102047-3

NO. 381528

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DANIEL CAMPEAU, individually and
on behalf of all persons similarly situated,

Petitioner/Plaintiff,

v.

YAKIMA HMA, LLC, a Washington corporation,

Respondent/Defendant.

PETITION FOR REVIEW

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I. INTRODUCTION

This Court should take review of Division Three's decision below pursuant to RAP 13.4(b)(1) and (4) because it: (a) dismantles a class action tolling doctrine this Court recognized twenty years ago in *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.2d 351 (2001); (b) involves a question of substantial interest to the public, in particular, procedural protections for workers and consumers; and (c) perpetuates harm to a group of 28 nurses who have been shut out of the civil justice system, despite proving they are victims of "egregious conduct" by their employer in *Washington State Nurses Ass'n v. Yakima HMA, LLC*, 196 Wn.2d 409, 416-20, 469 P.3d 300 (2020) ("*WSNA*").

II. IDENTITY OF PETITIONER

Petitioner-Plaintiff Daniel Campeau, a nurse and former employee of Respondent-Defendant Yakima HMA, asks this Court to accept review of the appellate decision designated in Part III, below.

III. COURT OF APPEALS DECISION

On May 2, 2023, Division Three issued a published decision in which it held that *American Pipe* tolling is unavailable to class members in Washington; it also reversed the trial court's application of tolling to Campeau's wage theft claims. Appendix A (Division Three Opinion) ("Op.") (*Campeau v. Yakima HMA, LLC*, 528 P.3d 855 (Wash. 2023)); CP116-117 (Trial Court Order).

IV. ISSUES PRESENTED FOR REVIEW

1. Did Division Three err in holding that the tolling doctrine set forth in *American Pipe v. Utah*, 414 U.S. 538 (1974) is no longer available to workers, consumers, and other class members in Washington, despite being recognized twenty years ago by this Court in *Pickett v. Holland America* and notwithstanding its application in nearly all other jurisdictions across the country?

2. Did Division Three err in holding that *American Pipe* tolling, if available, applies only during the pendency of some representative actions (class actions) but not others

(associational cases) where the same reasons for tolling exist in both circumstances?

V. STATEMENT OF THE CASE

From 2012 to 2017, Respondent-Defendant Yakima HMA cheated 28 nurses out of nearly $1.5 million in wages. *See WSNA*, 196 Wn.2d at 414-15; CP69-71 (*WSNA* Judgment). All these years later, the nurses, including Campeau, have not been repaid a cent of what Yakima HMA wrongfully withheld.

The Court will recall that, in *WSNA*, a five-justice majority vacated a judgment entered against Yakima HMA, holding that the nurses' union lacked standing to litigate backpay claims on behalf of its members. 196 Wn.2d at 415. The four-justice dissent viewed the decision as restricting access to justice and a departure from precedent. *Id.* at 426 (Yu, J., dissenting) ("[T]he majority's strict and rigid application of that rule here is not required by our precedent…."). Notably, the majority did not disturb the trial court's findings on the merits and, at several turns, decried Yakima HMA's conduct. *See id.* at 414-15, 425.

After the Court's decision, the union filed a motion for reconsideration. While the union's request was pending, and before the mandate issued, Campeau filed this putative class action in Yakima County Superior Court. *See* CP1-6. In his complaint, Campeau asserted that Yakima HMA must be estopped from denying the wages owed to him and his fellow nurses, citing the very same claims tried by his union. CP4. In other words, far from sleeping on his rights, Campeau filed this case against Yakima HMA before the last one concluded, asserting claims that could hardly be described as "stale."

Shortly thereafter, Yakima HMA filed a motion for judgment on the pleadings, arguing that Campeau's claims were untimely because the three-year limitations period had elapsed. CP23-40. Campeau did not argue with the math; after all, by then, Yakima HMA had been vigorously defending its non-payment of wages in the *WSNA* action for five years. CP41. Instead, Campeau requested that the trial court apply equitable tolling.

In support, Campeau cited several cases to the trial judge that tolled plaintiffs' claims in similar circumstances, arising out of jurisdictional uncertainty created by the courts and beyond plaintiffs' control. CP44-49 (citing, e.g., *Langlois v. BSNF Ry. Co.*, 8 Wn. App. 2d 845, 862-63, 441 P.3d 1244 (2019) (applying equitable tolling where plaintiff timely and reasonably filed suit in forum later determined to lack jurisdiction); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir. 1986) (same where plaintiff filed Title VII claim in state instead of federal court where law on proper fora was unsettled); *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 204-05 (3rd Cir. 2002) (same where plaintiff's pursuit of a remedy for trademark violation in another forum was discontinued due to lack of personal jurisdiction); *Nicely v. Pliva, Inc.*, 181 F. Supp. 3d 451, 457 (E.D. Ky. 2016) (tolling applied during pendency of state court product liability action where law on personal jurisdiction over corporation changed mid-stream)). Here too Campeau could not have reasonably anticipated that his once timely wage theft claims, tried to judgment, would eventually

fail on a jurisdictional defect (associational standing) that not even four justices on this Court would have predicted. *See id.* at 41-53.

