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NO. 94592-6

SUPREME COURT OF THE
STATE OF WASHINGTON

No. 33556-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly-situated registered nurses employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center,
AND JOHN SERLE, individually and in his official capacity
as an agent and officer of Lourdes Medical Center,

Respondents.

**SUPPLEMENTAL BRIEF OF PETITIONERS
JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES
(collectively the “Nurses”)**

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I. The Class Vehicle is Superior

A. The COA's superiority analysis is reversible error.

The Court of Appeals (“COA”) found that “the trial court ruled in favor of the plaintiff Nurses in all but one CR 23 requirement.” (Appx.35.) Thus, the Nurses satisfied numerosity, commonality, typicality, and adequacy of representation under CR 23(a) as a matter of law. The COA based its affirmance solely on CR 23(b)(3)'s *superiority* element, while implicitly conceding common-issue predominance. (Appx.39-40.)

The Superior Court and the COA erroneously focused on the individualized proof required to prove damages in a non-class-action setting—*i.e.*, whether any nurse got a break on any given day—which tainted its superiority analysis. (*E.g.*, Appx.40.) The COA—*after erroneously reviewing the evidence in a light most favorable to the Hospital*—affirmed, reasoning “the duties and experiences performed by one nurse, even as to nurses working in one hospital department, cannot be generalized,” without explaining how this relates to the superiority element. (Appx.41.) Moreover, neither the Superior Court nor the COA explained how individualized “duties and experiences of the nurses” relate to any liability element of the Nurses’ claims, *i.e.*, whether the Hospital’s: (1) uniform no-rest period-scheduling policy complies with *Brady* and whether requiring nurses to take intermittent-breaks while they are still responsible

for all aspects of patient care is consistent with the nature of the Nurse's work at this acute care hospital¹; (2) uniform non-payment-for-missed-rest-periods policy complies with *Yellow Freight*; (3) uniform meal-period-classification policy misclassified the nurses as having an "off-duty" meal period; and whether the Hospital's (4) uniform no-second-meal-period policy for twelve-hour shift nurses and practice violated Washington law regarding meal periods. Focusing on legally irrelevant operational differences and damages rather than the uniformity of the Hospital's illegal policies is inconsistent with CR 23's requirements and liberal enforcement of workers'-protection laws.

CR 23(b)(3)'s superiority element focuses on a "comparison of available alternatives" to class treatment, "case manageability," "conserving time, effort and expense," "providing a forum for small claimants," and "detering illegal activities." (Appx.38-39.) Each of the superiority factors favor a class here. The COA committed reversible error when it held *small-claims court* was superior to a class. (Appx.39.)

The COA erroneously failed to hold that the small damage amount for each nurse is a strong factor for certification, especially since the issues

¹ WAC 296-126-092(4) & (5) provide that rest periods must be scheduled unless it is shown that intermittent rest periods are consistent with the nature of the work. Absent such a showing, subsection (4) requires a scheduled 10-minute-block rest period.

are complex. Litigating these complex and important public-safety-impacting-wage-and-hour issues in hundreds of individual small-claims court cases is not superior to resolving the common issues once in Superior Court. Small claims court does not have adequate discovery procedures. The deterrence-of-illegal-activity factor favors a class because the class vehicle alone will ensure the Hospital does not work its 12-hour shift nurses straight through their shifts without rest and meal periods and compensates them appropriately when breaks are missed. Merely filing this putative class action caused this Hospital to uniformly change its rest-period-tracking-and-payment procedures, which the COA described as a “substantial, systemic victory.” (Appx.37.) Frankly, the small-claims-court holding implies the COA viewed the Nurses’ statutory wage-and-working condition rights as unimportant or trivial, which is in direct conflict with the teachings of *Demetrio* and *Sacred Heart*, i.e., that meal-and-rest period obligations implicate important public safety issues and the policy of ensuring employers pay all wages owed.²

B. The case law shows the class vehicle is superior; this is not a nationwide class and the illegal policies are common.

In *Schnall v. ATT Wireless Services, Inc.*, this Court—in a divided

² See also *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 830, 991 P.2d 1126 (2000); *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51-52, 925 P.2d 212 (1996).

