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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,

BRIEF OF RESPONDENT/CROSS-APPELLANT WASHINGTON STATE NURSES ASSOCIATION

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I. INTRODUCTION

On behalf of registered nurses ("RNs") who provide home health and hospice services, Respondent/Cross-Appellant Washington State Nurses Association ("WSNA") brought suit against the nurses' employer, Appellant/Cross-Respondent Yakima HMA, LLC d/b/a Yakima Regional Medical and Cardiac Center ("Yakima Regional"). WSNA asserted claims under the state Minimum Wage Act ("MWA"), RCW 49.46; the Industrial Welfare Act ("IWA"), RCW 49.12; WAC 296-126-092; the Wage Rebate Act, RCW 49.52; and for prejudgment interest. The evidence at trial was, in the court's words, "overwhelming" that the nurses worked time for which they were not paid. WSNA proved rampant wage violations through the compelling testimony of home care nurses, key admissions by employer witnesses, and thousands of the employer's own records.

Yakima Regional seeks reversal but notably does not assign error to any of the factual findings underlying the court's legal conclusions on liability or damages. Rather, it reprises its thrice-rejected attack on WSNA's associational standing in contravention of controlling law, ignores governing law on liability and damages, and alleges for the first time on appeal that Superior Court Judge Blaine Gibson was biased.

The court's findings of fact are supported by substantial evidence; its conclusions are grounded in settled law. This Court should affirm.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court correctly concluded that WSNA has associational standing to assert claims for unpaid wages and missed meal periods even though it relied in part on representative nurse testimony to establish liability and damages. (Assignments of Error #1 and #2)

2. Whether the trial court correctly concluded that Appellant violated RCW 49.12 and WAC 296-126-092, where the uncontested Findings of Fact ##14-18 are that Yakima Regional failed to permit nurses a reasonable opportunity to take 30-minute uninterrupted meal breaks, that RNs ate "on the fly" while working, and that Appellant created a workplace culture that encouraged nurses to skip meal breaks and discouraged them from reporting missed breaks. (Assignment of Error #3)

3. Whether the trial court adequately showed the basis or method for computing damages and whether substantial evidence supports the court's findings on damages. (Assignment of Error #4)

4. Whether Appellant waived any defense to double damages under RCW 49.52 and any claim that the trial court was biased by failing to raise those issues in the trial court (Assignments of Error # 5, 6).

5. Whether Appellant failed to meet its burden to prove a bona fide dispute existed at the time wages were owed and that the nurses knowingly submitted to its wage violations. (Assignment of Error #5)

6. If the claim that the trial court was biased was not waived, whether Appellant has proven bias. (Assignment of Error #6)

III. ASSIGNMENT OF ERROR ON CROSS-APPEAL

1. The trial court erred by denying WSNA's request for prejudgment interest. (Conclusion of Law #14)

IV. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL

1. Where the trial court only denied prejudgment interest based on Court of Appeals authority that has since been reversed, whether WSNA should be awarded prejudgment interest.

V. STATEMENT OF THE CASE

WSNA is a statewide professional association and labor organization whose purposes include advancing the economic and general welfare of the nurses it represents. RP 957:11-958:16; 1368:20-1369:2; 1420:7-9. In furtherance of these goals, WSNA has brought legal action against numerous hospitals to ensure compliance with state wage and hour laws, including laws mandating rest breaks and meal breaks. RP 958:17-959:7; 1420:9-1421:16. WSNA has been the exclusive bargaining representative of Yakima Regional's home care nurses at all times pertinent to this lawsuit. CP 29, ¶3.2; RP 1408:1-14. RNs must perform their duties in accordance with the Nurse Practice Act. RCW 18.79.

Yakima Regional provided home care services to individuals with post-surgical needs, long-term health conditions, and terminal illnesses. *See* RP 44:1-15. Home Health and Hospice Administrator, LaDonna Chambard, oversaw the home health and hospice programs at all pertinent times. RP 1444:12-1445:3 Ms. Chambard, along with clinical supervisors Ann Niesz and Ute Dedmore managed and supervised the home care RNs. RP 1479:22:-1480:5; 1680:12-1681:17; 1748:5-15.[1] Community Health Systems ("CHS") acquired Yakima Regional in the spring of 2014. RP 1476:4-13; 1480:4-8.

The essential duties of home health and hospice nurses were the same both before and after the change in Yakima Regional's corporate ownership. Trial Exhibit ("Ex.") 6. Depending on the needs of the patient, nurses created and maintained a plan of care; conducted assessments and tests; managed pain and medications; wound care, bowel maintenance, IV lines, catheters, and bed baths; educated patients and their families; case managed; traveled to patients; and completed all required documentation. *Id*.; RP 46:16-48:1; 486:8-488:23; 615:17-617:9. Hospice RNs working for Yakima Regional provided physical, social, emotional, and spiritual support services to terminally ill patients and their families at the end of life. *Id*. Home care nurses were the doctors' "eyes and ears." RP 59:7-14.

[1] Ms. Niesz and Ms. Dedmore both reported to Ms. Chambard. RP 1745:3-5; 1746:3-7.

Home health and hospice nurses were subject to the same written policies. Exs. 7-11. For example, they were subject to productivity standards mandating that they complete a certain number of "stats" per shift—five for hospice and six for home health. Ex. 9; RP 82:16-84:22; 330:12-18; 380:5-18; 492:5-9; 624:8-630:4; 815:25-816:11; 1022:18-1023:4; 1295:19-25; 1568:18-1569:19. Each "stat" was comprised of the patient visit, the drive time to the patient and charting. RP 86:2-12; 382:21-383:11; 498:15-18; 628:6-629:2.[2] Nurses did not have the discretion to perform fewer stats than the policy provides. RP 381:22-24; 495:15-497:7 (if RN did not see six stats, she did not get paid a full day's wage unless she used her paid time off); 629:3-4.

Home health and hospice nurses were subject to extensive charting requirements, which must be timely completed and which cannot be shortened. Ex. 6; RP 64:16-67:9; 66:8-67:9; 70:2-77:5; 89:7-90:6; 363:16-364:23; 367:7-15; 368:18-22; 490:23-491:10; 613:17-615:12; 618:8-620:2; 813:4-18; 1308:10-13; 1320:14-1324:8; 1333:13-16. Records of each visit must "stand alone" so Medicare reviewers will approve funding per federal regulations. RP 615:2-16. Documentation had to be completed the day of the visit or within 24 hours so on-call nurses in the evening or the nurse on duty the next day could access the information. RP 80:11-

[2] Different visit types were worth a different number of "stats" with lengthier and more complicated visits like start of care visits valued at more stats than a routine visit. Ex. 9.

82:15; 329:18-23; 363:16-368:17; 371:10-372:20; 622:19-623:17; 814:14-20. Additional intensive interdisciplinary group ("IDG") charting was required every two weeks. RP 93:8-94:13; 622:19-623:17. As explained in detail below, home health and hospice nurses were subject to the same policies and practices that resulted in nurses in both groups being denied pay for all hours worked at about the same rate. *See* § VI.B.3, *infra*.

WSNA's damages expert, Dr. Jeffrey Munson, used thousands of pages of the employer payroll wages and hours data to determine how many hours nurses were already paid for, the nurses' regular rate of pay and the number of days nurses worked more than five hours and were therefore entitled to a meal break. RP 1054:1-1058:15. Dr. Munson provided the Court with overall and weekly damages calculations based on the nurses' periods of employment, their hours worked on each day and week in the back pay period, their rate of pay and assumptions about the amount of off-the-clock work and missed meal breaks as exemplars. Exs. 97, 98. He prepared a tool to for the court to calculate damages based on its findings regarding the amount RNs worked off the clock and the frequency with which RNs missed their meal breaks if those differed from the assumptions Dr. Munson was provided. Ex. 96.

This appeal arises from a bench trial in Yakima County Superior Court before the Honorable Blaine Gibson. CP 2886. Appellant's multiple

attacks on WSNA's standing to bring this case were rejected at summary judgment, CP 361-384; 1252-53, after the close of plaintiff's case, RP 1282:1-5, and at the close of trial. CP 2886-97. The Court entered Judgment on April 23, 2018. CP 2908-10. Per *Hill v. Garda CL Northwest, Inc.* 198 Wn. App. 326, 394 P.3d 390 (2017), the court denied WSNA's claim for prejudgment interest because it awarded double damages under RCW 49.52. CP 2896. The court awarded a supplemental judgment on May 25, 2018. CP 3036-39.[3] On August 23, 2018, the Washington Supreme Court reversed the Court of Appeals in *Hill*. *Hill v. Garda CL Northwest, Inc.*, --- Wn.2d ---, 424 P.3d 207, 209 (2018).

