

FILED

FEB 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29366-1

COURT OF APPEALS, DIVISION III,
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,

Plaintiffs-Respondents,

v.

SACRED HEART MEDICAL CENTER,

Defendant-Appellant.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

INTRODUCTION..... 1

RESTATEMENT OF THE CASE..... 2

The Rest Break Practice for Registered Nurses At SHMC..... 3

The Superior Court’s Holdings..... 5

ARGUMENT..... 7

I. UNDER WELL ESTABLISHED WASHINGTON LAW, REST PERIODS ARE CONSIDERED “HOURS WORKED” AND THUS MUST BE COMPENSATED AT THE REQUIRED OVERTIME RATE WHEN THEY RESULT IN OVERTIME..... 7

A. The Washington Supreme Court Held In *Wingert v. Yellow Freight* That A Missed Rest Break Extends An Employee’s Work Day And That Additional Work Time Must Be Paid..... 7

B. The Washington State Department Of Labor And Industries Recognizes Rest Breaks As “Hours Worked.”..... 9

C. In Any Case, SHMC’s Own Payroll Records Treat Missed Rest Breaks As Hours Worked And It Should Not Now Be Permitted To Claim Otherwise..... 11

II. THE SUPERIOR COURT CORRECTLY REJECTED SHMC’S ATTEMPT TO REPUDIATE ITS OWN PAYROLL RECORDS BY ARGUING THAT THERE WAS NO EVIDENCE OF MISSED REST BREAKS..... 11

A.	The Only Rest Breaks Provided And Recorded At SHMC Are 15-Minute Block Breaks, Both Because That Is The Policy And Because The Nature Of The Work Of Nursing Does Not Permit Intermittent Breaks.....	11
B.	It Is SHMC's Burden To Rebut The Just And Reasonable Inference That The Missed Rest Forms In Fact Show A Missed Rest Break, Which It Did Not, And Cannot, Meet.....	14
III.	THE SUPERIOR COURT CORRECTLY HELD THAT PLAINTIFFS ARE OWED 15 MINUTES OF PAY FOR A MISSED REST BREAK RESULTING IN OVERTIME HOURS, AND DEFENDANT MAY NOT RE-PURPOSE OTHER PAY TO SATISFY ITS OBLIGATION.....	16
IV.	THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE DOCTRINES OF COLLATERAL ESTOPPEL, RES JUDICATA, AND WAIVER DO NOT APPLY IN THIS WAGE AND HOUR ACTION.....	20
A.	Plaintiffs Are Not Collaterally Estopped From Bringing This Action.....	20
B.	Res Judicata Does Not Apply Here.....	22
C.	The Doctrine Of Waiver Does Not Apply.....	23
V.	THE SUPERIOR COURT CORRECTLY HELD THAT THIS LAWSUIT WAS NOT PREEMPTED..	25
A.	Claims Based On State Law Are Not Preempted By Federal Labor Law.....	25

B. The Superior Court’s Acknowledgement That There Is A Collective Bargaining Agreement That Establishes The Working Conditions Of The Registered Nurses At Issue Here Does Not Result In Preemption; Courts May “Look To” A CBA To Establish Pertinent Facts.....	27
C. A Federal Court Has Already Determined That This Matter Was Not Preempted.....	29
VI. PLAINTIFFS ARE ENTITLED TO RECOVER THEIR ATTORNEYS’ FEES AND COSTS BECAUSE THE DEFENDANT VIOLATED THE MINIMUM WAGE ACT.....	30
VII. PLAINTIFFS ARE ENTITLED TO DOUBLE DAMAGES BECAUSE THERE WAS NO BONA FIDE DISPUTE ABOUT SHMC’S OBLIGATION UNDER THE MINIMUM WAGE ACT.....	31
VIII. THE SUPERIOR COURT CORRECTLY HELD THAT WSNA HAS STANDING TO PURSUE UNPAID WAGES FOR ITS MEMBERS.....	34
CONCLUSION.....	37

TABLE OF AUTHORITIES

Federal Cases

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208-09, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985).....	25, 27
Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)	15, 16
Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)	29
Carter v. Panama Canal Co., 463 F.2d 1289, 1293 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972)	15
Caterpillar Inc. v. Williams, 482 U.S. 386, 396, 107 S. Ct. 2425 (1987).	26
Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 690-691 (9th Cir. 2001).....	25
Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 342-343, 97 S. Ct. 2434 (1977).....	36
Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877 (1988).....	25
Livadas v. Bradshaw, 512 U.S. 107, 117, 114 S. Ct. 2068 (1994).....	26

State Cases

Anderson v. State, Department of Social and Health Services, 115 Wn.App. 452, 456, 63 P.3d 134 (2003).....	10
Bostain v. Food Express, Inc., 159 Wn.2d 700, 712, 153 P.3d 846 (2007)	8
Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 839 P.2d 314 (1992)	27
Department of Labor and Industries v. Overnite Transp. Co., 67 Wn. App. 24, 834 P.2d 638 (1992)	33
Ervin v. Columbia Distributing Inc., 84 Wn. App. 882, 891, 930 P.2d 947 (1997).....	22, 24, 28

Flower v. T.R.A. Industries, Inc., 127 Wn. App. 13, 36, 111 P.3d 1192 (2005).....	33
Fox v. State, Dept. of Retirement Systems, 154 Wn. App. 517, 524, 225 P.3d 1018 (2009)	14
Frese v. Snohomish County, 129 Wn. App. 659, 665, 120 P.3d 89, 92 (2005).....	21
Gaglidari v. Denny's Restaurants, 117 Wn.2d 426, 449, 815 P.2d 1362 (1991).....	31
Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004).....	22, 23, 24, 27
IAFF, Local 46 v. City of Everett, 146 Wn.2d 29, 44-46, 42 P.3d 1265 (2002).....	30
International Association of Firefighters v. Spokane Airports, 146 Wn.2d 207, 45 P.3d 186 (2002)	34, 35, 36
Jones v. Best, 134 Wn.2d 232, 241, 940 P.2d 1 (1998).....	24, 25
Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124, 1129 (2000) .	24
McDaniels v. Carlson, 108 Wn.2d 299, 303, 738 P.2d 254 (1987)....	20, 21
Morgan v. Kingen, 166 Wn.2d 526, 534, 210 P.3d 995 (2009)	32
Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983).....	23
Schilling v. Radio Holdings, 136 Wn.2d 152, 160, 961 P.2d 371 (1998)	32
State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 304, 57 P.3d 300, 303 (2002).....	21
Teamsters Local Union No. 117 v. Dept. of Corrections, 145 Wn. App. 507, 187 P.3d 754 (2008)	36

