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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

REPLY BRIEF OF INTERVENOR/APPELLANT WSNA

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I. LEGAL ARGUMENT

Much of Respondent's Brief is an inaccurate, misleading and irrelevant attack on the good faith effort of the Washington State Nurses Association ("WSNA") to fight for rest breaks for the registered nurses at Evergreen Hospital in Bellevue, Washington. A portion of this brief is regrettably devoted to rebutting some of these misleading attacks. The remainder addresses the dispositive legal issues.

A. The WSNA-Evergreen Settlement Did Not Prejudice Nurses' Individual Rights To Pursue Damages.

Pugh's Brief assumes several false premises. The first is that the WSNA-Evergreen settlement agreement resolved or compromised the wage claims of individual nurses. It did not. Instead, WSNA settled only its associational claims, obtaining new working rules and pay practices aimed at getting nurses their rest breaks. Separately and independently, the settlement created a fund from which individual nurses could choose to settle their individual wage claims for denied rest periods.

B. Pugh's Claim That WSNA Should Have Settled For More Damages Falsely Assumes That The Law Was Settled And That Damages Were Certain, Which They Were Not.

The second false premise is that WSNA settled for too little cash in this fund. Apart from the fact that nurses were free to reject the checks and pursue litigation, this premise is simply false. The past missed rest

breaks on which back pay might be awarded had not been recorded. The legal issue of whether rest breaks are "hours worked" for state law overtime purposes was only recently resolved in WSNA's favor by the State Supreme Court in another civil case brought by WSNA in its associational capacity on behalf of Providence Sacred Heart Medical Center nurses in Spokane, Washington. Just two months ago, the State Supreme Court overturned the Court of Appeals and held that missed rest breaks were indeed "hours worked" within the meaning of the Minimum Wage Act, Chapter 49.46 RCW. The Court held that prior to its decision the status of the law had been "fairly debatable" and "a bona fide legal dispute," precluded awarding double damages. Nonetheless the Court upheld overtime pay for missed breaks explaining:

> ...compensating employees who forgo their rest periods with overtime pay will help to ensure that employers continue to provide these breaks to their employees. Rest breaks are mandatory and promote employee efficiency. Further, rest periods help ensure nurses can maintain the necessary awareness and focus required to provide safe and quality patient care.

WSNA v. Sacred Heart Medical Center, slip opinion, --- Wn.2d ---, 287 P.3d 516, 520-21 (2012). (Sacred Heart Medical Center filed a motion for reconsideration on November 14, 2012, on the question of damages which is currently pending in the Washington Supreme Court).

Here, much of Pugh's Brief is focused on the notion that since the settlement fund was less than Evergreen's own estimate of $600,000 in potential liability, it was inadequate. Treating this $600,000 like money in the bank assumes that had the case proceeded, WSNA would have prevailed in the then-pending *Sacred Heart* case, and that Evergreen's other defenses on damages and liability would be rejected.[1]

C. Professional Nurses Were Fully Informed And Aware That Accepting Evergreen's Individual Offers Of Back Pay Precluded Them From Participating In The Then-Well-Known *Pugh* Class Action Litigation.

The third false premise is that registered nurses – among the most highly skilled professionals in the country – were somehow duped when, rather than await the uncertain outcome of future litigation, they accepted back pay checks. In fact, nurses were fully informed. In multiple letters and announcements, on-site meetings, by phone and electronically, WSNA announced the settlement terms including (1) the remedy calculation and payment range, (2) the litigation costs and fees offset and, (3) the extensive new policy and pay changes Evergreen agreed to implement without litigation delay. CP 77, 80-81. In every communication, often in bold, WSNA reminded Nurses that "**you may**

[1] Pugh's related false premise, at pp. 29 to 32, is that the amount owed by Evergreen to nurses for past missed rest breaks was a sum certain – and therefore the WSNA-Evergreen settlement was a *knowing and willful* agreement to short-change the nurses on their wages, thereby violating RCW 49.52.050.

refuse the settlement money that Evergreen will offer you and press your own claim for back wages." CP 77, 80-81. (emphasis in original) The entire settlement was posted on the WSNA Web site for review by the nurses, or anyone in the public for that matter, and still is today. CP 55.

