

**FILED**

**DEC 20 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 293661

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain  
employees it represents, and VIVIAN MAE HILL, individually and on  
behalf of others similarly situated,

Plaintiffs-Respondents,

v.

SACRED HEART MEDICAL CENTER,

Defendant-Appellant.

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**OPENING BRIEF OF APPELLANT**

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## I. INTRODUCTION

Plaintiffs-Respondents Washington State Nurses Association and Vivian Mae Hill (hereafter “WSNA-Hill” or “plaintiffs”) claim that when a nurse at Defendant-Appellant Sacred Heart Medical Center (hereafter “SHMC”) misses a 10-minute rest break as allowed under state law, WAC 296-126-092(4), the nurse should receive an additional 15 minutes of pay in compensation. On cross-summary judgment motions in the superior court, the undisputed evidence was that SHMC nurses received an additional 15 minutes of pay for every missed rest break claimed.<sup>1</sup> CP 1049; 1230-36.

One would expect the superior court to have dismissed WSNA-Hill’s claim at that point. Instead, the superior court granted summary judgment for plaintiffs, erroneously concluding that SHMC owed the nurses an additional \$52,361.41 in compensation and prejudgment interest, \$52,361.41 in double damages for a willful violation, \$200,000 in attorney’s fees for a willful violation, and \$22,545.42 in expenses, including \$11,800 in expenses for plaintiffs’ statistician Jeffrey Munson. The total judgment is \$327,268.24.

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<sup>1</sup> Nurses are paid both for the 10 minutes of work performed during what would otherwise be a rest break (1.0) plus the additional 15 minutes for having missed the rest break (1.5). Thus, nurses receive 2.5 times their pay rate for every missed 10-minute break that they claim.

The superior court's Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Third Motion for Summary Judgment should be reversed and remanded with instructions to dismiss plaintiffs' claim.

## II. ASSIGNMENTS OF ERROR

1. The superior court erred in granting plaintiffs' motion for summary judgment and denying SHMC's third motion for summary judgment in its August 20, 2010 order that also incorporated the superior court's prior March 12, 2009 dispositive rulings in favor of plaintiffs. CP 918-23; 1553-60 (notably Findings 1, 2, 3, 4, 5, 6, 8, 9, and 10).<sup>2</sup>

2. The superior court erred in awarding additional compensation and pre-judgment interest for alleged missed 10-minute rest breaks. CP 1555-56; 1557-59; 1560 (notably Findings 2, 6, and 10).

3. The superior court erred in awarding double damages and attorney fees pursuant to RCW 49.52.070. CP 1559-60 (notably Findings 9 and 10).

4. The superior court erred in awarding additional litigation expenses under the Washington Minimum Wage Act. CP 1559-60 (notably Findings 9 and 10)

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<sup>2</sup> SHMC is not appealing Finding 7. CP 1559.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Did the superior court err by granting summary judgment for plaintiffs on the issue of state law liability for alleged missed 10-minute rest breaks where there is no evidence that SHMC nurses were denied the right to 10 minutes of rest for every four hours worked as required by WAC 296-126-092(4)? (Assignment of Error No. 1)
2. Did the superior court err by concluding as a matter of law that the “nature of the work” performed by SHMC nurses did not allow for intermittent rest breaks of 10 minutes where the only evidence in the record is the contrary? (Assignment of Error Nos. 1 and 2)
3. Did the superior court err as a matter of law by concluding that plaintiffs were entitled to compensation at overtime rates for alleged missed rest breaks where plaintiffs had previously litigated the issue in an arbitration hearing and lost? (Assignment of Error Nos. 1 and 2)
4. Is a rest break that is not taken “time worked” under the Washington Minimum Wage Act, RCW 49.46? (Assignment of Error Nos. 1 and 2).
5. Did the superior court err as a matter of law by concluding that SHMC failed to properly compensate nurses for alleged missed rest breaks under state law where the undisputed evidence showed that SHMC

nurses received 15 minutes of pay for each missed 10-minute rest break under state law? (Assignment of Error Nos. 1 and 2)

6. Did the superior court err as a matter of law by interpreting the collective bargaining agreement between SHMC and WSNA in offsetting the amount received by the plaintiffs against the compensation owed for their alleged missed 10-minute rest breaks? (Assignment of Error No. 1)

7. Did the superior court err as a matter of law by awarding recovery for plaintiffs' expenses under the Washington Minimum Wage Act? (Assignment of Error No. 4)

8. Did the superior court err as a matter of law by awarding double damages (including doubling of pre-judgment interest) and attorney fees under RCW 49.52.070 where there is bona fide dispute as to whether plaintiffs were under-compensated for alleged missed rest breaks required by state law? (Assignment of Error No. 3)

9. Did the superior court err as a matter of law by granting WSNA standing as an association to bring this lawsuit where the individual participation of nurses was needed to establish on a nurse-by-nurse basis whether SHMC denied a nurse the right to 10-minute rest breaks under state law? (Assignment of Error No. 1)

#### IV. STATEMENT OF THE CASE

1. SHMC employs nurses, who are members of a collective bargaining unit represented by the WSNA. CP 1230. Because the nurses are paid hourly, they are non-exempt employees who are entitled to rest breaks under Washington law.