United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co., 84 Wn. App. 47, 925 P.2d 212 (1996)	24
White v. Salvation Army, 118 Wn.App. 272, 283, 75 P.3d 990, 995 (2003)	10, 13
Wingert v. Yellow Freight, 146 Wn.2d 841, 50 P.3d 256 (2002)	passim

Federal Statutes

29 U.S.C. § 185(a)	29
--------------------------	----

State Statutes

RCW 49.12	8
RCW 49.46.070	13
RCW 49.46.090	30
RCW 49.46.110	24
RCW 49.46.130	1, 17, 29
RCW 49.48.030	30, 31
RCW 49.52	8
RCW 49.52.050(2).....	31
RCW 49.52.070	31, 34

State Regulations

WAC 296-126-002(8).....	9
WAC 296-126-092.....	12
WAC 296-126-092(4).....	9
WAC 296-128-010.....	13

INTRODUCTION

The Washington State Nurses Association (“WSNA”) and Vivian Mae Hill, a registered nurse employed by Defendant Sacred Heart Medical Center (“SHMC”), filed the underlying lawsuit on December 21, 2007, in order to obtain unpaid wages owed pursuant to the overtime payment requirements of RCW 49.46.130. WSNA represents the approximately 1,200 registered nurses employed by SHMC, who provide direct patient care 24 hours a day, every day of the year.¹ Because these nurses provide direct patient care, they cannot simply leave their work station for a rest break unless another registered nurse is available to cover their duties, and therefore occasionally must work through a rest break.

Although SHMC tracks these missed rest breaks in its payroll system, it does not treat the time associated with missed rest breaks as “hours worked.” It is undisputed that SHMC refuses to pay the required premium overtime rate when a missed rest break results in overtime hours worked by a nurse. On Plaintiffs’ Motion for Summary Judgment, the Superior Court held that when a nurse misses a rest break that results in overtime hours worked, SHMC is obligated to pay the overtime rate on the first ten minutes of the rest break (which is time worked under Washington law).

¹ WSNA, a named plaintiff in this case, brings this lawsuit on behalf of its members employed by SHMC. Vivian Mae Hill is also a named plaintiff, employed at SHMC, and a member of WSNA. In this brief, Plaintiffs are collectively referred to as WSNA.

The Superior Court also held that SHMC cannot evade this obligation to pay overtime on the first ten minutes of a missed rest break by simply applying a separate payment for the remaining five minutes of the rest break that it is obligated to pay pursuant to its contract with WSNA. To permit such double counting would leave the nurses with either no overtime on the first 10 minutes of their state-mandated rest break, or no pay for the five additional minutes of a rest break that is required by the WSNA contract. The Superior Court correctly rejected this legerdemain, and determined that SHMC's obligation for missed rest breaks resulting in overtime hours worked was the overtime rate for the first 10 minutes (which is equal to 15 minutes of pay) plus its existing obligation to pay for the remaining five minutes of rest break, for a total of 20 minutes of pay. There is no dispute that SHMC pays only 15 minutes of pay for its missed rest break, and not the required 20 minutes of pay for a missed rest break resulting in overtime hours.

RESTATEMENT OF THE CASE

The Washington State Nurses Association is a membership organization which exclusively represents, for the purposes of collective bargaining, approximately 1,200 registered nurses ("RNs" or "nurses") employed by the Defendant, as well as nurses at forty other hospitals and facilities across Washington state. Its mission includes fostering high

standards of nursing, promoting the professional development of nurses, and advancing their economic and general welfare. CP 742. Due to the growing body of evidence demonstrating that rest breaks are critical for nurses to maintain the alertness and focus required to provide safe and quality patient care, ensuring that nurses receive full, uninterrupted rest and meal breaks have been a top organizational priority for WSNA for the past several years. It brought this lawsuit, along with one of its members, Vivian Mae Hill, in order to obtain money damages for its members due to SHMC's failure to pay overtime for missed rest breaks.

The Rest Break Practice for Registered Nurses At SHMC

Sacred Heart Medical Center provides its registered nurse employees with a 15-minute block rest break each four-hour work period. CP 216. Periodically, nurses are unable to take a rest break because of the urgent needs of their patients and the lack of relief coverage. CP 232. Nurses will not leave patients unattended due to their ethical and legal obligations. *Id.*

For the period between January 2005 and May 2006, nurses completed sworn affidavits indicating how many rest breaks they had missed in order to receive a payment for those missed rest breaks. CP 233; 237-8. This affidavit system was a result of an arbitration between WSNA and SHMC in which an arbitrator ordered that SHMC henceforth ensure

nurses received their rest breaks (obviating any need for payment) and pay nurses for the rest breaks they had missed in the past. CP 491-492.² The sworn affidavits were necessary, as SHMC had failed to keep any records of missed rest breaks prior to the arbitration.

Since approximately June of 2006, nurses who miss a rest break complete a “Missed Break Request” form and submit it to a nurse manager or payroll department. CP 233, 235. From these forms, SHMC timekeepers make notations in the electronic time keeping system. Since SHMC began tracking missed rest breaks in this fashion, 23,018 missed rest breaks occurred, about 57 percent that resulted in overtime hours worked. CP 1256-1258. The form has only three boxes for nurses to check:

- (1) Missed 1st Break;
- (2) Missed 2nd break; and
- (3) Missed 3rd break (12-hour shift only).

CP 235.

The form does not contemplate intermittent breaks, partial breaks or any other kind of fragmented break, nor is that the rest break practice at this workplace. CP 1556. At SHMC, nurses are entitled to 15-minute rest

² The issue presented to the arbitrator did not address the rate of pay owed pursuant to state law. Arbitrator Levak’s sole authority was to interpret and enforce the collective bargaining agreement, not to enforce or interpret state law.

breaks, and when they miss those rest breaks, SHMC pays those nurses at the straight time rate for the full 15 minutes, regardless of if that missed rest break resulted in overtime hours.