decision—affirmed the denial of a *nationwide* class to remedy a wireless carrier’s alleged illegal policy of misleading “consumers when it billed them for a charge that was not included in advertised monthly rates and was not described clearly in billing statements.”³ This Court held that—*in a nationwide class*—it is “incumbent upon class counsel to prove to the court that there are no significant differences in the various state laws, or if there are variations, that they can be managed by the trial court.”⁴ There “is simply no efficiency in asking a trial judge to manage the laws of 50 different states” in varied factual scenarios.⁵

In contrast, the present case is not *even a putative statewide class*. None of the problems *Schnall* identified exist for nurses in *one* Hospital with *one* set of break policies who are united by *one* collective-bargaining agreement that uniformly governs most of the terms and conditions of the Nurses’ employment under *one* state’s law. And no superiority factor renders any non-class-action procedure or forum superior.⁶

Similarly, the COA relied heavily on a federal case from Ohio,

³ See *Schnall v. ATT Wireless Services, Inc.*, 171 Wn.2d 260, 265, 259 P.3d 129 (2011).

⁴ See *id.* at 270.

⁵ See *id.* at 276.

⁶ See, e.g., *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514-15 (9th Cir. 2013) (remand with instructions to certify a class where district court denied wage-and-hour class certification based on superiority prong; the plaintiffs alleged common policies that resulted in wage violations and focusing on individual damages is reversible error).

Creely v. HCR ManorCare, Inc., which is distinguishable from this case and directly supports the *opposite* holding reached by the COA if one examines its facts and procedural posture.⁷ (Appx.40.) Again, the federal court in *Creely* initially certified as a *nationwide* class a group of nurses from different hospitals in different states. The *Creely* class was *decertified* after *discovery* was complete because the allegations of *bad training* surrounding an *indisputably lawful* employer policy failed to show a uniform national illegal policy. Discovery showed that the bad training lead only to evidence of *sporadic* and *decentralized* wage-and-hour violations in different hospitals nationwide and that there was no uniform illegal policy.⁸

The facts and procedural posture of *Creely* are not comparable to this case, as the Nurses here: (1) are alleging and have proffered common evidence showing the Hospital maintained *numerous* uniform policies that deprive them of legally mandated rest and meal periods; (2) work in the same facility; and (3) have not had the opportunity to conduct post-certification class discovery. Even the *Creely* case was certified initially because the “first stage review is ‘fairly lenient,’ requiring only that

⁷ *Creely v. HCR ManorCare, Inc.*, 920 F. Supp. 2d 846 (N.D. Ohio 2013).

⁸ *See id.* at 849-50 (“Plaintiffs, non-exempt hourly workers at *HCR facilities across the country*, allege they were denied overtime wages in violation of the FLSA’s minimum wage requirements due to Defendant’s implementation of the auto-deduct policy. Plaintiffs do not argue the auto-deduct policy is illegal, nor do they argue Defendant had an unofficial ‘policy to violate’ its lawful policy.” [emphasis added, record cites omitted]).

plaintiffs show a colorable basis for their claim that a class of similarly situated plaintiffs exists.”⁹ The COA committed reversible error here when it construed the evidence against the Nurses and found no superiority.

II. The Hospital’s Uniform Illegal Policies

A. The Hospital had interrelated, illegal rest-period policies.

On June 29, 2017, this Court issued its decision in *Brady v. Autozone Stores, Inc.*¹⁰ This Court approved of the analysis in *Pellino v. Brink’s* that employers have an affirmative duty to provide breaks and to ensure breaks policies conform to state law. *Brink’s* “ultimately provides greater protection for workers,” than the *Brinker Restaurant Corp.* decision out of California.¹¹ In *Brink’s*, the Court affirmed that worker-protection laws and CR 23 must be interpreted consistent with their remedial purpose and with Washington’s traditional role as a pioneer in protecting worker rights. The Superior Court and the COA erred as a matter of law when they failed to properly interpret the statutes and rules consistent with these principles.

Brady holds that: (1) employees satisfy their *prima facie* case by providing evidence that they missed breaks; (2) that the burden then shifts to the Employer to show breaks were given; and (3) that this is not an

⁹ See *id.* at 851; see also *Edwards v. First American Corp.*, 798 F.3d 1172, 1179-84 (9th Cir. 2015) (reversing denial of nationwide class certification as an abuse of discretion).

