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No. 68550-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIV. I

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

Respondents

v.

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

Appellants,

WASHINGTON STATE NURSES ASSOCIATION,

Appellant/Intervenor

King County Superior Court N0. 10-2-33125-5 SEA
The Honorable Harry J. McCarthy

RESPONDENTS' BRIEF
ANSWERING BRIEF OF APPELLANT EVERGREEN HOSPITAL MEDICAL CENTER

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I. INTRODUCTION

This class action was initially filed by nurses Debra Pugh and Aaron Bowman, seeking compensation and injunctive relief on behalf of themselves and those similarly situated for years of missed rest and meal breaks during their employment by Evergreen Hospital (Evergreen). Despite numerous complaints over a period of years, their bargaining representative and union, Washington State Nurses Association (WSNA), had failed to take any action against Evergreen under an existing collective bargaining agreement.

Upon learning that Ms. Pugh and Mr. Bowman intended to file this class action, WSNA filed its own claim on behalf of the same nurses in state court. When Ms. Pugh and Mr. Bowman intervened to challenge WSNA's standing to bring a claim for damages on their behalves, WSNA quickly entered into a settlement with Evergreen for nominal damages and dismissed its case before the court could resolve the standing issue. Pursuant to the settlement, Evergreen sent putative class members "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 then intervened in this case, to support Evergreen and prevent its members from obtaining additional compensation through this class action.

Evergreen appeals the trial court's order certifying the following class under CR 23:

> All registered nurses engaged in patient care who have been employed by Evergreen Hospital medical Center in King County, Washington and who, at any time between September 17, 2007 and the present, were denied rest or meals breaks.

Evergreen also appeals certification of the following subclass:

> All members of the Class who received and cashed a check purporting to waive and resolve their rest breaks claims with Evergreen.

Finally, Evergreen also appeals the trial court's order on partial summary judgment in which it found that (1) WSNA lacked associational standing to sue for damages on behalf of its members, (2) the settlement agreement between WSNA and Evergreen required court approval, and (3) the "settlement checks," which were only made available to nurses as part of the WSNA/Evergreen settlement, do not bar claims of nurses for additional compensation in this class action.

II. STATEMENT OF ISSUES

1. Whether the trial Court abused its discretion in finding that the Commonality requirement of CR 23 is met when overwhelming evidence shows that Evergreen's practices of failing to ensure its nurses receive all rest and meal breaks, failing to record all missed rest and meal breaks, and failing to pay for all missed rest and meal

breaks does not vary by department and Evergreen's policies and practices are centrally controlled by Evergreen.

2. Whether the trial court abused its discretion in finding that questions of law and fact predominate when Evergreen only provides speculative concerns or concerns identical to those rejected in Pellino v. Brinks.

3. Whether the named plaintiffs can adequately represent the class when they no longer work for Evergreen because Evergreen terminated them after they filed this class action lawsuit.

4. Whether the class definition is adequate or whether upon remand, the trial court should redefine it.

5. Whether WSNA lacks standing to assert its members' claims for damages for missed rest breaks, where there exist no employer records showing how many rest breaks were missed, when, and by whom that could establish damages without representative class member testimony from nurses.

6. Whether WSNA's inadequate representation, failure to disclose obvious conflicts of interest with its members, and failure to provide adequate notice about the settlement and this pending class action violated the due process rights of absent class members.

7. Whether WSNA and Evergreen should have obtained court approval of their settlement when they notified nurses that the settlement would only become effective upon court approval, WSNA's standing to sue for damages was challenged, and the

settlement terms compromised the claims in this pending class action case to which Evergreen was a party.

8. Whether the trial court had authority to determine that WSNA and Evergreen's settlement and "settlement checks" sent pursuant thereto could not bar additional compensation to class members.

9. Whether the "settlement checks" sent by Evergreen to class members in this case, which were admittedly less than the amounts owed, constitute an illegal kick-back of wages under RCW 49.52.050.

10. Whether the form of waiver that Evergreen obtained only through its settlement agreement with WSNA is enforceable, when WSNA had no standing to compromise the claims of nurses for damages for missed breaks or to enter into a settlement agreement with WSNA and when settlement of the class claims was never approved by the court.

III. STATEMENT OF THE CASE

A. Two Lawsuits Are Filed Against Evergreen Hospital.

In September 2010, Debra Pugh and Aaron Bowman filed this lawsuit on behalf of themselves and 1,300 other nurses (hereafter, "the 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.

At the same time, the Washington State Nurses Association (WSNA) filed a similar suit seeking damages for the nurses for missed

10-minute rest breaks.[1] CP 607-612. Despite the existence of a collective bargaining agreement (CBA) between WSNA and Evergreen, which provided nurses with more generous rest breaks than state law requires and gave WSNA the right to arbitrate Evergreen's failure to provide them, WSNA inexplicably chose not to take any action under the CBA. CP 627-665; 667-701. Instead, it filed a claim in King County Superior Court alleging violation of the Industrial Welfare Act. CP 607-612. In its complaint, WSNA claimed it had associational standing to sue Evergreen for monetary damages on behalf of the nurses. CP 609.

B. The Nurses Challenged WSNA's Standing to Sue for Them, and WSNA Quickly Settled the Nurses' Claims and Blocked the Court from Considering the Nurses' Challenge.

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). After a rebuffed effort to cooperate with WSNA on prosecuting the overlapping rest break claims, the Nurses moved to intervene in WSNA's case on February 4, 2011. CP 613-625. They did so to challenge WSNA's standing to sue for damages on their behalf and to protect the nurses' interests in getting full back pay damages for missed breaks. CP 621-622.

But on February 10, 2011, before the trial court could rule on the Nurses' motion to intervene or decide the issue of standing, WSNA and

[1] Unlike the nurses' lawsuit, WSNA chose not to bring any meal break claim for the Nurses. CP 447-451.

Evergreen entered into a settlement agreement. CP 477-484. Under the agreement, WSNA settled the rest break claims of over 1,300 nurses for $375,000.[2] 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 express 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, a week before the deadline to file their objections to the settlement, the Nurses took the deposition of Evergreen through its CR 30(b)(6) representative, Kathleen Groen. CP 585. The subject matters of the deposition included Evergreen's calculation of the amount owed nurses for missed breaks, whether there were records showing when nurses missed breaks, and how many breaks were missed. CP 585-605. At the deposition, Evergreen admitted that it calculated that it owed the nurses $600,000 in back pay, almost twice the $317,000 it would be paying them under the WSNA settlement.[3] CP 598-601. And

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

[3] $317,000 represent the amount actually paid to the nurses because WSNA took $58,000 from the settlement fund to pay its attorneys.

Evergreen admitted it had no evidence to dispute numerous declarations of nurses saying they regularly missed breaks. CP 586-605. Most significantly, however, Evergreen also admitted that it had no records showing when nurses missed breaks or the amount of back pay owed.[4] CP 586-590. All parties 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 filed a stipulation to dismiss WSNA's lawsuit immediately. Accordingly, hearings on the issues of standing, intervention, and joint settlement approval were stricken.

At this point in the litigation, the Nurses' counsel had been unable to contact the nearly 1,300 putative class members because Evergreen had refused to provide contact information for them. Upon learning that WSNA and Evergreen dismissed the other lawsuit by stipulation, the Nurses immediately moved to compel discovery of class members' contact information so they could alert putative class members of their rights. CP 1379-1381. The Court ordered production and imposed costs under KCLR 37(d) on March 10, 2011. Id. Under the terms of the order, however, Evergreen did not provide class member contact information

[4] On March 2, 2011, the same day as the Groen deposition, Evergreen served its answers to the Nurses' Requests for Admission where it admitted it had no documents showing how many rest breaks were missed, when, and by whom. CP 741-747.

until March 28, 2011, ten days after a protective order was entered on March 17, 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). On the rear of the check, Evergreen included a release of the Nurse's 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. Accompanying the check was a cover letter from Evergreen, which had also not been reviewed or approved by any court and contained misleading and incomplete information about the settlement and this pending class action. CP 499-500.