Below, Campeau also relied on the rationale of *American Pipe*, CP49-52, and cited numerous factors that favored tolling of his claims under then-existing Washington law; namely, "diligence in pursuing one's rights;" the policy aims of the underlying statutory claim (targeting wage theft), the purpose of the limitations period (disallowing stale claims), the "absence of prejudice to defendants," and his "reasonable reliance" on a prior proceeding, *id.* at 47-49 (citing, e.g., *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 810-811, 818 P.2d 1362 (1991)). Equitable tolling, he argued, must be assessed on a case-by-case basis, not by rigid application of a multi-factor test. *See id.* at 49 (citing *Douchette*, 117 Wn.3d at 813 (noting that a court's role is to "balance[e] the equities")).

The trial court agreed, finding that "extraordinary circumstances" warranted tolling of Campeau's claims:

> The Court DENIES Defendant's Motion and holds that equitable tolling applies to Plaintiff's claims during the pendency of the action filed by his union, tried to judgment in his favor, and reversed on appeal on jurisdictional grounds by [*WSNA*]. Plaintiff diligently pursued his clams through the WSNA action, including by testifying at trial; Plaintiff reasonably relied on the union's action to protect his statutory rights; the change in law on associational standing announced by the majority opinion in WSNA is an extraordinary circumstance outside of Plaintiffs control; tolling results in no prejudice to Defendant nor does it undermine the purpose of the statute of limitations; and the underlying remedial purpose of Plaintiff's wage and hour claims are served by tolling. For these reasons, the Court holds that equitable tolling applies such that Plaintiff's claims are not barred by the otherwise applicable limitations period.

CP111. But again, rather than just repaying the nurses their wages, Yakima HMA sought appellate review on the "timeliness" of Campeau's claims, which Division Three of the Washington Court of Appeal granted.

While its appeal was pending, Yakima HMA benefited from yet another fortuitous change in the law: this Court's decision in *Fowler v. Guerin*, 200 Wn.2d 110, 515 P.3d 502 (2002) ("*Guerin*"). As the Court knows, *Guerin* requires a showing of bad

faith or deception on the part of a civil defendant before equitable tolling will apply. 200 Wn.2d at 113. Campeau conceded below that he cannot show this particular breed of bad faith; but urged Division Three to apply the principles of *American Pipe* tolling as an independent basis on which to affirm the trial court's decision.

Division Three refused and instead held that *American Pipe* is not available to *any* litigant in Washington; the panel reasoned that to apply *American Pipe* would run contrary to this Court's decision in *Guerin* because the former does not require a showing of bad faith, but the latter does. Op. at 9-10. Though the court below acknowledged the existence of *Pickett* (in which this Court recognized class action tolling), Division Three did not attempt to harmonize *Pickett* with *Guerin* and apparently assumed this Court overruled *Pickett sub silentio. See* Op. at 10. Going further, the panel held that, even if *American Pipe* applies in Washington, the 28 nurses here cannot invoke its protection because the prior action was brought by a union, and not a class representative. *Id.* at 11.

This petition for review followed.

VI. ARGUMENT

A. Division Three Erred in Holding that *American Pipe* Tolling is Unavailable in Washington.

Division Three held that the limitations period for individual class member claims is not tolled during the pendency of a class action lawsuit. Op. at 7-10. In other words, according to Division Three, if an employee in Washington files a putative class action to, say, recoup overtime wages for himself and ninety-nine (99) coworkers, each of those 99 coworkers will *also* have to file a lawsuit to ensure their claims are preserved. The same would be true for a CPA class action filed on behalf of thousands of consumers injured by bogus fees or deceptive advertising.

If Division Three's ruling stands, individual workers and consumers in Washington will lack the protection they would receive in every federal trial court across the country and in the "wide majority" of sister state courts. *See Philip Morris USA, Inc. v. Christensen*, 905 A.2d 340, 354-55 n.8 (Md. 2006) (adopting *American Pipe* in Maryland and citing the "wide majority" of states

to do so, including Oregon, Utah, Hawaii, Idaho, Alaska, Pennsylvania, Illinois, Ohio, Arkansas, Kansas, Alabama); *see also Grimes v. Hous. Auth.*, 698 A.2d 302, 307 (Conn. 1997) (Connecticut court recognizing *American Pipe* tolling doctrine); *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522, 531-32 (Colo. Ct. App. 1994) (same in Colorado), *aff'd in part and rev'd in part on other grounds*, 908 P.2d 1095 (Colo. 1995); *Dubroff v. Wren Holdings, LLC*, No. 3940-VCN, 2011 WL 5137175, at *13 (Del. Ch. Oct. 28, 2011) (same in Delaware); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 180 (Iowa 1977) (same in Iowa); *DiCerbo v. Comm'r of Dept. of Emp't and Training*, 763 N.E.2d 566, 572 n.13 (Mass. App. Ct. 2002) (same in Massachusetts); *Northview Constr. Co. v. City of St. Clair Shores*, 236 N.W.2d 396, 406 n. 11 (Mich. 1975) (same in Michigan); *Bartlett v. Miller and Schroeder Municipals, Inc.*, 355 N.W.2d 435, 439 (Minn. Ct. App. 1984) (same in Minnesota); *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 251 (Mont. 2010) (same in Montana); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 (N.J. Super. Ct. App. Div. 1999)