¹⁰ *Brady v. Autozone Stores, Inc.*, 188 Wn. 2d 576, 397 P.3d 120 (2017).

¹¹ See *id.* at 123 (Headnote 12).

onerous burden if the employer is complying with its record keeping obligation. The argument the Hospital raised in its Answer to the Petition for Discretionary Review on pages 4, 7-8 and 16, wherein it argued that the denial of class certification was proper because there was “no evidence of an illegal policy,” is also inconsistent with *Brady* and *Brinks*. The Hospital implicitly argued that the law authorized it to allow “individual factors” including “patient flow in departments” to “influence” whether the nurses receive their lawfully mandated rest periods.¹² Thus, the Hospital simply leaves it up to the Nurses to find a way to take breaks. But *Brady*’s holding makes this policy and practice illegal because the Hospital admitted its policy and practice fails to ensure Nurses get breaks.¹³ In other words, the Hospital’s admission that it “allows” “individual factors,”—*like whether the Hospital or a specific department is busy*—to determine whether a nurse receives her lawfully mandated breaks and meal periods is a uniform unlawful policy sufficient for class certification under CR 23.¹⁴

¹² See also COA Opinion, Appx.13-25. The evidence presented by the Hospital as summarized by the COA *in a light most favorable to the Hospital* shows that the Hospital does not comply with its *Brady* obligations as a matter of official custom and practice.

¹³ See *Brady*, 397 P.3d at 123 (“*Pellino* indeed states that, ‘the plain language of WAC 296-126-092 imposes a mandatory obligation on the employer,’ and that ‘employers have a duty to ... ensure the breaks comply with the requirements of WAC 296-126-092.’”).

¹⁴ See *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 658, 355 P.2d 258 (2015) (“It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time. A workplace culture that encourages employees to skip

The Hospital's illegal policy of failing to ensure Nurses get breaks results from the Hospital's uniform practice of failing to schedule rest breaks and forcing nurses to take intermittent breaks without relieving them of their patient assignments. This uniform practice requires nurses to both work and take breaks at the same time.¹⁵

The Nurses showed in their COA Opening Brief that: (1) the Hospital's meals-and-breaks policies were all policies of general application and that there are no department-level policies on meals and breaks (Pet. Br. 9-10); (2) the Hospital's actual, written policy that was supposed to apply to all nurses required it to provide scheduled, 15-minute block breaks to every nurse in every department; (Pet. Br. 14-25); (3) the Hospital never actually scheduled block breaks for nurses in any department (with the possible exception of the Operating Room) and it did not have any system to relieve nurses of patient assignment to take breaks when the Hospital was busy (Pet. Br. 19-20); (4) a nurse must be relieved of patient assignment to be relieved of duty as a matter of law and as a standard of

breaks violates WAC 296-126-092 because it deprives employees of the benefit of a rest break 'on the employer's time.'").

¹⁵ Nurses who accept patient assignment are responsible as a matter of law and policy for the care of those patients—whatever it entails and whenever it is necessary. They are subject to discipline both as an employee and as a licensed professional, if they do not deliver the requisite care until they transfer patient assignment to another qualified nurse. *See* WAC 246-840-710(5)(c) and Department of Health-Nursing Care Quality Assurance Commission-Interpretive Statement-NCIS 1.0; *see also* CP347-351 (testimony from the Hospital's Nursing Director regarding nursing standards and the nursing handoff).

nursing (Pet. Br. 19-24); and (5) a court must determine whether intermittent breaks are appropriate based on the “nature of the work,” for that position and not on individual circumstances. (Pet. Br. 55-56.)

In its COA Response, the Hospital recognized that the Nurses’ “theory is that once an RN has a patient assigned, the nature of work is wholly contradictory to taking a break or meal period¹⁶ until responsibility for a patient is sufficiently transferred to another, even if the patients are all sleeping and need no active care.” (Res. Br. 35-36.) This issue should be decided as a class issue because it is common to all nurses working at this acute care hospital, *i.e.*, what type of break is lawfully required when the nature of the work requires the nurse to accept patient assignment responsibilities. Stated another way, the question of whether an RN who is required to accept patient assignment at this acute care hospital is entitled to scheduled block breaks under the WAC is indisputably a class issue.

