

No. 66857-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DEBRA PUGH and AARON BOWMAN, on their own behalf and  
on behalf of all persons similarly situated,

*Appellants,*

v.

WASHINGTON STATE NURSES ASSOCIATION  
& EVERGREEN HOSPITAL,

*Respondents.*

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**RESPONDENT WSNA'S RESPONSE TO  
APPELLANTS' OPENING BRIEF**

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## PROCEDURAL HISTORY

The Washington State Nurses Association (“WSNA”), a labor organization representing registered nurses (“RNs”) employed at King County Public Hospital District No. 2, d/b/a, Evergreen Medical Hospital Center (“Evergreen”), filed suit against Evergreen on September 15, 2010. The lawsuit, King County Superior Court Cause No. 10-2-32896-3, alleged that Evergreen violated Washington’s Minimum Wage Act (“MWA”) and related wage and hour requirements by failing to provide rest breaks for its RN employees. CP 1-5.<sup>1</sup> During 2010, WSNA moved for default judgment when Evergreen failed to timely Answer, and engaged in discovery, including propounding twenty-two discovery requests.

On September 17, 2010, Debra Pugh and Aaron Bowman, who at the time were employed as RNs by Evergreen, (“Appellants”) filed a class action lawsuit against Evergreen alleging similar rest break violation claims, but also claiming meal break violations. CP 20.

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<sup>1</sup> WSNA also filed similar suits against Providence Holy Family Hospital in Spokane, Wash., Good Samaritan Hospital in Puyallup, Wash., and Tacoma General Hospital in Tacoma, Wash.

On December 7, 2010, Appellants moved to consolidate their class action suit with the WSNA suit. CP \*\*<sup>2</sup>. They filed their motion with the presiding judge for King County Superior Court. CP \*\*.

In January 2011, WSNA and Evergreen commenced settlement talks, and retained Professor Cheryl Beckett of Gonzaga University School of Law in Spokane, Wash., to mediate a settlement. On January 31, 2011, WSNA and Evergreen reached tentative agreement on terms of settlement. CP 208.

On February 4, 2011, Appellants filed a Motion to Intervene in *WSNA v. Evergreen*, No. 10-2-32896-3. CP 19-31. The motion requested a hearing date of February 14, 2011, CP 17, but was not served on the parties until February 7, 2011. CP 96. The trial court struck the motion in part because it was not timely served on the parties. CP 203-4.

On February 11, 2011, Evergreen and WSNA executed a final settlement agreement that required WSNA to dismiss its lawsuit. CP 222. The settlement agreement compromised WSNA's rest break claims against Evergreen, and provided the option for individual RNs to compromise their claims by accepting an offer of payment from Evergreen. CP 222.

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<sup>2</sup> WSNA is concurrently filing Supplemental Designation of Clerk's Papers and will submit an errata with the properly numbered CP cites. Clerk's Papers submitted, but not yet sent to the Court, are designated CP \*\*.

On, February 24, 2011, Judge Laura Inveen's court denied Appellant's motion to consolidate its case, No. 10-2-33125-5 with *WSNA v. Evergreen*, No. 10-2-32896-3. CP 384-385. On February 24, 2011, Appellants filed a motion to intervene in front of Judge Middaugh and noted it for hearing on March 4, 2011. CP 267.

On March 2, 2011, WSNA and Evergreen submitted a Stipulated and Agreed Order of Dismissal, which was signed by the trial court the next day, dismissing the case with prejudice. CP 371-3. Appellants appeal this voluntary dismissal.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Abuse of discretion is the proper standard of review for all issues presented by this appeal. Appellants complain that the trial court did not hear its motion to intervene prior to the settlement of the lawsuit. A trial court's decision granting a stipulated voluntary dismissal under Washington Superior Court Rule ("CR") 41(a) is reviewed under an abuse of discretion standard. *Farmers Ins. Exch. v. Dietz*, 121 Wn. App. 97, 100; 87 P.3d 769 (2004). "Abuse of discretion requires that a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (citation and internal quotation marks omitted).

