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NO. 36017-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

WASHINGTON STATE NURSES ASSOCIATION,

Respondent/Cross-Appellant.

v.

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

Appellant/Cross-Respondent,

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
WASHINGTON STATE NURSES ASSOCIATION

Jennifer L. Robbins, WSBA No. 40861
Laura Ewan, WSBA No. 45201
SCHWERIN CAMPBELL BARNARD IGLITZIN &
LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Tel: 206-257-6008
robbins@workerlaw.com
ewan@workerlaw.com

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I. INTRODUCTION

The sole reason that the trial court did not grant prejudgment interest on the compensatory back pay award to Respondent/Cross-Appellant Washington State Nurses Association (“WSNA”) was that the Court of Appeals in *Hill v. Garda* had held that a plaintiff cannot recover both prejudgment interest and double damages under RCW 49.52.070 for the same wage violation.¹ Although the court was constrained by *Hill*, the court concluded that WSNA had otherwise established its entitlement to recover prejudgment interest at a specified rate and amount. CP 2896; RP 1890:15-1891:15.² In reversing the Court of Appeals, the Supreme Court in *Hill* reasoned that prejudgment interest and exemplary damages serve different purposes: the former to make employees whole for the lost use value of money, the latter to punish and deter employers like Appellant/Cross-Respondent Yakima HMA, LLC d/b/a Yakima Regional Medical and Cardiac Center (“Yakima Regional”), whose willful failure to pay wages owed causes harm. *Hill v. Garda CL Northwest, Inc.*, 191 Wn.2d 553, 573-577, 424 P.3d 207 (2018).

¹ *Hill v. Garda CL Northwest, Inc.* 198 Wn. App. 326, 366, 394 P.3d 390 (2017), *rev’d* 191 Wn.2d 553 (2018).

² Appellant/Cross-Respondent does not contest the propriety of the 12% simple per annum interest rate applied by the trial court or the total prejudgment interest amount that the court concluded would be owing but for *Hill*. It likewise does not dispute – and therefore concedes – that the Washington Supreme Court decision in *Hill* applies retroactively. See *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 75, 316 P.3d 469 (2013); *Jackowski v. Borchelt*, 174 Wn.2d 720, 731, 278 P.3d 1100 (2012); *Lunsford v. Saberhagen*, 166 Wn.2d 264, 271, 208 P.3d 1092 (2009).

The trial court below found facts, based on the evidence at trial, establishing the number of unpaid hours worked by WSNA-represented home health and hospice nurses during the time period in question and the frequency of their missed meal breaks during the same period. With those factual determinations of the number of unpaid hours worked, along with the employer's daily payroll data showing the number of hours each nurse was already paid for, the number of days on which each nurse worked enough hours to qualify for a missed meal period, and each nurse's regular rate of pay, the court calculated the amount of damages with exactness. WSNA's wage claims were therefore liquidated under the standards set by Washington law, and prejudgment interest is proper.

The findings and conclusions and judgments should be affirmed, except for Conclusion of Law #14, which should be reversed and remanded for entry of a supplemental judgment for prejudgment interest.

II. ARGUMENT

Yakima Regional argues that WSNA's damages claims are not liquidated. The cases it cites, however, only support the conclusions that WSNA's claims are liquidated and that a prejudgment interest award here is proper. The Washington Supreme Court has repeatedly explained:

Courts award prejudgment interest when claims are liquidated. A liquidated claim exists when "the amount of prejudgment interest can be determined from the evidence

with exactness and without reliance on opinion or discretion. A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated.”

Stevens v. Brink’s Home Security, 162 Wn.2d 42, 50, 169 P.3d 473 (2007) (quoting *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846 (2007) (internal citations omitted); see also *Hill*, 191 Wn.2d at 573-74; *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006). A wage claim is liquidated even if the number of unpaid hours are determined on an average or approximate basis and even if the plaintiff uses a damages expert to assist the trier of fact in determining the amount of back wages owed. *Stevens*, 162 Wn.2d at 50-51; *McConnell*, 131 Wn. App. at 536.

