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No. 89608-9

SUPREME COURT
OF THE STATE OF WASHINGTON

DEBRA PUGH, AARON BOWMAN, and FLOANN BAUTISTA on their own behalf and on behalf of others similarly situated,

Plaintiffs/Petitioners,

v.

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

Defendant/Respondent,

WASHINGTON STATE NURSES ASSOCIATION,

Intervenor/Respondent.

INTERVENOR/RESPONDENT WSNA'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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INTRODUCTION

Respondent Washington State Nurses Association ("WSNA") is a statewide labor organization representing Registered Nurses ("RNs"), including those employed by Respondent Evergreen Hospital. Petitioner Pugh *et al.* filed two requests for discretionary review: one for each of the Court of Appeals opinions below. This Answer is a companion to WSNA's Answer filed in Supreme Court No. 89637-2, which addressed Pugh's new argument regarding judicial approval for settled associational standing cases and more fully set forth WSNA's identity. Here, WSNA addresses the issue of associational standing. Arguments in Sections I and II (A) of the companion Answer filed in Supreme Court No. 89637-2 are incorporated herein.

Also as outlined more fully in WSNA's Answer filed in No. 89637-2, the superior court below ruled that a different trial judge in WSNA's earlier settled lawsuit against Evergreen (*WSNA v. Evergreen,* Case No. 10-2-32896-SEA) should have first judicially approved the settlement pursuant to Superior Court Civil Rule ("CR") 23 before ordering the case dismissed. The superior court also ruled that WSNA would have lacked standing to seek injunctive relief and 2) WSNA would have been unable to present evidence to prove damages in the earlier case

without running afoul of standing limitations had standing been litigated in *WSNA v. Evergreen,* Case No. 10-2-32896-SEA.

Petitioner here goes further. Pugh asks this Court to rule that as a matter of law, the only evidence an association may rely upon to establish standing in a wage violation case is employer records. As outlined below, such a proposal is without legal foundation and contrary to the public policy of this state to protect workers, including their ability to obtain unpaid wages owed. The Court of Appeals correctly reversed the trial court's decision that WSNA had no standing to sue Evergreen, and no review by this Court is justified.

RESTATEMENT OF CASE

The Restatement of Case from WSNA's companion Answer in No. 89637-2 is incorporated by reference herein.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND ERROR WHERE THE TRIAL JUDGE INVALIDATED A SETTLEMENT RESULTING IN A COURT-ORDERED DISMISSAL IN AN ENTIRELY SEPARATE MATTER.

As a threshold matter, it warrants note that the trial court should never have considered the question of WSNA's standing. This is because the issue of WSNA's standing to bring its lawsuit was not properly before the trial court in Pugh's case against Evergreen. On March 3, 2011, King

County Superior Court Judge Middaugh "ORDERED that [*WSNA v. Evergreen*, No. 10-2-32896-SEA] be dismissed with prejudice..." CP 1139-1141, Case No. 68550-3-I. The stipulated dismissal stated that WSNA and Evergreen Hospital had reached a settlement and, due to the trial judge's statement that the court lacked authority to approve the settlement during a conference call (which included Pugh's counsel), no approval was requested. CP 53, ¶ 5, CP 1139, *Pugh v. Evergreen Hospital Medical Center*, Wash. Ct. App. Div. I, Case No. 68550-3-I. Judge Middaugh's Order dismissing the WSNA case with prejudice was a final order. Indeed, Pugh directly appealed from Judge Middaugh's Order on March 24, 2011, to the Court of Appeals, Division I, Case No. 66857-9-1, an appeal Pugh later withdrew.[1]

Nonetheless, although the WSNA case had been settled and dismissed with prejudice, King County Superior Court Judge McCarthy ruled in the *Pugh v. Evergreen* action, a separate civil action, that Judge Middaugh erred and should have required pre-settlement approval before ordering the dismissal. CP 552-563 at 560-561. Judge McCarthy speculated that it would have been impossible for WSNA to prove its

[1] Pugh voluntarily withdrew her request for Court of Appeals review of Judge Middaugh's dismissal on March 19, 2012. On April 6, 2012, the Court of Appeals terminated the review and mandated the case (No. 10-2-32896-3) back to King County Superior Court.

standing to bring its case, *id.* at 559, an unprecedented collateral attack on a final order that threatens the finality of settlements.

Moreover, the trial judge ignored that WSNA and Evergreen were (and are) free at any time to enter into a contract in which WSNA releases any potential legal claims it has against Evergreen in exchange for improved working conditions for its members. In other words, the lawsuit was not a legal prerequisite to the settlement that the parties reached. Thus, standing cannot be a prerequisite that WSNA must prove before it may enter into a settlement and voluntarily dismiss its own lawsuit in which it released only its own right to sue. The Court of Appeals therefore correctly reversed and remanded the trial court's decision finding otherwise.

