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**COURT OF APPEALS FOR DIVISION I**

**STATE OF WASHINGTON**

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JANET LANE,

Plaintiff/Appellant,

v.

HARBORVIEW MEDICAL CENTER,

Defendant/Respondent.

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**BRIEF OF RESPONDENT**

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**ORIGINAL**

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## INTRODUCTION

This case is about a nurse who chose to work on a “per diem” basis for years, setting her own availability and working as available if the hospital had need, rather than taking a readily available classified position and committing to the schedule of that kind of position. Now the same nurse, appellant Jane Lane, claims that Harborview wrongfully “misclassified” her as a per diem nurse and that she is entitled to all of the benefits afforded nurses working in classified positions while she chose to remain a per diem, in addition to the benefits she received while working on a per diem basis.

The benefits associated with these different types of employment are different in some ways. But the differences in benefits provided to classified and to per diem nurses, the categories at issue here, are consistent with the objective differences between these types of employment.

Harborview did not harm Ms. Lane by continuing to employ her in the capacity she chose to continue in, per diem, rather than forcing her to work in a position that would have had her commit to a schedule that she apparently did not want. There was nothing wrong with Ms. Lane’s decision to stay working as a per diem, with ultimate control over her schedule, higher pay and other benefits consistent with her work circumstances. Nor was there anything wrong with Ms. Lane’s later decision to commit to a classified position. There *would* be something wrong, however, with

allowing Ms. Lane to keep the advantages of working as a per diem and to now, after the fact, give her the different benefits she might have received had she chosen a classified position all along. Harborview did not misclassify Ms. Lane under RCW §§49.44.160 and .170. The trial court properly denied Ms. Lane's motion for partial summary judgment and properly granted Harborview's motion for summary judgment.

### **COUNTERSTATEMENT OF ISSUES**

1. Did the trial court properly deny Ms. Lane's motion for summary judgment on her misclassification claim, given that the undisputed facts show that the differences in benefits that Harborview provides to classified nurses and to per diem nurses are supported by objective differences between the different groups' actual work circumstances and given that the misclassification act mandates assessment of objective facts rather than labels?

2. Did the trial court correctly grant summary judgment for Harborview on Ms. Lane's misclassification claim based on the undisputed and indisputable facts, despite Ms. Lane's new theory that Harborview was under an obligation to automatically place her in some, as yet unidentified, classified position?

3. Should the trial court's evidentiary rulings striking certain materials offered by Ms. Lane be affirmed, given that Ms. Lane's

statements about pay and alleged damages lacked foundation and consisted of allegations rather than evidence; given that Ms. Lane failed to establish foundation or her competence to testify about nurse scheduling; given that the demand letter composed by Ms. Lane's counsel is self-serving hearsay without offered or established exception, properly excluded under ER 408, irrelevant and speculation as to the issue for which it was submitted; and given that the exclusion of these materials caused no prejudice to Ms. Lane?

### **COUNTERSTATEMENT OF THE CASE**

#### **A. Harborview's nurse staffing**

Harborview's Operating Room Department ("OR") must remain adequately staffed 24 hours a day and 7 days a week, consistent with state and federal regulations and accrediting agencies.<sup>1</sup> Maintaining operating room staffing levels is especially important at Harborview--it is *the* Level 1 trauma center for Washington, Alaska, Idaho and Montana.<sup>2</sup>

Staffing can vary significantly because of such reasons as vacancies, difficulty in recruiting nurses, medical and other leave, holidays

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<sup>1</sup> CP 154; 162-64.

<sup>2</sup> CP 163; 260.

and vacations.<sup>3</sup> Like other hospitals, Harborview tries to meet its staffing needs by retaining nurses in several different employment categories.<sup>4</sup>

### 1. Classified nurses

Most nurses<sup>5</sup> at Harborview are “regular” civil service employees, i.e., in “classified” positions.<sup>6</sup> A classified nurse works either full or part time, i.e., a fixed full or partial “FTE” (Full Time Equivalent).<sup>7</sup> Classified nurses work established or rotating (variable) days and shifts, according to what is assigned to the position.<sup>8</sup> A classified nurse must take leave if she<sup>9</sup> chooses or needs to be absent when scheduled to work.<sup>10</sup>

The shifts available to classified nurses, especially those with less seniority, are not always attractive.<sup>11</sup> The key is that the nurse commits to working the assigned shift (day, evening, night, rotating), shift length (8 or 12 hours), and schedule (a combination of different shifts), rather than

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<sup>3</sup> CP 155; 163.

<sup>4</sup> CP 155; 163-67.

<sup>5</sup> The level of nurse specifically at issue here is Registered Nurse 2 (“RN2), the “journeyman” level of nurse. Ms. Lane has been and remains an RN2. Unless otherwise noted, all references to nurses in this brief are references to RN2s.

<sup>6</sup> CP 163-64. Washington’s Civil Service Laws were extensively rewritten by the Civil Service Reform Act of 2002, effective July 1, 2005. Under Civil Service Reform, collective bargaining supplanted much of the “Merit System Rules” for most civil servants, including classified nurses. See RCW §41.80.030, §41.06.170 and §41.06.111; see also WAC Title 357 (where merit system rules are now codified).

<sup>7</sup> CP 163.

<sup>8</sup> CP 163-64; 167-68.

<sup>9</sup> Of course Harborview does not assume that all nurses are female. However, most of the nurses involved in the facts of this case are female so Harborview uses feminine pronouns in this brief.

<sup>10</sup> CP 163-64.

<sup>11</sup> CP 291.

deciding when she wants to work. Although the nurse scheduler tries to meet special requests, a classified nurse is committed to the schedule if the scheduler cannot meet the request and a nurse faces discipline if she does not work as scheduled.<sup>12</sup> A classified nurse cannot assume she will be granted leave even if she asks, and even if she has accrued leave.<sup>13</sup> A classified nurse who wants to change her assigned shift or schedule has to request a change.<sup>14</sup>

As a classified nurse gains seniority, when a more attractive schedule becomes available the nurse has opportunity for it depending upon, among other factors, seniority level or order of request.<sup>15</sup> The goal (and effect) is to make shifts and schedules available in a fair manner especially given that classified nurses have to commit to working as scheduled.<sup>16</sup>

Many classified RN2 positions have been open and available at Harborview, in the OR and generally, throughout the years pertinent to this case.<sup>17</sup> Harborview's preference would be to meet its entire nurse staffing needs through hiring classified RN2s.<sup>18</sup>

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<sup>12</sup> CP 155, 163-64; 173-74; 431.

<sup>13</sup> CP 155, 163-64; 431.

<sup>14</sup> CP 164; 173-74.

<sup>15</sup> CP 58; 164; 173-74; 291.

<sup>16</sup> CP 163-64; 173-74.

<sup>17</sup> CP 97-98; 157; 167; 177-220.

<sup>18</sup> CP 167.

