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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 situated,

Plaintiffs/Respondents,

v.

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

Defendant/Appellant,

WASHINGTON STATE NURSES ASSOCIATION,

Intervenor/Appellant.

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

REPLY BRIEF OF APPELLANT KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, D/B/A EVERGREEN HOSPITAL MEDICAL CENTER

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I. INTRODUCTION

Private settlement of disputes between parties is strongly favored for both policy and practical reasons. The parties have knowledge of the strengths and weaknesses of their claims and are best positioned to judge the fairness of a settlement to them. At the request of a stranger, dissatisfied both with her own decision to settle and the notion that others who settled had less meritorious claims, the trial court set aside over 1,100 individual settlements and releases. It should have upheld the release by Ms. Bautista of her individual claims and rejected her effort to set aside settlements entered into by others.

Class actions are for resolution of common questions of fact and law, not to stitch together claims where common facts are absent, individualized fact-finding is needed, or where legal defenses require individualized proof. Allegations by two RNs from the night shift of the Emergency Department at the District are no basis for class certification across the entire hospital system, even had the allegations not been contradicted by their own testimony and substantial evidence provided by the District. Class certification should have been denied because the plaintiffs did not comply with the mandate to demonstrate compliance with each prerequisite of CR 23.

II. ARGUMENT

A. The District was free to settle with individual RNs, and those who settled their rest break claims are precluded from pursuing them further in this lawsuit. The WSNA Settlement had no preclusive effect on those claims.

Before a class is certified, a defendant may communicate with putative class members to offer settlement. Judge Canova properly rejected plaintiffs' attempt to prohibit the District from sending settlement offers and checks to the putative class members. The communications regarding settlement from the District to the RNs were straightforward, clear, and non-coercive. There is no basis to invalidate the releases.

Plaintiffs' attacks on WSNA's standing and representation of RNs and arguments about CR 23(e), even if correct, would not affect individual releases. Plaintiffs overlook the crucial fact that the WSNA Settlement had no preclusive effect on the RNs' rest break claims. RNs who did not accept the settlement checks remain free to pursue their own claims for missed rest breaks.

1. The RNs and the District are allowed to settle individual claims before certification, without approval from the court or putative class representatives.

Rule 23(e) permits a defendant to settle with potential class members before certification. *Christensen v. Kiewit-Murdock Inv. Corp.,* 815 F.2d 206, 213 (2nd Cir. 1987); *The Kay Co. v. Equitable Prod. Co.*, 246 F.R.D. 260, 262-63 (S.D. W. Va. 2007); *In re M.L. Stern Overtime Litig.*, 250

F.R.D. 492, 500 (S.D. Cal. 2008) (defendant may communicate with potential class members, account executives claiming missed breaks, regarding settlement offer and release); *EEOC v. McDonnell Douglas Corp.*, 948 F. Supp. 54, 55 (E.D. Mo. 1996) (defendant may communicate with employees to offer settlement, assert innocence, and speculate on EEOC's chance of success, if not misleading or unduly coercive); *Jankousky v. Jewel Co.*, 538 N.E.2d 689, 767 (Ill. App. 1989) (defendants may negotiate settlement prior to certification and need not inform putative class members of existence of class action).

Under the policy of encouraging settlements before certification, a plaintiff has no right "to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this" and "plaintiff has no legally protected right to sue on behalf of [potential class members] who prefer to settle." *Weight Watchers of Phil. v. Weight Watchers Int'l*, 455 F.2d 770, 773, 775 (2nd Cir. 1972); *see also Nesenoff v. Muten*, 67 F.R.D. 500, 503 n.4 (E.D.N.Y. 1974) ("Rule 23(e) . . . is not intended to insure court supervision of the settlement of potential class member claims with a view towards the economic viability of intervention or commencement of separate lawsuits in the event that the numerosity requirement is eliminated."); Debra Lyn Bassett, *Pre-certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353,

356 (2002) ("Until the class is certified, opposing counsel may conduct ex parte interviews, obtain statements regarding the matter in controversy, and negotiate settlements – all without the consent of, or even without notifying, class counsel.") (internal citations omitted).

Plaintiffs argue that court approval of the WSNA Settlement was required under CR 23(e) because the Agreement "compromised" the claims of the putative class. They are wrong both factually and legally.

