

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
10/29/2019 4:36 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 97532-9

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

WASHINGTON STATE NURSES ASSOCIATION,

Respondent/Cross-Appellant,

v.

YAKIMA HMA LLC, d/b/a YAKIMA REGIONAL MEDICAL AND  
CARDIAC CENTER,

Appellant/Cross-Respondent.

---

**APPELLANT/CROSS-RESPONDENT YAKIMA HMA, LLC, D/B/A  
YAKIMA REGIONAL MEDICAL AND CARDIAC CENTER'S  
RESPONSE TO AMICUS BRIEF FILED BY THE WASHINGTON  
EMPLOYMENT LAWYERS ASSOCIATION AND THE  
WASHINGTON STATE LABOR COUNCIL**

---

Paula L. Lehmann, WSBA #20678  
Davis Wright Tremaine LLP  
Attorneys for Appellant/Cross-  
Respondent Yakima HMA LLC

929 108th Avenue NE, Suite 1500  
Bellevue, WA 98004-4786  
(425) 646-6100 Phone  
(425) 646-6199 Fax

## TABLE OF CONTENTS

	<b>Page</b>
SUMMARY OF RESPONSE.....	1
ANALYSIS.....	1
CONCLUSION.....	4

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>UFCW Local 751 v. Brown Group, Inc.</i> , 517 U.S. 544, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996).....	2
<i>Wash. State Nurses Ass'n v. Sacred Heart Medical Ctr.</i> , 175 Wn.2d 822, 287 P.3d 516 (2012).....	3
<b>Other Authorities</b>	
Rule 23 .....	1, 3

## SUMMARY OF RESPONSE

WELA asks this Court to allow representative testimony for associational claims in the same way that it would allow representative testimony for class actions without addressing this fundamental distinction<sup>1</sup>: Class actions undergo a rigorous Rule 23 analysis *before* representative testimony is permitted; associational claims do not. Associational standing provides judicial efficiencies in those situations where the law is disputed but the documents and underlying facts are not. Represented employees have many options to pursue claims apart from civil suits brought by their union in an associational capacity. They have standing to assert their rights individually or collectively through federal or state agencies, individual or class actions, as well as the arbitration provision in their collective bargaining agreement. The proposed expansion of association standing here would not promote judicial efficiencies nor would it allow redress of claims that cannot already be addressed through other means that currently exist.

## ANALYSIS

This Court has consistently limited associational claims to those in which no individual testimony is needed to ascertain liability and damages

---

<sup>1</sup> For the most part the WELA amicus brief simply repeats arguments already addressed in Yakima Regional's briefing. Yakima Regional's arguments in its opening and reply briefs are not repeated here.

to allow efficiency as well as fairness. WELA's argument to the contrary is based on a misunderstanding of *UFCW Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996). There, the Supreme Court determined that under the WARN act Congress authorized the union to sue for its members' damages, thereby creating an *exception* to the third prong of associational standing which ordinarily prohibits standing where individual testimony is needed to prove damages. There is no statutory counterpart to the WARN act at issue here to support an exception to the well-established rule.

WELA's argument that "there is no principled reason" to treat associational claims different from class actions ignores the obvious – class certification processes ensure that representative testimony is used in only those cases that pass rigorous scrutiny on issues such as commonality and typicality. These protections are absent in associational cases.

WELA's argument that representative evidence should be allowed because the Judge found that the employer's records were not accurate is also wrong. The test for whether representative evidence should be permitted rests on the quality of that representative evidence and a rigorous assessment of its commonality and typicality, not alleged deficiencies in other types of evidence.

WELA acknowledges that the nurses at issue here could have used other routes to pursue collective claims, including a class action. Amicus Brief at 23. WELA's counter to the use of class actions where individual testimony is needed is to suggest that potential pre-dispute arbitration agreements containing a class action waiver could make a class action less attractive. That argument is inconsistent with the record here. The WSNA-represented nurses at issue are subject to a collective bargaining agreement that does not include a class action waiver. Ex. 13.

All parties acknowledge that associational standing is appropriate in cases where individual testimony is not required. *E.g. Wash. State Nurses Ass'n v. Sacred Heart Medical Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012) (no need for individual testimony of any kind to address the legal issue of the appropriate rate of pay for missed fifteen rest breaks).

This case is entirely different. It is undisputed that individual testimony was required to establish both liability and damages. It is also undisputed that the home health and hospice nurses each described unique working conditions that varied every day with every patient. However, because the case was not filed as a class action, there was no Rule 23 analysis before representative testimony was permitted.<sup>2</sup>

---

<sup>2</sup> Although Yakima Regional sought pre-trial appellate review of the association standing issue, the Court of Appeals declined, indicating that further factual development was needed before the issue could be addressed.

The Employer was therefore required to proceed to trial on what was in reality a class action without the pre-trial class certification assessment. This step-skipping jump to trial for associational claims may be efficient, but it is not just. Both the employees and employer deserve the protections of Rule 23 before what is in essence a class action claim is moved to trial.

