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No. 68651-8-I

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

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

Respondents

v.

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

Appellants,

WASHINGTON STATE NURSES ASSOCIATION,

Appellant/Intervenor

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

RESPONDENTS' BRIEF ANSWERING BRIEF OF APPELLANT/INTERVENOR WASHINGTON STATE NURSES ASSOCIATION

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I. INTRODUCTION

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

Upon learning that Ms. Pugh and Mr. Bowman intended to file this class action, WSNA filed its own claim on behalf of the same nurses in state court. When Ms. Pugh and Mr. Bowman intervened to challenge WSNA's standing to bring a claim for damages on their behalves, WSNA quickly entered into a settlement with Evergreen for nominal damages and dismissed its case before the court could resolve the standing issue. Pursuant to the settlement, Evergreen sent putative class members "settlement checks", and both WSNA and Evergreen sent the nurses letters encouraging them to accept the checks, misrepresenting the terms of the settlement and omitting material information about this class action.

WSNA then intervened in this case, to support Evergreen and prevent its members from obtaining additional compensation

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

II. STATEMENT OF ISSUES

1. 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.
2. Whether WSNA's inadequate representation, failure to disclose obvious conflicts of interest with its members, and failure to provide adequate notice about the settlement and this pending class action violated the due process rights of absent class members.

[1] WSNA claims in its brief that it also appeals the trial court's order certifying a class, but it fails to present any argument supporting its appeal on this issue. AB at 4. An appellate court will not consider an argument unsupported by citations to authority or to the record, or otherwise inadequately briefed. RAP 10.3(a)(6); State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). Accordingly, Respondents cannot respond to this issue here. Respondents do address issues related to class certification in response to Evergreen's appeal of that order. COA Appeal No. 68550-3-I.

3. Whether WSNA and Evergreen should have obtained court approval of their settlement when they notified nurses that the settlement would only become effective upon court approval, WSNA's standing to sue for damages was challenged, and the settlement terms compromised the claims in this pending class action case to which Evergreen was a party.

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

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

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

III. STATEMENT OF THE CASE

A. Two Overlapping Lawsuits Were Filed Against Evergreen Hospital.

In September 2010, Debra Pugh and Aaron Bowman filed this lawsuit on behalf of themselves and 1,300 other nurses (hereafter, "the Nurses") who worked for Evergreen Hospital and were denied their 10-minute rest breaks and 30-minute meal breaks required by the Washington Industrial Welfare Act, RCW 49.48 et seq. CP 1-5.

At the same time, the Washington State Nurses Association (WSNA) filed a similar suit seeking damages for the nurses for missed 10-minute rest breaks. [2] CP 283-287. Despite the existence of a collective bargaining agreement (CBA) between WSNA and Evergreen, which provided nurses with more generous rest breaks than state law requires and gave WSNA the right to arbitrate Evergreen's failure to provide them, WSNA inexplicably chose not to take any action under the CBA. CP 303-341; 343-377. [3] Instead, it filed a claim in King County Superior Court

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[2] Unlike the nurses' lawsuit, WSNA chose not to bring any <u>meal</u> break claim for the Nurses. CP 283-287.

[3] While WSNA claims that ensuring missed rest breaks for nurses is a "top priority" for the organization, undisputed evidence shows that WSNA was aware that Evergreen nurses were missing rest breaks as early as 2007. CP 130 (p. 15-16). And WSNA failed to take any formal action until September 2010 after it learned that Ms. Pugh intended to file this class action lawsuit. CP 94; Messitt Declaration in Support of Motion to Intervene in Case No. 10-2-32896-SEA, Sub #65.

alleging violation of the Industrial Welfare Act. CP 283-287. In its complaint, WSNA claimed it had associational standing to sue Evergreen for monetary damages on behalf of the nurses. CP 285.

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

As evidenced by Evergreen's Answer to WSNA's complaint, the issue of whether WSNA had standing to bring a claim for damages on behalf of the Nurses was immediately in dispute. CP 168 (Affirmative Defense No. 6). After a rebuffed effort to cooperate with WSNA on prosecuting the overlapping rest break claims, [4] the Nurses moved to intervene in WSNA's case on February 4, 2011. CP 289-301. They did so to challenge WSNA's standing to sue for damages on their behalf and to protect the nurses' interests in getting full back pay damages for missed breaks. CP 297-298.