Factually, the WSNA Settlement did not compromise any claims of putative class members.[1] Instead, it resolved WSNA's claims and established a settlement fund from which to offer checks and individual releases from RNs. Each individual release compromised only the rest break claim of the RN who accepted a check.

Legally, CR 23(e) is inapplicable because the WSNA lawsuit was not a class action. Plaintiffs' real argument appears to be that the District could not settle with individual RNs who were potential members of the class action. They made the same argument when this case was assigned to Judge Canova, asserting that Evergreen "should not be permitted to

[1] This is why plaintiffs' due process argument is without merit. Unlike the cases plaintiffs rely on, the RNs were not bound by the WSNA Settlement. In her concurring and dissenting opinion in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996), Justice Ginsberg emphasized procedural due process requirements for class action judgments and settlements that have preclusive effect on class members. Similarly, *In re Prudential Ins. Co.*, 148 F.3d 283, 306 (3rd Cir. 1998) dealt with a settlement that was binding on all class members.

obtain a release from the nurses of their claims in this lawsuit in its communications with putative class members." CP 14. Judge Canova rejected the argument and denied plaintiffs' motion to prevent the District from sending settlement checks to the RNs. CP 93-94.[2]

Judge McCarthy erred in ruling that CR 23(e) required court approval of the settlement between the District and WSNA. Judge Canova correctly ruled that court approval was not required of the District's subsequent settlements with the individual RNs. This Court should reverse Judge McCarthy's ruling and affirm Judge Canova's.

2. Plaintiffs' standing and adequate representation arguments miss the mark because the WSNA Settlement does not preclude RNs from pursuing rest break claims.

Plaintiffs' standing and adequate representation arguments are based on their mischaracterization of the WSNA Settlement. Plaintiffs assert the WSNA Settlement purports to preclude the RNs from pursuing claims for missed rest breaks, but it contains no such provision. Neither the District nor WSNA has ever argued that it bars a claim regarding missed rest breaks. Instead, the District made separate settlement offers to the RNs, clearly informing them of the results of accepting the enclosed check:

> Please understand that if you endorse and deposit or cash the check, you will acknowledge waiver and settlement in full of

[2] The District did not send the settlement checks and letter to the RNs until after Judge Canova's ruling. CP 115, 127-28.

> all claims you may have arising out of possible missed rest breaks during the period from September 15, 2007 to the date you deposit or cash the check, as well as acceptance of the Settlement Agreement.

CP 127. The letter informed the RNs of plaintiffs' lawsuit and that accepting the check would preclude participation in the class action. *Id.*

Plaintiffs' attack on WSNA as an inadequate representative makes clear that their argument is only relevant if the District were to argue that the WSNA Settlement, by itself, precludes the RNs from pursuing rest break claims. Resp'ts Br. at 33 ("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 . . . fails to adequately represent their interests . . . ."). The three cases plaintiffs rely on, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), and *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), all involve class actions and address the preclusive effect of class-wide settlements. Here, only the RNs who accepted the settlement checks cannot further pursue claims.[3]

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[3] While plaintiffs' arguments are misplaced, one of their numerous misrepresentations must be corrected. Plaintiffs assert, without any citation to the record, that RNs who are no longer employed by the District "make up the majority of the nearly 1,300 nurses in the class." Resp'ts Br. at 34, 48. There is no such evidence in the record and the assertion is false – only 439 of the 1253 RNs who were offered settlement checks were former employees (35%).

Even apart from its irrelevance, plaintiffs' argument and the trial court's decision regarding standing are mistaken. Plaintiffs admit that WSNA had standing to file lawsuit to ask for injunctive relief. Resp'ts Br. at 32 n.20. If WSNA had standing to file its lawsuit, then it had standing to settle the lawsuit.

3. The trial court had no duty to collaterally review the WSNA Settlement and its effect on RNs' claims for missed rest breaks; only the subsequent, individual settlements between the District and the RNs precluded such claims.

Arguing that the trial court had a duty to review the WSNA Settlement, plaintiffs again improperly conflate the WSNA Settlement with the individual releases signed by the RNs. The WSNA Settlement had no effect on this lawsuit. The individual releases, however, preclude RNs who accepted settlement checks from participating in this lawsuit for missed rest break claims.