Moreover, the COA accepted as a matter of *undisputed fact* that the Kronos system—the Hospital’s computer system for tracking hours work—“did not record rest periods or missed rest periods.” (Appx.5.) The COA specifically found that before the Hospital made changes in response to this lawsuit its policy did not afford nurses the opportunity to report missed rest

¹⁶ The Hospital misstates Petitioners’ position to the extent that “intermittent breaks” relate solely to rest periods and not meal periods.

period time and the Hospital had no knowledge of paying a nurse additional compensation for missed rest period time:

Lourdes maintained no policy that directed nurses to report missed rest breaks to the hospital payroll office and had no formal process for a nurse to report a missed break. Before March 2013 [after the Nurses filed suit], the hospital had no knowledge of any nurse being paid for a missed rest period, maintained no policy that provided for payment for a missed rest break, and never informed employees of the right to receive additional payment for a missed rest break.¹⁷

Hence, the Hospital uniformly failed to pay Nurses for the times when it admits patient flow prevented nurses in every department from taking a mandatory rest period, pursuant to its illegal policy of failing to schedule breaks and relieve nurses of duty for their mandatory rest periods.¹⁸ Thus, the Hospital indisputably: (1) has an illegal policy or practice of not ensuring that Nurses are relieved of their duties to receive the required meal-and-rest periods under the requirements of *Brady*, and, *in addition*; (2) has an illegal policy or practice of failing to pay nurses for all hours worked when the nurses inevitably miss their breaks under the first illegal policy under *Demetrio*; *Sacred Heart*, and *Wingert*. The Superior Court and the

¹⁷ Appx.5.

¹⁸ See, e.g., *Demetrio*, 183 Wn.2d at 657-59; *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 832-33, 287 P.3d 516 (2012); *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 851-52, 50 P.3d 256 (2002).

COA erroneously focused on legally irrelevant operational differences rather than the uniform illegal policies.

The only “element” of any claim asserted by the Nurses that *could* need individual assessment is the extent of damages (back pay) for missed rest periods.¹⁹ The Employer in *Brink’s* made the exact same defensive arguments to certification, *i.e.*: “whether to take breaks varied from employee to employee,” the “drivers and messengers had the discretion to decide when to take breaks,” and that there was no uniform policy governing when or how drivers took breaks.²⁰ The Division I Court of Appeals rejected the argument and correctly determined that the proper focus is on the common illegal policy, *i.e.*, whether “class members are entitled to compensation for . . . missed rest and meal breaks under Washington law,” and not these damage-related issues.²¹ The COA here failed to adequately explain why this case presents superiority or management problems, when nearly identical claims and theories were successfully tried to a class judgment in *Brink’s*.

¹⁹ See, e.g., *In re Monumental Life Ins. Co.*, 365 F.3d 408, 415-16 (5th Cir. 2004) (reversing decision to deny class certification because “Class certification centers on the defendants’ alleged unlawful conduct, not on individual injury,” and even where, as the district court ruled, “individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy” because the defendant engaged in a pattern of discrimination.)

²⁰ See *Pellino v. Brink’s, Inc.*, 164 Wn. App. 668, 683-85, 267 P.3d 383 (2011).

²¹ See *id.*

The COA Opinion also conflicts with the recent March 27, 2017 Division I Opinion in *Hill v. Garda CL Northwest, Inc.*, which affirmed a wage-and-hour judgment involving 500 employees from different departments but with similar issues.²² Although the Division I Court of Appeals reversed some of the damages, it made short work out of a non-superiority/manageability argument by affirming the finding that:

The single common and overriding issue presented is whether Drivers and Messengers are allowed legally sufficient rest or meal breaks and whether Drivers and Messengers are entitled to compensation for missed meal periods and rest breaks. The claims of individual class members are likely valued at a few thousand dollars each and adjudicating the claims presented on a class basis will be manageable; Class adjudication of common issues is therefore superior.²³

Moreover, in *Demetrio*, *Sacred Heart*, and *Yellow Freight*, this Court has consistently treated a missed rest period as “hours worked” that must be tracked and compensated.²⁴ Neither the Court of Appeals nor the trial court explained how alleged “operational differences” and “different

²² See *Hill v. Garda CL Northwest, Inc.*, 198 Wn. App. 326, 341, 394 P.3d 390 (2017) (“We conclude that the trial court’s findings were sufficient to show that a question common to the Plaintiffs predominated. Additionally, the trial court estimated the value of each individual’s claim and concluded that the action would be manageable as a class action. These findings, together with the court’s findings that there were likely hundreds of class members and that a common question predominated, are adequate to show the court’s reasons for determining that a class action was superior to individual actions.”).

