No. 89637-2

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiffs/Petitioners,

v.

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

Defendant/Respondent,

WASHINGTON STATE NURSES ASSOCIATION,

Intervenor/Respondent.

INTERVENOR/RESPONDENT WSNA'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Respondent Washington State Nurses Association ("WSNA") is a 100-year-old labor organization which for nearly 40 years has represented the approximately 1,200 registered nurses ("RNs") employed by Evergreen Hospital.[1] Beginning in 2007, WSNA, relying on associational standing, filed several lawsuits against Washington hospitals which failed to provide state-mandated rest breaks. One such case reached this Court a year ago.[2] The instant petitions relate to WSNA's rest break case against Evergreen Hospital filed in 2010. Following active litigation, discovery, and arm's-length professional mediation, WSNA and Evergreen reached a precedent-setting agreement in 2011 which assured nurses would be fully relieved of duties for uninterrupted rest breaks. While related to the WSNA case against Evergreen, the instant petition actually arises from a different, later filed putative class action case in which the trial judge purported to invalidate the WSNA-Evergreen settlement reached earlier in WSNA's lawsuit. The Court of Appeals granted discretionary review of that decision and in two opinions, *Debra Pugh et. al v. Evergreen Hospital*

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[1] King County Hospital District No. 2 changed the name of its Kirkland-based hospital in 2014 but continues to be commonly known as Evergreen.

[2] In *Washington State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 832, 287 P.3d 516 (2012), this Court unanimously upheld the right to be paid statutory overtime when a missed rest break results in overtime hours worked, explaining:

> ...[C]ompensating employees who forgo their rest periods with overtime pay will help to ensure that employers continue to provide these breaks to their employees. Rest periods are mandatory and promote employee efficiency. 29 C.F.R. § 785. Further, rest periods help ensure nurses can maintain the necessary awareness and focus required to provide safe and quality patient care.

Medical Center a/k/a King County Public Hospital District No. 2 and Washington State Nurses Association, Nos. 68550-3-1 and 68651-8-1, reversed the trial court and reinstated the settlement agreement.[3] WSNA respectfully requests this Court deny review of the correctly decided Court of Appeals decisions.

COURT OF APPEALS OPINIONS

The Court of Appeals correctly held WSNA had associational standing to bring its lawsuit against Evergreen and that no judicial approval was required before WSNA settled its claims. The trial court held that WSNA lacked standing, holding that labor unions lack standing to seek injunctive relief in cases brought on behalf of their members. The Court of Appeals found obvious error and Petitioner Pugh now also concedes the trial court erred in so holding. While Pugh continues to press arguments regarding standing for monetary damages, it is now undisputed that WSNA had standing to bring, and then settle, its case against Evergreen.

The Court of Appeals also reversed the trial court's holding that Superior Court Civil Rule ("CR") 23 required judicial approval of the WSNA-Evergreen settlement. The Court of Appeals ruled, and now even Pugh concedes, that this holding was likewise error: judicial approval under CR 23 was not required. Having abandoned the CR 23 theory, Pugh asks this Court for a new, sweeping judicial approval requirement

[3] Petitioner filed two petitions, one addressing each opinion, as does WSNA.

for associational standing cases. As the Court of Appeals opinions are entirely consistent with well-established Washington law, review by this Court should be denied.

RESTATEMENT OF CASE

I. WSNA'S CAMPAIGN FOR REST BREAKS FOR NURSES

Since its founding a century ago, WSNA has sought to foster high standards of nursing and advance nurses' economic and general welfare, including improving their pay and working conditions. *See* Intervenor WSNA's Motion for Discretionary Review in companion case no. 68651-8-I, p. 1, ¶ 2. Despite mounting evidence demonstrating the importance of rest breaks for nurses to maintain the alertness and focus required to provide safe and quality patient care, many Washington state hospitals have failed to ensure nurses receive full, uninterrupted rest as required by WAC 296-126-092. The failure to provide rest breaks erodes nurses' working conditions by making their jobs more stressful, less successful, and ultimately unsustainable.