Plaintiffs provide no authority for their novel argument that the trial court was required to collaterally review the WSNA Settlement other than a concurring opinion in a 27 year old case from the District of Columbia Circuit, *Telecomms. Research & Action Ctr. v. Allnet Commc'n Servs.*, 806 F.2d 1093 (D.C. Cir. 1986). The concurring opinion provides no support for plaintiffs' argument for two reasons. First, Judge Bork questioned whether associational standing could *ever* be granted to an

association seeking monetary damages on behalf of its members, which is contrary to Washington law. *Compare Allnet*, 806 F.2d at 1097-98 *with Int'l Ass'n of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 214-15, 45 P.3d 186 (2002). Second, Judge Bork's comments were in the context of a decision that arguably had preclusive effect on the association's members. *Allnet*, 806 F.2d at 1098. Even under Judge Bork's analysis, a review of the WSNA Settlement is proper only if the District asserted that it precludes RNs from pursuing money damages for missed rest breaks. The District has not taken that position. Plaintiffs' argument has no merit.

4. The individual settlements between the District and the RNs were not illegal kickbacks of wages because there was a *bona fide* dispute over the amount due.

RCW 49.52.050 and .070 do not apply where there is a *bona fide* dispute as to the amount of wages owed. *Yates v. State*, 54 Wn. App. 170, 176, 773 P.2d 89 (1989). The District has always maintained that it adequately provides rest and meal breaks. Chapter 49.52 RCW was "enacted to prevent abuses by employers in a labor-management setting, *e.g.*, coercing rebates from employees in order to circumvent collective bargaining agreements." *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 519-20, 22 P.3d 795 (2001). Plaintiffs blatantly distort the facts and the law in arguing that the checks the District sent to the RNs constitute an illegal kickback of wages.

The primary case plaintiffs rely on, *McDonald v. Wockner*, 44 Wn.2d 261, 267 P.2d 97 (1954), demonstrates the purpose for the statute and is easily distinguishable. There, the employer was a member of a car dealers' association which had negotiated a union contract for payment of commissions to sales persons. After the employee was hired, he and the employer agreed that he would receive a flat salary of $350 per month notwithstanding the union contract. The employee received $13,493.34 in commissions, on which he paid income tax, and rebated to the employer the amount exceeding the flat salary, $7,090.84. The Court held that RCW 49.52.050 sought to remedy "the mischief . . . of secret rebates of wages by an employee to an employer." *Id.* at 270.[4] There was no dispute over whether the underlying services were performed.

Here, by contrast, the District disputes how many rest breaks were missed, if any. It offered a settlement to each RN based on the total number of hours worked by that RN. In a wage dispute, an employee may accept less than the amount claimed, and the release is enforceable. *Martin v. Spring Break '83 Prods.*, 688 F.3d 247 (5th Cir. 2012); *Martinez v. Bohls Equip.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005).

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[4] In *Wockner*, the Court relied in part on *McNeill v. Hacker*, 21 N.Y.S.2d 432 (N.Y. City Ct. 1940), where the employer executed a contract with a union but later made oral agreements with employees to pay less for wages. The court held that the oral agreements were void under New York's similar anti-kickback statute.

Spring Break '83 is instructive. The plaintiff union members alleged that they were not paid for all the work they performed. A union representative investigated the allegations and concluded that it would not be possible to determine whether the plaintiffs actually worked on the days claimed. The union then settled with the employer and the employees received, and cashed, settlement checks. The employees later sued for unpaid wages and argued that they could not privately settle their wage claims under the Fair Labor Standards Act ("FLSA"). The court disagreed, holding that "payment offered to and accepted by [the employees] . . . is an enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves." *Spring Break '83*, 688 F.3d at 255. Similarly, here proof whether or when RNs missed breaks will be difficult. The individual RNs were best situated to determine whether the settlement offer was a fair compromise of a *bona fide* dispute over the hours worked through rest breaks. The individual settlements are enforceable.

5. There was no evidence, let alone clear and convincing evidence, that the individual settlement agreements between the District and the RNs were procured through overreaching, fraud, or misrepresentation.

Plaintiffs argue for the first time in this lawsuit that the individual settlements between the RNs and the District are void due to overreaching,

fraud, and misrepresentation.[5] Even had they made such arguments below, there was no basis for invalidating the settlements on those grounds.

A party seeking to avoid a release based on overreaching, fraud, or misrepresentation must produce evidence that is clear and convincing. *Reynolds v. Day*, 93 Wash. 395, 398, 161 P. 62 (1916). If the party meets this burden, the release is *voidable*, not *void*. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992); *Urban v. Mid-Century Ins.*, 79 Wn. App. 798, 805, 905 P.2d 404 (1995). If a release is *voidable*, a jury must then decide whether it is unenforceable. *Urban*, 79 Wn. App. at 805.