(same in New Jersey); *Butler v. Deutsche Morgan Grenfell, Inc*., 140 P.3d 532, 538 (N. Mex. 2006) (same in New Mexico); *Mun. Auth. of Westmoreland Cnty. v. Moffat*, 670 A.2d 747, 749 (Pa. Commw. Ct. 1996) (same in Pennsylvania); *Grant v. Austin Bridge Constr*. Co., 725 S.W.2d 366, 370 (Tex. App. 1987) (same in Texas); *Salatino v. Chase*, 939 A.2d 482, 491-92 (Vt. 2007) (same in Vermont).[1]

This Court should accept review to clarify that *American Pipe* tolling applies in Washington, as this Court first recognized in *Pickett*. First, some context is important:

1. Class Actions Play a Critical Role in Enforcing Remedial Laws that Protect Workers and Consumers.

The right to payment of wages in Washington is a "nonnegotiable" right, backed by powerful public policy. *Young v. Ferrellgas, LP*, 106 Wn. App. 524, 531-32, 21 P.3d 334 (2001)

[1] Of the few jurisdictions to reject *American Pipe* tolling, at least a handful have done so because their state law *forbids* class actions altogether. *E.g. Boone v. Citigroup, Inc*., 416 F.3d 382, 393 (5th Cir.2005) (noting that Mississippi does not permit class actions); *Casey v. Merck & Co., Inc*., 722 S.E.2d 842, 846 (Va. 2012) (same for Virginia)

(quoting *Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co*., 139 Wn.2d 824, 830, 991 P.2d 1126 (2000)). Similar statements of legislative intent exist in federal wage statutes. 29 U.S.C. §202(a); *see Tennessee Coal Co. v. Muscoda Local,* 321 U.S. 590, 597 (1944) (referring to the "remedial" and "humanitarian" aims of the federal Fair Labor Standards Act).

Despite these laws, wage theft in this Country is a *billion*-dollar enterprise.[2] Each year, government enforcement agencies make only a small dent in the problem, recovering stolen paychecks for just a fraction of the workforce.[3] Meanwhile,

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[2] While capturing the extent of wage theft in this country is challenging, it is easily in the "billions" each year, hurting low-wage earners the most. *See* Cooper, David, and Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, Economic Policy Institute (2017), available at: https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/ (last visited May 30, 2023).

[3] The United States Department of Labor publishes annual statistics showing it spends roughly 800,000 hours each year recovering backpay for in the range of between 150,000 to 300,000 workers. *See* www.dol.gov/agencies/whd/data/charts/all-acts (last visited May 29, 2023); *see also* Glover, Maria, *The Structural Role of Private Enforcement Mechanisms*

corporations and employer-defendants have taken full advantage of forced individual arbitration, further exacerbating the chronic underenforcement of wage laws. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1644-48 (2018) (Ginsberg. J., dissenting).

Where available, then, class action lawsuits play a critical role in enforcing workplace protections. *See id.* at 1642; *accord Oakley v. Domino's Pizza LLC*, 23 Wn. App. 2d. 218, 235, 516 P.3d 1237 (2022) (holding class action waiver in arbitration agreement substantively unconscionable and noting that collective action is likely the only way to vindicate smaller wage claims). This Court, in fact, noted that a class action *in this very case* is the appropriate vehicle to confront Yakima HMA's wage theft. *WSNA*, 196 Wn.2d at 425.

The same pattern of underenforcement repeats itself with consumer protection laws. *See AT&T Mobility LLC v.*

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in Public Law, 53 Wm. & Mary L. Rev. 1137, 1150-1151 (2012) (noting that Department of Labor investigates fewer than 1 percent of FLSA-covered employers each year).

Concepcion, 563 U. S. 333, 339 (2011) (permitting corporations to force consumers into individual arbitrations); *but see Scott v. Cingular Wireless* 160 Wn.2d 843, 852, 161 P.3d 1000 (2007) (holding class action waiver for consumer claims unconscionable, noting that "[c]lass actions exist because too many are injured to name").

As this Court has recognized, the alternative to enforcing worker and consumer rights through class action litigation is likely no redress at all. *See Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 524, 415 P.3d 224 (2018) (noting that a class action is "likely the only way that the nurses' [wage and hour] rights will be vindicated" given the fear of reprisal from the employer); *Scott*, 160 Wn.2d at 852 ("[W]hen consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public's rights.").

Washington's Civil Rule (CR) 23, and the caselaw construing it, evinces a state policy that favors aggregation of small claims to promote efficiency for the courts and the parties,

deterrence for statutory violations, and access to justice. *See id*. at 851-53. Indeed, Washington courts favor a liberal interpretation of Rule 23 given its purpose of avoiding multiplicity of litigation, freeing defendants from the harassment of identical future litigation, and saving individual plaintiffs the cost and trouble of filing individual suits. *See Smith v. Behr Process Corp*. 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002) (internal quotations and citation omitted)

2. *American Pipe* Tolling Furthers the Purpose of Rule 23.