A denied rest break is a violation of this state's minimum working conditions, RCW 49.12 *et seq.*, WAC 296-126-092(4), and, in addition, if a hospital fails to treat the time the nurse should have been resting as additional time worked, a denied rest break is also a wage violation, *Washington State Nurses Ass'n ("WSNA") v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 830, 287 P.3d 516 (2012); *Wingert v. Yellow Freight,* 146

Wn.2d 841, 849, 50 P.3d 256 (2002). To enforce the rest break requirements and wage protection statutes, WSNA sued major Washington hospitals for their failure to provide continuous, uninterrupted rest breaks.[4] The objective of these lawsuits is to force hospitals to employ adequate nursing staff to ensure RNs are fully relieved from their duties during state-mandated rest periods, and to hold hospitals financially accountable when they failed to provide the required rest breaks. After WSNA filed its lawsuit against Evergreen in 2010, the Petitioners Debra Pugh and Aaron Bowman also filed a lawsuit against Evergreen, seeking class treatment and money damages for denied rest and meal breaks.[5]

II. WSNA'S LAWSUIT AGAINST EVERGREEN HOSPITAL

After filing its Complaint for injunctive relief and damages in 2010 against Evergreen, WSNA engaged in discovery by propounding interrogatories, requests for production, and requests for admission. CP 804, ¶ 2. Evergreen denied all liability and raised numerous affirmative defenses to the lawsuit, asserting that it complied with all Washington wage and hour requirements. CP 490-494. Furthermore, Evergreen claimed that RNs received "intermittent" rest periods—that is, brief

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[4] In addition to its lawsuit against Evergreen Hospital and Sacred Heart Medical Center, WSNA also brought the following lawsuits: *WSNA v. Providence Holy Family Hospital*, Spokane County Superior Court Case No. 10-2-04257-6, *WSNA v. MultiCare Health System d/b/a Good Samaritan Hospital*, Pierce County Superior Court Case Consolidated Case No. 10-2-10146-8, and *WSNA v. MultiCare Health System d/b/a Tacoma General Hospital*, Pierce County Superior Court Consolidated Case No. 10-2-10146-8.

[5] WSNA's lawsuit sought relief for denied rest periods, not meal periods, because Evergreen maintains a system to provide meal periods and pay for denied meal breaks.

periods of rest throughout their shifts—and therefore Evergreen was not liable for any missed rest periods. CP 491, ¶ 13.[6] Despite denying liability, Evergreen agreed to participate in mediation, and the parties retained Professor Cheryl Beckett of Gonzaga University School of Law. CP 177.

The parties met on January 31, 2011, and the daylong shuttle mediation resulted in a settlement agreement in which WSNA dismissed its lawsuit in exchange for going-forward changes in working conditions assuring RNs received their rest breaks. CP 804, ¶¶ 2-3; CP 241-248. Specifically, Evergreen agreed to implement new procedures for all departments and begin to keep records of any denied rest periods. CP 241-244. The parties agreed that the goal of the settlement was to enable every nurse to take rest periods, except in very unusual circumstances. *Id.* In the rare case a rest period was denied, in most cases, Evergreen agreed it would pay an RN denied a rest period 15 minutes of pay at the overtime rate. *Id.* Evergreen also agreed to provide WSNA with data on an ongoing basis so WSNA could ensure denied rest breaks occurred in only rare circumstances and each department was adequately providing relief for the nurses. *Id.* Evergreen also agreed to re-train any managers who attempted to discourage a nurse from taking a rest break or from recording

[6] "Intermittent" rest periods equivalent to ten minutes for each four hours worked are permissible under WAC 296-126-092 "where the nature of the work allows." WSNA contends that the nature of the work of nursing does not allow for intermittent breaks and RNs must receive uninterrupted block breaks, but many Washington hospitals do not agree.

a denied rest break. *Id.*

III. WSNA SETTLES ITS LAWSUIT WITH EVERGREEN BUT THE SETTLEMENT DOES NOT BIND INDIVIDUAL NURSES WHO MAY CHOOSE TO PARTICIPATE OR NOT.

In addition to the improved working conditions benefiting all RNs at the hospital, Evergreen further agreed that it would offer payments to RNs represented by WSNA, based on the number of hours they worked. CP 243-244, ¶ 1-2. Due to the inherent uncertainty of litigation and Evergreen's defenses to liability,[7] WSNA agreed to a settlement amount of $317,000, with the important proviso that individual RNs could reject the offers of payment and pursue their own claims.