Had plaintiffs made the argument, the trial court should have rejected it at summary judgment. They produced no clear and convincing evidence of overreaching, fraud, and misrepresentation. Instead, their arguments are based on speculation and innuendo. *Martin v. Johnson*, 141 Wn. App. 611, 622-23, 170 P.3d 1198 (2007) (because "express public policy of this state strongly encourages settlement," court "cannot infer bad faith, collusion, or fraud merely based on innuendo and speculation alone"). Ms. Bautista testified that there was nothing inaccurate or misleading in the letter that accompanied the settlement check. CP 1134.

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[5] Plaintiffs made no such allegations or arguments in their amended complaint, CP 97-104, motion for partial summary judgment, CP 435-37, or reply briefs. CP 1241-57. The court made no such fact finding in its order invalidating the releases. CP 1334-45.

She understood that she was making a settlement with Evergreen, even though she felt it was "sucky." CP 1133. She knew that she could have contacted WSNA representatives to get more information about the settlement, but chose not to because she felt that it was "pointless." CP 1129-30. She had the contact information for plaintiffs' counsel but did not contact them. CP 1117-18.

What Ms. Bautista later felt was missing from the letter, in response to leading questions from her attorney, was plaintiffs' theory of the case. Resp'ts Br. at 49. Plaintiffs provide no authority that the District was required to recite *their* theory. Further, plaintiffs provide no evidence or authority that the District was responsible for any allegedly erroneous information independently provided by their union. The District is not. *Reynolds*, 93 Wash. at 399 ("[W]hatever Dr. Smith may have said, he was not employed by the company, but by the men in the mine, and his statements would not be binding upon the company, even assuming that the statement . . . , if relied upon, would be sufficient to impeach the release.").

The release in this case is analogous to that signed in *Beaver v. Estate of Harris*, 67 Wn.2d 621, 409 P.2d 143 (1965). The plaintiff was injured in a car collision and signed a release of claims three weeks later. He later discovered that his injuries were more serious and sought to

rescind the release. At the time of the settlement, the plaintiff had been examined by only his own doctor, the insurance adjuster had made no false or misleading statements, and the plaintiff understood that the settlement payment was a final payment. *Id.* at 624. In upholding the release, the Court noted that "[i]f releases obtained under the circumstances and facts now before us are to be taken lightly and rescinded, there will be few settlements without litigation." *Id.* at 627. Here, Ms. Bautista believed she was owed more for missed rest breaks, the District's letter contained no false or misleading statements, and Ms. Bautista understood that the settlement payment was a final payment.

Washington courts will set aside a release that is obtained by fraud. For example, in *Simmons v. Kalin*, 10 Wn.2d 409, 116 P.2d 840 (1941), the plaintiff was hit by a car and injured. The defendant's attorney visited the plaintiff the next day and told the plaintiff to talk with him if he wanted to make a claim. When the plaintiff later visited the attorney, the attorney said he must be examined by a doctor selected by the attorney. The plaintiff agreed, and the doctor examined him and took x-rays. The doctor provided his report only to the attorney. The attorney falsely told the plaintiff that, according to the doctor, nothing was wrong with the

plaintiff and he would be fine in a few months.[6] The plaintiff, "an ordinary laborer" and "far more senile than his years," signed a release but later discovered that he was permanently disabled. *Id.* at 416. The court held that this evidence tended to prove the plaintiff "was induced to sign the release through fraud," but the jury must decide whether it was clear and convincing before setting aside the release. *Id.* at 420.

Similarly, in *Pattison v. Seattle, Renton & S. Ry.*, 55 Wash. 625, 104 P. 825 (1909), the plaintiff was injured in a train collision. The treating doctor was employed by the defendant and told the plaintiff his injuries were not serious. Over the course of treatment, the doctor told the plaintiff he would get well soon and should settle with the company as soon as possible. The plaintiff signed a release, but later found out his injury was permanent. The court held that under those circumstances, the jury must determine whether the release was obtained through misrepresentation or fraud. *Id.* at 632. Similar circumstances are absent here.

B. Actual compliance with all the prerequisites of CR 23 was neither demonstrated nor can be.

Compliance with the prerequisites to class certification is not presumed. The burden is on the plaintiffs to prove each element.