WSNA also "notified" the Nurses about settlement by posting announcements and letters about the settlement on its website and mailing a letter to all "affected RNs." CP 60. These postings and letters had not been reviewed or approved by any court and also contained misrepresentations about the settlement and the class action. Furthermore, even though it was in the best interest of many of its members to reject the settlement check, WSNA was forbidden from saying so under the terms of its settlement agreement, wherein WSNA agreed it would not "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 "hold Evergreen harmless from any claims of Represented Employees who have received back

wages in accordance with and pursuant to this [settlement] Agreement." CP 834.

With only limited, self-serving, and misleading information provided by Evergreen and WSNA, the vast majority of Evergreen nurses (and class members in this lawsuit) endorsed the check and cashed it. AB 8-9. The majority did so before it was even possible for class counsel in this case to provide them with 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).[5]

C. WSNA Intervened in the Nurses' Own Class Action and Attempted to Prevent the Nurses from Obtaining Full Relief for their Missed Rest Breaks.

In light of the above events and in anticipation that Evergreen would seek to exclude class members who cashed the "settlement checks", the Nurses amended the complaint in this lawsuit to include class representative FloAnn Bautista, who had endorsed the settlement check. CP 97-105.

On August 8, 2011, the Nurses filed a motion for class certification. While the Motion for Class Certification was pending,

[5] 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. AB at 9. 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.

WSNA moved to intervene in this lawsuit to oppose and dispute that "the putative subclass of employees who accepted payment for missed rest breaks are entitled to further compensation from the Defendant." CP 226-230. The motion to intervene was granted on October 13, 2011. Id. After intervention was granted, Plaintiff's re-filed their motion for class certification. 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.[6] In opposition to the Motion for Class Certification, Evergreen submitted 12 declarations. CP 990. All of Evergreen's declarations in opposition to class certification 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.

Contemporaneously with the Motion for Class Certification, the Nurses filed a Motion for Partial Summary Judgment, asking the court to dismiss Intervenor WSNA's claim and Evergreen's likely defense that the "settlement checks" barred the Nurses from receiving full compensation for missed breaks in this class action. Evergreen and WSNA filed briefs in opposition and oral argument on both motions was held on February 3, 2012 in King County Superior Court.

[6] Nearly 900 of the nearly 1300 class members work/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).

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, concluding that class members who cashed "settlement checks" sent pursuant to WSNA's settlement with Evergreen 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 decision. CP 1346-1366. On August 1, 2012, Commissioner Mary Neel granted review.

IV. ARGUMENT

A. The Trial Court Did Not Err in Certifying a Class.

Class certification is reviewable only for abuse of discretion. E.g., Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 157 P.3d 847, 854 (2007). Washington courts favor a liberal application of CR 23, and any doubts are resolved in favor of certification. Nelson, 157 P.3d at 854; Smith v. Behr Process Corp., 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002). "A reviewing court must exercise even greater deference when the [trial] court has certified a class than when it has declined to do so." Marisol v. Giuliani, 126 F.3d 372, 375 (2d Cir. 1997).

1. Commonality is Met.

Evergreen argues that the trial court abused its discretion when it found that the nurses' claims raise common issues of law and fact suitable for class certification. AB at 27-33.

The commonality requirement of CR 23(a)(2) is met if the claims alleged raise at least one common material issue of law or fact or the defendant has engaged in a common course of conduct with respect to the potential class members. Brown v. Brown, 6 Wn. App. 249, 255 (1971). Under Brown, the shared questions of law or fact do *not* have to be identical. The 23(a)(2) requirement is met if the "course of conduct" that gives rise to the cause of action affects all class members and a single issue exists whose resolution will affect all or a significant number of putative class members. Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993) (the threshold for "commonality" is not high.). Although inquiry as to commonality might properly call for some substantive inquiry, "[t]he court may not go so far . . . as to judge the validity of the[ ] claims.). United Steel, Paper & Forestry, Rubber, Mfg. Energy v. ConocoPhillips, Inc., 593 F.3d 802 (9th Cir. 2010).

Consistent with these holdings, the trial court here concluded:

> Plaintiffs' claims raise common issues of law and fact suitable for class certification, and that the Plaintiffs' claims are typical and representative of the claims because of the class because Plaintiffs allege a common course of conduct as the basis for their claims. Plaintiffs allege that the Defendant failed to provide 10-minute rest breaks and 30-minute meal breaks required by Washington law to registered nurses. Plaintiffs allege that inadequate staffing by Evergreen has resulted in the inability of nurses to take their breaks. Accordingly, the Court CONCLUDES that the requirements of CR 23(a)(2) and (3) are met.

CP 1331. The trial court was presented with overwhelming evidence that nurses throughout the hospital did not get their required

10-minute rest breaks or uninterrupted 30-minute meal breaks on a regular basis. First, Evergreen admitted in its Answers that Nurses missed rest breaks by "skip[ping]" them. CP 555 (¶11); 1259 (¶13); 491 (¶13). Second, Plaintiffs submitted 22 declarations from nurses in 12 of Evergreen's departments (including the 8 largest) showing that Nurses do not get their rest and meal breaks, that Nurses were not paid for their missed breaks, and a common reason for the missed breaks is inadequate staffing. CP 703-739; CP 748-801. Third, Evergreen admitted in both deposition and written discovery that it had no evidence to dispute the accounts of missed breaks in declarations submitted by nurses and Evergreen did not keep records of rest breaks (except in one department and those records were irregular and incomplete). CP 586-605.

Evergreen claims that the trial court did not consider testimony in declarations it submitted and makes the unsubstantiated claim that the trial court "completely disregarded this evidence" by finding commonality. AB at 32. The Court should reject this argument. First, the trial court expressly stated in its order that it considered Evergreen's declarations. CP 1330.

Second, Evergreen's declarations do not dispute Plaintiffs' allegations that Evergreen did not ensure that its nurses received rest and meal breaks[7], did

[7] Under Washington law, an employer has a mandatory obligation to ensure employees take rest and meal breaks. See Pellino v. Brink's Inc., 164 Wn. App. 668, 687-690 (2011). Even if deemed credible, the declarations submitted by Evergreen do not dispute that nurses missed breaks to some degree. CP 907 (stating the number of missed rest breaks is "low"); CP 922 (stating as a nurse, she was "usually" able to take a break); CP 927 (stating she has occasionally addressed a missed break with her nursing staff); CP 936 (stating there is not a "significant" problem with missed rest breaks); CP 940, 950

not record all missed breaks[8], and failed to pay for all missed rest breaks, meal breaks during which nurses performed unremitting work, interrupted meal breaks, and late meal breaks.[9] While the declarations show that the frequency of missed breaks might vary by department (i.e., the damages caused by Evergreen's practices), they show that Evergreen's practices of failing to ensure rest and meal breaks, failing to record all missed rest breaks, and failing to compensate for all missed rest breaks and on-duty, interrupted, or late meal breaks did not vary by department. Id.; See Mortimore v. FDIC, 197 F.R.D. 432, 436 (W.D. Wash. 2000)(That class members may have to prove their damages on an individual basis is not a reason for denying class certification)(emphasis added).

Third, the declarations provided by Evergreen are not as persuasive as Plaintiff's declarations for several reasons. Most significantly, all but

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(manager states she cannot say that the nurses have never missed a break, and providing records (that post-date this lawsuit) showing missed breaks); CP 957-964 (failing to dispute that nurses in the ER miss breaks); CP 1010-1011 (failing to dispute nurses miss rest breaks and stating it is up to the nurse to report a missed break); CP 1015-1016 (describing rest breaks as "difficult to get" at times); CP 1056 (stating it is "possible" that nurses missed rest breaks).

