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No. 33556-9-III

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COURT OF APPEALS
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DIVISION III

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BY _____

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly situated registered nurses employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center,
AND JOHN SERLE, individually and in his official capacity
as an agent and officer of Lourdes Medical Center,

Respondents.

PETITIONERS' REPLY BRIEF

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I. Reply

A. The Hospital failed to show that any “operational differences” between nursing departments are legally relevant to any proposed class issue or that these alleged operational differences could serve as a basis to preclude class certification.

The Hospital’s response argument boils down to this: (1) alleged “operational differences” between nursing departments render class treatment “inappropriate” because “duties and experiences performed by one RN at Lourdes cannot be generalized to all other RNs”; and (2) Judge Spanner conducted several oral arguments and considered the record so he couldn’t have abuse his discretion. (Res. Br. 1, 19-20, 21-29, 31-49.) Neither Judge Spanner nor Respondents have explained to date, however, how any alleged “operational differences” between departments are legally relevant to the primary class issues. And no abuse-of-discretion test is grounded solely in the number oral-arguments conducted.

To the contrary, in *Tyson Foods, Inc. v. Bouaphakeo*, the U.S. Supreme Court rejected a similar operational-differences defense in a “donning-and-doffing” wage-and-hour case. The U.S. Supreme Court rejected the employer’s operational-differences arguments and affirmed class certification for largely the same reasons urged by Petitioners in this case: (1) there were important common questions applicable to the class—regardless of any operational difference between members; (2)

representative testimony was permissible to establish both liability on a common practice and estimated, class-wide damages; (3) representative testimony was appropriate when the employer violated both its recordkeeping and payment obligations to further the remedial purpose of the FLSA under principles articulated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); and (4) it is appropriate to bifurcate liability and damage issues in an FLSA case when it is necessary to determine the duties of the parties before damages can be calculated.¹

Moreover, questions of law are reviewed *de novo*.² *De novo* review is also applied to questions requiring the application of law to facts.³ Thus, when mixed questions of law and fact are reviewed, the reviewing court must independently determine the applicable law, and independently apply the law to the undisputed facts or the “supported” facts as found by the trial court.⁴ Review of whether the court applied the correct standard to deny class certification is plenary.⁵

¹ See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1044-50 (2016).

² See *Pasco v. PERC*, 119 Wn.2d 504, 506–508, 833 P.2d 381 (1992).

³ See *Tapper v. Employment Sec. Dept.*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

⁴ See, e.g., *Michaelson v. Employment Sec. Dept.*, 187 Wn. App. 293, 300, 349 P.3d 896 (2015).

⁵ See, e.g., *In re Monumental Life Ins. Co.*, 365 F.3d 408, 415-16 (5th Cir. 2004) (reversing decision to deny class certification because “Class certification centers on the defendants’ alleged unlawful conduct, not on individual injury,” and even

Additionally, the “chameleon phrase” “abuse of discretion” can be “misleading” when reviewing a class-certification denial, because “the legal standards are contained in Rule 23, and appeal can pose pure issues of law reviewed *de novo*. . ..”⁶ The reviewing court gives the trial court substantially more deference *when the appeal challenges the lower court’s grant of class certification*, whereas in appeals from the denial of class certification the trial court is *given substantially less deference*.⁷ It is always an abuse of discretion to deny class certification without adequately explaining for the reasons for the denial under the relevant CR 23 factors.⁸ An abuse of discretion occurs when the order: (1) is manifestly unreasonable or based on untenable grounds; (2) is outside the range of acceptable choices, given the facts and the applicable legal standard; (3) is based on factual findings that are unsupported by the record; (4) is based on an incorrect standard or the facts don’t meet the

where, as the district court ruled, “individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy” because the defendant engaged in a pattern of discrimination.)

⁶ See, e.g., *Tardiff v. Knox County*, 365 F.3d 1, 4 (1st Cir. 2004).

⁷ See, e.g., *In re Flag Telecom Holdings, Ltd. Securities Litigation*, 574 F.3d 29, 34 (2nd Cir. 2009) (“we accord the district court noticeably more deference than when we review a denial of class certification.”).

