WASHINGTON SUPREME COURT NO. 89637-2

Court of Appeals No. 68550-3-I

DEBRA PUGH, AARON BOWMAN, and FLOANN BAUTISTA, on behalf of themselves and all persons similarly situated

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2

Appellants

WASHINGTON STATE NURSES ASSOCIATION,

Appellant/Intervenor.

PETITION FOR REVIEW

David E. Breskin, WSBA No. 10704
Daniel F. Johnson, WSBA No. 27848
BRESKIN JOHNSON & TOWNSEND PLLC
1111 Third Avenue, Suite 2230
Seattle, Washington 98101
Phone: (206) 652-8660
Fax: (206) 652-8290

Attorneys for Respondents

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I. INTRODUCTION

This petition is a companion to the petition filed in Court of Appeals No. 68651-8-I, seeking review of a companion decision of the same court in relation to the same case. As summarized in the petition in no. 68651, Petitioners Debra Pugh, Aaron Bowman, and FloAnn Bautista, on behalf of themselves and approximately 1,300 similarly situated nurses ("the Nurses") currently and formerly employed by Evergreen Hospital Medical Center ("Evergreen") sued Evergreen for denying them regular meal and rest breaks in violation of the Washington Industrial Welfare Act. In a separate lawsuit, the Washington State Nurses Association ("WSNA") brought a similar lawsuit against Evergreen for denying its members rest breaks under state law.

Without informing the Nurses, WSNA and Evergreen reached a settlement which called for Evergreen to pay the Nurses a fraction of what was admittedly owed in exchange for complete releases. The Nurses moved to intervene in the union's case in order to challenge WSNA's standing to settle their claims and to protect their right to full recovery of the wages due to them. Initially, WSNA and Evergreen requested court approval of the settlement, but then reconsidered and simply dismissed the union's case. The trial court struck the Nurses' motion to intervene and did not consider their challenge to WSNA's standing.

Pursuant to the settlement, Evergreen sent the Nurses "settlement checks," and both WSNA and Evergreen sent the nurses letters encouraging them to accept the checks, misrepresenting the terms of the

settlement, and omitting material information about this class action.

WSNA intervened in the Nurses' case. It sided with Evergreen and tried to block the Nurses' case. The Nurses moved for class certification and for a summary judgment that WSNA had lacked standing to bring its lawsuit for monetary damages on behalf of its members for missed rest break. The Nurses also argued that, if WSNA had standing to settle its members' monetary claims, it should have sought approval of its settlement. The trial court agreed on both counts, certified the class and held the settlement checks sent pursuant to the WSNA settlement did not bar the Nurses from seeking additional relief in this case.

In separate appeals, WSNA and Evergreen both obtained discretionary review. In two published decisions issued October 28, 2013, the Court of Appeals reversed the trial court's summary judgment in favor of the Nurses. It held that WSNA had standing to sue for damages for its members, that court supervision and review was not required to afford absent nurses due process or protect their rights to compensation for missed rest breaks and that the checks issued to the Nurses pursuant to the settlement could be used by Evergreen to support affirmative defenses that would potentially bar the rest break claims of most nurses in the case.

This Court should take review under RAP 13.4(b)(1) because the Court of Appeals' decision is contrary to the well-established rule that a union cannot represent its members in claims for damages except where those damages are easily calculable from available, objective information. *International Association of Firefighters, Local 1789 v. Spokane Airports*,

146 Wn.2d 207, 45 P.2d 186 (2002). The Court of Appeals decision, if allowed to stand, would turn a very narrow exception in the rules of associational standing into a gaping one. This Court should also take review under RAP 13.4(b)(3) and (4) because the Court of Appeals' decision involves an issue of substantial public interest that should be determined by the Supreme Court and involves a question of law under the due process clause of the Washington State Constitution.[1]

II. ISSUES PRESENTED FOR REVIEW

As explained in the Nurses' petition in No. 68651-8-I, the Court of Appeals erred in finding WSNA had standing to represent the Nurses on their damages claims under the state's Wage Statute because this case does not fall within the narrow exception to the rule against such representational standing. If the Court of Appeals were correct on that issue, however, then court approval of the settlement agreement should be required in order to protect the due process rights of putative class members to receive notice and the opportunity to be heard, and to ensure that settlement was fair, adequate, and reasonable and not the product of collusion between the parties

[1] Because the Court of Appeals declined to consolidate WSNA's and Evergreen's appeals and issued separate decisions, the Nurses are filing two petitions with this Court, corresponding with the issues resolved in the two opinions below. In their petition for review of the other decision, No. 68651-8-I, the Nurses demonstrate that the Court of Appeals misunderstood and misapplied this Court's precedent on associational standing. Here, the Petitioners argue in the alternative that, if WSNA *did* have standing to bring the Nurses' claims for damages, then this Court should hold that such settlements should be treated like any other representative action, requiring court review and approval and court-supervised notice to the absent parties with an opportunity to be heard.

