NO. 68550-3-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellant,

WASHINGTON STATE NURSES ASSOCIATION,

Appellants.

AMICUS CURIAE BRIEF OF SKAGIT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a SKAGIT VALLEY HOSPITAL

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I. IDENTITY AND INTEREST OF AMICUS

Amicus curiae is Skagit County Public Hospital District No. 1, d/b/a Skagit Valley Hospital ("Skagit Valley" or "the District"). The District covers a portion of Skagit County.

Skagit Valley seeks to assist the Court's understanding of the implications of the questions presented beyond the litigants, particularly other major medical care providers. Skagit Valley supports reversal of the trial court's decision certifying the classes because the mere pleading standard adopted by the trial court will expose multi-site healthcare organizations to meritless class action claims used to leverage individualized disputes.

Skagit Valley serves a primarily rural population, but includes some urbanized areas. It operates ten primary and specialty care clinic facilities across Skagit, Island and North Snohomish Counties. Skagit Valley provides a broad range of primary and specialty care. At its flagship hospital, there are over 30 medical departments. The district also offers in-house hospice care across Northwest Washington, in cooperation with another public hospital district.

The duties of registered nurses often overlap with other health professionals. For example, at the District's Wound Care Center, registered nurses work alongside other health practitioners, including

nurse practitioners, ostomy nurses, LPNs, CNAs and Certified Wound Specialists.[1] These other health professionals are able to perform some of the same or complementary duties, and free RNs to attend to other matters, including break relief for RNs.[2] This is true not only in the District's Wound Care Center, but also in other practice areas where RNs work as part of a broader medical team.

II. ISSUES

A. Given the well-recognized potential that plaintiffs may seek to leverage individual claims through class actions, do mere allegations of similar injury meet the burden of proof imposed by CR 23?

B. Can the isolated experience of two nurses on the emergency department night shift, even with limited anecdotal support from a handful of other RNs from some departments at one facility, meet the plaintiffs' burden to prove they meet all requirements to bring the action as a class action?

C. Where a plaintiff provides no evidence that damages can be determined on a class-wide basis, has it met the burden to demonstrate that

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[1] *See* http://www.skagitvalleyhospital.org/program-services/hospital-services/wound-healing/ (visited *April 28, 2013*).

[2] *Compare* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Registered Nurses, on the Internet at http://www.bls.gov/ooh/healthcare/registered-nurses.htm (visited *April 28, 2013*) *with* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Licensed Practical and Licensed Vocational Nurses, on the Internet at http://www.bls.gov/ooh/healthcare/licensed-practical-and-licensed-vocational-nurses.htm (visited *April 28, 2013*).

common issues will predominate over individualized issues about whether a RN actually missed breaks?

III. STATEMENT OF THE CASE

Modern health care systems deliver medical services to a broad range of patients with myriad needs. Registered nurses are an important part of meeting patient needs. They may help treat patients with chronic conditions or acute medical needs. *See, e.g.,* CP 904-05, 921-22, 958-60. Surgical nurses assist doctors in the operating room while others help oversee patients' post-operative recovery while others still assist with scheduled diagnostic procedures. CP 926-27, 930-31, 935-36. Home health nurses provide their services off-site, operate independently and have different means of recording their time. CP 969-72.

Most registered nurses operate as part of medical teams, working alongside doctors. Other nursing professionals can perform some of the same duties as registered nurses, allowing registered nurses to focus on RN-specific duties. CP 704. In some departments, the duties of registered nurses overlap with duties of health professionals outside nursing. CP 906.

Two Emergency Department ("ED") registered nurses filed a class action, claiming to represent all of Evergreen's registered nurses and

asserting claims for missed rest and meal breaks.[3] The testimony from both plaintiffs and the defendant illustrates the substantial divergence of the witnesses' experience regarding whether meal and rest breaks were missed and whether the missed breaks were uncompensated. Nurses from some departments testified that registered nurses in those departments nearly always got their breaks. CP 840, 875. Nurses' own anecdotal experience varied where they worked in different departments or shifts. CP 710, 922.

Registered nurses within the same departments also testified to widely different experience in their ability to take rest or meal breaks. *Compare* CP 710 *with* CP 736; *compare* CP 799-800 *with* CP 940. As further example, one home health nurse testified that for over a year she missed every single rest and meal break every single day (CP 756-57), but also testified that she claimed the missed breaks and received overtime pay. CP 758. Another home health nurse testified that in her years of experience, she never found it difficult to take her rest and meal breaks. CP 970. Even the lead plaintiff acknowledged that registered nurses on other shifts in the ED almost always received their breaks. CP 1035.