VI. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews issues of law de novo. *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383 (2011). Where the trial court has evaluated evidence, this Court's review "is limited to determining whether the findings are supported by substantial evidence and, in turn whether those findings support the conclusions of law." *Id.* at 681-82. The Court draws reasonable inferences from the facts in favor of the trial court's determination. *Id.* Because Yakima Regional "does not assign error to any of the trial court's findings of fact, the findings of fact are verities on

[3] Yakima Regional does not appeal the attorney's fees and cost awards in the original or supplemental judgments.

appeal." *Id*.[4] "In Washington, findings of fact supported by substantial evidence will not be disturbed on appeal." *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Id*.

To defeat a showing of willful deprivation of wages under RCW 49.52, Yakima Regional bore the burden to show the existence of a bona fide dispute about whether all or part of the wages were really due. *Hill*, 424 P.3d at 211. Appellant must have proven that it had "a 'genuine belief' in the dispute at the time of the wage violation." That is a question of fact reviewed under the substantial evidence standard. *Id*. at 212. Appellant must have proven that the dispute was objectively reasonable. *Id*. at 211. That inquiry is a legal question about the reasonableness or frivolousness of an argument that the court reviews de novo. *Id*. at 212.

B. THE TRIAL COURT CORRECTLY HELD THAT WSNA HAS ASSOCIATIONAL STANDING.

1. The Court Of Appeals' *Pugh* Decision Is Dispositive.

It is well established in Washington that labor unions have associational standing to pursue wage claims on behalf of their members.

[4] *See also In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004), RAP 10.3(g); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) ("Defendant's failure to assign error to the facts entered by the trial court precludes our review of these facts and renders these facts binding on appeal").

Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 45 P.3d 186 (2002) ("*Firefighters*"); *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 365, 369, 312 P.3d 665 (2013), *rev. denied*, 180 Wn.2d 1007 (2014); *Teamsters Local Union No. 117 v. Dep't of Corr.*, 145 Wn. App. 507, 187 P.3d 754 (2008) ("*Local 117*"). An association has standing to pursue damages claims on behalf of its members when (1) the members of the organization otherwise would have standing to sue in their own right, (2) the interests that the organization seeks to protect are germane to its purpose, and (3) neither the claim nor the relief requires the participation of the organization's individual members. *Firefighters*, 146 Wn.2d at 213-14.[5] Appellant disputes only the third prong.

The Court of Appeals in *Pugh* held that the <u>same union</u> had associational standing to bring one of the <u>same claims</u> asserted here—state law missed break claims. *Pugh*, 177 Wn. App. at 365, 369. The Court acknowledged that a union meets the third *Firefighters* prong "when the record shows that the amount of monetary relief requested on behalf of each employee is certain, easily ascertainable, and within the defendant's knowledge." *Id*. at 366. The Court held that where, as here, an employer in

[5] The first two prongs are constitutional, but the third is judicially created for administrative convenience and efficiency. *Id*. at 215. Allowing unions to pursue monetary damages on behalf of its members "affords a practical and sensible remedy to individual members who belong to an employee association and, perhaps, lack the means to bring a lawsuit on his or her own behalf," while ensuring that courts are not burdened with multiple lawsuits arising out of the same set of facts. *Id*. at 216.

a wage and hour case has "failed to keep adequate records, damages may be established by 'just and reasonable inference,'" and "[s]uch inferences can be established by "'representative testimony.'" *Id*. at 368 (quoting *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946) and *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), *cert denied*, 488 U.S. 1040 (1989)).[6] In *Anderson*, the U.S. Supreme Court explained:

> it is the employer who has the duty…to keep proper records of wages….But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; …In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Anderson, 328 U.S. at 687 (emphasis added).[7]

The use of representative testimony from a manageable number of employees to prove a pattern or practice of wage law violations is thus a

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[6] Yakima Regional had a duty to keep accurate and complete records of hours worked and wages paid. RCW 49.46.070.

[7] The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. *Anderson* at 687-88.

well-established principle in collective and class actions under wage and hour law. *See, e.g., Chavez v. Our Lady of Lourdes Hospital at Pasco,* 190 Wn.2d 507, 519, 415 P.3d 224 (2018) ("it is not necessary to prove each plaintiff's damages on an *individual* basis; it is possible to assess damages on a class-wide basis using representative testimony"); *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 874-77, 281 P.3d 289 (2012) (reversing defense verdict because jury instruction erroneously foreclosed use of representative testimony); *Pellino,* 164 Wn. App. at 676; *Tyson Foods, Inc. v. Bouaphakeo,* 136 S.Ct. 1036, 1043-45, 194 L.Ed. 2d 124 (2016).[8]

In *Pugh*, the trial court found that "the parties disagree vehemently as to even the possible amount of damages in this case." *Pugh*, 177 Wn. App. at 367. All parties agreed that nurses in different sections of the hospital missed breaks at various rates and that "there are no records from which Evergreen can precisely determine the amounts owed." *Id*. The Court determined that damages were nevertheless "ascertainable," holding that damages for nurses denied their breaks could be calculated based on "representative testimony" from nurses from each unit about the frequency of missed meal breaks and applying those facts to employer records that

[8] *See also Reich v. Southern New England Telcoms. Corp.*, 892 F. Supp. 389, 396-97, 403-04 (D. Conn. 1995), *aff'd*, 121 F.3d 58 (2nd Cir. 1997) (affirming class-wide liability based on representative testimony, despite variations in frequency of missed lunch periods ranging from 50 to 98%); *McLaughlin*, 850 F.2d at 589.

showed the hours of work already paid per week, the hourly rate of pay and the number of breaks to which the nurses were entitled. *Id.* at 368 and n. 8, 9. In so holding, the Court rejected the trial court's ruling that the absence of records about the frequency of missed breaks was fatal to establishing WSNA's standing. *Id*. Were it necessary that the amount of uncompensated time be in the employer records for WSNA to have standing in a wage case, *Pugh* would have had to come out the other way.

Pugh controls. As in *Pugh*, the employer's records here are inaccurate as to the total amount of hours worked, but they establish the number of hours RNs were paid for, their hourly rate of pay and the number of meal breaks to which they were entitled. Exs. 1-5, 74, 84-86. As in *Pugh*, RNs' representative testimony can establish the facts missing from the employer records: 1) the amount of unpaid hours worked and 2) the frequency of missed breaks. *Accord Local 117,* 145 Wn. App. at 513-14 (damages were "easily ascertainable" and "within the employer's knowledge" because, after worker testimony, calculating back wages was simply a "math exercise."); *Int'l Union of Operating Eng'rs, Local 148 v. Illinois Dep't of Employment Sec.*, 215 Ill.2d 37, 828 N.E.2d 1104, 1116 (2005) (union had associational standing because award is calculated by application of straightforward formula using employer's salary data).

Similarly, the Washington Supreme Court recently unanimously held in a state law meal and rest break class action brought by nurses in a hospital that where a common policy or practice applied to all workers at issue, individual differences between workers are not relevant to determining employer liability and it is possible to assess damages on a class-wide basis via representative testimony. *Chavez*, 190 Wn.2d at 519.[9] The Court determined that factors that differed among departments, such as nurse type, shift length and frequency of missed breaks, were not sufficient to defeat class certification; rather, the dominant and overriding issue was whether the hospital failed to ensure nurses could take breaks and record missed breaks. *Id.* at 518-19.[10]

Recent cases like *Chavez* and *Tyson Foods* reaffirm the *Pugh* ruling that where an employer keeps inaccurate records, representative testimony can establish the amount of unpaid time worked by the entire group, such that calculation of damages is a formulaic determination based

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[9] The *Chavez* Court favorably discussed *Tyson Foods, supra*, which affirmed class certification on the grounds that "representative testimony and trial bifurcation could be used to manage the individual issues relating to damages." *Chavez*, 190 Wn.2d at 521-22 (citing *Tyson*, 136 S.Ct. at 1044-50).

[10] The *Washington Trucking* case relied on by Appellant is not a wage case and is readily distinguishable. There, an association could not maintain standing on a tortious interference claim. *Wash. Trucking Ass'n v. Empl. Sec. Dep't*, 192 Wn. App. 621, 369 P.3d 170 (2016). "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." *Id.* at 640. Such distinctions do not exist here. Liability arises from the same unlawful policies and practices by the same employer. Variations in damages are easily determined from the employer's own payroll records.

on hours already paid as reflected in employer's records. The trial court correctly concluded that WSNA has standing even though it partially relied on representative testimony to establish liability and damages.

2. It Is Well-Established That Employee Testimony Is Not "The Equivalent Of 'Participation'" For Purposes Of The Third *Firefighters* Prong.

