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No. 86563-9

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

CLERK

v.

SACRED HEART MEDICAL CENTER,

Respondent.

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ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Washington Supreme Court is not a court of error. Discretionary review is appropriate only if one or more of the four criteria in RAP 13.4(b) is met. Here, the Petition for Review fails to demonstrate that either criterion (b)(1) or (b)(4) has been met. Accordingly, the Court should decline to exercise discretionary review since petitioners (hereinafter “WSNA”) concede that there is no other basis for review.

II. THE COURT OF APPEALS DECISION IS CONSISTENT WITH THIS COURT’S OPINION IN *WINGERT V. YELLOW FREIGHT SYSTEMS, INC.*

WSNA asserts that the Court of Appeals decision in this case is in conflict with this Court’s decision in *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002) and, thus, the Court should take discretionary review under RAP 13.4(b)(1). However, the petition fails to “do more than merely assert that a conflict exists.” WSBA, Washington Appellate Practice Deskbook, § 27.11 at p. 27-11.

In *Wingert*, this Court held only that

employees enjoy both a statutory claim under RCW 49.52.070 and an implied private right of action under Chapter 49.12 RCW for breach of the industrial welfare regulation. *Id.* at 849-50.

Op. at 7. The damages are equal to the amount of pay that the employee would have received had the employee taken the rest break. *Id.* at 849.

In *Wingert*, the missed rest breaks occurred during an overtime shift, so the wages for the missed rest breaks were paid at the employee's overtime rate of pay. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 846, 50 P.3d 256, ____ (2002). See Petition at 11 n.2 ("The missed rest breaks at issue in *Wingert* occurred during an overtime shift" during which "the overtime rate was already being paid").

Here, the missed rest breaks did not occur during an overtime period. Rather, the missed rest breaks occurred "*during* the first 40 hours that a nurse works in a given workweek." Op. at 7 (emphasis added).

The Nurses' claim involve[s] only rest breaks that were missed during the first 40 hours of a nurses' workweek. This case does not present a dispute over Sacred Heart's responsibility to pay overtime with respect to hours worked and rest breaks earned when a nurse is on duty and working at the prescribed workplace for more than 40 hours in a workweek.

Op. at 3.

As a result, Providence Sacred Heart Medical Center ("Sacred Heart") paid nurses at the regular rate for the rest breaks they missed during regular hours. Op. at 8-9. Thus, payment of wages to the Sacred Heart nurses for missed rest breaks is consistent with *Wingert*. The Court of Appeals agreed. Op. at 10. Accordingly, the Petition for Review

should not be accepted under (b)(1) because there is no conflict between the decision of the Court of Appeals and this Court's decision in *Wingert*.

III. WSNA'S ARGUMENT IS BASED ON MWA, NOT *WINGERT*

The *Wingert* decision relates to claims and remedies under the IWA.¹ WSNA is not claiming that Sacred Heart violated the IWA. Op. at 6 (“[t]he Nurses’ complaint asserts their claim on pure MWA^[2] grounds”). Thus, the Court of Appeals decision cannot be in conflict with *Wingert*.

WSNA’s “claims [are] based exclusively on the MWA,” Op. at 4, which even WSNA concedes is a new and different cause of action not addressed in *Wingert*.³ Petition at 12 (“the *Wingert* employees sought pay under the IWA and the Wage Rebate Act and not the MWA”).

As the Court of Appeals said, reaching out to the MWA to provide a separate cause of action for missed rest breaks is mixing apples and oranges.

Reaching out to MWA for a time and one-half payment remedy where an employee violates an industrial welfare regulation dealing with rest periods is then no more called for than reaching out to the MWA for a time and one-half payment remedy where

¹ The Industrial Welfare Act (IWA), which is RCW Chapter 49.12, is the statutory authority pursuant to which the rest break regulation, WAC 296-126-092, was adopted. *Wingert*, 146 Wn.2d at 847.

² Minimum Wage Act (MWA), RCW Chapter 49.46.