A critical feature of class actions is the tolling of individual class member claims, recognized in *American Pipe v. Utah* nearly fifty years ago. There, the U.S. Supreme Court held that the statute of limitations on individual claims should be suspended from the time of filing and up to the point the trial court decides whether a case is suitable for class treatment. *Am. Pipe*, 414 U.S. at 554. Such tolling ensures that individual class members are not forced to file multiple, superfluous actions to protect their individual right to sue in the event the court ultimately rejects certification. *See*

id. at 553-54 ("[A] rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.").

Tolling class member claims, the Court reasoned, does not prejudice the defendant nor undermine the function of the statute of limitations because once the lawsuit is filed, "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation" and can act to preserve relevant evidence and avoid surprise. *Id.* at 554-55.

The same, of course, is true here where Yakima HMA has been actively litigating its non-payment of wages to the same 28 nurses for, now, eight years running.

3. The Washington Supreme Court Recognized *American Pipe* Tolling Twenty Years Ago.

Below, Division Three held that *American Pipe* tolling is no longer available in Washington because to apply it would conflict with *Fowler v. Guerin*. This is the extent of the analysis:

> *American Pipe* tolling does not require a plaintiff to show that the defendant engaged in conduct that interfered with the plaintiff's timely filing. And

> because *Fowler v. Guerin* prohibits equitable tolling of the statute of limitations in a civil case without such a showing, *American Pipe* tolling is not available in Washington.

Op. at 9-10.

Respectfully, there is no reasoned basis to find conflict between *Guerin* and *American Pipe*. To begin, *American Pipe* tolling is not discussed let alone cited in this Court's *Guerin* decision; and the plaintiff-teachers there appear not to have invoked it (relying instead on equity). Division Three failed to recognize that class action tolling can and does exist separate and apart from a state's equitable tolling rules. *Cf. Hatfield v. Halifax PLC*, 564 F.3d 1177, 1188 (9th Cir. 2009) (noting that while the two doctrines "overlap to some extent," California's equitable tolling is "not congruent" with *American Pipe* considerations).

Said another way, Division Three's entire basis for rejecting the efficiencies gained by *American Pipe* centers on a conflict that does not exist and can be easily harmonized, just as this Court has carved out a tolling doctrine unique to personal restraint petitions. *Guerin*, 200 Wn.2d at 123.

Meanwhile, for at least twenty years, class action litigants in Washington (and their counsel) could fairly assume that *American Pipe* tolling applies.[4] That is, the last and only time this Court has had occasion to consider the doctrine, the Court accepted its validity, albeit in the context of correcting a lower court's application of it to improperly revive stale claims. *Pickett v. Holland Am. Line-Westours, Inc.* 145 Wn.2d 178, 194-5, 35 P.2d 351 (2001). Surely, if the *Pickett* Court wanted to reject *American Pipe* tolling for Washington classes, it would have said so, rather than alleviate the lower court's "misunderstanding" of how the doctrine functions in practice. *See id.* at 195.

The only other Washington appellate court to consider *American Pipe* tolling was Division Three in *Columbia Gorge*

[4] This assumption is not just one held by the undersigned but is shared by a prominent national defense firm (Orrick) whose attorneys conducted a state-by-state survey of *American Pipe* tolling and concluded *Pickett* adopted it for Washington. *See* www.orrick.com/en/Insights/2020/08/A-Guide-To-Determining-Class-Claim-Time-Bars (last visited May 30, 2023).

Audubon Soc'y v. Klickitat Cnty., 98 Wn. App. 618, 989 P.2d 1260 (1999). There, oddly enough, the defendant-energy company (Enron) urged the Court to apply the doctrine to preclude the Yakima Nation from intervening as a third-party, arguing that whatever tolling of claims existed during a prior proceeding, had already lapsed. *See id.* at 624-25. The court reasoned that *American Pipe* was the wrong legal test for assessing the timeliness of *intervention* under Rule 24 but did not otherwise question the viability of the doctrine. *See id.* at 625.

This Court should accept review to clarify that, as indicated in *Pickett*, *American Pipe* tolling exists in Washington to protect individual class member claims and to promote the purpose of CR 23. *Guerin* does not overrule *Pickett* nor should it be construed to do so *sub silentio*. *See State v. Lupastean*, 200 Wn.2d 26, 40, 513 P.3d 781, 788 (2022) (noting that to overrule a case *sub silentio* "does an injustice to parties who rely on this court to provide clear rules of law.")

Allowing Division Three's opinion to stand would mean that individual class members will now have to race to the courthouse with duplicate filings, defeating the very efficiencies Civil Rule 23 was designed to achieve. Moreover, such ruling imposes a staggering burden on low-wage workers and consumers with so-called "low value" claims who will be unlikely to file individual actions on their own, let alone find or afford an attorney to do so on their behalf.

B. There is No Reasoned Basis to Disallow *American Pipe* Tolling During the Pendency of Some Representative Actions But Not Others.

Next, Division Three erred in its "alternative" holding; namely, that if *American Pipe* tolling exists in Washington, it only applies to some representative actions (CR 23 class actions) and not others (cases brought by unions on behalf of their members).

