No. 68550-3-1

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 NO. 10-2-33125-5 SEA
The Honorable Harry J. McCarthy

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

At the June 6 hearing, the Court asked for supplemental briefing on the application ofCR 23.2 to the case. The Court questioned whether the Rule granted the union, WSNA, standing or authority to sue Evergreen to enforce the rights owned by its members to wages for missed rest breaks under the Washington Wage Statute. WSNA did *not* sue Evergreen under the parties' collective bargaining agreement (CBA) asserting *its rights* under state and federal labor laws to enforce the wage provisions of the CBA. It only sued to enforce the rights of the nurses to payment of wages owed under the Wage Statute. On June 20, the Court asked the parties to also brief whether WSNA's settlement agreement needed court approval.

First, Rule 23.2 does *not* grant an association standing to sue exclusively in its own name on behalf of its members. By its terms, Rule 23.2 applies only to actions by or against the *members* of an association, not the association itself, and the Rule presupposes that "certain members" are named "as representative parties" who "will fairly and adequately protect" both the interests of the members and the association. WSNA did not join any members as party plaintiffs and did not make any showing to the trial court that it could adequately protect the interests of the members to individual damages under the Wage Statute.

Rule 23.2 also does not apply where, as here, the association is allowed by state law to bring an action in its own name under specific

rules established by state law for its standing to do so.[1] Under Washington law, a union only has standing to seek recovery of its members' individual *damages* claims if, given the nature of the claim asserted by the union, the member's individual damages are certain, easily ascertainable and within the knowledge of the employer, such that the exact amount owed each member is known to the employer and proving both the claim asserted and the relief sought does not require participation of individual members.[2]

Here, WSNA sought damages owed its members on their individual claims for unpaid rest breaks under the Washington Wage Statute and all parties agreed, including WSNA, that Evergreen lacked sufficient records to establish both the claim and the amount owed each member. For that reason, WSNA sought and obtained over 20 declarations from its nurse members to support its claims. CR 23.2 simply does not apply to give WSNA standing or authority to recover damages owed its members on their individual Wage Statute claims. WSNA had to establish its standing to do so under the *Firefighters'* test and could not.

[1] *See, Murray v. Sevier,* 156 F.R.D. 235,242 (D. Kan. 1994), vacated on other grounds, *Murray v. Scott,* 253 F.3d 1308 (lith Cir. 2001) discussing four types of actions that can involve an unincorporated association under Rule 23.2 and noting only action that can be brought by the association in its own name for members is one where state law permits the association to sue in its own name and governs the association's standing to do so. In such cases Rule 17(a) applies, not Rule 23.2.

[2] See, *International Ass'n of Firefighters Loca/1789 v. Spokane Airports,* 146 Wn.2d 207, 215-17 (2002) (union had standing to bring a *conversion claim* against employer on behalf of members to recover unlawful deductions made to their paychecks because the claim itself and the "exact amount" owed each employee was known to the employer and easily ascertainable from the employer's records showing the deductions made.)

Second, if the Court concludes that CR 23.2 did grant WSNA authority to sue Evergreen on behalf of its members, then by its plain language, CR 23.2 required WSNA to get court approval of its settlement and to send the nurses court approved notice of its terms, and afford them the opportunity to contest the reasonableness ofthe settlement *before* it was effective. The Rule expressly incorporates these requirements of CR 23(e). In doing so, CR 23.2 clearly intends to protect absent class members whose claims are being compromised by the association from conflicts the association may have that would prevent it from adequately and aggressively pursuing the member's rights to individual damages. The Rule also clearly intends that settlements be given the same judicial scrutiny as required under CR 23(e) to ensure that they are fair, adequate and reasonable *before* the settlement can be acted upon by the parties.

Finally, Rule 23.2 illustrates why, *unlike in this case,* normally when unions bring suit in their own name to enforce their *members'* statutory wage rights, they include at least one individual member as a representative party. WSNA's actions in this case are novel, and the ruling Evergreen and WSNA seek in this Court would be unprecedented. Under well-established law WSNA had no standing to sue for or settle its *members'* individual statutory wage claims, and no basis to interfere with this class action by its members to vindicate those claims.

II. ARGUMENT

Rule 23.2 did not authorize WSNA's lawsuit against Evergreen. Instead, by this plan terms, it authorizes the class action lawsuit brought

by the three nurses in our case on behalf of other nurses who are members of the union, i.e. the unincorporated association. The result of applying CR 23.2 to the case would be consistent with the trial court's ruling that WSNA lacked standing to sue on behalf of its members to recover their damages

under the Wage State and that court's ruling that the nurses could maintain their lawsuit as a class action on behalf of other nurses.