Testimony by an individual member of the plaintiff organization is not "the equivalent of 'participation' for the purposes of the third prong of the standing analysis." *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 894, n. 1, 337 P.3d 1076 (2014). Thus, WSNA's standing is not defeated simply because individual RNs were called as witnesses. *Id.*; *Pugh*, 177 Wn. App. at 366-67; *Local 117*, 145 Wn. App. at 513-14. Like the employers in *Local 117* and *Pugh*, Yakima Regional here

> confuses participation as witnesses with participation as necessary parties to ascertain damages. The employees are not necessary parties; neither are they indispensable parties. Here, the calculation of damages does not require individual determination and the liability issues, though of a factual nature, are common to all. We refuse to adopt [the employer's] position that participation of an individual member as a witness abrogates the Union's standing to prosecute the employees wage claims.

Id. This rule could not be clearer. Appellant's challenge to WSNA's associational standing on the grounds that nurses testified fails.

3. The Nurses' Testimony Was Sufficiently Representative.

Yakima Regional argues that the court erred in finding that testifying nurses provided sufficient representational testimony to establish liability and damages. App. Br. at 32-35. The crux of its argument is that there was variability in the patients and in the tasks RNs performed, and the reasons for the uncompensated time differed. Nearly every factual averment in this section of the brief lacks citation to the record. Appellant likely avoids referencing the record because it does not support the factual assertions made and because the record contains overwhelming evidence of the common experiences of the RNs as to supervision, instruction, employer policies and practices, duties and responsibilities, timekeeping, the amount of unpaid time worked and the frequency of missed breaks.

As explained above, substantial evidence established that the home health and hospice nurses had the same essential job duties and were subject to the same employer policies and practices, including productivity standards, charting, and timekeeping. *See* § V and citations to the record therein. Substantial evidence, including representative testimony, also supports the trial court's findings that the employer engaged in unlawful pay practices that applied to the group as a whole in nature and extent.

Yakima Regional expected RNs to complete daily time sheets, known as handwritten visit sheets or day sheets, listing the RNs' hours for

that day. Exs. 10, 12. Yakima Regional, specifically Ms. Chambard, required nurses to write 8 hours, or a total of 8 hours (8:00 a.m. to 4:30 p.m.), on their day sheets regardless of how many hours they actually worked. RP 96:20-102:15 (8 hours for 5 stats in hospice); 631:7-23 (same); 384:7-386:17 (8 hours); 500:12-22 (8:00 to 4:30); 816:23-817:15 (same); 502:11-15 (8 hours for six stats in home health); 507:18-509:2 (when home health RN reported six stats could not be completed in 8 hours, Chambard said "she would not pay us for paperwork"). RNs were essentially instructed to report false time records.

Even where the nurses did not write start and stop times on the day sheets, and even where the nurses wrote actual start and stop times on the day sheets, Ms. Chambard manually entered 8:00 a.m. to 4:30 p.m. as the nurses' hours worked into the Hospital's electronic timekeeping system and deducted 30 minutes for a meal break, until eventually the electronic system was programmed to automatically populate the nurses' hours as 8:00 a.m. to 4:30 p.m. Exs. 1, 2, 4, 5, 74, 84-86; RP 1579:11-1583:4-11; 1645:9-1651:16 (Chambard ignored start and stop times, discussing Ex. 102 at 1939-41). Nurses signed time cards with inaccurate hours because it was required in order to be paid. *See e.g.*, RP 285:22-286:1.

Management told nurses it was "the expectation" of Yakima Regional that the required stats be completed in eight hours. RP 100:22-

101:14 (Chambard taught RN she will be paid for 8 hours for 5 stats); RP 107:20-108:7; 110:6-21 (nurses paid on stats; charting is part of case management, employer will not pay overtime to do it); RP 119:12-121:3; 394:4-24; 497:14-498:14; 894:10-11 ("Those are the expectations. It will be done."); Ex. 41 ("The Company has expectations and they believe in this model and they are not going to change.").

Nurses consistently and credibly testified that it routinely took much longer than eight hours to complete the required stats.[11] Nurses usually began their work before 8:00 a.m. and typically charted after 4:30 p.m., often late into the evening, and even on days off and on weekends. RP 115:6-116:23; 327:22-328:15 (worked on charting constantly, wherever he could); 330:2-6; RP 374:1-9 (evenings, weekends, days off); 449:6-21 (caught up on charting on days off and weekends); 519:18-24; 521:24-524:5; 619:8-19; 641:24-643:11 (worked before 8:00 a.m. pre- and post-CHS); 643:12-645:20; 689:17-692:15 (would fall asleep charting at 1:00 a.m.); 698:11-703:6; 865:2-15. An RN might travel 150 miles or more in a shift to get to all patient visits. RP 63:18-24; 335:8-10; 809:1-2; 927:1-5; 1019:21-24. As long-time hospice nurse Karen Edgel explained:

> I expressed concern that the long hours were becoming fatiguing. They were starting to affect our life, our sleep

[11] Yakima Regional misrepresents the record by omission by failing to once mention the word "stat," when all nurse and manager witnesses testified that the Hospital's stat requirements controlled the nurses' workloads.

> …I was under the care of a cardiologist because my blood pressure was out of control, the stresses of the job. And I was concerned that should this continue that we may well make mistakes. You know, overworked, fatigue nurses can make mistakes. And we didn't want that to happen.

RP 162:11-25; *see also* § VI.E.1 (notice to employer of unpaid work).

Nurses also testified about first-hand knowledge of other home health and hospice RNs working after hours. RP 123:22-125:23 (received calls "more nights than not" from multiple other nurses working late while charting); 675:5-677:2 (staff meetings where non-testifying RNs reported unpaid hours to management); 679:3-18 (observed time stamp data in Galaxy device of other RN charting after hours); 113:3-114:16 (observed RNs from both home health and hospice working in the office before 8:00 a.m.); 321:18-24 (same); 807:21-808:8 (same); 520:9-521:3 (same); 396:11-23 (same); 544:4-15 (personal knowledge that at least seven home care nurses left employment due to work without pay).

After CHS introduced the Galaxy device, the Homecare Homebase software recorded the end time of the documentation that nurses complete for each visit type for each patient. RP 1330:11-1332:2.[12] Once a nurse is done charting for a patient visit in the device the nurse has to "sync" the information in order for it to be visible to other people accessing the patient's record. *Id*. Nurses typically "sync" the charting as

[12] Exs. 21-26 were admitted by stipulation. CP 2063. Appellant did not introduce any evidence that the "doc completion times" or "sync times" on Exs. 21-26 were inaccurate.

soon as they are done. *Id*. Nurses completed their charting and "sync'd" data after hours on days when nurses were paid only for the hours 8:00 a.m. to 4:30 p.m. Exs. 21-26; RP 1341:8-1359:12 (Hudson admitting that for 11-day period she documented after 4:30 p.m. every single day but was paid for only the hours of 8:00 a.m. to 4:30 p.m., including a Saturday when she was not paid for any work at all).

Notwithstanding the need to work outside the hours of 8:00 a.m. and 4:30 p.m. to complete the assigned work, Yakima Regional routinely rejects the RNs' requests for overtime in whole or in part (*e.g.*, an RN requesting three hours of overtime will be approved only for one).[13] RP 470:19-471:1 (request for extra stat to catch up on charting denied); 566:19-568:23 (request denied; instructed to see patient anyway); 599:8-601:15 (same); 635:16-19; 638:12-21; 639:18-640:18 (requested overtime in advance that was not approved over 25, 30 times; patient was falling out of plan of care, had not been seen for nine days, so no option to move patient; overtime request denied); 640:19-641:5 (once given 1 hour for 4 hours of work; overtime request denied in part 15 or 20 times); 829:15-24.

[13] The RNs were subject to an unlawful rule that overtime must be authorized in advance. Exs. 7 and 8, Policy 5-3; RP 102:16-22; 103:19-104:8; 634:12-635:10. Washington Department of Labor & Industries Policy provides: "A declaration by an employer that no overtime work will be permitted, or that overtime work will not be paid unless authorized in advance, is not a defense to an employee's right to compensation for any overtime hours actually worked." CP 1982. Furthermore, "hours worked" means all work requested, suffered, permitted or allowed and includes travel time…The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time." *Id.*

Yakima Regional actively discouraged nurses from requesting approval for overtime through scolding, discipline, and even bullying. RP 107:20-108:7; 110:12-21; 119:12-121:3; 402:1-4 (McVey: "At one point she [Chambard] said if I didn't like it I could find another job."); 653:12-655:1 ("I can't tell you how many times I was called in to my administrator's office and yelled at, screamed at" when reporting actual hours worked); 637:1-638:11; 823:23-824:25 (berated when called for overtime approval; Chambard screamed at him for reporting actual hours); 888:1-8 (Chambard does not pay overtime for paperwork); 508:10-509:2 (same); 912:4-10 (after being instructed to claim all hours worked, Chambard told him not to follow that policy); 1027:10-23 (Chambard told nurse it was not ok to report overtime); 1770:15-18 (disciplined for claiming overtime); *see also* RP 405:1-16; 387:22-388:17; 402:1-4; 682:6-684:23; 823:23-824:12; 837:19-24; 887:18-892:22.[14]

For example, Ms. Stillwaugh testified that she called Ms. Dedmore to request overtime approval for a start of care beginning late in the day. She said "I would like overtime approval and I'm tired of working for free." Ms. Dedmore's said she had to call her back. When she did, she said, I spoke to Ladonna and Ladonna said you could turn in your

[14] Appellant's payroll records reflect that the nurses received overtime earnings, Exs. 2-3, but that fact does not establish that nurses' requests for pre-approval of overtime were granted. Nurses received overtime pay rates for a variety of reasons not at issue here, including seeing patients or taking calls while on standby. *See* Exs.13-15, Art. 7, 9.

resignation by email, that she did not need it written." RP 637:1-21; 1695:10-1698:25 (Dedmore admitting this). One by one, nurses who loved their jobs left their jobs because they could no longer bear to work for free. RP 219:14-220:4; 336:-19-337:1; 611:21-610:2; 218:22-24.