[8] RCW 49.46.070 imposes record keeping requirements on employers, including an accurate record of the hours worked each day by each employee.

[9] WAC 296-126-092 requires that meal breaks be within the first 5 hours of the work-day. It is also requires that if a meal period is interrupted, the employer must pay for an on-duty meal period. Id.; See also State of Washington Department of Labor and Industries Administrative Policy ES.C.6 at p. 3 (attached as Appendix A to Appellant's Brief). Furthermore, under the Washington Wage Statute, employees in Washington are entitled to compensation for missed rest periods because their workday is extended by 10 minutes for each break missed. Wingert v. Yellow Freight Sys., 146 Wn.2d 841, 849 (2002). In Pellino, this court stated that Wingert applies with equal force to the requirement that on-duty employees "shall be allowed" a total of 30 minutes for a meal period without engaging in work activities.

one declaration of those provided by Evergreen in opposition to class certification are from managers *who are not class member*s. Obviously, these manager/employees have an incentive to remain on good terms with the company. When evaluating whether to certify a class, courts routinely discount declarations an employer has obtained from current employees because the statements are inherently biased or the result of coercion. See, e.g., Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 664 (D. Minn. 1991) (employees "have an interest in maintaining amicable relationships at work"); Rainbow Group, Ltd. v. Johnson, 990 S.W.2d 351, 357 n.5 (Tex. Ct. App. 1999) (employees signing declarations for employer likely "feared professional consequences of not signing"). As the United States Supreme Court recognized long ago, employees "are often induced by fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce detrimental to their health or strength." W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 394, 57 S. Ct. 578, 81 L. Ed. 703 (1937)[10]. In any event, Evergreen's *non-class member*/manager declarations cannot refute what plaintiffs and 20 other *class members* stated under oath about their own experience with missed breaks. See generally CP 17-20; 703-739; 748-801.

In addition and in contrast with the declarations submitted by the Nurses, the majority of Evergreen's declarations come from the smallest departments at the hospital. CP 905 (Manager Jeff Roberts stating there

[10] This is particularly true where, as here, the named plaintiffs, Ms. Pugh and Mr. Bowman, were terminated from employment after they filed this class action lawsuit.

are three nurses per shift in the CV Health and Wellness Center); CP 927 (Manager Cindy Hopson stating her department is one of the smaller units in the hospital); CP 935 (Manager Ken Mills stating he supervises 16 nurses total); CP 955 (three nurses work in Susan Smiley's department); CP 1015 (Janelle Collins supervises three nurses per shift); CP 1054 (Dianna Davis has a total of 20 nurses report to her). In sum, based on this undisputed evidence of Evergreen's common practices, the trial court did not abuse its discretion by concluding that CR 23(a)(2) was satisfied.

The court should reject Evergreen's suggestion that commonality is defeated by nurse testimony about why their breaks were missed or interrupted, and the existence of managerial discretion in different departments. AB at 29-30. The reasons why breaks were missed or different manners in which department managers may schedule breaks does not defeat commonality here because those facts do not affect or prevent resolution legal questions that are common to the class.[11] The court should also reject Evergreen's new claim that nurses may have waived their rest and meal breaks. AB at 29. Rest breaks cannot be waived, and meal breaks can only be waived by express agreement or by "unequivocal acts or conduct evidencing an intent to waive." Pellino v. Brinks, 164 Wn. App. 668, 697, 267 P.3d 383 (2011) (also stating that waiver will not be inferred from doubtful or ambiguous factors). Evergreen has failed to provide any evidence of express agreement to

[11] These issues are that Evergreen did not ensure rest and meal breaks, did not record all breaks missed, and failed to pay for missed rest breaks and on-duty, interrupted, or late meal breaks.

waive lunch periods.[12] And it has failed to provide sufficient evidence of "unequivocal" acts of waiver. The only "evidence" it provides is an unsubstantiated claim that nurses waived their lunch periods by bringing their own personal cell phones with them on a lunch break and thereby "allowing themselves" to be interrupted by a call.[13] AB at 29. Evergreen provides no authority and cannot meet its burden to show that merely bringing a personal cell phone to lunch constitutes an unequivocal act of waiver. Pellino, 164 Wn. App. at 697 (Waiver is an affirmative defense on which defendant bears the burden of proof).

The Court should also reject Evergreen's argument that Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011) and Oda v. State, 111 Wn. App. 79, 92, 44 P.3d 8 (2002) show that the trial court abused its discretion by concluding that CR 23(a)(2) is satisfied. In Wal-Mart, plaintiffs filed a class action alleging intentional sex discrimination in promotion under federal law. Evergreen's assertion that Wal-Mart applies in this case ignores settled Washington law in wage and hour cases and borders on being frivolous.[14] First, federal courts in Washington and elsewhere have held that Wal-Mart does not apply to wage and hour class actions. See, e.g., Troy v. Kehe Food Distribs., 2011 U.S. Dist. LEXIS 110012 (W.D.

[12] Notably, the CBA does not include a lunch break waiver. CP 640.

[13] While this is not evidence of waiver, it is evidence of an unpaid on-duty rest break, which violates WAC 296-126-092.

[14] This Court has consistently approved certification of class actions in wage and hour cases under the Washington Wage Statute. See Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35 (2010); Pellino v. Brink's Inc., 164 Wn. App. 668, 267 P.3d 383 (2011).

Wash. Sept. 26, 2011)(distinguishing Wal-Mart and certifying class claims under Washington Wage Statute.). The reason is obvious: a wage and hour case does not depend on proof of the employer's intent. The employer either provides or compensates for the breaks required by law or it does not. In contrast, cases of intentional discrimination in promotion require proof of an employer's intent to discriminate. See Ramos et. Al. v. SimplexGrinnell LP, 2011 U.S. Dist. LEXIS 65593 at *16 (E.D.N.Y. 2011)(Where "there is little discretion or subjective judgment in determining an employee's right to be paid prevailing wages; the right arises automatically, by operation of law . . .").

Second, Wal-Mart was a nationwide class action that alleged discriminatory practices in promotion decisions affecting millions of female employees at thousands of stores in the United States. Wal-Mart had no centralized control over promotion decisions and denied a common practice of discriminatory decision-making. Here, Evergreen admitted in its answer to the class action complaint that it knew that nurses missed their breaks. CP 555 (¶11); 1259 (¶13). It admitted in deposition that it had no evidence disputing the declarations from 22 nurses in 12 different hospital departments that nurses missed their breaks to one degree or another. CP 600-605.

Third, in Wal-Mart, Wal-Mart showed that its actual promotion practices varied widely between different stores in thousands of locations across the country. Here, the nurse declarations submitted in support of class certification show that nearly all the class members worked at

Evergreen's medical center, a single facility. The declarations here also show that despite any policies to the contrary, Evergreen's hospital-wide practices of failing to ensure its employees received all legally required rest and meal breaks, failing to record missed rest breaks, and failing to pay for all missed breaks, did not vary by department. CP 703-739; 748-801; 1009-1058. Further proof that Evergreen's practices are hospital-wide is provided by Evergreen's own admission that it had calculated that it owed nurses, hospital-wide, $600,000 in back pay for missed rest breaks and the fact that Evergreen sent settlement checks to every nurse in every department of the hospital. CP 598-601; AB at 6-9.

Oda v. State, 111 Wn. App. 79; 44 P.3d 8 (2002) is similarly distinguishable. Oda is also a sex-discrimination case that depended on the employer's intent. There, the plaintiffs alleged discriminatory practices with regard to promotion and pay for all female employees of the University of Washington and tried to use superficial statistical evidence to prove the employer's intent school-wide. But as discussed above, the Nurses' wage and hour case does not depend on proof of the employer's intent. Also, the employer in Oda, like in Wal-Mart, had no centralized control over promotion decisions and denied a common practice of discriminatory decision-making. That is not the case here, where Evergreen has admitted that it has centralized control over documenting missed meal breaks and centrally controls the time and attendance system in all hospital departments. CP 590-591.