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[3] Skagit Valley does not address questions regarding enforceability of the settlement agreement between EvergreenHealth and most of the nurses who would be included in the class. This should not be construed as a suggestion by Skagit Valley that the settlement should not be enforced, only that it is beyond the scope of this brief.

Plaintiffs' amended complaint alleges violation of Washington law for failure to provide required breaks, but does not allege breach of the Collective Bargaining Agreement. CP 103. While the claim is based on alleged failure to provide state-mandated 10 minute rest periods, much of the testimony from plaintiffs' witnesses addresses their ability to take 15 minute breaks (as provided by the contract with WSNA), not the shorter 10 minute period under state law. *See, e.g.,* CP 762, 772, 778, 792, 799.

"Downtime" when departments are not busy also varies, according to evidence from both parties. CP 764-65, 936. Other factual differences that could affect a nurse's ability to take breaks, full or intermittent, permeate the testimony (some nurses have private offices and can have food and drink at their desks, others work in patient treatment areas and cannot; some have fully scheduled treatment schedules, others have no scheduled patients). Some nurses brought hospital-issued cellular phones on their breaks in violation of hospital policy and were interrupted. Nurses who did not bring their phones on break were not. CP 712, 718, 724, 736.

The trial court granted the plaintiffs' motion to certify the class on the above record.

IV. ARGUMENT

A. The risk from improperly-brought class actions has long been recognized. That is why class plaintiffs must demonstrate actual compliance with both CR 23(a) and CR 23(b)(3) before certification.

Class actions carry with them great risk for defendants, particularly where, as here, plaintiffs bring class actions to resolve what are essentially individualized claims of missed meal or rest breaks. A class action carries with it much greater risk to a defendant than even a series of individual lawsuits raising similar claims. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995) (noting that defendants had prevailed in 12 of 13 individual cases, but that the "sheer magnitude" of risk from the class-based claims places defendants "under intense pressure to settle"). The requirement that a plaintiff must prove the prerequisites to certification is prophylactic and avoids potential abuse of the judicial process. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3rd Cir. 1995). "Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (internal citation omitted). These risks are not confined to mass tort class claims. They apply to class actions

generally. And, the risks posed by class-wide determinations have not abated. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "*in terrorem*" settlements that class actions entail . . . ." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011) (noting that risk applied to class arbitration as well). Federal courts have addressed these risks by vigorously enforcing the requirement that plaintiffs prove actual compliance with every prerequisite to bringing a class action. *See, e.g., Wal-Mart Stores v. Dukes,* 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

Washington's law is no different. Once a plaintiff has demonstrated that the four prerequisites of CR 23(a) have been met, the plaintiff "must further satisfy the tougher standard of CR 23(b)(3) and prove that common legal and factual issues *predominate* over individual issues and that a class action is an otherwise superior form of adjudication." *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 269, 259 P.3d 129 (2011) (emphasis in original); *see also Oda v. State*, 111 Wn. App. 79, 44 P.3d 8 (2002). The trial court absolved plaintiffs of demonstrating compliance by adopting a mere pleading standard, CP 1331, but its error was compounded by its failure to deny certification. The "tougher standard" of CR 23(b)(3) cannot be met when the issues are

how disparate and dispersed departments implement the details of a clear policy that rest and meal breaks are to be taken.

B. Two registered nurses from an Emergency Department night shift are not representative of a health care system's nurses, especially where the plaintiffs admit substantial dissimilarity of experience among other nurses in their department.

Under CR 23(a), the plaintiffs must demonstrate that their claims are typical of the claims of the class, and that they will fairly and adequately protect the interests of the class. Plaintiff Floann Bautista's interest in dismantling the settlement agreements between Evergreen and the registered nurses because she was unhappy that other nurses, who may not have missed rest breaks, received the same as or more than she did, CP 1043, clearly sets her at odds with the members of the class she hopes to represent. She cannot meet the CR 23(a)(4) requirement of fairly and adequately representing the interests of the class.

The claims of plaintiffs Debra Pugh and Aaron Bowman, both night shift ED nurses, are not typical of other putative class members. Mr. Bowman defined a rest break as a 15 minute block of time in which he completely transferred responsibility for patients, stepped away, and did not think about anything for 15 minutes. CP 1030. None of plaintiffs' other declarants seem to adopt his personal and atypical definition of a rest

break, which goes far beyond the requirements of WAC 296-126-092.[4] According to Mr. Bowman, he missed breaks even during "down time when [he] didn't have any patients or the patients had gone off for tests when [he] was not involved in any kind of patient care." CP 1029.