Rule 23.2 incorporates CR 23(e) which requires that any compromise and dismissal of the claims of association members be approved by the court after court approved notice has been sent to the members notifying them of their rights and options. The result of applying Rule 23.2 to the case would be consistent with the trial court's ruling that WSNA and Evergreen were required to obtain court approval of their settlement to the extent that they now seek to use the payments made pursuant to the settlement as a compromise of the nurse's class claims and to the dismiss the claims based on an affirmative defense that the payments and releases constitute a complete bar to the nurses obtaining the full back pay owed by their employer under the Wage Statute. The payments required by the settlement were never approved, the nurses did not receive notice of the terms of the settlement before the payments were made and the nurses were not given any opportunity to contest the terms of the settlement before the payments went out as required by CR 23(e).

A. Rule 23.2 Does Not Authorize WSNA's Suit Against Evergreen

Rule 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 protect the interests of the association and its members." (Emphasis added.) The rule further provides that in such an action, the court *"may"* make orders under CR 23(d), but that dismissal or compromise of the claims *"shall"* follow the procedure set forth in CR 23(e). CR 23.2 (emphasis added). A *compromise* of a class claim under CR 23(e) requires court approval and court approved notice be sent to members of the class, whose individual claims are being compromised. On its face, CR 23.2 applies to actions in which *"members"* of an unincorporated association sue as representatives on behalf of other

members of the association "as a class" and on behalf of the association. The interests of not only the association, but its members must be *"fairly and adequately protected."*

No Washington case applying CR 23.2 could be found. However, there are federal court and some state court cases that discuss the similar federal rule and similar state court rules. Federal courts have unanimously concluded that Rule 23.2 requires that actions involving unincorporated associations satisfy at least some of the criteria for and requirements of a CR 23 class action. *See Murray, supra.*, 156 F.R.D. at 238-242, discussing "majority" rule that only the terms of Rule 23(d) and (e) apply to an action under Rule 23.2; *Stolz* v. *United Brotherhood of Carpenters & Joiners, Local Union No. 971,* 620 F. Supp. 396, 403 (D. Nev. 1985) (holding that Rule 23.2 authorizes suit by union members *against their union* for violating federal laws and describing two lines of cases, one

holding that only the terms of Rule 23(d) and (e) apply, and another holding that some parts of Rule 23(a) and (b) also apply). Some state courts have adopted the majority federal rule that a party bringing an action under Rule 23.2 need only comply with the requirements of adequacy of representation and Rules 23(d) and (e), not CR 23(a) and (b).[3] But no court has permitted an association to completely dispense with the requirements ofCR 23(e), as WSNA did here.

Rule 23.2 does not permit a union, as an unincorporated association, to bring suit in its own name on behalf of its members to recover their back pay damages. [4] When an unincorporated association brings suit exclusively in its *own* name, as WSNA did, it can only do so if it is permitted by state law to bring a representative action on behalf of its members. In such a case, Rule 23.2 does not apply.[5]

Instead, the association's standing to bring suit is governed by the

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[3] *See, Arkansas County Farm Bureau v. McKinney,* 334 Ark. 582, 587, 976 S.W.2d 945, 950 (Sup. Ct. Ark. 1998).

[4] *See* RCW 49.52.070, authorizing civil action for double damages for unpaid wages by an "aggrieved employee or his assignee," not a union. WSNA does not claim to have gotten assignments of its members' rights.

[5] *See, Murray,* 156 F.R.D. at 240 (an association can only bring an action in its own name on behalf of members if it has standing to do so under state law or is enforcing its rights under a statute or the Constitution. In such a case, Rule 23.2 does not apply.) In our case, WSNA, for some reason, chose *not* to assert its rights under federal law and the CBA with Evergreen to recover for missed rest breaks. It chose instead to bring suit in its own name to enforce the rights owned by individual nurses to payment under the Washington Wage Statute. It has never explained why.

standing requirements of state law. *Id.* Thus, WSNA cannot use CR 23.2 to skirt the state law standing requirements set out in *Firefighters* There, the Washington Supreme Court set out the specific circumstances in which a union can sue in its own name to enforce the rights of members to back pay damages.[6] Those circumstances do not exist here because all parties, *including WSNA,* agree that Evergreen lacks sufficient records to establish the missed rest break claim or the amount of damages owed each nurse in a reasonably certain and easily ascertainable way. For that reason, WSNA relied on "evidence" supplied by its members in the form of20 individual nurse declarations or more to establish the missed rest break claim.