³ The Court of Appeals “correctly” concluded that the MWA overtime rate was “never discussed in *Wingert*” and “there was no need to do so.” Petition at 12 (citing Op. at 9).

an employer violates other industrial welfare regulations, such as WAC 296-126-210 (dealing with impermissible meal or lodging charges) or WAC 296-126-222 (sanitation and safety).

Op. at 9.

WSNA does not dispute that when a nurse misses a rest break, Sacred Heart pays the nurse “double-time”—once for the actual time spent working and an equal amount of compensation for the missed rest break.

Op. at 9. Thus, WSNA’s assertion that there is a conflict here with *Wingert* for purposes of meeting the (b)(1) criterion is not justified. On the contrary, the absence of an IWA cause of action underscores that Sacred Heart’s pay practices are consistent with *Wingert* when it comes to paying compensation for missed rest breaks.

IV. THERE IS NO VIABLE MWA CAUSE OF ACTION IN THIS LAWSUIT

The Petition for Review focuses mostly on WSNA’s argument that the Court of Appeals allegedly erred by not recognizing an MWA claim.

This is not an argument that supports discretionary review under RAP 13.4(b). Nonetheless, Sacred Heart feels compelled to address briefly the merits – or lack thereof – of WSNA’s argument.

For overtime pay purposes, the MWA only comes into play when an employer “shall employ any of his or her employees *for a work week longer than 40 hours.*” RCW 49.46.130(1) (emphasis added).

Here, the record conclusively shows that, while nurses sometimes were denied rest breaks, no nurse worked more than 40 hours in a workweek. Op. at 3, 7. Thus, the overtime pay requirement of the MWA was never in play and the Court of Appeals properly “conclude[d] that [Sacred Heart] did not violate the MWA by the way in which it compensated Nurses for the missed rest breaks.” Op. at 1-2.

[B]ecause the Nurses’ claims are for rest periods denied during the first 40 hours of a given workweek, the 40-hour workweek is not exceeded and neither the language of, nor the policy reflected by, the MWA comes into play.

Op. at 10. Nonetheless, WSNA persists in claiming error because it confuses compensation paid under the IWA with actual time worked under the MWA.

First, it is important to understand how a nurse at Sacred Heart is paid when working a regular 8-hour shift during which the nurse takes all rest breaks allowed by state law. During an 8-hour shift, state law says a nurse is entitled to two 10-minute rest breaks. So, when a nurse works an 8-hour shift, the nurse actively works seven hours and forty minutes with

two ten-minute rest breaks for a total of an 8-hour shift. The law requires that the rest breaks be paid. Thus, the nurse receives a total of eight hours pay. Not only that, but the time spent *taking* the rest breaks during the shift is considered “hours worked” even though the nurse is relieved from work during the rest breaks. *See* 29 CFR § 785.19 (employees are considered to be on duty when *taking* short rest breaks during their shift). As a result, a nurse, having taken all rest breaks allowed by law, is both paid for eight hours and is credited with eight “hours worked.”

This is in contrast to how a nurse at Sacred Heart is paid when working a regular 8-hour shift during which the nurse does not take rest breaks. To start with, the nurse is paid eight hours for the eight hours of work performed. In addition, the nurse receives compensation pursuant to the IWA (and *Wingert*) for the two missed rest breaks. At Sacred Heart, this is an additional 15 minutes of pay for each missed rest break.⁴ Thus, a Sacred Heart nurse who misses both rest breaks in an 8-hour shift receives 8 hours and 30 minutes pay. *Op.* at 9. However, the nurse is not credited with additional “hours worked” because, despite missing her rest breaks,

⁴ The collective bargaining agreement between WSNA and Sacred Heart provides for 15-minute rest breaks, which are longer than the state-mandated 10-minute rest breaks. For purposes of this lawsuit, plaintiffs limited their MWA claim to the state-mandated 10-minute rest breaks to avoid federal preemption issues that would be involved if the court were required to interpret the collective bargaining agreement. *Op.* at 6. It should also be pointed out that WSNA, prior to filing the lawsuit, had taken to arbitration this same issue, namely, whether nurses had an overtime pay claim under the MWA for damages for missed rest breaks and lost that claim insofar as they sought overtime pay. *Op.* at 2-3.

she went home at the end of her 8-hour shift and did not work longer than eight hours. “[S]ince entitlement to time and one-half under the MWA turns on the amount of time an employee is actually required to spend at the prescribed workplace,” the MWA is not implicated. Op. at 10.