Evergreen sent payments to the RNs with information about the offer of payment and options available to them. The Court of Appeals found the RNs were "provided ample notice of the settlement terms, including the option not to accept the individual checks and release their claims ... [and] ... were also well aware of the pending class action suit." *Pugh v. Evergreen Hospital Medical Center*, Wash. Ct. App. Div. I, No. 68550-3-I, Slip Op. at 8. In November 2010, Pugh herself had sent a mass email to Evergreen RNs stating: "I have filed a class action against Evergreen (this is separate from WSNA's lawsuit) and all staff at Evergreen are able to join the class action simply by calling the attorney

[7] Indeed, the question of what rate of pay was due was not resolved until two years later when this Court decided *WSNA, supra,* 175 Wn.2d 822, 830.

handling the case." CP 67. Evergreen's March 17, 2011, letters to the RNs stated:

> We 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, you participation in the Settlement Agreement with WSNA would remove you from the Pugh/Bowman lawsuit as to missed rest breaks.

CP 896-897.

WSNA also sent letters to the RNs which stated: "**you may refuse the settlement money that Evergreen will offer you and press your own claim for back wages.**" CP 82, 86-87, 89 (emphasis in original). WSNA held meetings at the hospital to explain the options and answered questions one-on-one with RNs. CP 59-60, 80, 82, 86-87. Pugh herself attended WSNA meetings on February 17 and March 8, 2011, and urged RNs to not accept the payments offered by Evergreen, handing out flyers detailing her objections and advertising the alternative class action. CR 54-55, 79.

On April 4, 2011, Pugh's counsel also mailed a letter to the RNs stating that by accepting the payment, they would release their claims. Pugh's attorneys urged the RNs to reject the check, claiming it was part of

a "sweetheart" deal between Evergreen and WSNA and that they could get more money by participating in the class action. CP 894; 899-900. While Pugh contends her counsel's letter was received too late for some RNs who had already decided to accept the settlement, in fact all RNs were fully informed of their options *prior* to the April 4, 2011, letter from Pugh's counsel.

The RNs understood that the WSNA-Evergreen settlement did not prejudice their rights to sue Evergreen for back pay. They were free to reject the tendered back pay and pursue their own action or participate in the *Pugh* lawsuit. All RNs could—considering their own working history —determine if the amount offered adequately compensated them for past denied rest periods.

After reaching a settlement, WSNA and Evergreen brought a joint motion for court approval, CP 510-522, which included affidavits from RNs regarding their approval of the settlement. CP 250-297.[8] Pugh

[8] Susan Hanser, an RN in the Med/Surg unit, said "I think that the settlement agreement between WSNA and Evergreen in this case is fair and that WSNA has fairly represented me and my coworkers. I am surprised at how quickly WSNA was able to settle this issue." CP 267, ¶ 10. Darla Mihovilich, an RN in the Post-anesthesia care unit, said "I think that this settlement is as fair as it can be given the situation." CP 252, ¶ 13. John Sincock, an RN in the OSNO department, said "I think that the settlement agreement between WSNA and Evergreen in this case is fair, and I am pleased with it overall." CP 263, ¶ 17. Karen Aziz Ketner, an RN in the CPC, said "I think that the settlement agreement between WSNA and Evergreen in this case is reasonable and fair. WSNA was very objective in their representation of our bargaining unit." CP 285, ¶ 11. Linda Alford, an RN in the PCU, said "I think that the settlement agreement between WSNA and Evergreen in this case is good, and that the changes this settlement will make at Evergreen will help staff morale." CP 289, ¶ 9. Gerrianne Nicholls, an RN in the Oncology unit, said "I think that the settlement agreement between WSNA and Evergreen in this case is absolutely fair. Recently, everything WSNA has done for the RNs is positive. They do a good job of representing the bargaining unit. I was surprised

objected. CP 448, ¶ 7. During a scheduling telephone conference call, which included Pugh's counsel, Judge Middaugh informed the parties that she believed the court lacked authority to approve the settlement because it was not brought as a class action lawsuit. CP 53, ¶ 5. Given the Judge's comments, the parties filed a stipulation acknowledging her statements on the court's authority and requested a dismissal. CP 1139-1141.[9] Pugh appealed the dismissal in the Court of Appeals, Division I, Case No. 66857-9. On March 19, 2012, Pugh voluntarily withdrew her request for Court of Appeals review of Judge Middaugh's March 3, 2011, Order dismissing the WSNA case. On April 6, 2012, the Court of Appeals terminated the review.