⁸ See *Wash. Educ. Ass’n (WEA) v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 793, 613 P.2d 769 (1980).

correct standard; or is (5) based on a misapplication of law.⁹

In Washington, specifically, the trial court is required as a matter of law to liberally construe Rule 23 in favor of certification when the case meets Rule 23's requirements;¹⁰ (2) err in favor of certifying a class since the class is always subject to the trial court's later modification or decertification by as the case develops;¹¹ and (3) interpret the substantive wage-and-hour statutes liberally to protect workers' wage rights and to protect workers and the public from tired employees.¹² Judge Spanner abused his discretion here because he failed to certify a class under the above legal standards when he failed to: (1) make any specific factual findings that show class treatment was inappropriate; (2) liberally construe CR 23 in favor of certification; and (3) liberally construe the wage-and-hour laws to protect workers, patients and the public.¹³ ***Also, Judge Spanner did not conduct an evidentiary hearing or resolve any disputed***

⁹ See, e.g., *Ryan v. State*, 112 Wn. App. 896, 899-900, 51 P.3d 175 (2002).

¹⁰ See, e.g., *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007); *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003).

¹¹ See *Moeller*, 173 Wn.2d at 278; *Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8 (2002); *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971).

¹² See, e.g., *Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008); *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001).

¹³ See, e.g., *Edwards v. First American Corp.*, 798 F.3d 1172, 1179-84 (9th Cir. 2015) (reversing denial of class certification as an abuse of discretion).

facts, so there are no factual findings to give deference to.

- 1. The Hospital had an unlawful policy or custom of failing to pay nurses for missed rest periods applicable to all class members.**

The Nurses presented overwhelming evidence that: (1) every nurse in every department is owed money for missed-rest periods during the back-pay period because every nurse at one time or another misses rest periods; (2) that Lourdes had a universal unlawful policy or custom of failing or refusing to compensate nurses for missed-rest periods; and that (3) Lourdes never paid any nurse for any missed rest period during the back-pay period, ever. (Pet. Br. 9-19.) Neither the Hospital nor Judge Spanner have ever explained how “operational differences” between departments render this claim inappropriate for class treatment or somehow excuse the Hospital’s systematic, universal failure to pay nurses for missed rest periods and for all hours worked. (Res. Br. 45-46.) *Importantly, Judge Spanner did not find as a matter of fact that whether a nurse got paid for a missed rest period depended on which department she worked in and no evidence shows that the Hospital paid any nurse in any department ever for a missed rest period.* (CP1012.)

To the contrary, the Hospital failed to address this specific illegal practice head-on in its Opening Brief, or explain why this common claim is destroyed by “operational differences” between departments that

“overwhelm” the claim rendering it “unmanageable.” (Res. Br. 45-46.) It just recharacterizes the claim as a “common-liability-issues-in-recordkeeping claim” and then argues that this isn’t really a legal claim. (Res. Br. 45-46.) Even though the Hospital did, in fact, have bad record keeping, the Nurses’ class claim isn’t fundamentally a “bad-recordkeeping claim,” it is an express claim for back pay for the Hospital’s non-payment of wages for hours worked, which is a claim that can result in criminal penalties and double damages to the extent that the Hospital’s non-payment of wages for hours work is found to be willful.¹⁴

The Nurses note that the Hospital improperly implies in its Brief through the use of passive voice—with absolutely no evidence to support the implication—that Lourdes had a system or practice in place to pay nurses for missed rest periods and that it, *in fact, had actually paid nurses for missed rest periods*: “. . . RNs report to their managers or to payroll

¹⁴ See, e.g., *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 830, 991 P.2d 1126 (2000) (“The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including the statutes at issue here which provide both criminal and civil penalties for willful failure of an employer to pay wages.”); *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51-52, 925 P.2d 212 (1996) (citing from chapters 49.46 and 49.48 RCW, and noting RCW 49.52.050 in discussing the statutory scheme of state laws granting employees nonnegotiable, substantive rights regarding minimum standards for working conditions, wages, and the payment of wages); see also *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 826, 287 P.3d 516 (2012) (time for missed rest breaks is hours worked that must be both tracked and compensated).

