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No. 68651-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

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

Plaintiffs/Respondents,

v.

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

Defendant/Appellant,

WASHINGTON STATE NURSES ASSOCIATION,

Intervenor/Appellant.

King County Superior Court No. 10-2-33125-5 SEA,
The Honorable Harry J. McCarthy presiding

BRIEF OF INTERVENOR/APPELLANT WSNA

David Campbell, WSBA # 13896
Carson Glickman-Flora, WSBA # 37608
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT LLP
18 W. Mercer Street, Suite 400
Seattle, WA 98119
Attorneys for Intervenor/Appellant WSNA

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I. INTRODUCTION

Intervenor/Appellant Washington State Nurses Association ("WSNA") is the statewide professional association for Registered Nurses ("RNs"). WSNA is the collective bargaining agent for nurses employed by 40-plus hospitals in Washington State, including the nurses employed by the Defendant and Appellant in this matter, King County Public District No. 2 d/b/a Evergreen Hospital Medical Center ("Evergreen" or "Hospital").[1] For the past 36 years, WSNA has been the elected collective bargaining representative for the more than 1,000 RNs employed by Evergreen and they are currently parties to a collective bargaining agreement which sets forth working conditions for all RNs.[2]

In September 2010, WSNA sued Evergreen for its failure to provide rest periods as required by Washington state law. *WSNA v. King County Public Health District No. 2,* Case No. 10-2-32896-3 SEA (Judge Middaugh). CP 443, 446-451. After conducting discovery, WSNA settled its rest period lawsuit through mediation on February 11, 2012, securing a

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[1] Evergreen Hospital has also appealed the superior court orders at issue here in Case No. 68550-3-I.

[2] As a labor union and professional association for more than 16,000 RNs in Washington State, WSNA's mission is to foster high standards of nursing, promote the professional development of nurses, and advance nurses' economic and general welfare. *See,* Appendix ¶2. "Due to the growing body of evidence demonstrating that rest breaks are critical for nurses to maintain the alertness and focus required to provide safe and quality patient care, ensuring that nurses receive full, uninterrupted rest and meal breaks has been a long-time top organizational priority for WSNA." *Id.*

commitment from Evergreen to adopt new work practices that would "assure" RNs received their rest periods. CP 426, 444, 452-460. In its settlement, WSNA expressly did not release any wage claims of any individual Evergreen RNs.

Subsequently, WSNA intervened in the instant lawsuit, which was brought by former Evergreen RNs Debra Pugh and Aaron Bowman, who alleged Evergreen had denied them and other RNs rest periods and meal breaks. *Debra Pugh et al. v. Evergreen,* Case No. 10-2-33125-5 (Judge McCarthy) (herein "*Pugh*"). WSNA intervened after Pugh filed class certification and summary judgment motions on August 8, 2011, which sought to invalidate the February 2011 settlement agreement WSNA had obtained in *WSNA v. King County Public Health District No. 2,* Case No. 10-2-32896-3 SEA. CP 11-33. Pugh also sought to invalidate the settlement agreements in which 1,157 individual RNs accepted back pay from Evergreen in exchange for a release of claims for paid unpaid rest breaks. *Id.* at 20. [3] CP 427-428. The trial court granted Pugh's motions. CP 548-551; 552-563. Both Evergreen and WSNA sought discretionary review of the superior court order in *Pugh,* Case No. 10-2-3312505 SEA, and the

[3] The process through with the RNs released their rest break claims in exchange for a cash payment is described in Declaration of Lorraine Hodgins in Support of Defendant's Response in Opposition To Motion for Class Certification, CP 43-50 at 44, ¶ 4. . In his Order dated March 14, 2012, Judge McCarthy recognized that WSNA's lawsuit was germane to its purpose. CP 558.

Commissioner granted review on August 1, 2012.[4] The Commissioner, after reviewing briefing by all three parties, hearing oral arguments, and reviewing significant parts of the superior court record, concluded that at least four issues were appropriate for review by this Court. The Commissioner concluded that review was appropriate because:

1. There is a question of whether the trial court, at the request of the individual plaintiffs, had authority to invalidate the privately negotiated settlement agreement between WSNA and Evergreen that released only WSNA's claims and no individual claims.

2. The trial court's ruling that WSNA has no standing to seek injunctive relief appears to be in conflict with *International Assoc. of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002).

3. In light of undisputed evidence of significant differences in the number/frequency of missed breaks between hospital departments and individual nurses within the departments, the trial court's ruling that plaintiffs' claims raise common issues of law and fact suitable for class certification may not meet the requirements of *Wal-Mart Stores. Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Oda v. State*, 111 Wn. App. 79, 44 P.3d 8 (2002).

4. Inconsistency between the trial court's determination that there is sufficient commonality to warrant class certification and the court's determination that WSNA does not have associational standing because damages are not easily ascertainable due to the variation in missed breaks.

See Ct. App. Commissioner's Decision dated 8/1/12.

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[4] Pugh brought a motion for reconsideration on August 23, 2012, of the Commissioner's Order accepting review which, to the Appellant's knowledge, has not been acted upon.

II. ASSIGNMENTS OF ERROR

WSNA appeals from the following orders: (1) Order Granting Plaintiffs' Motion for Class Certification, entered March 14, 2012, CP 548-551; and (2) Order granting Plaintiffs' motion for partial summary judgment, entered March 14, 2012, CP 552-563.

A. Assignments of error:

1. The trial court erred when it invalidated the settlement between WSNA and Evergreen on the basis that WSNA did not have standing to bring a wage and hour lawsuit against Evergreen for denied rest periods;

2. The trial court erred when it invalidated the settlement entered between WSNA and Evergreen on the basis that the settlement was not judicially approved pursuant to Superior Court Civil Rule ("CR") 23(e); and

3. The trial court erred when it invalidated 1,157 individual settlement agreements between RNs employed by Evergreen because there is no basis in Washington law for such invalidation.

