No. 68651-8-1

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON, DIVISION I

DEBRA PUGH, AARON BOWMAN, and FLOANN BAUTISTA on their own behalf and on behalf of others similarly situated,

Plaintiffs/Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a!k/a KING COUNTY PUBLIC HOSPITAL DISTRICT #2,

Defendant/Appellant, WASHINGTON STATE

NURSES ASSOCIATION, Intervenor/Appellant.

King County Superior Court No. 10-2-33125-5 SEA,
The Honorable Harry J. McCarthy presiding

INTERVENOR/APPELLANT WSNA'S BRIEF OF SUPPLEMENTAL AUTHORITY

David Campbell, WSBA # 13896
Carson Glickman-Flora, WSBA # 37608
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITI LLP
18 W. Mercer Street, Suite 400
Seattle, WA 9811

Attorneys for Intervenor/Appellant WSNA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Intervenor/Appellant Washington State Nurses Association ("WSNA") files this Brief of Supplemental Authority regarding Superior Court Civil Rule ("CR") 23.2. During oral argument on June 6, 2013, Judge C. Kenneth Grosse raised for the first time in this case the issue of whether CR 23.2 required Judge Laura Gene Middaugh in the earlier *WSNA v. Evergreen* case, No. 10-2-32896-SEA, to provide class action approval for the settlement agreement terminating WSNA's lawsuit. At the time of Judge Grosse's inquiry, counsel for WSNA was ill prepared to address this issue. Since then, WSNA has supplemented the Clerk's Papers, with notice to all parties, with portions of the record below which establish that WSNA is an incorporated non-profit entity. This supplemental brief is filed pursuant to the Court's order of June 20, 2013.[1]

SUMMARY OF ARGUMENT

WSNA is incorporated. Since CR 23.2 applies on its face only to unincorporated associations, the rule does not apply. Nor is this a case where WSNA named "certain members as representative parties" as provided in the rule. Even if there were a case in which class action-style

---

[1] *See* Letter from Richard D. Johnson to Parties, June 20, 2013, citing notation ruling by **Commissioner Mary Neel stating: "At oral argument, the panel requested that the parties** provide additional briefing on the application of CR 23.2 as it pertains to the issue of **whether court approval of the settlement was required. Briefs from both parties are** limited to 15 pages and are due by July 1, 2013."

rules might by analogy be applied to a union's action against an employer, here the settlement bound only WSNA, not any individual. The absence of any preclusive effect undercuts any policy argument for application of CR 23.2 to the *WSNA* v. *Evergreen* action. Moreover, application of CR 23.2 now would require an improper collateral reversal of a final judgment. Therefore, the Court should reverse Judge Harry McCarthy's Order collaterally invalidating the WSNA settlement because WSNA's settlement did not require court approval.

I. CR 23.2 DOES NOT APPLY TO THE *WSNA V. EVERGREEN* ACTION BECAUSE WSNA IS AN INCORPORATED NON-PROFIT ENTITY AND ALSO BECAUSE THE CASE DID NOT NAME CERTAIN MEMBERS AS REPRESTATIVE PARTIES.

A. WSNA Is Incorporated And Outside The Rule.

CR 23.2 "Actions Relating to Unincorporated Associations" states:

> An action brought **by or against the members of an unincorporated association** as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in rule 23(e).

(emphasis added)

While no Washington court has published an interpretation of CR 23.2, it is substantially similar to the corresponding Fed. R. Civ. P. 23.2

and thus federal case is instructive. *See* 3A KARL B. TEGLAND, WASHINGTON PRACfICE SERJES, RULES PRACTICE, PART IV, RULES FOR SUPERIOR COURT, CR 23.2 (6th ed. 2013). The purpose of Fed. R. Civ. P. 23.2 is to treat an unincorporated association as a "legal entity"..."when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b)." The Advisory Committee Notes of 1966 (hereinafter "Committee Notes"); 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACfiCE AND PROCEDURE § 1861, "Actions Relating to Unincorporated Associations" (3d ed. 2013); 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACfiCE 'I] 23.08 (2d ed. 1963); *Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 720 (5th Cir. 1980) (purpose of the rule is to ensure that unincorporated associations could be the subject of class actions even where state law did not grant capacity to sue or be sued).[2]

---

[2] *See also Northbrook Excess & Surplus Ins. Co. v. Med. Malpractice Joint Underwriting Ass'n of Massachusetts*, 900 F.2d 476, 478 (lst Cir. 1990) (adopting "restrictive application" of Rule 23.2 and concluding it is available only to unincorporated **associations without jural status under state Jaw)**; ***Gay Liberation v. University of*** *Missouri*, 416 F. Supp. 1350, n.9 (D. Mo. 1976), *rev'don other grounds*, 558 F.2d 848, (8th Cir. 1977) (purpose of Rule 23.2 is an "attempt to avoid the common law position that unincorporated associations lacked capacity to sue" but does not apply to corporations); *Suchem, Inc. v. Cent. Aguirre Sugar Co.*, 52 F.R.D. 348, 355 (D. P.R. **1971) ("when the law of the state ... does not provide an unincorporated association with capacity as a jural person to sue or to be sued, then and only then does the mechanism of Rule 23.2 come into operation and is available as a way of overcoming this lack of** capacity."); *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348 (D. P.R. 1971) (same). *But see Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81,86--87 (2d Cir. 1990) (adopting broader interpretation of the rule to apply to limited partnerships **even if partnership had capacity to sue as an entity under state law).**

Secondary Washington authorities concur with the limited purpose of the rule. "The purpose of CR 23.2 is to recognize and authorize...a class action [by an unincorporated association]." 3A WASHINGTON PRACTICE, *supra,* CR 23.2. Purpose of the rule is to "permit[] an unincorporated association to be treated as a 'legal entity' for purposes of bringing suit...[and] permit[] a class action involving all members of the association as plaintiff or defendant through the naming of certain representative members." 9A WASHINGTON PRACTICE, Civil Procedure Forms§ 23.2.1 (3d ed. 2012).