## **2. Per Diem nurses**

Harborview, like other hospitals, employs some nurses who make themselves available when they want to work. These are “per diem” nurses, a status recognized and common in the industry.<sup>19</sup> A per diem nurse tells the hospital when she will work and is not committed to working a set schedule.<sup>20</sup> Harborview schedules the per diem to work if it has need when the per diem has said she will work.<sup>21</sup> Per diem nurses are important to the system even though they are few in number compared to classified nurses and even though Harborview strives to minimize its reliance on per diems, or other nurses who are not classified.<sup>22</sup>

## **3. Other nurses**

Two other categories of nurse also work at Harborview (and are referenced generally in the parties’ materials). Travelers are nurses who, by choice, work for short periods of time all around the country.<sup>23</sup> Harborview contracts with travelers to work a set number of weeks and each traveler works an established schedule within the contract period.<sup>24</sup> Harborview must generally pay a traveler for the time she is scheduled, whether or not it uses her services.<sup>25</sup>

On occasion, Harborview also obtains services through an agency, to cover last-minute needs or unexpected absences if a department is

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<sup>19</sup> CP 96; 164-65.

<sup>20</sup> CP 164; 431-32.

<sup>21</sup> CP 57; 155; 164.

<sup>22</sup> CP 155; 164.

<sup>23</sup> CP 55-56; 166-67.

<sup>24</sup> CP 166; 313-15.

<sup>25</sup> CP 155; 166-67.

unable to get an employee to cover.<sup>26</sup> Rarely, if ever, however, does Harborview's OR obtain nurse services through an agency.<sup>27</sup>

**B. Comparing the pay and benefits for classified and per diem nurses**

A key difference between classified nurses and those who choose to work as per diems, is that classified nurses work a committed shift or schedule while per diem nurses work when they dictate if Harborview has need. Consistent with this difference, Harborview treats classified and per diem nurses somewhat differently in terms of pay and benefits.

**1. Pay**

Per diem nurses are paid more than classified nurses. For years, Harborview paid per diems 15% *more* per hour than classified nurses at the comparable pay step.<sup>28</sup> Since mid-2005 that percentage difference has diminished incrementally; since early 2007, Harborview pays its per diems about 6% more per hour than classified nurses.<sup>29</sup> In determining pay Harborview deals with competing issues: it must pay per diem nurses enough so it does not lose their services to other hospitals, but overcompensating creates too much incentive for classified nurses to leave

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<sup>26</sup> CP 167.

<sup>27</sup> CP 54-55; 155-56.

<sup>28</sup> CP 161; 164-65; 409-10.

<sup>29</sup> CP 158-61; 165.

their positions in favor of working as per diems.<sup>30</sup> For most of the years that she was a per diem, Ms. Lane received 15% more per hour than she would have received as a classified nurse.<sup>31</sup>

## **2. Pay, step and experiential increases**

As classified nurses received formal “cost of living adjustments,” Harborview also increased the rate of pay for its per diem nurses. Although COLAs were not automatic for per diems, Ms. Lane received many comparable pay raises while she worked as a per diem.<sup>32</sup>

Classified nurses receive periodic “step” increases. These increases are generally given yearly, for a full-time employee. Step increases were prescribed by civil service rules and are now part of collective bargaining.<sup>33</sup> Each step increase does not necessarily result in higher pay, but represents a move upward within the pay “range” assigned by the State for each position.<sup>34</sup> Per diem nurses were not subject to the same civil service rules and have not become part of the collective bargaining unit. One aspect of choosing to work in a per diem capacity is

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<sup>30</sup> CP 164-65.

<sup>31</sup> CP 159-61; 169; 409-10. Ms. Lane apparently disputes this information, yet she provided no evidence to the contrary, just her general belief. In her deposition, Ms. Lane testified that she did not know how her wage as a per diem compared to nurses in other categories. CP 274.

<sup>32</sup> CP 159-60.

<sup>33</sup> CP 159; 165, 407-09. Paid time counts. If a classified employee is on leave without pay for more than 10 days in a month the employee will not receive credit for that month toward her “incremental” date, i.e., the date of the next step increase.

<sup>34</sup> CP 159.

that the per diem nurse's salary is set with her individually.<sup>35</sup> Another aspect is that a per diem nurse's annual hours can vary dramatically, so until the last few years Harborview did not monitor the overall hours of each per diem nurse for this purpose.<sup>36</sup> While Ms. Lane was a per diem, a per diem could seek a step increase after working 2,080 hours since the last step (that is, working the hours a full time employee would work in a year) and, until recently, to obtain a step increase a per diem nurse would ask the payroll department to review her hours.<sup>37</sup>

Harborview placed Ms. Lane at the step and range she had been in when she left the University of Washington Medical Center ("UWMC"), months earlier.<sup>38</sup> Ms. Lane then received increases as a per diem that brought her to the top of the salary range as a nurse.<sup>39</sup>

One issue that apparently concerned Ms. Lane was the "equity adjustment" process that took place at Harborview. The process came about, generally, because there had been changes made to the maximum pay received by incoming nurses, those with experience away from

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<sup>35</sup> CP 164-66.

<sup>36</sup> CP 165; 407-08.

<sup>37</sup> CP 95-96; 101-02; 165.

<sup>38</sup> CP 159.

<sup>39</sup> CP 159-60; 407-10. Ms. Lane's speculation that her pay "lagged behind" others is unsupported by any citation and wrong. In terms of actual pay, the evidence is that Ms. Lane received \$37,800 more in pay than she would have received over the same years had she chosen to work as a classified nurse. CP 410.

Harborview.<sup>40</sup> In 2003 or 2004, Harborview agreed to an “equity adjustment” for its classified nurses. Through this, Harborview re-reviewed the experience level assigned to classified nurses. This resulted, generally, in increases to the nurses’ pay steps.<sup>41</sup> In early 2006, Harborview arranged for the per diem nurses to also obtain “equity adjustments.” Although this process came slightly later for per diem nurses, Harborview gave credit for a wider range of experience for per diems than it did for classified nurses; this worked to Ms. Lane’s benefit.<sup>42</sup>

### **3. Medical and dental**

Classified nurses receive medical and dental benefits. Ms. Lane received those same benefits as a per diem, on a par with classified nurses and consistent with Washington’s Health Care Authority regulations.<sup>43</sup>

### **4. Retirement and deferred compensation**

Classified employees are eligible for state retirement benefits, according to requirements of the Department of Retirement Systems. As a per diem, Ms. Lane was also eligible for state retirement benefits – she is

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<sup>40</sup> CP 170.

<sup>41</sup> CP 170.

<sup>42</sup> CP 159-60; 170-71.

<sup>43</sup> CP 161; 164-66; 169.

in the PERS-2 retirement system.<sup>44</sup> Ms. Lane also participated in the state's deferred compensation program as a per diem.<sup>45</sup>

## **5. Paid leave**

A significant difference between classified and per diem employees is that classified employees receive set amounts of paid leave per month while per diem employees do not. This is logical, given the circumstances of per diem employment. Paid leave, for example, vacation, affords an employee a rest from work. And sick leave is for when the employee has need. But a per diem, who retains control of when she works and can take a rest when she needs or desires to do so, does not have to take leave or otherwise account for her time away.<sup>46</sup> A per diem is not burdened by the obligation classified nurses have, of requesting leave that may or may not be approved. To pay per diem for "leave" would just mean paying her more money.