B. Issues Related to Assignments of Error:

1. Whether a trial court has authority to invalidate a privately negotiated settlement agreement reached in a separate settled and dismissed civil case, where the settlement agreement was not binding on any union members who were actual or potential plaintiffs before the court;

2. Whether a trial court may invalidate an employer-union settlement agreement which could have been reached in the absence of litigation based on

an alleged lack of union standing in the earlier litigation;

3. Whether labor unions have associational standing to bring a wage and hour lawsuit against employers for denied rest periods where, as here, the union sought both injunctive relief and/or damages;

4. Whether the trial court correctly concluded labor unions lack standing to seek injunctive relief on behalf of their members;

5. Whether the trial court properly applied the associational standards of *Firefighters* based on speculation regarding the proof which might have been offered in an earlier dismissed case;

6. Whether the trial court properly retroactively applied the class action judicial approval provision of Superior Court Civil Rule ("CR") 23(e) to invalidate a union-employer settlement agreement which bound only the union, not its members; and

7. Whether a trial court may properly invalidate 1,157 individual settlement agreements between RNs employed by Evergreen.

III. STATEMENT OF THE CASE

For the past decade, as nursing shifts have become longer and nursing work more technical, the Washington State Nurses Association ("WSNA" or "Union") has made the preservation of basic labor conditions for nurses an organizational priority. Appendix, ¶ 2, Ex. 1. Nursing

requires the execution of practical and scientific skills with accuracy – even in times of great stress – in addition to the emotional intelligence needed to care for patients and their families during difficult times. Simple errors tolerable in other professions can and do lead to death and injury in hospitals. Nurses are expected to be vigilant while on duty to avoid any medical errors or harm that could be caused from carelessness. See RCW 18.130.160 and WAC 246-840-710 ("Violations of standards of nursing conduct").

Moreover, many Washington hospitals, including the Defendant-Appelant in this matter, Evergreen Hospital, now employ RNs on a 13-hour shift basis (with 12 hours of paid work time and an hour of unpaid time) in order to more affordably operate 24-hour facilities. See declarations of RNs at CP 467, 482, 500, 504, 507. The longer shifts increase the importance of periodic rest breaks. This is especially so when considering that the average age of a Washington RN is now 48.8 years and the nursing profession continues to be one with the highest "burnout" rate. See factsheet from University of Washington at http://depts.washington.edu/uwrhrc/uploads/RN_Snapshot_2011.pdf.

In 2007, WSNA brought its first state lawsuit against a hospital for the failure to relieve RNs from patient care duties for state-mandated rest

periods.[5] The primary goal of that lawsuit, and WSNA's four subsequent lawsuits filed in 2010 (including the one at issue here),[6] was to force hospitals to employ adequate nursing staff to ensure that nurses are fully relieved from their duties during state-mandated rest periods.

The suits are all based on Washington's Industrial Welfare Act ("IWA"), which requires Washington employers to provide at least ten minutes of paid resting time for every four hours of work. *Wingert v. Yellow Freight,* 146 Wn.2d 841 (2002) 50 P.3d 256 (2002); WAC 296-126-092(4). Despite the state mandate, many of the hospitals represented by WSNA continue to use a "catch as catch can" break system, if any system exists at all. CP 468, 472-474, 479, 483, 486, 490, 493. Under this ad hoc method, it is the RN's responsibility to find the coverage for patient care during the rest period, not the hospital's responsibility to provide the relief from duty. *Id.* This means that for an RN to take a break, another RN with sufficient capacity to care for the breaking RN's patients must be found. This practice results in RNs being forced to ask other nurses to double their patient loads in order to get a break or to skip the rest break to avoid burdening a fellow RN with an unmanageable patient load. *Id.*

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[5] *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr*, 163 Wn. App. 272 (2011), review accepted, 173 Wn.2d. 1010 (2012).

[6] *WSNA v. Providence Holy Family Hospital*, Spokane County Superior Court Case No. 10-2-04257-6; and *WSNA v. MultiCare Health System d/b/a Good Samaritan Hospital* and *WSNA v. MultiCare Health System d/b/a Tacoma General Hospital*, Pierce County Superior Court Consolidated Case No. 10-2-10146-8.

In 2010 and earlier, Evergreen did not maintain a hospital-wide system for providing rest periods or even recording denied rest periods. CP 262-264. It did not compensate RNs for denied rest periods. CP 266-268. This failure resulted in frequent missed rest breaks. WSNA sued Evergreen on September 15, 2010, to enforce the state requirement that it provide rest periods to its RNs, and sought injunctive relief to require Evergreen to provide rest periods. CP 426, 443, 447-451. At the same time that WSNA brought its lawsuit against Evergreen, Debra Pugh and Aaron Bowman, two former RNs of Evergreen, brought a putative class action against Evergreen for denied meal and rest periods (WSNA's lawsuit sought relief for denied rest periods, not meal periods, because Evergreen maintains a system to provide meal periods and pays for denied meal breaks). CP 1-10.

Evergreen and WSNA participated in a settlement mediated by Professor Cheryl Beckett of Gonzaga University School of Law on January 31, 2011. CP 426, 444. The daylong shuttle mediation resulted in a written settlement agreement (herein "WSNA-Evergreen settlement agreement"), in which WSNA released its right to sue Evergreen in its associational capacity for injunctive relief or damages related to denied rest periods on behalf of its nurse members at Evergreen. CP 426, 444, 452-460 WSNA expressly did <u>not</u> release any of the wage claims of the

approximately 1,253 RNs it sought to represent in its lawsuit. CP 453-460. Instead, in exchange for releasing its own ability to sue Evergreen and as part of its Settlement Agreement with Evergreen, WSNA obtained promises from Evergreen to significantly improve working conditions for its nurses, to offer back pay to RNs for past denied rest periods, and to reimburse its attorneys' fees.[7] *Id.* at 453-455.

