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CASE NO. 360172

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

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WASHINGTON STATE NURSES ASSOCIATION,

Respondent/Cross-Appellant/Plaintiff,

v.

YAKIMA HMA LLC, d/b/a YAKIMA REGIONAL MEDICAL AND  
CARDIAC CENTER,

Appellant/Cross-Respondent/Defendant.

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**OPENING BRIEF OF APPELLANT**

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## I. INTRODUCTION

The trial court erroneously pushed the boundaries of associational status far beyond what the law permits. The Respondent, Washington State Nurses Association (“WSNA”), lacked associational standing to bring claims on behalf of home health and hospice nurses because individual testimony was needed to establish both liability and monetary damages for claimed missed meal periods and off-the-clock work. Each nurse self-reported hours worked and was undisputedly paid for all properly reported hours. As such, neither liability nor damages could be established from Yakima Regional Medical and Cardiac Center’s (“YRMCC” or “Employer”) records.

The wage claims at issue could not be established without participation of individual members. The amount of money sought on behalf of the individual nurses was not “certain, easily ascertainable, and within the knowledge of the Employer” as required by Washington law. The Employer had no way of knowing if nurses worked beyond their scheduled eight hours per shift or whether they took mandatory meal periods unless nurses reported that information. The evidence showed they did not do so and, therefore, the claims at issue were not certain, easily ascertainable or within the Employer’s knowledge.

The trial court erroneously allowed WSNA to circumvent this basic standard by presenting individual “representative” testimony from seven nurses. Representative testimony is improper here because home health and hospice nurses undisputedly work independently in remote locations with a high degree of variability in patients and tasks each day, all of which impact both the number of hours worked and meal periods. With two exceptions, “representative” nurses worked only a portion of the time period at issue, 2012-2017. In 2014, near the mid-point of this time period, technology changes transformed the delivery of care and the amount of time needed to provide it. By 2014, all nurses were issued the Samsung Galaxy device<sup>1</sup>. This computer technology allowed nurses to start and end their day from home, complete tasks such as ordering supplies more quickly and streamline charting. Representative testimony from one time period cannot be applied to the other.

WSNA failed to establish the requisite commonality that would support extrapolation of one nurse’s experience to another. Underscoring this point, the bench trial took twice as long as originally predicted. Each “representative” nurse testified about his or her own unique and, by WSNA’s own admission, highly variable experiences. Two additional

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<sup>1</sup> In trial testimony, there are various references to this device, which is a handheld device manufactured by Samsung, with a model name “Galaxy” and operating system “Android.” RP 758:2-12.

nurses testified that they had no unpaid work or missed meal breaks. This simply is not a case that lends itself to a one-size-fits-all solution. The association members lack the requisite commonality that would permit representative testimony to be extrapolated from one nurse to another.

The trial court also erred as a matter of law in awarding damages based on its own calculation that cannot be reconciled with the evidence, including expert testimony, and cannot be reproduced mathematically. The trial court further erred in awarding double damages for unpaid wages because a bona fide dispute exists and the nurses knowingly submitted to the pay practices they now challenge. Finally, the trial court's erroneous decisions substantially prejudiced YRMCC's right to a fair trial and revealed evident partiality, requiring vacation of the judgment in its entirety.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in holding that WSNA has standing to sue on behalf of its members. (Conclusion of Law #1)

2. The trial court erred in allowing representative testimony while holding that WSNA's claims did not require the participation of the organization's individual members and also holding that none of the nurses were necessary parties. (Conclusion of Law #3)

3. The trial court erred in holding that YRMCC violated the

Industrial Welfare Act, RCW 49.12 and its implementing regulation, WAC 296-126-092, by not allowing nurses to take meal periods.

(Conclusion of Law #7)

4. The trial court erred in entering findings on damages that do not show the basis or method for its computations and that do not comport with the evidence in the record. (Conclusions of Law #12 and 13)

5. The trial court erred in holding that double damages should be awarded. (Conclusion of Law #5)

6. The trial court erred in entering judgment against YRMCC because the court exhibited evident partiality toward WSNA. (Conclusions of Law #1, 3, 5, 7, 12-13)

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

1. Washington law limits associational standing to cases in which neither the claim asserted nor relief requested requires the participation of the association's individual members. When an associational claim requires extensive individualized testimony, the association cannot maintain standing. Did the trial court err by concluding that WSNA had standing as an association to bring this lawsuit where the individual participation of home health and hospice nurses was needed to

(1) establish on a nurse-by-nurse basis whether YRMCC denied pay for off-the-clock hours worked and claimed missed 30-minute meal breaks and (2) calculate the amount of monetary damages for these claims?

(Assignment of Error No.1 and 2)

2. In *Pugh v. Evergreen Hosp. Med. Ctr.*, the Court of Appeals, Division I, briefly discussed “representative testimony” that could be used to serve as proof of damages in an associational case without describing exactly how such representative testimony would work. Did the trial court err by expanding *Pugh* and concluding as a matter of law that WSNA had standing as an association to bring this lawsuit using representative testimony to establish both liability and damages? (Assignment of Error No. 2)

3. Did the trial court err in concluding as a matter of law that associational liability and damages were established by “just and reasonable inference” from the testimony offered at trial? (Assignment of Error No. 2)

4. The Industrial Welfare Act and its implementing regulation, WAC 296-126-092, provide that employees “shall be allowed” 30-minute meal periods that can be waived. Did the trial court err in concluding as a matter of law that YRMCC violated the law despite having processes in place to allow meal periods as well as instruction,

training and policies that required meal periods to be taken? (Assignment of Error No. 3)

5. The Washington Court of Appeals has repeatedly held that a trial court must enter findings showing the basis and method for its computation of damages. Did the trial court err in awarding damages without showing a basis or method for doing so and when the amount awarded is not supported by expert testimony or the record? (Assignment of Error No. 4)

6. Double damages under the Industrial Welfare Act are not appropriate when employees acquiesce in the alleged violation or a bona fide dispute exists as to the fact or amount of compensation owed. Did the trial court err in awarding double damages where a bona fide dispute exists, nurses knowingly submitted to the claimed violation, and YRMCC did not willfully deprive employees of wages or salary? (Assignment of Error No. 5)

7. The trial court's errors and evident partiality affected every aspect of this proceeding. If judgment is not entered in favor of YRMCC, should the matter be remanded to a new judge to conduct a new trial? (Assignments of Error No. 6)

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background**

1. Appellant Yakima HMA, LLC, d/b/a Yakima Regional Medical and Cardiac Center (“YRMCC”) is a general medical and surgical hospital in Yakima, Washington, affiliated with Community Health Systems (“CHS”) at the time the lawsuit was filed. YRMCC’s Home Care Agency is an affiliate of the hospital. It includes both the home health and hospice programs, which are separate programs within the Agency. RP 1449:16-21, 1474:6-9. On January 1, 2014, CHS acquired the Home Care Agency. RP 1476:4-8.