Hill was a rest and meal breaks case involving a multi-million-dollar award of back wages to a class of plaintiffs for “vigilance-free meal periods and rest breaks of which they were deprived” during a 9-year period of time. *Hill*, 191 Wn.2d at 572; *Hill v. Garda CL Northwest, Inc.*, No. 09-2-07360-1 SEA, 2015 WL 7356006, at *6, *8 (Wash. Super. Oct. 23, 2015). Plaintiffs brought the break claims under WAC 296-126-092 and double damages claims under RCW 49.52.070, as WSNA did here. *Hill*, 191 Wn.2d at 558. At trial, the *Hill* plaintiffs introduced expert testimony by the same expert WSNA used here – Dr. Jeffrey Munson – to

calculate damages from the employer's electronic payroll and timekeeping reports. *Hill*, 2015 WL 7356006, *1.³ In *Hill*, the trial court found that the payroll data for more than the first four years of the back pay period “do not allow precise calculations of missed rest and meal breaks and consequent damages because they do not contain information on the number of hours worked on any particular day.” *Hill*, 2015 WL 7356006, at *2. The findings of fact regarding the amount of missed rest and meal break time therefore relied on estimates supported by the evidence. *Id.* at *2-3. Although the issue on appeal was whether the plaintiffs could recover both prejudgment interest and double damage for the same wage violation, the Washington Supreme Court nevertheless determined that the plaintiffs were entitled to recover prejudgment interest on damages for the entire time period, including where the amount of missed break time was based on estimates supported by the evidence. *Hill*, 191 Wn.2d 572-77.

In *Hill*, the trial court found that

the damages were readily ascertainable based on pay rates, hours worked, and other objective data in the record and the Court's findings regarding the calculation of the number of rest and meal break minutes for which compensation is owed. Accordingly, the Court concludes that prejudgment interest is due on the back pay owed here at a rate of 12% simple per annum, or one percent per month.

³ As here, the trial court in *Hill* found Dr. Munson's methodology to be reasonable and sound. *Id.* at *3, *6, *8; CP 2892.

Hill, 2015 WL 7356006, at *8 (emphasis added).

Similarly here, after evaluating the disputed evidence, the trial court below made findings of fact based on documentary evidence, including employer policies, and nurses' testimony regarding the amount of off-the-clock time they worked and the frequency of missed meal breaks. CP 2888-93, ##6-10, 14-17, 19, 21-23. Specifically, the trial court found that nurses missed 90 percent of their statutorily-mandated 30-minute meal breaks. CP 2891, #19.⁴ The court also found that "[f]rom April 21, 2012 through April 1, 2014, the nurses were not paid for 22% of their hours they worked," CP 2983, #23, and that "[f]rom April 2, 2014, through August 31, 2017, the nurses were not paid for 37.5% of the hours they worked." *Id.* In other words, the court found that, for each day the nurses were paid for eight hours, nurses in the earlier time period were not paid for 1.76 hours of work and nurses in the later time period were not paid for three hours of work. *See* RP 1154:17-23.

As in *Hill*, the damages here were ascertained by the court based on the specific findings it made from the evidence at trial, along with data from the employer's payroll records regarding the number of days each nurse worked a sufficient number of hours to be entitled to a meal period,

⁴ Based on settled law, the trial court concluded that "[t]he appropriate measure of back pay damages for meal break violations is payment at the regular hourly rate for a full 30 minutes for each missed statutorily-mandated 30-minute uninterrupted meal break." CP 2895, #10.

the number of hours RNs were paid for, and the nurses' hourly regular rate of pay. Exs. 1-5, 74, 84-86; RP 1884:2-19 (court reviewed "every exhibit" paying "particular attention to the records that showed...how many hours they had been paid for during the, during this time period."); *see also* Exs. 96-98; CP 2892, ¶21 (Dr. Munson's damages calculations, which the court found to be helpful). Consistent with numerous Washington courts that have regarded judgments for back wages as liquidated and have awarded prejudgment interest,⁵ WSNA's claims for compensatory back pay damages were liquidated and an award of prejudgment interest is due.⁶