### **C. Scheduling to ensure adequate nurse staffing "24/7" at Harborview's OR**

The nurse responsible for scheduling the OR nurses at Harborview, Assistant Nurse Manager Cathy Browne,<sup>47</sup> prepares the schedule

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<sup>44</sup> CP 161; 164-66.

<sup>45</sup> CP 328-29.

<sup>46</sup> CP 430-31.

<sup>47</sup> CP 154.

approximately four weeks at a time.<sup>48</sup> This nurse schedules the different categories of nurse differently, in hierarchical order based on the nurses' commitments to a schedule and Harborview's obligation to pay.<sup>49</sup>

The nurse scheduler starts with the schedules to which classified nurses have been assigned.<sup>50</sup> She then assigns other classified nurses (those with varied/rotating schedules), where their services are needed.<sup>51</sup> The nurse scheduler can consider a classified nurse's request for leave or other constraints, and may grant it if the request meets with staffing needs.<sup>52</sup> The scheduler only lets a limited number of classified nurses take vacation at any one time, however.<sup>53</sup> Next, if the schedule being set is for a time when traveling nurses are used, the scheduler assigns shifts to them--they are committed to working a set number of hours per week and Harborview is contracted to pay them whether or not it uses their services.<sup>54</sup>

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<sup>48</sup> CP 51-52; 62-63; 155-56; 430-31

<sup>49</sup> Ms. Lane's conclusion that scheduling is done "the same way" for all nurses, repeated throughout her materials, is an inaccurate generalization. Perhaps Ms. Lane says this because scheduling is done in four week blocks. But that does not mean it was the same for all, given how scheduling is done.

<sup>50</sup> CP 58-59; 155-56. Classified nurses do not have a form, like per diems, to indicate when in the upcoming weeks each will be available to work. CP 58-59; 261-62. That is logical. Classified nurses are expected to work as assigned unless granted leave.

<sup>51</sup> CP 58.

<sup>52</sup> CP 56 & 430 (pp 14-15 of Ms. Browne's deposition); 59-60.

<sup>53</sup> CP 430-31.

<sup>54</sup> CP 57; 155; 431-32.

If there is still need in the schedule, the scheduler then consults the “availability sheet” that each per diem is asked to complete and submit.<sup>55</sup> On that sheet, a per diem has indicated when she is available to work during the upcoming four weeks.<sup>56</sup> The nurse scheduler then fits in the per diem on the schedule, on dates/shifts the per diem has indicated she will make herself available.<sup>57</sup> Unlike a classified nurse, a per diem does not have to request leave and depend on the request being granted. The per diem simply informs the scheduler that she is not available.<sup>58</sup>

The schedule any specific classified nurse is assigned to work depends on the position.<sup>59</sup> The means by which many classified RN2s obtain the schedule they desire is to take a classified position, accept the schedule initially assigned to the position, and then go through the process of requesting a different schedule through the policy or Collective Bargaining Agreement (“CBA”).<sup>60</sup> As a desired shift or schedule comes open, a nurse who has requested a change has opportunity for it.<sup>61</sup> In time, nurses can avoid working night shifts if they desire.<sup>62</sup> The process is as appropriate in this workplace like any other. Some shifts and schedules

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<sup>55</sup> CP 155; 261-62; 264-65; 430-31.

<sup>56</sup> CP 155; 261-62; 267; 430-31.

<sup>57</sup> CP 57; 155.

<sup>58</sup> CP 430-31.

<sup>59</sup> CP 58; see also CP 177-220.

<sup>60</sup> CP 58; 167-68.

<sup>61</sup> CP 167-68; 291-92.

<sup>62</sup> CP 291-92.

are more popular than others, so someone takes a job and then gets “in line” to obtain a desired schedule.

**D. Ms. Lane’s employment**

Before Ms. Lane came to Harborview, she was an RN2 at UWMC. She started at UWMC in 1987, and held a classified position there beginning in early 1991.<sup>63</sup> At UWMC, Ms. Lane worked day shifts.<sup>64</sup>

In 1998, Ms. Lane left UWMC for a private hospital.<sup>65</sup> Shortly thereafter, she decided to be a perioperative nurse at Harborview’s OR.<sup>66</sup> Ms. Lane applied to work per diem and Harborview hired her.<sup>67</sup> In 2007, Ms. Lane recalled that she applied to work as a per diem in 1998, rather than seek a classified position, because she says she was told there were no classified openings in the OR at the time.<sup>68</sup> Over the next nine years, however, many classified RN2 positions opened. These were positions for which Ms. Lane could have applied had she wanted a classified position.<sup>69</sup>

As a per diem, Ms. Lane generally made herself available to work only daytime shifts.<sup>70</sup> The nurse scheduler respected Ms. Lane’s wishes. Sometimes the scheduler needed help on an evening shift and would ask

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<sup>63</sup> CP 249-50; 255-58.

<sup>64</sup> CP 269-70.

<sup>65</sup> CP 258.

<sup>66</sup> CP 258-61; 273; 332.

<sup>67</sup> CP 332; 338.

<sup>68</sup> CP 260.

<sup>69</sup> CP 97-98; 157; 167-68; 173-4; 177-220.

<sup>70</sup> CP 173; 267-69; 290.

Ms. Lane to work; sometimes Ms. Lane agreed.<sup>71</sup> According to Ms. Lane, she was sometimes available to work on days in addition to those for which she was scheduled. When that happened and she wanted more work she would check with the scheduler; at least some of the time the scheduler was able to give Ms. Lane more hours to work.<sup>72</sup>

Ms. Lane decided when she would be available by reference to her husband's schedule. Mr. Lane has been a fire fighter since 1996.<sup>73</sup> Ms. Lane told Harborview she could work on days her husband did not work, and by doing so she and her husband were able to arrange their schedules so that either one was home for their children every day.<sup>74</sup>

Ms. Lane's hours varied from pay period to pay period. Sometimes she worked more than 40 hours a week (and received overtime and other earnings); many other times she worked fewer than 40 hours a week.<sup>75</sup> Over the years Ms. Lane chose to work as a per diem and set her availability, there does not appear to be a significant trend toward diminishing (or increasing) hours.<sup>76</sup> For a while, Ms. Lane worked Fridays through Sundays; she later decided she would not work those

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<sup>71</sup> CP 268-69.

<sup>72</sup> CP 264-65.

<sup>73</sup> CP 294-96.

<sup>74</sup> CP 266; 270-72.

<sup>75</sup> CP 161; 406-07.