²³ See *id.* (pinpoint pagination unavailable at time of filing) (emphasis added).

²⁴ See e.g., *Sacred Heart*, 175 Wn.2d at 826.

management styles” between nursing departments creates a litigation management-problem that would preclude class treatment in resolving the Hospital’s failure—and outright refusal—to pay *any* nurse for *any* missed rest period in *any* department during the back-pay period. The Hospital uniformly treated all nurses the same way when he or she missed a rest period regardless of department: it always failed to pay them. The other class issues are similarly uniform. The only arguably individual question for each nurse regarding missed meal-and-rest periods is how much the Hospital owes in back pay, which, under this Court’s decision in *Moore*, isn’t a permissible reason to deny certification.²⁵ After class discovery, claim forms, representative-testimony samples, or expert testimony, can be used to calculate damages.²⁶

Finally, the COA Opinion is also contrary to the *Tyson Foods* decision, in which the U.S. Supreme Court recently rejected a similar operational-differences defense in a “donning-and-doffing” wage-and-hour case. The U.S. Supreme Court held class certification proper for largely the same reasons urged here: (1) there were important common questions applicable to the class—regardless of any operational difference between members; (2) representative testimony was permissible to establish both

²⁵ See *Moore v. Health Care Authority*, 181 Wn.2d 299, 305-15, 332 P.3d 461 (2014).

²⁶ See *id.*

liability on a common practice and estimated, class-wide damages; (3) representative testimony was appropriate when the employer violated both its recordkeeping and payment obligations to further the remedial purpose of the FLSA under principles articulated in *Anderson v. Mt. Clemens Pottery Co.*²⁷; and (4) it is appropriate to bifurcate, if necessary, liability and damages issues after resolving common issues.²⁸

B. The Hospital had an illegal policy of improperly denying 12-hour shift nurses a second meal period.

The Nurses showed in their Opening Brief that common evidence established that the Hospital routinely and systematically denied 12-hour shift nurses a second meal period as a matter of policy and practice. (Pet. Br. 25-30, 59-62.) Specifically, the Hospital as a matter of routine practice and policy deprived nurses of a 12-hour meal period, as was conceded by the Hospital's CR 30(b)(6) representative. (CP345-346, Clapp. Dep. 17-18, Ins. 24-25, 1.) In response, the Hospital claims that because there is some evidence that some nurses, on some occasions, had no duties because the Hospital had no patients, and that during this no-patient downtime they "could" theoretically take the required second meal period, that Judge Spanner was within his rights to deny the class on this issue. (Res. Br. 43-

²⁷ See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

²⁸ See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1044-50 (2016).

45.) Yet, the fact that there were occasionally no patients in any given department does not absolve the Hospital of class liability for systematically depriving the 12-hour shift nurses of a second meal period and failing to pay them when they were so deprived. Again, this Court held that the regulations must be interpreted to further its purpose of promoting rest and meal periods.²⁹ Systematically denying nurses a lawfully required meal periods unless the Hospital is empty of patients does not comply with the law or promote the purpose of the meals-and-breaks laws.

C. The Hospital maintained a uniform policy and practice of misclassifying every nurse as having a presumptively unpaid, off-duty lunch.

The Nurses showed in their Opening Brief that the Nurses were “subject to recall” as a matter of course and *on duty* during their first meal period, but that they were subject to an automatic-meal deduction and were not given a paid first meal period as a matter of uniform policy of general application. (Pet. Br. 31, 61-62.)³⁰ The Hospital’s policy required nurses to “clock out” only if they left the premises after receiving special permission to clock out. (*E.g.*, CP746 at ¶9.) No evidence contradicts the fact the nurses received only an unpaid first meal period and that they were

²⁹ See *Demetrio*, 183 Wn. 2d at 658 (citations omitted).

