR 12 or CR 56. *See, e.g., Herko v. Metropolitan Life Ins. Co.*, 978 F. Supp. 141, 142 n.1 (W.D.N.Y. 1997); *Gonzalez v. GE Grp. Admins., Inc.*, 321 F. Supp. 2d 165, 166-67 (D. Mass. 2004).¹⁴ If granted, plaintiffs’ lawsuit would not be dismissed. *See* RCW 7.04A.070(6) (“If the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration.”). Instead, the District properly brought the motion under CR 7¹⁵: “Our civil rules provide generally that the application to the court for

¹³ The court also stated that the District failed to respond to plaintiffs’ argument, which was inaccurate. *Compare* VRP 8:18 – 9:3 *with* CP 661.

¹⁴ Plaintiffs argued that because the District’s motion did not “state a ‘future date by which the case status will be reviewed,’” it was intended to be a dispositive motion. CP 649. They misquoted KCLR 7(b)(11) and misled the trial court – the rule refers to language that must be in the court’s order, *not* the motion: “The *order* staying proceedings shall indicate a future date by which the case status will be reviewed.” KCLR 7(b)(11) (emphasis added).

¹⁵ “An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” CR 7(b)(1). The District’s motion complied with the rule. CP 544-58.

an order shall be by motion under CR 7(b)(1).” *Kittitas Cnty. v. Allphin*, No. 34760-5-III, 2018 WL 1284667 at *4 (Wash. Ct. App. Mar. 13, 2018).

The Supreme Court’s recent decision in *FutureSelect Portfolio Mgmt. v. Tremont Gp. Holdings*, No. 93824-5, 2018 WL 1321999 (Wash. S. Ct. Mar. 15, 2018) confirms that motions to compel arbitration are *not* dispositive – the right to an immediate appeal of an order *declining* to compel arbitration is an exception to appealable decisions listed in RAP 2.2(a). *Id.* at *3. The Court left open the issue of whether “orders compelling arbitration are immediately appealable,” noting that several of its cases hold that orders compelling arbitration are not immediately appealable. *Id.* at *3-*4 (*citing Saleemi v. Doctor’s Assocs.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) and *All-Rite Contracting Co. v. Omey*, 27 Wn.2d 898, 901, 181 P.2d 636 (1947)). If a motion to compel were dispositive, the decision granting the motion would be appealable as a matter of right. RAP 2.2(a)(3).

In making its decision, the court looked only at plaintiffs’ allegations in their Second Amended Complaint, ignoring the existence of the CBA. Plaintiffs cannot, however, avoid arbitration through “artful pleading,” avoiding mention of the governing CBA and its grievance and arbitration procedures. In an analogous context, Washington and federal courts do not allow parties to avoid federal preemption by omitting

mention of the federal claims from their pleadings. *Joy v. Kaiser Aluminum & Chem. Corp.*, 62 Wn. App. 909, 911, 816 P.2d 90 (1991)¹⁶; *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)¹⁷; *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 271 (2d Cir. 2005).¹⁸

G. The District did not waive its right to compel arbitration; it filed its motion 15 days after plaintiffs filed their Second Amended Complaint.

Although the trial court did not rule on the issue, plaintiffs may argue, as they did below (CP 643), that the District waived the right to compel arbitration under the CBA. There was no waiver. As soon as plaintiffs moved to amend the complaint by adding McFarland as a named plaintiff, the District argued that her claims were arbitrable. CP 283-85. The District's motion to compel arbitration was filed 15 days after the

¹⁶ "Preemption has been extended to include tort claims by employees against employers when they are inextricable intertwined with consideration of the terms of a labor contract. Artful pleading as a state law claim will not avoid preemption."

¹⁷ "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint."

¹⁸ "The artful-pleading doctrine . . . rests on the principle that a plaintiff may not defeat federal subject-matter jurisdiction by 'artfully pleading' his complaint as if it arises under state law where the plaintiff's suit is, in essence, based on federal law."

Court granted the motion to amend and plaintiffs filed the Second Amended Complaint. CP 431, 435, 544.

The timing of the District's filing of its motion to compel arbitration was in swift response to plaintiffs' claims in this lawsuit, which are a moving target. Initially, Lee's complaint was for declaratory and injunctive relief and certification of a CR 23(b)(2) class. CP 1-6. After Lee withdrew her first motion to certify, the District moved to dismiss her non-monetary and class claims for lack of justiciability and lack of standing. CP 1131-57. Lee then moved to amend her complaint. After Lee's amended complaint was filed, the District again moved to dismiss her non-monetary claims and her class claims for missed meal breaks. CP 1158-70 (Dkt. 27A). Although the complaint and amended complaint identified a meal break class of "all *other* nurses," *i.e.*, those not in the ED, plaintiffs asserted that what they "really" meant is nurses in the ED. CP 1178.