After completing the missed rest break form, a nurse must obtain the signature of a manager on the form. CP 235. The form is then forwarded to Defendant's timekeeping department where a timekeeper records 15 minutes of regular "hours" regardless of whether the missed rest break resulted in overtime hours worked. CP 1266-67. SHMC does not dispute that it has recorded missed rest breaks in the manner described above,³ or that it has failed to pay overtime on the 15 minutes of regular "hours" recorded for a missed rest break even if that time resulted in overtime hours worked. Because SHMC's failure was not in dispute, the Superior Court granted WSNA's motion for summary judgment on March 13, 2009. CP 918-923.

The Superior Court's Holdings

The Superior Court's final order on August 20, 2010, was based in large part upon its March 2009 order holding that a missed rest period is "time worked" under the Washington Minimum Wage Act ("MWA") and must be compensated accordingly. The Superior Court based its holding on

³ In its motion, SHMC's assertion that nurses can submit a missed rest break form "even though they received at least 10 minutes for a rest break" is not supported by the record, and SHMC has provided no such citation. In any case, the Superior Court rejected this theory on the basis that the facts in the record demonstrated the opposite.

the Washington Supreme Court's holding in *Wingert v. Yellow Freight*, 146 Wn.2d 841, 50 P.3d 256 (2002). CP 918-923. The Court also determined that every 10-minute break, which, when added to the work week, extends the work week beyond 40 hours, must be paid at the overtime rate of pay, *i.e.*, time and one-half the regular rate of pay. *Id.*

The Court also determined that because these particular nurses are entitled to a 15-minute rest break, the nurses must be paid for a missed rest break resulting in overtime hours at "10 minutes at time and one-half and 5 minutes of straight time." CP 1097-1098. Thus, the court held, for a missed rest break resulting in overtime hours, the nurses are owed 20 minutes of pay (10 minutes at time and one-half for a total of 15 minutes of pay, plus five minutes of straight time). The Superior Court rejected SHMC's argument that its payment of 15 minutes of pay at the straight time rate satisfies its obligation under the Minimum Wage Act because in fact SHMC owed 20 minutes of pay.

In response to multiple summary judgments and motions to set aside orders filed by SHMC, the Superior Court also rejected all of the same legal defenses that SHMC puts forth in its brief to this Court. Specifically, the Superior Court rejected SHMC's claims regarding preemption, waiver, estoppel, res judicata, preclusion, and standing, and it did so each time that SHMC attempted to re-litigate settled matters by bringing duplicative

motions. This re-litigation of legal issues in a relatively straight-forward wage and hour violation case dragged this matter on for three years and resulted in both parties incurring significant legal costs in a relatively low damage case.

ARGUMENT

I. UNDER WELL ESTABLISHED WASHINGTON LAW, REST PERIODS ARE CONSIDERED “HOURS WORKED” AND THUS MUST BE COMPENSATED AT THE REQUIRED OVERTIME RATE WHEN THEY RESULT IN OVERTIME.

A. The Washington Supreme Court Held In *Wingert v. Yellow Freight* That A Missed Rest Break Extends An Employee’s Work Day And That Additional Work Time Must Be Paid.

Defendant grossly misreads *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002) when it argues that missed rest breaks are not “hours worked.” It argues that *Wingert* holds that employees must be compensated for the additional “value” provided to the employer, in lieu of taking a paid break (apparently, this “value” is not the employees’ work time). Brief of Appellant, p. 12. There is no discussion of “value” in *Wingert*. *Wingert* is about wages due for additional time worked resulting from a missed rest break.

In *Wingert*, the Court held:

Employees who must work through their overtime break are, in effect, providing Yellow Freight *with an additional 10 minutes of labor* during the first two hours of their

overtime assignments. When the employees are not provided with the mandated rest period, ***their workday is extended by 10 minutes***. Taking the regulation into account, the ***employees are entitled to be compensated by Yellow Freight for 2 hours and 10 minutes of work***.

Id. at 849 (emphasis added).

The Supreme Court indisputably views the missed break period as resulting in additional labor on the part of the employee (the employer was provided “with an additional 10 minutes of labor” and must pay for that additional “10 minutes of work”). *Id.* It is compensation for additional work *time* that the Court is concerned that the employees receive from their employer.

Defendant also attempts to limit *Wingert* by pointing out that it involved the Industrial Welfare Act, RCW 49.12, and the Wage Rebate Act, RCW 49.52, and not the Minimum Wage Act (the instant case involves all three statutes). Yet, Defendant does not explain why rest breaks would be hours worked under the Industrial Welfare Act and Wage Rebate Act, but not the Minimum Wage Act. Indeed, Washington’s “long and proud history of being a pioneer in the protection of employee rights,” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (internal citations omitted), compels the opposite conclusion.

Defendant’s reliance on the phrase in *Wingert* stating that the rest break regulation “does not distinguish between regular and overtime hours

worked,” Brief of Appellant, p. 13-14, to support its notion that *Wingert* did not view missed rest breaks as time worked, is mistaken. The full statement in *Wingert* from which Defendant takes this phrase is:

WAC 296-126-092(4) does not distinguish between regular and overtime hours worked. Rather, the chapter defines “hours worked” as “all hours during which the employee is authorized or required by the employer to be on duty.” WAC 296-126-002(8). Therefore, as the Court of Appeals correctly concluded, the regulation “clearly and unambiguously prohibits working employees for longer than three consecutive hours without a rest period” regardless of whether the hours worked are regular hours, overtime hours, or a combination of both. *Wingert*, 104 Wash.App. at 588, 13 P.3d 677.

Wingert, 146 Wn.2d at 848.

Far from supporting the Defendant’s argument, this section of *Wingert* again illustrates that it doesn’t matter whether the worker missed a rest break during overtime or not, it is still “hours worked.”

B. The Washington State Department Of Labor And Industries Recognizes Rest Breaks As “Hours Worked.”

The Department of Labor and Industries (“DLI”) has adopted an administrative policy explaining the obligations of Washington employers to provide meal and rest breaks for their employees. CP 253-257. Department of Labor and Industries Administrative Policy No. ES.C.6 states, in pertinent part:

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. ***Rest periods are considered hours worked.*** Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

Id. (bold italics emphasis added).