Appellants mistakenly argue that the trial court's decision is reviewed de novo, wrongly suggesting that a denial of a motion to intervene is at issue here. In fact, Appellants' motion to intervene was never heard by the trial court because the case was voluntarily dismissed prior to any hearing on its motion.<sup>3</sup>

Appellants' also mistakenly assert that they may argue WSNA's standing de novo to this court, although the association's standing was not addressed by the trial court below. There was no decision by the trial court regarding standing, therefore no decision to review.<sup>4</sup> As Appellants are not seeking an appeal of a standing decision but rather an appeal of the trial court's granting of a stipulated order of dismissal pursuant to CR 41, its argument that this Court apply a "de novo" review to a jurisdictional question like standing is misplaced.<sup>5</sup> Instead, abuse of discretion is the proper standard to assess Appellants' arguments.

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<sup>3</sup> However, even if Appellants' motion had been heard and denied by the trial court (as it would have been), that denial of intervention would also be reviewed for abuse of discretion under CR 24 as it was untimely. *Kreidler v. Eikenberry*, 111 Wn. 2d 828, 832, 766 P.2d 438 (1989).

<sup>4</sup> As it did through its briefing to the trial court, Appellants makes numerous non-legal complaints about its role in the *WSNA v. Evergreen* lawsuit. As ad hominem attacks are not supported by the record and are also not germane to this dispute, WSNA does not correct the Appellants' irrelevant opinions about the union or its intentions.

<sup>5</sup> Additionally, Appellants assume, but make no attempt to demonstrate, they are entitled to review as a matter of right pursuant to Rule of Appellate Procedure, 2.1. Given the decision below was a non-discretionary, mandated order of voluntary dismissal, the WSNA contends appellate review, if available at all, is available only as a matter of discretionary review, a standard Appellant has not plead.

**II. IT WAS NOT ERROR FOR THE TRIAL COURT TO STRIKE APPELLANTS' MOTION FOR INTERVENTION ON THE GROUNDS THAT APPELLANT FAILED TO ADHERE TO LOCAL RULES GOVERNING SERVICE.**

The trial court struck Appellant's January 4, 2011 Motion to Intervene because Appellant failed to comport with a local rule requiring timely service of its motion on opposing counsel. CP 203-204. Where the issue is the application of a local rule by a trial court, the trial court is deemed the best exponent of its own rules, and its interpretation will not be disturbed by an appellate court unless the construction placed thereon is clearly wrong or an injustice has been done. *Snyder v. State*, 19 Wn. App. 631, 637, 577 P.2d 160 (1978).

Under CR 24(c), a person desiring to intervene "shall serve a motion to intervene upon all the parties..." Under King County Superior Court Local Rule 7(b)(4)(A), "The moving party shall serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered."

Appellant noted its motion hearing before the court for Monday, February 14. CP 17. According to the local rule, Appellant was required to serve its motion documents no later than six court days before the hearing

date, or by Friday, February 4. Service was not properly completed until Monday, February 7.<sup>6</sup> CP 96.

WSNA responded to Appellant's improperly noted motion by objecting to service. Rather than properly re-noting its motion, the Appellant attempted to correct its error by simply moving the hearing date back one day. CP 90-92. The trial court denied Appellant's attempt to skirt the noting rules, and ordered the motion struck. Because there is no abuse of discretion when a trial court enforces the plain language of its own local rule, the trial court committed no error when it struck Appellant's motion to intervene, and thus Appellants' request for relief should be denied.

**III. THE TRIAL COURT DID NOT ERR WHEN IT DECIDED TO HEAR APPELLANTS' MOTION TO INTERVENE UNTIL AFTER APPELLANTS' MOTION TO CONSOLIDATE WAS DECIDED BY THE PRESIDING JUDGE.**

Appellants argue that the trial court should have heard its motion to intervene prior to the King County Superior Court's Presiding Judge's decision on a separate motion to consolidate filed by the Appellants. A decision such as this one rests not on an application of law, but, as was

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<sup>6</sup> Appellant does not claim that WSNA waived its right to proper service although such a private agreement is permissible under CR 5(b)(7) (“[s]ervice ... may be made by delivering a copy by any other means, including facsimile or electronic means, consented to in writing by the person served”).

evident from the court's order, on considerations of efficiency of judicial resources and, as such, is to be reviewed under the abuse of discretion standard.

In the trial court's Order granting WSNA's and Evergreen's motions to strike Appellant's motion to intervene, the trial court relied on the need to consider judicial economy in light of Appellant's pending motion to consolidate. The Order stated:

The Court takes judicial notice of the fact that a Motion to Consolidate this case and the case filed by interveners Pugh et al is pending and that the lawsuit filed by interveners Pugh et al was filed as a class action and the class has not been certified...It is in the interest of judicial economy that the Motion to Intervene not be heard until after the Motion to Consolidate has been ruled on.