III. STATEMENT OF THE CASE

A. Two Lawsuits Were Filed on Behalf of Nurses Denied Rest Breaks, One by Nurses and Another by Their Union.

In September 2010, Debra Pugh and Aaron Bowman filed this action on their behalf and 1,300 other nurses who worked for Evergreen Hospital and were denied their 10-minute rest breaks and 30-minute meal breaks required by the Washington Industrial Welfare Act, RCW 49.48 et seq. CP 1-5. Two days earlier, WSNA had filed a similar suit seeking damages for the nurses for missed 10 minute rest breaks.[2] CP 607-612. In its complaint, WSNA claimed it had associational standing to sue Evergreen for monetary damages for its members. CP 609.

B. Without Informing the Nurses, WSNA Quickly Settled.

As evidenced by Evergreen's Answer to WSNA's complaint, the issue of whether WSNA had standing to bring a claim for damages on behalf of the Nurses was immediately in dispute. CP 492 (Affirmative Defense No. 6). The Nurses attempted to cooperate with WSNA on prosecuting the overlapping rest break claims, but were rebuffed. CP 619-621. On February 4, 2011, the Nurses moved to intervene in WSNA's case to challenge WSNA's standing to sue for damages on their behalf and to protect their interests in getting full back pay damages for missed breaks. CP 613-25. But before the court could rule on the Nurses' motion

[2] Unlike the nurses' lawsuit, WSNA chose not to bring any *meal* break claim for the Nurses. CP 447-451. Additionally, despite the collective bargaining agreement (CBA) between WSNA and Evergreen, which provided nurses with more generous rest breaks than state law and gave WSNA the right to arbitrate Evergreen's failure to provide them, WSNA chose not to take any action under the CBA. CP 627 665; 667-701.

or decide the issue of standing, on February 10, 2011, WSNA and Evergreen entered into a settlement agreement. CP 477-484. WSNA settled the rest break claims of 1,300 nurses for $375,000.[3] CP 479-480.

On February 18, 2011, WSNA and Evergreen filed a "joint motion" for court approval of their settlement. CP 510-522. The trial court set a March 18 hearing date on the motion and a briefing schedule. CP 487-488. By its terms, the scheduling order provided a date upon which the Nurses could object to the settlement and challenge WSNA's standing to sue on their behalves for monetary damages—an issue that was raised by the Nurses in their motion to intervene. *Id.*; CP 621-622. The deadline for filing objections was set for March 9, 2011. CP 487-488.

On March 2, 2011, the Nurses took the deposition of Evergreen through its CR 30(b)(6) representative, Kathleen Groen. CP 585. At the deposition, Evergreen admitted that it calculated that it owed the nurses $600,000 in back pay, almost twice what it would be paying them under the WSNA settlement.[4] CP 598-601. Evergreen also admitted it had no evidence to dispute the declarations of nurses saying they regularly missed breaks to varying degrees. CP 586-605. Most significantly, though, Evergreen also admitted that it had no records showing when nurses missed breaks or the amount of back pay owed. CP 586-590.[5] All parties

[3] This number represents approximately 5%-10% of the wages that Evergreen likely owes to nurses for breaks missed since September 2007. CP 448-449.

[4] WSNA took $58,000 from the $375,000 settlement to pay its attorneys, leaving $317,000 to pay to the Nurses. CP 345.

[5] *See also* CP 741-47 (answers to Admission that Evergreen had no documents showing how many rest breaks were missed, when, and by whom).

were aware that these admissions would be fatal to WSNA's claim that it had associational standing to seek damages on behalf of its members, because the Nurses had briefed the issue in their Motion to Intervene that was set for oral argument three days later, on March 5, 2011. CP 613-624.

On March 4, 2011, a day before the hearing on the Nurses' Motion to Intervene, Evergreen and WSNA suddenly reversed course and filed a stipulation to dismiss WSNA's lawsuit immediately. The trial court ordered dismissal and struck all scheduled hearings on the issues of standing, intervention, and settlement approval.

At this point in their own case, the Nurses' counsel had been unable to contact the nearly 1,300 putative class members because Evergreen refused to provide contact information for them. On learning that WSNA and Evergreen dismissed the other lawsuit by stipulation, the Nurses immediately moved to compel discovery of class member contact information so they could alert putative class members of their rights. CP 1379-1381. The court granted the motion on March 10, 2011. *Id.* Under the terms of the order, however, Evergreen did not provide class member contact information until March 28, 2011. CP 1488-1490; 1491-1493.