The cases cited by Yakima Regional only support WSNA's prejudgment interest claims. Like the case at bar, *Stevens* involved claims for unpaid wages, including overtime wages owing for hours worked without pay. There, as here, the Defendant argued that the amount owing required the factfinder "to rely on opinion or discretion and was therefore unliquidated." *Stevens*, 162 Wn.2d at 50. The Court rejected that

⁵ *E.g.*, *Stevens*, 162 Wn.2d at 50-52; *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 681, 699, 267 P.3d 383 (2011); *McConnell*, 131 Wn. App. at 536-37; *Curtis v. Security Bank of Wash.*, 69 Wn. App. 12, 847 P.2d 507, *rev. denied*, 121 Wn.2d 1031 (1993).

⁶ Yakima Regional disingenuously asserts that "it is not apparent" whether the trial court would have awarded prejudgment interest on the compensatory or the double damages portion of the judgment. App. Reply Br. at 25, n. 15. WSNA only sought prejudgment interest on the compensatory back pay amount. *See* CP 1978, Exs. 96-98, RP 1126:15-1127:22. The trial court specifically found the interest to be on the damages amount of \$1,447,758.09. CP 2893, ##23, 24. And, it is clear from the trial court's interest rate calculation of \$475.98 per day that the trial court applied a 12% simple per annum interest rate to the compensatory amounts only. CP 2896, Conclusion of Law #12, 14 (($\$1,447,758.09 \cdot .12$)/365 = \$475.98).

argument. Even though the plaintiffs relied on expert testimony to calculate the drive times comprising the unpaid hours worked, the Court nevertheless held that the jury did not have to rely on “opinion or discretion” to calculate the damages amount, because the drive time payments could be calculated by using the expert’s determination of the number of unpaid hours and the employees’ actual wage rates. *Id.* at 50-51. Thus, the drive time claim was liquidated and the trial court properly awarded prejudgment interest at 12% per annum. *Id.* at 51-52.

In *Bostain*, the Washington Supreme Court affirmed the trial court’s award of prejudgment interest even though the parties disputed the number of hours worked. *Bostain*, 159 Wn.2d at 723. Although the amounts were contested, “the plaintiffs submitted objective evidence of the overtime due and the basis for the calculations.” *Id.* The damages could therefore “be determined from the evidence with exactness,” and the trial court’s award of prejudgment interest was proper. *Id.*; *Stevens*, 162 Wn.2d at 50 (favorably discussing *Bostain*).

McConnell – also cited by Yakima Regional – also supports WSNA’s prejudgment interest claims. *McConnell* involved claims for missed rest periods, missed meal periods and overtime pay brought under the Minimum Wage Act on behalf of store managers, whose claims went to a two-week jury trial. *McConnell*, 131 Wn. App. at 530. At trial,

“experts for both sides testified that an exact computation of overtime hours worked by the managers was impossible.” *Id.* at 536 (according to the employer, “each expert gave opinion testimony as to a likely range, and the jury arrived at its own number”).

The Court nevertheless rejected the employer’s argument that damages could not be computed without recourse to opinion or discretion, because, like WSNA’s claims here, the overtime payments were “determinable by computation” based on the number of unpaid overtime hours the factfinder determined the employees worked and the employees’ hourly wage rates. *Id.* at 536. The Court aptly reasoned “Damages are liquidated if the evidence furnishes data that, if believed, made it possible to compute the amount owed with exactness...That is, that the defendant at the time of the transaction was able to ascertain the amount owed.” *Id.* (emphasis added). To the contrary, “[a] claim is unliquidated if the facts proved did not permit an exact sum to be fixed. A claim is unliquidated, for instance, if the amount must be arrived at by a determination of reasonableness.” *Id.* Like the jury in *McConnell*, the court here “had to evaluate disputed evidence as to the number of unpaid hours worked.” *Id.* And, also like in *McConnell*, “the necessary data to make this factual determination was set out in the evidence. The claim was, therefore liquidated.” *Id.*