II. FAR FROM COMMITTING LEGAL ERROR, THE COURT OF APPEALS CAREFULLY CONSIDERED AND EXPLAINED WHY THE TRIAL COURT ERRED IN HOLDING THAT LABOR UNIONS (1) LACK ASSOCIATIONAL STANDING TO SEEK INJUNCTIVE RELIEF (A DISPOSITIVE ERROR CONCEDED HERE BY PUGH) AND, IN ANY EVENT, (2) HAD STANDING TO PURSUE MONETARY DAMAGES HERE.

A. It Is Undisputed That WSNA Had Standing To Seek Injunctive Relief.

It is undisputed that WSNA sought injunctive relief and obtained a settlement containing prospective changes designed to assure Evergreen RNs received their state-mandated rest breaks. The Court of Appeals

reversed the trial court ruling on standing, holding:

> Additionally, the trial court's ruling disregards the fact that WSNA's lawsuit also sought injunctive relief, which does not require proof of individual damages. As WSNA correctly notes, the trial court's assertion that "Washington law is clear that a union may only represent its membership on a claim for damages and not for injunctive relief," is in error. As discussed above, our courts have recognized that associational standing to sue for injunctive relief is more easily established than standing to sue for monetary damages because it generally benefits members of an employee association equally. Because WSNA had standing to sue, the trial court's ruling invalidating the settlement agreement for WSNA's lack of standing is without basis. Accordingly, we reverse.

Pugh v. Evergreen Hospital Medical Center, Wash. Ct. App. Div. I, No. 68651-8-I, Slip Op. at 5 (emphasis added). This holding is not disputed and is therefore dispositive on the issue of standing.

B. In Any Case, WSNA Had Standing To Sue For Money Damages For Its Members Under *Firefighters*.

1. The Federal Law Cited By Pugh Is Inapposite Because The Federal And State Standards For Associational Standing Are Entirely Distinct.

Pugh argues that this Court should deny an association standing to sue in state court for money damages unless the association shows that the damages are "easily calculable from available, objective information," Petition for Review, No. 89637-2, p. 2, by which she means only employer records of hours worked. Pugh's proposal for a new, more restrictive test for associational standing conflicts with this Court's

decision in *International Association of Firefighters, Local 1789 v. Spokane Airport*, 146 Wn.2d 207, 45 P.2d 186 (2002) ("*Firefighters*"). Review should be denied because the Court of Appeals properly applied the three-part test set forth in *Firefighters* to find that WSNA had standing to bring its lawsuit for injunctive relief and money damages for its members.

This Court held in *Firefighters* that an association has standing to sue in Washington state court on behalf of its members when the following criteria are satisfied: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim requires the participation of the organization's individual members. *Id.* The *Firefighters* decision has since been given broad reading in subsequent decisions to permit associations to sue on behalf of their members in state court. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011) (holding Sierra Club had standing to sue on behalf of its members due to their interest in recreational use of surface water in a dispute about groundwater withdrawal). *See also, Washington Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969) (question of standing "should be given less

rigid and more liberal answer" in cases involving "serious public importance").

In deciding *Firefighters,* this Court was aware of the contrary rule in the federal courts, expressly noting that "federal courts have not accorded standing to an association to seek monetary damages on behalf of its members if it has not alleged an injury to itself or received an assignment of its members' damage claim." *Firefighters*, 146 Wn.2d at 214 (internal citations to federal cases omitted). The *Firefighters* Court recognized the federal restriction on associational standing was "judicial and not based on constitutional requirements," and therefore did not warrant "substantial deference." *Id.* at 215. This Court then adopted a different rule for Washington courts, permitting associations to sue for money damages where the aforementioned three criteria are satisfied. *Id.* This Court held: "we see little sense in an ironclad rule that has the effect of denying relief to members of an association based upon an overly technical application of the standing rules." *Id.*

Pugh argues that this Court should review the Court of Appeals decision below because the decision "departs sharply from the prevailing view in federal court decisions relating to associational standing." Petition for Review, p. 4. This is no doubt true, as federal law for associational standing for money damages is unrecognizable when

compared to Washington state law. Federal case law is only persuasive when construing similar state laws, not when construing distinct doctrines such as here. *Cf. State ex rel. Washington Fed'n of State Emp., AFL-CIO v. Bd. of Trustees of Cent. Washington Univ.*, 93 Wn.2d 60, 67-68, 605 P.2d 1252, 1256 (1980) (federal cases construing federal labor law "substantially similar" to state laws are persuasive). Had the Court of Appeals applied the federal law as advocated by Pugh, which precludes associations from seeking money damages, the decision would conflict with this Court's decision in *Firefighters.* The fact that the Court of Appeals decision is inconsistent with federal cases on associational standing is not a basis for review when this state has adopted a different associational standing test.

2. WSNA Has Standing To Sue For Money Damages Under Washington State Law Because The Claims Did Not Require The Individual Participation Of Its Members.