Finally, in Oda, Plaintiffs sought to rely solely on "slippery" and not particularly complex statistical evidence to establish a common practice of *intentional* discrimination without any anecdotal evidence of representative individual promotion or pay decisions. The Oda plaintiffs submitted no class member declarations to establish common practices and bring the "cold hard facts convincingly to life." Oda, 111 Wn. App. at 96. The court concluded that statistical evidence alone was insufficient to establish the employer's discriminatory motive when discretionary pay and performance decisions were made by faculty members in each department, and there was no evidence presented to show a common pattern of adverse treatment of women by the central administration. Oda, 111 Wn. App. at 101. That is not the case here, where Evergreen's policies and practices are the same hospital-wide, it has centralized control over those policies and practices, and "motive" is irrelevant. Oda does not show that the trial court abused its discretion in this case by concluding that commonality under CR 23(a)(2) exists.

2. Common Questions of Law and Fact Predominate.

CR 23(b)(3) requires that common questions of law and fact predominate over any questions affecting only individual members. In Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 254 – 256 (2003), the court explained the "predominance" requirement of CR 23(b)(3):

> The predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question

> being whether "adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." The predominance requirement is not a demand that common issues be dispositive, or even determinative; it is not a comparison of court time needed to adjudicate common issues versus individual issues; nor is it a balancing of the number of issues suitable for either common or individual treatment. Rather, "[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." The presence of individual issues may pose management problems for the judge, but as the chief commentator has observed, courts have a variety of procedural options to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined.

Id. (internal citations omitted). In deciding whether common issues predominate over individual ones, the court is engaged in a "'pragmatic' inquiry into whether there is a 'common nucleus of operative facts' to each class member's claim." That class members may eventually have to make an individual showing of damages does not preclude class certification. Id. at 256.

Evergreen argues that the trial court abused its discretion in finding that individual issues will predominate because individual nurses may define "rest period" differently, so they may think they missed a break, when they really took an intermittent break. According to Evergreen, individualized inquiry would have to be made of all the nurses to determine if nurses took intermittent breaks or actually missed a break. AB at 33-34.

First, nurse testimony will not define "rest period" or "intermittent break" or "unremitting work"—those terms are defined under Washington law. The trial court will apply these terms to answer questions common to the class, such as whether the nature of nursing work allows for intermittent breaks[15], and if so, whether short personal activities, such as "leaving the department to use the bathroom," "grab[bing] a granola bar" or "look[ing] up the weather on the internet", counts toward intermittent break time when nurses are not relieved of patient care and responsibility. CP 1028-1030.

Second, Evergreen's concerns are premature and speculative. If the trial court concludes that intermittent breaks are not permitted in nursing work under WAC 296-126-092, there will be no inquiry of nurses about intermittent rest breaks at all. If the court rules that intermittent breaks are allowed and individual participation is necessary to determine the number of missed rest breaks, the trial court has "a variety of procedural options to reduce the burden of resolving [them], including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined." Sitton, 116 Wn, App. at 255.

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[15] WAC 296-126-092 states that intermittent breaks are permitted only where the "nature of the work allows it." In WSNA v. Sacred Heart Medical Center, SCSC No. 07-2-05766-2, a case WSNA brought on behalf of nurses against a different hospital, the trial court answered this legal question with respect to nurses and concluded that nursing work was of the type that did not allow intermittent breaks under WAC 296-126-092. Order Granting Plaintiffs' Motion for Summary Judgment dated, August 20, 2010.

Finally, similar arguments regarding commonality and predominance were rejected in Pellino v. Brinks, 164 Wn.2d 668 (2011). Pellino involved a class of armored car drivers and messengers who alleged they were denied rest and meal breaks. In that case, class member testimony about breaks was similar to testimony here. Class members testified that when to take breaks varied by employee, they were able to take quick bathroom breaks, they occasionally purchased food while on route, and ate food while on the job. The court rejected Brinks' argument that because the decision of when to take breaks varied by employee[16] and there was no "uniform rule or policy on breaks," commonality and predominance were not met. Pellino, 164 Wn. App. at 683. As in Pellino, this Court should reject these arguments.

3. Named Plaintiffs Adequately Represent the Class.

The adequacy of representation requirement of CR 23(a)(4) is concerned with only two issues: (1) does the class representative have claims which conflict with those of the class; and (2) does the class have competent legal counsel to represent their claims. De Funis v. Odegaard, 84 Wn.2d 617, 622, 529 P.2d 438 (1974); Marquardt v. Fein, 25 Wn. App. 651, 656, 612 P.2d 378 (1980). Evergreen argues that the trial court

[16] Evergreen similarly claims that because Home Health RNs—one of the 24 departments at Evergreen—control the timing of their breaks, individual issues will predominate. AB at 35. Besides simply claiming, "facts relating to their claims will not be the same as on-site RNs", it fails to elaborate how this "difference" will create individual issues that would predominate over the main overriding issues in the case: whether Evergreen fulfilled its obligation to ensure its employees take rest and meal breaks and whether Evergreen violated the MWA when it fails to pay for missed rest breaks and on-duty, interrupted, or late meal breaks. As in Pellino, this argument should be rejected.

abused its discretion in finding that Mr. Bowman, Ms. Pugh, and Ms. Bautista adequately represent the class because (1) they work in the Emergency Department, (2) they refused to take rest breaks when they were offered, and (3) they are former employees. AB at 35. This Court should reject these arguments.

First, the class representatives are "adequate" because their interest in full payment for all missed breaks does not conflict with any interest of any class member. All nurses have an interest in receiving compensation from Evergreen for missed breaks during the class period. The fact that Ms. Pugh and Mr. Bowman worked in the Emergency Department does not create a "conflict" with other members of the class.[17]

Second, former employees are routinely approved as adequate class representatives in wage and hour class action cases. Glass v. UBS Financial Services, Inc., 2007 WL 221862 (N.D. Cal. 2007), affirmed 331 Fed. Appx. 452 (9th Cir. 2009)(concluding that class representatives in a wage and hour class action for damages were adequate representatives for current employees beyond the date of their employment). It has been widely recognized that former employees often make better class representatives than current ones because they have no fear of retaliation for their testimony and are more likely to push for a better result on behalf of the class. See e.g. Fujita v. Sumimoto Bank of California, 70 F.R.D.

[17] Ms. Pugh and Mr. Bowman deny Evergreen's allegations that they refused timely and adequately staffed rest and meal breaks. In any event, even if it was true, Evergreen does not show that this creates a conflict with other class members or undermine other class member testimony that they were denied breaks.

406, 411 (N.D. Cal. 1975); Kouba v. Allstate Ins. Co., 1981 U.S. Dist. LEXIS 15703, Fn. 3 (E.D. Cal. Sept. 24, 1981). The reasoning is discussed in Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. Pa. 1975). In that case, the court recognized that class representatives who were former employees of the company are often better situated because they are free from the coercive influence of the company. The court also recognized that if former employees were disqualified from representing a class of former and current employees, employers would be encouraged to discharge those employees suspected as most likely to initiate a [lawsuit . . . in the expectation that such employees would thereby be rendered incapable of bringing the suit as a class action." Id. at 247. This is particularly true here. Both Ms. Pugh and Mr. Bowman were Evergreen employees when they initiated this lawsuit, but after they filed this class action lawsuit, Evergreen fired them. In any event, both Ms. Pugh and Mr. Bowman have an interest in obtaining full compensation for missed rest and meal breaks during the class period, which does not conflict with the class' interests.