By that time, Evergreen had already sent "settlement checks" to the Nurses. CP 499-501 (letter dated March 17, 2011). The checks were received with a cover letter from Evergreen *before* letters could be sent by the Nurses' counsel and received by nurses that would have put in context the checks and Evergreen's letter and would have provided the nurses with essential information for evaluating Evergreen's statements. *See,* Decl. of

Batista, CP 755 at ¶12 ("Had I received the (letter) from (the Nurses' counsel) before I cashed the check, I would not have cashed it.") [6]

On the rear of the check sent to the nurses pursuant to the WSNA settlement, Evergreen included a release of the Nurses' rest break claims, which would be executed by endorsement. CP 787. Neither the employer's process for obtaining the release by endorsement nor the release itself had been reviewed or approved by any court. Nor had Evergreen's letter that accompanied the check been reviewed or approved. The letter contained misleading and incomplete information about the settlement and pending class action. CP 499-500. For example, it stated:

- That Evergreen "disagreed with (the) allegation (it) failed to pay registered nurses for rest breaks." CP 449 at ¶1. In fact, Evergreen admitted in deposition that it had calculated that it owed nurses $600,000 in back pay for missed rest breaks before settling with WSNA.
- That "we are actually paying somewhat more than ($375,000) as we decided that the minimum check to each RN should be at least $10 before taxes." In fact, the settlement was based on the express agreement that the minimum payment would be $300 to each RN. CP 472.
- That "if you do not (return the check within 60 days), you will be deemed to have accepted the Settlement Agreement." In fact, a failure to return the check would not be "deemed" acceptance or a waiver of rights

[6] The Court of Appeals appears to have been under a misimpression that the nurses received the letter from the Nurses' counsel before cashing the checks and not after. The record evidence was that the Evergreen's refusal to provide discovery prevented that.

under Washington law and placing the burden on the nurse to return the check or "be deemed" to have accepted the settlement is coercive.

Many nurses testified that they felt misled and coerced by their employer's letter to them and like Plaintiff Batista would not have cashed their checks had they received the letter from the Nurses' counsel first.[7]

Compounding the effect of the employer's letter on the nurses was WSNA's statements to them. For example, WSNA sent a post card to the nurses heralding its agreement as a "LANDMARK SETTLEMENT OVER NURSE REST BREAKS" and that it would ensure that "(nurses) are appropriately staff." CP 475 at ¶2 (capitalization in original). In fact, WSNA admitted in deposition through its 30(b)(6) representative that:

- The settlement required no more than what Evergreen was already required to do by law. CP 462.
- The settlement did not increase staffing or provide for adequate staffing and nothing in the agreement addressed staffing. CP 461.

WSNA's communications also failed to provide critical information:

- That the settlement was supposed to ensure a minimum payment of $300 to each nurse but in fact, after the settlement was reached, WSNA reduced the minimum payment to only $10. CP 499.
- That obtaining full back pay was not WSNA's interest. CP 459.
- That WSNA did nothing to calculate the back pay owed. CP 459.[8]

[7] *See,* Declarations from Laurine Morgan CP 774-776; Jill Horn CP 768-770; Jessyamma Adimathra CP 764-767; Ping Nip CP 791-794; Nancy Olson CP 788-790; Robbie Herring CP 795-798.

[8] At the same time, though WSNA's attorneys had in fact calculated that over $1 million in back pay was owed. These same WSNA attorneys were being fully paid the over

None of the communications to the nurses by WSNA or Evergreen had not been reviewed or approved by any court to ensure that the information provided was full, complete and accurate. Furthermore, WSNA was forbidden under the terms of its settlement agreement to "directly or indirectly . . . promote or encourage . . . suits, causes of action or claims relating to obtaining back pay for missed rest breaks for the Represented Employees." CP 835. WSNA also agreed to *indemnify* Evergreen for the Nurses' claims against Evergreen for missed rest breaks. CP 834.

A large number of the Nurses endorsed the checks and cashed them. CP 1295. The nurses did so *before* it was possible for class counsel in this case to provide them with any information about the inadequacies of the monetary settlement, WSNA's lack of standing to bring a damages lawsuit on their behalves, and their rights as putative class members in this pending class action. CP 112-113 (letter dated April 4, 2011).[9]

$50,000 owed *by WSNA to them* out of the $375,000 settlement amount that was denominated as *back pay compensation* under the agreement and was supposed to go to the nurses See, Declaration of Nurses' Counsel, David Breskin, CP 448 at ¶ 6. These facts about how the settlement proceeds for missed rest breaks were to be distributed were not disclosed in the information WSNA gave nurses prior to them receiving their checks. *See, e.g.,* CP 475.

