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 all persons 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.

Court of Appeals, Division I, No. 68651-8-I

ANSWER TO PETITION FOR REVIEW

John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
Livengood Fitzgerald
& Alskog, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Ph: 425-822-9281
Fax: 425-828-0908
Attorneys for Respondent

James S. Fitzgerald, WSBA #8426
EvergreenHealth
12040 128th Avenue N.E.
Kirkland, WA 98034-3013
Ph: 425-899-2638
Fax: 425-899-2624
General Counsel for Respondent

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I. INTRODUCTION

This Court should deny the petition for review. While the Washington State Nurses Association's ("WSNA") standing in a different lawsuit is moot and is also irrelevant to the validity of the settlements by individual nurses, there is no question that WSNA had standing to sue King County Public Hospital District No. 2 ("the District") for injunctive relief. *See* Pet. at 9, n.5. Whether WSNA lacked standing to sue for damages on behalf of its members is moot because WSNA's lawsuit was settled and its monetary damages claim dismissed with prejudice. Its lawsuit had no preclusive effect on any of the registered nurses' ("RNs") potential claims for damages. Its standing is irrelevant to the validity of the individual settlements of possible claims between the RNs and the District.

II. ISSUE PRESENTED

Does the issue of WSNA's standing to sue in another, already dismissed lawsuit present a case or controversy to be resolved in this lawsuit?

III. STATEMENT OF THE CASE

A. The *WSNA* lawsuit

WSNA, the exclusive bargaining unit for the District's RNs (CP 305), filed a lawsuit against the District on September 15, 2010, alleging

missed rest breaks and unpaid wages to RNs ("the *WSNA* lawsuit").[1] After engaging in discovery, WSNA and the District participated in a full-day mediation on January 31, 2011 before Professor Cheryl Beckett of Gonzaga Law School. CP 639-41.[2] In the week following the mediation, the parties reached a settlement agreement that resolved all of WSNA's claims ("the Settlement Agreement"). CP 630-37.

On February 4, 2011, petitioners Debra Pugh and Aaron Bowman filed a motion to intervene in the *WSNA* lawsuit. CP 289-301. On February 11, 2011, the District and WSNA jointly filed a notice of settlement. They then filed a joint motion on February 18 for the Superior Court to review and approve the Settlement Agreement. CP 186-98. Ms. Pugh and Mr. Bowman filed a renewed motion to intervene on February 24. District CP 10. During a telephone status conference requested by their counsel regarding the pending motions on February 25, Judge Middaugh questioned the court's authority to approve the Settlement Agreement. CP 527; District CP 53. Due to Judge Middaugh's comments, the District and WSNA determined that court approval of their settlement was not necessary or required and presented a stipulated order of dismissal to the

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[1] *Wash. State Nurses Ass'n v. King Cty. Pub. Hosp. Dist. No. 2 d/b/a Evergreen Hosp. Med. Ctr.*, King County Superior Court No. 10-2-32896-3 SEA. CP 606-10.

[2] Citations to the clerk's papers in Court of Appeals No. 68651-8-I are shown as "CP __," and citations to the clerk's papers in Court of Appeals No. 68550-3-I are shown as "District CP __."

superior court on March 2, 2011. CP 527; District CP 53, 1143. The court signed the stipulated order the following day. CP 646-48.

The Settlement Agreement is binding only on the District and WSNA. It resolved no monetary claims of individual RNs, except to the extent individual RNs also agreed to settle their own claims and accept the settlement checks sent to them in March 2011. CP 633; CP 594-95, 597. The RNs understood that they were not required to accept the checks, and that by doing so they would release individual claims related to missed rest breaks. CP 529-31, 594-95. The District sent checks to 1,253 RNs, and 1,157 RNs cashed the checks and released their claims. District CP 1294-95.

On March 24, 2011, Ms. Pugh and Mr. Bowman appealed the dismissal of the *WSNA* lawsuit, asking the court of appeals to set aside WSNA's voluntary dismissal of its own action while at the same time asserting that WSNA lacked standing to bring that action in the first place. Court of Appeals Case No. 66857-9-I; CP 211; District CP 189-90, 224-25. On March 19, 2012, after the appeal was fully briefed and oral argument scheduled, Ms. Pugh and Mr. Bowman moved to dismiss the appeal, which was granted on April 6, 2012.

B. The *Pugh* lawsuit

This case,[3] brought by two former Emergency Department RNs, Debra Pugh and Aaron Bowman, was filed two days after the *WSNA* lawsuit and additionally sought unpaid wages for alleged missed or interrupted meal breaks ("the *Pugh* lawsuit"). CP 1-5.

After WSNA and the District reached a settlement in the *WSNA* lawsuit, petitioners filed a motion in this lawsuit to enjoin Evergreen from settling claims with individual RNs. District CP 6-16. The trial court denied their motion. District CP 93-94. Counsel for petitioners then sent a letter to the RNs, asserting that his firm could recover more for them and explicitly warning that "[y]ou cannot cash [the settlement] check and be a part of the class action lawsuit over missed rest breaks" and "[i]f you want to be a member of the rest break class action, you should return the check back to Evergreen." CP 49-50.