Evergreen agreed to implement new procedures for all departments that would "assure" nurses received a 15-minute rest period for each four hours of work and begin to keep records of any denied rest periods. *Id.* The parties agreed that the goal of the settlement was to enable every nurse to take rest periods, except in very limited emergent or unusual circumstances. *Id.* Evergreen agreed to pay the RN denied a rest period 15 minutes of pay at that nurse's contract overtime rate of pay, regardless if the RN had worked 40 hours in that week. *Id.* It also agreed to provide WSNA with data on an ongoing basis so that the Union could ensure that denied rest breaks occurred in only rare circumstances and that each department was adequately providing relief for the nurses. *Id.*

The working conditions Evergreen agreed to provide were in excess of those required by state law.[8] In its agreement with WSNA,

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[7] These were $58,000 in costs and attorney time.

[8] Washington state law prohibits an employer and union from agreeing to labor conditions less than those provided for by statute, but they are free to agree to enhanced

Evergreen agreed to compensate all denied rest breaks at the contract overtime rate for 15 minutes, regardless of whether those denied rest breaks resulted in statutory overtime. CP 454. Evergreen also agreed to re-train any managers who attempted to discourage a nurse from taking a rest break or from recording a denied rest break.[9] CP 455. Evergreen's response to WSNA's lawsuit was to acknowledge a problem, and then work to correct it. The parties continued to work together to address the challenges of providing required rest periods in a hospital setting where emergent patient needs are common.

In addition, WSNA agreed Evergreen could make an offer of payment to each of the RNs WSNA had sought to represent in its association capacity (the 1,253 RNs employed by the Hospital from October 2007 to date of the settlement). CP 455-456. The parties agreed that Evergreen would offer at least $317,000, which was to be split on a

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standards, as Evergreen and WSNA did here. *See Wingert*, 146 Wn 2d 841, 852 ("So long as the provisions of chapter 49.12 RCW [the Industrial Welfare Act] operate as a base, the parties may contract through collective bargaining for any terms that enhance or exceed those minimum standards."). In *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr*, 163 Wn. App. 272 (2011), *review accepted*, 173 Wn.2d. 1010 (2012), the Washington Supreme Court accepted review of the question of "Whether an employee denied a 10-minute break period required by WAC 296-126-092(4) during the first 40 hours of the employee's work week is entitled to overtime pay for the missed break under the Washington Minimum Wage Act" because of a conflicting Court of Appeals decision in *Pellino v. Brinks, Inc.*, Wn App. 668 (2011).

[9] The issue of overtime is significant for all hospitals: overtime is discouraged, and nurses can be disciplined for working unauthorized overtime. Thus, it was essential that nurses not face discipline for missing a rest period (when in fact it is the Hospital that has failed when a RN is unable to take a rest period) for Evergreen's new break system to succeed. CP 454-455.

prorata hours worked basis for each RN. *Id.* Then, the RNs were informed that if they accepted their share of the settlement (which averaged about $270, with a high of $730 and a low of $10 based on the number of hours worked) that they would release their claims. Or, they could refuse the money and press their claims for more money in the *Pugh* lawsuit. CP 54-55, 77.

In March 2011, Evergreen offered the 1,253 RNs back pay for denied rest periods in exchange for a release of their individual claims for rest breaks. CP 175-178, 520-523 44 WSNA sent its members letters, held meetings, and answered questions one-on-one with RNs about WSNA's settlement and Evergreen's offers. CP 54-56, 75, 77, 81-82, 84. Both WSNA and Evergreen told the RNs they would give up their right to sue Evergreen if they accepted the offer. *Id.,* CP 175-176. At the same time, attorneys for the putative class disparaged WSNA and urged the RNs to reject the check claiming it was part of a "sweetheart" deal between Evergreen and WSNA. The class attorneys suggested that the RNs could get more money by participating in their class action. CP 79; 44-45, 49-50. However, more than 92 percent of the RNs accepted Evergreen's offer to pay for their release of claims. CP 520-523. Approximately a dozen RNs offered declarations in support of the WSNA-Evergreen settlement; in their view, the settlement was fair, and, most importantly, would

immediately begin to address the denied rest break problem at Evergreen.[10] CP 461-509.

In the absence of an accurate recordkeeping system at Evergreen, ascertaining damages with perfect accuracy is not possible.[11] CP 525-526. By offering a prorated share of the settlement to RNs, each RN could –

[10] Susan Hanser, an RN in the Med/Surg unit, said "I think that the settlement agreement between WSNA and Evergreen in this case is fair and that WSNA has fairly represented me and my coworkers. I am surprised at how quickly WSNA was able to settle this issue." CP 479, ¶ 10. Darla Mihovilich, an RN in the PACU, said "I think that this settlement is as fair as it can be given the situation." CP 464, ¶ 13. John Sincock, an RN in the OSNO department, said "I think that the settlement agreement between WSNA and Evergreen in this case is fair, and I am pleased with it overall." CP 475, ¶ 17. Karen Aziz Ketner, an RN in the CPC, said "I think that the settlement agreement between WSNA and Evergreen in this case is reasonable and fair. WSNA was very objective in their representation of our bargaining unit." CP 497, ¶ 11. Linda Alford, an RN in the PCU, said "I think that the settlement agreement between WSNA and Evergreen in this case is good, and that the changes this settlement will make at Evergreen will help staff morale." CP 501, ¶ 9. Gerrianne Nicholls, an RN in the Oncology unit, said "I think that the settlement agreement between WSNA and Evergreen in this case is absolutely fair. Recently, everything WSNA has done for the RNs is positive. They do a good job of representing the bargaining unit. I was surprised how fast WSNA was able to settle this issue." CP 486, ¶ 10. Christen Bingaman, an RN in the PCU, said "I was surprised and glad when I heard about the settlement agreement between WSNA and Evergreen. The settlement sounds fair to me. WSNA does a good job representing me and my coworkers. I am impressed with how quickly WSNA was able to reach a settlement." CP 468, ¶ 10. Erica Hall, an RN in the Oncology Unit, said "I think that the settlement agreement between WSNA and Evergreen in this case sounds fair. WSNA has done a good job representing me and the bargaining unit." CP 493, ¶ 10. Sue Dunlap, a Home Health Services RN, said "I think that the settlement agreement between WSNA and Evergreen in this case sounds wonderful. I am happy with the way WSNA represents me and my coworkers. I am ecstatic with the time frame in which WSNA was able to settle this issue. This is a real win for RNs." CP 490, ¶ 8. Audrey Clark, an RN in the Family Maternity Center, said, "I think that the settlement agreement between WSNA and Evergreen in this case is great, and that it is fair for all parties." CP 505, ¶ 9. Linda Morrill Sterritt, an RN in the Emergency Room, said "I support this settlement… I think that the settlement between WSNA and Evergreen in this case is fair." CP 508, ¶¶ 12-13. Cynthia Collette, an RN in Maternal-Fetal Medicine, said "I think the settlement is fair." CP 483, ¶ 10.