Similarly, Ms. Pugh claimed that she missed breaks on days that she spent significant time on the internet searching for another job. CP 961; *see also* CP 121. Ms. Pugh admitted that her experience on night shift differed from that of nurses on day shift in the ED: "Day shift pretty much always gets their breaks." CP 1035.

Mr. Bowman's and Ms. Pugh's experience in the ED was not even typical of other nurses on the same shift, where unlike other nurses, they refused to take breaks when offered and later complained about missing the breaks. CP 960-62. They even reported that they missed breaks when "there was simply no work load explanation for their asserted inability to take breaks." CP 961.

In a large health care system, the experiences and claims of two registered nurses from a single shift in a single department, particularly an ED, are not representative or typical of those of nurses in other departments.

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[4] Although many of the declarants address whether or not they took 15 minute rest breaks, they provided no evidence of whether they took the 10 minute breaks required under the regulation. *See, e.g.,* CP 762, 764-65, 792, 799-800.

C. Claims that a nurse did not a get rest or meal break on a given day or days are quintessentially individual claims. Issues of damages and liability will be intertwined, defeating the judicial economy that class actions are supposed to bring.

For large health care systems that have numerous medical departments with diverse methods of implementing common policies that nurses are entitled to rest and meal breaks, a nurse's claim that he or she did not take a break requires an individualized factual inquiry that determines both liability and the amount of damages. In contrast, claims alleging that a uniform policy consistently applied to a group of employees violates Washington's wage and hour laws are of the sort properly found suitable for class treatment.[5]

Like other large health care systems, Evergreen has numerous departments spread across multiple facilities, all of which are individually managed, where the registered nurses have diverse job duties, depending on the demands of each department. Evidence submitted by both plaintiffs and defendant shows that this diversity affects how breaks are administered. Individual managers and supervisors have the discretion and

[5] For example, in *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513, 532, 53 Cal. 4th 1004 (Cal. 2012), the employer adopted "a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required," and the court determined that class certification of the rest break claim was appropriate.

authority to determine the best method for providing breaks, depending on the needs and circumstances of their respective departments.

Plaintiffs provided no evidence of a uniform policy or practice to deprive registered nurses of rest or meal breaks. Evergreen's testimony of its policy was unrebutted. CP 115-16. Plaintiffs failed to demonstrate how liability and damages could be shown through common proof. Instead, the trial court was presented with anecdotal and conflicting evidence of (1) nurses who missed rest and/or meal breaks, reported the missed breaks, and were paid for the missed breaks; (2) nurses who missed rest and/or meal breaks, did not report the missed breaks, and were not paid; (3) nurses in some departments who never missed breaks; (4) nurses in some departments who always missed their breaks; (5) nurses on some shifts within a department who never missed breaks; (6) nurses whose meal breaks were interrupted because they violated Evergreen's policy by taking their cellular phones with them[6]; (7) nurses who were able to take intermittent rest breaks during their shifts.

The court concluded that common issues predominated on the rest and meal break claims despite a lack of evidence that the nurses were deprived of 10 minute rest breaks (as opposed to the contractual 15 minute

[6] *Compare* CP 712 *with* CP 718, 724, 736.

breaks)[7] and despite evidence that other health care professionals were available to relieve the registered nurses of their duties during their breaks. On this record, proof of both liability and damages would have to proceed on an employee-by-employee basis, with individual testimony on whether the nurse missed a break, whether the nurse had downtime on a shift supporting a defense that the nurse took an intermittent break, whether a nurse's meal break was interrupted because the nurse took a cellular phone on the break, and so on.

In an analogous setting of "a large, decentralized university, where departments have great autonomy in personnel decisions," class action treatment of employment discrimination claims is inappropriate. *Oda*, 111 Wn. App. at 100. "The fact that numerous individual decisions are made by a large number of department heads and deans means that there are 'individually tailored justifications' for the alleged discrimination in the case of each faculty member." *Id.* (*quoting Merrill v. S. Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986)). The same is true of a large, decentralized healthcare system.

VI. CONCLUSION

The trial court's decision certifying the class in this lawsuit represents a departure from the requirement that courts engage in a

[7] *See, e.g.*, CP 762, 764-65, 792, 799-800.

vigorous analysis of class certification requests. Skagit Valley requests that the Court reverse the trial court's certification decision and remand for a class certification analysis that complies with the requirements under CR 23.

Respectfully submitted this 7th day of May, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I filed the original of this document with the Court of Appeals, Division I, and delivered via ABC Legal Messengers a copy of this document to the following attorneys:

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Dated this 7th day of May, 2013.

Lynda Ha