Nurses also provided reasonable estimates about the amount of unpaid work and frequency of missed meal periods, § VI.D.2 *infra,* and consistently and credibly testified that they had to work through their meals to achieve the Hospital's productivity requirements, § VI.C.2 *infra.*

Courts in wage cases discussed in § IV.B.1 above looked to the *quality* of the representative testimony, and did *not* require any specific threshold number of witnesses to establish liability and/or damages. None of these Washington State, U.S. Supreme Court, or federal circuit cases regarding representative testimony hold that a plaintiff must provide "expert testimony, statistical analyses, sampling data, questionnaires, interviews, surveys, or other data," App. Br. at 33, to show testimony is representative. *Id.* As the Second Circuit Court of Appeals explained:

> **It is axiomatic that the weight to be accorded evidence is a function not of quantity but of quality**, *DeSisto*, 929 F.2d at 793 ("'**the adequacy of the representative testimony necessarily will be determined in light of the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony'**")…Our focus is…on whether the district court could reasonably conclude that there was "sufficient evidence to show the amount and extent

> of…[uncompensated] work as a matter of just and reasonable inference."

Reich, 121 F.3d at 67-68 (emphasis added); *see also Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 113, 1116 (4th Cir. 1985) (testimony need only be "fairly representational.").[15]

Based on the nature of the work involved, the nurses' working conditions and the detail and credibility of the testimony, the nurses clearly established that their testimony was representative of the larger group, that Yakima Regional violated their rights to compensation for all hours worked, that it denied them 30 uninterrupted minutes of work-free time to eat for their unpaid meal breaks, and that Yakima Regional denied them pay for missed meal breaks. About half of the RNs testifying for WSNA were primarily home health RNs and about half were primarily hospice RNs, though nurses in one program regularly crossed over to work into the other program. RP 40:20-23; 43:5-13; 51:16-52:21; 76:6-78:7; 92:1-93:7; 379:15-380:2; 491:11-492:9; 612:19-613:8; 623:18-624:7; 803:17-19; 809:8-14; 1045:16-22. Their periods of employment collectively covered the entire time period at issue.

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[15] The few cases relied on by Appellant (one of which is unpublished), App. Br. at 33-34, are entirely distinguishable because, unlike here, there was no showing in those cases that the experiences of the chosen witnesses were representative of the larger group of employees. Moreover, the cases against DirectSat involved testimony from only 1.89% and 3% of the employee group, and employees were paid on a piece rate basis.

As in *Pugh* and *Local 117*, calculating damages was simply a "math exercise." The court applied its findings based on nurses' estimates of the amount of off-the-clock time worked and missed meal breaks to the employer's payroll and timekeeping records to determine the amount of hours for which Yakima Regional owes back pay. CP 2892-93, ##21-23. The court used thousands of employer payroll documents which provide the nurses' paid hours, regular rate of pay and the number of days that they worked enough hours to be entitled to a meal break. Exs. 1-5, 74, 84-86, 96-98; RP 1884:2-19 (court use of Munson analysis); 1054:2-1092:8; 1098:19-1102:20; 1138:6-18; 1147:14-1155:24 (Munson methodology in extracting and using thousands of pages of employer data).[16]

This Court should affirm the trial court's ruling that WSNA has associational standing.

C. THE TRIAL COURT CORRECTLY CONCLUDED THAT YAKIMA REGIONAL DEPRIVED RNS OF STATUTORILY-COMPLIANT MEAL PERIODS.

1. Meal Break Standards.

WAC 296-126-092, promulgated by the Washington State Department of Labor & Industries ("L&I") pursuant to the IWA, sets forth the statutory requirements for meal periods. The WAC provides in relevant part that "(1) Employees shall be allowed a meal period of at least

[16] In light of this, Appellant could not be more misleading when it contends that "it is undisputed that there are no Employer records that establish damages." App. Br. at 31.

30 minutes which commences no less than two hours nor more than five hours from the beginning of the shift" and "(2) No employee shall be required to work more than five consecutive hours without a meal period." WAC 296-126-092. Where, as here, the employer's policy provides for unpaid meal periods, Exs. 7-8, Policy 7-3, to receive a statutorily-compliant meal period, the employee must be "completely relieved from duty and receive 30 minutes of uninterrupted mealtime." CP 1992[17]; *Pellino,* 164 Wn. App. at 689, 691 (WAC 296-126-092 requires 30 minutes of relief from work or exertion).

"WAC 296-126-092 imposes a mandatory obligation on the employer to provide meal breaks and to ensure those breaks comply with the requirements of WAC 296-126-092." *Brady v. AutoZone, Inc.,* 188 Wn.2d 576, 584, 397 P.3d 120 (2017); *Pellino*, 164 Wn. App. at 688.

> 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….

Demetrio v. Sakuma Bros. Farms. Inc., 183 Wn.2d 649, 658, 355 P.3d 258 (2015) (emphasis added) (internal cites omitted). The employer violates the law if it creates or disregards conditions of employment that it knows

[17] This guidance has since been amended, but the quoted language has not changed. https://www.lni.wa.gov/WorkplaceRights/files/policies/esc6.pdf.

or should know are preventing employees from getting lawfully adequate breaks. *United Food and Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 54, 925 P.2d 212 (1996).

A plaintiff asserting a meal break violation under WAC 296-126-092 meets its *prima facie* case by providing evidence that employees did not receive a meal break that complied with the requirements of the WAC. *Brady*, 188 Wn.2d at 584. The employer may then rebut this by showing that in fact no violation occurred or a valid waiver of the right to a meal break exists. *Id*. at 584-85 (adopting the burden-shifting approach from *Anderson*, 328 U.S. at 686-88). Appellant met neither burden here.

2. WSNA Proved Statutory Meal Break Violations.

Yakima Regional does not appeal Findings of Fact ##14-18, finding that Yakima Regional's productivity requirements failed to permit RNs a reasonable opportunity to take 30-minute uninterrupted meal breaks and that RNs ate "on the fly" while driving, charting, or making phone calls, all for the benefit of Yakima Regional. App. Br. at 3-6; CP 2890-91. Nor does it appeal the court's findings that Yakima Regional created a workplace culture that encourages employees to skip breaks and discouraged them to report missed breaks. *Id*. Unchallenged findings of fact are verities on appeal. *See* § VI.A. *supra*. This Court should affirm the trial court's finding of liability under the IWA and WAC 296-126-092,

Conclusion of Law #7, based on those uncontested facts. CP 2895. Doing so adheres to the standards set forth in *Brady*, *Pellino*, *Demetrio* and L&I's administrative policy.

Appellant argues Conclusion of Law #7 was error because RNs chose to skip their lunches. This is implicitly a waiver defense that can be quickly disposed of; Appellant did not offer any proof that RNs expressly agreed to waive their meal periods or that they impliedly waived their meal break rights through unequivocal acts. Waiver is an affirmative defense regarding which the employer bears the burden of proof. *Pellino*, 164 Wn. App. at 696.

> A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors.

Id. at 696-97 (internal citations omitted).