[11] Perfectly accurate payroll records are not required for workers to recover unpaid wages in off-the-clock cases. An employer's failure to keep records obviously cannot excuse wage violations and, in such cases, the courts require the employer to rebut any credible evidence put forward by the workers seeking payment for wrongly denied wages. *See Anderson et al. v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946).

considering his or her own working history – determine if the amount offered adequately compensated them for their past denied rest periods, particularly given the risks and length of continuing litigation. There was no requirement for the RNs to accept the back pay Evergreen offered. CP 5252-523. All currently employed nurses would benefit from the new rest break procedures Evergreen adopted as part of the settlement, regardless of who accepted the check. The settlement agreement expressly stated that no adverse action would be taken against RNs who declined the settlement, and Evergreen offered an additional assurance in its letters. CP 176.

Because the trial court committed obvious error by wrongfully invalidating a lawful private settlement between WSNA and Evergreen and the settlements between Evergreen and 1,157 of its RN employees, this Court should reverse the trial court's decision to invalidate these private agreements.

IV. ARGUMENT

A. THE TRIAL COURT LACKED AUTHORITY TO INVALIDATE THE PRIVATELY NEGOTIATED SETTLEMENT AGREEMENT BETWEEN WSNA AND EVERGREEN AS THAT AGREEMENT RELEASED ONLY WSNA'S CLAIMS AND NO INDIVIDUAL CLAIMS.

1. The Trial Court's Invalidation Of A Settlement Agreement Reached In A Separate Case Is Unprecedented, Will Inhibit Settlements, And Is Contrary To Well Established

Washington Law and Policy Encouraging Private Settlements.

It is undisputed that a) the trial court explicitly invalidated a settlement reached in an entirely separate civil case; and b) the invalidated settlement was binding on WSNA and Evergreen, not the individual RNs who were potential class members in *Pugh*. The Commissioner correctly framed the first issue for review by this Court as follows: "Whether the trial court, at the request of the intervenor individual plaintiffs [Pugh], had authority to invalidate the privately negotiated settlement agreement between WSNA and Evergreen that released only WSNA's claims and no individual claims." Ct App. Commissioner's decision dated 8/1/12, p. 2. The trial court invalidated the WSNA-Evergreen settlement based on a sweeping and erroneous legal conclusion about unions' standing to sue employers in Washington state and the application Superior Court Civil Rule ("CR") 23. CP 557-563.[12]

As far as undersigned counsel can determine, it is unprecedented for a trial court to invalidate a settlement reached in a case not before it. Should such collateral attacks against settlement of dismissed cases be countenanced, it will (among other things) deter parties from reaching

[12] Prior to inviting the trial court to collaterally nullify WSNA's standing in the settled other lawsuit, Pugh had made the precise arguments to Judge Middaugh, the judge assigned to *WSNA v. Evergreen*, Case No. 10-2-32896-SEA, and been rejected. When its collateral attack bore more fruit in front of Judge McCarthy, Pugh dropped its appeal in this court of Judge Middaugh's superior court rulings.

settlements in civil cases. The express public policy of this state is to *encourage* settlement of lawsuits, not thwart them. *City of Seattle v. Blume*, 134 Wn.2d 243, 258 (1997); *State v. Noah*, 103 Wn. App. 29, 50 (2000); KARL B. TEGLAND, 15 WASH. PRACTICE § 53.1 (2d ed. 2009). Where, as here, the settlement was not even binding on any potential plaintiffs in the second case, this problem is magnified and threatens Washington's public policy of encouraging private settlement.

As a threshold matter, and apart from the substantial legal errors outlined below, this Court ought to conclude that as a matter of law, the trial court exceeded its authority by invalidating a private settlement agreement in dismissed litigation which was not binding on the same parties appearing before the trial court. Pugh's claim that the trial court did not invalidate the agreement, but merely ruled on a defense, ignores the trial court's explicit ruling invalidating the settlement agreement, which the judge found to be a necessary perquisite to his decision. CP 562 (Judge McCarthy held that "the invalidity of the settlement due to WSNA's lack of standing fundamentally undermines [Evergreen's] argument…The settlement could not have been possible without WSNA's claiming associational standing, which the court has found to be invalid").

2. The Settlement Agreement Between WSNA And Evergreen Is Valid, Regardless of WSNA's Standing To Sue Evergreen.

When the trial court in the *Pugh et al. v. Evergreen* lawsuit invalidated the WSNA-Evergreen agreement, it turned upside down core principles of contract law, depriving Evergreen and WSNA of the benefit of their bargain reached on February 10, 2011. Under Washington law, a release of claims "is a contract whereby one party pays consideration to another in exchange for the latter's agreement never to bring a civil action against the former on the claims at issue." *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 192 (2005); *see also Reynolds v. Day*, 93 Wash. 395, 398 (1916) ("[r]eleases of this kind are like any other writing, and are not to be lightly overcome"), and *Bunting v. State*, 87 Wn. App. 647, 653 (1997) ("a release is a contract").

The WSNA-Evergreen settlement extinguished only WSNA's ability to sue Evergreen. It expressly did not release the right of individual RNs to press their own claims. The private settlement between WSNA and Evergreen did not prejudice the rights of any nurses because each was free to reject the tendered back pay sue for back pay in which each would have been absent the WSNA settlement.