But on February 10, 2011, before the trial court could rule on the Nurses' motion to intervene or decide the issue of standing, WSNA and Evergreen entered into a settlement agreement. CP 153-160. Under the agreement, WSNA settled the rest break claims of over 1,300 nurses for $375,000.[5] CP 155-156.

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[4] Detail about the attempts to cooperate can be found in the Nurses' Third Party Motion to Intervene. CP 295-297.

[5] This number represents approximately 5%-10% of the wages that Evergreen likely owes to nurses for breaks missed since September 2007. CP 124-125.

On February 18, 2011, WSNA and Evergreen filed a "joint motion" for court approval of their settlement. CP 186-198. The trial court set a March 18 hearing date on the motion and a briefing schedule. CP 162. By its express terms, the scheduling order provided a date upon which the Nurses could object to the settlement and challenge WSNA's standing to sue on their behalves for monetary damages—an issue that was raised by the nurses in their motion to intervene. Id.; CP 297-298. The deadline for filing objections was set for March 9, 2011. CP 162.

On March 2, 2011, a week before the deadline to file their objections to the settlement, the Nurses took the deposition of Evergreen through its CR 30(b)(6) representative, Kathleen Groen. CP 261. The subject matters included Evergreen's calculation of the amount owed nurses for missed breaks, whether there were records showing when nurses missed breaks, and how many breaks were missed. CP 261-281. At the deposition, Evergreen admitted that it calculated that it owed the nurses $600,000 in back pay, almost twice the $317,000 it would be paying them under the WSNA settlement. CP 274-276. And Evergreen admitted it had no evidence to dispute numerous declarations of nurses saying they regularly missed breaks. CP 262-281. Most significantly, however, Evergreen also admitted that it had no records showing when nurses missed breaks or the amount of back pay owed. CP

262-266.[6] All parties were aware that these admissions would be fatal to WSNA's claim that it had associational standing to seek damages on behalf of its members, because the Nurses briefed the issue in their Motion to Intervene that was set for oral argument three days later, on March 5, 2011. CP 289-301.

On March 4, 2011, a day before the hearing on the Nurses' Motion to Intervene, Evergreen and WSNA filed a stipulation to dismiss WSNA's lawsuit immediately. Accordingly, hearings on the issues of standing, intervention, and joint settlement approval were stricken.[7]

At this point in the litigation, the Nurses' counsel had been unable to contact the nearly 1,300 putative class members because Evergreen had refused to provide contact information for them. The Nurses moved to compel discovery of class members' contact information, so they could alert putative class members of their rights. CP 585-587. The Court ordered production and imposed costs under KCLR 37(d) on March 10, 2011. CP 585-587. Under

[6] On March 2, 2011, the same day as the Groen deposition, Evergreen served its answers to the Nurses' Requests for Admission where it admitted it had no documents showing how many rest breaks were missed, when, and by whom. CP 417-423.

[7] Because a hearing was never held, Judge Middaugh never considered the Nurses' arguments about standing. Accordingly, WSNA's claim that Judge Middaugh "rejected" the nurses' arguments about standing is erroneous. See AB at 14, Fn. 12. The Nurses appealed the order dismissing the lawsuit and striking the hearings. *See* COA No. 66857-9-I. On April 6, 2012, this Court granted The Nurses' motion to withdraw their appeal because the appeal was rendered moot by the trial court's decision in this case.

the terms of the order, however, Evergreen did not provide class member contact information until March 28, 2011, ten days after a protective order was entered on March 17, 2011. CP 588-590.

By that time, Evergreen had already sent "settlement checks" to the Nurses. CP 177 (dated March 17, 2011). On the rear of the check, Evergreen included a release of the Nurse's rest break claims, which would be executed by endorsement. CP 597. Neither the employer's process for obtaining the release by endorsement nor the release itself had been reviewed or approved by any court. Accompanying the check was a cover letter from Evergreen, which had also not been reviewed or approved by any court, and contained misleading and incomplete information about the settlement and this pending class action. CP 594-595.