³⁰ The Kronos system automatically subtracted 30 minutes of time from the nurses’ hours worked for the day unless specifically overridden by the nurse claiming a missed meal period.

“on call” and “subject to recall” while they ate lunch as a matter of course. Every nurse was misclassified as being “off duty” and not “subject to recall” during the first meal period and is entitled to compensation.

D. The Hospital’s “automatic-meal-deduction” policy was otherwise illegal.

The Nurses showed in their Opening Brief that the Hospital’s “automatic-meal-deduction” policy was illegal because an employee who works unauthorized overtime is subject to discipline under the Hospital’s official written policy, and hitting the “cancel deduction” button for a missed meal period results in overtime that can subject a nurse to discipline if it is unauthorized. (Pet. Br. 9-11, 31-32, 62-63.) The Hospital did not fairly address this issue in their COA brief or dispute that there is a uniform policy that would punish employees for hitting the “cancel deduct” button if doing so would push them into unauthorized overtime. Judge Spanner did not make any findings that would preclude this claim from proceeding on a class basis, and, indeed, ruled from the bench that determining liability on a class-wide basis for missed breaks requires only “some evidence” that there is a “policy or culture” that breaks are “prohibited or discouraged or that there won’t be compensation.” (RP180-181.) There is no basis in the record or reason contained in the Hospital’s Opening Brief that would preclude class certification of this issue.

III. The Other Reversible Errors

- A. **The COA committed reversible error when it “assumed” the trial court resolved evidentiary conflicts in a light most favorable to the Hospital and then “deferred” to those purported findings even though they were not articulated in the trial court’s class-certification order.**

The COA abdicated its legal-review obligations by deferring to *implied findings* that the trial court simply did not make. Although the standard of review is “abuse of discretion,” whether CR 23’s requirements are met is either a question of law or a mixed question of law and fact. Mixed questions of law and fact are generally reviewed *de novo*, *except as to fact findings*.³¹ Thus, cases outside this jurisdiction—consistent with *Oda v. State*—recognize that “abuse of discretion” in the CR 23 context is a “chameleon phrase” and can be “misleading” when reviewing a class-certification denial, because the requirements of CR 23 are a matter of law.³² Absent specific findings or a more rigorous analysis than simply reciting CR 23’s requirements, the trial court should be granted minimal deference.³³

³¹ See, e.g., *Tapper v. Employment Sec. Dept.*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993); *Pasco v. PERC*, 119 Wn.2d 504, 506–508, 833 P.2d 381 (1992).

³² See, e.g., *In re Flag Telecom Holdings, Ltd. Securities Litigation*, 574 F.3d 29, 34 (2nd Cir. 2009); *Tardiff v. Knox County*, 365 F.3d 1, 4 (1st Cir. 2004); see also *In re Monumental Life Ins. Co.*, 365 F.3d at 415-16.

³³ See, e.g., *Edwards*, 798 F.3d at 1179-84 (“We review the district court’s determination of class certification for abuse of discretion and consider “whether the district court correctly selected and applied Rule 23’s criteria. . . . The underlying legal questions, however, are reviewed *de novo*, and ‘any error of law on which a certification order rests is deemed a *per se* abuse of discretion.’”).

Here, to affirm the trial court's decision, the COA determined that the Superior Court necessarily "*must have*" resolved "*conflicts in the evidence*" against the Nurses that "*would have included some determination of the credibility*" of the evidence presented. (Appx.32.) *The COA then held that it was required to construe all the evidence in the record against the Nurses, even though it admitted that no case, rule, or statute expressly compelled the holding, to grant these "implied" findings deference.* (Appx.30-32, 38-39.) Construing all the evidence against the Nurses in the absence of specific findings is directly contrary to the rule that courts are required to err in favor of certifying a class since the class is always subject to the trial court's later modification or decertification as the case develops. The COA erroneously analogized a CR 23 determination to a bench trial, where the trial court is required to make specific findings of fact under CR 52(a)(1) after taking evidence subject to cross-examination. This analogy is severely flawed because the trial court did not make any actual fact-findings or conduct an evidentiary hearing or even purport to resolve credibility issues.³⁴ (Appx.29-31.). No authority suggests that the CR 23 ruling in this case is legally analogous to a bench trial on the merits after a final judgment, where the policies of judgment-finality are in play.