While it is true that WSNA and Evergreen reached this agreement five months after WSNA had brought a lawsuit in its associational capacity seeking back pay and injunctive relief for denied rest periods, it is equally true that WSNA and Evergreen were (and are) free at any time to

enter into a contract in which WSNA releases any potential legal claims it has against Evergreen in exchange for improved working conditions for its members. In other words, the lawsuit was not a legal prerequisite to the settlement that the parties reached.[13] Thus standing cannot be a prerequisite that WSNA must prove before it may enter into a settlement and voluntarily dismiss its own lawsuit in which it released only its own right to sue.[14]

3. Assuming, *Arguendo,* That WSNA's Standing To Sue In An Earlier Voluntarily Dismissed Lawsuit Was A Basis To Invalidate the WSNA-Evergreen Settlement, The Trial Court Erred When It Found WSNA Did Not Have Standing.

The trial court rejection of WSNA's standing to seek damages misinterprets the state supreme court's *Firefighters v. Spokane Airports* decision. Pugh argues that the trial court correctly determined that the seminal Washington state case regarding a union's standing to sue for damages on behalf of its members, *International Association of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002) (herein "*Firefighters*"), "stands for the position that a union may only represent its members on a claim for injunctive relief, not damages." CP

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[14] This Court need not reach the question of whether a union must have standing before it can release the rights of its members to sue their employer, because no such agreement was made in this case. WSNA released its rights. The 1,157 nurses then released their individual rights to sue.

558. This is a clear misstatement of law. While *Firefighters* recognized that "federal courts have not accorded standing to an association to seek monetary damages on behalf of its members if it has not alleged an injury to itself or received an assignment of its members' damage claim," it expressly rejected the federal courts' limitation on association standing. 146 Wn. 2d at 214-216. The *Firefighters* Court found that adopting the federal rule of association standing in Washington courts "would likely burden individual members of the employee association economically and would almost certainly burden our courts with an increased number of lawsuits arising out of identical facts." *Id.* at 216. Therefore, the Court held, "we see little sense in an ironclad rule that has the effect of denying relief to members of an association based upon an overly technical application of the standing rules." *Id.* The Court also recognized that the federal court's circumscription of an association's standing to sue for damages was prudential in nature, rather than a constitutional limitation, and determined that Washington courts would recognize the standing of associations to obtain money damages for their members. *Id.* at 215. There has never been any dispute that a union can sue for injunctive relief on behalf of its members (in either federal or state court). Rather, the issue is whether an association or union can seek damages on behalf of their members without an assignment of wages, and in Washington the

answer is yes if "the amount of monetary damages sought on behalf of those members is certain, easily ascertainable, and within the knowledge of the defendant." *Id.* at 215-16.

Noting that Evergreen failed to keep adequate records related to rest periods, the trial court concluded that WSNA's previously settled and voluntarily dismissed lawsuit would have "require[d] the participation of at least some of the registered nurses who worked at Evergreen hospital" to prove damages. CP 557-559. This was pure hypothesis on the part of the trial court. It had no idea how WSNA would have presented its case or proved damages at trial in a different, now dismissed, lawsuit before a different judge. The trial court ignored the myriad types of evidence that Washington courts have accepted to prove damages in off-the-clock cases. *See, e.g., Pellino v. Brink's Inc.,* 164 Wn. App. 668 (2011) (in class action, trial court relied on extrapolations from partial records by an expert, written documents and communications created or maintained by the employer's agents, testimony from current and former managers of the employer, reasonable inferences from the absence of records as well as a representative sampling of employee testimony to determine damages). In this case, on these facts, the trial court erred when it invalided WSNA's standing to pursue a different lawsuit it voluntarily dismissed. It did so because it had a fundamental misunderstanding of *Firefighters* which

recognized much broader standing rights for associations in Washington state. This broad view of standing rights for unions in wage and hour actions is consistent with Washington's status as "pioneer in assuring payment of wages due an employee." *Champagne v. Thurston County*, 173 Wn.2d 69, 178 P. 3d 936 (2008) (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)); *see also Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).[15]

In any case, even if the trial court's speculation regarding how the *WSNA v. Evergreen* lawsuit would have proceeded were true – and an RN would have "participated" in WSNA's lawsuit had it continued to trial – the trial court's holding that such participation would void WSNA's standing is incorrect. As the *Firefighters* Court explained, labor unions in Washington may sue for damages on behalf of their members:

> 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;

[15] Contrary to Plaintiff's argument, WSNA vigorously argued the issue of standing to the trial court. At oral argument, WSNA cited *Firefighters v. Spokane Airports,* 146 Wn.2d 207, 45 P.3d 186 (2002), *Teamsters 117 v. Dept. of Corrections,* 145 Wn. App. 507, 514 (2008), and *Anderson v. Mt. Clemons Pottery Co.,* 328 U.S. 680, 66 S.Ct. 1187 (1946), in support of its position that, while irrelevant to the validity of its settlement agreement, WSNA did have associational standing to bring suit against Evergreen for rest break violations. Verbatim Report of Proceedings at 23:10-24:25, 25:10-25:25.

> and (3) neither claim asserted nor relief requested requires the participation of the organization's individual members.

Id. at 213-214.

Standing is not precluded because individual association members may be called as witnesses. *Teamsters Local Union No. 117 v. State, Dept. of Corrections,* 145 Wn. App. 507, 514 (2008). The association seeking standing in the *Teamsters* case was a labor union seeking to recover unpaid wages for its members. The defendant/employer argued that the union lacked standing because it could not make out its case without relying on evidence from individual members. The *Teamsters* court rejected the employer's argument:

> [The employer]...argues that standing is precluded because the individual union members will need to be called as witnesses on the issue of liability. The [employer] confuses participation as a witness with participation as necessary parties to ascertain damages. The employees are not necessary parties, neither are they indispensable parties. Here, the calculation of damages does not require individual determination and the liability issues, though of a factual nature, are common to all. We refuse to adopt [the employer's] position that participation of an individual member as a witness abrogates the Union's standing to prosecute the employees' wage claims.

Id. at 507.