Pugh's implicit suggestion that nurses were unaware of their option to participate in the *Pugh* Class Action case, is likewise belied by undisputed evidence that:

1. Months before the WSNA – Evergreen settlement, Pugh emailed all Evergreen nurses announcing she "had filed a class action against Evergreen (separate from the WSNA suit) and all staff at Evergreen are able to join" by calling Mr. Breskin's firm at 206-652-8660. CP 43, 62. Pugh used a master list of nurses made available to her as part of her employment at Evergreen to make this announcement;
2. At a daylong on-site WSNA meeting on February 17, 2011, a month before Evergreen made any back pay offers to individual nurses, nurses were told about how they could refuse to accept settlement money and could pursue claims through the Pugh Class Action case; (CP 54)
3. Lead Plaintiff Pugh herself attended this WSNA meeting and shared her opinions about why the WSNA settlement should be

rejected. She handed out flyers detailing her objections and again advertising the alternative of pursuing the class action case; (CR 55, 79)

4. On March 8, 2011, at another WSNA event at Evergreen, there was further discussion with nurses about how to pursue the Pugh case if they chose to do so; (CR 55)

5. When settlement offers were made, Evergreen informed nurses again in writing of the Pugh case and told them that if they accepted the settlement check they would not be able to participate in the Pugh Class Action suit. (CR 44). In its letter to nurses, dated March 17, 2011, Evergreen stated: "We also wish to make you aware that in addition to the WSNA lawsuit described above, two former Evergreen employees, Debra Pugh and Aaron Bowman, filed a lawsuit in which they seek to represent you as a class of registered nurses who may not have been paid for missed rest breaks and missed meal breaks. The court has not 'certified' the class. If it is so certified, your participation in the Settlement Agreement with WSNA would remove you from the Pugh/Bowman lawsuit as to missed rest breaks." CP 175.

Nurses were well aware of the consequences of their choices. CP 43-45. Pugh's repeated suggestions that WSNA, by an indemnification clause in its settlement agreement, or otherwise, suppressed information about the *Pugh* matter, is simply false.

D. Contrary To Pugh's Claim Of Procedural Abuse, The Record Shows That WSNA Brought And Settled Its Action First, And Dropped Court Approval As A Condition Of Settlement At The Direction Of Judge Laura Middaugh.

The fourth false premise is that WSNA and Evergreen somehow abused the legal procedural process in reaching a settlement agreement. The facts are that:

1. The WSNA case was filed before the *Pugh* Class Action;
2. After discovery and an arm's length professional mediation the parties reached a settlement of the Association's claims;
3. At the time of the settlement, Pugh's counsel had yet to seek class certification, and had merely filed a complaint alleging a class action.

Although Evergreen and WSNA had originally agreed, and told Judge Middaugh "while there is no legal requirement that the parties obtain approval of the settlement, the parties have jointly agreed to seek court approval," CP 193, Evergreen and WSNA determined that Court approval was not required after a status conference on February 25, 2011,

in which Judge Middaugh questioned whether the Court had authority to approve the settlement. *See* Evergreen's Petition for Review, App. 918, Case No. 68550-3-I. Due to Judge Middaugh's comments, Evergreen and WSNA presented a stipulated order of dismissal to the Court on the morning of March 2, 2011, *before* the deposition of Kathleen Groen. *Id.*, App.836, 863-74. The court signed the stipulated order the following day. Pugh's repeated allegation that the need for court approval was conceded or dropped for nefarious reasons is simply groundless. Pugh appealed the WSNA case to this Court, Case No. is 66857-9-I, but dropped its appeal after successfully collaterally attacking the WSNA-Evergreen settlement in the *Pugh* case. It was Pugh's collateral attack that is an abuse of the rules, not WSNA's settlement of its own lawsuit.

E. Contrary To Pugh's False Assumption, Grafting Class Action Rules Onto Union Associational Actions Will Limit Workers' Abilities To Obtain Justice For Wage Claims Through The Courts Which Is Contrary To Washington Law.

The fifth false premise is that the handling of the *WSNA* case should be treated as a class action damages case, and viewed through that lens. Here, WSNA settled associational, not individual, claims, and therefore this focus is completely illusory. As outlined fully below, settled precedent precludes imposing class action rules in associational cases. Grafting ill-fitting class action rules for the first time to associational civil

actions in Washington will make it more difficult for labor, and other organizations, to bring cases forward which promote the remedial force of Washington's progressive workers' rights legislation. Such a finding would also significantly depart from this Court's prior rulings by reducing access to judicial resolution of claims by further restricting eligibility for standing.