The Court's class certification order did not include class-wide claims for injunctive or declaratory relief or for late or interrupted meal breaks. CP 254-56. By adding McFarland as a named plaintiff, however, plaintiffs sought to resurrect those claims.¹⁹ The combination of McFarland's deposition testimony, which was given *before* plaintiffs

¹⁹ McFarland quit almost immediately after the trial court named her as a representative employee. CP 672.

sought to amend the complaint, and the Second Amended Complaint, made clear that the claims in this lawsuit arise under the CBA and require an interpretation of the CBA's express terms and the past practices of the parties.²⁰

Waiver of a contractual right to arbitration is disfavored, and a party seeking to prove waiver has a heavy burden of proof. *Steele v. Lundgren*, 85 Wn. App. 845, 852, 935 P.2d 671 (1997). In *Hill v. Garda CL Nw. Inc.*, 169 Wn. App. 685, 281 P.3d 334 (2012), *rev'd on other grounds*, 179 Wn.2d 47, 308 P.3d 635 (2013), the class plaintiffs argued that the defendant had “waived its right to arbitration by engaging in 19 months of litigation before filing the motion to compel.” *Id.* at 690. During the 19 months, the defendant participated “in discovery and motions practice, taking depositions of the named plaintiffs, and moving for summary judgment.” *Id.* at 691. This Court disagreed. As noted by the Court, an amended complaint presents an “obvious opportunity” to assert the right to compel arbitration, *id.* at 692, and that is what the District did

²⁰ Paradoxically, if former employee McFarland has standing to pursue and obtains forward-looking “relief,” ***an injunction to adhere to the 10-minute break rule would allow RNs less rest time than under the CBA.*** Effectively amending the CBA terms and substituting less favorable terms on behalf of one individual no longer subject to it is just another reason to require arbitration.

here. The District took only two weeks to file the motion to compel following plaintiffs' filing of the second amended complaint.

H. Joinder of WSNA is not required.

For mandatory joinder of parties under CR 19, the court must join a party, if feasible, (1) in order to give complete relief to the existing parties, (2) to protect a person's interest who is not a party in the action, or (3) to spare the existing parties the risk of increased or inconsistent obligations. CR 19(a). Under this rule, a party is "necessary" if its "absence from the proceedings would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability." *Serres v. Wash. Dep't of Retirement Sys.*, 163 Wn. App. 569, 588, 261 P.3d 173 (2011); *see also Lindberg v. Cnty. of Kitsap*, 133 Wn.2d 729, 745, 948 P.2d 805 (1997) ("Persons who may be involved in the subject matter of an action are not necessary parties where no recovery is sought against them and they would not be prejudiced by the judgment.").

Here, WSNA is not a necessary party under CR 19 because there was no decision on the merits before the trial court which impacts an

interest of the WSNA.²¹ The sole inquiry is whether the plaintiffs have made a claim which requires interpreting the CBA. Complete relief on this narrow issue may be granted by the trial court between the existing parties without affecting WSNA's rights. There is no prejudice to the WSNA by the court determining whether plaintiffs' claims require interpretation of the CBA.

WSNA has no interest at stake in the action as evidenced by the fact that it has refrained from asserting any such interest. Even if it had an interest, plaintiffs chose not to join it as a party.

WSNA is also not a necessary party as shown by the terms of the CBA. Although the CBA is an agreement between the District and the WSNA, an aggrieved nurse alone may initiate the grievance process.²²

V. CONCLUSION

Disputes relating to a collective bargaining agreement are presumptively within the CBA's arbitration provisions unless negated expressly or by clear implication. *Local Union No. 77*, 40 Wn. App. at 63.

²¹ If the WSNA's rights are affected by this action, plaintiffs should have joined the union as a party. Plaintiffs did not.

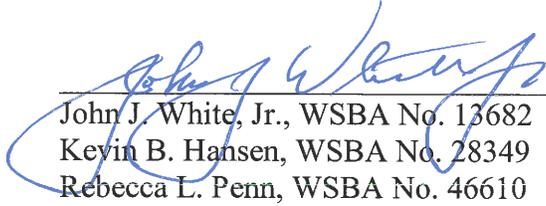
²² Grievance procedure steps one, two and three state: "If any nurse has a grievance, *the nurse* and/or the Local Unit Chairperson, or designee, *shall* first present the grievance in writing" CP 106, 147, 190 (emphasis added).

[E]ven frivolous claims are arbitrable, and a court has no business weighing merits of a grievance or determining whether there is particular language in the labor agreement to support a claim; such decisions are for arbitrator.

Id. at 64. For public employment, “[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective [bargaining] agreement.” *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 234, 45 P.3d 186, amended on denial of reconsideration, 50 P.3d 618 (2002) (quoting *Warrior & Gulf Nav. Co.*, 363 U.S. at 581).

Lee’s and McFarland’s individual claims for late or interrupted meal periods require construction of the CBA. The class claims for “missed” rest breaks, as shown by the evidence, are actually claims that the contractual 15-minute breaks were missed, not the 10-minute or intermittent breaks permitted under state law. All claims in this lawsuit relate to the CBA’s subject matter and must be submitted to its grievance and arbitration provisions which permit group grievance and arbitration procedures. Plaintiffs cannot evade the grievance and arbitration provisions of the CBA through the simple expedient of ignoring them.

Respectfully submitted this 23rd day of March, 2018



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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on March 23, 2018, I caused service of the foregoing to the following counsel of record:

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Dated: March 23, 2018



Lee Wilson, Legal Assistant

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