CP 203-204.

CR 42(a) governs consolidations, and Washington case law interpreting CR 42(a) holds that consolidation can be used in three different senses: 1) when all except one of several actions are stayed until one is tried, in which case the judgment in the one trial is conclusive as to the others, 2) when several actions are combined into one, lose their separate identity, and become a single action in which a single judgment is rendered, and 3) when several actions are ordered to be tried together but each retains its separate character and requires the entry of a separate judgment. *Angelo v. Angelo*, 142 Wn. App. 622, 637, 175 P.3d 1096,

1136-37 (2008) (citing 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2382, at 8-9 (3<sup>rd</sup> ed. 2008)).

Thus, given the array of possible consolidation outcomes the trial court may have faced once Appellant's motion to consolidate was decided, any effort by the trial court to grapple with intervention prior to a ruling on consolidation would have been premature and subject to later adjustment. In light of this, the trial court's decision to delay Appellant's re-filing of its motion to intervene was reasonable, and falls far short of an abuse of discretion.

**IV. EVEN HAD APPELLANT PROPERLY SERVED ITS MOTION TO INTERVENE PRIOR TO THE MANDATORY DISMISSAL OF THE LAWSUIT DUE TO A SETTLEMENT BETWEEN THE PARTIES, ITS INTERVENTION APPLICATION WOULD HAVE BEEN DENIED BECAUSE IT WAS UNTIMELY AND APPELLANTS' ABILITY TO PROTECT ITS OWN INTERESTS WAS NOT IMPAIRED.**

**A. Appellants' Application For Intervention Was Made Too Late In The Lawsuit To Satisfy Civil Rule 24.**

Washington State Court Rule CR 24(a) states in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action...(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Timeliness is a critical requirement of CR 24(a). *Kreidler v. Eikenberry*, 111 Wn. 2d 828, 832, 766 P.2d 438 (1989); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9<sup>th</sup> Cir. 1997). Whether a motion to intervene is timely under CR 24 requires consideration of: (1) the stage of the proceedings; (2) whether the parties would be prejudiced; (3) the reason for any delay in moving to intervene. *Cabazon* at 1061.

Appellants waited until the final stage of the WSNA lawsuit to attempt to intervene. Appellants did not file for intervention until after WSNA and Evergreen had achieved a mediated settlement. CP 19-31. A motion to intervene filed at or near the time final judgment is entered “requires a strong showing that intervention is necessary considering all of the circumstance including prior notice, prejudice to the other parties, and reasons for the delay”. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007). Here, Appellants were aware from the time they filed their own lawsuit that their claims and WSNA’s claims were identical in many respects and that WSNA and Evergreen were engaged in mediation settlement during January 2011.

Moreover, had Appellants been permitted to intervene, WSNA would have been prejudiced as WSNA had already reached agreement on settlement terms with Evergreen regarding its claim. Intervention would have prolonged the case at a point when the parties had achieved

resolution, adding needless delay and expense. Yet, the settlement of WSNA's claims have no bearing on the Appellants' lawsuit against Evergreen and the WSNA settlement only compromised WSNA's claims and not individual RNs.

**B. As A Practical Matter, A Denial Of Appellants' Motion To Intervene Does Not Impair Appellants' Ability To Protect Its Own Interests, And There Is Thus No Other Reason To Find Error In The Trial Court's Decision.**

Appellant has failed to identify any authority for its dubious claim that a trial court is required to consider a non-party's motion to intervene before performing the ministerial task of granting dismissal. Instead, Appellant has alleged WSNA and Evergreen "misled the court into believing the parties had an absolute right to dismissal with prejudice..." Appellants' Opening Brief, p. 30. In fact, the court rules provide WSNA with that very absolute right. WSNA is the master of its own complaint, and should it obtain a stipulated dismissal from a defendant, as it did here, the trial court had no choice under CR 41 but to execute the dismissal. Indeed, any other understanding could force a plaintiff to continue a lawsuit that it had fully resolved with a defendant.

Appellant seems to claim that it should have a role in deciding whether WSNA should have compromised its claim on behalf of its membership, although individual RNs' claims were not automatically

compromised by the settlement agreement, only through the acceptance of a payment from Evergreen. But Appellants ignore the fact that dismissal with prejudice in this instance denies WSNA the right to commence another action against Evergreen for the same cause of action, but it does nothing to impair Appellants' right to pursue its pending lawsuit on behalf of individual nurses.