2. During the time period at issue in this lawsuit, YRMCC typically employed six full-time equivalent home health nurses and two to three hospice nurses to individually travel to each assigned patient’s residence for the provision of home care nursing services. RP 1449:22-1450:3; 1474:14-18. YRMCC assigned home health and hospice nurses to different territories with the goal of aligning nurse assignments to where the nurses lived. RP 1452: 2-1453:13, Ex 117. YRMCC permitted home health and hospice nurses to self-schedule their patient visits in the order and at the times they preferred. RP 1455: 6-20. In the spring of 2014, nurses were provided with a Samsung Galaxy device (“Galaxy device”) for the purpose of patient charting, scheduling, and ordering patient

supplies. RP 1457:5-10. YRMCC never used the Galaxy device to keep track of the hours nurses worked. RP 1532:17-1533:3. Following provision of the Galaxy device, nurses were encouraged to begin their work day from home. RP 1492: 1-3.

3. To track work time, home health and hospice nurses submitted handwritten daily time sheets or electronic daily time sheets to YRMCC managers showing the total number of hours worked. RP 1488:18-1489:18, 1492:2-24, 1495:1-15. YRMCC managers entered the information on total hours worked from the daily time sheets into YRMCC's timekeeping system known as Kronos. RP 1488:18-24; 1492:4-7; 1492:8-24. Because the timekeeping system required a start and stop time in order to generate payment, the Employer entered a start and stop time that corresponded to the total hours reported by the nurse. RP 1579:1-1580:8. Each nurse reviewed his or her biweekly Kronos Time Cards ("Time Cards"), made modifications as necessary, and verified by signature that each Time Card was correct. RP 1490: 8-16; 1492:4-7. If a nurse made a correction, supervisors updated Kronos and sent copies to human resources to ensure correct payment of wages. RP 1490:17-1491:11; 1492:4-7. If a nurse missed a meal period or worked approved overtime, YRMCC provided training and written forms to report that information, and payments were made to compensate the nurse

appropriately. RP 1463:15-1464:10; Ex 105. Other than a very brief period of time when an office-based time clock system was tested, this manner of tracking, reporting, and correcting time remained consistent throughout the relevant time period. RP 1491:20-1492:7; 1494:20-25.

4. The home health and hospice nurses are members of a bargaining unit represented by WSNA. RP 1408:1-14. YRMCC and WSNA are signatories to a collective bargaining agreement that governs the terms and conditions of employment for WSNA members. Ex 13. The bargaining unit was established decades ago. RP 1185:25-1186:9. Each collective bargaining agreement has included a mandatory grievance and arbitration provision. Ex 13 – Article 18, Ex 14 – Article 18, Ex 15 – Article 18. Each also includes language outlining the contractual requirements for meal periods. *Id.* at Article 7.4. The August 1, 2016, collective bargaining agreement added new language that requires: “Nurses must timely complete and submit a Missed Break/Meal Form when they miss or encounter a shortened meal period (less than thirty [30] minutes) or miss a rest period due to work issues.” RP 1416:1-14.

Two grievances were submitted that relate to the issues at trial. One related to discipline administered to Nurse Campeau, which was resolved by payment of all claimed unpaid wages and a promise from Nurse Campeau that he would properly report missed meal periods and

off-the-clock work going forward. RP 912:13-18; 1013:4-23; Exs 59, 114. The second grievance related to association-wide claims of unpaid overtime, which would include off-the-clock hours and missed meal periods (“overtime grievance”). Exs 106, 107, 114, RP 1423:10-1425:6, 1426:18-1427:2. Immediately after the overtime grievance was submitted, YRMCC received an unsolicited letter from the majority of currently employed nurses disavowing the content. Ex 106. On October 31, 2014, following an Employer investigation finding no contract violation, WSNA elected to withdraw the overtime grievance. RP 1013:2, Ex 108.

5. Christine Watts was deposed as the WSNA corporate designee on specific topics on September 9, 2016. RP 1369:6-12. During her deposition, she testified that the associational unit was limited to a total of 10 nurses. RP 1412:3-10. Ms. Watts also testified that she did not know the amount of damages claimed by each nurse represented by the association. RP 1374:17-1375:24; 1376:15-1377:20. During trial, WSNA changed its position with WSNA witnesses testifying that the associational unit instead included 28 nurses. RP 995:14-996:19; Ex 16.

6. WSNA called a total of seven nurses from both the home health and hospice programs. YRMCC called two nurses. Individual testimony from these nine nurses varied markedly.

## **7. Testifying Hospice Nurses**

### **a. Nurse Irazabal (WSNA Witness)**

Nurse Irazabal worked as a full-time nurse for YRMCC from 2008 until late 2013. RP 1018:19-1019:1. She started in the home health program and then moved to the hospice program a few years later. RP 1019:7-10. Her patients' territory covered Wenas Lake, Rimrock and occasionally Moses Lake. RP 1019:15-20. Nurse Irazabal began a health leave in August 2013 and decided to retire rather than return to work at YRMCC. RP 1029:25-1030:4.

Nurse Irazabal testified that her supervisors at YRMCC told her it was important to take a 30-minute uninterrupted meal break throughout her employment. RP 1028:18-23, 1032:3-7. Despite this knowledge, she never reported a missed meal period because she knew that her supervisors would have instructed her to take the required 30-minute meal break. RP 1028:24-1029:4.

Nurse Irazabal testified that during her employment with the agency, she worked two to three hours off the clock. 1029:5-12. Nurse Irazabal also testified that she was paid in full for all reported hours worked and hours verified on her biweekly time cards. RP 1033:12-15; 1036:4-8; 1037:16-1038:8; 1039:3-8. Nurse Irazabal confirmed that she

knew she could take her time card to her supervisor to have it corrected if she felt the information on it was incorrect. RP 1038:9-22.

**b. Nurse Stillwaugh (WSNA Witness)**

Nurse Stillwaugh worked as a hospice case manager at YRMCC from 2006 to November 2016. RP 607:17-608:3. YRMCC assigned Nurse Stillwaugh to see patients in the Upper Valley, which included Highway 12, White Pass, Chinook Pass, Highway 410, the Wenas Valley and Selah. RP 617:17-618:7. Several of Nurse Stillwaugh's patients resided in an assisted living facility, which reduced her drive times between patient visits. RP 738:16-739:11.

Nurse Stillwaugh's initial work schedule at YRMCC was 32 hours a week, with four eight-hour shifts per week. RP 610:12-18. She subsequently reduced her schedule to three days a week so she could spend more time with her child. RP 610:12-24. In addition to weekends, she also had Tuesdays and Fridays off. RP 713:18-22. Despite working only three days a week, YRMCC continued to classify Nurse Stillwaugh as a .8 FTE. RP 770:6-16.<sup>2</sup> Nurse Stillwaugh testified that she routinely received pay for time not worked on her days off, Tuesdays and Fridays, from 2010 until September 2015. RP 764:2-18; 768:15-770:5; Ex 120

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<sup>2</sup> During Ms. Stillwaugh's testimony, the Court questioned whether a discussion of her FTE status and associated benefits was in fact "an issue between the employer and this particular employee as opposed to the association." RP 772:21-773:9.

(“Vast majority of the payments shown on the Punch Detail Reports for Tuesdays and Fridays were for times I did not work.”).