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[6] The doctor "knew, and [defendant's] attorneys were fully informed, that [plaintiff] was suffering from a compression fracture of his spine. That information was never conveyed by [defendant's] attorneys to [plaintiff]; in fact, they misrepresented the contents of the report" of the doctor. *Simmons*, 10 Wn.2d at 421.

Appellant's Opening Br. at 26-27. The trial court's certification order absolved the plaintiffs from proving the necessary elements, accepting mere allegations as sufficient. CP 1331. The trial court's failure to conduct the mandatory rigorous analysis is alone reason to reverse. *Miller v. Farmers Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003). However, the record also affirmatively demonstrates that certification of the proposed class (and subclass) is improper.

1. Ms. Bautista's objection to the rest break settlement because she knew other settling RNs had not missed breaks is an actual conflict with those she claims to represent.

Ms. Bautista testified to her knowledge that other RNs who settled their rest break claims had not actually missed any breaks. This "ticked [her] off" and made her feel misled. CP 1035, 1046. Her perception, in hindsight, that the settlement was therefore unfair to her is what motivated her to challenge it – and seek to set it aside for all RNs. This is no hypothetical conflict. Ms. Bautista's conflict with other RNs is exactly what brought her before the court. Uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). It is also essential to due process for absent class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The trial court ignored facially

evident conflicts between putative class members and Ms. Bautista, and conflicts among unnamed class members.

A plaintiff is not an adequate representative if her interests are antagonistic to those of the class or if a "fundamental conflict" exists among a class. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3rd Cir. 1979). "A conflict is 'fundamental' when it goes to the specific issues in controversy, or where, as here, some plaintiffs claim to have been harmed by the same conduct that benefitted other members of the class." *Allied Orthopedic Appliances v. Tyco Healthcare Grp.*, 247 F.R.D. 156, 177 (C.D. Cal. 2007); *see also Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010) ("Conflicts of interest may arise when one group within the larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative."). "[N]o circuit approves of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class." *Allied Orthopedic*, 247 F.R.D. at 177; *see also Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) (reversing certification for cattle producers where class definition included producers who claimed harm from contracts and marketing agreements that benefitted some of the unnamed class members); *Brown v. Am.*

Airlines, Inc., 285 F.R.D. 546 (C.D. Cal. 2011) (plaintiff's position on key issue conflicted with position of many putative class members).

Ms. Bautista's harm – accepting the settlement check and releasing her rest break claim – has by her own admission benefited other members of the putative class. If the settlements are set aside, RNs who will have proof problems on their individual claims, as well as those Ms. Bautista knows did not miss breaks, will lose the benefit of their settlements. Their interests are not served by voiding their settlement agreements. The evidence shows that Ms. Bautista's interest in setting aside the individual releases conflicted with those she sought to represent. *See, e.g.,* CP 842, 846, 853, 857, 861, 864, 868, 871, 875, 883, 889, 903.

2. Plaintiffs bore the burden of demonstrating the existence of common questions of fact or law and that the common questions would predominate. The trial court's acceptance of mere allegations cannot stand in the face of contrary evidence, including evidence from the plaintiffs themselves.

At her deposition, Ms. Pugh testified that her experience was not even shared by Emergency Department RNs working other shifts. The day shift RNs "pretty much always" got their breaks and this was *different* from her night shift experience. CP 1035.

Plaintiffs urge this Court to disregard contrary evidence that comes from smaller medical departments – in essence because they are *different*. Resp'ts Br. at 15-16. These dissimilarities – in size, medical practice and

demonstrated managerial discretion in implementing rest and meal breaks – are exactly why class certification across the District's hospital and multiple campuses is inappropriate. Plaintiffs are similarly dismissive of contrary RN testimony regarding Home Health Services. The detailed declaration provided by a long-time home health RN shows that it is different from all other departments in that RNs individually determine their daily activities, including the timing of their rest breaks. CP 970-72.