WSNA also "notified" the Nurses about settlement by posting announcements and letters about the settlement on its website and mailing a letter to all "affected RNs." CP 55. These postings and letters had not been reviewed or approved by any court and also contained misrepresentations about the settlement and the class action. Furthermore, even though it was very likely in the best interest of many individual nurses to reject the settlement check, WSNA was forbidden from saying so under the terms of its settlement agreement, wherein WSNA agreed it would not "directly or indirectly, ... promote or encourage any . . . suits, causes of action or claims relating to obtaining back pay for missed rest

breaks for the Represented Employees." CP 457. WSNA also agreed to "hold Evergreen harmless from any claims of Represented Employees who have received back wages in accordance with and pursuant to this [settlement] Agreement." CP 456.

With only limited, self-serving, and misleading information provided by Evergreen and WSNA,[8] the vast majority of Evergreen nurses (and class members in this lawsuit) signed the endorsement on the back of the check and cashed it. CP 10. The majority did so before it was even possible for class counsel in this case to provide them with information about the inadequacies of the monetary settlement, WSNA's lack of standing to bring a damages lawsuit on their behalves, and their rights as putative class members in the pending class action. CP 49-50 (letter dated April 4, 2011).[9]

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

In light of the above events and in anticipation that

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[8] WSNA claims that it provided information about the settlement in "meetings" and "one-on-one's." AB at 11. However, it cannot say how many nurses of the over 300 current Evergreen employees and 1000 former Evergreen employees attended these meetings. Id.; CP 137 (p. 96).

[9] WSNA boasts that more than a dozen RNs offered declarations in support of the settlement as "fair." AB at 11-12 (Fn. 10). But those declarations are unpersuasive on the issue of "fairness" because they were drafted by WSNA's counsel and signed in February 2011, when nurses had only received self-serving information from WSNA and Evergreen and weeks before nurses could have received class counsel's letter about the settlement and this class action case. CP 465-509.

Evergreen would seek to exclude class members who cashed the "settlement checks", the Nurses amended the complaint in this lawsuit to include class representative, FloAnn Bautista, who had endorsed the settlement check. CP 34-42.

On August 8, 2011, the Nurses filed a motion for class certification. CP 11-33. While the Motion for Class Certification was pending, WSNA moved to intervene in this lawsuit to oppose and dispute that "the putative subclass of employees who accepted payment for missed rest breaks . . . are entitled to further compensation from the Defendant." CP 85-89. The motion to intervene was granted on October 17, 2011. Id.

On January 6, 2012, the Nurses filed a Motion for Partial Summary Judgment, asking the court to dismiss Intervenor WSNA's claim and Evergreen's defense that the "settlement checks" barred the Nurses from receiving full compensation for missed breaks in this class action. Evergreen and WSNA filed briefs in opposition to both motions, and oral argument was held on February 3, 2012 in King County Superior Court.

On March 14, 2012, Judge Harry McCarthy granted the Nurses' Motion for Class Certification. CP 548-551. On the same day, he granted the nurses' Motion for Partial Summary Judgment, concluding that the claims of class members who cashed "settlement checks" sent pursuant to WSNA's settlement with Evergreen were not barred from seeking further compensation in

this class action. CP 552-563.

On April 13, 2012, WSNA and Evergreen sought discretionary review of the trial court's decision. CP 564-584. On August 1, 2012, Commissioner Mary Neel granted review.

IV. ARGUMENT

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

In this case, the trial court properly concluded that (1) WSNA lacked associational standing to sue for damages on behalf of its members, (2) the settlement agreement between WSNA and Evergreen required court approval, and (3) the "settlement checks" only made available to nurses as part of the settlement did not bar

claims of nurses for full compensation owed for missed rest breaks in this class action. This Court should affirm and remand for trial.

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

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

When a union or other organization seeks to sue for relief on behalf of its members, it must show it has "associational standing." Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-214, 45 P.3d 186, 188-189 (2002). An association has standing to bring suit on behalf of its members when the following criteria are satisfied: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor relief requested

requires the participation of the organization's individual members. Id. at 213-214 (hereinafter referred to as the Firefighters test).