(depending on department or manager preference) when they miss a rest break so that additional time can be added to their record through an ‘edit punch’ by a manager or payroll.” (Res. Br. 45.) This sentence *implies* that RNs, have, in fact, reported to their managers or to payroll (depending on department or manager preference) when they miss a rest break and that they have, in fact, been paid when they did so, ***but no evidence in the record supports even an inference that any nurse was ever paid for a missed rest period or that Lourdes had formal department-level policies for reporting missed rest periods. This is a blatant misrepresentation of the record and the Superior Court never made any factual finding that any nurse was ever compensated for a missed rest period at any time during the back-pay period.*** (See, e.g., TP386-389 [Indeed, the Hospital’s lawyer admitted to Judge Spanner he can’t point to one record showing payment for even one missed-rest period, despite a specific request for this information in discovery].) The record is littered with examples of nurses complaining that they were missing rest periods, yet no evidence shows that any one of them was ever paid for one. (Cf. CP1649 at ¶¶11-12.)

As demonstrated in the Nurses’ Opening Brief, the evidence is overwhelming that every nurse is owed money for missed rest periods during the back-pay period and that the Hospital had never once paid a nurse for a missed rest period during the back-pay period. (Pet. Br. 9-19.)

As of the time of the filing of this Brief, and despite the Nurses' timely discovery request, the Hospital has never once identified any particular nurse who was paid for any particular missed rest period during the proposed class-certification period (RP355-372, RP387-390), and the Hospital did not point to any such evidence in its Opening Brief.

Thus, contrary to Judge Spanner's ruling that "duties and experiences performed by on RN at Lourdes cannot be generalized to all other RNs," (CP1012), in connection with miss rest breaks, *every nurses' experience was exactly the same: they all missed breaks and none were paid the wages she or he was due for these hours worked.* (Cf. CP195-198.) The Superior Court's clear duty under CR 23 was to certify a class to remedy the Hospital's uniform and willful failure to pay the nurses their wages, not to declare without any evidentiary support that such a class would be "unmanageable" due to operational differences between the departments because damages might need to be estimated or aggregated.¹⁵ The Superior Court clearly abused its discretion when it refused to certify this issue for class treatment because the Nurses meet Rule 23's standards.¹⁶

¹⁵ See *Moore v. Wash. State Health Care Auth.*, 181 Wn.2d 299, 305-15, 332 P.3d 461 (2014).

¹⁶ The Hospital even admits on page 23 of its Brief that a policy or culture of "*prohibiting break or not paying for them*" is sufficient to certify a class.

2. **Whether a nurse may legally be in assignment caring for patients and on the break at the same time must be decided on a class-wide basis; whether intermittent breaks are permissible must be decided based on “the nature of the position.”**

The Nurses showed in their Opening Brief that: (1) the Hospital’s meals-and-breaks policies were all policies of general application that that there are no department-level policies on meals and breaks (Pet. Br. 9-10); (2) the Hospital’s actual, written policy that was supposed to apply to all nurses required it to provide scheduled, 15-minute block breaks to every nurse in every department; (Pet. Br. 14-25); (3) the Hospital never actually scheduled block breaks for nurses in any department (with the possible exception of the Operating Room) and it did not have any system to relieve nurses of patient assignment to take breaks when the Hospital was busy (Pet. Br. 19-20); (4) a nurse must be relieved of patient assignment to be relieved of duty as a matter of law and as a standard of nursing (Pet. Br. 19-24); and (5) the law requires a court to determine whether intermittent breaks are appropriate based on the “nature of the position,” and not what any particular employee is doing on any particular day. (Pet. Br. 62-62.) The Nurses took specific exception to several of Judge Spanner’s legal summary-judgment-rest-break rulings and showed why

these rulings were contrary to law.¹⁷ (E.g., Pet. Br. 32-33.)