Unlike the workers in *Wingert*, a nurse did not miss rest breaks during an overtime period. Op. at 10. The 30 minutes of additional pay for the missed rest breaks during regular hours is compensation required under the IWA as mandated by *Wingert*. The pay is not required by the MWA because all wages due under the MWA have already been paid.⁵

Because the additional labor is provided during, not after, the employee’s work assignment, and because the Nurses’ claims are for rest periods denied during the first 40 hours of a given workweek, the 40-hour workweek is not exceeded and neither the language of, nor the policy reflected by, the MWA comes into play.

Op. at 10.

⁵ The MWA neither requires rest breaks nor provides a remedy for missed rest breaks. As this court said in *Wingert*, the “failure to provide rest periods [did] not [result] in lost wages” under the MWA. 146 Wn.2d at 847. It did however strike the majority of this court as inequitable that an individual who is denied state-mandated rest breaks would not be entitled to any more pay than the employee who took the rest breaks. As a result, this court implied a remedy for damages under the IWA and held that employers must pay the worker not only for the time spent working through the rest break but must pay an equal amount to compensate for the missed rest break. In effect, an employee who misses a rest break receives double-time because of the IWA violation. Op. at 9. This is similar to an employee who works an 8-hour shift on a holiday and receives 16 hours pay (8 hours for “hours worked” and 8 hours in lieu of taking off on the paid holiday). For MWA purposes, the employee is credited for 8 “hours worked”—not 16 hours.

**V. THE COURT OF APPEALS DECISION DOES NOT
“THREATEN” THE ABILITY OF WASHINGTON WORKERS TO
BE PAID FOR MISSED REST PERIODS**

WSNA claims that “the Court of Appeals decision threatens the ability of all Washington workers to be paid for missed rest periods” and, thus, is an issue of substantial public interest meriting discretionary review pursuant to RAP 13.4(b)(4). This is nonsense. This Court has already decided in *Wingert* that Washington workers who are denied their state-mandated rest breaks have an implied cause of action for unpaid wages under the IWA and the Wage Rebate Act. Sacred Heart is in compliance with the IWA and the Wage Rebate Act as required by *Wingert* as evidenced by the fact that WSNA is not alleging an implied cause of action under the IWA. Consequently, petitioners’ assertion that the Court of Appeals decision “threatens the ability of all Washington workers to be paid for missed rest periods” is without foundation.

**VI. ALLEGED ERROR IN THE DAMAGES FORMULA IS NOT
GROUNDS FOR DISCRETIONARY REVIEW**

Assuming – which Sacred Heart does not – that WSNA were to prevail on its MWA claim, Sacred Heart would owe a nurse 15 minutes pay for each missed rest break (1.5 x 10 minutes = 15 minutes pay). WSNA does not dispute that this is their damages formula. It is also undisputed that Sacred Heart paid each nurse 15 minutes for every missed

rest break. Op. at 10-11. Consequently, WSNA failed to state a claim under the MWA because there are no unpaid wages.

[E]ven if the MWA applied, Sacred Heart—although not obliged to do so by the MWA—has in fact paid the Nurses 15 minutes’ worth of compensation for every rest break missed. This is undisputed. Nonetheless, the Nurses persuaded the Superior Court that it should not take Sacred Heart’s payment of 15 minutes’ compensation for their contracted-for breaks under the CBA into consideration because to treat Sacred Heart’s payment for 15-minute rest breaks as sufficient overtime payment for a foregone 10-minute State-mandated rest period “would essentially leave the Nurses without pay for 5 minutes of their *contractually obligated* rest break period.” CP at 925 (emphasis added).