[9] In addition to the checks sent pursuant to the settlement agreement, Evergreen sent a second batch of checks to a small number of nurses (69 of them) purportedly paying them for missed meal breaks that were recorded as missed, but had not been paid. CP 120, 172. These checks, which did not include payment for meal breaks that were late, interrupted, or not reported as missed, also included a waiver on the rear of the check. Id. The enforceability of these meal break checks was not an issue raised in Plaintiff's Motion for Summary Judgment or otherwise considered or resolved by the trial court in its order. CP 1334-1335. Accordingly, whether these meal break checks/waivers are enforceable is not an issue in this appeal.

C. WSNA Intervened in This Case to Prevent the Nurses from Obtaining Further Relief for their Missed Rest Breaks.

In light of the above, the Nurses amended their Complaint to add FloAnn Bautista, who cashed her check, as a Plaintiff. CP 97-105.

On August 8, 2011, the Nurses filed their class certification motion. While the motion was pending, WSNA moved to intervene to oppose class certification and block the Nurses from obtaining "further compensation from the Defendant." CP 226-230. The motion to intervene was granted on October 13, 2011, and Plaintiffs re-filed their class certification motion. CP 298-326. In support of their motion, the Nurses submitted over 20 declarations from class member nurses in 14 departments, including the eight largest, all claiming they missed breaks.[10]

Contemporaneously with the Motion for Class Certification, the Nurses filed a Motion for Partial Summary Judgment, asking the trial court to dismiss Evergreen's defense that the "settlement checks" barred the Nurses from participating in this class action. Oral argument on both motions was held on February 3, 2012 in King County Superior Court.

On March 14, 2012, Judge Harry McCarthy granted the Nurses' Motion for Class Certification. CP 1330-1333. On the same day, he granted the Nurses' Motion for Partial Summary Judgment that because

[10] Nearly 900 of the nearly 1300 class members work or worked in the largest eight departments: CCU, Emergency, Family Maternity Center, MedSurg, Neonatal ICU, Ortho, Spine, and Neurology (OSNO), Home Health, and the Progressive Care Unit (PCU). In opposition to the Motion for Class Certification, Evergreen submitted 12 declarations, nearly all of which were from managers who currently work for Evergreen but are not class members in this case. CP 560-583. Evergreen submitted only one declaration from a class member, and she is a former manager. CP 968-973.

WSNA lacked standing to represent its members and the settlement agreement was not court approved, putative class members who cashed "settlement checks" pursuant to WSNA's settlement were not barred from seeking further compensation in this class action. CP 1334-1345.

Both WSNA and Evergreen sought discretionary review of the trial court's order, which was granted. CP 1346-1366. The Court of Appeals reversed the order granting summary judgment for the Nurses, concluding that WSNA had associational standing to bring a claim for damages on behalf of its individual members and that court approval of Evergreen and WSNA's settlement agreement was not required. Slip Op. at 6.

IV. ARGUMENT

The Court of Appeals decision implicates constitutional issues and issues of substantial public interest that warrant review by this Court under RAP 13.4(b)(4) and RAP 13.4(b)(3).[11] If the Court of Appeals were correct that WSNA had associational standing to sue on behalf of its members for damages, then court approval of the settlement agreement should be required to ensure the Nurses receive due process and that the settlement was fair, adequate, and reasonable and not the product of collusion between the parties.

1. If an Association Can Sue for its Members for Monetary Damages That are Not Easily Ascertained, Court Approval is Necessary.

Under CR 23, class actions are subject to particular safeguards to

[11] As stated in the accompanying Petition for Review in case No. 68651-8-I, review is also appropriate under RAP 13.4(b)(1), because the Court of Appeals' decision that WSNA had standing to represent its members in a suit for damages is contrary to this Court's precedent.

ensure that diverse interests of class members are properly represented by the named plaintiffs. For example, in a class action, the court must ascertain whether the representative parties will fairly and adequately protect the entire class. CR 23(a)(4). Where damages are sought, the court must ensure that class members receive court-approved notice and an opportunity to be excluded. CR 23(b)(3). Rule 23 also provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner *as the court directs*." CR 23(e) (emphasis added). Courts closely supervises and approve of the notice of a class action settlement that is sent to absent class members. *See also Collins v. Thompson*, 679 F.2d 168, 172 (9th Cir. 1982) (the primary concern of CR 23(e) is to ensure that other unrepresented parties and the public interest are treated fairly by the settlement.). This safeguard also ensures that any "settlement is fair, adequate, and reasonable and is not the product of collusion between the parties." *Pigford v. Glickman*, 206 F.3d 1212, 1215 (D.C. Cir. 2000) (emphasis added).