As a general matter, the third prong of the Firefighters test cannot be met when an association seeks monetary damages. "Monetary damages are distinguishable from injunctive relief, in that injunctive relief generally benefits every member of an employee association equally whereas the amount of monetary damages an employee suffers may vary from employee to employee." Id. at 214, citing, Warth v. Seldon, 422 U.S. 490, 515 (1975). It is primarily for this reason that no federal court has ever permitted an association to seek monetary relief on behalf of its members pursuant to a claim of associational standing. Id.; See also United Union of Roofers v. Ins. Corp. of Am., 919 F.2d 1398, 1400 (9th Cir. 1990); Ironworkers District Council v. University of Washington Board of Regents, 93 Wn. App. 735, 970 P.2d 351 (1999).

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

Under the facts of this case, WSNA lacked standing to sue for damages on behalf of its members because some degree of individual participation is required to compute the amount of unpaid wages owed to nurses for missed rest breaks. WSNA and Evergreen have both admitted that no records exist that show the amount of monetary relief owed to nurses for missed breaks. CP 417-423; CP 262-266. The complete lack of records distinguishes this case from every other Washington case where an association was permitted to sue for damages on behalf of its members.

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

here because there are no employer records documenting missed breaks. Because the amount due to each nurse is not "certain, easily ascertainable, or within the knowledge of [Evergreen]," WSNA did not have associational standing to sue for damages on behalf of its members under established Washington law.

This Court should reject WSNA's argument that because it could hire an expert to calculate damages, individual participation of its members is not necessary. AB at 19-22. First, WSNA did not present this argument to the trial court,[10] and even now fails to suggest how it would be possible for an expert to calculate damages in this case without individual member participation when no employer records exist. WSNA's claim is contradicted by the only case it cites as support, Pellino v. Brinks, 164 Wn. App. 668, 267 P.3d 383 (2011). First, Pellino was a class action by employees, not an associational case by a union. The rules of associational standing do not apply to class actions, which commonly rely on a variety of evidence to prove class damages.

Furthermore, by WSNA's own admission, in Pellino, an expert calculated damages by relying on "partial [employer] records" and "a representative sampling of employee testimony" to calculate damages." AB at 19. As in Pellino, even an expert's calculation of damages will require participation of at least a

[10] Notably, WSNA did not make any of the arguments presented in this appeal to the trial court. CP 510-515. In opposition to Plaintiff's Motion for Partial Summary Judgment, it refused to address the issues presented. Id.

sampling of WSNA members, which precludes WSNA's claim of associational standing under Firefighters.

For the above reasons, the court did not err in concluding that as a matter of law, WSNA lacked standing to bring a claim for damages on behalf of its members, and that its settlement of those claims could not bar the Nurses from obtaining further relief in this class action.[11] This Court should affirm this conclusion.

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

In addition to lacking standing to represent the nurses under Washington law, WSNA also failed to adequately represent the nurses and possessed a conflict of interest, which violated the due process rights of absent nurse class members.

An agreement, whereby a representative plaintiff purports to settle the claims of members of a class, may not be enforced against the due process rights of the absent class members where the representative plaintiff does not possess the same claim, or fails to adequately represent their interests, or has a conflict of

[11] In the commissioner's ruling, she suggests that the trial court concluded that WSNA lacked standing to bring a claim for injunctive relief. As stated in the Nurses' Motion to Modify, the trial court made a scrivener's error in citing the Firefighter's rule, but concluded only that WSNA lacked standing to bring a suit for damages. Ct. App. Commissioner's Decision dated 8/1/12; Motion to Modify at 1-3. It is undisputed that Firefighters stands for the proposition that a union may only represent its members on a claim for injunctive relief, but not damages (unless they can be calculated with certainty without member participation.) CP 105-107. ***WSNA's standing to bring a claim for injunctive relief was not an issue at the trial court level*** because no one argued that WSNA lacked standing to bring a claim for injunctive relief. CP 90-122; CP 517-547.