In response, the Hospital recognizes that the Nurses’ “theory is that once an RN has a patient assigned, the nature of work is wholly contradictory to taking a break or meal period¹⁸ until responsibility for a patient is sufficiently transferred to another, even if the patients are all sleeping and need no active care.” (Res. Br. 36.) *The Hospital is 100% correct that the Nurses contend that this issue should be decided as a class issue—even if they ultimately lose the issue—because both the Nurses and the Hospital need to know whether the Hospital has scheduling obligations and what constitutes a legal break in the context of nursing in an acute care facility based on the nature of the position.* The Hospital failed to provide even one valid reason why this issue cannot or should not be decided on a class basis. (Res. Br. 35-42.) To the contrary, the Hospital makes several “arguments” that don’t touch on whether the “nature of the position” precludes intermittent breaks.

First, the Hospital contends that the RCWs and WACs prohibiting patient abandonment don’t define when a nurse is “in assignment” or whether she can “take breaks or meal periods,” but the Hospital does not

¹⁷ The Hospital did not respond to any specific legal exception in its Opening Brief.

¹⁸ The Hospital misstates Petitioners’ position to the extent that “intermittent breaks” relate solely to rest periods and not meal periods.

explain how this is relevant or defeats class treatment on this issue. (Res. Br. 36-37 & n.5.) The Hospital's Nursing Director Denise Clapp and all the nurses who testified on the record understand that when a nurse has been assigned a patient, she is working and responsible for that patient until she transfers care to another qualified nurse. (*See, e.g.*, CP350-55; CP361; CP408, CP530, CP564, CP1721-1727 at ¶2, CP1728-1734 at ¶2, CP598-599 at ¶2, CP604 at ¶3; *see also* TP199-231.) For purposes of breaks, each nurse in each unit is subject to the same problem once she is assigned a patient: whether a nurse can take a rest break is dictated by whether the Hospital provides her with another nurse to report off to or the fortuitous event that there are no patients to care for during a break period. (*E.g.*, CP545, CP548-550, CP552, CP554, 557-558, CP560, CP564, CP574, CP576, CP584, CP1721-1727 at ¶¶2, 6-7, 13, CP1728-1734 at ¶¶2-3, 7, CP598-601 at ¶¶2, 5-6, 10, CP604-606 at ¶¶2-6, 11, CP387, CP389-390, CP394, CP416, CP426-427, CP488-489, CP491-496, CP499-500, CP513-517, CP520, CP525, CP530, CP433, CP440, CP444, CP445-458, CP457, CP466.) Whether the Hospital has a scheduling-and-relief obligation in this situation must be decided on a class basis, *i.e.*, based on the nature of the position, and not on what any nurse is doing at any given moment.

Clapp was designated as the Hospital's CR 30(b)(6) witness on this

very subject. She affirmed that all nurses in patient assignment are subject to discipline by the Hospital if they fail to provide care to a patient to whom they are assigned. (*See, e.g.*, CP361.) The Hospital's theory on appeal would lead to nonsensical and dangerous results if the Hospital prevailed because it would necessarily require the Court to rule that a nurse can be in patient assignment and working the same time. This means a nurse could be disciplined for failing to provide patient care during her intermittent or block break. This will discourage nurses from taking a break and relax knowing that she could lose her job and license if she does not hear a monitor alarm go off or respond to a call from a patient while attempting to take the break. Such a standard is contrary to public policy because it promotes nurse fatigue in acute care hospital settings, which, in turn, jeopardizes patient safety. In short, Clapp's sworn testimony directly contradicts the Hospital's basic position in this case, and is consistent with all of the other evidence the Nurses presented to the Superior Court on the nature of a nurses' duties, and shows that intermittent breaks are inconsistent with the duties of a nurse in assignment.¹⁹

¹⁹ *See Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 658, 355 P.2d 258 (2015) ("It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time. A workplace culture that encourages employees to skip breaks violates WAC 296-126-092

Second, the Hospital argues that, “Plaintiff’s theory requires examination of whether a hand off occurred and if that hand off was sufficient.” (Res. Br. 37.) ***But no it doesn’t—this argument is a straw man.*** The Nurses are not asking the Superior Court to evaluate the sufficiency of any particular handoff—that is for the nurses to determine pursuant to applicable nursing standards—only that the Hospital must make another qualified nurse available to relieve the in-assignment nurse through a scheduling process so that there is some nurse to hand the her patients off to. (*See, e.g.*, RP199-222, 231, RP351-357, 373.) The law requires relief-of-duty in the context of a nurse who is actively caring for patients when she is required by law to take a rest break at regularly scheduled intervals—both for her benefit and for patient safety.