Unlike a CR 23 class action, the rules governing associational standing were created by the courts and rest upon the principle that individuals who have chosen to join together in a group do so to promote a collective interest. As explained in the Nurses' petition in no. 68651, federal and Washington state courts have recognized particular threshold requirements to asserting associational standing: (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 the claim asserted nor relief requested requires the participation of the organization's individual members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 97 S. Ct. 2434, 53 L. Ed. 2d. 383 (1977).

Federal courts have consistently refused to allow an organization to represent its members in a suit for monetary damages. *United Union of Roofers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990); *Sanner v. Board of Trade of Chicago*, 62 F.3d 918, 922-923 (7th Cir. 1995); *Bermudez v. Hernandez*, 245 F. Supp. 2d 383, 386 (D.P.R. 2003). This Court recognized a narrow exception to this rule where damages are "easily ascertained" from employee records and do not require individual employee participation to calculate. *International Association of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 45 P.2d 186 (2002). As explained in the Nurses' other petition, the Court of Appeals turned that narrow exception into a gaping one and its decision should be reversed.

If this Court were to concur with the Court of Appeals and approve of the expanded version of associational standing it articulated, it should require that a court supervise and approve of any settlement in such a case.

The constitutional guarantee of due process of law requires that before a money judgment can be entered and binding on the class, class members must receive adequate representation, court-approved notice, and

a right to opt out or object. See *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring and dissenting in part). Notice and the opportunity to be heard are fundamental due process requirements provided to putative class members by the Fifth Amendment. *In re Prudential Ins. Co.*, 148 F.3d 283, 306 (3d Cir. 1998).

In this case, the Nurses did not get due process. As WSNA and Evergreen acknowledged, court approval of the settlement would have enabled the Nurses to obtain timely, neutral information about their right to participate or exclude themselves, and an opportunity to have their objections considered by a court of law. As the Settlement Agreement itself indicated:

> This Agreement is contingent in its entirely upon approval by the King County Superior Court in the Lawsuit as may be deemed appropriate and necessary and/or required. The parties agree to fully cooperate to obtain the approval of the court.

CP 837; CP 499 (inviting nurses to view of copy of the settlement agreement). WSNA and Evergreen represented to the court and the Nurses that they would obtain court approval, and they requested a briefing schedule. CP 486. They submitted a Joint Motion to Approve the Settlement. CP 510-522. And they represented to the Nurses that the settlement would not only be approved by the King County Superior Court, but it would not take effect until it was approved. CP 82, 89, 499, 837.

Then, when the named plaintiffs and their counsel in this case challenged WSNA's standing, WSNA and Evergreen quickly reneged and unilaterally dismissed the lawsuit without any court approval, and unilaterally mailed out "settlement checks" without ever telling the nurses that no court had reviewed the settlement for validity or fairness. CP 89, 499. Here, the very fact that both WSNA and Evergreen seek to prevent the Nurses from getting additional compensation owed to them for missed rest breaks through this class action, raises doubt about the adequacy of WSNA's representation of its members. By failing to obtain court approval in an open hearing, they deprived the Nurses of any opportunity to object to the settlement, challenge WSNA's representation, or to hear the objections of others. As indicated above, the information WSNA and Evergreen provided to the Nurses about the settlement and this class action was one-sided and inaccurate, and it was never reviewed by any court. These actions denied due process to the absent nurses whom WSNA claims to represent.

2. The Trial Courts Have Authority to Require Court Supervision and Approval of a Settlement on Behalf of Absent Union Members.

The Court of Appeals held that the trial court not only did not have to review and approve the settlement, but had no authority to do so. To the contrary, there is ample authority from analogous circumstances. First, a trial court generally possesses inherent authority to manage and supervise the disputes that come before it. *See* CR 16; *International Union et. al. v. Brock*, 477 U.S. 274, 290, 106 S. Ct. 2523, 2533, 91 L. Ed.

2d 228, 240 (stating that if a court is presented with evidence of inadequate representation by an association in a subsequent case, it would have to consider how it might be alleviated.); *See also TRAC v. Allnet Communication Services, Inc.*, 806 F.2d 1093, 1098 (D.C. Cir., 1986) (Bork, J., concurring) (stating that similar safeguards to those in CR 23 must be implemented by the court in subsequent lawsuits, even if it is simply "through some new mechanism" created by the court.).[12]

Civil Rule 23.2 provides similar safeguards to protect absent unnamed union members. CR 23.2 provides that "an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties" is permitted so long as "the representative parties will fairly and adequately represent the interests of the association and its members." The rule further provides that in such an

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[12] In *TRAC* the court denied associational standing on a claim for damages on behalf of members. In his concurrence, Judge Bork discussed the risks associated with an organization using associational standing to bring a claim for damages and avoid CR 23:

> [I]f the association lost this suit, the question could arise later whether it had adequately represented the interests of its members so as to preclude them from bringing suit on their own. A court would then have to rule on that independent claim and might have to hear subsequent suits.
>
> . . . .
>
> In addition, if the association prevailed and damage relief were granted, the court would then have to take steps through some new mechanism to assure that all appropriate members of the association are notified, or are included. Any shortcomings in this respect could again raise independent questions about the preclusive effect of such a judgment on those members. These new problems would all arise from this unnecessary circumvention of established class action procedures.