Along with several fellow nurses, Nurse Stillwaugh signed an October 15, 2013, letter addressed to YRMCC, stating that she disagreed with a WSNA grievance that raised issues of unpaid overtime and a hostile work environment – issues virtually identical to those raised at trial. RP 728:4-729: 9; Ex 106. In the letter, Nurse Stillwaugh stated that she had not experienced any problems with compensation nor experienced a hostile office atmosphere. Ex 106.

Nurse Stillwaugh testified that her employment conditions changed at YRMCC after she signed the October 15, 2013, letter. She testified that she was no longer able to complete her work within eight hours (although she later testified that she worked two unpaid hours each day prior to CHS taking over in the spring of 2014). RP 644:9-23; 647:7-15. Nurse Stillwaugh testified that she began to work longer hours because the hospice nurses lost their full-time pharmacist, and she experienced long wait times calling the replacement outside-pharmacist, Pro Care. RP 620:9-19; 644:9-645:9. Nurse Stillwaugh also testified that it took her a long time to order patient supplies after YRMCC introduced the Samsung device in 2014. RP 644:12-645:9. After CHS took over, Nurse

Stillwaugh testified that she worked two to five unpaid hours each working day. RP 646:25-647:3.

Nurse Stillwaugh kept a personal diary of her hours worked for a six-month period of the five-year time-span at issue in the lawsuit. She did not share these personal records with YRMCC. RP 689:17-690:5; 723: 24-724: 2; Ex 37.

Nurse Stillwaugh testified that she disagreed with her supervisors' requirement that she seek preapproval for overtime and seek assistance if needed to take required meal periods. She testified that she "argued" with her supervisors for 30 to 40 minutes when she called to request overtime. If her supervisor instructed her to not work overtime but instead to reschedule the patient visit, Nurse Stillwaugh ignored the instruction and "went ahead and [worked overtime] anyway." RP 742:22-743:7, 743:23-744:1. Nurse Stillwaugh also testified that she worked extra hours at night to complete patient charting without first seeking the required preapproval. RP 641:6-19.

Nurse Stillwaugh testified she did skip meal periods for a variety of reasons, including wishing to end her work day 30 minutes earlier -- "I'm off at 4 because I haven't had a lunch." RP 637:7-8. Nurse Stillwaugh received training on how to report missed meal periods, but did not generally report them. RP 652:16-653:8, 731:24-732:16. Nurse

Stillwaugh testified that she only filled out one time clock adjustment form for a missed meal period and believed she was paid for it. RP 730:25-731:23; Ex. 109.

Nurse Stillwaugh testified that “every day was different” in her job as a hospice nurse at YRMCC. RP 738:15.

**c. Nurse Edgel (WSNA Witness)**

Nurse Edgel worked as a full-time hospice nurse from the fall of 2013 until May 2016. RP 40:9-41:3; 42:13-15. When Nurse Edgel began working at YRMCC, her assigned territory for patient visits was Yakima proper. RP 63:10-15. She subsequently took over the Lower Valley, which covered areas between Union Gap and south to Grandview when another nurse left the agency. RP 63:14-20.

Along with several of her fellow nurses, Nurse Edgel signed the October 15, 2013, letter to YRMCC disavowing a WSNA grievance raising many of the same issues that are raised in this case. RP 217:13-218:6; 295:12-296:1. In the letter, Nurse Edgel stated that she had not experienced any problems with compensation nor experienced a hostile work atmosphere. Ex 106. Nurse Edgel decided to sign the letter because “I was not experiencing those same things.” RP 218:7-9.

Nurse Edgel testified that she kept a personal record of her hours worked at YRMCC from September 19, 2013, through May 6, 2016,

which she did not share with YRMCC. Nurse Edgel destroyed her records from September 19, 2013, until May 1, 2014 but began to retain records beginning on May 1, 2014, because she felt she was working more hours than she was being paid. RP 236:22-237:18, Ex 28-29. Nurse Edgel estimated that she worked one to two hours off the clock each working day during her employment at the agency from the fall of 2013 until May 2016. RP 116:24-117:16.

Nurse Edgel testified that the Galaxy device introduced in April or May 2014 saved her working time. RP 238:10-21.

Nurse Edgel testified that YRMCC trained her to report missed meal periods by writing a note or filling out a form. RP 95:17-23. She testified that “it was a known fact among all of us” that nurses were supposed to report missed lunches to YRMCC. RP 131:22-25. Nurse Edgel chose to not report missed meal periods because “it was just another thing to do, you know.” RP 131:25-132:2. Nurse Edgel testified that she did not take an uninterrupted meal period because she prioritized patient care over taking the time for herself. RP 228:25-230:13. She was fully paid for all hours based on the biweekly time sheets she signed. RP 288:5-13.

Nurse Edgel testified that there was no such thing as an average day. RP 230:14- 232:3. She also testified to the independent nature of

Hospice nurses' work: "When we're doing hospice work we're independent. We make our schedule. We go see our patients. We work independently. We also know that our coworkers are the doing the same thing." RP 124:14-17.

**d. Nurse Rosencrance (WSNA Witness)**

Nurse Rosencrance worked briefly as a hospice nurse for YRMCC from August 2015 to November 2015. RP 320:8-17. He left YRMCC for a promotion to Healthcare Director at Highgate Senior Living. RP 319:19-24; 345:23-346:5.

Nurse Rosencrance testified that he was paid for all verified hours reported on his biweekly time cards including overtime. RP 347:6-13.

Nurse Rosencrance estimated that he worked one to two hours off the clock each working day during his employment at the Agency. RP 331:23-332:7. Nurse Rosencrance never told the Home Care Agency that he was working more hours than he reported, however. RP 331:23-332:7. He also testified that he worked overtime one day and was paid for it. RP 347: 11-16.

Nurse Rosencrance chose to not take a meal period because he needed that time to work on charting. RP 335: 13-20. He never informed his supervisors that he was not taking required meal periods. RP 336:12-16.

Nurse Rosencrance testified that there was no such thing as an average day. “Each one of our patients is going to be different. Each situation that we walk into the home is going to be different. You know, each nurse handles different things differently. So, you know, the overall goal is probably achieved but most of us usually get there in our own way.” RP 346:11-347:5.

**e. Nurse Dedmore (YRMCC Witness)**

Nurse Dedmore became a hospice nurse in May 2017 after serving as a hospice supervisor. RP 1678:25-1679:9.

Nurse Dedmore was paid in full for all hours she reported as a hospice nurse, including all overtime she reported. RP 1686:4-8, 12-14. She testified that she was able to take her meal periods every day. RP 1686:9-11. She further testified that she did not work any hours for which she was not paid in full. RP 1686:15-17.

**8. Testifying Home Health Nurses**

**a. Nurse McVey (WSNA Witness)**

Nurse McVey worked at YRMCC from 1999 to 2004 and again from 2011 to early November 2014. RP 359:18- 25.