CR 24(a) requires intervention if the intervenor "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest..." The settlement agreement between WSNA and Evergreen does nothing to impair Appellants' ability to pursue its suit. The settlement binds only those employees who accepted a settlement payout. Any employee who returned his or her individual settlement check to Evergreen within sixty (60) days of issuance is not bound by the WSNA settlement. Those employees who rejected the WSNA settlement are free to join the Appellant Class and pursue whatever remedies are available to them through that action. CP 209. Thus, nothing about the settlement and dismissal of the WSNA lawsuit impairs the ability of Appellants to protect its own interests through its pending lawsuit.

**V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED DISMISSAL OF THE WSNA LAWSUIT BECAUSE, UNDER CIVIL RULE 41, IT HAD NO DISCRETION TO DO OTHERWISE.**

A decision granting a motion for voluntary dismissal under CR 41(a) is reviewed for an abuse of discretion. *Farmers Ins. Exch. v. Dietz*, 121 Wn. App. 97, 100; 87 P3ed 769 (2004). Appellant argues the trial court abused its discretion when it ordered dismissal of the WSNA suit based on a stipulation from the parties that they had reached a settlement. Appellants' Opening Brief, p. 30, 31.

CR 41 directs that a voluntary dismissal is "mandatory" (with the exception of certain class actions), when the parties have stipulated that they agree to the dismissal. CR 41 is specific that an action will be dismissed upon motion of the plaintiff unless a counterclaim has been pleaded by the defendant prior to service upon him of the motion to dismiss. "The plaintiff's right in this respect is absolute and involves no element of discretion on the part of the trial court." *Goin v. Goin*, 8 Wn. App. 801, 802, 508 P.2d 1405 (1973) (citations omitted).

A motion to intervene has no effect on the mandatory dismissal because "the right to a voluntary nonsuit is fixed at the moment that it is claimed." *McKay v. McKay*, 47 Wn.2d 301, 305, 287 P.2d 330 (1955). The fact that Appellants' motion to intervene was pending at the time the

stipulated order was filed did not affect Evergreen's and WSNA's "absolute right to a stipulated dismissal." *Spokane County v. Specialty Auto & Truck Painting*, 119 Wn. App. 391, 396, 79 P.3d 448 (2003); 8 Moore's Federal Practice, § 41.33[5][c][H] (3d ed. 2008) ("A motion to intervene should not affect the plaintiff's right to dismiss as of right").

Moreover, where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance, though such analysis will be followed only if the reasoning is found to be persuasive. *Beal for Martinez v. City of Seattle*, 134 Wn. 2d 769, 777, 954 P.2d 237 (1998). Here, though the federal and state versions of Rule 41 are not identical, they are sufficiently alike, especially in their treatment of voluntary dismissal, that guidance can be drawn from view federal courts take to stipulated dismissals.

Under federal law, once the parties have filed a stipulation of dismissal under CR 41(a)(1)(A), there is no longer a pending case or controversy into which a non-party may intervene. *See GMAC Commercial Mortg. Corp. v. LaSalle Bank Nat'l Ass'n*, 213 F.R.D. 150, 150-51 (S.D.N.Y. 2003). While the Washington rule is more liberal than the federal rule regarding *when* a right to dismissal may be exercised, the federal rule is more liberal with regard to the freedom of a plaintiff to seek dismissal. Under the federal rule, a plaintiff may dismiss an action without

consent of the court either by stipulation of all parties or unilaterally if the defendant has not yet filed an answer or motion for summary judgment. *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9<sup>th</sup> Cir. 1997). Thus, under the federal rules, settlement is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved. “[T]he traditional view is that the judge merely resolves issues submitted to him by the parties . . . and stands indifferent when the parties, for whatever reason commends itself to them, choose to settle a litigation.” *Heddendorf v. Goldfine*, 167 F.Supp. 915, 926 (D.Mass.1958).

Thus, once WSNA and Evergreen presented the trial court with stipulated dismissal, the court had no discretion but to dismiss the lawsuit; hence, there has been no abuse of discretion and no grounds for reversal.

### CONCLUSION

For all of the above reasons, WSNA respectfully requests that this Court deny Appellant’s effort to vacate the trial court’s order dismissing WSNA’s lawsuit.

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RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of September, 2011, I caused the foregoing Respondent WSNA's Response to Appellants' Opening Brief to be filed via First Class U.S. Mail with:

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