Equally, Ms. Bautista's interest in seeking full payment of all wages owed for missed breaks is congruent with the interest of all subclass members in full payment of wages owed. Any "conflict" alleged by Evergreen is hypothetical,[18] and hypothetical or potential conflicts are not sufficient to deny class certification. See Wilkinson v. F.B.I., 99 F.R.D.

[18] Evergreen's contention that Ms. Bautista does not represent the interests of other nurses because they "already reject[ed] further litigation" (presumably by signing the "settlement" checks) is circular and nonsensical. It is also speculative. AB at 36.

148, 160 (CD. Cal.1983) ("A merely speculative possibility of inadequate representation is not a sufficient basis to find that Rule 23(a)(4) is not satisfied."); 5 James Wm. Moore et al., Moore's Federal Practice § 23.25[4][b][ii] (3d ed.1998) (stating that to find inadequacy of representation "most courts hold that the conflict must be more than merely speculative or hypothetical"). The trial court did not abuse its discretion in finding that CR 23(a)(4) is met.

4. The Class Definition Is Adequate.

Evergreen claims that the class definition adopted by the court is inadequate because it "predetermines liability." AB at 38. At this early stage in litigation, it was entirely proper for the court to assume that Plaintiff's allegations that all nurses who worked at Evergreen during the class period missed rest and meal breaks and were not compensated for them. See Smith v. Behr Process Corp., 113 Wn. App. 306, 320 n.4, 54 P.3d 665 (2002) (Where class certification is sought at the early stages of litigation, courts generally assume that the allegations in the pleadings are true.); See also Noble v. 93 Univ. Place Corp., 224 F.R.D. 330, 338, 341-342 (S.D.N.Y. 2004) (stating that class members need not be ascertained prior to certification, but must be ascertainable at some point in the case, and noting that "certification is routinely granted where the proposed class definition relies in part on the consideration of defendants' alleged liability."); Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. Tex. 1993) (holding that to not permit a class to be defined in terms of the legal claims brought "would preclude certification of just about any class

of persons alleging injury from a particular action.").

Furthermore, in this case, Evergreen provided the court with no evidence to dispute Plaintiffs' allegations that all nurses who worked at Evergreen missed rest and meal breaks to some extent, Evergreen failed to keep records as required by law as to these nurses, and Evergreen failed to pay these nurses for missed breaks. Under these circumstances, the class definition is adequate because it does not require the court to make any determination on the merits of the claim in order to identify the class, which based on the undisputed evidence consists of all nurses employed by Evergreen during the time period. It is also undisputed and clear from the evidence that Evergreen did not ensure that any of its nurse employees received rest breaks as required by Pellino.

Even if this Court concluded there is an error in the class definition, the proper remedy is to remand to the trial court to revise the definition. Sitton, 116 Wn. App. at 250 (Courts resolve close cases in favor of allowing or maintaining the class); James v. City of Dallas, 2002 U.S. Dist. LEXIS 22706 (N.D. Tex. Nov. 22, 2002) (Revision of class definition by appellate court does not change the certifiability of the class when the requirements of CR 23 are met). Here, it could easily alleviate Evergreen's concerns with a broader definition:

> All registered nurses engaged in patient care who have been employed by Evergreen Hospital medical Center in King County, Washington between September 17, 2007 and the present.

As is very common in class actions cases, the court could craft narrower subclasses as discovery progresses if deemed appropriate and helpful in adjudicating the case.

B. Summary Judgment was Properly Granted.

In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). The evidence and all reasonable inferences therefrom are to be considered in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). "All questions of law are reviewed de novo." Berger v. Sonneland, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

In this case, the trial court properly concluded that (1) WSNA lacked associational standing to sue for damages on behalf of its members, (2) the settlement agreement between WSNA and Evergreen required court approval, and (3) the "settlement checks" only made available to nurses as part of the settlement did not bar claims of nurses for full compensation owed for missed rest breaks in this class action. This Court should affirm and remand for trial.

1. WSNA Lacked Associational Standing to Sue for Damages on Behalf of its Members.

It is improper for a plaintiff lacking standing to assert the rights of other parties or nonparties. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). The claims of a plaintiff determined to lack standing are not his or hers to assert and cannot be resolved in whole or in part on the merits. Ullery v. Fulleton, 162 Wn. App. 596, 604, 256 P.3d 406, 411 (2011). A party cannot settle claims that it does not possess. Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018 (9th Cir. 2003) (a plaintiff seeking to represent a class who lacks standing to bring the claim cannot seek relief on behalf of any member of the class.).

When a union or other organization seeks to sue for relief on behalf of its members, it must show it has "associational standing." Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-214, 45 P.3d 186, 188-189 (2002). An association has standing to bring suit 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 the claim asserted nor relief requested requires the participation of the organization's individual members. Id. at 213-214 (hereinafter referred to as the Firefighters test).

As a general matter, the third prong of the Firefighters test cannot be met when an association seeks monetary damages. "Monetary

damages are distinguishable from injunctive relief, in that injunctive relief generally benefits every member of an employee association equally whereas the amount of monetary damages an employee suffers may vary from employee to employee." Id. at 214, citing, Warth v. Seldon, 422 U.S. 490, 515 (1975). It is primarily for this reason that no federal court has ever permitted an association to seek monetary relief on behalf of its members pursuant to a claim of associational standing. Id.; See also United Union of Roofers v. Ins. Corp. of Am., 919 F.2d 1398, 1400 (9th Cir. 1990); Ironworkers District Council v. University of Washington Board of Regents, 93 Wn. App. 735, 970 P.2d 351 (1999).

Washington courts have followed the federal courts' reasoning on this issue. In Washington, a union generally has associational standing to sue an employer for injunctive relief, but does not have standing to sue the employer on behalf of its members for damages unless "the amount of monetary relief requested on behalf of each employee is certain, easily ascertainable, and within the knowledge of [the employer]." Firefighters, 146 Wn.2d at 216 (emphasis added).

Under the facts of this case, WSNA lacked standing to sue for damages on behalf of its members because some degree of individual participation is required to compute the amount of unpaid wages owed to nurses for missed rest breaks. WSNA and Evergreen have both admitted that no records exist that show the amount of monetary relief owed to nurses for missed breaks. CP 586-590; 742-746. The complete lack of

records distinguishes this case from every other Washington case where an association was permitted to sue for damages on behalf of its members.

Washington Courts have, without exception, required that employer records exist from which damages could be computed with such certainty as to constitute a mere "mathematical exercise" before it will find associational standing. Teamsters Local Union No. 117 v. Dep't of Corr., 145 Wn. App. 507, 513, 187 P.3d 754 (2008) (concluding that damages were easily ascertainable as nothing more than a "mathematical exercise" because they could be calculated with certainty using electronically stored information on employer provided pagers and employer time records.); Int'l Ass'n of Firefighters, 146 Wn.2d at 216 (calculation of damages did not require individual determination because the exact amount of relief due each individual employee was known to the employer from its own payroll records, which showed exactly how much each employee had contributed to social security and Medicare during a certain time period). No similar "mathematical exercise" can occur here because there are no employer records documenting missed breaks. Because the amount due to each nurse is not "certain, easily ascertainable, or within the knowledge of [Evergreen]," WSNA did not have associational standing to sue for damages on behalf of its members under established Washington law.

The Court should reject Evergreen's claim that the standing issue is a "red herring" because this is simply an issue of contract law. AB at 20. If its payments to the absent class member nurses under the WSNA

settlement gives Evergreen an affirmative defense of "accord and satisfaction" or "waiver"[19] of the claims made in this class action case, then WSNA's standing to have agreed to that compromise on behalf of its members must be decided. This is particularly so, when the record shows WSNA's claim of standing was a false claim that was used by the parties to induce nurses into signing "settlement checks" and releases. See infra at 48-50.

For the above reasons, the court did not err in concluding that as a matter of law, WSNA lacked standing to bring a claim for damages on behalf of its members, and that its settlement of those claims could not bar the Nurses from obtaining further relief in this class action.[20] This Court should affirm this conclusion.

