Supreme Court No. 94592-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

CA No. 33556-9-III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETTA JONES, individually, and on behalf of all similarly situated registered RNs employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners/Plaintiffs,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical Center, AND JOHN SERLE, individually and in his official capacity as an agent and officer of Lourdes Medical Center,

Respondents/Defendants.

DEFENDANTS' ANSWER TO AMICUS CURIAE MEMORANDUM REGARDING PETITION FOR SUPREME COURT REVIEW

Rebecca A. Watkins, WSBA No. 45858
Aaron A. Bass, WSBA, No. 39073
Of Attorneys for Respondents/Defendants

Sather, Byerly & Holloway, LLP
111 SW Fifth Avenue, Suite 1200
Portland, OR 97204-3613
Telephone: 503-225-5858

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

I. IDENTITY OF RESPONDENTS

Our Lady of Lourdes at Pasco and John Serle, the respondents-defendants in this petition, respectfully request this Court deny review of the February 9, 2017 unpublished opinion of Division III of the Washington Court of Appeals.

II. ANSWER TO AMICUS CURIAE MEMORANDUM

Amicus Washington Employment Lawyers Association (hereinafter, "WELA") join plaintiffs in asking the Court to accept discretionary review of the February 9, 2017 unpublished opinion of the Court of Appeals. WELA primarily contends review is warranted 1) because of a conflict in the standard of review applied by Division III here and other published Court of Appeals decisions, and 2) because of substantial public interest.[1] Defendants disagree.

A. No Conflict Evident Across Court of Appeals Decisions

1. "Wonderings" by Division III do not amount to a wrong standard of review.

---

[1] WELA duplicates plaintiffs' arguments, and defendants have attempted to avoid simply replicating their answer to plaintiffs' petition. Defendants have already responded to the claimed "concession" that Supreme Court review is warranted and the arguments about the summary judgment motions. Defendants point out again that plaintiffs did not object to the summary judgment motions, actually describing them as "useful" in zeroing in on the class issues. (RP 349).

WELA contends Division III applied a different standard of review than prior cases dictate. This Court has long held that appellate courts review a trial court decision on class certification for abuse of discretion. *Schnall v. AT&T Wireless Svcs, Inc.*, 171 Wn.2d 260, 259 P.3d 129 (2011). This is a purposely deferential review, more deferential than *de novo* or even substantial evidence review. In the context of class action certification decisions, this Court has instructed that a trial court abuses its discretion only if the decision is "manifestly unreasonable" or untenable. *Id.*; *Lacey Nursing Ctr., Inc. v. Department of Revenue*, 128 Wn.2d 49, 47, 905 P.2d 338 (1995). "Ordinarily, we will not disturb a certification decision if the record indicates consideration of the CR 23 criteria and the decision is based on tenable grounds." *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003). Courts have also noted that in close cases, they affirm class certification because the class can always be later decertified. *Moeller v. Farmers Ins. Co. of Wash*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *Miller*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003); *Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8 (2002).

WELA (and plaintiffs) make much out of dicta by Division III about the abuse of discretion standard:

> "We wonder if two of these principles conflict. If we are to defer to the trial court's decision, we question whether we should resolve close cases by approving a class action

> when the trial court denied certification. The gist of affording a trial court discretion is to affirm the trial court in close calls."

WELA attaches great importance on this dicta, asserting "the practical effect of the [new] deferential standard of review" renders denials of class certification unreviewable. WELA at 3. The appellate courts of Washington have applied this deferential abuse of discretion standard for decades, and it has not had the practical effect of rendering class certification decisions "unreviewable". *Schnall*, 171 Wn.2d at 280 (reversing classification of class certification in part); *Lacey Nursing*, 128 Wn.2d at 56 (reversing class certification); *Sitton*, 116 Wn. App. at 261 (affirming CR 23(b)(3) class, but vacating CR 23(b)(1), (2) classes). In fact, WELA and plaintiffs seem to really be arguing that a class should always be considered "superior", at least for wage claims. That would divest a trial court of all discretion whatsoever contrary to CR 23 and case law.