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

First, the record shows that WSNA did not vigorously prosecute the nurses' damages claim for missed rest breaks. CP 142 (p. 142). WSNA admits that it was primarily interested in the "processes and systems moving forward" to allow nurses to obtain rest breaks in the future, and that obtaining "back pay" for nurses was not its objective in settlement negotiations. CP 135 (p. 60); CP 142 (p. 142). WSNA restates this position in its brief to this Court. AB at 7, 24 (The primary goal of the Associational lawsuit was "to force hospitals to employ adequate nursing staff to ensure that

nurses are fully relieved from their duties during state-mandated rest breaks."). WSNA's utter disregard for its members' interests in monetary damages was illustrated by WSNA's decision to participate in mediation without even attempting to calculate what was actually owed to nurses for missed rest breaks. CP 135 (p. 59-60); CP 138 (p. 105). This reveals an insurmountable and obvious conflict of interest: WSNA's focus on processes "going forward," to the detriment of any interest in monetary damages, conflicts with the Nurses' interests in obtaining compensation due for past violations of their statutory rights, especially nurses who no longer work at Evergreen (and who make up the majority of the nearly 1,300 nurses in the class) and cannot therefore benefit from injunctive relief at all. WSNA admits that there was no one at its settlement mediation representing the interests of the former nurses. CP 147-148 (pp. 211-214).

Second, there was ample evidence that WSNA provided misleading, inaccurate, incomplete, and conflicting information about WSNA's lawsuit and settlement. CP 147 (pp. 212-213). Before Evergreen sent nurses a "settlement check," WSNA sent nurses a post-card claiming that the settlement was a "landmark" agreement and that it would result in increased staffing that would permit nurses to get their breaks. CP 151; See also CP 75 (WSNA and Evergreen have agreed to implement extensive changes . . . to ensure . . . that you are appropriately staffed to allow for

breaks . . ."; CP 84 (Evergreen will ensure . . . adequate staffing."). This information was inaccurate, as shown by WSNA's deposition testimony. In deposition, WSNA's representative admitted that it did not secure any agreement from Evergreen to increase staffing, despite the fact that increased staffing was necessary to ensure nurses received their breaks. AP 725 (p 15), 732 (p. 97, lines 14-15), 738 (p. 148, line 3); CP 66-67 (With regard to rest and meal breaks, "Staffing is of major interest to you all."); CP 58 ("This is really about adequate staffing to ensure . . .uninterrupted break[s]."). [12]

In addition, WSNA failed to make a number of significant and material disclosures about the settlement and WSNA's associational representation of its members. CP 75, 77, 81-82, 84. It failed to disclose:

(1) That the settlement did not require Evergreen to do anything that was not already required by Washington law; [13]

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[12] This deposition testimony conflicts with WSNA's claim in this appeal that the settlement agreement "improve[ed] working conditions" because it obligates Evergreen "to adequately staff its facility." AB 24, 27-29. The claim is also belied by the express terms of the settlement agreement, which does not include an obligation to increase staff at its facility. CP 453-455.

[13] In addition to increased staffing claims, WSNA has claimed that it secured more than the law requires because Evergreen agreed to pay missed rest breaks at an overtime rate. CP 454. However, this is already required under Wingert v. Yellow Freight Sys., 146 Wn.2d 841, 849 (2002); See WSNA v. Sacred Heart Medical Center, --Wn.2d – (October 25, 2012) (stating that Wingert stands for this proposition). WSNA also told nurses that they achieved changes through settlement that a court "could not have ordered," including changes in "timekeeping" which included "keep[ing records of missed breaks . . ." CP 81. This is already required by law. See RCW 49.46.070. In addition, WSNA failed

(2) Any details about the settlement and distribution formula created by WSNA that would be used to allocate the money;[14]

(3) That WSNA had a conflict of interest in representing both current and former employees for monetary relief;

(4) That WSNA's standing to bring a claim for damages had been challenged;

(5) That WSNA had never attempted to calculate back-pay owed to nurses prior to reaching settlement because it was not its "objective";

(6) That Evergreen had calculated it owed $600,000 in back wages for missed rest breaks before settling with WSNA for $375,000; CP 75, 77, 81-82, 84.