DLI Policy ES.C.6 has previously been cited with approval by Washington courts. *See, e.g., White v. Salvation Army*, 118 Wn.App. 272, 283, 75 P.3d 990, 995 (2003) ("As we previously observed in this opinion, we may give weight to an administrative policy of an agency with expertise in a matter if the policy reflects that it has been thoroughly considered and is supported by valid reasoning. We give weight to DLI's explanation of its policy here."); *Anderson v. State, Department of Social and Health Services*, 115 Wn.App. 452, 456, 63 P.3d 134 (2003) (citing DLI Policy ES.C.6's discussion of travel time as hours worked).

C. In Any Case, SHMC's Own Payroll Records Treat Missed Rest Breaks As Hours Worked And It Should Not Now Be Permitted To Claim Otherwise.

As described above in the restatement of case, there is no dispute that when a SHMC nurse misses a rest period, a SHMC timekeeper notes "MBA" (which stands for "missed break approved") on the payroll records and adds the .25 hours (or 15 minutes) to the "regular hours" column on the record. CP 1266-1267. Thus, SHMC itself characterizes the missed rest break time as "hours."

II. THE SUPERIOR COURT CORRECTLY REJECTED SHMC'S ATTEMPT TO REPUDIATE ITS OWN PAYROLL RECORDS BY ARGUING THAT THERE WAS NO EVIDENCE OF MISSED REST BREAKS.

A. The Only Rest Breaks Provided And Recorded At SHMC Are 15-Minute Block Breaks, Both Because That Is The Policy And Because The Nature Of The Work Of Nursing Does Not Permit Intermittent Breaks.

SHMC again attempts to disavow its own payroll practices by arguing that its own records of missed rest breaks – which are the *only* records of missed rest breaks at SHMC – cannot be relied upon by Plaintiffs to recover wages owed them. SHMC's argument relies on its theory that state law merely requires it to "allow" nurses to take "intermittent" rest breaks (versus block breaks), and that there is no duty

for it to record these rest breaks.⁴ The argument that an employer must merely “allow” an employee to take a rest break, and not actually relieve that employee of her duties to enable a rest break, is clearly foreclosed by DLI’s prohibition of waivers of rest breaks. CP 253-257. Department of Labor and Industries Administrative Policy No. ES.C.6 (“Employees may not waive their right to a rest period.”). How a worker would ever recover lost wages for missed rest breaks under such a formulation of the law is a mystery, but in this case, as there are no “intermittent” breaks at SHMC for nurses, SHMC’s theory is inapplicable anyway.

The Superior Court considered all of the evidence presented to it regarding the practice of rest breaks at SHMC and found that 1) the specific nature of nursing work does not allow for “intermittent” breaks, and 2) in any case, there are no “intermittent” breaks for nurses at SHMC, only block breaks. The Superior Court made these factual determinations after a review of multiple declarations in the record, deposition testimony, and documentary evidence about the rest break practices. It looked to the collective bargaining agreement, finding only a reference to a 15-minute rest break, which is how SHMC satisfies its obligation under state law to provide “not less than ten minutes,” WAC 296-126-092, of rest for each four hour period worked. There is no evidence of any kind that nurses

⁴ In its oral ruling on August 20, 2010, the Superior Court held that SHMC was indeed required to keep such records.

take breaks that are distinct from the 15-minute block breaks that are part of the working conditions at SHMC.

SHMC's argument should not be mistaken for a disputed fact. A genuine issue of fact does not exist where a reasonable person could reach only one conclusion. *White v. Salvation Army*, 118 Wn.App. 272, 284, 75 P.3d 990 (2003). In light of the dearth of any other evidence of any kind even suggesting that there are different rest breaks at SHMC, there can be no other conclusion. SHMC itself does not argue that there was a material fact in dispute about these issues that, as a matter of law, should have prevented the Superior Court from ordering summary judgment.⁵

This Court need not take SHMC's unsupported assertions that it has a different, separate intermittent break system that none of its policies or practices reflect as adequate to set aside the Superior Court's order. It was SHMC's burden to keep accurate records, and the only records it kept regarding missed rest breaks were the block break forms.⁶ These are the forms upon which the Superior Court appropriately relied.

⁵ Instead, SHMC wants this Court to order the Superior Court to enter summary judgment for it.

⁶ The MWA requires every employer "subject to any provision of this chapter or of any regulation issued under this chapter to keep a record of employees' hours." RCW 49.46.070. Regulations promulgated by the Washington State Department of Labor and Industries explicitly require that employers "keep and preserve records which show an employee's "hours worked each workday and total hours worked each workweek" and "total daily or weekly straight-time earning or wages," as well as a significant amount of other payroll related information. WAC 296-128-010.

B. It Is SHMC's Burden To Rebut The Just And Reasonable Inference That The Missed Rest Forms In Fact Show A Missed Rest Break, Which It Did Not, And Cannot, Meet.

Once the nurses put forth evidence of the missed rest breaks and the failure of SHMC to pay the required overtime rate for some of those missed rest breaks, the burden shifted to SHMC to challenge this evidence. If an employer fails to maintain adequate records, the employee need only prove the amount of uncompensated work performed by “just and reasonable” inference. *Fox v. State, Dept. of Retirement Systems*, 154 Wn. App. 517, 524, 225 P.3d 1018 (2009). If the employee does so, it is the obligation of the employer to rebut that evidence of the precise amount of work performed. *Id.*

Here, the nurses put forth the missed rest break records collected by SHMC. SHMC argues that those records cannot be relied upon because they address a 15-minute break, not a 10-minute break. However, an employer cannot evade liability in this way. Instead, even if this Court accepts SHMC's argument that its missed rest break records are not precise regarding the length of the missed rest break because SHMC has failed to provide any more precise records, the nurses are entitled to rely on these records to recover the wages owed them.

Defendant cannot defeat liability by arguing that its own records are incomplete. It cannot prevail merely by arguing that its own missed rest break forms (which it designed, provided, and approved) do not show a missed 10-minute rest break, yet produces no other evidence to rebut a just and reasonable inference that those missed rest break forms do in fact show a missed rest break. Even if such an assertion was true – which it cannot be based on the face of the missed rest break forms – it would not matter to the legal issue in this case, because SHMC cannot evade liability by claiming its own records are incomplete.

In *Anderson v. Mt. Clemens Pottery Co.*, the U.S. Supreme Court explained:

[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes... [t]he solution... 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; it would allow the employer to keep the benefits of an employee's labors without paying due compensation.