Moreover, Pugh's premise ignores the fact that WSNA has long been the elected collective bargaining representative of the Evergreen nurses and that the nurses, unlike in a class action, have an ongoing voice in the decision-making of their democratically run association. As a matter of labor law, labor unions have a wide discretion to act on behalf of represented employees. *Lindsey v. Municipality of Metropolitan Seattle*, 49 Wn. App. 145, 149, 741 P.2d 575 (1987). The Court's deference to union decisions about how to effectively represent employees is expansive. *Schmidtke v. Tacoma School Dist. No. 10*, 69 Wn. App. 174, 181, 848 P.2d 203 (1993); *Patterson v. International Broth. of Teamsters, Local 959*, 121 F.3d 1345, 1349-50 (9th Cir. 1997).

Contrary to Pugh's claim, there is nothing unusual about unions advocating for former employees, regarding issues arising from their employment in the bargaining unit. *See, e.g., Rosen v. Public Service Elec. & Gas Co.*, 477 F.2d 90, n. 8 (3rd Cir. 1973) ("it does not naturally

follow, as the company implies, that a union loses all interest in the fate of its members once they retire"). There is no actual or inherent conflict in advocating the interests of the nurses' collective interests where their claim arises from their work in the bargaining unit. Current and former employees selected WSNA to do just that. In any event, here former employees' claims were not compromised and they were informed about their choices, including details of the *Pugh* case.

Long after the *Pugh* damages case has come and gone, WSNA will be advocating and negotiating on behalf of Evergreen Nurses. Their legal status and right to do so arises from having been chosen by the employees to act for their collective interests. Imposing class action rules on union associational cases is completely at odds with the union's pre-existing statutory status as the collective bargaining representative.

To see the danger of relying on class action cases to protect employee interests one need look no further than this case. Here, if the trial court's decision is allowed to stand, the result will be to have a court overturn a union-employer settlement agreement which (a) for the first time assures nurses will get rest breaks, (b) provides overtime pay above statutory requirements, (c) helps protect nurses and their patients from the dangers of fatigue and resulting medical mistakes, and (d) will only be effective if monitored and enforced by the WSNA. Why overturn the

settlement? According to the putative class action counsel, because the union secured only half the back pay it ought to have. Requiring unions to act in the narrow confines of class action rules is needless, as a union is already responsible for working for the benefit of the whole.

F. Pugh Fails To Cite Any Case For The Proposition That One Superior Court May Set Aside Settlements Reached In A Different Superior Court Case.

Settlement contracts are enforceable absent a contravention of public policy. *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, Slip Copy, --- Wn.2d ---, 271 P.3d 850, 853 (2012) (internal citation omitted). Collateral attacks on settlements on a basis other than a contravention of public policy would "open a Pandora's box." *In re Marriage of Buckley*, 36 Wn. App. 487, 489, 675 P.2d 619 (1984) (allowing collateral attacks on divorce settlement "without any more than a showing of a disparity in the award" would "open a Pandora's box") (quoting *Peste v. Peste*, 1 Wn. App. 19, 25, 459 P.2d 7 (1969)); *Halvorsen v. Halvorsen*, 3 Wn. App. 827, 832, 479 P.2d 161 (1970) (noting a "strong policy favoring finality in property settlement agreements" because "[p]arties often, as they have here, base their conduct on a property settlement").[2]

[2] Although these cases dealt with divorce settlements, the reasoning behind finding a public policy in favor of finality of settlements described in those cases, applies here as well. As in *Halvorsen*, the parties have based their conduct on the Evergreen-WSNA

Here, when WSNA's claims against Evergreen for failing to provide rest breaks were resolved in a settlement agreement and its lawsuit was voluntarily dismissed (at the trial court's direction), Pugh dropped her appeal in *WSNA v. Evergreen,* King Co. Sup. Ct. Case No. 10-2-33125-5. Instead, Pugh collaterally attacked the WSNA-Evergreen settlement, making the same arguments that had been included in its appeal of *WSNA v. Evergreen*, to a new judge in *Pugh v. Evergreen*. There is no authority for such a collateral attack on a finalized settlement agreement. Moreover, where, as here, the individual settlement agreements between the nurses and Evergreen were optional, and not required by the *WSNA-Evergreen* settlement, there is no legal basis for their invalidation. As WSNA explained in its appeal brief, pp. 13-15, allowing collateral attacks on final settlements in other cases is an extraordinary change in judicial procedure which will ultimately discourage and undermine settlement of all civil cases.