Op. at 10-11.

The Court of Appeals held that, in so doing, the trial court impermissibly engaged in an interpretation of the CBA.

We see no way that the trial court or we can conclude that the CBA is thereby violated without interpreting the CBA. Clearly, Sacred Heart has a different view of the CBA. For this additional reason, we find no violation of the MWA. If the Nurses believe that their rights *under the CBA* are offended by this application of the MWA, then they have a claim under the CBA, not the MWA.

Op. at 11.

Although WSNA takes exception to this holding by the Court of Appeals, it makes no argument that the alleged error meets any of the criteria for discretionary review under RAP 13.4(b). Accordingly, this Court should not accept discretionary review on the basis of WSNA's argument set forth at page 16 through 20 of the Petition for Review.

VII. IF THE COURT ACCEPTS REVIEW, IT SHOULD TAKE UP THE ISSUES OF RES JUDICATA/COLLATERAL ESTOPPEL, PREEMPTION, AND LACK OF WILLFULNESS

Sacred Heart raised numerous issues that were addressed by the parties in their briefs; but, the Court of Appeals did not need to reach these issues in arriving at its holding.

In the event that this Court were to grant WSNA's Petition for Review, Sacred Heart provisionally requests, pursuant to RAP 13.4(d), that the following issues be addressed by this Court as part of such review:

A. Did the superior court err by granting summary judgment for plaintiffs on the issue of state law liability for alleged missed 10-minute rest breaks where there is no evidence that nurses were denied the right to 10 minutes of rest for every 4 hours worked as required by WAC 296-126-092(4)?

B. Did the superior court err by concluding as a matter of law that the "nature of the work" performed by Sacred Heart nurses did not

allow for intermittent rest breaks of 10 minutes where the only evidence in the record is to the contrary?

C. Did the superior court err as a matter of law by concluding that plaintiffs were entitled to compensation at overtime rates for alleged missed rest breaks where plaintiffs had previously litigated the issue in an arbitration hearing and lost? (Res judicata, collateral estoppel, and waiver.)

D. Did the superior court err as a matter of law by awarding recovery for plaintiffs' expenses under the MWA?

E. Did the superior court err as a matter of law by awarding double damages (including doubling of pre-judgment interests) and attorney fees under RCW 49.52.070 where there is a bona fide dispute as to whether plaintiffs were under-compensated for alleged missed rest breaks required by state law?

F. Did the superior court err as a matter of law by granting WSNA standing as an association to bring this lawsuit where the individual participation of nurses was needed to establish on a nurse-by-nurse basis whether Sacred Heart denied a nurse the right to a 10-minute rest break under state law?

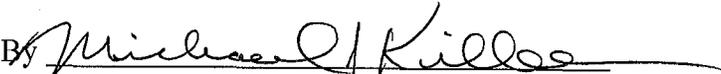
G. Did the superior court err as a matter of law by interpreting the collective bargaining agreement between Sacred Heart and WSNA in

offsetting the amount received by the plaintiffs against the compensation owed for their alleged missed 10-minute rest breaks? (§ 301 preemption.)

VIII. CONCLUSION

The Petition for Review fails to raise any issues meeting the criteria for discretionary review under RAP 13.4(b). Accordingly, this Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 26th day of October, 2011.

By 

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PROOF OF SERVICE

I, Valerie S. Macan, the undersigned, hereby certify and declare under that the following statements are true and correct:

1. I am over the age of 18 years, not a party to the within cause and am employed by the law firm of Davis Wright Tremaine. My business and mailing addresses are both 1201 Third Ave., Suite 2200, Seattle, Washington 98101-3045.

2. On the 26th day of October, 2011, I caused to be sent for filing an original and one copy of *Answer to Petition for Review* via overnight mail to:

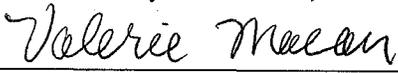
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3. On the 26th day of October, 2011, I caused to be served a copy of *Answer to Petition for Review* via overnight mail to:

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Valerie S. Macan