In contrast, the Hospital contends in this case that its rest-period obligations are satisfied if the nurses can engage in “personal activities” or have “down time” while she or he is in patient assignment, like when they text a family member or run to the bathroom or shove food in their mouths while they are simultaneously caring for patients. (Res. Br. 40-41; RP236-237.) But the Hospital’s argument proves the Nurses’ point regarding intermittent breaks. The Nurses contend that any alleged “down time”

because it deprives employees of the benefit of a rest break ‘on the employer’s time.’”).

does not qualify as a lawful rest break when a nurse is in assignment and that this renders intermittent breaks “inconsistent with the nature of the position.” (See, e.g., RP199-222, 231, RP351-357, 373.) Even if the Nurses ultimately lose this issue on the merits, it should be decided on a class-wide basis, as courts are not allowed to resolve material factual disputes or make any inquiry into the merits of the claim at the certification stage.²⁰ Moreover, the alternative to class treatment is having a 100 or more trials on the same issue, over and over, with the potential for inconsistent results. The class vehicle avoids this problem.

Finally, the Nurses note that the Hospital boasts that Operating Room nurses “rarely miss a break” because: (1) “most surgeries are scheduled,” *i.e.*, patient flow is predictable; (2) there is always a charge nurse without assigned patient assignment available to relieve the OR nurses for meals and breaks; and (3) the Hospital actually schedules meals and breaks so that the OR nurses are assured that they are relieved of patient assignment. (Res. Br. 8-9.) In contrast, *in every other department*, the undisputed evidence is that: (1) patient flow is unpredictable; (2) there is no “scheduling”; (3) there is no dedicated relief nurse to ensure that the

²⁰ See *Smith, v. Behr Process Corp.*, 113 Wn. App. 306, 320 & n.4, 54 P.3d 665 (2002); *Ellis v. Costco Wholesale*, 657 F.3d 970, 983 (9th Cir. 2011); *United Steel, Paper & Forestry, Rubber, Mfg. Energy Union v. ConocoPhillips Co.*, 593 F.3d 802, 807-08 (9th Cir. 2010); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 516-546 (N.D. Cal., Sept. 25, 2012).

nurses are relieved of patient assignment so that they can take their lawfully-required rest periods; and (4) the nurses are left to fend for themselves because the Hospital does not schedule breaks like it does in the OR. (*E.g.*, CP195-197.) *The OR example shows that the Hospital knows how to relieve nurses for breaks when it wants to but that it willfully refuses to do so for every nurse in every department except the nurses in the OR.* Thus, the “example” of the OR isn’t that a class must be denied; it shows why it must be granted because the Hospital is unlawfully and willfully refusing to comply with its scheduling obligations for every other nurse in the Hospital.

3. The Hospital had an illegal custom of improperly denying 12-hours shift nurses a second meal period.

The Nurses showed in their Opening Brief that the evidence established that the Hospital routinely and systematically denied 12-hour shift nurses a second meal period as a matter of practice. (Pet. Br. 25-30, 59-62.) In response, the Hospital claims that because there is some evidence that some nurses, on some occasions, had no duties because the Hospital had no patients, and that during this no-patient downtime they “could” theoretically take the required second meal period, that Judge Spanner was within his rights to deny the class on this issue. (Res. Br. 43-45.) The overwhelming evidence is, however, that when there were

patients, the Hospital as a matter of routine practice deprived nurses of a 12-hour lunch, as was conceded by the Hospital's CR 12(b)(6) representative. (CP345-346, Clapp. Dep. 17-18, Ins. 24-25 & 1.) The fact that there were occasionally—*read rarely*—no patients in any given department does not absolve the Hospital of class liability for systematically depriving the 12-hour shift nurses of a second meal period and failing to pay them when they were so deprived. Again, the Washington Supreme Court held that the regulations must be interpreted to further its purpose of promoting rest periods.²¹ Systematically denying nurses a lawfully required meal periods *unless the Hospital is empty of patients* does not comply with the required meal-period law or promote the purpose of mandatory rest-and-meal periods.