WELA ignores some facts in its attack on the Court of Appeals. Division III questioned whether the "close call" standard applied when a trial court *denies* certification. But WELA ignores that Division III did not find the "superiority" determination a close call. Part of the appellate court's discussion suggests it may have found predominance a close call, noting common questions for many RNs. (Appx. (S.Ct.) 0038-39). But it

reiterated more than once that it based its decision on superiority: manageability of subclasses, individual stories, other alternatives to class treatment. (Appx. (S.Ct.) 0038-41). Courts have previously described the superiority element as "a highly discretionary determination" the trial court has the best position to assess. *Miller*, 115 Wn. App. 815, 828; *Sitton*, 116 Wn. App. 245, 256-57. Division III recognized the trial court's unique position to gauge the "idiosyncrasies" of managing of a class claim. Nothing in the unpublished decision suggests the trial court or the appellate court found the superiority element a close call.

2. Trial court had sufficient record for review.

WELA also contends this case conflicts with the decision in *Miller v. Farmers Brothers Col*, 115 Wn. App. 815, 64 P.3d 49 (2003), because Division III assumed the trial court made factual findings in favor of defendants. The parties and the courts examined and cited *Miller* in the course of this litigation. In *Miller*, the appellate court reversed a certification of a class for failure to "make any record" about numerosity, predominance, and superiority determinations. No conflict exists between the holding in *Miller* and the present case.

Although plaintiffs and WELA argue Judge Spanner failed to make findings, this record – by virtue of the two motions for class certification and three summary judgment motions – is replete with the

reasons why Judge Spanner ruled as he did. Judge Spanner expressly reviewed and considered the parties arguments and case citations. (Appx. (S.Ct.) 0053). He made express findings on these issues; the appellate court did not have to assume anything on this front. He expressly found differences by "shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department" created so many individual issues that they would overrun generalizations across nurses. (Appx. (S.Ct.) 0055). WELA ignores the fact that plaintiffs themselves testified to very individualistic reasons for missing rest breaks or meal periods. (CP 492-93; 435; 445-46; 550; 394-95).

Judge Spanner found that a class would not be superior to joinder or individual lawsuits. (Appx. (S.Ct.) 0055). Plaintiffs had no other class members ready to join the case. (RP 409). Judge Spanner found that subclasses by the nine departments would be necessary and unmanageable. (Appx. (S.Ct.) 0055; RP 407). WELA ignores that plaintiffs promoted subclasses by department. (CP 1583-84). WELA also ignores that plaintiffs admitted that damages would probably not be manageable on a class-wide basis. (RP 104-105). Judge Spanner directly challenged plaintiffs for trying to treat liability as damages, and not articulating any clear plan for managing liability or damages on a class-

wide basis. (RP 104; 356). Judge Spanner expressly considered the arguments – briefed and oral – from the parties in reaching his decision.

A trial court's reference to the evidence, arguments or cases presented by the parties reveals consideration of the record. *Hill v. Garda CL NW*, 198 Wn. App. 326, 341-42, 394 P.3d 390 (2017) (citing *Eriks v. Denver*, 118 Wn.2d 451, 167, 824 P.2d 1207 (1993)). In *Hill*, the trial court stated it considered the parties motions and found an "overriding" common question; the appellate court found this to signal findings adequate for supporting the certification decision despite the lack of more detail. *Id.* at 341-42. Here, Judge Spanner recited the procedure to date, and indicated he fully considered the briefs, evidence and arguments. He then found common class issues did not predominate because "the specifics for each class member overrun any generalities." (Appx. (S.Ct.) 0053-54). The similarity of language to *Hill* is remarkable; the difference is that the trial court in *Hill* found a common question to override individual factors, and our trial court found individual issues to overrun the common. The unpublished decision by Division III does not conflict with *Miller*.

///

///

B. No Substantial Public Interest Requiring Supreme Court Review.

WELA argues in favor of review on the basis that the unpublished decision raises substantial public interest. It cites to the importance that employees are paid wages due – a point with which defendants whole-heartedly agree. WELA also cites to the important role of class actions – another point defendants do not contest. But those are general interests already addressed by statutes, rules, and case law. The question for review is not whether wage laws or class actions serve public interest – it is whether the decision by the Court of Appeals presents a substantial issue of public importance that this Court needs to address.