<sup>76</sup> CP 406-07.

days.<sup>77</sup> Ms. Lane was apparently frustrated because she did not feel she could increase her work hours during the week if she wanted to work day shift.<sup>78</sup> Yet Ms. Lane chose not to be available for hours when Harborview had greater need for additional staffing.<sup>79</sup>

In addition to her per diem work at Harborview, for several years Ms. Lane worked for other employers, including Seattle Surgery. Ms. Lane also worked for Benchmark, a company providing agency nurses.<sup>80</sup>

According to Ms. Lane, beginning in 2001 she believed Harborview was not providing her with pay increases she thought she should receive. She was sufficiently concerned that, in 2003, she retained a lawyer to represent her on the issue although she did not sue.<sup>81</sup>

Others encouraged Ms. Lane to obtain a classified position rather than continue as a per diem. Ms. Lane recalls that Ketra Hayes suggested she apply for a charge nurse position. Ms. Lane did not apply because that position did not come with a schedule she wanted<sup>82</sup> and she apparently did not want to do what others did, i.e., take a position and then “get in line” to request a change. Between 1998 and 2007, Ms. Lane did not apply for any of the many classified positions that came open. Ms. Lane’s current

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<sup>77</sup> CP 304; 319.

<sup>78</sup> CP 304-05.

<sup>79</sup> CP 310-12.

<sup>80</sup> CP 285-86, 287, 325-26; 339.

<sup>81</sup> CP 274-81.

<sup>82</sup> CP 301-03.

position, which she was offered very shortly after she applied for it, is the only classified position for which she ever applied at Harborview.<sup>83</sup>

At Harborview, all nurse position openings are posted in the nursing recruitment bulletins and, for the last several years at least, are posted on-line as well.<sup>84</sup> Openings are also posted on the units.<sup>85</sup> Harborview has a Nursing Recruitment Office and nurses who are interested in positions can apply through that office.<sup>86</sup> Harborview does place advertisements in newspapers, in “help wanted” ads.<sup>87</sup> But these ads are to generate general interest and are not postings for specific positions. For someone with experience at Harborview, or any UW institution, relying on the Sunday papers would not be a realistic way to look for a specific position.<sup>88</sup> Ms. Lane testified that she watched for vacant positions in only two ways. She says she read ads in the Sunday papers and, sometimes, she asked others informally if they knew of an open position that came with a 7:00am to 3:00pm shift.<sup>89</sup>

Many classified RN2 positions came open at Harborview between late 1998 and mid-2007. These were filled through the competitive

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<sup>83</sup> CP 302.

<sup>84</sup> CP 167-68; 174-75.

<sup>85</sup> CP 174-75.

<sup>86</sup> CP 167-68.

<sup>87</sup> CP 168.

<sup>88</sup> CP 168.

<sup>89</sup> CP 298-301.

process and were positions for which Ms. Lane could have applied.<sup>90</sup> Vacancies occur regularly, and in varying shifts and schedules.<sup>91</sup> There probably were more vacancies in positions that initially required working on less desirable shifts.<sup>92</sup> That is logical. As noted, unless there is an opening on a desirable shift (like the classified position for which Ms. Lane applied), a nurse who wants to work in a classified position accepts a position despite the shift and then waits for opportunity to change.

Since August 2007, Ms. Lane has worked as a classified RN2. She applied for the position in July 2007. Ms. Lane says this was the first classified position she saw that came with the schedule she wanted.<sup>93</sup>

**E. Summary of Ms. Lane's per diem and classified benefits**

As noted above, Ms. Lane was in the state retirement system (PERS-2) both as a per diem and as a classified employee. Ms. Lane received medical and dental insurance both as a per diem and classified employee. Ms. Lane received step increases, although upon request while as a per diem, rather than regularly according to an assigned FTE. Harborview increased Ms. Lane's pay as a per diem, and her raises coincided with classified employee COLAs. Ms. Lane and other per diems were eligible for the "equity adjustment," the recalculation of

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<sup>90</sup> CP 167-68; 173-75.

<sup>91</sup> CP 163-64; 168; 173-74.

<sup>92</sup> CP 177-220.

<sup>93</sup> CP 298-300.

experience. Although per diem nurses received “equity adjustment” reviews later than classified nurses, Harborview assessed more experience for per diems; this worked to Ms. Lane’s advantage.

Harborview paid Ms. Lane more per hour as a per diem than as a classified nurse.<sup>94</sup> And, importantly, as a per diem Ms. Lane had the flexibility of determining when she wanted to work, flexibility she would not have in a classified position.

**F. Ms. Lane’s complaint**

In her suit, filed in June 2006, Ms. Lane asserted a single cause of action--that Harborview misclassified her under RCW §§49.44.160 and .170.<sup>95</sup> Ms. Lane claimed she should have been considered a classified employee since 1998 and that it was wrongful of Harborview to distinguish between per diem and classified nurses. Ms. Lane demanded all the benefits she received as a per diem nurse, plus different benefits and leave provided to classified nurses, back to 1998 when she first came to Harborview.

Both parties moved for summary judgment. Ms. Lane sought partial summary judgment, asking the trial court to hold as a matter of law that Harborview had misclassified her. Harborview asked the trial court to

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<sup>94</sup> Ms. Lane started in her classified position at a lower hourly rate than she had received as a per diem. CP 321-22.

<sup>95</sup> CP 340-41.

grant judgment in Harborview's favor based on the undisputed facts, including the objective differences between per diem and classified employment, and the law. The trial court denied Ms. Lane's motion and granted judgment in Harborview's favor.

## ARGUMENT

### A. Standard of Review

This court reviews summary judgment orders *de novo* and generally performs the same inquiry as the trial court.<sup>96</sup> It examines the pleadings, affidavits, and deposition excerpts placed before the trial court and "take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party."<sup>97</sup> To withstand summary judgment, a plaintiff may not rely simply on allegations or speculation.<sup>98</sup> A statement of general understanding, without the inclusion of facts on which that understanding are based, is inadmissible.<sup>99</sup>

Given the objective differences between per diem and classified employment Ms. Lane was not, as a matter of law, entitled to judgment on

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<sup>96</sup> Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

<sup>97</sup> Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

<sup>98</sup> Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988); Public Utility District No. 1 v. WPPSS, 104 Wn.2d 353, 360-61, 705 P.2d 1195 (1985).

<sup>99</sup> Marks v. Benson, 62 Wn. App. 178, 182-83, 813 P.2d 180 (1991) (see cases collected within).

her claim and her unsupported allegations and speculation were insufficient to create any issues of fact. Summary judgment in Harborview's favor was proper. Harborview respectfully asks this court to affirm the trial court's rulings.

**B. Ms. Lane's misclassification claim was properly dismissed on summary judgment**

As noted above, Ms. Lane's sole cause of action is based on the misclassification sections, RCW §§49.44.160 and .170, enacted in 2002. These sections apply specifically to public employers. They are consistent with the common law principal, applied in a variety of employment situations, that the actual attributes of a position should prevail over labels or simple names. The sections expressly do *not* require a public employer to provide the same benefits to all employees. They do require that rules providing for exclusion of benefits be supported by objective differences.<sup>100</sup> To misclassify means to classify an employee by using a label that does not objectively describe the employee's actual work circumstances.<sup>101</sup>

**1. Elements of a misclassification claim**

Based on the language of the misclassification sections, in order to prove she was misclassified Ms. Lane would have to establish at least the

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<sup>100</sup> RCW §49.44.160.