4. The Hospital uniformly misclassified every nurse as having a presumptively unpaid, off-duty lunch.

The Nurses showed in their Opening Brief that the undisputed evidence shows that the Nurses were “subject to recall” as a matter of course and *on duty* during their first lunch, but that they were subject to an automatic-meal deduction and were not given a paid first lunch as a matter of uniform policy of general application. (Pet. Br. 31, 61-62; *see also* CP395; CP1721-1727 at ¶¶10-12; CP1728-1734 at ¶¶11-13; CP600-601 at

²¹ *See Demetrio*, 183 Wn. 2d at 658 (citations omitted).

¶¶9-12, CP605-606 at ¶¶9-12; CP143-144 at ¶¶3-4, 8, CP150-151 at ¶¶9, 13, CP157-158 at ¶¶9-10; CP163 at ¶10; CP167-168 at ¶¶3, 9-11.) The Hospital's policy required nurses to "clock out" only if they left the premises after receiving special permission to clock out. (*E.g.*, CP746 at ¶9.) No evidence contradicts the fact the nurses received only an unpaid first lunch and that they ate lunch while being "on call" and "subject to recall" while they ate as a matter of course. Every nurse in the facility was misclassified as being "off duty" and not "subject to recall" during the first lunch and is entitled to compensation. (*See also* RP264-307, 374-380; CP1650 at ¶4.)

In fact, the Hospital's own affiants and managers generally agree the nurses were subject to recall: "Due to the nature of the work, there may be times when a RN in my department [*i.e.*, ***all departments during the night shift***, CP1962-1964, ¶¶1-4] cannot take a full meal period or is interrupted during a meal period." (CP1965, Schwarder Aff. ¶28); "Admittedly, some days, on some shifts, on some units, RN's would miss their meals and breaks out of patient necessity." (CP1814, Barron Aff. ¶4); "I have informed RN's that have been interrupted during lunch periods to report the missed lunch or hit the cancel meal deduct function on Kronos because RNs are supposed to be compensated for interrupted meal periods." (CP1822, Carr Aff. ¶¶6-7); "Due to the nature of the work, there

may be times when a Registered Nurse in the department's I oversee [which is: *ED, Ambulatory, Observation, Same-Day Surgery, Labor and Delivery, Rehab, Medical Unit, and ICU* (§3)] cannot take a full meal period or is interrupted during a meal period. In such circumstances, I expect the RN to cancel the automatic deduct in Kronos or tell me or their supervisor or charge nurse that they missed the meal period." (CP1834, Champagne-Wright Aff. ¶40); "If they cannot fit in a break or lunch period, I always tell them to put it down and get paid for it." (CP1846-1847, Funderburk Aff. ¶22); "Due to the nature of the work, there may be times when a Registered Nurse in my department [Rehab] cannot take a full meal period or is interrupted during a meal period." (CP1854, Gomez-Hodges Aff. ¶22); "Because of my role as Charge Nurse, I have been interrupted during my 30-minute meal periods." (CP1859, Gooding Aff. ¶11); "Due to the nature of my work, there may be times where I am unable to take my full meal break, or my meal break is interrupted." (CP1864, Grave Aff. ¶10.); "Due to the nature of the work, there may be times when a Registered Nurse in my departments [Med-Surg. and ICU and ED, §§2-4] cannot take a full meal period or is interrupted during a meal period." (CP1879, Hannigan Aff. ¶35); "Due to the nature of my work, there may be times when I am unable to take my full meal break, or my meal break is interrupted." (CP1899, Kelly Aff. ¶11.); "If a [sic] RN

misses a meal period, I try to get the RN a chance to take the meal period later in the shift. If an RN cannot get a full 30-minute meal period, then they are paid.” (CP1924, Pease Aff. ¶11); “Due to the nature of the work, there may be times when Registered Nurses in my departments [OB, Observation, and Same-Day Surgery ¶¶1, 6] cannot take a full meal period or is interrupted during a meal period.” (CP1942-1943, Playo Aff. ¶31); “When I eat dinner on the unit, sometimes I get interrupted. Then, I have to return later to finish my meal.” (CP1681, Champagne-Wright Aff. ¶4); “When I eat dinner on the unit, sometimes I get interrupted. Then, I have to later return to finish my meal.” and “These RNs [in ICU, OB, ED, Observation, and Rehab] are free to eat or pursue any personal activities, provided they stay at the unit to respond if a patient need arises.” (CP1690-1691, Carrie Garcia Aff. ¶¶6, 10-15; *see also* CP1906 at ¶¶4, 8.)