She was one of the six nurses to sign the October 15, 2013, letter to YRMCC disavowing the WSNA grievance on overtime and hostile work environment. Ex. 106. In the letter, Nurse McVey stated that she had not

experienced any problems with compensation nor experienced a hostile office atmosphere. *Id.*

Nurse McVey testified that her employment conditions changed when the Galaxy device was introduced in the spring of 2014. RP 446:18-22; Ex. 41. Nurse McVey had generally been able to complete her patient assignments within the scheduled time period until she was asked to use the Galaxy device. RP 395:14-16. She experienced a great deal of difficulty adjusting to the new technology because she was not “very techy savvy.” RP 376:4-18; 448:11-20. She testified that she asked to either return to paper records for charting or have someone else at the agency enter data in the device for her but that YRMCC told her they could not do that. RP 458:8-20. She testified that YRMCC did allot her additional time, including overtime, to catch-up on charting when she requested it. RP 439:2-8.

Nurse McVey briefly kept a personal record of her work hours from July 8, 2014, to November 3, 2014. She never shared this record with YRMCC. RP 424:23-426:4; Ex 89. From April 2012 until the Galaxy device came into effect in the spring of 2014, Nurse McVey first testified she “did not very often” work hours beyond eight that were unpaid, and then later testified that she did work, on average, thirty minutes off the clock per day during this time. RP 395:14-16; 412:25-

413:9. She also testified that, after the Galaxy device took effect, she would work from home anywhere between two and 10 hours, depending on how far behind she was. RP 467:13-16, 467:24-468:8. Nurse McVey testified that she worked, on average, two hours off the clock. RP 468:9-14. She testified that she would also work on her days off and during the weekends. 374:4-9.

Nurse McVey never recorded missed meal periods. RP 421:20-21. She testified that she may have seen a form “floating around” that was used to report missed meal breaks. RP 421:20-422:4. Nurse McVey called in once for overtime preapproval (and received it) but never sought preapproval again because she felt uncomfortable with the problem-solving process that preceded approval. RP 387:22-389:7.

Nurse McVey testified that her duties and responsibilities varied from day-to-day, and from those of other nurses. RP 462:8-23.

**b. Nurse Campeau (WSNA Witness)**

Nurse Campeau began working in YRMCC’s Home Health Agency as a full-time home health nurse in April 2011. RP 803:4-16; 803:20-23. He left the Home Health Agency around July or August 2016. RP 803:9-11. Nurse Campeau was primarily assigned to Selah, Naches, and Wood Shed. RP 808:9-21.

Nurse Campeau kept a personal diary of the hours he was working from 2011 through 2016, which he did not share with YRMCC. RP 838:6-14; Ex 93. Nurse Campeau testified that it was “just a generalized addition to figure out what kind of a general idea of the hours I wasn’t getting paid for. Wasn’t intended to be an accurate document.” RP 946:1-9. He estimated that he worked two hours per day off the clock during his employment with the Agency. RP 830:2-15.

YRMCC instructed Nurse Campeau during orientation to take a 30-minute uninterrupted meal break each shift. RP 831:19-24. YRMCC also informed him there was a form to fill out for missed meal periods, which he completed on occasion. RP 832:2-22.

WSNA filed a grievance on behalf of Nurse Campeau in July 2014 based on his claim of unpaid unreported overtime. RP 934:6-16; 935:16-24; Ex. 45. WSNA and the Employer settled that grievance on September 12, 2014 and Nurse Campeau was paid for all claimed hours in exchange for his promise to comply with YRMCC timekeeping policies and procedures, including seeking preapproval of overtime and reporting missed meal periods, as part of the grievance resolution. RP 912:13-18; 1013:4-23; Ex 59.

Nurse Campeau testified that “there wasn’t really any true average day because each day is a little different with your patients’ needs.” RP 830:5-7.

**c. Nurse Teeters (WSNA Witness)**

Nurse Teeters worked as a full-time home health nurse for YRMCC from the spring of 2009 to August of 2017. RP 483:1-22. She was assigned to the Lower Valley and traveled between Grandview to White Swan. RP 488:4-8. Nurse Teeters is one of two nurses to have worked the entire period of liability at issue in this case.

Prior to the Galaxy device being introduced in 2014, Nurse Teeters testified that she only occasionally provided services to hospice patients. RP 491:21-24. After the Galaxy device was introduced, she stopped serving hospice patients altogether because “the device was too complicated and you had to be trained specifically for the hospice program.” RP 491:11-17. In contrast to other nurses’ testimony, Nurse Teeters testified that the Galaxy device made her day faster. RP 572:2-13. She testified that she saved 30 to 45 minutes completing the Home Health OASIS form by using the Samsung Galaxy device. RP 574:3-23.

Nurse Teeters affirmed that YRMCC instructed her to report missed meal breaks. RP 530:20-531:4. She testified that she generally did not report them, however, because she didn’t think anyone could help her

in the Lower Valley and because it was “out of my comfort zone” to answer questions from her supervisors and problem-solve her day with them. RP 531:5-534:1, Ex. 117. Nurse Teeters testified that she did report a missed meal period once and it was paid. RP 531: 5-12, 532:18-20.

Nurse Teeters estimated she usually worked an additional two hours per day off the clock from April 2012 until she left the agency in 2017. RP 523:16-524:5. She also testified that YRMCC approved the overtime she requested every time but once in 2012 or 2013 when she did not report it. RP 566:11-569:7; 599:13-601:24. Nurse Teeters testified that YRMCC management would not have known she was working unless she reported it. RP 522:2-16. Nurse Teeters confirmed that she was paid in full for all hours verified on her biweekly time cards for the appropriate liability period. RP 546:17-547:4.

She testified that “every day she worked as a home health nurse for the agency was unique.” RP 585:9-14.

**d. Nurse Hudson (YRMCC Witness)**

Nurse Hudson worked full-time for the Home Health Agency from 2010 to the end of August 2017. RP 1292:24-1293:2. She is one of two nurses who worked the full liability period at issue in this case. She testified that no two days of work were ever the same. RP 1295:17-18.

Nurse Hudson also signed the October 15, 2013, letter disagreeing with the WSNA grievance on unpaid overtime and hostile work environment. Ex. 106. In the letter, Nurse Hudson stated that she had not experienced any problems with compensation nor experienced a hostile office atmosphere. *Id.*

Nurse Hudson testified that once she became proficient, the Galaxy device “was the most wonderful thing” that cut a lot of time off her day because she no longer had to come into the office as frequently. RP 1310:4-16.

Nurse Hudson testified that she typically received 30-minute uninterrupted meal periods by taking them at the completion of her patient visits. RP 1340:15-25. Nurse Hudson also testified that she was generally able to complete her patient assignments within an eight-hour day. RP 1296:1-6. She testified that her practice was to call her supervisor to troubleshoot and receive approval for overtime if necessary when she needed extra time to complete her job responsibilities during the day. RP 1296:7-23. Nurse Hudson testified that she was paid in full for all hours verified on her biweekly time cards for the appropriate liability period. RP 1360:2-20: “I got paid for every hour I worked. If I worked extra hours, I submitted it to the employer and I got paid.”