Petitioners moved to set aside the settlements by other RNs, on the grounds that WSNA lacked standing to bring the other action. The trial court granted the motion, denying the District's cross motion for partial summary judgment. The court of appeals reversed.

[3] King County Superior Court No. 10-2-33125-5 SEA, filed September 17, 2010.

IV. ARGUMENT

A. WSNA's standing to sue in the *WSNA* lawsuit is moot and irrelevant.

WSNA's standing to bring a different, already-dismissed lawsuit is both moot and irrelevant. An appeal is moot where it presents purely academic issues and where it is not possible for the Court to provide effective relief. *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). When an appeal is moot, it should be dismissed. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Here, the question of WSNA's standing to sue for monetary damages in the *WSNA* lawsuit has no bearing on whether the 1,157 individual settlements between the RNs and the District are valid under the principle of accord and satisfaction.

Petitioners' attempt to intervene in the *WSNA* lawsuit was mooted by WSNA's dismissal under CR 41(a)(1)(A), which "create[s] an absolute right to a stipulated dismissal." *Spokane Cnty. v. Specialty Auto & Truck Painting*, 119 Wn. App. 391, 396, 79 P.3d 448 (2003); *see also McKay v. McKay*, 47 Wn.2d 301, 304, 287 P.2d 330 (1955) ("The plaintiff's right in this respect is absolute and involves no element of discretion on the part of the trial court.").

Ms. Pugh and Mr. Bowman appealed the dismissal of the *WSNA* lawsuit on the basis that their motion to intervene was pending and the trial court was required to review and approve the Settlement Agreement. In upholding the absolute right to a dismissal, however, this Court has specifically rejected the suggestion that the right to dismiss is restricted when the dismissal may prejudice another party. *See Herr v. Schwager*, 133 Wash. 568, 572-73, 234 P. 446 (1925). In *Herr*, the defendant argued that:

> since he interposed the defense of the statute at a time when under the law it furnished a complete defense to the action, and that since it may not be a defense to a subsequent action, he has acquired thereby some right which vests in the court a discretion to deny a dismissal, even though the right might be absolute under other circumstances.

Id. The Court responded: "Where the right is absolute, we do not understand that it is affected by the nature of the defense interposed." *Id.* at 573. That Ms. Pugh and Mr. Bowman had already sought to intervene at the time the stipulated order was filed did not affect the right to a stipulated dismissal because "the right to a voluntary nonsuit is fixed at the moment that it is claimed." *McKay*, 47 Wn.2d at 305. "A motion to intervene should not affect the plaintiff's right to dismiss as of right." 8 MOORE'S FEDERAL PRACTICE, § 41.33[5][c][H] (3d ed. 2008). Once a stipulation of dismissal has been filed under CR 41(a)(1)(A), there is no

longer a pending case or controversy into which a non-party may intervene. *See GMAC Comm'l Mortg. Corp. v. LaSalle Bank Nat'l Ass'n*, 213 F.R.D. 150, 150-51 (S.D.N.Y. 2003).

Ms. Pugh and Mr. Bowman complain that after initially filing a motion seeking court approval of the Settlement Agreement, the District and WSNA opted for a stipulated dismissal. There was, however, no statutory or contractual obligation to obtain court approval of the Settlement Agreement. Court approval is generally restricted to certain types of cases, such as class actions, shareholder derivative suits, and actions against joint tortfeasors. *See, e.g.*, CR 23(e); CR 23.1; RCW 4.22.060. Apart from such cases, parties to a lawsuit retain the right to negotiate a settlement of claims free from the interference of non-parties or court supervision.

The Settlement Agreement required court approval only to the extent either party "deemed" such approval "appropriate and necessary and/or required." CP 636. The express public policy of Washington State is to encourage out-of-court settlement. *See City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2000). Settlement can occur both before and after a lawsuit is filed. *See* KARL B. TEGLAND, 15 WASH. PRACTICE § 53.1 (2d ed. 2009). The settlement and the stipulated dismissal of the *WSNA* lawsuit

were entirely consistent with the State's strong public policy and real world practice. It is irrelevant whether the parties initially thought it advisable to seek court approval of the Settlement Agreement – the fact is that such was determined to be neither required nor necessary.

Petitioners seek a ruling on WSNA's standing to sue in a different lawsuit, but any such ruling would merely be advisory. WSNA dismissed its claims with prejudice. Petitioners dismissed their appeal in that case nearly two years ago. There is no longer any case or controversy for this Court to rule upon.