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how fast WSNA was able to settle this issue." CP 274, ¶ 10. Christen Bingaman, an RN in the PCU, said "I was surprised and glad when I heard about the settlement agreement between WSNA and Evergreen. The settlement sounds fair to me. WSNA does a good job representing me and my coworkers. I am impressed with how quickly WSNA was able to reach a settlement." CP 256, ¶ 10. Erica Hall, an RN in the Oncology Unit, said "I think that the settlement agreement between WSNA and Evergreen in this case sounds fair. WSNA has done a good job representing me and the bargaining unit." CP 281, ¶ 10. Sue Dunlap, a Home Health Services RN, said "I think that the settlement agreement between WSNA and Evergreen in this case sounds wonderful. I am happy with the way WSNA represents me and my coworkers. I am ecstatic with the time frame in which WSNA was able to settle this issue. This is a real win for RNs." CP 278, ¶ 8. Audrey Clark, an RN in the Family Maternity Center, said, "I think that the settlement agreement between WSNA and Evergreen in this case is great, and that it is fair for all parties." CP 293, ¶ 9. Linda Morrill Sterritt, an RN in the Emergency Room, said "I support this settlement... I think that the settlement between WSNA and Evergreen in this case is fair." CP 296, ¶¶ 12-13. Cynthia Collette, an RN in Maternal-Fetal Medicine, said "I think the settlement is fair." CP 271, ¶ 10.

[9] The parties stipulation stated: "Due in part to the Court's comments on February 25, 2011, including with regard to its authority or lack thereof to approve the settlement, the parties have determined that Court approval of the parties' settlement is not necessary or required." CP 1139.

Pugh made the same arguments regarding WSNA's standing that were rejected by Judge Middaugh to Judge McCarthy, the King County Superior Court Judge assigned to *Pugh et al. v. Evergreen.* CP 414-446. Pugh moved the trial court to collaterally nullify WSNA's standing in the settled and now dismissed lawsuit in front of Judge Middaugh. *Id.* On Pugh's motion, the trial court invalidated the WSNA-Evergreen settlement. CP 1334-1345. It found that WSNA's lack of standing in its earlier lawsuit against Evergreen precluded it from reaching a settlement with Evergreen and therefore the individual release agreements obtained by Evergreen were also invalid. CP 1334-1345. The trial court also found the WSNA-Evergreen settlement required judicial approval pursuant to CR 23. *Id.* It is this decision the Court of Appeals found to be in error.

ARGUMENT

I. THE COURT OF APPEALS INTERLOCUTORY DECISION REMANDED THE PUGH CASE FOR FURTHER PROCEEDINGS. AS THE COURT OF APPEALS DECISION PRESERVES THE *STATUS QUO* BY LEAVING IN PLACE A SETTLEMENT THAT ENSURES NURSES RECEIVE REST BREAKS, RAP 13.5 PRECLUDES REVIEW EVEN ASSUMING *ARGUENDO* PROBABLE LEGAL ERROR.

A. The Court Of Appeals Granted Discretionary Interlocutory Review Under RAP 2.3(b) And, After Reversing Some Of The Trial Court's Rulings, Remanded The Case For Further Proceedings. Therefore, Review By This Court Should Be Denied Unless, In Addition To Finding Probable Legal Error, This Court Finds That The Court Of Appeals Decision Substantially Altered The *Status Quo.*

At the outset, it appears Pugh may have incorrectly sought review by this Court of an interlocutory decision pursuant to RAP 13.4 rather than RAP 13.5. Review under RAP 13.4 is reserved for decisions "terminating review." In contrast, RAP 13.5 is proper for a "party seeking review by the Supreme Court of an interlocutory decision..." Here, where Pugh seeks review of Court of Appeals decisions rejecting the trial court's order granting Pugh's motion for partial summary judgment and remanding class certification for reevaluation by the trial court, the decision is interlocutory. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 464-65, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) (concluding that "a refusal to certify a class is inherently interlocutory"); *Pickett v. Holland American Line-Westours, Inc.*, 145 Wn.2d 178, 182, 35 P.3d 178 (2001) (noting that review of a denial of class certification was interlocutory).

Under RAP 13.5(b), review by this Court is only appropriate where (1) the Court of Appeals has committed an obvious error which would render further proceedings useless; or (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the *status quo* or substantially limits the freedom of a party to act; or (3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

Pugh does not argue that the circumstances described in RAP

13.5(b)(1) or (3) are present here. Consequently, for this Court to accept review under RAP 13.5, Pugh would need to demonstrate that the Court of Appeals committed probable legal error *and* that its decisions substantially altered the *status quo*. Pugh has not and cannot do so.