B. CR 23(a) and (b) Do Not Apply to a Rule 23.2 Class Action

The "majority rule" interpreting Rule 23.2 supports the conclusion that the nurses can maintain their representative class action on behalf of

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[6] In *Firefighters,* the court adopted a three-part test for union standing and held that the third prong of the test was met because: **(1)** given the nature of the union's claim, i.e. "conversion" by the employer of deductions made to the employee's paycheck for social security contributions, the "amount of monetarily relief requested on behalf of each employee *is certain, easily ascertainable* and *within the knowledge of* the (employer)" and "the *exact amount* due each individual employee *is known;"* therefore (2) neither the *claim asserted* (conversion of deductions made by the employer) nor the *relief requested* (repayment of deductions) requires the participation of individual members in the lawsuit." 146 Wn. 2d at 216-217 (emphasis added). In so holding, the court affirmed the appellate court's conclusion that given the nature of the claim, "the measure of relief is at the (employer's) fingertips" from its records and therefore "the trial court did not need *evidence* from any of the individual (union members)." 103 Wn. App. 764,771 (emphasis added).

the other nurses who are members of the union *without* having to show that the requirements ofCR 23(a) and (b) are met. Rather, Rule 23.2 only requires a showing that the nurses are adequate representatives and any compromise or dismissal of the action comply with CR 23(e). *Murray.* 156 F.R.D. at 239; *Arkansas County Farm Bureau,* 976 S.W.2d at 950.

Thus, applying the "majority rule" to the nurses' Rule 23.2 class action would dispose of Evergreen and WSNA's objections to the trial court's class certification order because their objections are directed at the alleged failure of the nurses to meet the requirements ofCR 23(a) and (b). Thus, while the trial court clearly acted within its discretion in certifying the action under CR 23(a) and (b), the result of applying CR 23.2 under the majority rule is consistent with the trial court's determination that the action is properly maintained as a class action by the three nurse plaintiffs on behalf of the other nurses who are members of the union.

C. Suit under CR 23.2 Requires Compliance with CR 23(e)

Both federal and state court decisions construing the requirements of Rule 23.2 unanimously hold that a party who *is* permitted to bring a representative action under Rule 23.2 must adhere to the notice and approval requirements of Rule 23(e). The requirements are clearly intended under CR 23.2 to protect absent class members in the same way and to the same degree as a class action certified under CR 23(a) and (b).[7]

[7] *See, Jones v. Home Care of Wash., Inc.,* 152 Wn. App. 674 (2009)(a pre-certification settlement of class claims must be scrutinized by court to ensure that it is not collusive or prejudicial to rights of absent class members; notice must be provided to class prior to dismissal); *see, also,*

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Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375 (9[l]

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As noted by the trial court in our case, none of these steps were followed by WSNA and Evergreen. Instead, WSNA actively prevented court approval of the settlement it reached with Evergreen that sought to compromise the damages claims of its absent members, i.e. the same class action claims that were alleged by the Plaintiff nurses in this lawsuit. WSNA also admitted through its designated CR 30(b)(6) representative that it did *not* seek to protect the interests of absent class members to *damages* from unpaid rest breaks. Instead, WSNA sought to promote the "association's" interest in "going forward" relief because of its state-wide campaign to obtain rest breaks for nurses in the future.

Also, by dismissing its action before the agreed upon hearing on nurse objections to the settlement, WSNA effectively prevented judicial scrutiny of the adequacy of its representation of the interests of the absent nurses and prevented the court from determining if the agreement was the product of collusion or self-dealing, something fundamental to permitting suit by an association under Rule 23.2.[8] Thus, for example, WSNA effectively prevented the trial court from scrutinizing the propriety of WSNA deciding to pay its *own* attorneys over $50,000 of the $350,000 in back pay damages that was part of the wages that were actually owed to

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considering if class settlement should be approved trial court considers whether the settlement is fair, adequate and reasonable.)

[8]*See, e.g., Officers of Justice* v. *Civil Serv. Comm 'n,* 688 F.2d 615, 624 (9th Cir. 1982)("The primary concern of this subsection (CR 23(e)) is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties.")

the nurses under WSNA's settlement with Evergreen.

With regard to the notice requirements of CR 23(e), incorporated by reference in CR 23.2, WSNA's dismissal of its action before the agreed upon hearing on the nurse's objections to the settlement prevented the trial court from controlling and approving notice to the nurses on the settlement terms and the nurses' options. It effectively prevented court approved class notice from being *received* by nurses *before* Evergreen sent them checks and before the nurses acted on the checks. Court approved notice is another procedural safeguard contemplated by CR 23.2's reference to the provisions ofCR 23(e). *Stolz, supra.*, 620 F.Supp. at 403.