Appellant's argument that there is no liability because it told RNs to take breaks is foreclosed by substantial evidence that, notwithstanding a written policy of providing breaks, the workplace culture denied RNs a meaningful opportunity to take meal breaks. Nurses consistently and credibly testified that they were required to work through their meals in order to achieve the Hospital's productivity requirements. They ate on the

fly, while driving between patient visits, while charting, and while taking or making phone calls relating to patient care. RP 125:24-127:5; 129:6-130:23; 335:13-336:9; 420:3-22; 528:17-23; 650:5-652:15; 833:14-23; 832:23-833:23; 1028:3-17. Their meals were typically interrupted by phone calls from patients, doctors, pharmacists and the office. RP 529:12-531:12; 651:19-23 (there was always something coming up, always a telephone call, always a patient need, an office call, or a pharmacy call). Nurses generally needed to take the calls that came from doctors and pharmacists in between patients because these providers were difficult to reach, connecting usually involved phone tag, and long delays in getting medications meant patients would continue to endure pain, remain in respiratory distress or experience other adverse health impacts. RP 129:19-130:23; 228:25-230:6; 620:9-622:18.[18]

As to the alleged lack of notice, nurses repeatedly notified management that they had to work through their meal breaks in order to meet the employer's expectations regarding stats and productivity and to address patient needs. RP 132:2-13; 422:8-17; 680:16-681:15 (in meeting with management "Karen [Edgel] actually said, 'We are never taking a lunch, we don't have time.'" Dedmore did not respond; Chambard said

[18] Nurses also explained that if they did not do the phone calls and charting over lunch, they would need to do that work later in the day or evening to complete the charting and calls that were part of the stat requirement – time for which they knew they also would not be paid. RP 834:4-15; 335:16-20.

CHS policy is we are going to pay on stats, not overtime and that is not going to change.); 992:1-7. They also notified management on specific days that they missed their breaks, but were not compensated for those missed breaks. RP 663:14-21; Ex. 38 (day sheets reporting missed meals); Ex. 47. Management discouraged nurses from using the missed meal break forms or failed to inform nurses that process was available. RP 336:6-9 (not even told he could record a missed meal); 863:23-864:4 (RN turned in missed break form and was told that "breaks don't apply to home health because we drive between patients and get a break that way.")[19]; *see also* § VI.B.3 *supra* (intimidation and bullying for reporting actual work hours).

Under WAC 296-126-092, *Brady, Pellino, Sakuma* and L&I Policy, the Court correctly concluded that these facts proved that Yakima Regional denied RNs their right to 30 uninterrupted minutes free from work to eat. This court should affirm.

D. THIS COURT SHOULD REJECT APPELLANT'S ATTACKS ON THE COURT'S DAMAGES RULINGS.

1. The Trial Court Showed The Basis And Method For Computing Damages.

Appellant asserts that the trial court erred through a lack of specificity in its findings or conclusions. App. Br. at 38. "A trial court must enter findings showing the basis and method of its computation of

[19] Appellant misrepresents the record when it states Stillwaugh testified that she skipped her meal periods to get off early. App. Br. (citing RP 637:7-8).

damages." *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840, 786 P.2d 285, *rev. denied* 114 Wn.2d 1023 (1990); *see also McWhorter v. Bush*, 7 Wn. App. 831, 833, 502 P.2d 1224 (1972). The trial court's findings and conclusions do exactly that.[20]

Plaintiff's damages expert, Dr. Munson, processed several thousand pages of employer payroll documents and turned it into usable data, checking for inconsistencies and outliers. RP 1054:2-22. From employer payroll hours and wages data he determined on a weekly basis for each nurse: how many hours of work nurses were already paid for, their regular rate of pay, and how many meal breaks they were entitled to. RP 1058:4-1088:10; 1098:19-1101:16. He calculated what the nurses' damages would be, assuming certain rates of missed meal breaks and uncompensated time as exemplars, and distilled that analysis into an overall damages spreadsheet, Ex. 97, and a weekly damages spreadsheet, Ex. 98. RP 1125:14-1130:17; 1197:8-1208:10. He also prepared Ex. 96, a "summary of damages calculated at a variety of different rates of missed meal breaks in concert with a variety of different rates of off the clock work" so that the court could use Dr. Munson's methodology while finding a "different percentage of hours worked without compensation

[20] Appellant cites cases in which the findings were "nonexistent," consisted of one sentence and for which there were no oral opinions, or did not attach dollar amounts. App. Br. 38. Here, by sharp contrast, the court made detailed oral and written findings.

beyond the paid hours" than Dr. Munson assumed. RP 1147:14-1155:24.[21]

The Findings of Fact explain how Dr. Munson's damages methodology was helpful to the Court as follows:

> The Court found the methodology of plaintiff's expert, Dr. Jeffrey Munson, for calculating damages, <u>including Trial Exhibits 96, 97 and 98</u> to be helpful. Dr. Munson's methodology for calculating damages is reasonable and sound. <u>He developed a database that can be used as a tool for calculating damages based upon input from the court</u> based on the court's findings regarding the amount of off-the-clock hours worked by the nurses and the frequency of their missed meal breaks. <u>For instance, Dr. Munson created a chart, Ex. 96, which contains the total amount of back pay and the total interest calculated by Dr. Munson assuming varying rates of off-the-clock hours worked and varying rates of missed meal breaks</u>. All the data Dr. Munson used to develop his methodology and his tool for calculating damages came from Yakima Regional's payroll wages and hours records…."

CP 2892, ¶21 (emphasis added).[22] The court explained in its oral ruling that it 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." RP 1884:2-19.[23] The court "cross-checked those with the spreadsheets that Dr. Munson had created…. And every time I checked it was accurate." *Id.* The way Dr. Munson assembled the data was

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[21] Here, Dr. Munson explained Ex. 92. The Court referenced Ex. 96 in its findings. Exhibits 92 and 96 are both variable damages tools that function in the identical way.

[22] Yakima Regional discussed Exhibit 96 and states, "In its Findings of Fact, the court stated it did not use this chart." App. Br. at 38, n.4. This is obviously blatantly false.

[23] The trial record included 90 exhibits, several of which were hundreds or thousands of pages long. CP 2099-2104.

"reasonable and sound." *Id*.

As to the off-the-clock claim, Dr. Munson explained that his methodology used variable percentages that focused on the relation of unpaid hours to paid hours and told how the court could use Exhibit 96:

> And if the Court found that on average nurses worked nine hours but were paid for eight that would mean they worked one additional hour for every eight. <u>That one divided by eight is a 12.5 percent rate of their paid hours</u>. <u>Their actual time worked was 12.5 percent more</u>.

RP 1152:11-16. Thus, as Dr. Munson explained, to determine the percentage of off-the-clock time, the court divides the number of unpaid hours by the number of paid hours. *Id*. In the example above, the RNs worked 12.5% more than they were paid. Dr. Munson explained that if the court found that nurses on average worked 11 hours but were paid for eight, "working three additional hours for every eight, that's an unpaid rate at 37.5 percent." RP 1154:17-23.[24]

The court made findings of fact based on nurses' estimates of the amount of off-the-clock time worked and frequency of missed meal breaks and applied those findings to the employer's payroll records to determine the amount of hours for which Yakima Regional owes back pay. CP 2892-93, ##21-23. The trial court found that nurses missed 90% of their

[24] *See also* 1121:2-16 (percentage used is "the percentage more that they actually worked compared to their paid hours" resulting in "a number of hours of unpaid time due to off the clock work").

statutorily-mandated 30-minute meal breaks. CP 2891, #19. 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 court 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*. Finding of Fact #23 makes it clear that the trial court followed Dr. Munson's approach to calculating damages. The trial court's determination that nurses in the later time period were underpaid in an amount equal to 37.5% of each eight-hour day worked, i.e., three hours, mirrors the example discussed by Dr. Munson at trial that nurses "working three additional hours for every eight, that's an unpaid rate at 37.5 percent." RP 1154:17-23. Similarly, the trial court's conclusion that nurses in the earlier time period were underpaid by an amount equal to 22% of each eight-hour day (i.e., 1.76 hours per eight-hour day), corresponds to one of the potential damages scenarios identified by Dr. Munson on his chart. *See* Ex. 96.[25]

[25] Dr. Munson's methodology to calculate the percentage of off-the-clock work was the only one presented to the court, and the court explained how that methodology was helpful; this portion of FOF #23 was thus clearly intended to state the amount of time the

Comparing the trial court's method with Ex. 96, moreover, it is apparent that the principal amount of damages calculated by the court corresponds to Dr. Munson's calculations, simply prorated to account for the different rates in the different periods. CP 2893, #23 ("The Court determined the proportion of the period…attributable to each of the two periods of time for which the Court calculated a different percentage of unpaid hours worked."). The earlier period covered by FOF #23 contains 711 days, while the later period contains 1,248 days. That means 36.3% of the days were in the earlier time period (711/1,959) and 63.7% of the days were in the later time period (1,248/1,959). A weighted damages calculation based on Exhibit 96 is as follows:

36.3% x $1,022,134[26] =	$371,035
63.7% x $1,690,361[27] =	$1,076,760
	$1,447,795

This sum is virtually identical to the court's Finding of Fact #23, relied upon in Conclusion of Law #12, finding principal damages in the amount of $1,447,758.09. Conclusion of Law #14 simply doubles that number pursuant to RCW 49.52.070. The court concluded that "[t]he appropriate

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nurses worked *but were not compensated* as a proportion of the amount of time they worked *and were* compensated. In stating that nurses "were not paid for" 22% and 37.5% "of the hours they worked," the trial court did not mean to suggest that it was applying a wholly different formula from the one presented at trial and one that would have been inconsistent with the rest of the court's stated reasoning and findings of fact.