2. Washington law provides that non-exempt employees must be **allowed** a paid rest break of 10 minutes for every four hours worked. WAC 296-126-092(4). The regulatory requirement can be fulfilled by allowing either (a) a block break of at least 10 minutes, *id.*, or (b) intermittent breaks totaling 10 minutes, where the “nature of the work” allows. WAC 296-126-092(5). The state regulation was adopted pursuant to authority given to L&I to establish rest break requirements under the Industrial Welfare Act, RCW 49.12. Aggrieved individuals have an implied right of private action for missed rest breaks. *Wingert v. Yellow Freight Sys. Inc.*, 146 Wn.2d 841 (2002).

3. A nurse at SHMC claims a missed rest break by submitting a claim form. CP 946. The nurse then receives pay in lieu of a rest break as well as being paid for her time working through the rest break (so she effectively gets double-time when working through a rest break).

4. A nurse’s actual shift time is not extended when she misses a rest break. She is not required to sit in the break room and make-up a

missed break. She leaves work at the end of her shift whether she took her rest breaks or missed them. CP 472. The only difference is that she gets more compensation if she works through a rest break, than if she takes her rest break. However, her total hours worked remain the same.

5. Plaintiff Vivian Mae Hill is a member of the collective bargaining unit represented by WSNA. SHMC and WSNA are signatories to a collective bargaining agreement that governs the terms and conditions of employment for WSNA members. CP 1556. The issue raised in this lawsuit – whether missed rest breaks should be paid at an overtime rate rather than straight time – was litigated previously between WSNA and SHMC through the contractual grievance process in May 2006. CP 286-300. Relying on the MWA and *Wingert v. Yellow Freight Systems Inc.*, 146 Wn.2d 841, 848 (2009), WSNA argued that nurses were entitled to be paid at overtime rates for missed rest breaks in addition to the pay they received for performing work during what would have been a rest break. Ruling against WSNA, Arbitrator Levak ordered “the Employer to compensate each RN for lost breaks at the RN’s straight time rate, with no interest.” CP 299. WSNA did not appeal or otherwise seek to overturn the arbitrator’s decision regarding the rate of pay or the amount. Since May 2006, SHMC has fully complied with the arbitrator’s decision.

6. Thus, by way of example, if a nurse claims she missed the two rest breaks, the nurse receives 30 minutes of additional compensation (15 additional minutes of pay for each missed break) which means that the nurse received eight-and-a-half hours of pay for her shift of eight hours of work. The nurse is not required to remain after the shift or to lengthen the shift by 30 minutes in order to receive 30 minutes of compensation for the missed rest breaks. Rather, the nurse is released at the end of her shift and free to go home while collecting at least double compensation for rest breaks that were not taken. CP 472.

7. In 2007, WSNA filed this lawsuit in Spokane County Superior Court attempting to relitigate the required rate of pay for a missed rest break. WSNA argued, as they did in the prior arbitration, that the rate should be computed at overtime rates based on the MWA. CP 210.

Attempting to avoid federal preemption, WSNA claimed the arbitrator's ruling was not pertinent and need not be interpreted by the superior court because WSNA's lawsuit only related to state law liability and damages for missed rest breaks. CP 918-21. Nevertheless, WSNA proceeded to introduce and rely upon interpretations of the collective bargaining agreement and the arbitrator's decision to support its argument as to liability and damages in state court. The superior court expressly

relied upon these arguments in its findings regarding liability and damages. CP 1556 (Findings 2(b) and 2(c)).

## V. STANDARD OF REVIEW

In reviewing summary judgment, the Court of Appeals stands in the shoes of the trial court and examines the record *de novo* construing all facts and reasonable inferences from the facts in the light most favorable to the nonmoving party. *Greenfield v. Western Heritage Ins. Co.*, 154 Wn. App. 795, 799 (2010); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 186 (2009).