She testified that no two days of work were ever the same. RP 1295: 17-18. Nurse Hudson testified that she had no unpaid hours and no missed meal periods. RP 1325:12-19, 1334:21-1335:3.

**B. Procedural History**

On January 13, 2017, the parties filed cross motions for summary judgment and partial summary judgment. WSNA sought partial summary judgment on liability, and YRMCC sought summary dismissal of all WSNA's claims on the grounds that WSNA lacked associational standing and also could not establish damages. The trial court heard oral arguments on the cross motions on April 21, 2017, and denied both motions. The trial court entered the Order denying YRMCC's Motion for Summary Judgment on May 1, 2017, without prejudice. *See* CP 1252-1254.

On May 3, 2017, the trial court certified the Order to allow YRMCC to seek discretionary review. CP 1345-1347. The trial court found a controlling question of law as to which there was a substantial ground for a difference of opinion on associational standing and that immediate review of the order would materially advance the ultimate termination of this litigation. RAP 2.3(b)(4). *Id.*

On June 12, 2017, the Washington State Court of Appeals, Division III, denied YRMCC's motion for discretionary review, stating

that “more factual development” was necessary to determine whether a substantial ground for difference of opinion existed. CP 1633-1638.

On January 22, 2018, a nine-day bench trial began in Yakima County Superior Court. On April 23, 2018, the trial court issued the Judgment, Findings of Fact and Conclusions of Law, and Findings of Fact and Conclusions of Law and Order Granting Plaintiff’s Motion for Attorneys’ Fees and Costs. On May 25, 2018, the trial court entered an Order Granting Supplemental Attorneys’ Fees and Costs and a Supplemental Judgement of Attorneys’ Fees and Costs.

#### **V. STANDARD OF REVIEW**

In reviewing a trial court’s findings of fact and conclusions of law from a bench trial, the Court of Appeals proceeds through a two-step process. “First, we must determine if the trial court’s findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court’s conclusions of law.” *Landmark Dev. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1990) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)). Substantial evidence is that which would persuade a fair-minded, rational person of the truth of the declared premise. *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), cert. denied, 503 U.S. 986, 112 S.Ct. 1672, 118 L.Ed.2d 391 (1992). We

review conclusions of law de novo, even if they are mislabeled as findings of fact. *Willener*, 107 Wn.2d at 394; *Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 210, 936 P.2d 1163, review denied, 133 Wn.2d 1022, 950 P.2d 476 (1997).

## VI. ARGUMENT

### A. **The Trial Court Erred in Holding as a Matter of Law That WSNA Has Standing to Sue on Behalf of Its Members because Its Claims Require the Individual Participation of Nurses**

In Washington, associational standing must be predicated on three criteria: (1) the association members have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor relief requested requires the participation of the association's individual members. When an association seeks monetary damages rather than injunctive relief, criteria (3) 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* ("*Spokane Airports*"), 146 Wn.2d 207, 215-16, 45 P.3d 186 (2002); *Teamsters Local Union No. 117 v. State, Dep't of Corr.* ("*Teamsters Local 117*"), 145 Wn. App. 507, 512-13, 187 P.3d 754,

756 (2008). Only the third prong of the associational test is at issue in this appeal.

Associational standing exists for the practical reason that it will provide a convenient and efficient method of litigating individual claims for association members. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn. 2d 207, 213, 45 P.3d 186, 189 (2002). The third prong required for associational standing is judicially self-imposed for “administrative convenience and efficiency.” *Id.* at 215. The “ultimate question” is whether the relief requested makes individual participation of the association’s members indispensable. *Id.* Where WSNA was compelled to develop testimony from seven nurses of an associational group initially identified as ten and later improperly expanded to twenty-eight, WSNA could not prove either liability or damages without individual testimony.

The nurses could have addressed their claims of off-the-clock work and missed meals through a variety of more appropriate channels, including via the federal or state departments of labor, individual lawsuits, a class action, or arbitrating the overtime grievance procedure brought by WSNA. Associational standing cannot substitute for claims that should be individually raised or a class action where formalized class certification

processes offer an employer protection from improper extrapolation of unique individual claims.

**1. Nurses’ Extensive Individualized Testimony Defeats WSNA’s Standing**

It is well established that where, as here, a claim requires “extensive” individualized testimony, the association cannot maintain standing:

Resolution of each member’s claim would involve a fact-specific inquiry regarding the nature of the member’s business expectancy with individual owner/operators, the extent of interference with that expectancy, and the amount of damages.

*Washington Trucking Ass’n v. Employment Security Dep’t*, 192 Wn.App. 621, 639-640 (2016), *overruled on other grounds by* 188 Wn. 2d 198, 208, 393 P.3d 761 (2017) n. 10 (2017) (“we do not address whether WTA has associational standing to assert such a claim on behalf of the Carriers.”).

In the other important Washington cases addressing standing, the association was able to establish standing by pointing to employer records and simple calculations to establish damages. *Teamsters Local 117*, 145 Wn. App. at 513 (association used employer’s pager data that it collected and used to establish damages). Similarly, in another key case, damages claimed were withholdings for Social Security, and the employer matched the funds dollar for dollar – “the exact amount of relief due each individual employee is known.” *Spokane Airports*, 146 Wn.2d at 216-217.

WSNA initially attempted to establish its claims through the Galaxy device. Once it became clear that the device was not used for timekeeping purposes and that reliable timekeeping data could not be extracted from the device, WSNA was forced to change course. WSNA attempted to prove liability and damages using the personal time records a few nurses sporadically kept. These records are unreliable, which the court acknowledged in FOF # 10 (“Those personal records were not necessarily exact nor precisely accurate.”) (CP 2889). When these documents were proved unreliable, WSNA had no option but to attempt to prove the case using representative testimony. The trial, originally scheduled for five days, lasted nine days as seven nurses testified on behalf of WSNA about their individual experiences, unpaid work and missed meal periods. The extensive individualized testimony of WSNA’s nurses at trial necessarily defeats associational standing.

## **2. *Pugh* Does Not Address Key Issues in Lawsuit**

WSNA now bases its associational standing on a Division I decision, *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 369, 312 P.3d 665 (2013) (WSNA had standing and it could enter into a valid settlement agreement with the nurses’ employer). According to *Pugh*, if damages may be evidenced through the employer’s records that are certain and easily ascertainable, standing is not defeated simply because

individual association members may be called as witnesses. *Id.* at 366.

Here, it is undisputed that there are no Employer records that establish damages.

In *Pugh*, WSNA could establish standing because the employer in the case agreed that it would **not need** individualized participation to establish rest break damages for its members:

Indeed, WSNA and Evergreen considered various damages calculations and in fact determined damages owed to the nurses for the settlement agreement without requiring participation of the individual nurses.

*Id.* at 368 and fn. 8. Moreover, the *Pugh* case is readily distinguished from this case. First, *Pugh* involved a challenge to a settlement agreement by individual nurses who wanted to bring their own class action and therefore disputed WSNA's standing. The trial court addressed the issue of standing after the association reached a settlement with Evergreen Hospital, and after the association and employer had jointly determined the settlement amount for missed breaks (based on a formula that was not explained in detail in the case).