Here, the trial court also confused union members' participation in a lawsuit as possible witnesses as cause for loss of standing. Under *Firefighters, supra,* 146 Wn.2d at 215-216, in order to qualify for

associational standing, a claim for damages on behalf of an association's membership must be for an amount "certain, easily ascertainable, and within the knowledge of the defendant." This rule "permit[s] a single plaintiff [e.g., an association] to adequately represent the interest of its many members in a single lawsuit thus avoiding repetitive and costly independent actions." *Teamsters, supra,* 145 Wn. App. at 512.

Had WSNA pursued its lawsuit, damages would no doubt need to be proven. As *Pellino, supra,* 164 Wn. App. at 668, recognized, there are a number of ways to do so. There is no evidence in this record that reliance on each injured member was necessary for damages. Thus it was wrong for the trial court to assume that the standing requirements had not been satisfied, even if they were required to be satisfied.

B. IN ANY EVENT, WSNA SOUGHT INJUNCTIVE RELIEF FOR WHICH STANDING IS ESTABLISHED WITHOUT REGARD TO THE *FIREFIGHTER* DECISION.

The trial court's holding that "Washington law is clear that a union may only represent its membership on a claim for damages and not for injunctive relief" is incorrect. CP 558. The *Firefighters* limitations apply only when a union is seeking money damages for its members. *Firefighters, supra,* 146 Wn.2d 207, (A union may sue for an injunction in Washington state); *see, e.g., Washington Fed'n of State Employees v. Joint Ctr. for Higher Educ.*, 86 Wn. App. 1, 4, 933 P.2d 1080, 1081 (1997) (holding the union had representational standing to seek injunction and noting that Washington "Supreme Court has criticized 'unrealistically strict' considerations of standing" and "Washington is increasingly taking a broader, less restrictive view [of standing]").

Here, WSNA sought injunctive relief in its action against Evergreen Hospital. In its complaint, WSNA alleged that Evergreen had failed to provide or pay for denied rest periods, including a failure to keep adequate records of missed rest periods. CP 449-450. The only remedy

for such a record-keeping failure under Washington law is to keep the records, *i.e.,* an injunction, and WSNA sought all appropriate relief.[16]

Indeed, going-forward relief was a primary component of the settlement between WSNA and Evergreen. In the settlement agreement, Evergreen agreed to implement new procedures in each unit to "assure" that nurses receive their rest breaks. CP 453. In the event that a nurse is unable to take a rest break or the rest break is interrupted, Evergreen implemented a simple and easy process for the nurse to record the rest break on its electronic timekeeping system (as Evergreen already did for missed meal breaks). CP 453-454.

Hence, assuming arguendo that WSNA lacked standing in its action against Evergreen for damages, it had standing to pursue an injunction.

There Was No Legal Basis For The Trial Court To Invalidate The WSNA-Evergreen Settlement By Applying Superior Court Civil Rule ("CR") 23(e). Because the settlement agreement between WSNA and Evergreen did not release any claims but WSNA's own claims, the concerns under-girding the CR 23(e) settlement notice do not apply

[16] WSNA and Evergreen explained WSNA's suit to the trial court this way: "It is a suit for monetary damages for failure to pay for hours worked resulting from missed rest breaks and an order directing the defendant, King County Public Hospital District No. 2 d/b/a Evergreen Hospital Medical Center ("Evergreen") to comply with the record keeping requirements of RCW 49.46.070." Jt. Mtn. to Approve Settlement, 2/18/11, KCSC Case No. 10-2-32896-SEA.

here.[17] WSNA dismissed its lawsuit pursuant to CR 41(a)(1), which permits voluntary dismissal, "[s]ubject to the provisions of rules 23(e) and 23.1..." CR 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." CR 41(a)(1) recognizes a duty to protect absent class members in voluntary dismissals.

The reasons for this concern are obvious. It would not be fair for named representatives of a putative class to compromise or release the claims of the absent class members, possibly to the sole benefit of themselves and their attorneys, without any assurance as to the fairness of the settlement. CR 23(e) acts to protect absent class members from this abuse. *See e.g. Jones v. Home Care of Washington, Inc.*, 152 Wn. App. 674, 682-84 (2009) (holding that suits filed as class actions are subject to class treatment for purposes of settlement).

None of those concerns are present here. First, as Evergreen points out, WSNA did not bring a class action; therefore, CR 23(e) does not apply based on its own terms.[18] Second, there is no reason in this case to

[17] As WSNA argued before the trial court, the settlement did not release any individual rights of the nurses like in a class action settlement. Verbatim Report at 21:25-23:9.

[18] As recognized by the United States Supreme Court, there is a great difference between suits by associations on behalf of their members and class actions. "While a class action

transplant the important protections of CR 23(e) here. This is because the WSNA-Evergreen settlement did not release any claims of putative class members. Instead, the WSNA-Evergreen settlement involved only a release of WSNA's claim in exchange for improved working conditions, and permitted Evergreen to make individual offers of settlement to its RNs. The Settlement Agreement left it to individual nurses themselves to decide if they wanted to release their claims in exchange for the sums offered by Evergreen. The vast majority of them decided that what was offered was fair compensation for the past denied rest breaks, and released their own claims. CP 428. No court approval was needed for WSNA to enter into a contract with Evergreen, and no court approval was necessary for the RNs to enter into individual contracts with Evergreen.

Finally, even if court approval was necessary, that does not justify Judge McCarthy's invalidation of the agreement. The parties to the Agreement agreed that an arbitrator, not a state court, would adjust any dispute as to the meaning of the Agreement. CP 458-459.

C. THERE WAS NO LEGAL BASIS FOR THE TRIAL COURT TO INVALIDATE THE 1,157 SETTLEMENT

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creates an ad hoc union of injured plaintiffs who may be linked only by their common claims," the doctrine of associational standing "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *International Union, United Auto., Aerospace & Agr. Implement Workers v. Brock,* 477 U.S. 274, 289-90 (1986). "The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests." *Id.* at 290.

AGREEMENTS BETWEEN THE RNS AND EVERGREEN THAT RESOLVED THOSE RNS' REST BREAK WAGE CLAIMS AGAINST EVERGREEN.