WSNA's standing in a settled and dismissed case involves no matters of continuing and substantial public interest to justify deciding a moot case. *In re Cross*, 99 Wn.2d at 377. None of the factors for such an exception – whether the matter is of a private or public nature, the need for guidance to public officials, and whether the question is likely to recur – are present here. A settlement of a dispute involves concessions and compromise by both parties, in recognition of the risks of litigation. Whether or not WSNA had standing to sue for monetary relief on behalf of its members, there is no question that it had standing to sue for injunctive relief and to settle that dispute. As a result of the settlement of WSNA's claims and dismissal of the *WSNA* lawsuit, there was no

adjudication on the merits that might prejudice Ms. Pugh or Mr. Bowman from seeking whatever damages they believe they are owed in this lawsuit.

B. The settlements between the District and the other RNs are binding contracts resolving their potential claims, and petitioners' rights are not dependent on WSNA's standing to sue or settlements by other RNs.

Nor are Ms. Pugh's or Mr. Bowman's rights to pursue adjudication of their own claims prejudiced by other RNs' settlements. The petitioners identify neither preclusive effect nor prejudice to their claims resulting from WSNA's settlement or the other RNs' settlement of their own claims. They can't. *See* CP 594-95. Even Ms. Bautista points to no prejudice or preclusion from WSNA's settlement and dismissal of its lawsuit. Ms. Bautista is barred from additional recovery because *she* settled *her own* claim and is bound by accord and satisfaction with the District. *Perez v. Papps*, 98 Wn.2d 835, 843-44, 659 P.2d 475 (1983). Whether WSNA or other RNs settled or did not settle is of no legal consequence.

IV. CONCLUSION

Even a successful appeal would provide no cognizable relief to petitioners. A ruling that WSNA lacked standing to seek monetary relief on behalf of its members would have no impact on the Settlement Agreement, the 1,157 individual settlements between the RNs and the

District, or petitioners Pugh's and Bowman's right to recover if they can prove their own claims.

DATED this 17th day of January, 2014

John J. White, Jr, WSBA #13682
Kevin B. Hansen, WSBA #28349
Livengood, Fitzgerald & Alskog, PLLC
Attorneys for Respondent King County Public Hospital District No. 2

121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281
Fax: (425) 828-0908

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 17, 2014, I caused service of the foregoing to the following counsel of record:

Attorneys for Respondents: David E. Breskin Daniel F. Johnson Breskin Johnson & Townsend, PLLC 1111 Third Avenue, Suite 2230 Seattle, WA 98101 WSBA #10607 – Breskin WSBA #27848 – Johnson Ph: 206-658-8660 Fax: 206-652-8290 Email: dbreskin@bjtlegal.com djohnson@bjtlegal.com asiefer@bjtlegal.com msimmel@bjtlegal.com admin@bjtlegal.com	☐ via U.S. Mail ☐ via Hand Delivery ☐ E-Service ☐ via Facsimile ☒ via E-mail w/ hard copy to follow per agreement ☐ via Overnight Mail
Attorneys for Intervenor WSNA: David C. Campbell Carson Glickman-Flora Schwerin Campbell Barnard Iglitzin & Lavitt 18 West Mercer Street, Suite 400 Seattle, WA 98119 WSBA #13896 – Campbell WSBA #37608 – Glickman-Flora Ph: 206-285-2828 Fax: 206-378-4132 e-mail: campbell@workerlaw.com flora@workerlaw.com fassler@workerlaw.com woodward@workerlaw.com	☐ via U.S. Mail ☐ via Hand Delivery ☐ E-Service ☐ via Facsimile ☒ via E-mail w/ hard copy to follow per agreement ☐ via Overnight Mail

Dated: January 17, 2014

Lee Wilson

Lee Wilson

OFFICE RECEPTIONIST, CLERK

From: Lee Wilson <wilson@lfa-law.com>
Sent: Friday, January 17, 2014 2:57 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: James S. Fitzgerald; John White; Kevin Hansen
Subject: FW: Pugh, et al. v. Evergreen hospital & WSNA - Case #89608-9
Attachments: Ans.Petition for Review.Evergreen.pdf

Many apologies – I forgot to attach the document to my previous message – here it is:

Ms. Lee Wilson, Assistant to:
John J. White, Jr. and Kevin B. Hansen
LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
wilson@lfa-law.com
Ph: 425-822-9281 ext. 325
Fax: 425-828-0908

From: Lee Wilson
Sent: Friday, January 17, 2014 2:50 PM
To: 'supreme@courts.wa.gov'
Cc: 'James S. Fitzgerald'; John White; Kevin Hansen
Subject: Pugh, et al. v. Evergreen hospital & WSNA - Case #89608-9

Case Name: Pugh, et al. v. Evergreen & WSNA, Intervenor/Respondent
Case Number: 89608-9
Filed by: John J. White, Jr.
425-822-9281
WSBA #13682
white@lfa-law.com

Attached is Answer to Petition for Review for filing in the above-referenced matter. Thank you.

Ms. Lee Wilson, Assistant to:
John J. White, Jr. and Kevin B. Hansen
LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
wilson@lfa-law.com
Ph: 425-822-9281 ext. 325
Fax: 425-828-0908

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