³⁴ See, e.g., *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (a court may abuse its discretion by resolving fact issues in affidavits without an evidentiary hearing).

B. The trial court committed reversible error by requiring *the Nurses* to move for summary judgment before ruling on the motion for class certification.

At the end of the first class-certification hearing, the Superior Court indicated that because of the “complexity of all this,” it was not going to rule on whether class certification was appropriate. (RP122.) The Superior Court was not “comfortable” with the underlying meals-and-breaks law and instructed *the Nurses, not the Hospital*, to file a series of plaintiffs’ summary-judgment motions to help the Superior Court understand the legal issues and controlling law. (RP123-129, RP137.) The Nurses complied with the trial court’s directive and filed three summary-judgment motions, while the Hospital filed one cross-motion. The Superior Court made numerous legal rulings in conjunction with these motions that impacted absent class members pre-class certification. (Appx.57-63.) The COA also expressly endorsed this procedure. (Appx.25-27.) This procedure is flatly inconsistent with protecting the absent-class members’ due-process rights through the notice-and-protective order provisions of CR 23(c)-(e) and the rule prohibiting merits-determinations pre-class certification.³⁵

³⁵ See, e.g., *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) (“Due process requires that an absent class member’s right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations.”).

C. The COA committed reversible error when it held that this case cannot be certified as a hybrid CR 23(b)(1) or (b)(2) class.

The trial court and the COA refused to certify a class under CR 23(b)(1) or (b)(2) because the Nurses also sought to certify a class under CR 23(b)(3), relying on *Nelson v. Appleway Chevrolet, Inc.*³⁶ (Appx.35.) This ruling is legal error and inconsistent with both *Nelson's* holding and its rationale. The reason courts do not allow damages to be recovered in a CR 23(b)(1) or (b)(2) class—as stated by this Court in *Nelson*—is that absent class members are not entitled to the same due-process-notice protections that class members are entitled to under CR 23(b)(3). However, once a court determines that a CR 23(b)(3) class is not appropriate, but that the case otherwise meets the requirements of CR 23(b)(1) or (b)(2), then it should simply limit recovery to exclusively injunctive or declaratory relief rather than denying the CR 23(b)(1) or (b)(2) class altogether.

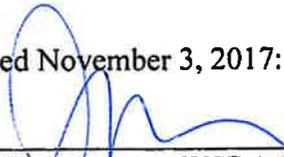
IV. Prayer for Relief

The Nurses request the Court to reverse the Court of Appeals and remand the case with instructions to certify a class.³⁷ The Nurses meet the elements of CR 23 as a matter of law. Alternatively, the Nurses request a reversal and remand for findings consistent with this Court's decision.

³⁶ See *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 189, 157 P.3d 847 (2007)

³⁷ See, e.g., *Leyva*, 716 F.3d at 514-15.

Signed November 3, 2017:



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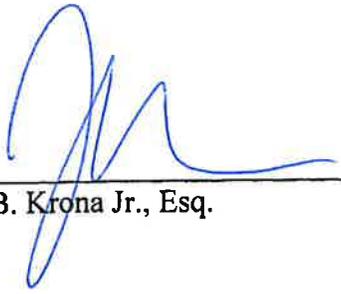
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PROOF OF SERVICE

I, Jack B. Krona Jr., certify that on this date, I caused a true and correct copy of the foregoing "Supplemental Brief" to be served on Aaron Bass and Rebecca Watkins, Sather, Byerly & Holloway, LLP, 111 SW Fifth Ave, Suite 1200, Portland, OR 97204, by e-mail transmission by party agreement to serve documents electronically and on the attorneys for *Amicus Curiae* Washington Employment Lawyers Association by email transmission and by the court's e-service mechanism to the following email addresses: bchandler@terrellmarshall.com; tmarshall@terrellmarshall.com; jneedlel@wolfenet.com.

DATED this November 3, 2017

By: 

Jack B. Krona Jr., Esq.

LAW OFFICES OF JACK B. KRONA JR.

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