In any case, even if WSNA and Evergreen's private Settlement Agreement to improve working conditions in exchange for WSNA's release of associational wage claims was somehow unlawful, which it is not, its invalidation is not a basis to undo the 1,157 separate contracts between individual RNs and Evergreen. "...[U]nder the principle of freedom to contract, parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy." *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, --- Wn.2d ---, 271 P.3d 850, 853 (2012) (internal citation omitted). No public policy has been offended by these agreements. There is no suggestion of coercion. The few RNs challenging the contracts have articulated only buyer's remorse, but that is insufficient to void their contracts under Washington law. *In re Marriage of Ferre,* 71 Wn. App. 35 (1993). If personal regret is not a basis to void their own contracts, it certainly cannot void the thousand-plus other contracts of the RNs who are satisfied with their bargain and currently enjoy the new working conditions negotiated by WSNA, all of which are at peril due to the trial court's decision extinguishing their agreements. For these reasons, the

trial court erred when it invalidated these RNs' contracts with Evergreen to accept back pay and release their rest period claims.[19]

D. INVALIDATION OF THE PRIVATELY REACHED SETTLEMENT AGREEMENT REACHED BETWEEN WSNA AND EVERGREEN THREATENS THE INTEGRITY OF PRIVATE SETTLEMENTS TO FULLY AND FINALLY RESOLVE DISPUTES AND RISKS THE IMPORTANT GOING-FORWARD CHANGES IN THE WORKING CONDITIONS FOR THE RNS AT EVERGREEN.

The WSNA-Evergreen Settlement Agreement obligates Evergreen to adequately staff its facility so RNs are not denied rest breaks, provides for penalty pay at the overtime rate for denied rest periods, and imposes other obligations on Evergreen above and beyond state law. CP 453-455. If the trial court's decision to void the WSNA-Evergreen Settlement stands, Evergreen nurses, and their patients, will suffer the loss of these new working conditions.

Pugh's response to this undisputed fact of these going forward workplace changes has been to mislead the trial court, and now this Court, about the nature of the Settlement Agreement between WSNA and Evergreen. Pugh claims, with no evidence, a nefarious intent on the part of WSNA to get a "sweetheart" deal, suggesting that the deal benefits the Union and the Employer at the expense of the RNs. But the deal between

[19] For these same reasons, the trial court erred when it certified a subclass of RNs who had already released their claims for rest periods.

WSNA and Evergreen only provided enhanced working conditions for the RNs at Evergreen, and no monetary settlement to the Union.[20] There is no evidence of coercion of the RNs to accept the back pay, and ample evidence that RNs who released their claims acted based on information provided to them by their Union, their Employer, and by class action counsel.[21] Moreover, given the difficulties of proof, defenses and inherent risks in litigation, there is no assurance that the proposed class of those who accepted settlement will not be required to return those settlement monies to Evergreen.

V. CONCLUSION

For the foregoing reasons, WSNA requests that the Court grant its appeal.

Respectfully submitted this 8th day of October 2012.

Jennifer Robbins for

David Campbell, WSBA # 13896
Carson Glickman-Flora, WSBA # 37608
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT LLP
18 W. Mercer Street, Suite 400
Seattle, WA 98119
206-285-2828
Attorneys for Intervenor/Appellant WSNA

[20] With the exception of reimbursement of its attorneys' fees for bringing the lawsuit.
[21] See FN 8, *infra*.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2012, I caused the foregoing Brief of Intervenor/Appellant Washington State Nurses Association to be filed with the Court of Appeals, Division I, and true and correct copies of the same to be sent via email and US First Class Mail, per agreement of counsel, to:

James S. Fitzgerald
John J. White, Jr.
Kevin B. Hansen
Livengood Fitzgerald &Alskog, PLLC
121 Third Avenue
Kirkland, WA98083-0908
fitzgerald@lfa-law.com
White@lfa-law.com
Hansen@lfa-law.com

David Breskin
Annette M. Messitt
Miriam Simmel
Amber Siefer
BRESKIN JOHNSON & TOWNSEND, PLLC
1111 Third Avenue, Suite 2230
Seattle, WA98101
dbreskin@bjtlegal.com
amessitt@bjtlegal.com
asiefer@bjtlegal.com
admin@bjtlegal.com

Carson Glickman-Flora

Carson Glickman-Flora, WSBA # 37608

Appendix

Declaration of Christine Himmelsbach
In Support of Joint Motion
to Approve Settlement

Case No. 10-2-32896-3

HONORABLE LAURA GENE MIDDAUGH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WASHINGTON STATE NURSES ASSOCIATION, Plaintiff, v. KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2 d/b/a EVERGREEN HOSPITAL MEDICAL CENTER, Defendant.	**NO.** 10-2-32896-3 **DECLARATION OF CHRISTINE HIMMELSBACH IN SUPPORT OF JOINT MOTION TO APPROVE SETTLEMENT**

Christine Himmelsbach declares and states as follows:

1. I am the Assistant Executive Director of Labor Relations for Washington State Nurses Association (WSNA) and make the following statements based on my personal knowledge.

2. WSNA is a membership organization of 16,000 registered nurses which exclusively represents, for the purposes of collective bargaining, registered nurses employed by Evergreen. WSNA's mission includes fostering high standards of nursing, promoting the professional development of nurses, and advancing their economic and general welfare. WSNA's mission statement can be seen on WSNA's webpage at

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

http://www.wsna.org/About/documents/vision.pdf, a copy of which is attached as Exhibit 1. Due to the growing body of evidence demonstrating that rest breaks are critical for nurses to maintain the alertness and focus required to provide safe and quality patient care, ensuring that nurses receive full, uninterrupted rest and meal breaks has been a long-time top organizational priority for WSNA.