The Hospital did not substantively respond to this misclassification ground for class certification anywhere in its Response Brief, with the possible exception of one paragraph on pages 42 and 43, when it claims that “RN’s do report and get paid for missed meal periods, as plaintiffs and ‘exceptions’ records confirm.” (Res. Br. 42-43.) What the “exceptions” records confirm, however, is that the nurses were subject to recall, on call, and on duty during every meal break, but they were presumptively treated as if they had taken an unpaid lunch during every first meal period.

The Hospital also, cryptically, contends that Petitioners somehow “de-emphasized” this misclassification theory, but it does not explain how. This has been a primary class theory since the first class certification hearing and they raised this issue both on paper and orally at the hearings. (See, e.g., RP373-379.) In fact, the Superior Court specifically admonished the Hospital’s counsel to respond to this argument at the class-certification hearing. (RP379, at lines 11-13.) The Nurses contend that they were all misclassified and entitled to a paid first lunch as a matter of course because they were all subject to recall, but the automatic-meal-deduct function in Kronos presumed that they were entitled to—and in fact took—an unpaid first meal period. The Hospital failed to provide any substantive response to this ground for class certification, let alone explain why class certification on the issue is inappropriate. (Res. Br. 42-43.) The Hospital also failed to contradict any law cited by the Nurses on this issue, or attack on appeal the Superior Court’s legal ruling that requiring a nurse to remain subject to recall during a meal period meant that the nurse was entitled to paid-meal periods. (E.g., CP1650 at ¶4.)

5. The Hospital’s “automatic-meal-deduction” policy was otherwise illegal.

The Nurses showed in their Opening Brief that the Hospital’s “automatic-meal-deduction” policy was illegal because *an employee who*

works unauthorized overtime is subject to discipline under the Hospital's official written policy, and hitting the “cancel deduction” button for a missed lunch results in overtime that can subject a nurse to discipline if it is unauthorized. (Pet. Br. 9-11, 31-32, 62-63; *see also* CP324-326, CP746, CP683-684, *see also* CP168-169 at ¶11, CP1721-1727 at ¶12, CP1728-1734 at ¶14.) The Hospital does not address this issue in their brief or dispute that there is a uniform policy that would punish employees for hitting the “cancel deduct” button if doing so would push them into unauthorized overtime. (Pet. Br. 42-44.) Judge Spanner did not make any findings that would preclude this claim from proceeding on a class basis, and, indeed, ruled from the bench that determining liability on a class-wide basis for missed breaks requires only “some evidence” that there is a “policy or culture” that breaks are “prohibited or discouraged or that there won’t be compensation.” (RP180-181.) There is no basis in the record or reason contained in the Hospital’s Opening Brief that would preclude class certification of this issue.

B. The Nurses have a proper trial plan.

The Hospital argues that Judge Spanner’s ruling is supported by the U.S. Supreme Court’s *Comcast* anti-trust decision because the Nurses don’t have a sufficient trial plan or damage model. (Res. Br. 47-50.) First, Judge Spanner didn’t rule that he was denying class for either

reason. (CP1011-1012.) And the Nurses have a workable plan that they presented to the Superior Court on a number of occasions and no evidence or finding shows it is unworkable. (CP217-220, CP1636-1640.) Second, the Nurses have not conducted broader post-class-certification-liability-or-damages discovery and the Hospital refused to respond to such discovery or even provide the names of the class members. (E.g., CP172-188, CP367-374, CP633-662, CP732-740.) The Nurses intend to propose a damage model after liability is fixed and/or damage discovery occurs, but it will be based on sufficient representative evidence. Third, *Comcast* is an anti-trust case and “anti-trust damages” are a threshold element of the liability element of the claim in a way unlike any other contract or tort claim.²² The Hospital’s argument is also inconsistent with *Moore*.²³

C. The Hospital takes unwarranted liberties with the record.

The Hospital takes a number of liberties with the facts and makes assertions that are either unsupported by the record or taken out of context.