328 U.S. 680, 687 (1946), superseded on other grounds by statute as stated in *Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C. Cir.), *cert. denied*, 409 U.S. 1012 (1972).

The Defendant is seeking to avoid liability for wage and hour violations by asserting that, due to its failure to comply with the MWA by

keeping adequate payroll records, the Plaintiffs cannot prove any such violations occurred. This is exactly the argument that *Anderson* rejects, holding that allowing such a defense “would place a premium on an employer's failure to keep proper records in conformity with his statutory duty.” *Anderson*, 328 U.S. at 687. As a result, the Supreme Court held that in situations such as the present case, the employer’s faulty recordkeeping is not, as Defendant would have this Court believe, a defense justifying summary judgment. Rather, Defendant’s inadequate records merely shift the burden onto Defendant to refute Plaintiffs’ evidence supporting a “just and reasonable” inference that Plaintiffs were underpaid, something SHMC has failed to accomplish.

III. THE SUPERIOR COURT CORRECTLY HELD THAT PLAINTIFFS ARE OWED 15 MINUTES OF PAY FOR A MISSED REST BREAK RESULTING IN OVERTIME HOURS, AND DEFENDANT MAY NOT RE-PURPOSE OTHER PAY TO SATISFY ITS OBLIGATION.

As noted above, it is undisputed that nurses at SHMC are entitled to a 15-minute rest period every four hours pursuant to the collective bargaining agreement between SHMC and WSNA. It is also undisputed that when a nurse misses the rest period, SHMC pays the nurse a total of 15 minutes of straight time for each missed rest break. Breaking it down further, for each five minutes of a missed rest break, the nurse receives

five minutes of pay at her regular rate. For the first ten minutes of the missed rest break, the nurse receives ten minutes of straight time pay at her regular rate. In total, she receives 15 minutes of pay for the 15 minutes of a missed rest break.

The Superior Court held that “ten minutes of nurses’ rest break is at issue here and must be compensated at the appropriate time and one-half rate of a nurse’s regular rate of pay when it results in overtime pursuant to RCW 49.46.130.” Thus, what is at issue here is the first ten minutes of a nurse’s rest break. And, as stated above, the first ten minutes are compensated with ten minutes of straight time pay, *and* the final five minutes of the missed rest break are compensated with five minutes of straight time pay.

However, SHMC contends it should be allowed to double count the last five minutes of pay for each missed rest break as both an additional five minutes of straight time required by its contract and five minutes of overtime required by statute. SHMC’s theory would offset a statutory overtime obligation by converting to its benefit (1) an independently negotiated contract benefit, (2) attributed by the employer to a separate and distinct five minute period, which (3) employees are entitled to above and beyond the statute. Defendant’s theory would

essentially leave the nurses without pay for the final five minutes of the contractually obligated rest break period.

Under Defendant's theory, absent a collective bargaining agreement, nurses, like other employees, would be entitled to five minutes of additional overtime pay per statute. However, where, as here, employees negotiate a 15-minute break, they would lose their right to overtime for that additional time because the employer would be permitted to offset an overtime obligation with wages paid for a different contractual purpose.

Defendant wants to take the same five minutes of pay used to compensate the last five minutes of the 15-minute breaks to satisfy the overtime obligation. However, there is no basis for such a position. The payroll records do not show that any overtime has been paid. Instead, the records show 15 minutes of straight time for a 15 minute missed rest period. SHMC admits that this time is paid as straight time for the 15 minutes of a missed rest break. CP 473.

Defendant has not already paid Plaintiffs the proper overtime rate for a missed 10-minute rest break. What Defendant has done is pay for a 15-minute rest break with 15 minutes of pay. The only way to reach Defendant's conclusion that it has "already paid" the first 10 minutes of overtime at the time and one-half rate is to leave the nurses shorted for the

last five minutes of their missed rest break. Defendant cannot repurpose money it has already paid for another obligation.

Instead, as the Superior Court held, nurses are owed time and one-half for the first 10 minutes of the 15-minute break (the statutory break period), and then the Employer has obligated itself via contract to an additional five minutes of pay when the break is missed. Plaintiffs do not seek enforcement of this contract right, nor did the Superior Court order the overtime rate for the last five minutes of a missed rest break, but SHMC should not be permitted to *breach* its contract and re-purpose pay committed for another purpose under its contract to satisfy its overtime obligation here.

Accepting SHMC's repurposing of the last five minutes of pay (1) defeats the statute's core purpose of ensuring needed rest breaks by eliminating any incentive to comply with the law; (2) violates the state's wage records act by allowing the employer to attribute pay to two separate timer periods; and (3) discriminates against union represented employees by providing they have overtime rights inferior to others.

Defendant relies on a letter from the Department of Labor and Industries in another matter to support its double counting theory, as it did in the Superior Court below. In that letter, the DLI stated:

...when a worker's extended workday resulting from a missed break results in overtime hours, it triggers an employer's duty to pay for the missed rest break at overtime rates.

CP 749.

However, in the letter, DLI also determined that it did not have the authority to ensure that the hospital at issue paid its nurses both for the five minutes of missed rest break time pursuant to the contract *and* the overtime rate for (at least) the first ten minutes of the 15-minute rest period. The Superior Court did not find this part of the letter persuasive and rejected it. In any case, the letter does not speak to the judicial branch's authority to ensure compliance with the law.

IV. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE DOCTRINES OF COLLATERAL ESTOPPEL, RES JUDICATA, AND WAIVER DO NOT APPLY IN THIS WAGE AND HOUR ACTION.

A. Plaintiffs Are Not Collaterally Estopped From Bringing This Action.

Under Washington law, a four-part test is used to determine whether collateral estoppel (also known as "issue preclusion") applies:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

McDaniels v. Carlson, 108 Wn.2d 299, 303, 738 P.2d 254 (1987).

There is no collateral estoppel or issue preclusion here because in order for issue preclusion to apply, the alleged precluded issue must be identical to the issue previously ruled upon. *Frese v. Snohomish County*, 129 Wn. App. 659, 665, 120 P.3d 89, 92 (2005) (no collateral estoppel because issue was not “identical”); *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300, 303 (2002) (“collateral estoppel, also called issue preclusion, bars relitigation of any issue that was *actually litigated* in a prior lawsuit”) (emphasis in original).