B. The Court Of Appeals Decision Preserves A Historic Settlement Which Helps Assure Nurse Health And Patient Safety, Allows Nurses To Retain Settlement Funds Collected Several Years Ago, and In No Way Limits Pugh's Right To Pursue Remaining Claims.

The settlement between Evergreen and WSNA obligates Evergreen to adequately staff its facility so nurses are not denied rest breaks, provides for penalty pay at the overtime rate for denied rest periods, and imposes other obligations on Evergreen above and beyond state law. CP 241-243. It thus assures nurse health and patient safety in accord with this Court's decision in *WSNA, supra,* 175 Wn.2d ("[r]est periods...promote employees efficiency [and]...help ensure nurses can maintain the necessary awareness and focus required to provide safe and quality patient care"). Nor, importantly, does the WSNA-Evergreen settlement limit Pugh's rights to pursue remaining claims for denied meal breaks or claims for nurses who did not elect to receive settlement funds and release their claims. Thus, even assuming *arguendo* the Court of Appeals committed probable error, Pugh cannot meet the requirements of RAP 13.5 for review by this Court.

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II. ASSUMING *ARGUENDO* THAT PUGH PROPERLY SOUGHT REVIEW UNDER RAP 13.4, PUGH'S NEW THEORY OF AN IMPLIED JUDICIAL APPROVAL REQUIREMENT FOR ASSOCIATIONAL STANDING CASES DOES NOT WARRANT CONSIDERATION BY THIS COURT.

As a threshold matter, Pugh argues for review under RAP 13.4(b)(3), which permits acceptance of review for a significant question of constitutional law, and RAP 13.4(b)(4), which permits review for a question of substantial public interest. However, no authority is cited to support a constitutional claim. Nor does the Petition articulate the purported substantial public interest. As this Court has recognized, "arguments unsupported by any authority will not be considered on appeal." *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998).

A. For The First Time, Pugh Argues This Court Should Require Court Approval Of Associational Settlements Not Because CR 23 Applies, But Because Of A Court's "Inherent Authority" To Do So. Because This Argument Was Not Raised Below, It Is Not Properly Reviewed Here By This Court.

Generally, "[a]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008); RAP 2.5; *see also Washburn v. Beatt Equipment, Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992) ("Arguments or theories not presented to the trial court will generally not be considered on appeal."). Further, "[a]n appellate court

may dispose of an issue by applying a theory which was not precisely raised on appeal only if the trial court was adequately apprised of the party's position." *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993).

Pugh has never before advanced the argument she now makes: that the trial court should have reviewed and approved the WSNA-Evergreen settlement *not* pursuant to CR 23(e) as she argued below, but under its "inherent authority to manage and supervise the disputes that come before it."[10] The trial court granted partial summary judgment for Pugh, concluding that "[n]otwithstanding Evergreen's and WSBA's [*sic*] explanations and arguments to the contrary, court approval of their settlement was not optional and it should have been obtained as mandated by CR 23(e)." CP 1342-1343. The trial court cited *Pickett, supra,* 145 Wn.2d 178, a case addressing CR 23 court approval of class action settlements. CP 1343. Pugh did not raise the argument that it was within the trial court's inherent power to require settlement approval before the Court of Appeals.[11] Petitioner cites no case or rule requiring judicial

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[10] Petition for Review at 15.

[11] In her briefing before the Court of Appeals, Pugh focused again on CR 23(e) requirements for court approval of settlements. *See* Respondents' Brief Answering Brief of Appellant/Intervenor WSNA, at pp. 22-23, in companion case *Pugh v. Evergreen Hospital Medical Center*, Wash. Ct. App. Div. I, No. 68651-8-I. Even when the Court of Appeals asked for supplemental briefing on "whether WSNA's settlement agreement needed court approval," Pugh continued to rely on the requirement of CR 23(e) as the basis of her argument. Respondent's Supplemental Brief at pp. 1, 3, 8-10, *Id.* Moreover, the Court of Appeals opinion addressing whether court approval of the Settlement was necessary addressed only whether CR 23(e) mandates such approval ("WSNA's suit was not brought as a class...Thus, CR 23(e) does not apply here and court approval of the

approval of non-class action settlements outside of CR 23. Extending required pre-settlement approval to a whole class of new cases would impact the complexity of litigation, the mediation process, and the certainty and desirability of settlement. Assuming *arguendo* such an expansion warranted consideration, it should not be adopted whole cloth on an interlocutory appeal in a case where the issue was neither argued nor ruled upon below.

