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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

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**PROVIDENCE SACRED HEART MEDICAL CENTER'S  
ANSWER TO AMICUS CURIAE BRIEF BY WASHINGTON  
EMPLOYMENT LAWYERS ASSOCIATION**

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## I. OVERVIEW

The Washington Employment Lawyers Association (WELA) amicus brief does not discuss, much less analyze, the Washington Minimum Wage Act (MWA), RCW 49.46.130(1), which is the basis of petitioners' overtime pay claim and the Court of Appeals decision. Instead, WELA's amicus brief is devoted largely to an issue that is not in dispute, namely, whether Washington rest break rules adopted pursuant to the Industrial Welfare Act ("IWA") protect employees from "conditions of labor which have a pernicious effect on their health." RCW 49.12.010.<sup>1</sup> WELA Amicus Brief at 6-17. Providence Sacred Heart Medical Center (Sacred Heart) is not challenging Washington's rest break rule, WAC 296-126-092(4). Nor are the petitioners Hill and the Washington State Nurses Association (WSNA) suing for a violation of the IWA.<sup>2</sup>

WELA's other argument, namely, that the Court of Appeals decision gives employers "a financial incentive" for not providing rest

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<sup>1</sup> WELA ignores the IWA statutory definition stating that "conditions of labor" for purposes of the IWA "*shall not include* conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department." RCW 49.12.005(5) (emphasis added). The Washington Industrial Safety and Health Act (WISHA), RCW Ch. 49.17, which is a completely separate law and RCW chapter, governs industrial safety and health and authorizes the regulations administered by the Department.

<sup>2</sup> WELA seems intent on mimicking the so-called "Brandeis Brief" format – heavy on social science data and policy analysis, light on legal citation – that was popularized in a case regarding the constitutionality of maximum hours laws designed to "protect" women workers. *Muller v. Oregon*, 208 U.S. 412 (1908). However, unlike the Brandeis Brief in *Muller*, WELA's amicus brief is directed at an issue that is not in dispute.

breaks mischaracterizes the holding and misstates the facts. WELA Amicus Brief at 3-6.

## II. ARGUMENT

WELA's amicus brief, although not repetitive of matters in other briefs, RAP 10.3(e), fails to provide arguments that will "assist the appellate court," RAP 10.6(a), and should be disregarded.

### A. Whether Rest Breaks Protect the Health and Safety of Nurses Is Not An Issue.

The Washington rest break regulation, WAC 296-126-092(4), was adopted by the Department of Labor & Industries pursuant to the IWA.<sup>3</sup> RCW 49.12.010. Neither the validity of the rest break regulation nor the authority of L&I to adopt the regulation is in dispute. Likewise, whether Sacred Heart practices comply with the Washington Industrial Safety and Health Act (WISHA) regulations is not an issue.<sup>4</sup>

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<sup>3</sup> WELA's brief erroneously implies that the employer's mandatory duty under the Washington regulation to allow rest breaks creates a mandatory duty to police employees to ensure that they are not performing work during rest breaks. WELA Amicus Brief at 4. The regulation states that employees "shall be allowed" a rest break. This language means that employers must "make available" rest periods. See *Brinker Restaurant Corporation v. Superior Court of San Diego County* (Cal. Supreme Ct. No. 5166350, 4/12/12) (California law requiring employers to "provide" rest/meal breaks means that employers must make rest/meal breaks available, not that the employer had to "police" employees to ensure they are not performing work during rest/meal periods).

<sup>4</sup> WELA devotes a significant portion of its amicus brief addressing workplace musculoskeletal disorders and related ergonomics issues. WELA Amicus Brief at 8-13. In 2003, Washington voters passed an initiative that repealed L&I's WISHA ergonomics rule. <http://www.lni.wa.gov/Safety/Topics/Ergonomics/History/default.asp>.

**B. Sacred Heart Complies with IWA When Nurses Report Missed Rest Breaks.**

When Sacred Heart nurses self-report that they are unable to take a rest break on certain occasions, Sacred Heart compensates them with 15 minutes pay for each missed rest break in accordance with this Court's holding in *Wingert v. Yellow Freight Systems Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002). *Washington State Nurses Ass'n v. Sacred Heart Medical Ctr.*, 163 Wn. App. 272, 276 (2010) ("the nurse received 15 additional minutes of pay").