## VI. ARGUMENT

### A. The State Law Requirements Regarding Rest Breaks Were Met at SHMC.

Under Washington law, employers must allow employees a 10-minute rest period for every four hours of work. WAC 296-126-092(4); *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 847 (2002). These rest periods must be paid. WAC 296-126-092(4); *Wingert*, 146 Wn.2d at 847. As a penalty or damage award, an employer must pay an employee who works through a rest period at the rate the employee would have been paid for “ten minutes of work.” *Wingert*, 146 Wn.2d at 848.<sup>3</sup> There is no dispute that SHMC did that.

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<sup>3</sup> An employee is not entitled to overtime pay under the Washington Minimum Wage Act (MWA), which is a separate issue not raised or addressed in *Wingert*.

**1. Plaintiffs Submitted No Evidence of a Missed Ten-Minute Rest Break Under State Law.**

Plaintiffs submitted no evidence demonstrating that nurses at SHMC are denied a rest break required under Washington law. Plaintiff Hill's testimony is limited to allegedly missing contractual rest breaks ("a 15-minute break in the morning and afternoon"). CP 334. However, these contractual breaks, which are 15 minutes, are not required by state law upon which the lawsuit is based.<sup>4</sup> There is no evidence that plaintiffs failed to receive their rest breaks as required by state law.

SHMC nurses submit a missed rest break form to claim payment for not getting a full 15-minute contractual break. CP 946. They can submit such a claim even though they received at least 10 minutes for a rest break.

State law and regulation provide that employees must be allowed *ten minutes* total of rest break time. The rest break may either be scheduled as a block or taken *intermittently* over the course of a shift. WAC 296-126-092(4) ("Employees shall be allowed a rest period of not

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<sup>4</sup> Plaintiffs repeatedly rely upon the collective bargaining agreement ("CBA") for its argument that nurses are owed overtime for missed rest breaks. CP 1053. However, plaintiffs attempt to avoid section 301 preemption by asserting that its claims in this lawsuit are *without reliance* on an employment contract. Plaintiffs *cannot* have it both ways; they cannot rely on the CBA for its claim that nurses have not been paid properly for their statutory rest breaks, then tell this Court that plaintiffs' claims do not rely upon the CBA. As explained below, because plaintiffs relied upon the CBA to make their claims and the superior court interpreted the CBA in reaching its decision, their claims are preempted by section 301.

less than ten minutes . . . for each four hours of working time. . . . Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.”). The failure to receive 15 consecutive minutes of rest during a particular 4-hour period does not prove that a nurse was denied at least 10 minutes of rest required under WAC 296-126-092(4). CP 1181-89.

Not only is there no evidence to support the conclusion that plaintiffs were denied 10-minute block breaks, but the superior court also erred in concluding, without any evidence, that the nature of the work at SHMC does not allow for intermittent breaks.

There is no requirement that SHMC choose between intermittent breaks and scheduled block breaks to demonstrate compliance with state law. State law does not prohibit SHMC from allowing both intermittent breaks and scheduled block breaks. Further, there is no requirement that SHMC record breaks. All that SHMC has to do to comply with the state regulation is to “allow” nurses to take rest breaks. Nurses complaining that they missed contractual block rest breaks does not establish liability or a denial of rest breaks required under state law. First, nurses must show that 10 minutes of scheduled break time was missed – which they haven’t – and they must also show that the nature of the work did not permit them

to get 10 minutes of rest every four hours, even if they did not get scheduled breaks. The only evidence is that nurses take intermittent rest breaks, which fully satisfies state law. CP 472; 945.

Intermittent breaks satisfy the state regulation even if scheduled breaks are missed. Accordingly, plaintiffs WSNA and Hill have failed to establish an essential element of their claim and summary judgment should have been granted to SHMC.

**2. Damages for Missed Rest Breaks Is Straight Time Under WA Law.**

The source of the obligation to pay employees additional compensation for missed rest breaks is the Industrial Welfare Act (IWA),<sup>5</sup> RCW 49.12, not the MWA. *Wingert v. Yellow Freight Sys. Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002). *Wingert* held that under the IWA, employees who are not provided with the mandated rest period of ten minutes are “entitled to be compensated” an additional ten minutes. *Id.* at 849.