(7) How much settlement money would be used to pay to WSNA's attorneys, and

(8) That in fact, no court had reviewed the settlement for fairness or validity, despite the fact that previous communications assured nurses that the settlement agreement would become "*effective*" when approved by the Superior Court. CP 142 (p. 142); CP 138 (p. 103-105); CP 77 (stating the effective date of the

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to inform nurses that nearly all the other "changes" listed on the "settlement information sheet" are also already required by law or the existing collective bargaining agreement between Evergreen and WSNA. CP 81-82.

[14] Neither Evergreen nor WSNA told nurses that WSNA had agreed to settle on the basis that each nurse would receive a minimum of $300, but changed the distribution formula to favor nurses who had greater hours of work even if they rarely missed a rest break. CP 75, 77, 81-82, 84.

settlement agreement is "the date that King County Superior Court approves the settlement.); CP159 (settlement is contingent "in its entirety" upon approval by the court); CP 459. These omissions are material and failure to disclose them shows that WSNA inadequately represented the Nurses.

Third, the settlement agreement created a conflict of interest between WSNA and its members that prevented WSNA from providing adequate notice about the "settlement." As part of the settlement agreement, WSNA agreed it would not "directly or indirectly, ... promote or encourage any . . . suits, causes of action or claims relating to obtaining back pay for missed rest breaks for the Represented Employees."[15] CP 457. WSNA also agreed to "hold Evergreen harmless from any claims of Represented Employees who have received back wages in accordance with and pursuant to this [settlement] Agreement." CP 456. Accordingly, despite the fact that many of its members were owed thousands of dollars in back-pay for missed breaks and clearly may have benefited from refusing the settlement check and participating in this class action, WSNA was prohibited from telling them so, and had an enormous interest in their doing so ***because WSNA would have to indemnify Evergreen*** for any additional

[15] "Represented Nurses" included all nurses engaged in patient care at Evergreen Hospital from September 15, 2007 to the date of the agreement, including past and present Evergreen employees. CP 453.

compensation recovered. Indeed, WSNA admits that current Evergreen employees would benefit from the "new" rest break procedures going forward, "regardless of whether they accepted the check." AB at 13. WSNA never made this statement to the Nurses because it was forbidden from doing so under the terms of the settlement. Even now, when it is in the best interest of WSNA's individual members for this class action to go forward, WSNA continues to fight against its own members' interest through this appeal, because it is bound by its agreement to indemnify Evergreen from these class action claims regarding rest breaks. CP 456.

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

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

Civil Rule 23 governs class actions and it provides responsibilities and safeguards to protect the interests of absent class members. In such cases, the court must ascertain whether the representative parties will fairly and adequately protect the entire class and must see to it that class members learn of the action through "the best notice practicable." CR 23(b)(3) and

23(a)(4). CR 23 also provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."[16] CR 23(e). The purpose of the rule is fairly obvious. It protects those individuals who possess the claim at issue when they are being represented by another person or entity because they are absent from the lawsuit and are not pursuing the claim themselves. Collins v. Thompson, 679 F.2d 168, 172 (9th Cir. 1982) (the primary concern of CR 23(e) is to ensure that other unrepresented parties and the public interest are treated fairly by the settlement.). This safeguard also ensures that any "settlement is fair, adequate, and reasonable and is not the product of collusion between the parties." Pigford v. Glickman, 206 F.3d 1212, 1215 (D.C. Cir. 2000) (emphasis added). In this case, the trial court did not err by concluding that court approval of the settlement was required under the circumstances in this case because (1) as a party to this class action, Evergreen had a duty under CR 23(e) to obtain approval and (2) court review of the settlement was necessary to protect the due process rights of the Nurses.

[16] In 2003, the federal rules were changed to require court approval for only certified class actions; however, Washington declined to adopt this change to CR 23(e) and still requires court approval of compromise or dismissal of all class actions notwithstanding class certification. Compare FRCP 23(e) and FRCP 23(e)(repealed Dec. 1, 2003).