**C. Sacred Heart Is Not Financially Rewarded When Nurses Report Missed Rest Breaks.**

It is undisputed that Sacred Heart nurses are receiving more than double pay for missed rest breaks. *Washington State Nurses Ass'n*, 163 Wn. App. at 280-81. This is because they receive 15 minutes pay for the missed break *in addition to* being paid for the 10 minutes of work performed in lieu of taking a rest break. Thus, WELA mischaracterizes the facts in arguing that Sacred Heart is "financially rewarded" or achieves a "financial incentive" if nurses miss rest breaks. The opposite is true. Paying more than double for each missed break removes any financial incentive for missed rest breaks.<sup>5</sup>

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<sup>5</sup> And, according to WELA's amicus brief, there is an inherent financial incentive for Sacred Heart to allow rest breaks because they "increase the worker's output for the

**D. The Number of “Hours Worked” Doesn’t Change if a Nurse Misses a Rest Break.**

The petitioners Hill’s and WSNA’s “claims [are] based exclusively on the MWA,” *Washington Nurses Ass’n v. Sacred Heart Medical Ctr.*, 163 Wn. App. 272, 277 (2010). However, WELA deliberately ignores the undisputed fact that liability under the MWA turns on the amount of *time* an employee is “on duty,” not the amount of exertion, physical effort, or quantity of production by an employee. *Id.* at 281 (“MWA turns on the amount of time an employee is actually required to spend at the prescribed workplace”).

“Hours worked” is defined as “all hours during which the employee is authorized or required, by the employer to be on duty on the employer’s premises or at a prescribed workplace.” WAC 296-126-002(8). When rest breaks are taken during the workday – that is, after the employee has clocked in and before the employee has clocked out – the rest breaks themselves are treated as “hours worked.” *Id.* at 279 (rest breaks that are taken must be “paid”).

Petitioner Hill testified that her shift started at 6:31 a.m. and continued to 15:01 p.m., which is eight “on duty” hours plus a half-hour unpaid lunch.

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benefit of the employer.” Amicus Br. at 6, fn.2 (making the point that Sacred Heart is financially rewarded if nurses take – rather than skip – rest breaks).

Q. So, your scheduled hours, then, what are those?

A. Day shifts 6:31 to 15:01.

Q. I'm trying to do the math in my head. You have included, then, a half-hour unpaid meal period?

A. Correct.

Q. So, you're scheduled for eight and a half hours?

A. Correct.

CP 684 (Hill Dep. 11:3-9).

Ms. Hill was thus entitled to two 10-minute breaks as part of her eight "on duty" hours. Under the MWA, she is "on duty" when taking a rest break. A rest break that is taken counts the same as active work (and vice-versa) for purposes of compensable time under the MWA because the right to pay under the MWA is based on "on duty" time.

If Ms. Hill misses both rest breaks, she is still credited with eight "hours worked" because she was on duty for eight hours. It is undisputed that the length of her shift is not extended. *Washington State Nurses Ass'n*, 163 Wn. App. at 277, 281 ("the description of the foregone rest period as providing the employer with additional labor *during* the workday is more accurate than treating it as an extension" under the MWA). However, because she "in effect" provided more labor that benefits the

employer during an 8-hour shift, she is entitled to *additional compensation under the IWA*. *Wingert*, 146 Wn.2d at 846. Thus, to comply with *Wingert* and the IWA, Sacred Heart pays Ms. Hill a total of 30 additional minutes of compensation (15 minutes for each of the two missed rest breaks) or a total of 8.5 hours compensation for working eight hours without rest breaks as compared with 8.0 hours compensation for working eight hours when she took her rest breaks. The extra 15 minutes compensation for each missed rest break eliminates any “financial reward” to Sacred Heart when Ms. Hill or others miss rest breaks.

Mandating compensation for missed rest breaks under the IWA does not, however, increase the number of “hours worked” under the MWA. Ms. Hill still clocks in and clocks out at the same times. Once she clocks out she is no longer “on duty” and her shift ends after eight hours worked.