[26] This number is the back pay damages calculated by Dr. Munson for 90% missed meals and an off-the-clock rate of 22%. Ex. 96.

[27] This number is the back pay damages calculated by Dr. Munson for 90% missed meals and an off-the-clock rate of 37.5%. Ex. 96; RP 1154:21-1155:2.

measure of back pay damages for unpaid work time is payment at the nurses' regular rate for hours up to 40 per week, and one and one half times the regular rate for hours in excess of 40 per week." CP 2896, ¶9.[28]

In light of all of the foregoing, the trial court sufficiently explained the basis and method of its computation of damages.

2. Substantial Evidence Supported The Judge's Conclusions.

Conclusion of Law #12, to which Appellant assigns error, states that WSNA is entitled to judgment for the principal amount of damages in the amount of $1,447,758.09. That damages figure flows directly from Findings of Fact ("FOF") #19 and #23, to which Appellant did <u>not</u> assign error. As explained above, unchallenged findings of fact are verities on appeal.[29] Appellant's attack on Conclusion of Law #12 should be denied on the ground that FOF #23. Should this Court choose to review the trial court's Findings of Fact #23, however, it should affirm, as substantial evidence supports the court's findings.

First, substantial evidence supports the finding that the nurses worked 22% more hours than they were paid for (i.e., 1.76 unpaid hours when paid for eight) from April 21, 2012 through April 1, 2014. RP 117:4-17 (1-2 hours averaged over entire time period); 523:16-525:1 (two per day averaged over entire time period); 647:7-15 (2 hours pre-CHS); 830:5-

[28] Dr. Munson's damages model also employs these rules. RP 1121:18-1123:1.
[29] *See* authority cited in § VI.A, *supra*.

8 (worked a minimum of ten hours a day before and after CHS); 1021:22-1022:6 (2.5-3 hours per day pre-CHS); 1029:5-12 (same); *see also* Ex. 18 at 2 (exit interview: "working 45-60 hours a week"); *id*. at 4 (same: "worked 50+ hours weeks, skipping all my breaks…").[30]

Substantial evidence also supports the court's findings that the nurses worked 37.5% more than they were paid for in the second period of time covered by the suit, April 2, 2014, through August 31, 2017, (i.e., 11 hours when paid for eight). RP 393:17-21 and 468:9-20 (2.5 hours post-CHS, but sometimes as high as four to eight unpaid hours per day); 330:4-6 (did a couple of hours of charting at home); 645:21-647:6 (2-5 hours per day post-CHS); 663:15-668:2; 830:5-8. Record evidence further substantiates these estimates. *See* Exs. 21-26 (documents reflecting nurses completing charting and sync'ing data late in the evening and early morning), Exs. 28, 29 (personal daily records of Edgel's time worked)[31]; Ex. 37 (Time Tracker hours totaling more than 11 hours per day; repeated

[30] Because the trial court's findings do not, as Appellant contends, translate to 2.5 hours and 3.85 unpaid hours respectively, *see* App. Br. at 40, any suggestion by Appellant that there is not substantial evidence to support that amount of unpaid work also lacks merit.

[31] Ms. Edgel worked additional time not reflected in these records. RP 195:21-196:8 (Ex. 28 did not record additional charting time at home or office, or additional time worked before 8:00 am); 200:18-201:7 (Ex. 28 doesn't capture time spent on phone calls, talking to other staff, with pharmacists, or any time spent working before 8:00 am.). The "Time Tracker" totals under-reported the time Ms. Edgel spent working. RP 200:18-201:13.

work on days off)[32]; Ex. 38 at 1 (charted 8:40 p.m. to 12:45 a.m. to finish new open), *id*. at 3 (charted until 9:45 p.m. last night, "I still have 4 hours of IDG notes to do at some point. It cannot be done."); *id*. at 5 (12.3 hour day with no lunch or breaks); *id*. at 7 (11.42 hours plus no lunches/breaks); *id*. at 10 (12.30 hours including 4 hours of IDG notes); Exs. 41 (exit interview: "working 8-10 hours + then still having anywhere from 2-6 hrs of work to do at home"); Ex. 89 (average of 10-11 hours in Galaxy device per day plus work on days off); Ex. 102, e.g., at 2384 and RP 918:17-920:15 (9.3 hours paid, 3 hours uncompensated work).

Substantial evidence also supports the court's rationale for subdividing its calculations into these two time periods based on increased nurses' workloads that came with the transition to CHS.[33] The Home Care Agency lost its pharmacist, requiring nurses to perform additional work to manage medications. RP 130:7-130:23; 145:5-146:14; 644:9-23; 675:20-676:7; 1476:4-1478:6. The Samsung device increased the amount of documentation and charting time. RP 326:21-327:9 (documenting in device more labor intensive); 1031:11-22 (same); 644:9-645:9 (supply ordering took longer); 794:1-25 (same); 798:11-19 (same); 939:17-940:14

[32] Ms. Stillwaugh explained her notes on Ex. 37 reflecting after-hours work and missed lunches or breaks RP 689:17-692:15; 698:11-703:6. Time Tracker (Galaxy device) totals did not include all working time. RP 657:4-22; RP 701:20-702:10.
[33] The court explained the basis for the two periods in his oral ruling. RP 1885:21-1887:2.

(same); Ex 41 at 2 (device became her whole life).[34]

There was also substantial evidence at trial to support the court's conclusion in FOF #19 (also not excepted to by Appellant, and therefore also a verity on appeal), that nurses missed their meal breaks 90% of the time. RP 130:24-131:10 (missed meal breaks 97-98% of the time); 336:2-5 (out of any ten shifts, received none); 421:5-11 (same); 529:6-11 (got meal break two out of ten shifts); 652:4-13 (missed meal breaks 100% of the time); 832:23-833:11 (possibly one a month); 1028:3-9 (got a meal break 1-2 out of ten shifts); *see also* 1340:4-1341:3 (took untimely meal breaks every shift).

A final note: the court concluded that "Yakima Regional failed to prove an entitlement to any amount of offset." CP 2894, ¶28.[35] Yet, Dr. Munson "reduced the damages estimates by the amount of overtime wages already paid" as reflected in Appellant's records. CP 2892; RP 1088:11-22; 1091:18-1092:8. Since the Court's principal damages calculation and Dr. Munson's are the same, it can be reasonably inferred from the evidence that the court also credited Appellant for overtime already paid.

3. The Judge Correctly Awarded Thirty Minutes Of Pay For Each Missed Meal Break.

When an employer fails to provide an employee with required rest

[34] After CHS, even the few paperwork "stats" were not available. RP 509:6-510:5.
[35] Even now, Appellant does not argue it is entitled to any offset.

breaks, it must pay the worker an extra ten minutes as compensatory damages for each missed break. *Wash. State Nurses Ass'n v. Sacred Heart Medical Ctr*, 175 Wn.2d 822, 832, 287 P.3d 516 (2012); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002). The same principle applies to pay for missed meal periods. *See Hill*, 198 Wn. App. at 360-61 and n. 38 (relying on *Wingert* to affirm award of 30 minutes of pay for each missed meal break where employees were paid for every minute they worked but were deprived of opportunities to rest), *rev'd on other grounds*, 424 P.3d 207; *Pellino*, 164 Wn. App. at 680-81, 698-99.[36]

The law requires Yakima Regional "to compensate nurses for all missed breaks." *Chavez*, 190 Wn.2d at 518. The trial court correctly concluded that Appellant's failure to provide nurses with 30 uninterrupted minutes free from work or exertion entitles the nurses to 30 minutes of backpay for each missed break on top of pay for all hours actually worked.

E. THE TRIAL COURT CORRECTLY HELD YAKIMA REGIONAL'S FAILURE TO PAY WAS WILLFUL AND THAT IT OWED EXEMPLARY DAMAGES.

1. Yakima Regional Bears the Burden to Prove An Exception Applies To Double Damages For Willful Wage Violations.

An employer who intentionally underpaid its employees must pay

[36] *See also* CP 1993 (discussing paid meal periods, L&I explains that "As long as the employer pays the employees during a meal period…<u>and otherwise complies with the provisions of WAC 296-126-092</u>, there is no violation of this law, and payment of an <u>extra</u> 30-minute meal break is not required.") (emphasis added).

exemplary damages unless it carried its burden of showing that a statutory defense applied. RCW 49.52.050, .070; *Hill, supra*, 424 P.3d at 209; *Schilling v. Radio Holdings, Inc*., 136 Wn.2d 152, 159-61, 961 P.2d 371 (1998). "The standard for proving willfulness is low." *Hill*, 424 P.3d at 211; *see also Schilling*, 136 Wn.2d at 160 (test is "not stringent"; willful means "merely that the person knows what he is doing, intends to do what he is doing, and is a free agent"). An employer's failure to pay will be deemed willful unless it was a result of "carelessness or error" or if the employer proves there was a "bona fide dispute about whether all or part of the wages were really due." *Id.*; *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009).