2. WSNA Did Not Adequately Represent the Nurses' Interests.

In addition to lacking standing to represent the nurses under Washington law, WSNA also failed to adequately represent the nurses and

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[19] Notably, Evergreen had not pled the affirmative defenses of accord and satisfaction and waiver until after the two motions at issue in this appeal were filed and fully briefed. CP 1252. They filed an amended answer on the morning of oral argument. CP 1258 (filed on February 3, 2012).

[20] In the commissioner's ruling, she suggests that the trial court concluded that WSNA lacked standing to bring a claim for injunctive relief. As stated in the Nurses' Motion to Modify, the trial court made a scrivener's error in citing the Firefighter's rule, but properly applied the correct rule and concluded later in its order only that WSNA lacked standing to bring a suit for damages. Ct. App. Commissioner's Decision dated 8/1/12; Motion to Modify at 1-3. It is undisputed that Firefighters stands for the proposition that a union may only represent its members on a claim for injunctive relief, but not damages (unless they can be calculated with certainty without member participation.) CP 105-107. ***WSNA's standing to bring a claim for injunctive relief was not an issue at the trial court level*** because no one argued that WSNA lacked standing to bring a claim for injunctive relief. CP 414-446; 517-547; 1079-1109.

possessed a conflict of interest, which violated the due process rights of absent nurse class members.

An agreement, whereby a representative plaintiff purports to settle the claims of members of a class, may not be enforced against the due process rights of the absent class members where the representative plaintiff does not possess the same claim, or fails to adequately represent their interests, or has a conflict of interest. See Phillips Petroleum v. Shutts et al., 472 U.S. 797, 812; 105 S. Ct. 2965; 86 L. Ed. 2d 628 (1985) (stating: ". . . the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir. 1992) ("[I]f the plaintiff was not adequately represented in the prior action, or there was a denial of due process, then the prior decision has no preclusive effect."); Hesse v. Olson, 598 F.3d 581, 589 (9th Cir. 2010) (Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members.) The record is replete with *undisputed* facts showing that WSNA did not adequately represent the Nurses when it entered into the settlement agreement with Evergreen and administered the "settlement."

First, the record shows that WSNA did not vigorously prosecute the nurses' damages claim for missed rest breaks. CP 466 (p. 142). WSNA admits that it was primarily interested in the "processes and systems moving forward" to allow nurses to obtain rest breaks in the

future, and that obtaining "back pay" for nurses was not its objective in settlement negotiations. CP 459 (p. 60); CP 466 (p. 142). WSNA restates this position in its brief to this Court. AB at 7, 24 (The primary goal of the Associational lawsuit was "to force hospitals to employ adequate nursing staff to ensure that nurses are fully relieved from their duties during state-mandated rest breaks."). WSNA's utter disregard for its members' interests in monetary damages was illustrated by WSNA's decision to participate in mediation without even attempting to calculate what was actually owed to nurses for missed rest breaks. CP 459 (p. 59-60); CP 462 (p. 105). And WSNA admits that there was no one at its settlement mediation representing the interests of the former nurses. CP 471 (pp. 211-214). These facts reveal an insurmountable and obvious conflict of interest: WSNA's focus on processes "going forward," to the detriment of any interest in monetary damages, conflicts with the Nurses' interests in obtaining compensation due for past violations of their statutory rights, especially nurses who no longer work at Evergreen (and who make up the majority of the nearly 1,300 nurses in the class) and cannot therefore benefit from injunctive relief at all.

Second, there was ample evidence that WSNA provided misleading, inaccurate, incomplete, and conflicting information about WSNA's lawsuit and settlement. CP 472 (pp. 212-213). Before Evergreen sent nurses a "settlement check," WSNA sent nurses a postcard claiming that the settlement was a "landmark" agreement and that it would result in increased staffing that would permit nurses to get their breaks.

CP 475; See also CP 80 (WSNA and Evergreen have agreed to implement extensive changes . . . to ensure . . . that you are appropriately staffed to allow for breaks . . ."; CP 89 (Evergreen will ensure . . . adequate staffing."). This information was inaccurate, as shown by WSNA's deposition testimony. In deposition, WSNA's representative admitted that it did not secure any agreement from Evergreen to increase staffing, despite the fact that increased staffing was necessary to ensure nurses received their breaks. CP 454 (p 15), 461 (p. 97, lines 14-15), 467 (p. 148, line 3); CP 71-72 (With regard to rest and meal breaks, "Staffing is of major interest to you all."); CP 63 ("This is really about adequate staffing to ensure . . . uninterrupted break[s]."). [21]

In addition, both WSNA and Evergreen failed to make a number of significant and material disclosures about the settlement and WSNA's associational representation of its members. CP 80, 82, 86-87, 89. It failed to disclose: (1) That the settlement did not require Evergreen to do anything that was not already required by Washington law; [22] (2) Any

[21] Under the terms of the settlement agreement, Evergreen has no obligation to increase staffing at its facility. CP 477-484.

[22] In addition to increased staffing claims, WSNA has claimed that it secured more than the law requires because Evergreen agreed to pay missed rest breaks at an overtime rate. CP 454. However, this is already required under Wingert v. Yellow Freight Sys., 146 Wn.2d 841, 849 (2002); See WSNA v. Sacred Heart Medical Center, --Wn.2d – (October 25, 2012) (affirming that Wingert stands for this proposition). WSNA also told nurses that they achieved changes through settlement that a court "could not have ordered," including changes in "timekeeping" which included "keep[ing records of missed breaks . . ." CP 86. This is already required by law. See RCW 49.46.070. In addition, WSNA failed to inform nurses that nearly all the other "changes" listed on the "settlement information sheet" are also already required by law or the existing collective bargaining agreement between Evergreen and WSNA. CP 86-87.

details about the settlement and distribution formula created by WSNA that would be used to allocate the money;[23] (3) That WSNA had a conflict of interest in representing both current and former employees for monetary relief; (4) That WSNA's standing to bring a claim for damages had been challenged; (5) That WSNA had never attempted to calculate back-pay owed to nurses prior to reaching settlement because it was not its "objective"; (6) That Evergreen had calculated it owed $600,000 in back wages for missed rest breaks before settling with WSNA for $375,000; CP 80, 82, 86-87, 89; (7) How much settlement money would be used to pay to WSNA's attorneys, and (8) That in fact, no court had reviewed the settlement for fairness or validity, despite the fact that previous communications assured nurses that the settlement agreement would become "*effective*" when approved by the Superior Court. CP 466 (p. 142); CP 462 (p. 103-105); CP 82 (stating the effective date of the settlement agreement is "the date that King County Superior Court approves the settlement."); CP 483 (settlement is contingent "in its entirety" upon approval by the court); CP 837. These omissions are material and failure to disclose them shows that WSNA inadequately represented the Nurses.

Third, the settlement agreement created a conflict of interest between WSNA and its members that prevented WSNA from providing

[23] Neither Evergreen nor WSNA told nurses that WSNA had agreed to settle on the basis that each nurse would receive a minimum of $300, but changed the distribution formula to favor nurses who had greater hours of work even if they rarely missed a rest break. CP 80, 82, 86-87, 89.

adequate notice about the "settlement." As part of the settlement agreement, WSNA agreed it would not "directly or indirectly, ... promote or encourage any . . . suits, causes of action or claims relating to obtaining back pay for missed rest breaks for the Represented Employees."[24] CP 835. WSNA also agreed to "hold Evergreen harmless from any claims of Represented Employees who have received back wages in accordance with and pursuant to this [settlement] Agreement." CP 834. Accordingly, despite the fact that many of its members were owed thousands of dollars in back-pay for missed breaks and clearly may have benefited from refusing the settlement check and participating in this class action, WSNA was prohibited from telling them so, and had an enormous interest in their doing so ***because WSNA would have to indemnify Evergreen*** for any additional compensation recovered. CP 834. Indeed, WSNA admitted in its appeal breif that current Evergreen employees would benefit from the "new" rest break procedures going forward, "regardless of whether they accepted the check." Appellant Brief of Intervenor WSNA, COA No. 68651-8-I at 13. WSNA never made this disclosure to the Nurses and it was forbidden from doing so under the terms of the settlement. Even now, when it is in the best interest of WSNA's individual members for this class action to go forward, WSNA continues to fight against its own members' interest through its appeal,

[24] "Represented Nurses" included all nurses engaged in patient care at Evergreen Hospital from September 15, 2007 to the date of the agreement, including past and present Evergreen employees. CP 831.

because it is bound by its agreement to indemnify Evergreen from these class action claims regarding rest breaks. CP 834.