<sup>101</sup> RCW §49.44.170(2)(d).

following elements: (1) that Harborview “misclassified” Ms. Lane as a per diem, rather than classified, employee; (2) that Harborview gave Ms. Lane fewer benefits because it misclassified her as a per diem (rather than classified) employee; (3) that Harborview misclassified Ms. Lane purposefully “to avoid providing” benefits; and (4) that, from an objective standpoint, Ms. Lane’s work circumstances as a per diem nurse were no different from those of a classified nurse.

Mader v. Health Care Authority<sup>102</sup> is the reported decision that refers to the misclassification sections, although they were not directly at issue in the case. In referencing the sections the court noted with approval that sections’ requirement that actual circumstances of employment are what should determine employee status, and that an employee should not be afforded or denied benefits based solely on a label.<sup>103</sup>

Consistent with Mader, and the concept obviously underlying the misclassification sections, to determine whether an employer has misclassified an employee or group of them, a court should use an individualized, case-by-case, approach. This is only logical. Depending on the industry, employee pool and workplace, and perhaps other factors, there could be any number of work circumstances affecting employee classification. In other words, a court should use objective standards

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<sup>102</sup> 149 Wn.2d 458, 70 P.3d 931 (2003).

<sup>103</sup> 149 Wn.2d at 475-76.

applicable to the particular type(s) of employment at issue, rather than only the examples listed in the statute. That “per diem” employment is not listed in the sections as a category of employment does not mean that it is either endorsed or prohibited as a type of employment. What is important is whether there are objective differences between per diem and other types of employment used in the health care industry, specifically at public hospitals. There are objective differences. As discussed below, given the undisputed and indisputable evidence presented, Harborview was entitled to judgment, as a matter of law, on Ms. Lane’s claim.

**2. Harborview did not “misclassify” Ms. Lane – she chose to remain a per diem nurse, and could have taken a classified nurse position at virtually any time**

The first issue is whether Harborview even determined Ms. Lane’s status. It did not. Ms. Lane’s contention that Harborview intentionally (mis)classified her is belied by the context in which her suit arises. She chose to leave UWMC, resign from a second hospital, and then come to Harborview to work in the OR. Harborview was under no obligation to have an immediate vacancy to suit her personal desires. Then, Ms. Lane could have chosen, at almost any time between 1998 and 2007, to take a position in classified service rather than continue as a per diem. There were many, many, openings for classified RN2s at Harborview over the years, in the OR department and elsewhere.

The fact that there were so many openings for classified positions when Ms. Lane and some other nurses continued to work as per diems, demonstrates that Harborview did not have such power in the employment market place that it could force nurses to submit to misclassification and take jobs that lacked appropriate benefits. The facts here are unlike those presented in Mader, or Vizcaino (the permatemps case),<sup>104</sup> in which it was the employer who exercised its considerable power to exclude employees from certain (desirable) classifications. Over the years, Harborview obviously had no ability to force nurses to continue working as per diems and, by so working, forgo the different benefits associated with classified work. There were too many openings for classified positions. Thus, per diem employment must have a tangible benefit that classified service does not have. That benefit is the freedom and flexibility to decide to work or not work as one so chooses. To rule that Ms. Lane was misclassified would be to ignore this benefit and the reality of Ms. Lane's work history and choices.

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<sup>104</sup> In Vizcaino the issue was whether a private employer could designate some workers, whom it admitted were common law employees and whom the IRS had ruled as such, as nonemployee "independent contractors" to exclude them from a benefit the employer offered employees and for which it received favorable tax treatment. The court held that Microsoft could not avoid including the workers in a plan offered to all employees simply by calling them independent contractors for some purposes and not others. Vizcaino v. Microsoft, 120 F.3d 1006, 1015 (9<sup>th</sup> Cir. 2007).

**3. The work circumstances of per diem employment are objectively different from classified employment**

The facts, which are undisputable, established that there are objective differences in work circumstances between per diem and classified employment. Ms. Lane was not misclassified as a per diem. These differences are consistent with the different ways in which Harborview treats classified and per diem nurses. That both classified and per diem nurses perform essentially the same tasks does not mean that their work circumstances are the same. Nor is it dispositive that some per diems may choose to work as such for years. The attributes of their employment, i.e., their work circumstances, are different in important aspects.

A key difference in circumstances between classified and per diem nurses is the difference in obligations that per diem nurses' owe their employer to come to work. And the concomitant difference in obligations that the employer, Harborview, owes per diems.

As described above, per diem nurses, themselves, decide when they are available to work and when they are not. This is unlike classified nurses. Per diem nurses are free to decline work. Per diem nurses control their own schedules, even if they are be expected to work at least a few shifts a month. Unlike classified nurses, per diems are not limited to a certain number of vacation leave days per year. Unlike classified employees, per diems do not have to show proof of illness to justify taking

sick leave.<sup>105</sup> They do not have to ask anyone at Harborview, or give any reason, to decide not to work. That control provided Ms. Lane with the flexibility to arrange her schedule around her husband's job, her family's needs and her desires, including her desire to avoid what she viewed as undesirable schedules assigned to classified positions. Ms. Lane's decision to work as a per diem and control her work schedule was of course legitimate, but that control distinguishes her per diem status from classified service.

Consistent with a per diem's retention of control, Harborview has different responsibilities to its per diem staff than it does to classified personnel. Per diems work on an as-needed basis, i.e., when Harborview needs staff. That is a trade-off for the per diem's freedom of determining when she will be available to work, and is unlike Harborview's obligation to classified staff. In the absence of narrow regulatory exceptions (e.g., during formalized reductions in force), a public employer is obligated to pay its classified employees whether or not it needs their services on a given day.<sup>106</sup> That is because classified nurses commit to working certain shifts and schedules (whether easy or not) because the public needs a trauma center. This is obviously a responsible way of doing the public's business, and consistent with objective differences between classified and per diem employment.

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<sup>105</sup> CP 117 (Article 16 of CBA that appears to pre-date civil service reform and referencing WAC repealed July 1, 2005); see also WAC 357-31-130.

<sup>106</sup> See RCW 41.06.150, last paragraph, for an example of an exception.

**4. Benefits provided to per diems are consistent with the objective differences between per diem and classified employment**

Further showing that the distinctions drawn between classified and per diem nurses are proper, and not based on misclassification, is that the differences in benefits given to the different groups derive from the differences in work circumstances. For example, one significant difference in benefits is that classified employees receive a certain amount of paid leave per month but per diem employees do not. This is logical, given the circumstances of per diem employment. A recognized policy consideration behind vacation benefits, for example, is that they afford a rest from work.<sup>107</sup> A per diem retains control of when she works and can rest when she feels the need or desire to do so. She can just decide not to make herself available to work. Awarding vacation leave to a per diem would simply mean paying her more.