²² See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (“It would drive a stake through the heart of the class action device, in cases in which damages were sought ... to require that every member of the class have identical damages”); see also *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18–19 (1st Cir. 2015) (limiting its interpretation of *Comcast* to the principle that the plaintiff’s theory of impact must match his damages model); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (same); *In re Whirlpool Corp. Front Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (same); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (same).

²³ See *Moore*, 181 Wn.2d at 305-15.

For example, the Hospital claims that “supervisors and managers of various departments implement how rest breaks and meal periods are planned, taken and reported in their departments,” but it doesn’t explain how they do this, or cite to the record, or show how this fact is relevant to any class issue raised by the Nurses. (Res. Br. 4.)

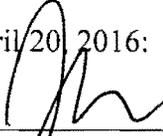
The Hospital represents or implies that all Nurses were “trained on” “the need to report missed rest breaks” (Res. Br. 5), but no evidence supports this statement. The plaintiff-witnesses have all affirmed under oath *both* that there was no system in place for tracking time for missed rest periods *and* that they had never been paid for a missed rest periods despite missing rest periods regularly. (CP144 at ¶6, CP148-149 at ¶¶3-8, CP155-157 at ¶¶3-8, CP161-163 at ¶¶ 5-9.) The non-party nurse-witnesses who submitted affidavits on behalf of the Nurses also universally testified *both* that there was no system in place for paying missed rest periods *and* that they, in fact, had never been paid for a missed rest period despite missing rest periods regularly. (CP1721-1727 at ¶7, CP1728-1734 at ¶4, CP598-599 at ¶3, CP604-605 at ¶¶6-7.) Another Hospital Rule 30(b)(6) representative, Roberta Jo Wittorf, was designated to testify about the Hospital’s meals-and-breaks training related to payroll policies, but she could not identify any specific document or written policy that shows that employees were ever trained on how to report a missed

rest period. (*E.g.*, CP675-677).

With respect to the testimony the Hospital cites on pages 6-19, much of it is misleading or taken out of context. For example, the Hospital represents that Garcia “even admitted” that “there are times during the shift when patient flow allows RNs to take small incremental breaks and chat about personal matters surf the internet, check e-mails, read magazines, or grab a snack.” (Res. Br. 7.) But Garcia was adamant in her testimony that she was never on a break even if she ran to the bathroom while she was in assignment because she still responsible for her patients, and most of the cites in the string cite of evidence are to manager affidavits and not Garcia’s testimony. (*E.g.*, CP564) In fact, the Hospital actually accused Garcia of being “fixated” on her inability to get relief from a break during her deposition because she refused to concede that she was on break while in patient assignment unless she is actually provided with relief from a qualified nurse for her patient assignments, even though the Hospital’s lawyer kept insistent that she was “resting” at times even if she was actively caring for patients. (CP564-566.) Page limits preclude the Nurses from addressing all the factual inaccuracies in the Hospital’s record cites and all the misleading use of passive-voice in the Hospital’s Opening Brief. The Nurses request that the Court review the facts discussed at CP882-884, 890-919 for a more accurate picture of the record

because the Hospital is taking liberties with the record.

Signed April 20, 2016:

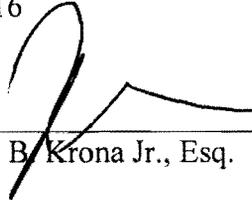


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PROOF OF SERVICE

I, Jack B. Krona Jr., certify that on this date, I caused a true and correct copy of the foregoing "**PETITIONERS' REPLY BRIEF**" to be served on Aaron Bass and Rebecca Watkins, Sather, Byerly & Holloway, LLP, 111 SW Fifth Ave, Suite 1200, Portland, OR 97204, by e-mail transmission by party agreement to serve documents electronically.

DATED this 20th day of April, 2016

By: 

Jack B. Krona Jr., Esq.