### **CONCLUSION**

Associational standing should not be expanded to include cases where representative testimony is needed to establish liability or damages. Associational standing is not a substitute for class actions. Where representative testimony is needed, employees and employers are entitled to the rigorous analysis required in class actions prior to the use of such testimony. Associational claims and class actions are distinct for good reasons. This Court should maintain that distinction both for efficiency and fairness to all parties.

//

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of October, 2019.

Davis Wright Tremaine LLP  
Attorneys for Appellant/Cross-  
Respondent Yakima HMA LLC

By  \_\_\_\_\_  
Paula L. Lehmann, WSBA #20678  
929 108th Avenue NE, Suite 1500  
Bellevue, WA 98004  
Telephone: 425-646-6100  
Fax: 425-646-6199  
E-mail: [paulalehmann@dwt.com](mailto:paulalehmann@dwt.com)

**DECLARATION OF SERVICE**

I, Katie Angelikis, hereby declare under penalty of perjury under the laws of the State of Washington that on this 29<sup>th</sup> day of October, 2019, I caused the foregoing **APPELLANT/CROSS-RESPONDENT YAKIMA HMA, LLC, D/B/A YAKIMA REGIONAL MEDICAL AND CARDIAC CENTER'S RESPONSE TO AMICUS BRIEF FILED BY THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND THE WASHINGTON STATE LABOR COUNCIL** to be filed electronically with the Supreme Court of the State of Washington, and a true and correct copy of the same to be served upon the following by the method indicated:

<p>Erika Nusser          Blythe H. Chandler          Terrell Marshall Law Group PLLC          936 North 34<sup>th</sup> Street, Suite 300          Seattle, WA 98103</p> <p><i>Attorneys for Amici Curiae The Washington Employment Lawyers Association and The Washington State Labor Council</i></p>	<p><input type="checkbox"/> Hand Delivery</p> <p><input checked="" type="checkbox"/> Electronic Service</p> <p><input type="checkbox"/> By deposit in the US Mail</p>
<p>William Rutzick          Schroeter Goldmark &amp; Bender          810 Third Avenue, Suite 500          Seattle, WA 98104</p> <p><i>Attorneys for Amici Curiae The Washington Employment Lawyers Association and The Washington State Labor Council</i></p>	<p><input type="checkbox"/> Hand Delivery</p> <p><input checked="" type="checkbox"/> Electronic Service</p> <p><input type="checkbox"/> By deposit in the US Mail</p>

<p>Jeffrey L. Needle  Law Office of Jeffrey L. Needle  705 Second Avenue, Suite 1050  Seattle, WA 98104</p> <p><i>Attorneys for Amici Curiae The Washington  Employment Lawyers Association and The  Washington State Labor Council</i></p>	<p><input type="checkbox"/> Hand Delivery</p> <p><input checked="" type="checkbox"/> Electronic Service</p> <p><input type="checkbox"/> By deposit in the  US Mail</p>
<p>Jennifer L. Robbins  Laura Ewan  Schwerin Campbell Barnard Iglitzin &amp; Lavitt,  LLP  18 West Mercer Street, Suite 400  Seattle, WA 98119</p> <p><i>Attorneys for Respondent/Cross-  Appellant/Plaintiff Washington State Nurses  Association</i></p>	<p><input type="checkbox"/> Hand Delivery</p> <p><input checked="" type="checkbox"/> Electronic Service</p> <p><input type="checkbox"/> By deposit in the  US Mail</p>

Signed in Seattle, Washington, this 29<sup>th</sup> day of October, 2019.

  
Katie Angelikis, Legal Assistant

**DAVIS WRIGHT TREMAINE LLP**

**October 29, 2019 - 4:36 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97532-9  
**Appellate Court Case Title:** Washington State Nurses Association v. Yakima HMA, LLC  
**Superior Court Case Number:** 15-2-01109-9

**The following documents have been uploaded:**

- 975329\_Briefs\_20191029163400SC801864\_1925.pdf  
This File Contains:  
Briefs - Answer to Amicus Curiae  
*The Original File Name was Yakima HMA Response to Amicus Brief Filed by WELA and WSLC.pdf*

**A copy of the uploaded files will be sent to:**

- aaron@mcguinnessstreepy.com
- bhandler@terrellmarshall.com
- enusser@terrellmarshall.com
- ewan@workerlaw.com
- jenniferronda@dwt.com
- jgmattorneyatlaw@yahoo.com
- jim@mcguinnessstreepy.com
- jneedlel@wolfenet.com
- laureelingenbrink@dwt.com
- marysanden@dwt.com
- owens@workerlaw.com
- robbins@workerlaw.com
- rutzick@sgb-law.com
- woodward@workerlaw.com

**Comments:**

---

Sender Name: Katie Angelikis - Email: katieangelikis@dwt.com

**Filing on Behalf of:** Paula Lee Lehmann - Email: paulalehmann@dwt.com (Alternate Email: katieangelikis@dwt.com)

Address:  
929 108th Avenue NE  
katieangelikis@dwt.com  
Bellevue, WA, 98004  
Phone: (425) 646-6100

**Note: The Filing Id is 20191029163400SC801864**