Washington law requires that the rest breaks that are taken must be paid. WAC 296-126-092(4) (rest periods are “on the employer’s time”). The court *Wingert* held that employees who work through their rest breaks are “in effect,” providing their employer with “an additional ten

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<sup>5</sup> The Washington meal and rest break regulations, WAC 296-126-092, “were adopted [by the Department of Labor and Industries] under the authority of Chapter 49.12 RCW.” *Wingert*, 146 Wn.2d at 847, 5 P.3d at 260.

minutes of labor” at a time when they are otherwise entitled to ten minutes of pay for not working (i.e., a ten-minute rest break). *Id.* at 849. Thus, employees must be compensated for the additional “value” provided to the employer in lieu of taking a paid break. The *Wingert* court did not apply the MWA or hold that a missed rest break constitutes “hours worked” to be counted for overtime purposes, nor could it, because a rest break not taken cannot be converted to “hours worked” as that term is defined.<sup>6</sup> The *Wingert* Court remanded the case for a trial on the merits, *id.* at 854, stating that “the issue of damages must be determined with respect to each claim.” *Id.* at 851.

Prior to *Wingert*, an employee would receive 10 minutes of pay regardless of whether she worked for 10 minutes or took a rest break for 10 minutes. The employee received the same amount. The *Wingert* court viewed this an invitation to employers to deny rest breaks with impunity. Accordingly, the Court held that an employee is entitled to additional *compensation* when the employee provides “in effect” more work than is actually required during an eight-hour shift under WAC 296-126-092(4). *Wingert*, 146 Wn.2d at 846.

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<sup>6</sup> *Wingert* interpreted the Industrial Welfare Act (IWA) and the Wage Rebate Act (WRA) not the overtime provision of the MWA. Liability for wages under the IWA and WRA do not establish an overtime obligation under the MWA. *See Iverson v. Snohomish County*, 117 Wn. App. 618, 623 (2003) (*Wingert* is limited to the question of whether employees had a private right of action for missed rest periods).

To be paid for eight hours under WAC 296-126-092(4), the employee need only actively work seven hours and 40 minutes because the employee is entitled to a total of 20 minutes of paid rest breaks. But, if the employee is denied a rest break, the employee actively works for 10 minutes rather than taking a 10-minute paid rest break; similarly, if the employee is denied both rest breaks, the employee actively works for 20 minutes instead of taking 20 minutes of paid rest break. In either case, the employee gets paid the same for the eight-hour shift. The *Wingert* majority, holding that this was inequitable, implied a remedy under the IWA and directed that employees receive an additional 10 minutes of compensation, i.e., double compensation, for each missed 10-minute rest break.<sup>7</sup>

In holding that workers are entitled to compensation at the rate of an additional 10 minutes pay for every missed 10-minute rest break, the *Wingert* decision supports the conclusion that damages for missed rest breaks is straight time under Washington law. *Id.* at 848 (the Washington

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<sup>7</sup> The employee gets paid once for actively working for 10 minutes and also gets a like amount for being denied what would otherwise have been a paid break. There never was an issue as to whether the employee would get paid for the time actually worked. The issue was the inequity of being paid the same for actively working as for taking a rest break. *Wingert* determined that the worker should, in effect, receive double time for working through a rest break even though the employee's actual shift time or work day is not increased. The employee thus receives pay for her working time and a like amount for the non-working time, i.e., the rest break not taken.

rest break regulation “does not distinguish between regular and overtime hours worked”).

**3. Estoppel and Waiver Bar Plaintiffs’ Claim Against SHMC.**

The plaintiffs here did not rely on the IWA to state a claim. Indeed, plaintiffs do not contest that SHMC has properly paid the nurses for missed rest breaks under the IWA. CP 1230-31. Rather, plaintiffs put forward a separate cause of action under the state Minimum Wage Act (“MWA”), RCW 49.46, by asserting that a missed rest break constitutes additional “hours worked.” If true, the plaintiffs would be entitled to compensation for missed rest breaks at overtime rates. The superior court accepted this erroneous overtime pay argument even though it is not supported by *Wingert*.

Additionally, this precise issue— the appropriate rate of pay for missed rest breaks – was the same issue raised by WSNA in the grievance and arbitration process mandated by the CBA.

Arbitrator: What remedy are you seeking?

WSNA Counsel: “We are seeking back pay for nurses in amounts reasonably estimated by the arbitrator . . . at the *overtime rate* . . . .”

CP 774.

It is undisputed that the arbitrator rejected this argument – he ordered payment for missed rest breaks at the straight time rate.

The Arbitrator will further order the Employer to compensate each RN for lost breaks at the RN's *straight time rate*, with no interest.

CP 299 (emphasis added). Accordingly, the matter was fully resolved in a 2006 arbitration in which it was determined that the appropriate rate of pay for missed rest breaks was the straight time rate.

**a. Plaintiffs' claim is barred by the collateral estoppel doctrine.**

The doctrine of collateral estoppel “prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case.” *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561 (1993) (internal citations omitted). The requirements for applying the doctrine are:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice.

*Id.* at 562 (internal citations omitted); *Neff v. Allstate Ins. Co.*, 70 Wn.