In *Pugh*, WSNA and the employer agreed on a methodology for assessing damages. This agreement appeared to be the most important factor cited by in the decision. *Id.* In addition, *Pugh* included an express claim for injunctive relief. The *Pugh* court noted "our courts have

recognized that associational standing to sue for injunctive relief is more easily established than standing to sue for monetary damages. . .” *Id.* at 369. *Pugh* turned on those two factors (agreement on damages and injunction among remedies requested), neither of which exists here.

Here, unlike *Pugh*, injunctive relief is not sought. Damages have not already been calculated and agreed to by both parties. Given this and the absence of Employer records that would support the associational claims here, WSNA had no option but to rely on the individual participation of nurses at trial to establish unpaid hours and missed meal period liability and damages for its members, which necessarily defeats associational standing.

**B. Court Erred in Finding that Testifying Nurses Provided “Sufficient Representational Testimony” to Establish Liability and Damages**

Neither the law nor the evidence supports the trial court’s use of representational testimony in this case.

In *Pugh*, the court briefly discussed “representative testimony” that could be used to establish standing, holding that “representative testimony from each department could serve as proof of damages” without describing exactly how such representative testimony would work. *Id.*

WSNA relied heavily on this underdeveloped theory, calling seven nurses to testify about their claims and damages without providing any

basis for establishing this testimony as “representative.” The nurses’ testimony established the opposite. Their testimony uniformly affirmed a high degree of independence coupled with day-to-day variability in patients, services performed, unpredicted changes (patients might develop complications requiring more time or drop from their schedule unexpectedly). WSNA did not provide expert testimony, statistical analyses, sampling data, questionnaires, interviews, surveys, or other data that could support its representational testimony theory. And, given the small number of hospice nurses, the “representative” label is fictitious – trial testimony included virtually every hospice nurse.

In the context of class actions, courts have rejected similar efforts to establish representative testimony that fails to meet minimal evidentiary standards<sup>3</sup>:

The plaintiffs proposed to get around the problem of variance by presenting testimony at trial from 42 “representative” members of the class. ***Class counsel has not explained in his briefs, and was unable to explain to us at the oral argument though pressed repeatedly, how these “representatives” were chosen—whether for example they were volunteers, or perhaps selected by class counsel after extensive interviews and***

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<sup>3</sup> YRMCC recognizes that this is not a class action case and that the legal standards for class certification are not at issue in this case; however, YRMCC believes that the class action cases cited in this section are all relevant and persuasive, and that the principles in these cases apply to WSNA’s flawed efforts to establish liability and damages in this case by representative testimony.

*hand-picked to magnify the damages sought by the class.* There is no suggestion that sampling methods used in statistical analysis were employed to create a random sample of class members to be the witnesses, or more precisely random samples, each one composed of victims of a particular type of alleged violation.

*Espenscheid v. DirectSat USA LLC*, 705 F.3d 770, 774 (2013) (class decertified because of variance in damages across class) (emphasis added); *see also Rindfleisch v. Gentiva Health Servs., Inc.*, No. 1:10-CV-3288-SCJ, 2015 WL 12552053, at \*8 (N.D. Ga. Dec. 23, 2015) (striking expert testimony because representative sampling method unreliable); *Farmer v. DirectSat USA, LLC*, No. 08 CV 3962, 2013 WL 2457956, at \*6-7 (N.D. Ill. June 6, 2013) (class decertified under *Espenscheid* analysis based on faulty “representative proof” and damages variance).

Specific testimony affirms that these witnesses’ experiences are not representative. Nurse McVey testified to her difficulty adapting to the Galaxy device whereas Nurses Hudson and Teeters testified that the device saved them time in their day. Nurse Stillwaugh testified that she received compensation for four shifts a week when she only worked three, which compensated her at least in part for hours worked beyond eight in any given shift. Nurse Campeau admitted that he had entered into an agreement with YRMCC that he would comply with timekeeping

procedures as part of a grievance settlement but breached that agreement to keep a private record of hours he did not properly report.

Nurses also testified to various reasons for working extra hours and missing meal periods. Nurse Edgel testified that she routinely prioritized patient care over her own needs. Nurse Stillwaugh testified to skipping lunches so she could leave work earlier. Nurses testified to working different amounts of unpaid overtime. RP 116:24-117:9, 467:11-468:5, 523:16-25, 646:19-647:3, 830:2-8. Finally, the testimony of Nurses Hudson and Dedmore affirms that some nurses claimed no unpaid hours or missed meal periods. The testimony of each nurse is simply too unique to permit reasonable extrapolation to all other nurses in the associational unit.

**C. The Trial Court Erred in Holding that Meal Break Violations Occurred.**

Under WAC 296-126-092, employees “shall be allowed” a 30-minute meal period. Employees may waive their meal periods. *See Brady v. AutoZone, Inc.*, 188 Wn.2d 576, 584-85, 397 P.3d 120 (2017). In assessing a missed meal period claim, the issue is whether the employer maintained an adequate system for ensuring that nurses could take meal periods and record missed breaks. *See Chavez v. Our Lady of Lourdes*

*Hosp. at Pasco*, 190 Wn. 2d 507, 518, 415 P.3d 224, 231 (2018). The substantial evidence establishes that YRMCC met this standard.

Numerous nurses testified that they knew YRMCC's policy required them to take uninterrupted 30-minute meal breaks and to promptly report meal breaks that were not taken. *E.g.* RP 1028: 18-23, 1032:3-7, RP 530:20-531:4. Nurses were instructed to arrange their patient visits to allow for a half-hour uninterrupted meal period. RP 462:24-463:4, 831:19-24. In order to ensure an uninterrupted meal period, nurses were told that they should transfer calls to the nursing supervisor on duty in the office during their meal period. RP 227:14-18, 228:7-241543:21-1544:9.

YRMCC recognized that there could be emergencies or other circumstances that made it difficult or impossible for nurses to take a meal period on a given eight-hour shift. Nurses were instructed to call for assistance before the meal period was missed. VP 229:13-230:13, 295:5-11, 743:14-744:22, 938:21-939:16. These calls were used to "problem-solve" by discussing whether a patient could be moved to another day or rescheduled for another nurse, whether the supervisor could assist with phone calls and the like. VP 1770:19-1771:8, 1771:20-1772:9. If a solution could not be found, the nurse was instructed to report the missed meal period using a time adjustment form. RP 95:17-23, 652:21-653:8,

730:25-731:5, 731:20-732:2, 831:25-832:22. According to Nurse Edgel, “[i]t was a known fact among all of us” that nurses were supposed to report missed lunches. RP 131:22-25.

When nurses reported their missed meal breaks, YRMCC paid them. RP 531:5-12, 532:18-20; 730: 25-731:23; Ex. 109.

Despite their knowledge that meal periods were required to be taken, many nurses testified they did not do so. The reasons varied from using the missed meal period to reduce the shift length by a half-hour to nurses prioritizing patient care over their own time away from work. RP 228:25-230:13, 637:7-8. Some nurses chose not to seek assistance because it took time or was “out of my comfort zone” to answer questions from managers and problem-solve with them. RP 531:5-534:1, RP 132:1-2, Ex. 117. Another nurse didn’t call for help because she didn’t want to be told to take a meal period. RP 1028:24-1029:4. Again, YRMCC could not know that nurses were disregarding instructions in the field unless the nurses reported the missed meal period, which they generally did not do.