First, as a party to this class action case, Evergreen had a duty under the express terms of CR 23(e) to obtain court approval of its settlement with WSNA because the terms of the settlement "compromised" the claims of the putative class in this case. CP 456 (Evergreen and WSNA agreed that Evergreen would issue checks with release language to putative class members as part of the settlement). This triggered the notice of compromise requirement under CR 23, and putative class members were entitled to notice of the compromise in a manner directed by the court. CR 23(e). By failing to obtain court approval of this compromise of claims, Evergreen violated CR 23(e) as a party to this class action.

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

> This Agreement is contingent in its entirely upon approval by the King County Superior Court in the Lawsuit as may be deemed appropriate and necessary and/or required. The parties agree to fully cooperate to obtain the approval of the court.

CP 459; CP 175 (inviting nurses to view of copy of the settlement agreement).

They represented to the court that they would obtain court approval and requested a briefing schedule. CP 162. Evergreen and WSNA submitted a Joint Motion to Approve the Settlement. CP 186-198. And they represented to the Nurses that the settlement would not only be approved by the King County Superior Court, but it would not take effect until it was approved. CP 77, 84, 175, 459. Neither Evergreen nor WSNA corrected this misinformation; rather, they quietly dismissed the lawsuit before approval and executed the settlement. CP 84, 175.

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

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

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

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

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

> By seeking associational standing in this case, TRAC is trying to avoid some of the burdens imposed by the class action mechanism. Yet it could easily increase the burdens on the courts. As the court here points out, if this suit had been brought as a class action under Rule 23(b)(3) of the

> Federal Rules of Civil Procedure, then before the suit could proceed the court would ascertain whether the representative parties will fairly and adequately protect the entire class and make certain that class members learn of the action through the best notice practicable. See Fed. R. Civ. P. 23(a)(4) & 23(c)(2). In contrast, if the association lost this suit, the question could arise later whether it had adequately represented the interests of its members so as to preclude them from bringing suit on their own. A court would then have to rule on that independent claim and might have to hear subsequent suits. Cf. International Union, 106 S. Ct. at 2533 ("were we presented with evidence that such a problem existed either here or in cases of this type, we would have to consider how it might be alleviated"). In addition, if the association prevailed and damage relief were granted, the court would then have to take steps through some new mechanism to assure that all appropriate members of the association are notified, or are included. Any shortcomings in this respect could again raise independent questions about the preclusive effect of such a judgment on those members. These new problems would all arise from this unnecessary circumvention of established class action procedures.

TRAC, 806 F.2d at 1098 (Bork, J., concurring):

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

TRAC also confirms that when a party claims associational standing in an attempt to avoid CR 23, similar safeguards to those in CR 23 must be implemented, even if it is simply "through some

new mechanism" created by the court. Id. That is exactly what the trial court did here, and its decision that WSNA and Evergreen should have sought court approval of their settlement is consistent with the reasoning in TRAC.

Finally, the Court should reject WSNA's argument that the trial court's ruling was in error because of Washington's public policy favoring private settlement of disputes. AB at 15. Washington has an equal if not greater public policy interest in ensuring that employees are paid all wages to which they are entitled. See RCW 49.46.005; RCW 49.48; RCW 49.52; Pellino v. Brinks, 164 Wn. App. 668, 684 (2011) (Washington State has a "long and proud history of being a pioneer in the protection of employee rights."). Furthermore, Washington's interest in encouraging private settlements is limited. The law only favors the amicable settlement of claims when settlement is secured without fraud, misrepresentation, or overreaching. Woods v. Gamache, 14 Wn. App. 685, 687 (1975). As discussed in detail above, WSNA overreached by entering into a settlement for claims it did not have standing to bring and both WSNA and Evergreen obtained nurses' signatures through collusion and misrepresentation. Finally, WSNA cites no authority supporting its claim that Washington's public policy to encourage private settlement extends to parties who do not have standing to bring the claim in the first place.

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

The trial court concluded that the "settlement checks" could not bar nurses from pursuing further compensation in this class action. CP 562. The trial court did not err in reaching this conclusion for three reasons: First, as a matter of law, the "settlement checks" constitute an illegal kick-back of wages under RCW 49.52.050. Second, there is ample evidence in the record that the waivers were obtained through overreaching, fraud, and misrepresentation.