But on an even more fundamental level, WSNA failed to include as a party, any individual nurse to "represent" its members in its lawsuit against Evergreen, as Rule 23.2 by its terms presupposes. This failure appears to be unprecedented. In reported Washington cases, where a union has sued on behalf of its members to enforce their wage rights, the union has always joined a union member as a representative party. *See, Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 827-28 (2012); *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 828 (2000); *United Food & Commercial Workers Union Local JOOI v. Ernst Home Centers, Inc.*, 84 Wn. App. 47,49 (1996). [9]

[9] It is just as common for one or more union members to sue *without* the union, even when they are represented by the union's lawyers, including the lawyers for WSNA in this case. *See Wingert v. Yellow Freight Systems, Inc.*, 146 Wn. 2d 841,845-46 (2002); *see also Champaigne v. Thurston Co.*, 163 Wn. 2d 69, 72 (2008); *Frese v. Snohomish County*, 129 Wn. App. 659, 661 (2005).

But in its lawsuit against Evergreen, WSNA unilaterally sued for and settled its members' individual wage claims without joining as a party any individual union member. Nor did WSNA provide for any of the structural protections that normally accompany representative actions.

The trial court found such unilateral action in conflict with the rules governing a union's standing under *International Ass'n of Firefighters no. 1789 v. Spokane Airports,* 146 Wn.2d 207,215-16 (2002): a union may not represent members on claims for monetary damages that require "individualized proof and thus the individual participation of association members," i.e., unless the monetary damages are "certain, easily ascertainable, and within the knowledge of the defendant." *Id.* (quoting *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of America,* 919 F.2d 1398, 1400 (9th Cir. 1990)).

At the very least, Rule 23.2 succinctly and precisely shows why

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in the absence of the procedural protections afforded by Rule 23(e), which include advance notice of the terms of settlement before they are effective and court approval, WSNA's settlement did not validly release the nurse's wage claims for missed rest breaks. [10]

[10] It must be recalled that WSNA and Evergreen argued to the trial court in support ofWSNA's intervention in the nurse's class action, that the checks sent to the nurses were payments being made "pursuant to" the terms of their settlement and could be used by Evergreen to bar the nurses from obtaining the *full* back pay owed them for missed rest breaks. To this end, Evergreen used the checks sent pursuant to its unapproved settlement with WSNA to assert the affirmative defense of"release" by the nurses of their class claims in this lawsuit. It did so, even though it admitted through its 30(b)(6) representative, it believed it owed the nurses $600,000 in back

III. CONCLUSION

If the Court concludes that CR 23.2 applies, then the result of applying the rule is consistent with that the trial court's class certification order that the action is properly maintainable by the three nurse Plaintiffs on behalf of other nurses to enforce their rights under the Washington Wage Statute to payment for missed rest and meal breaks. The result of applying CR 23.2 would also be consistent with the trial court's summary judgment order that WSNA lacked standing to sue in its own name to recover its members' damages under the Washington Wage Statute for missed rest breaks. And, applying CR 23.2 would be consistent with the trial court's conclusion that to use the payments made pursuant to the WSNA settlement as a compromise and basis for dismissal of the nurses' class claims in this lawsuit, WSNA and Evergreen had to get court

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pay for missed breaks not the $300,000 it was paying under the WSNA settlement. But any attempted compromise or dismissal of the nurses' class claims, even under CR 23.2, required court approval and court approved notice before the checks were sent. Because the settlement agreement was never approved and court approved notice was never sent, the trial court refused to permit Evergreen to use its payments as a *complete* bar to the nurse's class action claims *tofu//* back pay, rather than as a mere set off for the amounts paid. Thus, in context, the trial court's summary judgment order concerning Evergreen's settlement with WSNA simply prevented Evergreen from asserting the affirmative defense of "release" as a complete bar to the nurse's class based claims because the compromise of the class claims that drove the amount being paid had never been approved by any court. As the nurses' counsel pointed out in oral argument, the trial court's summary judgment order should be read in context as addressing Evergreen's use of the settlement payments in this way. The order does not speak to other provisions of the settlement agreement; nor does the order prevent Evergreen from asserting a "set-off' for the payments made. Evergreen has not lost the benefit of the payments in limiting or reducing the claims made in this action.

approval after notice to the nurses and an opportunity for them to object to the terms of the settlement. The trial court did *not* address any other use or provision of the settlement agreement. 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 lstdayofJuly,2013.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on July I, 2013, I caused the foregoing to be filed via legal messenger with:

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