App. 796, 800 (1993) (internal citations omitted).

All four requirements are met here; thus, plaintiffs' claims are barred. First, the parties arbitrated the same issue in 2006. After reviewing WSNA's grievance and arguments based upon Washington's state law, WSNA's arguments regarding *Wingert*, and testimony regarding SHMC's practices regarding overtime pay and missed rest breaks, the Arbitrator specifically addressed what the appropriate remedy would be and ordered compensation for missed rest breaks at straight time rates. Second, the Arbitrator issued a final order based on the merits. Third, WSNA was a party to the arbitration and there is privity between WSNA and its members. *See Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 308 n.5 (2004). Fourth, WSNA has not shown that applying the collateral estoppel doctrine would result in any injustice. WSNA was afforded a full and complete opportunity to litigate the issue of the overtime rate previously.

Plaintiffs' attempt to separate the 2006 arbitration from the instant action is belied by the evidence in the record. In the arbitration action, the plaintiffs sought overtime pay based on the Washington statutes. CP 293-96. The Arbitrator's decision makes it clear that the remedy (damages in the form of payment for missed rest breaks at the straight time rate) was based on Washington law as argued by WSNA. CP 299.

**b. Plaintiffs' claim is barred by res judicata.**

WSNA is barred by res judicata, which applies when, “a prior judgment [has] a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.” *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891 (2000) (internal quotations omitted). Here, the arbitrator’s earlier order was based on the same facts and the same issues that WSNA presents here. The subject matter, causes of action, the parties, and quality of the parties are identical to those in the earlier arbitration proceeding.

In the arbitration proceeding, WSNA cited to *state law* requiring payment for missed rest breaks. CP 776-77. WSNA relied on this same *state law* in this case. Based on the same authorities, WSNA asserted entitlement to overtime compensation for missed rest breaks in this case. Accordingly, the subject matter, causes of action, the parties, and quality of the parties are identical to those in the earlier arbitration proceeding and the plaintiffs claim is barred by res judicata.<sup>8</sup>

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<sup>8</sup> Even if this Court were to erroneously conclude that pay in lieu of a missed rest break also constitutes “hours worked” for overtime purposes and that WSNA is not generally barred by res judicata, WSNA still cannot show any damage because plaintiffs received 15 minutes of pay for each missed rest break.

**c. Plaintiffs' claim is barred by waiver.**

Plaintiffs brought the grievance that resulted in Arbitrator Levak's decision and award in 2006. It is undisputed that the arbitration award granted compensation for missed rest breaks at the straight time rate and that plaintiffs have been paid for their missed rest breaks at the straight time rate ever since. CP 1052; 1230-31. Plaintiffs' decision to accept the arbitrator's award and not attempt to vacate it bars WSNA from proceeding with the instant claim. Under Washington law, waiver occurs when conduct constitutes a knowing and voluntary relinquishment of a known right. *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39 (2000); *Jones v. Best*, 134 Wn.2d 232, 241 (1998).

**B. MWA is Not Applicable Because Plaintiffs Did Not Work Additional Hours Beyond The Shift Time They Were Paid For.**

Contrary to the superior court's Finding 2(a), a missed rest break is not "time worked" and does not put an employee into overtime.<sup>9</sup>

"Hours worked" is defined as all hours during which the employee "is authorized or required, by the employer to be on duty on the employer's premises or at a prescribed workplace." WAC 296-126-

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<sup>9</sup> An analogous situation is an employee who is entitled to a day off with pay on a holiday. If the employee works the holiday, the employee generally receives both the pay for working as well as the holiday pay the employee otherwise would have received while on a holiday. Thus, the employee who works the holiday gets paid for 16 hours, but only works 8 hours. In terms of calculating overtime pay for the week, the 8 hours of holiday pay does not count as 8 "hours worked" toward the 40-hour threshold for overtime pay.

002(8). This definition was followed by the Washington Supreme Court in *Stevens v. Brink's Home Security*, 162 Wn.2d 42, 169 P.3d 473 (2007). It is also supported by L&I's Administrative Policy ES.C.2 (rev. 9/2/2008) (“[i]f any of the three elements is not satisfied, then the time . . . is not considered ‘hours worked’”).

In this case, it is undisputed that none of these three required elements is met with regard to missed rest breaks. SHMC nurses are not “required by the employer to be on duty on the employer’s premises or at a prescribed workplace” to make-up a rest break. To the contrary, the nurse leaves at the end of his or her shift; the nurse does not remain on premises or stay an extra ten minutes to make-up an alleged missed break. CP 472. Her shift is not extended. Rather, the nurse simply goes home at the end of her shift and receives a make-up payment in her paycheck. CP 472. Thus, the alleged missed rest breaks are not “hours worked.” The nurse is neither “on duty” nor is the nurse “required by [SHMC] to be . . . on the employer’s premises” after her shift ends to qualify for payment of an alleged missed rest break. The superior court’s conclusion to the contrary is an incorrect reading of the law.