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

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

amount owed under contract or law is void as against public policy as an illegal rebate of wages. McDonald v. Wockner, 44 Wn.2d 261, 267 P.2d 97 (1954).

In Wockner, a car salesman was entitled to be paid under a union contract a commission on each car sold. Unhappy with the contract rate of pay, the car salesman solicited from his employer a different agreement. He and the employer entered into an agreement whereby, the salesman would be paid a set salary per month of $350 in lieu of the commissions owed under the contract. When it turned out that the salary paid him less than the commissions owed under the contract, he sued the employer for an illegal rebate of wages. Id. at 263-267. The trial court held that an agreement to be paid less than the amount owed under the union contract was void as against public policy as an illegal rebate of wages. Id. at 269. Accordingly, the court held that the acceptance by the employee of less than the amount actually owed under the contract did not bar his claim for full payment of all commissions owed. Id.

The Washington Supreme Court affirmed and held that the difference between what was paid by the employer in salary and what was owed the employee under the contract was an illegal rebate of wages under RCW 49.52.050(2). Id. at 271. It held that the employee's voluntary agreement to accept less than what was owed and then sue the employer might be unfair or even

reprehensible but the agreement was void as against public policy. Id. at 272; See also SPEEA v. Boeing Co., 92 Wn. App. 214, 220 (1998) ("Where an employer and employee "attempt to make a contract of employment in violation of the clearly expressed provision of the statute, the natural right of the employer and the employee to contract between themselves must . . . yield to what the legislature has established as the law." citing, Pillatos v. Hyde, 11 Wn.2d 403, 407, 119 P.2d 323 (1941)); Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 454, 298 P. 705 (1931) ("agreement to waive rights involving a question of public policy is void").)

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

It is also the case that the nurses are entitled to double the amount of wages unpaid because RCW 49.52.070 provides for

double damages where wages are wrongfully and intentionally withheld. The undisputed facts are that Evergreen sent checks to the nurses for missed rest breaks pursuant to the WSNA settlement on March 17, 2011 that totaled no more than $317,000, i.e. the $375,000 settlement amount less the $58,000 in WSNA attorney fees. AB at 10. But Evergreen admitted in deposition two weeks earlier on March 2, 2011 that it had estimated that it owed the nurse $600,000 in back wages for missed breaks, not $317,000. CP 274. This evidence supports a willful failure to pay wages, as well as an illegal rebate of wages entitling the nurses to double damages under RCW 49.52.070.

Since a nurse's agreement to accept and cash a settlement check for less than the amount owed in back pay for missed rest breaks is void as against public policy under Wockner and RCW 49.52.050, nurses who cashed their settlement check sent to them pursuant to the WSNA settlement are not barred from obtaining full recovery of the back wages owed and double damages under RCW 49.52.070. At most, the settlement payments may have provided Evergreen with a set off of back pay damages owed nurses for missed breaks who cashed their checks, but not a complete bar to their claim.

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

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

First, WSNA clearly engaged in overreaching when it entered into a settlement agreement to resolve claims it had no standing to bring and when there existed a clear conflict of interest between WSNA and former employees of Evergreen (the majority of the nearly 1,300 class members). Second, as described in detail above, both WSNA and Evergreen made material misrepresentations, and provided inaccurate, incomplete, and conflicting information about the settlement to the nurses before they cashed the "settlement checks." See supra pp. 18-22. Based on the record in this case, overreaching, fraud and misrepresentations occurred in procuring the agreement of the nurses to accept the amount tendered by Evergreen on their missed rest break claims. Accordingly, the waivers are unenforceable under Washington law.

V. CONCLUSION

For the foregoing reasons, Respondents request that this Court affirm the trial court's order concluding that (1) WSNA lacked associational standing to sue for damages on behalf of its members, (2) the settlement agreement between WSNA and Evergreen required court approval, and (3) the "settlement checks" only made available to nurses as part of the settlement do not bar additional compensation owed to nurses in this class action lawsuit.

DATED 7th day of November, 2012.

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CERTIFICATE OF SERVICE

I, Sylvia Louise Rollins, hereby certify that a true copy of the foregoing was served this 7th day of November, 2012, to the following attorneys of record via email and legal messenger:

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