G. Pugh's Claims That WSNA Failed To "Adequately Represent" Its Member Nurses Were Not Upheld By The Trial Court And Are Not Related To Any Issues On Appeal. Therefore, This Court Should Disregard These Ad Hominem Attacks In Their Entirety.

Pugh presents a litany of attacks on WSNA, claiming the Union "failed to adequately represent the nurses and possessed a conflict of

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settlement. Evergreen has modified its rest break policies and has sent checks to nurses, many of which were cashed.

interest, which violated the due process rights of absent nurse class members," Pugh Res., p. 16, failed to "vigorously prosecute the nurses' damages claim for missed rest breaks," Pugh Res. p. 17, "provided misleading, inaccurate, incomplete, and conflicting information about WSNA's lawsuit and settlement," Pugh Res. p. 18; failed to provide "adequate notice" about the settlement, Pugh Res. p. 21, and "participate[d] in mediation without even attempting to calculate what was actually owed to nurses for missed rest breaks," Pugh Res. p. 18. Neither the trial court in this case nor the trial court in *WSNA v. Evergreen,* King County Case No. 10-2-32896-SEA, accepted any of Pugh's factual claims. These claims did not form the basis of the *Pugh v. Evergreen* trial court's (erroneous) legal conclusions that WSNA did not have standing to bring its wage and hour lawsuit and that CR 23(e) applied to the WSNA-Evergreen settlement. Even if these claims were relevant, Pugh's unsubstantiated allegations that WSNA failed to adequately represent its member nurses in reaching the rest break settlement could not have formed the basis of a summary judgment decision – which would require no material facts be in dispute – and certainly cannot now be accepted as material facts by this appellate court.

WSNA vigorously disputes Pugh's attacks, none of which are findings of fact by the trial court decision at issue in this appeal, and, as

outlined in the restatement of the case at pages 4-5, documentary evidence contradicts Pugh's claims that nurses were not informed or were treated unjustly in the WSNA-Evergreen settlement or in their own settlements. Pugh erroneously asserts that WSNA never made any estimate of potential damages. But this is contradicted by an undisputed finding of fact by the trial court below. Order at 8.

Moreover, even if documentary evidence did not contradict Pugh's claims, the trial court did not accept them, and this Court should not do so now. There is no evidence for the notion that anyone other than FloAnn Bautista and a few others of the more than thousand who signed individual settlement agreements with Evergreen are dissatisfied with WSNA's settlement agreement, and, in any event, that question is not before this Court. Pugh's attacks should be disregarded.

H. The Trial Court Properly Denied Summary Judgment On Pugh's Illegal Kickback Claim As Requiring Trial.

Pugh argues that the Evergreen–WSNA Settlement constituted an illegal kickback or rebate of wages because the amount owed by Evergreen to nurses for past missed rest breaks was a sum certain of $600,000 – and therefore the WSNA-Evergreen settlement was a *knowing and willful* agreement to short-change the nurses on their wages, thereby violating RCW 49.52.050. As outlined above, no amount certain was known. Nor are there facts of record which remotely support this claim.

The trial court rejected Pugh's claim, noting that "willfulness" is a necessary element and "[d]epending on the evidence at trial, it may well be that willfulness cannot be shown by plaintiffs due to a 'bona fide' dispute amount the amount of wages owed." CP 561. Since the Washington State Supreme Court only a few months ago concluded that there was a "bona fide" dispute under Washington law regarding whether overtime is owed for nurses missed rest breaks (a necessary component of wages owed), consideration here is barred not only because it turns on disputed facts, but because it is now resolved as a matter of law. *WSNA v. Sacred Heart,* slip opinion, --- Wn.2d ---, 287 P.3d 516, 520-21 (2012).

I. The Lower Court's Finding That WSNA Lacked Standing Misconstrues The Relevant Case Law, As Well As WSNA's Theory Of Its Case.

Pugh fails to rebut the fact that WSNA sued Evergreen for damages and *injunctive relief,* and unions plainly have standing to pursue injunctive relief on behalf of their members in Washington courts. Thus, even if WSNA had to establish standing prior to settling its lawsuit, it would have easily done so.[3] Nonetheless, the trial court concluded that WSNA lacked standing to pursue (and then settle) its case against Evergreen because the claim would have required the participation of

[3] WSNA's agreement with Evergreen provided for injunctive relief and did not involve any back wages. The back wages were paid directly to each nurse if the nurse chose to sign an individual agreement with Evergreen.

individual nurses. The trial court said, "it is clear that WSNA would require the participation of at least some of the registered nurses who worked at Evergreen." CP 560. Pugh states that an issue for appeal is:

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

Pugh Response at 2.