It is undisputed that SHMC pays nurses for all the hours that they actually work during a shift.<sup>10</sup> It is also undisputed that SHMC then provides additional compensation for alleged missed rest breaks based on the measure of damages set forth in *Wingert*. 146 Wn.2d at 848 (holding that an employer must pay an employee, who works through a rest period, damages at the rate the employee would have been paid for “10 minutes of work”). *Wingert* does not require SHMC to count a rest break that is not taken as “hours worked.” Neither does the MWA where the employee goes home and never actually takes the rest break.

The superior court’s conclusion that a missed rest break counts as “hours worked” is based on a false assumption. The superior court assumed that an employee who misses a rest break actually works a longer shift, an assumption contradicted by the undisputed fact that a nurse’s shift is not extended when he or she misses a rest break.

**C. The Superior Court Erred as a Matter of Law Because Plaintiffs Were Paid the Amount They Claim and Suffered No Damages.**

Even if plaintiffs had submitted evidence that they were not allowed either a 10-minute block or intermittent rest break as required under Washington law and that such missed rest breaks are “hours

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<sup>10</sup> Also, if a nurse actually takes a rest break during the shift, SHMC not only pays for the rest break but also counts it as “hours worked” because the nurse was on duty and actually took a rest break, unlike the situation in this lawsuit where no rest break is actually taken.

worked,” no damages exist. It is undisputed that SHMC paid nurses a total of 15 minutes compensation for each missed rest break, CP 473-74, which equates to time and one-half for the 10 minutes of rest break under the state law that forms the basis of plaintiffs’ claims in the lawsuit. *See* WAC 296-126-092(4).

The Washington Department of Labor and Industries (L&I) reviewed a similar situation and determined that when an employer “compensates the nurse by paying for 15 minutes of straight time” when the nurse misses a rest break, that the employer “effectively pays the nurses at overtime rates for the missed mandatory 10-minute rest break as provided by WAC 296-126-092.” CP 749-50.

Thus, plaintiffs have no damages under state law because SHMC has already paid plaintiffs the total amount they would receive based on overtime rates for any alleged missed 10-minute rest break. Because plaintiffs have no claim for damages, the superior court erred in granting summary judgment to plaintiffs in denying summary judgment to SHMC.

**D. Plaintiffs’ Claim Is Substantially Dependent On an Interpretation of the CBA, and Thus, Is Preempted by Section 301.**

Plaintiffs’ claim that they did not receive pay at an overtime rate for missed rest breaks is preempted by Section 301 because it relies upon and requires the superior court to interpret the CBA and the May 28, 2006

arbitration decision in order to avoid setting off the 15 minutes of pay received for missed rest breaks against the alleged overtime damages owed under state law for missed rest breaks. Interpreting and characterizing the CBA method of compensation for missed rest breaks in relation to damages is preempted and not within the superior court's jurisdiction.

Arbitrator's decisions are given a "nearly unparalleled degree of deference" provided the arbitrator arguably construed or applied the contract. *Stead Motors v. Auto Machinists Lodge No. 1173*, 886 F.2d 1200, 1204 (9th Cir. 1989). If an arbitrator ignores the plain language of the contract or enforcement would violate a well-defined public policy (such as the MWA), a court may vacate the award or refuse to compel compliance. *See, e.g., W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983). Here, the plaintiffs made no effort to timely vacate the arbitration decision.

At the outset of this lawsuit, plaintiffs claimed that preemption principles did not apply. However, as the litigation unfolded, the plaintiffs relied upon the CBA for their argument that the payments received by them for missed rests breaks had to be characterized and interpreted based on the purposes of the collective bargaining agreement. The superior court then engaged in an extensive analysis of the alleged impact of the CBA and the Arbitrator's ruling on the damages available here and set