B. Adopting A New Doctrine Of Judicial Approval As Proposed By Pugh Is Particularly Inappropriate Here, As The Settlement Agreement Did Not Bind Or Preclude The Claims Of Individual Nurses And Each Exercised An Informed Choice.

Petitioner's argument for a new judicial settlement process assumes, inaccurately, the WSNA settlement precluded nurses from asserting their statutory rights. This is factually incorrect. The Court of Appeals explained:

> Pugh argues that by failing to obtain court approval, Evergreen denied the RNs due process by providing insufficient notice of the settlement and depriving them an opportunity to be heard. But as Evergreen contends, the settlement did not in fact "compromise" the claims of the putative class members; it resolved only WSNA's claim and simply offered checks to and sought releases from those RNs who chose to settle their individual claims. Thus, none of the putative class members were bound by

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settlement was not required...", *Pugh v. Evergreen Hospital Medical Center*, Wash. Ct. App. Div. I, No. 68550-3-1, Slip Op. at 7. The Court of Appeals expressly dismissed Pugh's contention, "that even if the WSNA suit was not a class action, Evergreen still had a duty to obtain court approval for the settlement under CR 23(e) because it compromised the claims of the putative class in the class action case." *Id.* at 8.

> the settlement or released their individual claims unless they affirmatively chose to do so by accepting the check. The settlement simply bound the WSNA, Evergreen, and those nurses who opted to accept the individual settlement checks.

Pugh, Wash. Ct. App. Div. I, No. 68550-3-I, Slip Op. at 8.

As for the claim that individual nurses were somehow duped by their union or unaware of their choices, the Court of Appeals held:

> Moreover, the RNs were not denied due process rights to notice and opportunity to be heard. They were provided ample notice of the settlement terms, including the option not to accept the individual checks and release their claims. They were also well aware of the pending class action suit and that they had the choice to pursue their individual claims by joining that lawsuit. In fact, 19 of the RNs affirmatively refused to accept the settlement checks.

Id., Slip Op. at 8 (emphasis added).

In short, there were no secrets and no one's right to sue was compromised by the settlement other than WSNA's. This case falls far short of a significant constitutional question under 13.4(b)(3).

III. PETITIONER'S NEW, UNTETHERED THEORY OF JUDICIAL APPROVAL OF PRIVATE SETTLEMENTS MUST BE REJECTED, AS IT HAS NO BASIS IN THE CIVIL RULES OR CASE LAW AND IS IN SHARP OPPOSITION TO THIS COURT'S LONG HISTORY OF ALLOWING ASSOCIATIONS TO ACT FOR THEIR MEMBERS.

A. The Court Of Appeals Correctly Held The Trial Court Lacked Authority To Invalidate The Settlement Because WSNA's Suit Was Not A Class Action.

WSNA's suit was not a class action and CR 23 did not apply. Pugh acknowledges these clear facts in her Petition for Review, stating

that "CR 23.2 does not apply here, where WSNA has not joined any of its members as party plaintiffs" and conceding CR 23(e) does not automatically apply. Petition for Review at 17, 18. The Court of Appeals correctly held that the trial court lacked authority to approve the settlement because the suit was not a class action. Slip Op. at 7.

B. Petitioner's New Theory Regarding Judicial Approval of Private Settlements Has No Legal Basis.

Lacking another rationale to refute the Court of Appeals' decision, Pugh creates a new, untethered theory in her Petition for Review. She now argues that even though this is not a class action and CR 23 does not technically apply, judicial approval is still required, relying on *Diaz v. Trust Territory of the Pacific Islands,* 876 F.2d 1401, 1408 (9th Cir. 1989). *Diaz* is a federal *class action* lawsuit holding that Fed. R. Civ. P. 23(e) applies to class action settlements before a class has been certified, and is inapposite here. Indeed, all of the cases Pugh cites in support of her argument that the Court should "extend the safeguards" of CR 23(e) involve only federal class actions. See *Mahan et. al., v. Trex,* 2010 WL 4916417 (N.D. Cal., November 22, 2010); *Lyons v. Bank of America,* 2012 WL 5940846 (N.D. Cal., November 27, 2012). Not only are *Diaz, Mahan* and *Lyons* class action cases, they are also federal cases that interpret Fed. R. Civ. P. 23(e), a rule dissimilar to CR 23(e) and inapplicable to a Washington state suit.