The differences in “step increases” as applied to classified and per diem nurses are also logically consistent with the differences in work circumstances. With classified employees, Harborview has a right to expect that they would work according to the level of the position (100% or other percentage of FTE), and take leave when not actually working.

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<sup>107</sup> Scannell v. Seattle, 97 Wn.2d 701, 648 P.2d 435 (1982) (Brachtenbach concurrence).

The amount of time each nurse is expected to work per year is predictable. Thus, it makes sense for the rules applicable to classified staff to provide for a step increase based simply on the passing of time. Per diems are different. They control how much they make themselves available; some undoubtedly work fewer hours per year and others work more. An employer like Harborview, although it chose to give step increases to per diems (which is not mandated in any event), would have no predictable basis to give regular increases to per diems. Awarding steps based on hours worked, and upon request rather than simply the passing of a year, was consistent with the difference in work circumstances. Harborview now has different systems in place to track per diem hours, but that does not mean that its prior method was inappropriate or inconsistent with the objective differences between classified and per diem employment.

In summary, the differences in work circumstances between per diem and classified employment are objective, undisputed and illustrated by the different ways that Harborview treated the different groups. Harborview did not misclassify Ms. Lane or per diem nurses generally. Summary judgment was properly granted for Harborview.

**C. Ms. Lane’s argument that she was “not temporary so that she must have been classified” is without merit; her argument is based essentially on labels rather than on work circumstances**

Ms. Lane also contends that, because she worked in a per diem position for more than a short period of time, she was not a temporary employee so, therefore, she must be considered a “classified” employee regardless of who controlled that decision and regardless of objectively different circumstances of employment.<sup>108</sup> The gist of this argument appears to be this: Harborview misclassified Ms. Lane because, though she chose to work as a per diem for years before applying for a classified position, Harborview continued to employ her as a per diem rather than force her to accept a classified position (and its assigned schedule) or stop employing her. Ms. Lane’s arguments are without merit.

The cases Ms. Lane cites do not require this Court to look only at how long she chose to remain working as a per diem rather than her actual work circumstances. State ex rel. Cole v. Coates,<sup>109</sup> for example, involved the civil service position of “crosswalk foreman.” Later, after a city charter was adopted and new commissioner elected, the city restructured the pay for the position (from monthly to daily) and renamed it. The new commissioner took that opportunity to appoint someone else into the newly renamed position. When the former incumbent sued, the court

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<sup>108</sup> See the argument beginning at page 13 of Ms. Lane’s brief.

<sup>109</sup> 74 Wash. 35, 132 P. 727 (1913).

compared the new position with the old one and determined it was the same position, in that it had the same duties and responsibilities despite the change in pay and name. The court further noted that the pay change did not create a “day laborer” position, exempt from civil service.<sup>110</sup> Cole does not hold that a position should be evaluated solely on its title or other superficial attributes as Ms. Lane seems to argue. The objective circumstances are what are important.

Other cases cited by Ms. Lane, Allard v. City of Tacoma<sup>111</sup> and Petley v. City of Tacoma<sup>112</sup> provide her with no more support. Allard held that the employer should have considered the nature of positions, rather than titles, in determining whether one employee was entitled to another’s position based on seniority.<sup>113</sup> In Petley, a city hired a “hydraulic engineer” without using the civil service examination register. The city argued that it did not have to hire from the register because the examination had been for “designing” and “construction” engineers, not “hydraulic” engineers. The court found that, under the circumstances presented, a “designing engineer” was necessarily also a “hydraulics engineer.” Thus the city could not avoid hiring from the register. The actual attributes of the types of engineer, not their names, was what was

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<sup>110</sup> 74 Wash. at 38, 39.

<sup>111</sup> 176 Wash. 441, 29 P.2d 698 (1934).

<sup>112</sup> 127 Wash. 459, 221 P.579 (1923).

<sup>113</sup> 176 Wash. at 443.

important.<sup>114</sup> Although these cases predate the misclassification sections by years, they are consistent in illustrating that the objective circumstances of the positions here, per diem positions contrasted to the circumstances of classified nurse positions, are what should be considered, rather than titles or generalizations.

State ex rel. Thompson v. City of Seattle,<sup>115</sup> a case that Ms. Lane did not discuss, provides useful guidance. In Thompson, a city had previously used civil service positions to perform minor plumbing maintenance and repair work. When the city decided to install an irrigation and sprinkler system, however, it hired a licensed plumber. The plumber was eligible for a civil service position, yet the city chose to hire him on a temporary basis. When it hired the plumber the city indicated that the length of the temporary appointment would be a month. In fact, the city kept the plumber working on the project considerably longer than a month, and then ended his employment. The plumber sued, claiming he had worked long enough to achieve permanent status. The court disagreed. Although his services were utilized longer than anticipated he was not initially employed on a permanent basis—and knew that fact—

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<sup>114</sup> 127 Wash. at 463.

<sup>115</sup> 185 Wash. 105, 53 P.2d 320 (1936).

and he was not transformed into a permanent employee just because he remained in the position longer than anticipated.<sup>116</sup>

Ms. Lane is making essentially the same argument as the plumber in Thompson. Although she applied as a per diem and chose to continue working in that capacity rather than commit to a schedule she apparently did not want, Ms. Lane claims that, because of how long she chose to continue as a per diem, her position transformed into a classified position at some unknown time so she should now be awarded the different benefits of both positions. In essence, Ms. Lane demands to be paid for the leave she never had to take as a per diem, and yet not have to repay either the higher pay she received as a per diem nor ever account for the flexibility she had while she worked as a per diem. Ms. Lane is no more entitled to the relief she seeks than was the plumber in Thompson.

Ms. Lane also argues that her per diem position should be considered a classified position based on a Collective Bargaining Agreement (“CBA”), at least after civil service reform on July 1, 2005.<sup>117</sup> Article 6 of a CBA<sup>118</sup> (undated) between Harborview and the nurse’s Union, SEIU District 1199, addresses Bargaining Unit Classifications, i.e., classes who are and are not covered by the CBA. That Article provides:

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<sup>116</sup> 185 Wash. at 109-110.

<sup>117</sup> See footnote 6, at page 4 above.

<sup>118</sup> CP 114.

- 6.2 Full-Time Employees. An employee who is classified staff and is regularly scheduled on a forty (40) hour week in a seven (7) day period, or an eighty (80) hour week schedule in a fourteen (14) day period.
- 6.3 Part-time Employees. An employee who is classified staff and who is regularly scheduled to work a minimum of twenty (20) hours in a seven (7) day period or forty (40) hours in a fourteen (14) day period. Such employees received prorated salaries and benefits.
- 6.4 Per Diem/Hourly Employees. Per Diem/hourly employees are temporary University employees not covered under the provisions or the terms of this labor agreement.