forth its reliance on that analysis in Finding 2. CP 918-21; 1556. This reliance on and interpretation of the CBA in relation to characterizing the amounts paid to plaintiffs for missed rest breaks means that WSNA's claim is preempted by Section 301. The U.S. Supreme Court has repeatedly emphasized that collective bargaining agreements are governed by federal law and federal common law under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a); *Allis-Chalmers v. Leuck*, 471 U.S. 202, 208-09, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). Accordingly, whenever disputes arise under a collective bargaining agreement, federal law preempts state law. And, where, as here, an arbitrator's decision is not timely vacated, it becomes part of the CBA unless and until the parties negotiate new terms in future negotiations. *See San Diego Dist. Council of Carpenters v. Cory*, 685 F.2d 1137, 1142 (9th Cir. 1982) ("Parties to a collective bargaining agreement rely upon arbitration decisions to delineate the common law of the work place and to identify issues for future negotiations"). For this reason, the argument that 15 minutes of pay for a missed rest break does not constitute full relief in this lawsuit cannot be resolved without interpretation of the prior arbitration decision, which is now effectively part of the CBA. And, to determine whether WSNA members are entitled to overtime pay, and whether the pay that they have received can be

properly offset against any state law obligation, a court would need to interpret, as the superior court did, the collective bargaining agreement and the arbitrator's decision of May 28, 2006.

Plaintiffs *cannot* have it both ways; they cannot rely on the CBA for their claim that nurses have not been paid properly for their statutory rest breaks, and then tell this Court that plaintiffs' claims do not rely upon the CBA.

Thus, Plaintiffs' claim is preempted by Section 301. The U.S. Supreme Court has repeatedly emphasized that collective bargaining agreements are governed by federal law and federal common law under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). *Allis-Chalmers v. Leuck*, 471 U.S. 202, 208-09, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). Accordingly, whenever disputes *arise under* a collective bargaining agreement, federal law preempts state law. "Section 301 governs claims *founded directly on rights created by collective-bargaining agreements*, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (emphasis added).<sup>11</sup>

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<sup>11</sup> Moreover, to determine whether WSNA members were paid correctly and whether they are entitled to overtime pay, the Court would need to interpret the 2004 and 2007 CBAs (including the arbitrator's decision).

**E. Plaintiffs' Expenses Incurred in the Litigation Are Not Available Because Plaintiffs Did Not Have a Valid Washington Minimum Wage Act Claim.**

Plaintiffs' claim for reimbursement for expenses beyond statutory costs is premised on its underlying argument that SHMC violated the MWA by not treating a missed rest break as time worked. *See McConnell v. Mothers Work, Inc.* 131 Wn. App. 525, 532-33 (2006). Time not worked, i.e., a missed rest break, is not required to be counted for overtime purposes under the MWA, thus there is no MWA violation and, consequently, plaintiffs are not entitled to additional expenses incurred in this lawsuit.

**F. Double Damages and Attorney Fees Under RCW 49.52 Should Not Have Been Awarded Because There is a Bona Fide Dispute Regarding Plaintiffs' Claim For Overtime Pay.**

Employers are liable for double damages only if they “willfully and within intent to deprive . . . pay an employee a lower wage than the wage bracket [the] employer is obligated to pay.” RCW 49.52.050; *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659 (1986). An employer’s non-payment of wages is not willful when it results from a “bona fide dispute.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160 (1998). *See also Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 849 (2002) (stating that willful withholding is “the result of knowing and intentional

action and not the result of a bona fide dispute as to the obligation of payment”). A “fairly debatable” dispute over . . . all or a portion of the wages must be paid precludes a finding of “willfulness”. *Schilling*, 136 Wn.2d at 161.

Disputes as to the law create a bona fide dispute. *See, e.g., Morrison v. Basin Asphalt Co.*, 131 Wn. App. 158, 166 (2005); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 723 (2007). Moreover, courts have determined that employers are not willful when an employer follows a CBA regarding wage payments, even though a court later determines that the employer was liable after resolving the bona fide dispute. *See, e.g., Champagne v. Thurston County*, 163 Wn.2d 69 (2008) (finding that the employer’s wage payment system “complies with the provisions and the governing collective bargaining agreement with respect to overtime wages and compensatory time”); *Moran v. Stowell*, 45 Wn. App. 70, 724 P.2d 396 (1986) (determining that the employer did not act willfully because the employer’s decision regarding compensation “was based upon provisions of the collective bargaining agreement . . . the [employee’s] failure to exhaust the remedies through the mandatory grievance procedures,” and other affirmative defenses, “all of which posed fairly debatable issues”).

In this case, no Washington appellate courts has ever determined that a rest break that is *not taken* constitutes “hours worked” under the MWA for purposes of computing overtime pay. The relationship between missed rest breaks and the overtime threshold in the MWA was neither presented to nor considered by the court in *Wingert*, which addressed only a private right of action for compensation for missed rest breaks under the Industrial Welfare Act, but made no ruling on the rate of pay under the MWA. Further, courts applying *Wingert* have never held that alleged missed rest breaks are “hours worked” under the MWA. Like the employers in *Champagne* and *Moran*, SHMC followed the CBA as interpreted by Arbitrator Levak in his decision, which required SHMC to pay straight time for claimed missed rest breaks. Finally, it is clear from the volumes of briefing in this case that a fairly debatable dispute exists regarding how rest breaks not taken should be compensated under Washington law. Thus, the plaintiffs are not entitled to double damages or attorney fees under RCW 49.52.070 as set forth by the superior court in its findings 8 and 9 of its August 20, 2010 Order. CP 1559-60.