WELA appears to argue that wage and hour cases need to be treated as class actions for access to justice. They seem to propose that the courts always have to certify classes and there could be no situation in which individual lawsuits would be superior to a class action. As noted above, CR 23 and substantial case law contradicts that argument. WELA's Consumer Protection Act analogy has little relevance. Washington law already provides for statutory award of attorney fees for employees who sue to recover unpaid wages. RCW 49.48.030. Each employee can recover fees, even if an employee recovers $5,000 or only $5.00 and the attorney fees far exceed that amount. Similarly, Washington law already provides

for penalties to deter employers from willfully violating the law. RCW 49.48.020; RCW 49.48.125. The reasoning cited in *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 161 P.3d 1016 (2007) and *Schnall* – the prohibitive costs of pursuing individual litigation – seemingly have less importance in the context of wage claims.

Again, however, the general importance of paying wages owed to employees does not decide RAP 13.4(b)(4). That requirement asks whether Division III's decision presents a question of such public importance that the Supreme Court needs to weigh in. The Court of Appeals found it did not, and thus did not warrant publishing. As an unpublished opinion, regardless of what WELA, plaintiffs, or defendants think, the need for Supreme Court review also decreases. The courts disapprove of citing unpublished decisions. *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 839 n.4, 64 P.3d 15 (2003). WELA speculates this unpublished opinion could have persuasive value in future cases. It cannot override published case law or create a conflict in precedence. That is relevant to the difference between RAP 13.4(b)(4) and the standard for a motion to publish. It makes it unnecessary for the Supreme Court to weigh in.

III. CONCLUSION

For the reasons outlined herein, defendants' answer to plaintiffs' petition for review, and their arguments below, defendants respectfully ask the Court to deny discretionary review of the February 9, 2017 unpublished opinion of the Court of Appeals.

Dated: August 23, 2017

Respectfully submitted,

Aaron J. Bass, WSBA 39073
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the original and one copy of **DEFENDANTS' ANSWER TO AMICUS CURIAE MEMORANDUM RELATING TO PETITION FOR SUPREME COURT REVIEW** via efiling on the following:

State of Washington Supreme Court
PO Box 40929
Olympia, WA 98501-0929

I further certify that on this date, I mailed a copy of the foregoing **DEFENDANTS' ANSWER TO AMICUS CURIAE MEMORANDUM RELATING TO PETITION FOR SUPREME COURT REVIEW** via email only to the following:

Jack Krona, Jr.
Law Offices of Jack B. Krona, Jr.
6509 4th St., NW
Gig Harbor, WA 98335
Email: j_krona@yahoo.com

James G. McGuinness
Aaron M. Streepy
McGuinness & Streepy Law Offices
1728 109th Avenue Ct. East
Edgewood, WA 98372
Email: jim@mcguinnessstreepy.com
aaron@mcguinnessstreepy.com

Toby J. Marshall
Blythe H. Chandler
Terrell Marhsall Law Group PLLC
936 N. 34th Street, Suite 300
Seattle, WA 98103
Email: bchandler@terrellmarshall.com
tmarshall@terrellmarshall.com

Jeffrey L. Needle
Law Office of Jeffrey L. Needle
119 First Avenue South, Suite 200
Seattle, WA 98104
Via Email: jneedle@wolfenet.com

DATED: August 23, 2017

Aaron J. Bass, WSBA 39073
Of Attorneys for Defendants

SATHER BYERLY & HOLLOWAY, LLP

August 23, 2017 - 10:05 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94592-6
Appellate Court Case Title:	Judith Q. Chavez, et al. v. Our Lady of Lourdes Hospital, et al.
Superior Court Case Number:	12-2-50575-9

The following documents have been uploaded:

- 945926_Briefs_20170823100238SC021745_2912.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was signed Defs Answer to Amicus Curiae Memo re Petition for Supreme Court Review.PDF

A copy of the uploaded files will be sent to:

- aaron@mcguinnessstreepy.com
- abass@sbhlegal.com
- bchandler@terrellmarshall.com
- j_krona@yahoo.com
- jim@mcguinnessstreepy.com
- jneedlel@wolfenet.com
- tberistain@sbhlegal.com
- tmarshall@terrellmarshall.com
- vray@pointruston.com

Comments:

Sender Name: Teresa Beristain - Email: tberistain@sbhlegal.com
Filing on Behalf of: Rebecca Watkins - Email: rwatkins@sbhlegal.com (Alternate Email: tberistain@sbhlegal.com)

Address:
111 Southwest Fifth Avenue
Suite 1200
Portland, OR, 97204
Phone: (503) 412-3114

Note: The Filing Id is 20170823100238SC021745