Ms. Lane's argument is that because she says she did not just temporarily work as a per diem, and worked "nearly" or "essentially"<sup>119</sup> full-time as such,<sup>120</sup> then her per diem position changed at some point in time into a classified position covered by the CBA. But this is inconsistent with definitions set forth in the CBA. For either full or part time employees, the first criterion is that the employee must be in a classified position: A "Full-Time Employee" is one who is an employee who is (1) classified staff *and* (2) who is "regularly scheduled" to work 40 hours a week. Similarly, for a "Part-Time Employee," the person must hold a position that is both (1) classified and (2) regularly scheduled to

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<sup>119</sup> See, for example, Ms. Lane's brief at page 2.

<sup>120</sup> If Ms. Lane's hours are averaged over the years she chose to work as a per diem, she worked approximately 71% (to possibly as much as 73%) of the time. CP 406-07. Harborview disagrees that his is near full time. Moreover, the average does not take into account variations between months and years, and does not reflect that, as a per diem, Ms. Lane was who determined when she was available to work.

work a minimum of 20 hours a week. By making herself available to work as much as she did in her per diem position (and by being needed by Harborview), Ms. Lane met one of the criteria of a “part time” position—she probably averaged more than 20 hours a week, depending on what time period is considered. However, Ms. Lane was not in a classified position. Moreover, by retaining control over her availability, the flexibility that per diem employees have that classified employees do not, Ms. Lane was not “regularly scheduled.” Thus she failed to meet that criterion as well.

Ms. Lane also argues that Article 6.4, which provides that Per Diem and hourly employees are a species of temporary employees and are “not covered under the provisions or terms of th[e] labor agreement,” means that she should be considered to have been classified. Ms. Lane argues that she became classified because she chose to remain a per diem longer than what she considers temporarily. But the Article does not provide for per diem employees to be excluded from the definition of classified employees only if they work in that capacity for a short period of time. Rather, the CBA defines per diem employees as a species of temporary, i.e., non permanent (non classified) employee, without addressing the length of time a person chooses to remain in the capacity. That definition makes sense. Given the flexibility that per diem

employees have with respect to when they make themselves available to work (i.e., except for maintaining a minimal level of contact with the hospital, they determine their own availability), and given also the fact that Harborview only uses their services when it has need, per diems are in essence temporary in that they are not committed to any set shift, days or schedule.

Moreover, Ms. Lane fails to explain how she, instead of the Union, has standing to enforce her interpretation of the CBA's definitions of who is within the bargaining unit. She is neither a party nor beneficiary to the contract. In addition, it is not for Harborview, or this Court even, to determine whether Ms. Lane's position should have been covered by the CBA. The Public Employment Relations Commission ("PERC") is the entity with authority to determine what groups of employees are within a bargaining unit, if an appropriate request is made.<sup>121</sup> Ms. Lane's arguments based on the CBA provide no basis for this Court to reverse the trial court.

**D. Harborview did not wrong Ms. Lane by expecting her to apply for a classified position if she desired one, rather than have a "review" process in place**

Ms. Lane also argues she should win because Harborview did not necessarily have an internal process by which a nurse could have her

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<sup>121</sup> See RCW §41.58.005(1); see also WAC Ch. 391-35.

status formally reviewed. According to Ms. Lane's logic, she should have been able to have her per diem position simply "reclassified" and transformed into a classified position. This argument is baseless. First, there *was* a means readily available to Ms. Lane to obtain a classified position: she could have applied for one of the numerous such positions that came open.<sup>122</sup> Perhaps Ms Lane did not want to commit to the schedule initially assigned to one of the classified positions. But why should she have been excused from doing what other nurses did, and continue to do: take a classified position, agree to work the schedule assigned and then, if the employee wants a different schedule, work up or "bid" to get a more desired schedule?<sup>123</sup> It was apparently important to Ms. Lane to control her availability by remaining a per diem nurse. That might have been important to her, but does not mean she should be able to retain that control and then step into a classified position over someone else, who had paid "her dues" and worked up the "old fashioned" way.

In addition, to implement such a system would likely further weaken the incentive for nurses to commit to classified positions. If the system worked as Ms. Lane suggests it should, nurses with little seniority would simply work as per diems, controlling their availability to avoid unpopular shifts, until they were senior enough to automatically get a

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<sup>122</sup> CP 157; 168; 173-4; 177-220.

<sup>123</sup> CP 291.

desirable shift when reclassified. If the system worked that way, Harborview would lose the ability to fill unpopular shifts. For many good reasons, including but not limited to budget control, reliability, fairness and consistency with civil service, Harborview uses classified nurses to the extent possible.<sup>124</sup> In fact, one of the downward pressures on hourly pay for per diem nurses is that Harborview does not want to provide too much incentive for nurses to abandon classified employment for per diem work. But what Lane suggests would do just that. It would discourage nurses from taking classified positions.

There are other, practical, reasons why the system would not work as Ms. Lane suggests it should. For one thing, it is unclear how such a process could be effected given the objective differences between classified and per diem employment. What Ms. Lane suggests would require the hospital to compare apples to oranges. It might be possible to review length of service and total hours worked to determine, at the time of conversion, a nurse's hourly pay rate and step/experience level. But a difficult issue would be determining the means by which Harborview would handle the nurse's schedule upon conversion from per diem to classified status. As noted above, to let someone who had used per diem status to maintain the schedule she wanted then step over those who had

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<sup>124</sup> CP 164-65.

previously committed to a less desirable schedule, would be unfair to those who chose to start as classified employees. And it would create the incentive for nurses to remain per diems simply to avoid having to “pay their dues.” One might suggest that the hospital could just negotiate a new schedule for the per diem. Or perhaps the hospital might just establish, for the newly classified position, the same schedule the per diem had chosen. Again, however, that would make it difficult or impossible for Harborview to fill unpopular shifts. Another issue would be the means by which Harborview would establish vacation and sick leave for the newly-converted position. And it would make little sense for the nurse to be awarded credit or pay for leave not needed and taken. A per diem who made herself available to work when Harborview had little need for her services would presumably work less than a per diem who was available when there was need. But to award “leave” for the hours that the less-available per diem did not work because Harborview had no need, would incentivize nurses to be more particular about what shifts, hours and days they made themselves available. That makes no sense either. Yet another question would be how to account for the higher pay that the nurse received as a per diem. If, in the transformation from per diem to classified, the nurse received credit toward paid leave for her per diem experience, then the tradeoff should be that the per diem would repay the

hospital for the extra pay she received while working as a per diem. But asking a nurse to repay years of higher wages could be difficult. And it might well seem unfair to a nurse who had enjoyed and spent the higher hourly wages, to have the overage deducted later, especially if the hospital did what Ms. Lane suggests should happen and converted the position rather than let the nurse determine the capacity in which she worked.

Ms. Lane had an opportunity to reclassify her position. She could have seriously looked, and applied, for a classified position years before she did. Summary judgment, in Harborview's favor, was proper.