**G. The Superior Court Erred in Holding That WSNA Has Standing to Sue on Behalf of Its Members.**

An association only has standing to sue “on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s

purpose;<sup>12</sup> and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. Apple Adver. Comm’n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). When, as here, an association seeks monetary damages rather than injunctive relief, criteria (c) for associational standing is met only when the amount of money sought on behalf of the members is “certain, easily ascertainable, and within the knowledge of the defendant.” *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 215-16 (2002) (conjunctive test); *Teamsters Local Union No. 117 v. State Dep’t Corr.*, 145 Wn. App. 507, 512-13 (2008).

Here, the amount of monetary relief requested for each employee is not certain, easily ascertainable, or within the knowledge of the defendant. *See Int’l Ass’n of Firefighters, Local 1789*, 146 Wn.2d at 215-16. WSNA lacked standing as an association to bring this lawsuit because the individual participation of nurses was needed to establish whether any damages occurred. WSNA can only prove its claim and determine the amount of money relief requested by submitting evidence from each and every nurse member of its organization. Currently, nurses complete missed rest break forms when nurses allegedly miss fifteen-minute block

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<sup>12</sup> WSNA did not present competent evidence to support the organization’s purpose. Even if the underlying issue here is germane to WSNA-Hill’s purpose, WSNA has already pursued and lost the issue in a prior arbitration, the contractually agreed upon forum for resolution of the dispute.

rest breaks. The missed rest break forms provide no evidence that nurses missed *statutory ten-minute block or intermittent rest breaks*. Thus, plaintiffs have submitted *no* evidence demonstrating that nurses miss statutory 10-minute block or intermittent rest breaks, and WSNA has no standing to make overtime claims on behalf of individual nurses.

In addition, variation of work schedules and rates of pay requires the participation of the individual members of WSNA to determine the monetary relief requested. CP 474. Thus, determining the amount of damages sought for each nurse required the nurse members' involvement and is far more than a simple mathematical calculation. *See Teamsters Local Union No. 117*, 145 Wn. App. at 513.

WSNA did not have standing to sue on behalf of its members, because the nurse members' participation was required to determine whether or not they did indeed missed any statutory rest breaks and suffered any damages.

## VII. CONCLUSION

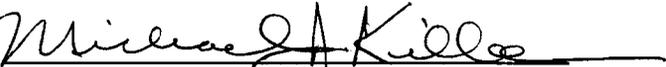
Summary judgment for plaintiffs should be reversed and remanded with instructions to enter summary judgment for SHMC.

The reversal of an order granting summary judgment to one party does not necessarily mean that the other party's motion for summary judgment must be granted. But granting summary judgment to the other

party can be an appropriate remedy in a case where the two motions take diametrically opposite positions on the dispositive legal issue, and raise no issues of fact. *See Weden v. San Juan Cty*, 135 Wn.2d 678, 709-10, 958 P.2d 273 (1998).

*Estate of Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 776-77, 27 P.3 1233 (2001). *See also, Kim v. Allstate Ins. Co., Inc.*, 153 Wn. App. 339, 365-66 (2009).

RESPECTFULLY SUBMITTED this 17th day of December,  
2010.

By 

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## PROOF OF SERVICE

I, Carol Gary, the undersigned, hereby certify and declare under that the following statements are true and correct:

1. I am over the age of 18 years, not a party to the within cause and am employed by the law firm of Davis Wright Tremaine. My business and mailing addresses are both 1201 Third Ave., Suite 2200, Seattle, Washington 98101-3045.

2. On the 17th day of December, 2010, I caused to be sent for filing an original and one copy of *Opening Brief of Appellant* via overnight mail to:

Clerk of Court  
Court of Appeals, Division III  
500 N. Cedar Street  
Spokane, WA 99201

3. On the 17th day of December, 2010, I caused to be served a copy of *Opening Brief of Appellant* via overnight mail to:

David Campbell, Esq.  
Dmitri Iglitzin, Esq.  
Carson Glickman-Flora, Esq.  
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Seattle, WA 98119-3971

Executed at Seattle, Washington this 17th day of December, 2010.

  
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Carol Gary