TRAC, 806 F.2d at 1098 (Bork, J., concurring). These concerns have actually come to pass in this case.

action, the court "may" make orders under CR 23(d), which permits courts to make appropriate orders to protect absent parties, and that dismissal and compromise of the claims "shall" follow the procedure set forth in CR 23(e), which requires court supervision and approval of any settlement.

The parties in this case agree that CR 23.2 does not apply here, where WSNA has not joined any of its members as party plaintiffs. Nonetheless, it is significant that even a lawsuit under CR 23.2 cannot escape the requirements of court approval. The situation presented by CR 23.2 provides much less opportunity for collusion and inadequate representation than a case for damages brought under an associational standing theory. For example, under CR 23.2, members of an organization are joined as plaintiffs to participate in the process and approve any compromise of their damages claims. But in an associational standing case, a single organization is the only representative plaintiff and is unconstrained to sacrifice individual interests in favor of furthering the larger goals of the organization. This exactly what happened in this case, where WSNA *admitted* that its priority in settlement discussions was injunctive relief going forward, not back pay for its members. CP 339.

There are other instances when the safeguards of court approval articulated in CR 23(e) are required in order to protect absent parties. In *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir., 1989), the Ninth Circuit extended the court approval requirement of

CR 23(e) to settlements made before a class has been certified.[13] The *Diaz* Court noted that when CR 23(e) does not apply automatically, "the court should hold a hearing to determine whether the proposed settlement and dismissal are tainted by collusion or will prejudice absent class members with a reasonable reliance expectation of the maintenance of the action for the protection of their interests." *Diaz*, 876 F.2d at 1407, n. 3. To determine whether pre-class certification settlement or dismissal is appropriate, court must

> inquire into possible prejudice from (1) class members' possible reliance on the filing of the action if they are likely to know of it either because of publicity or other circumstances, (2) lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations, (3) any settlement or concession of interests made by the class representative or counsel in order to further their own interests.

Diaz, 876 F.2d at 1408.

There were numerous "red flags" concerning fairness and adequacy of representation here. Many of the more obvious ones have already been discussed above:

- The employer admitted owing $600,000 in back pay to its employees but would only be paying them about half the amount that the employer *admitted* was owed.

[13] In 2003, the federal rules were changed to require court approval for only certified class actions; however, Washington declined to adopt this change to CR 23(e) and still requires court approval of compromise or dismissal of all class actions notwithstanding class certification. *Compare* FRCP 23(e) and FRCP 23(e)(repealed Dec. 1, 2003). Furthermore, federal courts have continued to require court approval of precertification settlements despite the rule change. *See Lyons*, 2012 U.S. Dist LEXIS at *4, fn. 1.

- The union testified it was not concerned with getting full back pay and did nothing to confirm the amount actually owed because its interests were in getting non-monetary policy changes to enhance its position with the employer *vis a vis* their bargaining position.
- The union did not include any union member as a representative plaintiff in the case to ensure adequacy of representation.
- The union attorneys calculated that over $1 million was owed in back pay to the nurses but this fact was never revealed to the nurses.
- The union attorneys who negotiated the settlement would be paid *in full* out of the amount agreed to *as compensation that was supposed to be paid the nurses as back pay* while nurses would receive as little as $10.
- The settlement was premised on a minimum payment of $300 to each nurse but after the settlement was reached, the distribution was changed so that nurses got as little as $10. The change in distribution benefitted union business agents and representatives who testified that they had no missed breaks or few missed breaks.

Federal courts have relied upon *Diaz* for the authority to insist on scrutinizing dismissals and settlements of uncertified class action cases, even when approval is not required by rule. See *Mahan et. al., v Trex*, 2010 U.S. Dist. LEXIS 130160 (N.D. Cal., November 22, 2010); *Lyons et. al. v. Bank of America*, 2012 U.S. Dist. LEXIS 168230 (N. D. Cal., November 27, 2012). It these situations only the courts can protect absent class members from collusion and prejudice. Similar protections are necessary here to ensure that absent group members' claims have been

adequately represented, and to ensure the organization and its lawyers did not sacrifice individual interests for their own.