In the instant case, the issue is whether the Defendant has failed to comply with the Washington Minimum Wage Act by paying only the regular rate for missed rest breaks that result in overtime hours. The arbitration decision resolving the Union’s 2004 grievance regarding missed rest breaks decided the following issue:

Whether the Employer violated the [Collective Bargaining] Agreement by failing to provide rest periods as required by Article 8.5? If so, what is the appropriate remedy?

CP 478.⁷

SHMC’s assertion that WSNA and SHMC arbitrated the same issue in 2006 is false. While the Union and the Defendant arbitrated the

⁷ According to the arbitration award, Article 8.5 stated: “Rest and Meal Periods. Rest periods of fifteen (15) minutes for each four (4) hour work period shall be provided.” CP 479.

Defendant's obligations pursuant to its collective bargaining agreement, they have never arbitrated the nurses' rights to overtime pay under the Minimum Wage Act.⁸ The arbitration in 2006 addressed a contract right to rest breaks, not a statutory right to missed rest breaks, nor a statutory right to payment at the overtime rate for missed rest breaks. The arbitrator's authority to issue the award, which ordered the Defendant "**to comply with the Agreement and provide the required 15-minute rest breaks,**" CP 491, was entirely based on the parties' contract agreement to submit disputes about the contract to arbitration, and had nothing to do with the Washington Minimum Wage Act, which is the issue here.

B. Res Judicata Does Not Apply Here.

The party asserting the defense of res judicata bears the burden of proof. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). "[T]he res judicata test is a conjunctive one requiring satisfaction of all four elements." *Id.* The doctrine does not apply if the claims are not the same. Causes of action are identical for res judicata if (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4)

⁸ Nor could the Union have done so. See *Ervin v. Columbia Distributing Inc.*, 84 Wn.App. 882, 891, 930 P.2d 947 (1997). Moreover, SHMC's reference to WSNA's counsel's mention of the MWA during the arbitration does not mean that the arbitrator decided the nurses' rights under the MWA.

the actions arise out of the same nucleus of facts. *Id.* (citing *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)). “However, res judicata does not bar claims arising out of different causes of action, or intend ‘to deny the litigant his or her day in court.’” *Hisle, supra*, 151 Wn.2d at 864-865 (citing *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986)).

There is no res judicata here because the 2006 arbitration between WSNA and SHMC did not involve any claim involving the Washington Minimum Wage Act. The arbitration involved a question of contract interpretation, and the arbitrator’s singular focus was on whether SHMC had breached its *contract* with WSNA, not whether it had violated the Minimum Wage Act.

C. The Doctrine Of Waiver Does Not Apply.

SHMC also argues that, because WSNA did not vacate the 2006 arbitration award ordering SHMC to provide 15-minute rest breaks pursuant to the parties’ contract and to pay damages for past missed rest breaks, this represents a “waiver” of its right to vindicate its members’ rights under the Washington Minimum Wage Act. For the same reason that WSNA is not collaterally estopped from pursuing this claim (specifically, the 2006 arbitration between the parties did not involve the Minimum Wage Act, but rather a contract right), it has not “waived” any

right to sue.

In any case, it is well established that a union cannot waive an employee's rights under Washington's MWA. "...[T]he basic statutory rights provided by the Minimum Wage Act may not be waived or altered by a collective bargaining agreement, and...employees are not required to arbitrate these 'nonnegotiable' claims." *Ervin v. Columbia Distributing Inc.*, 84 Wn. App. 882, 891, 930 P.2d 947 (1997) (noting that the MWA "expressly provides that collective bargaining agreements may establish wages, hours, and working conditions only "in excess of the applicable minimum" established by the statute. RCW 49.46.110"). *See also, Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2005) (employers and employees may not bargain away Minimum Wage Act requirements); *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 925 P.2d 212 (1996) (same).

Defendant has not pointed to any case in which a Washington court has adopted the doctrine of waiver in a Minimum Wage Action. The two cases cited by Defendant involve the application of the doctrine to the court's procedural requirements, *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124, 1129 (2000) (holding that "the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day

procedural rules”) or to performance of a contractual duty, *Jones v. Best*, 134 Wn.2d 232, 241, 940 P.2d 1 (1998).

V. THE SUPERIOR COURT CORRECTLY HELD THAT THIS LAWSUIT WAS NOT PREEMPTED.

A. Claims Based On State Law Are Not Preempted By Federal Labor Law.

The purpose of Section 301 is to “mandate resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable consistent resolution of case management disputes.” *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988). Any claim that seeks to challenge an aspect of a collective bargaining agreement must be brought under Section 301. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208-09, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). Section 301 preempts claims “founded directly on rights created by collective bargaining agreements, and also claims substantially dependent upon an analysis of a collective bargaining agreement.” *Lingle*, 486 U.S. at 410 n.10. and noting in the event resolution of a state law claim “involves attention to the same factual considerations as the contractual determination, such parallelism does not mandate preemption.” *Id.* at 408. *See also Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 690-691 (9th Cir. 2001) (“the bare fact that a collective-bargaining agreement will be consulted in the course of

state-law litigation plainly does not require the claim to be extinguished [under the doctrine of preemption]).

When a claim derives from an independent, substantive provision of state law, preemption has no application. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 396, 107 S. Ct. 2425 (1987) (“plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement”). The Supreme Court has specifically explained the difference between claims that are based upon rights created through a CBA and those separate rights that are provided to all individual employees through substantive state or federal laws:

In *Lueck* and [*Lingle*], we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of the claim, as ‘independent’ of rights under the collective-bargaining agreement (and not whether a grievance arising from ‘precisely the same set of facts’ could be pursued) that decides whether a state cause of action may go forward.

Livadas v. Bradshaw, 512 U.S. 107, 117, 114 S. Ct. 2068 (1994)
(internal citations omitted).

In *Livadas*, the Court held that because the plaintiff’s claim required the court only to “look to” the CBA to determine her rate of pay, there was not even a “colorable argument” for preemption, because her claim was “entirely independent of any understanding

embodied in the collective-bargaining agreement between the union and the employer.” *Id.* at 124-25.

B. The Superior Court’s Acknowledgement That There Is A Collective Bargaining Agreement That Establishes The Working Conditions Of The Registered Nurses At Issue Here Does Not Result In Preemption; Courts May “Look To” A CBA To Establish Pertinent Facts.