The evidence of the myriad ways nurses provided notice of the violations and Appellant still refused to pay easily meets these standards.

- **Staff meetings**: Nurses raised concerns about unpaid hours worked at staff meetings with management. *See, e.g.*, RP 507:18-25; 1691:7-16.
- **Specially-convened meetings:** Nurses set up meetings with management to talk to them about their hours worked without pay and missed breaks. RP 110:6-11; 133:2-3; 141:21-154:7; 160:3-165:19; 313:24-314:15; 334:1-5; 334:19-335:10; 535:13-536:14; 539:8-541:24; 542:9-543:20 (elevated to Chief Nursing Officer); 682:6-684:23 (elevated to Eric Davis in Human Resources); 685:3-16 (elevated to regional manager for CHS); RP 822:23-823:4 (elevated to CHS Human Resources).
- **Individual meetings:** Nurses met with direct and upper management to ask to be paid for hours worked. RP 132:16-133:2; 134:1-135:11 (also CHS Regional Manager); 139:10-141:20; 377:3-19; 400:7-401:21; 682:6-684:23; 685:3-16; 742:6-10; 1025:3-1026:2; 1690:14-

1694:3 (Dedmore admitting to many meetings where RNs complained about long, late, unpaid hours worked).

- **Exit interviews:** RNs submitted exit interview documents outlining the un-remedied wage theft after notice. RP 397-:5-400:6; 984:6-10; 984:14-234; 987:17-24; 990:2-5, 14-15; Exs. 18 & 41.

- **Letters to management, Human Resources and Corporate Compliance:** Ex. 17, 45-50.

- **Union grievance:** Ex. 114.

- **"Assignment Despite Objection" (ADO) Forms:** Used by RNs to document harmful workplace conditions. RP 893:15-895:21; Ex. 60.

- **Timecards:** Some nurses wrote their actual hours on their day sheets or other information about uncompensated time and missed meal breaks and were not paid. *See, e.g.,* Ex. 38; Ex. 102 at 2384.

- **Employer software:** after-hours documentation, "sync" times and total hours in the device in a day. RP 682:6-684:23; 868:20-869:6; 869:16-23; 1330:8-1332:2; 1687:25-1688:13; Exs. 21, 28, 37, 89, 99.

At no point subsequent to this notice did nurses experience a change in pay practices or pay for all hours worked or missed meals. RP 105:1-8; 402:11-24; 542:2-4; 543:18-20; 669:16-24. Management did not tell nurses to claim actual hours worked or to not work after hours. RP 322:5-10; 402:19-21; 537:19-22; 542:6-8; 543:15-17; 598:6-8; 659:15-20; 661:11-23; 688:20-689:16; 1025:15-18.

The double damages award under RCW 49.52.070 must be upheld because Appellant failed to prove any exception applied.

2. Yakima Regional Failed To Prove A Bona Fide Dispute.

a. ***Abandoned Issues Should Not Be Addressed On Appeal.***

Abandoned issues will not be addressed for the first time on

appeal. RAP 2.5(a); *Green v. Normandy Park*, 137 Wn. App. 665, 688, 151 P.3d 1038 (2007); *Stratton v. U.S. Bulk Carriers, Inc.*, 3 Wn. App. 790, 793–94, 478 P.2d 253 (1970). Where an answer raises a defense but the party fails to include the defense in its statement of the issues of law to be decided by the trial court and in its trial brief, the defense has been abandoned and cannot be raised on appeal. *Soderberg Adver., Inc. v. Kent–Moore Corp.*, 11 Wn. App. 721, 737, 524 P.2d 1355 (1974).

Other than in its Answer, Appellant did not assert a bona fide dispute until after the trial court issued its oral findings and conclusions. Yakima Regional put on no evidence of a bona fide dispute at trial and did not argue the defense in its trial brief or anywhere else. *See*, CP 39, ¶9; CP 1996-2018 (trial brief not raising the issue); CP 2105-2128 (Appellant's statement of the issues for the court to decide, not raising bona fide dispute); RP 1810-1853 (defense closing argument not mentioning bona fide dispute). This untimely defense should not be heard now.

b. *Yakima Regional's Assertion Of A Bona Fide Dispute Fails As A Matter Of Law And Fact.*

An employer can defeat a showing of willful deprivation of wages if it meets its burden to show that "there was a 'bona fide' dispute about whether all or a part of the wages were really due." *Hill*, 424 P.3d at 211; *Schilling*, 136 Wn.2d at 161, 165.

> A bona fide dispute has both an objective and subjective component. The employer must have a genuine belief in the dispute at the time of the wage violation. That is the subjective component. In addition, that dispute must be objectively reasonable – that is, the issue must be fairly debatable. That is the objective component.

Hill, 424 P.3d at 211-12 (internal citations and quotations omitted). A bona fide dispute is a "'fairly debatable' dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid." *Schilling*, 136 Wn.2d at 161. The genuine belief in the dispute must have been <u>at the time of the wage violation</u>; this is not an after-the-fact inquiry to be made in hindsight in litigation. *Id.*; *see also Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 500, 663 P.2d 132 (1983).

Appellant did not put forward <u>any</u> evidence, let alone substantial evidence, that the employer subjectively believed wages were not owing at the time the violations occurred. *Hill*, 424 P.3d at 211. Appellant contends it did not know how much RNs were actually working because it relied on day sheets time cards. RP 1488:18-24; 1490:4-1492:8-24, 1495:1-4. The record is bursting with evidence of actual notice. *See* §§ VI.B.3, VI.E.1 *supra*. And, Chambard repeatedly disregarded information about actual hours worked, and the system defaulted to eight hours or 8:00 to 4:30. RP 1579:50-1582-19; 1645:9-1651:16; 1496:9-1497:6; Ex. 102 at 1939-41.

Appellant relies on a letter dated October 15, 2013 stating, among other things, that RNs are granted overtime to complete their day. Ex. 106. Appellant offered no testimony that Yakima Regional relied on that letter to pay RNs for fewer hours than they actually worked.[37] Appellant also mentions Campeau's promise to seek preapproval of overtime, but omits reference to his testimony explaining that when he did so, Chambard instructed him not to write his start and stop times with a note "Don't do." RP 876:7-13; Ex. 94. Finally, Appellant states that the parties' collective bargaining agreements ("CBAs") addressed meal periods and overtime, App. Br. 44, but no Yakima Regional witness testified that the CBA created any dispute over whether missed meal breaks or all hours worked must be paid. None of these excuses make the requirement to pay for all hours worked "fairly debatable." Appellant has not proven either the subjective or objective prong required to establish a bona fide dispute.

3. Yakima Regional Failed To Prove The RNs Knowingly Submitted To The Wage Violations.

To have "knowingly submitted" to a withholding of wages, the employee must have "deliberately and intentionally deferred to [the] employer the decision of whether they would ever be paid. *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 682, 27 P.3d 681 (2001),

[37] Nurses explained that they signed that letter even though it was not true because they feared retaliation, or because they were new employees not yet subject to the violations. RP 218:7-15; 472:23-473:12; 475:9-25; 703:12-705:9; 762:17-768:11.

rev. denied 145 Wn.2d 1037 (2002) (demands to be paid undercut claim of "knowing submission"); *see also Durand v. HMIC Corp.*, 151 Wn. App. 818, 836–37, 214 P.3d 189 (2009), *rev. denied*, 168 Wn.2d 1020 (2010). Staying on the job even though the employer fails to pay also does not suffice. *Chelius*, 107 Wn. App. at 683; *Durand*, 151 Wn. App. at 837.

Appellant attempts to shift the blame for vast amounts of uncompensated works onto the shoulders of the nurses, who, they assert, "knowingly submitted" to the violations, because the nurses "disregarded" Yakima Regional's "instruction" to take meal periods and because they signed off on inaccurate time cards prepared by the employer. App. Br. at 45. This is a cruel and cynical position given the nurses' legal and ethical obligations to their patients and that Yakima Regional deliberately falsified records and bullied nurses into signing time cards that reflected fewer than the actual number of hours worked in a day.

RNs have a legal and ethical duty to act in their patients' best interests and cannot shirk those duties to avoid overtime at the command of their employer. *See* RCW 18.79.260 ("No person may coerce a nurse into compromising patient safety by requiring the nurse to delegate if the nurse determines that it is inappropriate to do so."); WAC 246-840-700 (standards for nursing conduct for RNs providing that "The nurse shall be responsible and accountable for the quality of nursing care given to

clients. This responsibility cannot be avoided by accepting the orders or directions of another person."); Ex. 6 (job description requiring patient care in accordance with Nurse Practice Act, conduct in accordance with patient's plan of care).[38] By requiring RNs to meet minimum "productivity" standards, i.e., to see five (hospice) or six (home health) patients per day, the RN had to perform nursing care for all five or six patients in accordance with these standards. *Id*.