Even if a demonstration of legal standing was required in order for WSNA to settle its claim, which it is not, *see* WSNA Appeal Brief at pp. 15-17, the trial court and Pugh's conclusions regarding WSNA's standing are based on factual and legal error.

Pugh and the court below incorrectly assumed that because Evergreen did not keep adequate records of missed breaks, WSNA would be required to present the testimony of individual nurses in order to establish damages. Moreover, both Pugh and the court below wrongfully assumed that the participation of some nurses to establish damages would be fatal to WSNA's associational standing.

In wage and hour cases where employers have failed to keep adequate records, the employees are permitted to establish the extent of damages by "just and reasonable inference." *Anderson et al. v. Mt.*

Clemens Pottery Co., 328 U.S. 680, 687, 66 S.Ct. 1187 (1946) (superseded by statute on other grounds). "It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages." *Id.* at 688.

This "inference" can be, and routinely is, established through types of "representative testimony." *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040, 109 S.Ct. 864 (1989) (Ninth Circuit upheld a lower court's inference of violation for 28 employees based on testimony of five witnesses). In these circumstances, the courts recognize an exception to the "rule that precludes the recovery of uncertain and speculative damages." *Mt. Clemens, supra,* 328 U.S. at 688. "The burden is not on the employees to prove the precise extent of uncompensated work." *McLaughlin*, supra, 850 F.2d at 589. In these cases the trial courts ultimately have a "duty to estimate back wages," based on the representative testimony of employees. *Brock v. Seto*, 790 F.2d 1446, 1449 (9th Cir. 1986).

Nonetheless, even if the participation of some employees as witnesses deprived WSNA of associational standing, which it does not, it was unwarranted for the lower court to assume that WSNA would have to use employee testimony in its case to determine damages. Contrary to Pugh's assertions and the finding of the trial court, it is well established

that damages can be determined through means other than the testimony of employees at trial. See, e.g., *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 370-71 (4th Cir. 2011), cert. denied, 132 S.Ct. 1634 (2012) (damages for unpaid wages were established by expert studies using video surveillance).

Washington courts recognize this same principle when the employer has failed to keep records. *See Pellino v. Brink's Inc.,* 164 Wn. App. 668 (2011) (in class action for unpaid wages due for denied rest breaks, trial court relied on all types of evidence to determine damages in the absence of reliable records). The trial court erroneously found that the participation of some nurses as witnesses would necessarily deprive WSNA of associational standing, a conclusion already rejected by this Court in *Teamsters Local Union No. 117 v. Dep't of Corrections*, 145 Wn. App. 507, 513-514, 187 P.3d 754 (2008) , holding:

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

(footnote omitted) (emphasis added).[4]

There are no facts in this record that could support the trial court's assumption that WSNA would have had to use the testimony of individual nurses to prove damages and, if WSNA had decided to do so, that decision would not be a reason to eliminate its standing to pursue wages for its members.

J. Pugh And The Court Below Incorrectly Assert That Superior Court Civil Rule 23(e) Is Applicable In The Settlement Of A Lawsuit That Is Not A Class Action.

The court below ruled that judicial approval of WSNA's settlement of its associational suit was mandatory under Superior Court Civil Rule ("CR") 23(e). The trial court concluded that because the WSNA-Evergreen settlement did not meet the technical requirements of CR 23(e), the settlement was invalid. This was in error. Obviously, CR 23 applies to class actions but not every collective action is a class action subject to CR 23.[5] Associational suits are distinct from class actions. The Supreme Court has insisted on distinguishing associational suits from class

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[4] In Washington, labor unions in particular, using associational standing, have been important participants in the enforcement of employee benefits created by the Legislature.

[5] Federal courts have also made clear that the strict requirements of FRCP 23 are inapplicable to an opt-in collective action under the FLSA. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996), cert. denied, 519 U.S. 982 (1996); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). If the WSNA lawsuit against Evergreen is akin to a class action at all, it is like an "opt-in" class where each member must make an individual choice to participate and be bound by the class settlement.

actions. *See International Union, United Auto Workers v. Brock*, 477 U.S. 274, 289, 106 S.Ct. 2523 (1986) (where Secretary of Labor asked Supreme Court to "reconsider and reject the principles of associational standing set out in *Hunt*" and argued that "members of an association who wish to litigate common questions of law or fact against the same defendant [should] be permitted to proceed only pursuant to the class-action provisions of Federal Rule of Civil Procedure 23." The Supreme Court held: "[t]he Secretary's presentation… fails to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions."); *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978) (recognizing value in permitting associational suits, because "[a] class suit may be too cumbersome").