Similarly, neither *International Union, United Auto, Aerospace &*

Agr. Implement Workers v. Brock, 477 U.S. 274, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986), nor the concurrence in *TRAC v. Allnet Communication Services,* 806 F.2d 1093, 1098 (D.C. Cir. 1986), cited by Pugh, support an expansion of the trial court's role by requiring the court to approve and authorize private settlements. Indeed, *UAW v. Brock* affirms the doctrine of associational standing and "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Id.* at 290. These decisions do not allow or propose the expansion of CR 23 court approval into private settlements.

C. Petitioner's New Theory Regarding Judicial Approval Of Private Settlements Flies In The Face Of Washington State's Long History Of Allowing Associations To Act For Their Members.

WSNA's suit was based on Washington state law permitting associations to bring lawsuits on behalf of their injured members. As early as 1949, Washington courts have held that labor unions, as associations, may represent workers' interests in legal actions. *SAVE v. City of Bothell,* 89 Wn.2d 862, 866, 576 P.2d 401, 403-404 (1978) (citing *Boilermakers Local 104 v. Int'l Bhd. of Boilermakers,* 33 Wn.2d 1, 203 P.2d 401 (1949)). Courts have affirmed and strengthened these associational rights over time, recognizing that the right of an association to sue to vindicate the interests of its members benefits not only the members but also the court system. *See UAW v. Brock, supra,* 477 U.S. at 290; *SAVE,* 89 Wn.2d

at 867 (when litigation is too costly for individuals and a class action too cumbersome, an association can be the simplest vehicle to redress injury); *International Ass'n of Firefighters v. Spokane Airports,* 146 Wn.2d 207, 216, 45 P.3d 186 (2002) (associational suits may include monetary relief where individual participation is not required, as otherwise the court "would likely burden individual members of the employee association economically and would almost certainly burden our courts with an increased number of lawsuits arising out of identical facts").

Pugh's attempt to require judicial approval of private settlements of association cases entirely contradicts this long line of associational standing cases in Washington state. The Court should reject Pugh's attempt to expand judicial approval of private settlements, as it not only lacks any basis in statutory or common law, but is also contrary to established Washington precedent regarding associational standing.

CONCLUSION

The arguments presented in the Petition for Review are without merit and Pugh has not met the requirements of RAP 13. Accordingly, the Petition for Review should be denied.

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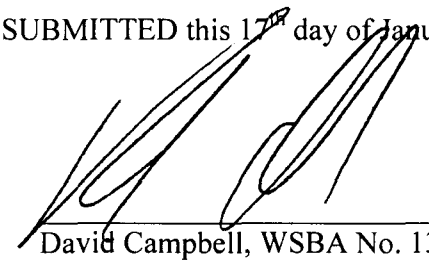
RESPECTFULLY SUBMITTED this 17th day of January, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2014, I caused the foregoing Answer to Petition for Review to be filed with the Washington State Supreme Court, and true and correct copies of the same to be sent via email and U.S. First Class Mail, per agreement of counsel, to:

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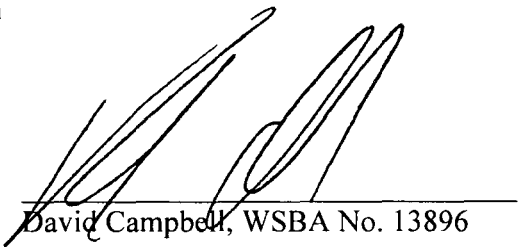

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From: Carrie Fassler [mailto:fassler@workerlaw.com]
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To: OFFICE RECEPTIONIST, CLERK
Cc: David Campbell; Carson Glickman-Flora; Jude Bryan
Subject: Filing in WA Supreme Court Case No. 89637-2

Good Afternoon,

Attached please find Intervenor/Respondent Washington State Nurses Association's Answer to Petition for Review for filing in *Debra Pugh, et al. v. Evergreen Hospital Medical Center and Washington State Nurses Association,* Supreme Court Case No. 89637-2. If you have any trouble opening the document please let me know.

Sincerely,

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