In practice, this meant, for example, not abandoning a dying patient who would otherwise suffer and not following a manager's instructions to leave the home after obtaining vital signs and a consent form, where the patient required immediate treatment of post-surgical incisions and had urgent health care questions. *See, e.g.*, RP 48:14-16 ("If symptoms are not managed we won't leave that home until they are. So that may mean staying until they pass."); 566:19-568:23; 599:8-601:15. Long-time hospice nurse Stillwaugh defended her decision to work the overtime instead of moving the patient to another day, at RP 744:1-8:

> I absolutely could not leave a patient in a terminal process, restless terminal agitation, attempting to get up out of bed, fight or flight system going, and a family crying or a patient gurgling, drowning in their secretions, pain out of control, screaming and yelling that I could hear in the

[38] Violations of the standards of nursing conduct or practice subjects RNs to discipline under the Uniform Disciplinary Act, RCW Chapter 18.130. WAC 246-840-700, -710.

> background. Yes, I absolutely chose to do that visit, yes, morally and ethically I did make that decision.[39]

Nurses' choice not to abandon their patients, not to violate their essential job expectations and not to violate their obligations under the Nurse Practice Act, especially in light of their repeated requests to be paid for all hours worked, is hardly what the legislature meant by "knowingly submitting" to wage violations. RCW 49.52.070.

The double damages award should be affirmed.

F. THE JUDICIAL BIAS CLAIM WAS WAIVED AND, IF NOT WAIVED, IT FAILS ON THE MERITS.

Appellant waived its partiality claim by failing to raise the issue at the trial court. RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). Courts of appeal "will generally not consider [an appearance of fairness claim] for the first time on appeal." *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 605, 337 P.3d 1131, 1136 (2014).[40] Courts "presume trial judges perform their functions regularly and properly, without prejudice or bias." *Club Envy of Spokane,*

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[39] Solutions offered to avoid overtime were often not clinically acceptable. RP 638:22-639:6 ("you can't move a patient that's actively dying"); 743:8-744:8 (solutions offered not clinically best for patient; "I wish [Chambard] would have said I'll call another person to help me. I never heard that option."); 599:13-600:1 (no substitute RN offered).

[40] *Tatham v. Rogers*, 170 Wn. App. 76, 107, 283 P.3d 583, 600 (2012) is distinguishable because bias was raised before the trial court in a post-trial motion for relief from the judgment, and undisclosed close business dealings between the judge and opposing counsel created substantial prejudice to opposing party.

184 Wn. App. at 606; *State v. Perala*, 132 Wn. App. 98, 111, 130 P.3d 852, *rev. denied* 158 Wn.2d 1018 (2006). "Judicial rulings alone almost never constitute a valid showing of bias." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).[41]

Yakima Regional lodges this serious allegation of judicial misconduct, Code of Judicial Conduct 2.11(A); 3(D)(1), by grossly misrepresenting the record. For example, Appellant complains that the court made an "improper mid-trial statement" that a witness was lying, when the cited remark actually occurred <u>in the court's oral findings made after closing argument</u>. RP 1864:6-16. Determining a witness's credibility in his findings is precisely the job of a trial court judge.

Regarding the alleged "contradictory rulings" about data from the Galaxy device, Appellant alleges that the Judge "abruptly cut off the line of questioning by shouting that the evidence was unreliable and everyone knew it." App. Br. at 46. The cited record shows that the judge asked counsel to *reorder* her questions, his comments occurred after a lunch break – not during questioning – and counsel responded that following the break "I was prepared to move on." RP 1728:12-24; 1731:23-1733:18.

The Judge did not then "allow" WSNA to use "that data" in cross-examination. App. Br. at 46. WSNA questioned witness Hudson regarding

[41] Evidence of the judge's actual or potential bias must be shown. *Id.*; *Perala*, 132 Wn. App. at 113.

the "doc completion time" and "sync time" data in the Homecare Homebase software that the witness testified reflected the actual times that she completed her charting, Ex. 21. This is wholly different data than counsel asked Appellant's expert about. *Compare* Ex. 127 and Ex. 21. Defense counsel did not object to WSNA's examination of the witness about the "doc completion time" and "sync time" data in Ex. 21, and Ex. 21 was admitted in evidence based on the parties' stipulation. CP 2063.[42]

This Court should reject Appellant's claim of trial court bias.

G. THIS COURT SHOULD AWARD WSNA ITS REASONABLE ATTORNEY'S FEES ON APPEAL.

WSNA asks this Court to grant it its attorney's fees on appeal. RAP 18.1(a). If it prevails on appeal, WSNA is entitled to attorney's fees by statute. RCW 49.46.090(1), RCW 49.48.030 and RCW 49.52.070; *Wash. State Nurses Ass'n*, 175 Wn.2d at 836; *Schilling*, 136 Wn.2d at 157–59; *Corey v. Pierce Cty.*, 154 Wn. App. 752, 774, 225 P.3d 367 (2010); *Dice v. City of Montesano*, 131 Wn. App. 675, 693, 128 P.3d 1253 (2006); *Brandt v. Impero*, 1 Wn. App. 678, 682–83, 463 P.2d 197 (1969).

VII. ARGUMENT RELATED TO CROSS-APPEAL

[42] The Judge likewise did not "allow" WSNA to "expand" the associational unit by admitting Exhibit 16. Appellant did not object to Exhibit 16, RP 996:12-13, and never moved to limit damages to ten nurses based on WSNA's CR 30(b)(6) testimony. Regarding admitting Exs. 96-98, it is proper to allow damages experts to conform their calculations to the evidence at trial. *See, e.g., Pellino*, 164 Wn. App. at 698; *Reich v. Waldbaum, Inc.*, 833 F. Supp. 1037, 1048-50, 1053-54 (S.D.N.Y. 1993).

WSNA claimed prejudgment interest in addition to double damages. CP 17-23; CP 1945-1995.[43] In its denial of prejudgment interest, the trial court relied on the now-overturned appellate decision in *Hill*, acknowledging that "were it not for current case law holding to the contrary, WSNA would also be entitled to judgement for interest in the amount of $517,845.07 plus interest from February 3, 2018, at $475.98 per day." CP 2896. Aptly anticipating the Washington Supreme Court's analysis, the court said the *Hill* appeals court ruling was "clearly wrong:"

> interest is a form of compensation because somebody has been deprived money they were supposed to have. It's completely different from punitive damages.
>
> In this case Washington law allows double damages for willful failure to pay wages. The two are completely unrelated. And to say that the, that for a wage claim like this that the defendant doesn't have to pay interest if they have to pay double damages is making a gift to the defendant.

RP 1890:22-1891:8.

In *Hill*, the Washington Supreme Court held "aggrieved workers may recover both double exemplary damages under RCW 49.52.070 and prejudgment interest under RCW 19.52.010 for the same wage violation." *Hill*, 424 P.3d at 209 (reversing the court of appeal's ruling that awarding

[43] Washington courts typically award prejudgment interest on judgments for back wages. *E.g.*, *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 50-51, 169 P.3d 473 (2007); *Pellino*, 164 Wn. App. at 681; *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006); *Curtis v. Security Bank of Wash.*, 69 Wn. App. 12, 847 P.2d 507, *rev. denied*, 121 Wn.2d 1031 (1993).

both prejudgment interest and double damages constituted impermissible double recovery for the same wage violation). The court reasoned, "[b]ecause the compensatory function of prejudgment interest and the punitive function of exemplary damages are different, there is no bar on awarding both for the same underlying wage violation." *Id*. This holding is directly on point and requires reversal of the trial court's denial of prejudgment interest.[44]

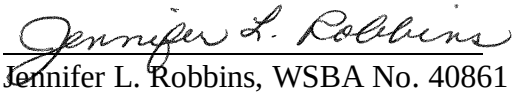
This Court should reverse the trial court with regard to Conclusion of Law #14 and award WSNA prejudgment interest.

VIII. CONCLUSION

For all of the foregoing reasons, the trial court's findings and conclusions and judgment should be affirmed, except for Conclusion of Law #14, which should be reversed.

Respectfully submitted this 29th day of October, 2018.

SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT, LLP



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[44] *Hill* applies retroactively and thus should be applied here. *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). In *Jackowski*, the court applied two Washington Supreme Court cases, which had been handed down while the case was on appeal. The court found that because these two cases did not announce that the new rule should be applied prospectively only, they should be given retroactive effect. *Jackowski*, 174 Wn.2d at 731.

DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the state of Washington that on this 29th day of October, 2018, I caused the foregoing 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:

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