The intent behind CR 23(e) – to ensure fairness in class settlements, see WSNA Appeal brief, pp. 24-25 – is also inapplicable in this case where nurses had to take affirmative action to accept an individual settlement (similar to an *opt in* class action) and execute an

individual release and were not bound automatically by the WSNA-Evergreen settlement.[6]

For the same reason, Pugh's reliance on Judge Bork's concurring opinion in *TRAC v. Allnet Communication Services, Inc.*, 806 F.2d 1093 (D.C. Cir. 1986), is misplaced. Apart from the fact that his opinion is not binding in Washington, or even in the DC Circuit,[7] the reasons underlying Bork's fears in *TRAC* do not apply in this case. In *TRAC,* Bork explained: "if the association lost this suit, the question could arise later whether it had adequately represented the interests of its members so as to preclude them from bringing suit on their own." *Id.* at 1098 (Bork, J., concurring). Here, the settlement was not automatically binding on individual nurses, and there is no serious question of which members chose to be bound or not. There would not be a serious "burden" involved in determining which nurses opted to accept back pay, as Judge Bork feared in the *TRAC* concurrence, as each participating nurse made a knowing and voluntary decision to be bound.

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[6] *See also Martin v. Spring Break '83 Productions, LLC*, 688 F.3d 247, 256 (5th Cir. 2012) ("[t]he Settlement Agreement was a way to resolve a bona fide dispute as to the number of hours worked – not the rate at which Appellants would be paid for those hours – and though Appellants contend they are yet not satisfied, they received agreed-upon compensation for the disputed number of hours worked") (footnote omitted).

[7] *See, e.g., Rockford Principals and Supervisors Assoc. v. Bd. of Ed. of Rockford School Dist. No. 205*, 721 F. Supp. 948, (N.D. Ill. 1989) ("no per se rule exists with regard to associations seeking money damages on behalf of their members, although in some quarters there are rumblings that such a rule should exist") (citing Bork's *TRAC* concurrence)).

In the *TRAC* concurrence, Judge Bork also (unsuccessfully) advocated a *per se* rule against associational standing when money damages were involved by arguing:

> If the association prevailed and damage relief were granted, the court would then have to take steps through some new mechanism to assure that all appropriate members of the association are notified, or are included. Any shortcomings in this respect could again raise independent questions about the preclusive effect of such a judgment on those members.

Again, because the financial aspect of the WSNA-Evergreen settlement was *opt-in,*[8] there is not any kind of "burdensome question" about which nurses the settlement might have a "preclusive effect" on, and it is also unnecessary to inquire about how the members of the association were notified about the settlement. If the nurse opted in, signed a waiver, and accepted the check, then obviously the nurse was notified about the settlement, and obviously the settlement has a preclusive effect on that nurse. If the nurse did not accept the settlement check then the nurse is not bound by the settlement and there is no preclusive effect. The fears of "increas[ing] the burdens on the courts" raised by Judge Bork in his *TRAC* concurrence are not real in this case, and the *TRAC* concurrence does not support the partial summary judgment ruling below.

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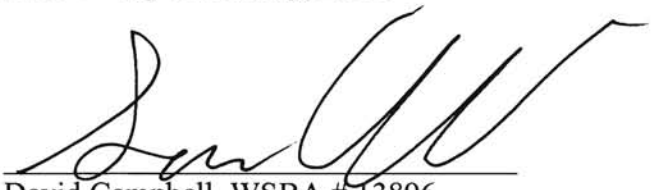
[8] Although the new labor polices in the WSNA-Evergreen settlement applied to all nurses.

As the trial court wrongly invalidated the WSNA-Evergreen settlement by finding that WSNA had no standing to pursue its associational suit and that the associational suit was subject to Civil Rule 23(e), its ruling was clearly in error and, accordingly, summary judgment should be reversed.

II. CONCLUSION

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

Respectfully submitted this 4th day of January, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2013, I caused the foregoing Reply Brief of Intervenor/Appellant Washington State Nurses Association and one true and correct copy of the same 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:

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