YRMCC developed and maintained procedures to allow nurses to take meal periods and to report meal periods when missed. YRMCC even went so far as to negotiate contract language in 2016 that mandated reporting of missed rest breaks. Ex. 16 at Article 7.4. There was no

violation of the Industrial Welfare Act, and the trial court's Conclusion of Law # 7 is in error.

**D. The Trial Court Erred in Entering Findings on Damages that Do Not Show the Basis or Method for its Computations.**

The trial court erred by not adequately showing the basis and method for its calculation of unpaid wages and missed meal break damages (CP 28891, FOF # 21). The Washington Court of Appeals has repeatedly held that a trial court must enter findings showing the basis and method for its computation of damages. *See Peterson v. Neal*, 48 Wn.2d 192, 292 P.2d 358 (1956); *Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840–41, 786 P.2d 285, 293 (1990).

In its Findings of Fact and Conclusions of Law, the trial court states that it *did not rely on the methodology of WSNA's expert* to calculate damages.<sup>4</sup> The court provides no alternate explanation for how it calculated the nurses' total monetary damages for unpaid wages and missed meal breaks other than noting it apportioned the different percentages of unpaid hours worked and meal breaks missed during the liability period. Despite YRMCC's attempts to clarify the basis for

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<sup>4</sup> Ex. 96 contains a chart that WSNA's expert provided, into which the court could enter the percentage of missed meal breaks and unpaid wages to determine the total monetary damages. In its Findings of Fact, the court stated it did not use this chart.

damages, the trial court has provided no additional explanation for its calculations such as a specific breakdown for monetary damages corresponding to each percentage of unpaid hours worked and missed meal breaks. It is impossible to duplicate the trial court's finding or ascertain the court's methodology from the record. Among other concerns, YRMCC is unable to ascertain whether offsets were provided for the admitted overtime hours that were, in fact, paid to each nurse or whether commute time was included in the calculations.

In *McWhorter v. Bush*, the Washington Court of Appeals remanded the case for the purposes of taking further evidence or for the entry of additional findings of fact and conclusions of law to establish the trial court's basis and method of calculating damages. The court stated, "No findings of fact or conclusions of law were entered showing the basis for the trial court's computations of these damages. . . Findings establishing the basis for awarding the amount of damages are, therefore, insufficient." *McWhorter v. Bush*, 7 Wn. App. 831, 833–34, 502 P.2d 1224, 1225–26 (1972). In *Shinn v. Thrust IV, Inc.*, the Washington Court of Appeals similarly found the lower court's written findings to be "inadequate to allow for effective appellate review of the damages issue" when it "fail[ed] to attach dollar amounts to the various items or areas of

damage identified by the court.” *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840–41, 786 P.2d 285, 293 (1990).

The trial court’s findings here simply do not meet the Washington standard. The trial court judge found, without explanation, that for a portion of the time period at issue all nurses in the associational group failed to be paid for “22% of their hours they worked.” This finding translates to 2.5 unpaid hours per day per nurse (total hours worked =  $8 + .22(X-8)$ ). The trial judge also found for another time period (after introduction of the Galaxy device) that all nurses failed to be paid for “37.5% of the hours they worked.” This finding translates to 3.85 unpaid hours per day per nurse (total hours worked =  $8 + .375(X-8)$ ). *See* FOF #23. The nurses’ testimony varied on their “guesstimated” hours of unpaid time on average, but these guesstimates were generally lower than the trial court’s finding. Of note, there were two nurses who worked for YRMCC during the entire time period at issue. Nurse Teeters estimated she worked an additional two hours per day off the clock, and Nurse Hudson testified that she had no unpaid hours and no missed meal periods. RP 1334:24-1335:3, 1360:2-20. In contrast to this testimony, the trial court’s finding would have all nurses working 10.3 hours per day through April 1, 2014, and 11.85 hours per day between April 1, 2014, and

August 31, 2017. RP 116:24-117:9, RP 330:2-6, 331:23-332:1, 523:16-25, 830:2-8.

The trial court included the time worked through meal periods in these calculations of daily overtime. FOF # 23 (CP 2893). The court then found that “these times do not include the time for which YRMCC is required to pay the nurses for missed meal periods.” *Id.* The court then awarded an additional amount for missed meal periods, and subsequently doubled all damages so that the judgment erroneously requires YRMCC to pay for each missed meal period four times. CP 2896.

**E. The Trial Court Erred in Awarding Double Damages as to both Missed Meal Periods and Off-the-Clock Work Hours**

Washington courts have repeatedly held that double damages may not be awarded under RCW 49.52.070 if the employee knowingly submitted to the violation or there is a bona fide dispute over the wage claim. A bona fide dispute may arise from not only the existence of a claim, but also the amount of compensation owed. *See Wolf v. IDA Mktg. Servs., Inc.*, 174 Wn. App. 1066, 2013 WL 1859112 at \*4 (2013) (“[A bona fide dispute] applies to disputes over the *amount* of compensation owed”) (emphasis in original); *Wash. State Nurses Ass’n v. Sacred Heart Medical Center*, 175 Wn.2d 822, 834, 287 P.3d 516 (2012) (“A bona fide dispute is a ‘fairly debatable’ dispute over whether all or a portion of

wages must be paid.”); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160-162, 165, 961 P.2d 371(1998) (existence of a bona fide dispute over the obligation to pay *or the amount of the wages* may effectively negate statutory willfulness) (emphasis added).

The trial court erred as a matter of law in awarding double damages under RCW 49.52.070 for unpaid wages and missed meal periods for two reasons. (Conclusion of Law #13).

**First**, there is a bona fide dispute regarding the claims and amount of unpaid wages allegedly owed. The testifying nurses acknowledged that YRMCC would have no basis for determining their claimed missed hours of pay unless they reported the hours, and they did not report them. RP 522:2-16. Even months after the lawsuit was filed, WSNA’s corporate designee could not tell YRMCC the amount at issue for either the claimed off-the-clock hours or claimed missed meal periods. RP 1374:17-1375:24; 1376:15-1377:20. YRMCC had no basis for determining the merit of a claim for unpaid hours/meal periods or of calculating an amount due when it was not provided with any information from which to make that assessment. How could these claims be other than disputed?

Moreover, YRMCC had good reason to believe WSNA’s claims were without merit. Nearly every nurse in the associational unit

disavowed the very claims that lie at the heart of this lawsuit. These nurses, four of whom testified at trial, advised YRMCC of the following:

We work independently visiting our patients and are responsible for our own time management, including breaks and meal time. When we find that our work day may go into overtime, we call our manager in the office, who in turn helps us determine if another nurse can see a patient for us, or a patient can be moved into the next day, or we are granted overtime by our director to complete our day.... [W]e have never been advised to list our hours as 0800 1630, and we have not been discouraged from clocking in with Kronos.