Plaintiffs ask the Court to disregard contrary evidence from hospital district managers because it "cannot refute" testimony regarding individual RNs' "own experience with missed breaks." Resp'ts Br. at 15. The fundamental fault with plaintiffs' analysis is that individualized experience does not mean that the fact questions are common or that common facts would predominate. The declarations from hospital nursing managers address how each took steps to provide breaks to RNs in their departments – dealing with issues of commonality and predominance. Further, manager testimony directly refutes RNs' assertion of regularly missed breaks. *Compare* CP 765-66 *with* CP 922-23; *compare* CP 799-800 *with* CP 940, 945. Michael Swenson's declaration directly refutes testimony from Ms. Pugh and Mr. Bowman, noting affirmative refusal to take breaks when available and claims of missed breaks on shifts when there were low patient counts as well as regular attention to personal tasks

while claiming missed breaks. CP 960-62.[7] The trial court also had before it testimony from non-managerial RNs (CP 875) and managers about their experience as non-managerial RNs (CP 922-23, 940-41) that missed breaks were rare in their departments. Non-managerial RNs who had worked in different departments testified that their experience with missed rest breaks varied significantly depending on the department. CP 879.

Ms. Bautista testified in her declaration that her patient load increased at one point causing her to miss breaks. CP 755. However, her declaration omitted that Certified Nursing Assistants were added to the department staff at that time to take on jobs that did not require an RN, and resulted in no greater work required of the RNs, just a shift to more specialized patient-care duties. CP 1011. In some departments, other medical professionals and RNs provided overlapping services, preventing

[7] Plaintiffs suggest the Court disregard declarations from District employees based on their status alone. The cases cited by Plaintiffs do not support the assertion. For example, in *Rainbow Group, Ltd. v. Johnson*, 990 S.W.2d 351 (Tex. Ct. App 1999), there was actual evidence of pressure. Declarations from current employees can be relied upon, and can be credible. *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1429, 47 Cal. Rptr. 3d 83 (2006). The declarations submitted by the District are in the declarants' words. If declarations are to be discounted, it should be plaintiffs' cookie-cutter declarations that rely on conclusory phrases drawn from case law, rather than the declarant's own words. ("When I remained on duty I performed unremitting work . . ." CP 749, ¶12; CP 752, ¶13; CP 769, ¶14; CP 773, ¶13; CP 779, ¶15; CP 789, ¶14; CP 792, ¶13; CP 796, ¶15; CP 800, ¶13; CP 789, ¶7 (slightly different adverbial clause). "Unremitting work" is drawn from this Court's opinions in *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 693, 267 P.3d 383 (2011) and *Frese v. Snohomish Cnty.*, 129 Wn. App. 659, 666, 120 P.3d 89 (2005). The credibility of canned declarations, identically tailored to legal argument, whether submitted by employer or employee, is suspect. *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 159-60 (S.D.N.Y. 2008).

a "common answer" to key questions raised, such as whether RN "staffing" caused missed breaks. *See, e.g.,* CP 906.

Plaintiffs object to the hospital district's defense of waiver on some RNs' claims of missed meal breaks, and in doing so demonstrate why certification on meal break claims is improper, while misrepresenting both the record and the District's brief. The District provides cellular telephones to on-duty nurses so that patients may contact them. CP 944. Contrary to plaintiffs' representation, Resp'ts Br. at 17, these are not the RNs' "personal" cell phones. Plaintiffs do not deny that the District's policy was that RNs not bring the hospital phone on lunch or rest breaks. The evidence is clear that RNs who violated the policy were more likely to have meal breaks interrupted by a call than those who did not. *See* Appellant's Opening Br. at 31-32. Meal breaks can be waived by express agreement or "unequivocal acts." *Pellino*, 164 Wn. App. at 697. The waiver defense on missed meal breaks is an individualized determination that renders certification improper because individual facts will predominate – including inquiries into whether RNs brought their duty phones with them and were interrupted by calls.

Similarly, determining whether RNs were able to take intermittent breaks as permitted by state law will also be individualized-fact intensive.[8] Plaintiffs' claims for exemplary damages will also require individualized determinations. Exemplary damages are available only for willful violations. Whether the District was aware that a particular RN had missed a break and refused to pay must include individual fact-finding.

3. Ms. Pugh and Mr. Bowman are inadequate class representatives because they fail to show their claims are typical, and the record shows the contrary.