3. WSNA's efforts to ensure that nurses receive the rest breaks that they are entitled to, or receive payment in the rare cases that rest breaks must be missed (as a disincentive to the employer), has included nurse education programs (including education sessions in multiple cities across the state in 2010 and aggressive outreach to our members through the WSNA website, electronic newsletters, WSNA's quarterly magazine, and a recorded phone message to every member), legislative advocacy (including proposing legislation in 2009 and 2010 and a public education campaign with statewide television ads), work with the Department of Labor & Industries on rulemaking and enforcement, and lawsuits like the instant one. Since 2005, WSNA has filed grievances at multiple facilities leading to arbitrations including a landmark arbitration decision in 2010 at the University of Washington Medical Center that included new policies for tracking missed breaks and interrupted breaks. WSNA also recently won a lawsuit filed in 2007 against Sacred Heart Medical Center granting nurses back pay for missed break and limiting the use of intermittent breaks. Currently, the Washington State Nurses Association is a plaintiff in four other lawsuits, in Spokane and Pierce counties, against hospitals for failing to provide rest breaks.

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

4. I, as well as other WSNA representatives, an Evergreen RN, and counsel attended the Jan. 31, 2010 mediation for WSNA. Evergreen's lead human resources, chief nursing officer, and counsel attended for Evergreen.

5. WSNA has endeavored to keep the RNs at Evergreen informed at every step of the way about its lawsuit against Evergreen. WSNA hosted a dinner meeting on January 13, 2011, where it discussed the lawsuit and its purposes with its membership. More than 50 RNs attended. The WSNA nurse rep. Sara Frey, has updated RNs about the lawsuit as part of her routine visits to the worksites and officer meetings. On February 17, 2011, WSNA representatives were present at Evergreen from 6 a.m. to 10 a.m. and 2:00 p.m. to 6:00 p.m. to answer questions about the settlement. A Settlement Information document was distributed to nurses who attended the Q&A sessions. A copy of the Settlement Information document is attached as Exhibit 2. WSNA sent postcards in advance about the Q&A sessions. WSNA has also used its electronic membership messaging system and website to keep members informed. WSNA will send another set of postcards announcing the March 18th hearing date for the proposed settlement.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

SIGNED at Seattle Washington, this 18th day of February, 2011.

Christine Himmelsbach

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

EXHIBIT 1

WSNA's **Vision, Mission & Goals**

PURPOSES

The Purposes of the Washington State Nurses Association shall be:

- To work for the improvement of health standards and the availability of health care service for all people.
- To foster high standards of nursing.
- To stimulate and promote the professional development of nurses and advance their economic and general welfare.
- These purposes shall be unrestricted by considerations of age, color, creed, disability, gender, health status, life style, nationality, race, religion or sexual orientation.

VISION

The Washington State Nurses Association is the collective and leading voice, authority, and advocate for the nursing profession in the State of Washington.

MISSION

The Washington State Nurses Association provides leadership for the nursing profession and promotes quality health care for consumers through education, advocacy, and influencing health care policy in the State of Washington.

GOALS

- Nurses in Washington State will be informed on issues and trends that affect their professional practice.
- The Washington State Nurses Association will lead the profession wherever decisions are made affecting nursing and health care.
- The Washington State Nurses Association will anticipate and respond to the changing needs of the profession and nurses.
- The Washington State Nurses Association will maintain and strengthen nursing's role in client advocacy for consumer safety and quality health care.
- The Washington State Nurses Association will be responsive to cultural diversity needs of its members and to the consumers of health care.
- The Washington State Nurses Association will promote the professional development and advance the economic and general welfare of all nurses.

EXHIBIT 2

WSNA v. Public District Hospital 2 d/b/a Evergreen Hospital Center (Evergreen)–
SETTLEMENT INFORMATION

On February 10, 2011, representatives from WSNA and Evergreen Hospital agreed to settle WSNA's rest break lawsuit. Evergreen agreed to a new rest break policy that will revolutionize the way nurses at Evergreen take rest breaks. WSNA hopes that Evergreen's new system will set the standard for other hospitals in Washington to follow! We'll need to work together to hold Evergreen accountable to the new rest break procedures.

Overview

- Evergreen will begin recording and paying for missed rest breaks, and will pay some back wages for its failure to pay for rest breaks in the past.
- Evergreen managers will adopt procedures to assure nurses receive rest breaks and conduct training on the new rest break procedures.
- Evergreen will promptly investigate any accusation of retaliation against nurses for exercising their rights under this settlement.

New System to Track Missed Breaks

- Evergreen will keep records of missed breaks and will modify its Time and Attendance System to provide a method for nurses to record missed breaks.
- Evergreen will indicate how many rest breaks a nurse is entitled to for each shift.
- Nurses will be able to mark missed rest breaks in the Time and Attendance System.
- Evergreen will provide WSNA department-level data regarding missed rest breaks upon request.

New Policies for Missed Breaks

- Evergreen will compensate nurses for missed breaks. Missed rest breaks will be treated as hours worked and will be compensated at 15 minutes straight time. If the missed rest break extends beyond the normal work day as defined in the collective bargaining agreement, the missed break will be compensated at 15 minutes at the overtime rate.
- If compensation for a missed break is denied, the supervisor will state a reason in the Time and Attendance System, and both the nurse and WSNA will be notified.
- Paychecks will reflect payments for missed breaks in a separate category if feasible and practicable for Evergreen's payroll system.
- If a rest break is interrupted during the first 10 minutes, nurses will have the option of taking a new 15-mintue rest break, or the option of being paid for a missed break. If a rest break is interrupted after the first 10 minutes, nurses may resume and complete the remainder of the 15-minute break, or record a missed rest break.

Back Wages for Missed Rest Breaks

WSNA settled the lawsuit for $375,000, which includes the costs of bringing the lawsuit. Approximately $325,000 will be distributed to nurses impacted by this settlement, including to former nurses who worked anytime between September 15, 2007 and the effective date of the Settlement Agreement, which will be the date the King County Superior Court approves it. The funds will be prorated by the total number hours a nurse worked during the lawsuit time period. The back wages offered for a nurse who worked 4000 hours during the lawsuit time period will be twice of as large as for a nurse who worked 2000 hours. **However, you may refuse the settlement money that Evergreen will offer you and press your own claim for back wages.**