Attempting to distinguish these two substantially similar procedural devices, the court below suggested it was a matter of *how long* the tolling period lasts, with shorter periods of tolling

deemed acceptable and longer periods not. *See* Op. at 11-12. That is, the court surmised on its own that tolling from the time of class action filing to certification will be relatively short ("weeks or months") whereas tolling during the time it takes to determine associational standing will be comparably longer ("years"). *Id.* From here, the court posits that tolling that goes on too long (it is unclear *how* long) will "significantly interfere with the important legislative policies" of statutes of limitations. Respectfully, the panel's reasoning is deeply flawed.

First, class certification is not the sort of "threshold" issue that gets decided once-and-for-all at the outset of a case. Rather, by the plain text of Rule 23, class certification is *always* conditional, subject to later modification or wholesale decertification by the trial judge at any time during the proceeding. CR 23(c)(1); *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). And, of course, the grant or denial of certification is common fodder on appeal, upsetting the certification decision "years" after the date

of filing. *See e.g.*, *Chavez*, 190 Wn.2d at 524 (reversing trial court's order denying certification six years after filing); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 347, 367 (2011) (reversing trial court's order granting certification seven years after order).[5]

Moreover, the *duration* of a given tolling period is beside the point. As the Court knows, statutes of limitation protect defendants from litigating stale claims. *See Guerin*, 200 Wn.2d at 118-19. The U.S. Supreme Court adopted *American Pipe* tolling precisely because it *does not conflict with these aims*.

[5] In addition, Division Three's assumption that a decision on class certification will happen quickly is out of step with modern practice. Although CR 23(c)(1) directs trial courts to determine class certification "[a]s soon as practicable," it often takes months (and months) of back-and-forth with the defense to obtain the necessary discovery required to satisfy the court's "rigorous analysis" standard, *see Oda v. State*, 111 Wn. App. 79, 93, 44 P.3d 8 (2002), not to mention the time dedicated to overcoming various defense tactics, such as attempts to remove class actions to federal court, compel arbitration, stay class discovery, or strike class claims altogether. As to the rare case where a court is confronted with associational standing questions, there is no basis to assume it will take a comparatively lengthier period of time to resolve.

Am. Pipe, 414 U.S. at 554 ("This rule is in no way inconsistent with the functional operation of a statute of limitations."). By its very nature, *American Pipe* tolling only applies when an individual claimant or class member files *the very same claim against the very same defendant* as asserted in a prior proceeding. *See Am. Pipe*, 414 U.S. at 555; *see also Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467-68 (1975) (noting that the existence of a prior filing on "exactly the same cause of action" is "more than an abstract or theoretical consideration…because [it] avoid[s] the evil against which the statute of limitations was designed to protect."). The same claim filed in the subsequent action is not stale, the evidence has not been lost, and the defendant cannot possibly be prejudiced – whether the tolling during the first case lasts weeks or months or years.

Here, just like in a class action, the nurses' union brought the original case as a representative action, with individual nurses relying on the suit to vindicate their claims for back pay and missed breaks. Though a rare procedure, such aggregation of claims

through representative action has the very same goals as a CR 23 class action. *See Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 216, 45 P.3d 186, 190, (2002) (noting that, without the union's representative action, the process of asserting claims would burden "individual members of the employee association economically and would almost certainly burden our courts with an increased number of lawsuits arising out of identical facts.").

A rule that tolls individual member claims during the pendency of an association's identical case avoids needless filings and achieves the same efficiencies as with a class action. And it cannot possibly prejudice the defendant. *See Level I Sportswear, Inc. v. Chaikin*, 662 F. Supp. 535, 539-40 (S.D.N.Y. 1987) (noting that an intervenor-employee's claim was subject to tolling where union's claim for breach of a collective bargaining agreement had been litigated in state and then federal court, reasoning that the "proposed intervenor cannot be reasonably

charged with sleeping on her rights by awaiting the decision on appeal.").

This Court should accept review of Division Three's decision and hold that the union's filing suspended the statute of limitations on Campeau's claims until the Court determined that his union lacked standing to assert them on his behalf. Just like a defendant in any wage and hour class action, Yakima HMA cannot claim "surprise" from the assertion of Campeau's claims, which exactly parallel those asserted and tried in *WSNA* involving the very same employees. To conclude otherwise would greatly prejudice the nurses considering the proven merits of their claims and the unanticipated jurisdictional black hole created by the majority opinion in *WSNA*.

On this final point, Division Three criticizes the nurses' union, suggesting it "should have known" it had no standing to pursue the nurses' backpay claims. Op. at 12-13. This "should have known" retort seems particularly harsh when the parties' trial judge along with four members of this Court would not have so

concluded. What is more, the union had every reason to believe its representative action was appropriate under then-existing law. *See Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 365, 312 P.3d 665 (2013) (holding a "union has standing to sue in its associational capacity for injunctive relief and back pay for missed breaks incurred by its members"); *see also Washington State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 825, 836, 287 P.3d 516 (2012) (affirming damages award in case brought by WSNA on representative basis).

Lastly, even if it were true that somehow the union should have foretold the future, there is no basis to impute such knowledge to individual nurses, including Campeau. Such reasoning turns agency-principal law on its head (where the imputation of knowledge runs in reverse, from agent to principal), and is contrary to Campeau's assertion that he relied on his union to vindicate his rights in court rather than file his own lawsuit. CP1-2.