Plaintiffs' assertion that the absence of conflicts with class members and counsel competency are the only inquiries for adequacy under CR 23(a)(4) is unsupported by either case they cite. Resp'ts Br. at 23. In *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974), the Court stated, "In evaluating the applicability of CR 23(a)(4), the prerequisite that the interests of a purported class be fairly and adequately represented, *one of the essential factors to be considered* is the presence or absence of adversity within the asserted class." (emphasis added) In *Marquardt v. Fein*, 25 Wn. App. 651, 656, 612 P.2d 378 (1980), the court stated, "*One of the prerequisites* to a class action is that the representative will fairly and adequately protect the interests of the class. CR 23(a)(4). *An essential*

[8] Plaintiffs suggest that a Superior Court decision in another case should resolve the issue. Resp'ts Br. at 22, n.15. Here, there is direct testimony that the nature of work of RNs in at least some departments permits intermittent breaks. *See, e.g.*, CP 922, 936.

concomitant of adequate representation is that the class representative's attorneys be qualified . . . ." (emphasis added) Neither holds that these are the exclusive inquiries. Plaintiffs' assertion is contrary to U.S. Supreme Court holdings that typicality is an essential element of adequacy of representation. *See, e.g., Amchem Prods.*, 521 U.S. at 626.

Typicality "goes to the heart of a representative['s] ability to represent a class." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). Ms. Pugh and Mr. Bowman are atypical of the RNs generally. Both are from a single department with a unique medical practice – the Emergency Department. Mr. Bowman maintains that he was denied a break even if he was able to rest and attend to personal matters and was not involved in patient care. CP 1029. Both Ms. Pugh and Mr. Bowman have claimed they were unable to take breaks even on days when patient census and acuity were low. CP 961. Both were affirmatively uncooperative in taking breaks. *Id.* Ms. Pugh claimed to have missed her breaks on days when computer-use records show extensive personal use by her during her shift. CP 961. They will be subject to specific defenses and evidence to contradict the essential elements of their individual claims. "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

Plaintiffs' response on the question whether Ms. Pugh and Mr. Bowman, as former employees, are adequate representatives of the District's RNs seems to assume that the burden rested with the hospital to disprove their adequacy, rather than the reverse. Despite Ms. Pugh's active lobbying, neither her email to all the RNs, nor her flyers, nor her attorney's letters could convince the RNs she seeks to represent. Ms. Pugh's and her attorney's communications told the RNs of her suit and warned that if they settled individually, they could not be part of her action. CP 67; CP 894, 112-13. The letter from Evergreen transmitting the individual checks said the same. CP 127. Knowing this, over 90% of the potential class took affirmative action to reject Ms. Pugh as their representative.

4. Both the current and re-cast class definitions are materially defective.

On its face, the class definition predetermines the merits. Only RNs "denied" breaks are members. There is already testimony that not all RNs missed breaks, much less were "denied" them. CP 970. While addressing the broader question of certification, the U.S. Supreme Court's concern about merits determination is relevant to a class definition as well.

> [A] preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the

> absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). Although plaintiffs' suggested alternate formulation of the class definition eliminates the language pre-determining the merits, it is still defective. For example, it would include RNs always employed at the District in exempt positions (including senior executives holding nursing licenses). It would include current managers who were in the past line RNs, creating problems with mounting a defense. It would include the RNs who settled their individual claims regarding rest breaks, whether under the challenged releases or in other employment disputes unrelated to this action. It contains no fixed end date, and as new RNs are hired they would become class members, triggering additional notices of the action.

In arguing the adequacy of the class definition, plaintiffs misstate the record. Resp'ts Br. at 27. There *is* testimony that RNs missed no breaks in some departments or on some types of shift and that downtime during a shift was common so that RNs could rest and attend to personal matters. CP 970, 922, 936. Plaintiffs' assertion that the District provided no evidence that RNs who missed breaks were paid for the break is false.[9] CP 1016. There *is* evidence that the District took steps to ensure RNs got their

[9] While payment for missed breaks is primarily a merits inquiry and not for resolution at class certification, the misstatement of the record should not go unremarked.

breaks. It had a uniform policy that breaks were to be provided, and taken. The record details how managers in different departments carried out the policy to provide breaks, tailoring implementation to the specific medical practice, duty overlap and RN needs. *See, e.g.,* CP 905-07, 927, 932-33, 941-44, 954-55, 958.

III. CONCLUSION

The trial court should be reversed in all respects. Summary judgment should be granted to the District on the validity of the WSNA Settlement, the RN releases and Ms. Bautista's individual release. The summary judgment invalidating the WSNA Settlement and individual RN releases should be reversed. The order certifying the primary class and the subclass should be reversed and a denial entered in its stead.

Respectfully submitted this 8th day of February, 2013

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on February 8, 2013, I caused service of the foregoing to the following counsel of record:

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Dated: February 8, 2013

Lillian Cruz

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