As set forth above, an association suing only for monetary damages for its members must show that its claim does not "require[] the participation of the organization's individual members." *Firefighters,* 146 Wn.2d at 213-214. The *Firefighters* Court cited approvingly the Court of Appeals Division III conclusion that "the ultimate question is 'whether the circumstances of the case and the relief requested make individual

participation of the association's members indispensable.'" *Id.* at 215 (quoting *Int'l Assn. of Firefighters, Local 1789 v. Spokane Airports,* 103 Wn. App. 764, 770 14 P.3d 193 (2000)). This rule is "entirely reasonable and ensures fairness in cases where an individual association member's participation is not necessary to prove the damages that are asserted on behalf of the members by the association." *Id.* at 216.

In *Teamsters Local Union No. 117 v. Department of Corrections,* 145 Wn. App 507, 187 P. 3d 754 (2008), the Court of Appeals confronted a similar challenge to a union's associational standing when the union sought to call witnesses as part of its wage action against the employer. The court held: "We refuse to adopt [the employer's] position that participation of an individual member as a witness abrogates the Union's standing to prosecute the employees wage claims." *Id.* at 513-514 (internal citations omitted).

Here, consistent with the *Firefighters* and *Teamsters Local 117* decisions, the Court of Appeals held that the mere fact that there was disagreement about damages did "not mean that there is no ascertainable amount of damages" and "WSNA need only show that it was prepared to establish damages that did not require the participation of the individual members." *Pugh, supra,* No. 68651-8-I, Slip Op. at 4. Despite Pugh's insistence to the contrary, the court found that the fact that Evergreen

admitted that it did not keep records did not bar the case because "representative testimony from each department could serve as proof of damages." *Id.*

The Court of Appeals recognition of this fact is entirely consistent with prior decisions recognizing the myriad of ways workers may prove up lost wages when the employer has failed in its duty to keep records of hours worked. *See, e.g., Pellino v. Brink's Inc.,* 164 Wn. App. 668, 698, 267 P.3d 383 (2011) (in class action, trial court properly relied on extrapolations from partial records by an expert, written documents and communications created or maintained by the employer's agents, testimony from current and former managers of the employer, reasonable inferences from the absence of records, as well as a representative sampling of employee testimony to determine damages). *See also, Anderson et al. v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946) ("where the employer's records are inaccurate or inadequate," employees may carry their evidentiary burden by producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference").

As the Court of Appeals correctly recognized, had WSNA pursued its lawsuit, damages would no doubt need to be proven and many methods that did not require reliance on each injured member were available to do

so. The trial court's assumption that WSNA would not be able to prove damages was without factual foundation and entirely speculative, and failed to consider the many accepted methods to prove damages when the employer has failed to keep records.

Finally, Pugh's proposal for a new, stricter standard for associational standing is further objectionable in light of Washington's "long and proud history" of protecting workers. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (noting establishment of the minimum wage a quarter-century prior to federal minimum wage law, the eight-hour work day, family leave law, and double damages and attorney's fees to enforce payment of wages). Under Pugh's definition of associational standing, an employer who has violated the record-keeping requirements of RCW 49.12.050 and WAC 296-126-050 would be immune from suit by a labor organization representing its employees seeking back pay.

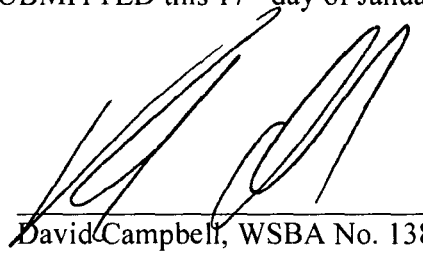
Under Pugh's formulation, an employer who fails to keep records is *rewarded,* as it, unlike the employer complying with the recording keeping records, cannot be subject to suit by an association for the lost wages. Pugh's proposal would thus eliminate one avenue for workers unlawfully deprived of wages to obtain the back wages in court; therefore, the proposal should be rejected as it is entirely inconsistent with this

Court's liberal standing rules and our state's proud history of protecting workers. The Court of Appeals correctly rejected the narrow definition of associational standing proposed by Pugh and properly followed this Court's test set forth in *Firefighters.* Therefore, there is no basis for review.

CONCLUSION

The arguments presented in the Petition for Review are without merit and the Petitioner has not met the requirements of RAP 13. Accordingly, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 17th day of January, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2014, I caused the foregoing Answer to Petition for Review to be filed with the Washington State Supreme Court, and true and correct copies of the same to be sent via email and U.S. First Class Mail, per agreement of counsel, to:

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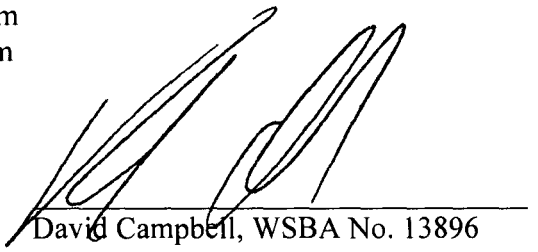

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Good Afternoon,

Attached please find Intervenor/Respondent Washington State Nurses Association's Answer to Petition for Review for filing in *Debra Pugh, et al. v. Evergreen Hospital Medical Center and Washington State Nurses Association,* Supreme Court Case No. 89608-9. If you have any trouble opening the document please let me know.

Sincerely,

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