Washington courts have consistently held that section 301 of the Labor Management Relations Act (“LMRA”) does not preempt Washington Minimum Wage Act claims. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 864-865, 93 P.3d 108, 114 (2004) (citing *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 839 P.2d 314 (1992) for the proposition that “section 301 should not preempt nonnegotiable *or* independent negotiable claims”). In fact, “preemption is the exception, not the rule in Washington” and there is a strong presumption against finding preemption.” *Hisle*, 151 Wn.2d at 863-864.

As the *Hisle* Court explained, “Section 301 preemption occurs where the state claim “is inextricably intertwined with consideration of the terms of the labor contract” and application of state law “requires the interpretation of a collective-bargaining agreement.” *Id.* at 863 (citing *Allis-Chalmers Corp.*, *supra*, 471 U.S. at 213 (1985). “A state statutory or

common law claim is independent of the CBA - and therefore should not be preempted by section 301 - if it could be asserted *without* reliance on an employment contract.” *Ervin v. Columbia Distributing Inc.*, 84 Wn. App. 882, 889, 930 P.2d 947 (1997) (emphasis in original) (holding that because the Minimum Wage Act rights the employee asserted “are independent of the agreement or the employer's practices and procedures, and resolution of the statutory claim will depend on the agreement only to determine the appropriate regular rate of pay,” the claim was not preempted).

The Superior Court below looked to the parties’ CBA to confirm the length and type of rest break provided by SHMC, as well as the rate of pay for the nurses for purposes of damage calculation. This did not require interpretation of the CBA (and, in fact, SHMC admitted the length of a rest break in its Answer). Just as a court may “look to” a CBA to determine the rate of pay, as in *Lingle, supra*, 486 U.S. at fn 12, without preemption resulting, the Superior Court appropriately looked to the CBA to determine that the only rest breaks for nurses at SHMC were 15-minute block breaks. Such a look does not result in preemption.

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C. A Federal Court Has Already Determined That This Matter Was Not Preempted.

A federal district court judge has already rejected Defendant's argument that this lawsuit is preempted by Section 301. On February 8, 2008, the Defendant sought to remove this case to Federal Court on precisely the same grounds it now argues that this case is preempted. The Eastern District Federal Court remanded the case on May 7, 2008 and held:

The Court's inquiry into whether the Association's claims are preempted by the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), begins with asking whether "the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA." *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). The Association is claiming that Sacred Heart violated the Washington Minimum Wage Act (MWA), RCW 49.46.130, by failing to pay nurses one and one-half time their regular rate of pay for missed required rest breaks. The Court concludes the Association's claims are based on a right conferred by the MWA, not the CBA.

Accordingly, the Court turns to the second analytical step, which is whether the Association's MWA-based claims are "substantially dependant" on an analysis of the CBA. *See Burnside*, 491 F.3d at 1059-60. The Court concludes the CBA need not be interpreted in order to determine whether Sacred Heart complied with the MWA. In the event that the Association is successful and damages need to be calculated, *reference* to the CBA will be required, but there is no indication that determining a particular nurse's wage rate will require *interpretation* of the CBA. *See Burnside*, 491 F.3d at 1074. Accordingly, even though the state court may need to refer to the CBA in order to determine

damages, the Court concludes using the CBA in this manner does not result in LMRA preemption. *See id.*

CP 249-250.

VI. PLAINTIFFS ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES AND COSTS BECAUSE THE DEFENDANT VIOLATED THE MINIMUM WAGE ACT.

Plaintiffs are entitled to recover their attorneys' fees in this case under RCW 49.48.030, which states that reasonable attorney fees "shall be assessed" against an employer "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him." The Minimum Wage Act at RCW 49.46.090 also provides for fees and costs when an employer pays an employee less than what is owed. It is well established under Washington law that when a labor organization is successful in recovering judgment for wages or salary owed to its represented employees, it is a "person" entitled to reimbursement under this provision. *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 44-46, 42 P.3d 1265 (2002).

As described in Section 1 pp. 7-9, *supra*, SHMC's argument that the damages Plaintiffs seek are not wages is misplaced. In *Wingert v. Yellow Freight Systems, Inc.* 146 Wn.2d 841, 850-51, 50 P.3d 256 (2005), the Court found that employees who had been denied their 10 minute break periods during overtime had a cause of action for unpaid wages due

to the additional work time they had provided to their employer. The plaintiff nurses in this case were denied their wages for missed rest breaks that resulted in overtime hours worked, violating the Minimum Wage Act, and thus the Superior Court properly assessed attorney's fees and costs.⁹

VII. PLAINTIFFS ARE ENTITLED TO DOUBLE DAMAGES BECAUSE THERE WAS NO BONE FIDA DISPUTE ABOUT SHMC'S OBLIGATION UNDER THE MINIMUM WAGE ACT.

Plaintiff nurses are entitled to double damages because SHMC's failure to pay them overtime for their missed rest breaks was willful. RCW 49.52.050(2) prohibits an employer from "willfully and with intent to deprive the employee of any part of his or her wages...pay[ing] any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance or contract," and RCW 49.52.070 entitles employees who were deprived of wages in violation of RCW 49.52.050(2) to recover "twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees."

⁹ In any case, Washington's Supreme Court has held that RCW 49.48.030 "has been construed to include awards that were not for wages for work actually performed, but rather, **money due by reason of employment.**" *Gaglidari v. Denny's Restaurants*, 117 Wn.2d 426, 449, 815 P.2d 1362 (1991) (emphasis added). Thus, an award of reasonable attorneys' fees and expenses is appropriate and necessary in this case, regardless of how the damage award is characterized, as the money owed is undisputedly "due by reason of employment."

Under RCW 49.52.070, “[w]illful means ‘merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.’” *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009), *as corrected* (Nov. 09, 2009), *reconsideration denied* (Nov. 12, 2009) (quoting *Schilling v. Radio Holdings*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998)). Where an employer fails to pay wages owed, only two instances negate a finding of willfulness: 1) the employer was careless or erred in failing to pay, or 2) “a ‘bona fide’ dispute existed between the employer and employee regarding the payment of wages.” *Id.*

Defendant does not argue that its failure to pay the nurses overtime for their missed rest breaks was the result of carelessness or error. And, contrary to Defendant’s argument, its failure to pay was not the result of bona fide dispute, which requires “a ‘fairly debatable’ dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid.” *Schilling, supra*, 136 Wn.2d at 161 (quoting *Brandt v. Impero*, 1 Wn. App. 678, 680-81, 463 P.2d 197 (1969)). There is no dispute here about whether an employment relationship exists. However, SHMC appears to argue that because it is presenting a contrary interpretation of the law, that alone means there is a bona fide dispute. This is not the case.