When a nurse allegedly missed his or her rest breaks, the nurse did not stay late because of the missed break. Likewise, a nurse’s workday is not extended because he or she had missed a rest break. Nurses are not required to be on the premises pre- or post-shift sitting in a break area to make up for missed rest breaks.

CP 478 (Declaration of Jodi C. Nauditt ¶ 4).

Thus, she has the same number of “hours worked” under the MWA regardless of whether or not she takes rest breaks.<sup>6</sup>

**E. Petitioners’ MWA Argument Is Moot Because They Have No Damages.**

Assuming – which Sacred Heart does not – that petitioners were to prevail on their MWA claim, Sacred Heart would owe each nurse 15 minutes pay for each missed rest break (1.5 x 10 minutes = 15 minutes pay). Petitioners do not dispute that that is their damages formula. It is also undisputed that Sacred Heart paid each nurse 15 minutes for each missed rest break. *Washington State Nurses Association*, 163 Wn. App at 282 (“Sacred Heart . . . has in fact paid the Nurses 15 minutes’ worth of compensation for every missed rest break. This is undisputed.”). Consequently, Petitioners’ MWA claim fails because there are no unpaid wages.

**F. Sacred Heart Nurses Regularly Get Rest Breaks.**

WELA incorrectly implies that Sacred Heart nurses are either systematically “forced to work through their rest breaks,” WELA Amicus Brief at 1, or that Sacred Heart is “not providing rest breaks.” WELA

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<sup>6</sup> “[S]ince the rest periods are already compensated, ‘[t]his case does not present the usual situation where employees seek to recover wages for uncompensated work’ because, as Yellow Freight argued, ‘its employees [had] been paid for all the time they worked, so its failure to provide rest periods [did] not [result] in lost wages.’ [*Wingert*, 146 Wn.2d] at 848-49.” *Washington State Nurses Ass’n*, 163 Wn. App. at 279-80.

Amicus Brief at 5. However, the undisputed evidence is that nurses regularly get rest breaks and are not unremittingly engaged in active work.

Miss Hill typically works as a circulating nurse in the Main Operating Room (“MOR”). She is scheduled for an 8-hour work day with an unpaid half-hour lunch.

The nature of the work of nursing in the MOR is such that it allows nurses to take either block or intermittent rest breaks. Management typically schedules MOR nurses who work 8-hour shifts for two 15-minute block rest breaks in accordance with their collective bargaining agreement and the interpretation of that contract provided by Arbitrator Levak in 2006.

If the nurse is in an operation during the scheduled rest break time, management typically sends another nurse into the operating room to provide relief. If for any reason the relief nurse does not show up, the nurse in the operating room is supposed to provide notification so that management can make other arrangements to ensure that the nurse is allowed to take his or her rest break. I am aware that nurses occasionally refuse to take their rest breaks for patient care reasons even though another nurse if available to perform those duties.

...

Nurses exercise independent judgment and work as professionals. They are able to take rest breaks intermittently during the course of their day. I am aware that nurses from the MOR, including Ms. Hill, take intermittent rest breaks by engaging in such activities as making personal phone calls,

using hospital computers for personal reasons, getting beverages from the cafeteria, or chatting with co-workers.

C 945-46 (Declaration of Lourie Morse ¶¶ 3, 4, 5, 6, and 8).

Ms. Hill herself has no history of continuous or excessive missed rest breaks.

Following the arbitration in 2006, Ms. Hill claimed 24 missed 15-minute rest breaks on the claim form appended to her Declaration in this lawsuit. She was paid her base rate for each claimed missed 15-minute rest break in accordance with that decision.

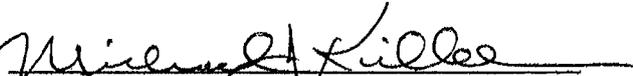
Since the arbitration claim form was submitted on or about July 14, 2006, Ms. Hill has submitted new claims for missed 15-minute block rest breaks on the missed break request form from time to time. She has been paid for each claimed missed 15-minute block rest break for 15 minutes of straight time.

CP 949 (Declaration of Kathy Sliz-Buyea ¶¶ 7 and 8).

### III. CONCLUSION

WELA's amicus brief fails to provide arguments that will "assist the appellate court," RAP 10.6(a), and should be disregarded.

RESPECTFULLY SUBMITTED this 26th day of April, 2012.

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