VII. CONCLUSION

For the foregoing reasons, the Court should accept review of the decision below.

DATED this 1st day of June, 2023.

I certify that this document contains 4,595 words, in compliance with the RAP 18.17.

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Appendix A

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DANIEL CAMPEAU, individually and on behalf of all persons similarly situated, Respondent, v. YAKIMA HMA LLC, Petitioner.	)	No. 38152-8-III PUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — In 2015, the Washington State Nurses Association (WSNA) brought suit on behalf of its union members against their employer, Yakima HMA LLC (Yakima Regional), and obtained a large judgment for back wages and attorney fees. Our Supreme Court reversed that judgment and dismissed the action because WSNA lacked associational standing to bring suit on behalf of its members.

Daniel Campeau, a union member of WSNA, then brought this action seeking class certification and asserting the same claims that had been dismissed. Yakima Regional moved to dismiss on the basis that the statute of limitations had run on Mr. Campeau's claims. The trial court denied the motion, concluding that the statute of limitations had been equitably tolled by WSNA's suit. Yakima Regional sought

discretionary review of that ruling, and we granted review.

While review was pending, the Washington State Supreme Court clarified the doctrine of equitable tolling. Mr. Campeau tacitly concedes that the doctrine does not apply here. He now argues that the statute of limitations was tolled under another doctrine, *American Pipe*[1] tolling.

As an intermediate appellate court, we must follow Washington State Supreme Court precedent. Recent precedent requires us to conclude that *American Pipe* tolling is not available in Washington. But even if it was available, the doctrine would not apply here. We reverse the trial court's order and dismiss Mr. Campeau's claims.

FACTS

Previous litigation

Mr. Campeau was employed as a home care nurse from 2011 to 2016. In 2015, his union, WSNA, brought suit against Mr. Campeau's employer, Yakima Regional, alleging various wage and hour violations. That case was eventually dismissed by our Supreme Court; we include the facts of the litigation as related in the court's opinion:

[1] *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974).

> In April 2015, WSNA filed suit against Yakima Regional on behalf of 28 home health and hospice nurses seeking damages under the Washington Minimum Wage Act[2] and the industrial welfare act[3] for unpaid working hours, overtime hours, and missed meal periods.
>
> . . . .
>
> In 2017, the parties filed cross motions for summary judgment. WSNA sought partial summary judgment on liability, and Yakima Regional sought summary dismissal on the grounds that WSNA lacked associational standing to bring its claim. The trial court denied both motions, but it certified its order denying Yakima Regional's motion for summary judgment for interlocutory discretionary review under RAP 2.3(b)(4) because there was substantial ground for a difference of opinion on the standing issue. The Court of Appeals denied the motion for discretionary review because more factual development was necessary to determine what evidence WSNA would rely on to establish damages.
>
> A nine-day bench trial began in January 2018. At trial, nine nurses testified about the work environment, the hours they worked without pay, and missed meal periods. . . .
>
> . . . .
>
> In its findings of fact and conclusions of law, the trial court held that WSNA had associational standing to bring the claims. . . . The court found total damages to be $1,447,758.09 and awarded WSNA attorney fees and court costs. Finally, the court ruled that Yakima Regional knowingly and willfully deprived the nurses of their pay and ordered double damages pursuant to RCW 49.52.070.
>
> Yakima Regional appealed, arguing, among other things, that WSNA lacked associational standing; WSNA cross appealed.

Wash. State Nurses Ass'n v. Cmty. Health Sys., Inc., 196 Wn.2d 409, 412-14, 469 P.3d 300 (2020). Our Supreme Court reversed the trial court and dismissed the case, holding

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[2] Chapter 49.46 RCW.

[3] Chapter 49.12 RCW.

that WSNA did not have associational standing because the damages for the individual nurses "were not certain or easily ascertainable." *Id.* at 426. It filed its decision on August 13, 2020. *Id*. at 409.

Current litigation

On October 7, 2020, Mr. Campeau filed this action against Yakima Regional, seeking class certification and raising the same claims as in the WSNA case. The complaint stated it sought "to vindicate the rights of the nurses who prevailed at trial in the WSNA [c]ase, but who have still not been paid the wages they are due." Clerk's Papers (CP) at 2. The complaint noted that Mr. Campeau had taken "an active role" in the prior case, including testifying at trial. CP at 3. Yakima Regional answered that Mr. Campeau's claims were barred by the statute of limitations and moved to dismiss on the pleadings under CR 12(c).

Mr. Campeau argued that the court should apply equitable tolling, relying on Washington authority applying federal law and our Supreme Court's decision in *In re Personal Restraint of Fowler*, 197 Wn.2d 46, 479 P.3d 1164 (2021). He argued that those authorities did not require him to show that bad faith by Yakima Regional interfered with his ability to timely file suit.

At oral argument before the trial court, Mr. Campeau reiterated, "We are not alleging any bad faith or deception on the part of [Yakima] Regional. We rely on an alternative series of equitable tolling cases." Rep. of Proc. (RP) at 24-25. He also acknowledged that there had not been any barrier to the nurses joining or intervening in the WSNA case or filing their own claims previously, beyond it being an "unnecessary multiplication of litigation." RP at 26. The trial court ruled that the elements for equitable tolling had been satisfied and denied Yakima Regional's motion to dismiss.