Ex 106.

Furthermore, nurses consistently testified that they frequently failed to follow the standard procedure for reporting missed meal breaks and overtime worked. They also acknowledged that YRMCC had no other way of knowing the extent of their unpaid working time given the independent nature of their work. For example, Nurse Teeters testified that YRMCC management would not have known she was working extra hours unless she reported it. RP 522:2-16. Several nurses, including Nurses Edgel, Stillwaugh, and Campeau, testified to keeping personal records of their time worked that they did not share with YRMCC. Nurse Campeau testified that he promised to comply with YRMCC timekeeping policies and procedures, including seeking preapproval of overtime and

reporting missed meal periods, as part of a grievance resolution, but never did so. RP 912:13-18; 1013:4-23; Ex. 59.

A bona fide dispute also exists because YRMCC did not learn the amount of unpaid time that WSNA claimed until trial. WSNA's expert Dr. Munson provided estimates based on information provided by WSNA's counsel in March of 2017 but subsequently updated his estimates all the way through trial. Not even WSNA's 30(b)(6) witness could tell YRMCC the amount at issue with any individual claim or on behalf of the association when her deposition was taken pre-trial for that express purpose. Given the association's inability to quantify these claims pre-trial, there was a bona fide dispute regarding the claims as well as the amount of damages that precludes an award of double damages.

Moreover, where, as here, the employer relies on the collective bargaining agreement and follows the provisions of the CBA "with respect to overtime wages and compensatory time," the employer does not willfully deprive employees of wages or salary. *Wash. State Nurses Ass'n v. Sacred Heart Medical Center*, 175 Wn.2d 822, 834-836 (2012). The collective bargaining agreements throughout the time period at issue here have addressed meal periods in Article 7.4 and overtime in Article 7.5. The evidence is undisputed that WSNA withdrew its grievance on the pay practices at issue in this case. Ex 108, RP 1011:1-14. Importantly, the

August 1, 2016 collective bargaining agreement between WSNA and YRMCC included newly bargained language that required: “Nurses must timely complete and submit a Missed Break/Meal Form when they miss or encounter a shortened meal period (less than thirty [30] minutes) or miss a rest period due to work issues.” RP 1416:1-14. YRMCC had every reason to expect that missed meal periods, if they actually existed, would be properly reported. It is undisputed that the nurses who form the associational group in this case did not abide by this language. And yet the damages here also include unreported missed meal periods from August 1, 2016, through August 31, 2017.

*Second*, the evidence shows the nurses knowingly submitted to the claimed wage violations. They admitted that they disregarded YRMCC’s instruction to take meal periods and further instruction that they report them if missed. RP 131:22-132:1, 652:16-653:8, 731:24-732:16, 1028:18-1029:4. Likewise, they admitted that they underreported their hours worked and verified time reports they knew to be inaccurate. RP 131:11-20, 410:5-14, 439:9-21, 600:23-601:24.

The trial court’s finding of double damages must be reversed.

**F. The Judge’s Evidentiary Rulings and Trial Conduct Prejudiced YRMCC’s Rights and Reveal the Judge’s Evident Partiality.**

The Judge’s errors and evident partiality affected every important aspect of this case including the findings of fact and conclusions of law. Washington’s appearance of fairness doctrine seeks to prevent the problem of a biased or potentially interested judge. *State v. Carter*, 77 Wn. App. 8, 12, 888 P.2d 1230 (1995). A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674 (1995).

Examples of error and partiality include contradictory rulings on the use of data extracted from the Galaxy device, which WSNA acknowledged pre-trial was unreliable. CP 1102. Because WSNA referenced the unreliable data at trial, YRMCC asked its expert to explain the reasons why the data from the device was unreliable. RP 1724:2-22. The Judge abruptly cut off the line of questioning by shouting that the evidence was unreliable and everyone knew it. RP 1728:12-24; 1731:23-1733:18. The Judge subsequently allowed WSNA to use that “unreliable” data to cross-examine a witness’s credibility on her testimony regarding the hours that she worked. RP 1352:20-1359:12. Then the Judge used the

very evidence he had declared was unreliable to support his improper mid-trial statement from the bench that the witness was lying. RP 1864:6-12. The Judge went so far to support WSNA's case as to remind WSNA to introduce evidence and instruct on how best to examine witnesses (RP 1367:11-20, 1864:6-16, Ex. 99; RP 845:4-848:20, Ex. 93; 852:4-18, Ex. 45; 966:24-97:4); to allow expert testimony to be revised mid-trial (RP 1193:15-1196:21); to allow WSNA to expand the associational unit from 10 to 28 despite the 30(b)(6) testimony that should have been binding on WSNA (CP 2894; RP 995:14-996:19; Ex. 16); to make assumptions, not grounded in the evidence, about how YRMCC could have recorded time differently; and then finding that YRMCC "intentionally chose not to adopt" this fictional timekeeping system created by the court, FOF # 5, to interrupt YRMCC's closing argument to interject his disagreement (RP 1821:5-1822:18) and to introduce new arguments of his own, never made by WSNA, when he issued his decision from the bench. RP 1880:16-1881:15. And even though he declared his own arguments were not part of his findings of fact, he subsequently allowed WSNA to include his commentary in the findings of fact signed by the court. CP 2890 (FOF #12). YRMCC was never given an opportunity to respond to this

prejudicial argument – which is easily rebutted<sup>5</sup> – because WSNA never made it at any point and the Judge framed it after the closing arguments had ended. RP 1880:16-1881:15. In a final display of partiality, the Judge ordered YRMCC to pay all expert fees including those he did not use and those that were admitted to be wrong. CP 1922:13-1923:17. The trial record is replete with such examples of partiality and prejudice.

Justice requires that the court’s decision be reversed and if remanded for a new trial, assigned to a different judge. *See Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012) (Division III) (holding relief from judgment was appropriate remedy to obtain relief based on alleged violations of appearance of fairness doctrine).

## VII. CONCLUSION

YRMCC does not dispute that nurses should be paid for all hours worked. But YRMCC does dispute the associational standing permitted here that allowed WSNA to blur distinct individual claims with “representative testimony” that would never have withstood the rigors of a class certification process. If associational status is broadened in this way,

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<sup>5</sup> The Judge’s argument ignores the fact that the start and stop times on the time sheets were placeholders to show total hours worked, not a record of the actual start and stop time. The Judge’s argument also ignores the fact that YRMCC paid thousands and thousands of dollars of overtime to the nurses in the associational unit. Ex 2. Every nurse who testified had earned varying amounts of overtime that YRMCC undisputedly paid for properly reported hours worked. Thus the record did not show that nurses worked exactly eight hours every day from 8:00 to 4:30.

there is – literally – no limit to the number and types of claims associations may bring. Employers are left with little ability to defend themselves when faced with generalized “guesstimates” that are leveraged into a one-size-fits-all percentage resulting in collective damages that bear no actual relationship to the individual testimony offered at trial.

For all the foregoing reasons, the judgment of the trial court should be reversed. If remanded, a new judge should be assigned.

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This amended brief is only to correct the caption. Nothing else within has changed.

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