**E. The trial court's evidentiary rulings were correct and should be upheld**

**1. The trial court properly struck Ms. Lane's generalized declaration testimony relating to pay and alleged damages**

In attempting to withstand summary judgment, Ms. Lane offered her view of how the substantially higher hourly rate she made as a per diem would compare to leave compensation; her understanding about weekend premium pay and who received it; an opinion that the step increases classified nurses received must have exceeded the raises she received over the years; and her conclusion that the equity adjustment

given to per diem nurses was provided to her and others because she had her attorney at the time write a letter on her behalf.<sup>125</sup>

The trial court properly excluded that portion of Ms. Lane's declaration. First, information about how her pay compared was inconsistent with her prior testimony that she did *not* know how what she made compared to others.<sup>126</sup> Having denied knowledge, Ms. Lane is hardly competent to provide an opinion on the issue shortly thereafter. Further, most of the statements are just allegations, unsupported by identified factual material (for example, her allegation that she "lost thousands" of dollars over the years). A plaintiff may not withstand summary judgment simply by relating conclusions, allegations or speculation.<sup>127</sup> In addition, statements that set forth no more than the declarant's general understanding, without also including the specific facts upon which the understanding is based, are inadmissible.<sup>128</sup>

In addition, as is evident from the trial court's order, Ms. Lane did not in her declaration offer information to establish a foundation for her knowledge. Ms. Lane could have been familiar generally with the state

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<sup>125</sup> CP 394-95, ¶¶6-9.

<sup>126</sup> Ms. Lane testified that she did not know how her hourly pay as a per diem compared to that of classified nurses, saying: "I didn't know what they were making. I really just focused on what I made." CP 274.

<sup>127</sup> Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

<sup>128</sup> Marks v. Benson, 62 Wn. App. 178, 182-83, 813 P.2d 180 (1991).

systems, even as a per diem employee, but that does not mean she is competent to opine on technical issues such as how paid leave and hourly rates compare. Even on appeal she has made no attempt to lay a foundation for her views other than her tenure at the state: no experience working on payroll issues, no opportunity to oversee benefits, etc. With respect to Ms. Lane's belief that the equity adjustment per diems received was triggered by her attorney's demand letter, that is just speculation--she did not even attempt to provide information about the basis for that belief. Ms. Lane had opportunity to provide the appropriate foundation(s) for her views, if any existed, but did not do so. The trial court properly struck this proffered testimony.

**2. The trial court properly struck Ms. Lane's conclusion that scheduling was done "the same" for classified as for per diem nurses**

Ms. Lane's "testimony" about scheduling suffers from many of the same defects as her views about pay and benefits. Ms. Lane offered her opinion, but no to establish competence to possess it. Ms. Lane did not do the scheduling, Ms. Browne did.

Ms. Lane's contention that other witnesses agreed with her opinion that scheduling was done "the same way" for all, is disingenuous.<sup>129</sup> In none of Ms. Lane's citations do the speakers confirm Ms. Lane's

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<sup>129</sup> See CP 51-52; 58-62; 97-98.

conclusions, except that everyone agrees that, in the OR, Ms. Browne did the scheduling four weeks in advance.<sup>130</sup>

Moreover, the issue that Ms. Lane focuses on in her appeal, apparently the time span over which Ms. Browne does the scheduling, says nothing about the hierarchy or process that Ms. Browne uses when she developed the schedule each month. It does not change the fact that Ms. Browne only grants leave to a limited number of classified nurses at any one time, yet the per diems control their own schedules, each providing a goldenrod form indicating when she will be available during the next month. Nor does it affect that fact that, although Ms. Browne might consider the preferences of the classified nurses, she might or might not grant a classified nurse the preference asked for while a per diem nurse retains control – she can simply say she is not available to work. This portion of Ms. Lane’s declaration was properly stricken.

**3. The trial court properly struck Ms. Lane’s counsel’s demand letter**

The final evidentiary ruling Ms. Lane appeals relates to one of the demand letters attorneys sent to Harborview on her behalf over the years. The trial court struck the letter as hearsay with no exception argued or

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<sup>130</sup> CP 58-59; 61-63; 155-56.

shown; no proper testimonial sponsorship or authentication; under ER 408 and lack of relevance.<sup>131</sup>

Ms. Lane now argues that, because her attorney wrote the letter and she offered it, a blanket rule renders the letter admissible.<sup>132</sup> But is not the law. In Bulaich the court held that admission depends on at least two issues: (1) whether admission, if submitted by the party making the offer of settlement, would chill settlement discussions; and (2) whether there was an independent reason why the document was relevant.<sup>133</sup>

Here, first of all, the demand letter is not really an offer of settlement – it is a demand for money and threat of litigation if payment is not forthcoming. To allow a plaintiff to offer her demand for money as some means of establishing liability is not the same as one party offering to take some action to resolve the matter. To accept Ms. Lane’s argument would mean that a summons and complaint is evidence. It is not.

Moreover, the demand is not relevant. It does not establish whether Harborview had a process for reclassifying unhappy employees or not. Harborview may just have disagreed with the demand, whatever its internal processes. The demand is certainly no more probative of any

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<sup>131</sup> CP 600.

<sup>132</sup> Bulaich v. AT&T, 113 Wn.2d 254, 778 P.2d 1031(1989).

<sup>133</sup> 113 Wn.2d at 263-64.

facts than attorney arguments. They are not evidence. The trial court properly excluded the demand letter.

**4. Ms. Lane has not in any event established that she was prejudiced by the exclusion of these stricken materials**

Ms. Lane did not include, in her notice of appeal, the trial court's order striking portions of her declaration. Under RAP 2.4(b), the trial court rulings are subject to review by this court only if (1) the trial court's order prejudicially affected the trial court's orders on the parties' motions for summary judgment and (2) the ruling was made before this Court accepted review. The second requirement has been met. However, the trial court's order excluding portions of Ms. Lane declaration did not prejudicially affect the trial court's rulings on summary judgment. That is because the material stricken does not truly establish Ms. Lane's legal theories. As noted above, it amounts to Ms. Lane's own generalized opinions and her attorneys' arguments. This provides another basis for this Court to affirm the trial court's order striking these materials.

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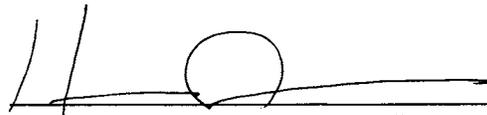
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**CONCLUSION**

Harborview asks this Court to affirm the trial court's orders: denying Ms. Lane's motion for partial summary judgment; striking portions of Ms. Lane's declaration; and granting Harborview's motion for summary judgment and dismissing Ms. Lane's case in its entirety.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of June, 2009.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, consisting of a stylized 'H' followed by a circle and a horizontal line extending to the right.

HELEN ARNTSON, WSBA #19932  
Assistant Attorney General  
Attorneys for Respondent Harborview

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that I filed with the Washington State Court of Appeals, Division I, the original and one copy of the Brief of Respondent, via Seattle Legal Messenger, at the following address:

Court of Appeals of Washington, Division I  
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And that I arranged for a copy of the Brief of Respondents to be served on counsel in the manner described below, at the following addresses:

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DATED this 19<sup>th</sup> day of June, 2009 at Seattle, Washington.

*Bana Devi Vasquez*  
BANA DEVI VASQUEZ