3. The Court of Appeals Erred in Concluding That Individual Releases Obtained Through a Faulty Process Were Binding.

The Court of Appeals also erred when it concluded that by cashing the settlement checks, the nurses released their claims by accord and satisfaction. Slip Op. at 10. First, it relied solely on its erroneous conclusion that WSNA had standing to settle the Nurses' claims. If WSNA lacked standing, the payments Evergreen made under its settlement with WSNA cannot be binding. Even if WSNA had standing to sue, the trial court was correct that there is at least an issue of fact whether an employer can pay an amount in settlement of wages due that it admits are greater than that amount, without engaging in an illegal "rebate" of wages under RCW 49.52.050. CP 479-484, 598-601.

V. CONCLUSION

The Court of Appeals erred in concluding WSNA had standing to represent its members on monetary damages claims. And if a union can do this, court approval should be required to protect the due process rights of absent class members. This Court should take review under RAP 13.4(b)(3) and (4), and hold that court approval similar to that required under CR 23(e) was required here and in any case where organizations are permitted to sue for damages on behalf of their members where the requirements of *Spokane Airport* are not met.

Dated this 27th day of November, 2013.

BRESKIN JOHNSON TOWNSEND, PLLC

By: _____

David E. Breskin, WSBA No. 10607
Daniel F. Johnson, WSBA No. 27848
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Jamie Telegin, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 27th day of November 2013, I served true and correct copies of the document to which this Certificate is attached on the following in the manner listed below.

Attorneys for Appellants
James S. Fitzgerald, WSBA #8426
John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
Lee Wilson, Legal Assistant
Livengood Fitzgerald & Alskog, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
425-822-9281 Phone
425-828-0908 Fax
fitzgerald@lfa-law.com, white@lfa-law.com, hansen@lfa-law.com, wilson@lfa-law.com

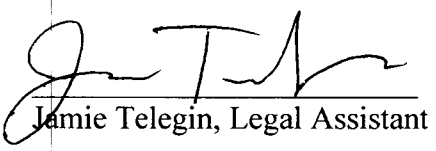
[ ] VIA FACSIMILE
[X] Via First Class Mail
[ ] Via Electronic Filing
[X] Via Email
[ ] Via Messenger

Attorneys for Intervenor WSNA:
David C. Campbell, WSBA #13896
Dmitri L. Iglitzin, WSBA #17673
Carson Glickman-Flora, WSBA #37608
Sean M. Leonard, WSBA 42871
Schwerin Campbell Barnard Iglitzin & Lavitt
18 West Mercer Street, Suite 400
Seattle, WA 98119
206-285-2828 Phone
206-378-4132 Fax
campbell@workerlaw.com,

[ ] VIA FACSIMILE
[X] Via First Class Mail
[ ] Via Electronic Filing
[X] Via Email
[ ] Via Messenger

iglitzin@workerlaw.com,
flora@workerlaw.com,
leonard@workerlaw.com,
fassler@workerlaw.com

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.



Jamie Telegin, Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEBRA PUGH, AARON BOWMAN and FLOANN BAUTISTA on their own behalf and on behalf of all persons similarly situated,	)	No. 68651-8-I
	)	DIVISION ONE
Respondents,	)	PUBLISHED OPINION
v.	)	
EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2,	)	
Appellant,	)	
WASHINGTON STATE NURSES ASSOCIATION,	)	FILED: October 28, 2013
Appellant.	)	

Grosse, J – A union has standing to sue in its associational capacity for injunctive relief and back pay for missed rest breaks incurred by its members when, as here, damages can be established without requiring the participation of the individual union members. Thus, the trial court erred by invalidating a settlement agreement between the union and the employer based on the union's lack of standing. Accordingly, we reverse.

FACTS

The Washington State Nurses Association (WSNA) appeals from the same trial court orders addressed in the linked appeal brought by Evergreen Hospital.[1] Thus, the procedural and substantive facts are identical to those set forth in the opinion for the

[1] Pugh v. Evergreen Hospital and Wash. State Nurses Ass'n, No. 68550-3-I (Wash. Ct. App. October 28, 2013).

Evergreen appeal. Accordingly, for efficiency for they will not be repeated here but will be incorporated by reference as they are necessary to the analysis.

ANALYSIS

WSNA contends that the trial court erred by concluding that WSNA lacked standing to sue Evergreen and invalidating the settlement agreement on that basis. We agree. An association has standing to sue 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.[2]

Unlike a suit for injunctive relief which generally benefits every member of an employee association equally, a suit for monetary relief may involve varying amounts of damages among employee members.[3] Thus, in a suit for money damages, the third requirement has been interpreted to permit associational standing when "an individual association member's participation is not necessary to prove the damages that are asserted on behalf of the members by the association."[4] This is established when the record shows that the amount of monetary relief requested on behalf of each employee is certain, easily ascertainable, and within the defendant's knowledge.[5]

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[2] International Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002).
[3] Spokane Airports, 146 Wn.2d at 214.
[4] Spokane Airports, 146 Wn.2d at 216.
[5] Spokane Airports, 146 Wn.2d at 216.