The final case relied on by Yakima Regional did not, by contrast to the foregoing cases, involve claims for unpaid wages or back pay for missed breaks. *Maryhill Museum of Fine Arts v. Emil's Concrete Const. Co.*, 50 Wn. App. 895, 751 P.2d 866 (1988). Rather, it was a breach of contract case involving reconstruction and restoration of part of a historic building. Unlike the court below and the courts in *Hill*, *Stevens*, *Bostain* and *McConnell*, which all computed back pay based on the number of uncompensated hours and the employees' hourly wage rate, the court in *Maryhill* used its discretion to determine the reasonable cost of repairs. Because the costs and extent of the repairs were disputed, until the court made that decision, the amount owing was not liquidated. *Id.* at 903. Here, at the time the wages were due, Yakima Regional knew the nurses' hourly wage rate and that it was obligated to pay for all hours worked, including time worked through what should have been the nurses' meal breaks. This case is thus distinguishable from *Maryhill Museum*.⁷

In light of all of the foregoing, this Court should reverse Conclusion of Law #14 and award WSNA prejudgment interest.

⁷ *Maryhill Museum* has likewise been distinguished in cases reaffirming the rules discussed in the other cases above. *See, e.g., Egerer v. CSR West, LLC*, 116 Wn. App. 645, 653-54, 67 P.3d 1128 (2003).

III. CONCLUSION⁸

The trial court's sole basis for denying WSNA's prejudgment interest claim was the Court of Appeals decision in *Hill*, which has now been reversed. On the question whether WSNA's back pay claims are liquidated, WSNA's claims for back pay for missed meal breaks and uncompensated hours worked, including overtime hours worked, are indistinguishable from those asserted in *Hill*, *Stevens*, *Bostain* and *McConnell*, all of which regarded judgments for back wages as liquidated and awarded prejudgment interest, even where the number of unpaid hours determined by the trial court was based on contested, estimated or expert evidence. This Court should reverse the trial court with regard to Conclusion of Law #14 and award WSNA prejudgment interest.

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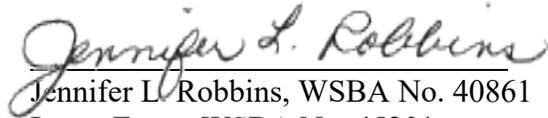
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⁸ WSNA limits its argument in this cross-reply brief to the issues in the cross-appeal. However, WSNA notes that Yakima Regional's Reply Brief makes new arguments for the first time in reply. Appellant's Reply Brief at 6, n. 4, and 23, § I. As explained in *W. Norman Timber v. State*, an appeals court does not "consider arguments or authorities presented by appellant for the first time in its reply brief." 37 Wn.2d 467, 471, 224 P.2d 635 (1950). In any event, the new arguments do not avail Yakima Regional. Both cases in n.4 applied federal associational standing jurisprudence, not, as Appellant implies, the law of "other states," and both held the plaintiff organization had standing to assert claims for damages. Yakima Regional has not appealed the attorneys' fee and cost award.

Respectfully submitted this 28th day of December, 2018.

SCHWERIN CAMPBELL BARNARD IGLITZIN &
LAVITT, LLP

A handwritten signature in cursive script that reads "Jennifer L. Robbins".

Jennifer L Robbins, WSBA No. 40861

Laura Ewan, WSBA No. 45201

18 W Mercer St, Suite 400

Seattle, WA 98119

(206) 257-6008

robbins@workerlaw.com

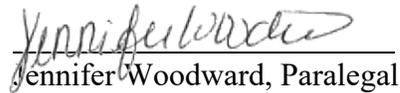
ewan@workerlaw.com

DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the state of Washington that on this 28th day of December, 2018, I caused the foregoing Reply Brief of Respondent/Cross-Appellant Washington State Nurses Association to be filed electronically with the Washington State Court of Appeals, Division, III, and a true and correct copy of the same to be served via email on:

Paula L. Lehmann
Mary R. Sanden
Davis Wright Tremaine LLP
777 108th Avenue NE, Suite 2300
Bellevue, WA 98004
paulalehmann@dwt.com
marysanden@dwt.com

Signed in Seattle, Washington, this 28th day of December, 2018.


Jennifer Woodward, Paralegal

SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT

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