Appellate procedure

Yakima Regional petitioned this court for discretionary review, which we granted under RAP 2.3(b)(1). Comm'r's Ruling, *Campeau v. Yakima HMA, LLC*, No. 38152-8-III,

at 10 (Wash. Ct. App. June 16, 2021). While review was pending, our Supreme Court decided *Fowler v. Guerin*, 200 Wn.2d 110, 123, 515 P.3d 502 (2022), in which it clarified that the more lenient standard for equitable tolling set forth in *Personal Restraint of Fowler* was to be applied in the context of personal restraint petitions only. In civil suits, plaintiffs were still required to show that a defendant's bad faith interfered with timely filing suit. *Id.* at 125.

ANALYSIS

EQUITABLE TOLLING

Yakima Regional contends the statute of limitations has run on Campeau's claims and that equitable tolling is not appropriate.[4] We agree.

We review a trial court's grant of equitable relief de novo. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 375, 113 P.3d 463 (2005). In civil cases, Washington has consistently required a plaintiff seeking equitable tolling of the statute of limitations to demonstrate

> (1) the plaintiff has exercised diligence, (2) the defendant's bad faith, false assurances, or deception interfered with the plaintiff's timely filing, (3) tolling is consistent with (a) the purpose of the underlying statute and (b) the purpose of the statute of limitations, and (4) justice requires tolling the statute of limitations.

Fowler v. Guerin, 200 Wn.2d at 125 (describing the four predicates as the *Millay*[5] standard). Federal courts follow a more "relaxed" standard, which our Supreme Court has followed only in the setting of personal restraint petitions, where it has inherent

[4] Although not explicitly discussed by the parties, the statute of limitations is three years for bringing a claim for unpaid wages. RCW 4.16.080(3); *Seattle Pro. Eng'g Emps. Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d 1126 (2000).

[5] *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998).

authority to extend time to file a habeas-style challenge to a conviction. *Id*. at 123-24 (citing *Pers. Restraint of Fowler*, 197 Wn.2d at 53).

Campeau tacitly concedes that equitable tolling is not available under Washington law and instead urges this court to apply the tolling rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). Yakima Regional contends that *American Pipe* tolling is not available in Washington because it would relieve a plaintiff of a required predicate for tolling the statutes of limitations in civil actions—that a defendant's bad faith interfered with the plaintiff timely filing suit. We agree.

AMERICAN PIPE TOLLING

In *American Pipe*, the State of Utah commenced a putative class action suit against American Pipe and Construction Company and others, alleging violations of the Sherman Act, 15 U.S.C. § 1. 414 U.S. at 540-41. The suit was filed 11 days before the statute of limitations ran. *Id.* at 541-42. The trial court declined to certify the case as a class action because the plaintiffs were not so numerous that joinder was impracticable. *Id.* at 543. Eight days after the order denying class action status, 60 Utah public agencies and entities, members of the original putative class, moved to intervene in the action. *Id.* at

543-44. The trial court denied the motions, concluding the statute of limitations had run and had not been tolled by the filing of the class action on their behalf. *Id.* at 544.

The United States Supreme Court reversed, holding that where class certification was denied solely on the grounds of numerosity, "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553. It reasoned that requiring individual class members to preemptively "file protective motions to intervene or to join in the event that a class was later found unsuitable" would run contrary to a principal purpose of the class action procedure, efficiency and economy of litigation. *Id.*

A. *American Pipe* tolling is not available in Washington

In *Fowler v. Guerin*, our Supreme Court explained that "statutes of limitation reflect the importance of finality and settled expectations in our civil justice system." 200 Wn.2d at 118. And "'[a] statutory time bar is a legislative declaration of public policy which the courts can do no less than respect, with rare equitable exceptions.'" *Id.* (internal quotation marks omitted) (quoting *Bilanko v. Barclay Ct. Owners Ass'n*, 185 Wn.2d 443, 451-52, 375 P.3d 591 (2016)). The court "cautioned against broadly applying equitable tolling in a manner that 'would substitute for a positive rule established by the

legislature a variable rule of decision based upon individual ideas of justice.'" *Id.* at 119 (quoting *Leschner v. Dep't of Lab. & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947)). In emphasizing the necessity of the second predicate of the four-part *Millay* standard, the court wrote, "[B]y allowing equitable tolling upon a showing that the defendant engaged in bad faith, false assurances, or deception, the *Millay* standard properly recognizes that a defendant should lose the benefits of finality provided by statutes of limitation only when that defendant has engaged in conduct that justifies making an exception." *Id.* at 121. Later in its opinion, the court reiterated this point: "'In the absence of bad faith on the part of the defendant . . . *equity cannot be invoked*.'" *Id.* at 123 (emphasis added) (quoting *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991)).[6]

American Pipe tolling does not require a plaintiff to show that the defendant engaged in conduct that interfered with the plaintiff's timely filing. And because *Fowler*

[6] We note some ambiguity here. A proper reading of the majority opinion does not require a showing of the defendant's "bad faith." Rather, equitable tolling may be found if the defendant "engaged in conduct" that "interfered with the plaintiff's timely filing." *Fowler v. Guerin*, 200 Wn.2d at 121, 125 (linking the conduct to the other requirement of the second predicate).