In *Department of Labor and Industries v. Overnite Transp. Co.*, 67 Wn. App. 24, 834 P.2d 638 (1992), the Court held that there was not a bona fide dispute when the employer attempted to argue that the federal cases the Department of Labor and Industries relied upon for its finding that the Washington Minimum Wage Act was not preempted by the Federal Motor Carrier Act were wrongly decided. *Id.* at 35-36. The Court stated that: “absent meritorious argument to that effect and absent citation to authority which supports its view, [the employer's argument] does not amount to a bona fide dispute which justifies invoking the **narrow exception** to the statute providing for double damages.” *Id.* at 36 (emphasis added) (*see also Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005) rejecting employer’s argument that there was a bona fide dispute over whether a signing bonus was an expense, holding that “[t]he fact that [the employer] contrived a legal argument that the bonus was actually an ‘expense’ does not make it a bona fide dispute.”)

In this case SHMC puts forward an alternative argument for how rest breaks not taken should be considered for the purpose of calculating overtime pay but it does not provide authority to support this view, and therefore its attempted legal argument does not amount to the existence of a bona fide dispute over the amount of wages that should be paid. Thus,

Defendant has willfully deprived the plaintiff nurses of overtime they are owed, and the Plaintiffs are entitled to double damages under RCW 49.52.070. Finally, the fact that SHMC's duplicative motions caused "volumes of briefing in this case," see Brief of Appellant at p. 27, does not convert this issue into a "bone fida." If that was indeed a factor, an employer could evade double damages merely by running up the cost of litigation by filing duplicative briefs.

**VIII. THE SUPERIOR COURT CORRECTLY HELD THAT
WSNA HAS STANDING TO PURSUE UNPAID
WAGES FOR ITS MEMBERS.**

It is well established in Washington State that labor unions may sue for damages on behalf of their members, if certain conditions are met. *International Association of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002) ("*Firefighters*"). In *Firefighters*, the Court held:

An association has standing to bring suit on behalf of its members when the following criteria are satisfied: (1) the members of the organization would otherwise 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 claim asserted nor relief requested requires the participation of the organization's individual members.

Id. at 213-214.

The Court explained that to deny the union standing would "likely burden individual members of the employee association economically and would almost certainly burden our courts with an increased number of

lawsuits arising out of identical facts. In short, we see little sense in an ironclad rule that has the effect of denying relief to members of an association based upon an overly technical application of the standing rules.” *Id.* at 216.

SHMC appears to concede that WSNA meets the first two prongs of the standing test, and disputes only the third prong regarding the recovery of damages. The *Firefighters* Court held that the third prong of the associational test (that neither “the claim asserted nor relief requested requires the participation of the organization’s individual members”) is prudential in nature, rather than constitutional, and “judicially self-imposed for administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.” *Firefighters, supra*, 146 Wn.2d at 215. This prong of the test is satisfied if the damages sought on behalf of an association’s members are “certain, easily ascertainable, and within the knowledge of the defendant.” *Id.* at 216.

Here, the damages at issue are certain, easily ascertainable, and within the knowledge of the Defendant. WSNA’s expert, Dr. Munson, determined the damages based on data provided by the Defendant from its own payroll records. SHMC challenges WSNA’s reliance on SHMC’s own payroll records to support its argument that individual nurses’

testimonies are necessary to determine the appropriate damages. This argument is erroneous for the reasons described in Section II at pp. 11-13, *supra*. At its core, SHMC's argument fails because the damages were in fact determined on the basis of documents within SHMC's possession, and not on the basis of individual testimony by every nurse. *See also Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 342-343, 97 S. Ct. 2434 (1977) (association may be appropriate representative of its members "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause") (cited with approval in *Firefighters, supra*, 146 Wn.2d at 214).

In *Teamsters Local Union No. 117 v. Dept. of Corrections*, 145 Wn. App. 507, 187 P.3d 754 (2008), the court made clear that a union had standing to recover unpaid wages on behalf of its members. The court explained: because "...the calculation of damages does not require individual determination and the liability issues, though of a factual nature, are common to all" and because "[c]alculating the wages will then be nothing more than a mathematical exercise []," the union could properly seek damages for its members. *Id.* at 513-514.

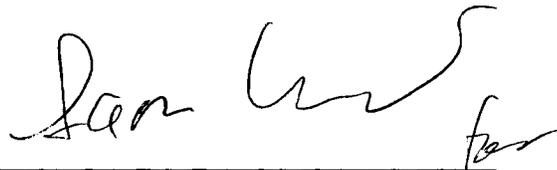
Likewise, in the instant matter, the liability issues are common to all nurses represented by WSNA, and damages were determined with a

simple mathematical exercise using information within the control of SHMC.

CONCLUSION

For the foregoing reasons, Defendant's request for relief should be denied.

Respectfully submitted this 2nd day of February, 2011.

A handwritten signature in black ink, appearing to read "Carson Glickman-Flora". The signature is written in a cursive style with a large, sweeping flourish at the end.

Carson Glickman-Flora, WSBA #37608
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2011, I caused the original Brief of Respondent, and a copy thereof, to be sent via UPS

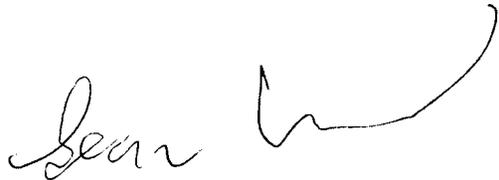
Overnight mail to:

Clerk of the Court
Washington State Court of Appeals, Division III
500 N Cedar Street
Spokane, WA 99201

And a true and correct copy of the same to be sent via UPS Overnight mail

to:

Paula L. Lehmann
Michael J. Killeen
Davis Wright Tremaine LLP
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Seattle, WA 98101-3045

A handwritten signature in cursive script, appearing to read "Sean Leonard", written in black ink. The signature is positioned above a horizontal line.

Sean Leonard, WSBA # 42871