Because WSNA failed to adequately represent its members before, during, and after settlement, the settlement and "settlement checks" sent pursuant thereto cannot bar the nurses from participating in this class action for the remainder of the wages owed to them for missed breaks.

3. Court Approval of the Settlement Agreement Was Required Under the Circumstances.

Civil Rule 23 governs class actions and it provides responsibilities and safeguards to protect the interests of absent class members. In such cases, the court must ascertain whether the representative parties will fairly and adequately protect the entire class and must see to it that class members learn of the action through "the best notice practicable." CR 23(b)(3) and 23(a)(4). CR 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."[25] CR 23(e). The purpose of the rule is fairly obvious. It protects those individuals who possess the claim at issue when they are being represented by another person or entity because they are absent from the lawsuit and are not pursuing the claim themselves. 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

[25] 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).

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). In this case, the trial court did not err by concluding that court approval of the settlement was required under the circumstances in this case because (1) as a party to this class action, Evergreen had a duty under CR 23(e) to obtain approval and (2) court review of the settlement was necessary to protect the due process rights of the Nurses.

First, as a party to this class action case, Evergreen had a duty under the express terms of CR 23(e) to obtain court approval for any agreement that "compromised" the claims of the putative class in this case. When Evergreen agreed in its settlement with WSNA to issue checks with releases to putative class members in this case, it triggered CR 23(e) requirements. CP 834 (Evergreen and WSNA agreed that Evergreen would issue checks with waivers to all putative class members); CR 23(e). By claiming it was not bound by CR 23(e) obligations when it entered into the agreement with WSNA, Evergreen is attempting to simultaneously get the benefit of the affirmative defense of "accord and satisfaction" for paying only a fraction of wages owed to nurses, while arguing that the payments did not "compromise" the claims of class members in this class action case. Evergreen cannot have it both ways. If its payments to the absent class member nurses under the WSNA settlement gives it the right to assert affirmative defenses of accord and satisfaction and waiver, then

its payments are an attempted "compromise" of the class claims in this case, and court approval was necessary under CR 23(e). If that were not true, then nothing would prevent an unscrupulous employer from tendering a fraction of the wages actually owed employees under the Washington Industrial Welfare Act in an effort to compromise their claims and then obtain dismissal of the employees' class action against it without the protection of judicial scrutiny and approval.

Second, by failing to obtain court approval, Evergreen and WSNA violated the due process rights of Nurses because they promised court approval, provided insufficient notice, and denied the Nurses an opportunity to be heard. Both WSNA and Evergreen took the position that court approval of the settlement was required and would be obtained before the settlement would take effect. They included a contingency clause regarding court approval in the settlement agreement:

> 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). They represented to the court that they would obtain court approval and 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.

Evergreen claims that it is irrelevant whether Evergreen and WSNA initially thought court approval was necessary. AB at 19. But under the facts of this case, that is simply not true. Evergreen and WSNA's words and actions regarding court approval provided a (false) sense of security to the Nurses about the propriety and fairness of the settlement. And then, instead of correcting the misinformation they provided to encourage nurses to sign their checks, WSNA and Evergreen quietly dismissed the lawsuit without seeking approval and mailed out "settlement checks" without ever telling the nurses that no court had reviewed the settlement for validity or fairness. CP 89, 499.

Furthermore, 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. These actions also violated the due process of the absent nurses that WSNA claims to represent. See Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring and dissenting in part) (the minimal procedural due process requirements a class action money judgment must include notice, a right to opt out, and adequate representation if it is to bind absentees); In re Prudential Ins. Co., 148 F.3d 283, 306 (3d Cir. 1998) (reasonable notice and the opportunity to be heard are due process requirements provided to putative class members by the Fifth Amendment). Because court approval was necessary to protect the due process rights of absent class members and to comply with CR 23 as it

relates to this class action case, the trial court did not err in concluding that court approval of the settlement was required under these circumstances.

4. The Trial Court Had a Duty to Review the Settlement Agreement and Determine its Effect on Class Claims in this Case.

By attempting to avoid the responsibilities and safeguards of CR 23 through its claim of associational standing, WSNA did not foreclose independent claims of inadequate representation, inadequate notice, collusion, lack of opportunity to object, and questions about the preclusive effect of the damages portion of the settlement in this class action lawsuit. Accordingly, these very issues were properly raised and resolved by the trial court in this case.

The risks of circumventing CR 23 requirements through associational standing are explored in detail in TRAC v. Allnet Communication Services, Inc., 806 F.2d 1093 (D.C. Cir., 1986). In that case, an organization (TRAC) brought a claim for damages under the theory of associational standing. In his concurrence, Judge Bork explained what would likely happen if a party was granted associational standing to bring a claim for damages and avoid CR 23:

> By seeking associational standing in this case, TRAC is trying to avoid some of the burdens imposed by the class action mechanism. Yet it could easily increase the burdens on the courts. As the court here points out, if this suit had been brought as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, then before the suit could proceed the court would ascertain whether the representative parties will fairly and adequately protect the entire class and make certain that class members learn of the action through the best notice practicable. See Fed. R. Civ. P. 23(a)(4) & 23(c)(2). In contrast, if 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. Cf. International Union, 106 S. Ct. at 2533 ("were we presented with evidence that such a problem existed either here or in cases of this type, we would have to consider how it might be alleviated"). 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).

TRAC clearly shows that the trial court in this case had the authority, if not a duty, to rule on the independent claims raised in this case about WSNA's lack of standing and overreaching, due process violations, inadequacy of representation, and the effect of the WSNA settlement and "settlement checks" on class claims. Id. (stating a court would "have" to rule on independent claims raised in subsequent lawsuits). By failing to seek court approval of its settlement, Evergreen (and WSNA) assumed this risk.

TRAC also confirms that when a party claims associational standing in an attempt to avoid CR 23, similar safeguards to those in CR 23 must be implemented, even if it is simply "through some new mechanism" created by the court. Id. That is exactly what the trial court did here, and its decision that WSNA and Evergreen should have sought

court approval of their settlement is consistent with the reasoning in TRAC.

Finally, the Court should reject Evergreen's argument that the trial court's ruling was in error because of Washington's public policy favoring private settlement of disputes. AB at 16. Washington has an equal if not greater public policy interest in ensuring that employees are paid all wages to which they are entitled. See RCW 49.46.005; RCW 49.48; RCW 49.52; Pellino v. Brinks, 164 Wn. App. 668, 684 (2011) (Washington State has a "long and proud history of being a pioneer in the protection of employee rights."). Furthermore, Washington's interest in encouraging private settlements is limited. The law only favors the amicable settlement of claims when settlement is secured without fraud, misrepresentation, or overreaching. Woods v. Gamache, 14 Wn. App. 685, 687 (1975). As discussed in detail above, WSNA overreached by entering into a settlement for claims it did not have standing to bring and both WSNA and Evergreen obtained nurses' signatures through collusion and misrepresentation. Finally, Evergreen cites no authority supporting a claim that Washington's public policy to encourage private settlement extends to parties who do not have standing to bring the claim in the first place. AB at 16.