This reading is consistent with Justice Yu's instruction: "[C]ourts must make a fact-specific determination in each case where equitable tolling is sought, based on what the defendant knew or should have known, and how the defendant's conduct affected the plaintiff's ability to timely file their claim." *Id.* at 126 (Yu, J., concurring).

v. Guerin prohibits equitable tolling of the statute of limitations in a civil case without such a showing, *American Pipe* tolling is not available in Washington.

B. *American Pipe* tolling would not apply

As an alternative basis for our decision, even if *American Pipe* tolling was available in Washington, that doctrine would not apply here.

Before today, our courts have not decided whether *American Pipe* tolling is available under Washington law. But the occasional references to the doctrine indicate that type of tolling is limited to class actions.

Our Supreme Court has explained that *American Pipe* tolling stays "'the limitations period on viable claims while the trial court determines the parameters of the class in any possible class action.'" *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 195, 35 P.3d 351 (2001) (quoting *Anderson v. Unisys Corp.*, 47 F.3d 302, 308 (8th Cir. 1995)). And as we have previously noted, the *American Pipe* rule "makes sense only in the context of a class action." *Columbia Gorge Audubon Soc'y v. Klickitat County*, 98 Wn. App. 618, 625, 989 P.2d 1260 (1999).

Here, the initial lawsuit brought by WSNA was not a class action. Thus, the *American Pipe* rule does not apply. Mr. Campeau nonetheless argues that the WSNA litigation was just like a class action because it was a representative action. We disagree.

In a class action, class certification is a threshold issue that is to be determined "[a]s soon as practicable after the commencement of an action brought as a class action." CR 23(c)(1); *see also* FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."). In the WSNA litigation, our Supreme Court specifically identified early class certification as one of the procedural safeguards of class actions. *Wash. State Nurses Ass'n*, 196 Wn.2d at 422-23. It noted that "[a]ssociational standing cases do not have the same protections." *Id.* at 424.

This case highlights an important difference between suits brought on the basis of associational standing and class actions. In the WSNA case, the question of associational standing was not finally decided until our Supreme Court issued its decision in 2020, five years after the action was commenced and after the merits of the case were fully litigated. *Id.* at 412-14. Because the associational standing question depended on the evidence on which WSNA would rely to establish damages, it was not amenable to interlocutory review and was not a threshold issue like class certification would be. *Id.* at 413, 424-25.

Applied to class actions only, *American Pipe* tolling will extend the statute of limitations for weeks or months. Applied to associational standing, *American Pipe* tolling would extend the statute of limitations for years. Thus, to apply *American Pipe* tolling to

associational standing would significantly interfere with the important legislative policies the statute of limitations seeks to further.

C. No "unanticipated jurisdictional black hole"

Mr. Campeau next contends we should apply *American Pipe* tolling because our Supreme Court's decision in *Washington State Nurses Association* created an "unanticipated jurisdictional black hole" that prejudiced the nurses. Answer to Yakima HMA's Opening Br. at 9. We disagree.

The prior ruling could have been anticipated

Yakima Regional challenged WSNA's associational standing throughout the prior litigation.[7] "Associational standing requires that damages be certain, easily ascertainable, and within the knowledge of the defendant." *Wash. State Nurses Ass'n*, 196 Wn.2d at 415. The Supreme Court's decision did not create new law; rather, it "decline[d] to alter" the existing associational standing test. *Id.* at 425.

At some point prior to trial, WSNA should have known there was a real risk it could not meet this standard. To the extent Mr. Campeau and the other union members

[7] In its motion to dismiss, Yakima Regional represented that "WSNA's lack of standing was asserted in [Yakima Regional's] Answer and at every stage of the lawsuit including summary judgment and trial." CP at 34 n.4.

did not anticipate this risk, it has nothing to do with Yakima Regional's conduct; rather, it has to do with communications between WSNA and its union members.

No jurisdictional black hole

Our Supreme Court observed that "WSNA chose to bring these claims using associational standing, which has limitations under our case law." *Id.* at 415. The court noted that "[o]ther routes to collective action . . . were not foreclosed for the nurses," including a class action under CR 23 or a collective action under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219. *Id.* at 425. As Mr. Campeau acknowledged to the trial court, the 28 individual nurses could also have joined in WSNA's case from the beginning or intervened when Yakima Regional raised the associational standing issue.

For these reasons, we disagree with Mr. Campeau's contention that the Supreme Court's prior decision created an "unanticipated jurisdictional black hole."

CONCLUSION

American Pipe tolling is not available in Washington because tolling of the statute of limitations in civil cases requires a showing that the defendant's conduct interfered with the plaintiff's ability to timely file. But even if *American Pipe* tolling was available, it would not apply to an action brought by an association on behalf of its members. We conclude that Mr. Campeau's wage claims against Yakima Regional were not tolled and

are barred by the statute of limitations. We reverse the superior court's order and dismiss Mr. Campeau's claims.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Pennell, J.

Staab, J.

SCHROETER GOLDMARK BENDER

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