In Teamsters Local Union No. 117 v. Department of Corrections (DOC),[6] we held that a union representing prison emergency response team members had associational standing to sue DOC for recovery of wages for time spent on call while off duty. We concluded that the amount of wages sought was both easily ascertainable and within the employer's knowledge because the employees carried pagers when off duty and wages could be calculated by subtracting time for regular shifts, overtime, on leave, or official standby. More importantly, we concluded that standing is not defeated simply because individual association members may be called as witnesses:

> [The employer] confuses participation as witnesses with participation as necessary parties to ascertain damages. The employees are not necessary parties; neither are they indispensable parties. Here, the calculation of damages does not require individual determination and the liability issues, though of a factual nature, are common to all. 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.[7]

Here, the trial court concluded that WSNA lacked standing because the third requirement was not met:

> Spokane Airports holds that the union's standing to sue on an associational basis violates the third requirement unless "the amount of monetary damages sought on behalf of those members is certain, easily ascertainable, and within the knowledge of the defendant." 146 Wn.2d at 215-16. In Spokane Airports, the amounts due were withholdings for Social Security and employer matched funds, which were calculated exactly and were clearly known to the Spokane airport. [146 Wn.2d] at 217. In a similar case involving Special Emergency Response Team (SERT) employees at a prison seeking compensation for their on-call time, the Court of Appeals found standing for the union where calculating possible damages, "will then be nothing more than a mathematical exercise." Teamsters Local Union No. 117, 145 Wn. App. at 513.

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[6] 145 Wn. App. 507,187 P.3d 754 (2008).

[7] Teamsters Local Union No. 117, 145 Wn. App. at 513-14 (footnote and citation omitted).

> No such easily ascertainable amount of damages can be found here. The parties disagree vehemently as to even the possible amount of damages in this case. Plaintiffs assert that WSNA previously calculated the amount owed to the nurse was over $1 million dollars, and that Evergreen estimated the amount due as approximately $600,000, although Evergreen contests the basis and accuracy of this amount. Further, all parties agree that nurses in different sections of the hospital missed breaks at various rates. Unlike Spokane Airports and Teamsters Local Union No. 117, all parties agree there are no records from which Evergreen can precisely determine the amount owed. Under these circumstances, it is clear that WSNA would require the participation of at least some of the registered nurses who work at Evergreen Hospital.

We disagree with the trial court. First, the fact that the parties disagree about the amount of damages does not mean that there is no ascertainable amount of damages and WSNA is thereby prevented from establishing damages for purposes of standing. Rather, WSNA need only show that it was prepared to establish damages that did not require participation of the individual members. Indeed, WSNA and Evergreen considered various damages calculations and in fact determined damages owed to the nurses for the settlement agreement without requiring the participation of the individual nurses.[8]

Nor is the absence of records fatal to establishing WSNA's standing. Our courts have recognized that in wage and hour cases where employers have failed to keep adequate records, damages may be established by "just and reasonable inference."[9] Such inferences can be established by "representative testimony," as in McLaughlin v.

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[8] E.g., they used the number of hours worked per week over the alleged time period, the hourly rate, and the number of breaks to which they were entitled.

[9] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

Ho Fat Seto,[10] where the Ninth Circuit upheld the lower court's inference of a violation involving 28 employees based on the testimony of five witnesses. Similarly here, representative testimony from each department could serve as proof of the damages. As in Teamsters Local Union No. 117, the participation of some nurses to establish damages does not abrogate the union's standing to prosecute such cases.[11]

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.[12] 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.

WSNA also contends, as does Evergreen, that the trial court erred by invalidating the settlement agreement on the basis that the settlement was not court approved under CR 23(e), and by invalidating the individual settlements and releases entered into by WSNA members. As we conclude in our opinion in Evergreen's appeal, these arguments have merit and the trial court erred by invalidating the settlements on these

[10] 850 F.2d 586, 589 (9th Cir. 1988), cert. denied, 488 U.S. 1040, 109 S. Ct. 864, 102 L. Ed. 2d 988 (1989).
[11] See 145 Wn. App. at 513-14.
[12] See Spokane Airports, 146 Wn.2d at 214.

bases.[13] Accordingly, we reverse the trial court's order granting summary judgment for Pugh and remand for reinstatement of the settlement agreement.

We reverse and remand.

WE CONCUR:

[13] See Evergreen, No. 68550-3-I, slip op. at 12.