5. The Individual Endorsement Waivers on the "Settlement Checks" Do Not Bar Further Compensation.

The trial court concluded that the "settlement checks" could not bar nurses from pursuing further compensation in this class action. CP

1334-1345. The trial court did not err in reaching this conclusion for two reasons: First, as a matter of law, the "settlement checks" constitute an illegal kick-back of wages under RCW 49.52.050. Second, there is ample evidence in the record that the waivers were obtained through overreaching, fraud, and misrepresentation.

6. The "Settlement Checks" Constitute an Illegal Kick-Back of Wages.

RCW 49.52.050 prohibits employers from paying any employee a lower wage than the wage such employer is obligated to pay such employee by "any statute, ordinance, or contract." Remedial statutes protecting employee rights must be liberally construed. Pellino v. Brink's Inc., 164 Wn. App. 668, 684 (2011). Under the Washington Industrial Welfare Act, employees in Washington are entitled to compensation for missed rest periods because their workday is extended by 10 minutes for each break missed. Wingert v. Yellow Freight Sys., 146 Wn.2d 841, 849 (2002); see also WSNA v. Sacred Heart Medical Center, --Wn.2d – (October 25, 2012). An agreement between an employer and its employee wherein an employee has agreed to accept less than the amount owed under contract or law is void as against public policy as an illegal rebate of wages. McDonald v. Wockner, 44 Wn.2d 261, 267 P.2d 97 (1954).

In Wockner, a car salesman was entitled to be paid under a union contract a commission on each car sold. Unhappy with the contract rate of pay, the car salesman solicited from his employer a different agreement. He and the employer entered into an agreement whereby, the salesman

would be paid a set salary per month of $350 in lieu of the commissions owed under the contract. When it turned out that the salary paid him less than the commissions owed under the contract, he sued the employer for an illegal rebate of wages. Id. at 263-267. The trial court held that an agreement to be paid less than the amount owed under the union contract was void as against public policy as an illegal rebate of wages. Id. at 269. Accordingly, the court held that the acceptance by the employee of less than the amount actually owed under the contract did not bar his claim for full payment of all commissions owed. Id.

The Washington Supreme Court affirmed and held that the difference between what was paid by the employer in salary and what was owed the employee under the contract was an illegal rebate of wages under RCW 49.52.050(2). Id. at 271. It held that the employee's voluntary agreement to accept less than what was owed and then sue the employer might be unfair or even reprehensible but the agreement was void as against public policy. Id. at 272; See also SPEEA v. Boeing Co., 92 Wn. App. 214, 220, 963 P.2d 204 (1998) ("Where an employer and employee "attempt to make a contract of employment in violation of the clearly expressed provision of the statute, the natural right of the employer and the employee to contract between themselves must . . . yield to what the legislature has established as the law." citing, Pillatos v. Hyde, 11 Wn.2d 403, 407, 119 P.2d 323 (1941)); Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 454, 298 P. 705 (1931) ("agreement to waive rights involving a question of public policy is void").)

Similarly in this case, the nurses are owed a certain amount in back pay for missed rest breaks by statute, because the Washington Industrial Welfare Act and its regulations mandate that employers ensure a minimum of two 10 minute rest breaks for each 8 hours worked. WAC 296-126-092; RCW 49.12; See also Pellino v. Brinks, 164 Wn. App. 668 (2011). Evergreen cannot avoid paying the amount owed by statute by entering into an agreement with their employees to pay less than the amount owed. The difference represents an illegal rebate of wages and the nurse's agreement to accept less than what is owed is void as against public policy.

It is also the case that the nurses are entitled to double the amount of wages unpaid because RCW 49.52.070 provides for double damages where wages are wrongfully and intentionally withheld. The undisputed facts are that Evergreen sent checks to the nurses for missed rest breaks pursuant to the WSNA settlement on March 17, 2011 that totaled no more than $317,000, i.e. the $375,000 settlement amount less the $58,000 in WSNA attorney fees. AB at 10. But Evergreen admitted in deposition two weeks earlier on March 2, 2011 that it had estimated that it owed the nurse $600,000 in back wages for missed breaks, not $317,000. CP 598. This evidence supports a willful failure to pay wages, as well as an illegal rebate of wages entitling the nurses to double damages under RCW 49.52.070.

Since a nurse's agreement to accept and cash a settlement check for less than the amount owed in back pay for missed rest breaks is void as

against public policy under Wockner and RCW 49.52.050, nurses who cashed their settlement check sent to them pursuant to the WSNA settlement are not barred from obtaining full recovery of the back wages owed and double damages under RCW 49.52.070. At most, the settlement payments may have provided Evergreen with a set off of back-pay damages owed nurses for missed breaks who cashed their checks, but not a complete bar to their claim.

7. The Endorsement Waivers Cannot Be Enforced Because Nurses Were Induced into Signing the "Settlement Checks" by Overreaching, Fraud, and Misrepresentation.

Under contract law, a release induced by fraud, misrepresentation or over-reaching is void. Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 187, 840 P.2d 851 (1992); Urban v. Mid-Century Insurance, 79 Wn. App. 798, 804, 905 P.2d 404 (1995). In this case, there is ample evidence that overreaching, fraud, and misrepresentation on the part of WSNA and Evergreen induced nurses to cash the "settlement" checks.

First, WSNA clearly engaged in overreaching when it entered into a settlement agreement to resolve claims it had no standing to bring and when there existed a clear conflict of interest between WSNA and former employees of Evergreen (the majority of the nearly 1,300 class members). Second, as described in detail above, both WSNA and Evergreen made material misrepresentations, and provided inaccurate, incomplete, and conflicting information about the settlement to the nurses before they cashed the "settlement checks." See supra at 32-38. Based on the record in this case, overreaching, fraud and misrepresentations occurred in

procuring the agreement of the nurses to accept the amount tendered by Evergreen on their missed rest break claims. Accordingly, the waivers are unenforceable under Washington law.

The Court should reject Evergreen's claim that the release is enforceable because Ms. Bautista claims she was not misled by Evergreen's letter, which accompanied the check, or the express release language. AB at 23. First, Evergreen mischaracterizes Ms. Bautista's deposition testimony. Ms. Bautista was testifying about what she understood at the time she received the letter. CP 1125 at line 24-25. As stated above, when Evergreen sent out the "settlement checks" and accompanying letter, nurses had only received self-serving information from WSNA and Evergreen and nothing from class counsel or the court. See supra at 32-38; CP 755; CP 763; CP 766.

Ms. Bautista went on to state that she did not know from the letter that Evergreen admitted it owed nurses nearly twice the amount it actually paid. CP 130 at lines 11-15. She also states in her deposition testimony that based on Evergreen's letter, she was under the impression she would have to pay to consult her own attorney with questions about the "settlement" and testifies she could not afford one. CP 1129 at lines 12-15. Ms. Bautista also testified that she signed the check because she "thought it was a lost cause" and reiterated she could not afford an attorney. CP 1133 at line 16-25. She also testified that there was significant information missing from the Evergreen letter that she considered those omissions misleading. CP 1135-1137; CP 755; See also

CP 763, 766, 770, 776, 793-794,797-798 (where class members indicate they would not have cashed their check if they knew they would have automatically become of member of the class action or that Evergreen admitted it owed more than it paid in the WSNA settlement). This testimony, in addition to the ample evidence in the record (detailed above) about WSNA and Evergreen's misleading and incomplete communications with the nurses about the settlement and pending class action, shows that the nurses were induced into signing the "settlement checks" by overreaching, fraud, and misrepresentation.

V. CONCLUSION

For the foregoing reasons, Respondents request that this Court affirm the trial court's order certifying a class and order on partial summary judgment, and remand for trial.

DATED 5th day of December, 2011.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on December 5, 2012, I caused the foregoing to be filed via legal messenger with:

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