WSNA has been an incorporated non-profit organization in the state of Washington since its founding in 1908. CP 598-99 (WSNA Articles of Incorporation); Declaration of Counsel, Ex. A (WSNA registration record from Washington Secretary of State). As a non-profit corporation with a registered agent in Washington state, the plain language of Rule 23.2 does not apply. WSNA has jural status without regard to Rule 23.2 and the language of the rule does not apply to actions brought by or against WSNA. WSNA's articles of incorporation were provided as part of the *WSNA* v. *Evergreen* action, and then designated as a Clerk's Paper after oral argument in this matter.

//

//

B. WSNA Did Not Name Any Individual Or Members In It Action Against Evergreen, Precluding Application Of 23.2.

As is more fully outlined below, even if WSNA were an unincorporated association, the policy of protecting "class members" has no application, where, as here, a settlement has no preclusive effect on individual members. Nonetheless, the plain language of 23.2 applies only when an action is "by or against the members of an unincorporated association as a class by naming **certain members as representative parties.**" CR 23.2. (emphasis added). In *WSNA v Evergreen,* WSNA did not name or otherwise rely on individuals or members of any type. The action was brought and settled in WSNA's name only. Hence, CR 23.2 on its face does not apply.

II. NEITHER CR 23.2 NOR CR 23(E) SHOULD BE APPLIED BY ANALOGY HERE BECAUSE THE WSNA SETTLEMENT HAD NO PRECLUSIVE EFFECT ON ANY PARTIES OTHER THAN THE DEFENDANT AND WSNA.

CR 23.2 incorporates the requirement ofCR 23(e) which prohibits dismissal or compromise of a class action absent court approval and notice. CR 23(e). The Washington Supreme Court defined a "class action" in *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 208-09,35 P.3d 351 (2001), as representative suits that:

> ...when settled, impose a preclusive agreement by the named plaintiffs on themselves as well as absent class

> members. This necessarily precludes absent class members who possess valid legal claims from independently exercising their right to their day in court.

Id. CR 23(e), as incorporated in CR 23.2, ensures that absent class members will not compromise rights absent adequate notice. Such notice is a "minimal procedural due process protection." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985); see also *King Cnty. v. Taxpayers of King Cnty.,* 133 Wn.2d 584, 617, 949 P.2d 1260, 1276-77 (1997) (observing court has "affirmative responsibilities to assure the legal interest of each absent class member is protected").

"[T]his notice is for the benefit of the members of the class to allow them to object to their inclusion in the case or to be bound by the judgment in the event their rights may in any way be adversely affected:· *Dore v. Kinnear,* 79 Wn.2d 755, 767,489 P.2d 898, 905 (1971). *InDore,* the Court found the plaintiffs' action to be a "valid class action" despite that fact that no notice pursuant to the CR 23 was provided. *Id.* However, this was "in no manner fatal to their class action for the reason that by our disposition of this case, no rights of these plaintiffs have been prejudiced or adversely affected by their being included in this action." *Id. See also United States v. Allegheny-Ludlum Industries, Inc.,* 517 F.2d at 826 (5th

Cir. 1975) (notice may be necessary "in order **to bind** absent class members in connection with back pay awards") (emphasis added).

Here, the WSNA-Evergreen settlement bound only WSNA, not individual members. As with many union-employer settlements, with or without a court case, it included improved working conditions and a voluntary back-pay fund which bound no individual nurse.[3]

In addition, it is important to note that WSNA members eligible for back pay as part of the WSNA settlement did receive multiple notices from WSNA, Evergreen, and Pugh and her attorneys regarding their choice to accept the back pay and compromise their rest break claims or reject the offer. WSNA Appeal Brief at p. II. If this Court determines that Judge Middaugh should not have dismissed the WSNA action without notice to those eligible for the back-pay awards, it can, and should, nonetheless find that the multiple notices received by the nurses satisfied the notice requirements set forth in 23(e). *Dare, supra,* 79 Wn.2d at 767.

//

//

//

//

---

[3] **Washington courts have long recognized a union's ability to sue and be sued to enforce collective bargaining agreements.** ***See, e.g., Teamsters v. Lucas Flour Co.*****, 369 U.S. 95,** 82 S.Ct. 571, 7 L.Ed.2d 593 (1962).

III. ASSUMING ARGUENDO THAT JUDGE MIDDAUGH SHOULD HAVE APPLIED RULE 23.2, BECAUSE PUGH DROPPED HER DIRECT APPEAL OF JUDGE MIDDAUGH'S FINDING THAT NO COURT APPROVAL OF THE WSNA SETTLEMENT WAS NECESSARY, TO NOW APPLY CR 23.2 WOULD RESULT IN AN IMPROPER COLLATERAL REVERSAL OF A FINAL JUDGMENT.

A. Judge Middaugh's Order Was A Final Order Subject To Direct Appeal And Is Not Subject To Collateral Attack By Another Superior Court Judge.

The Court should not permit a collateral attack on Judge Middaugh's Order dismissing WSNA's lawsuit rather than via direct appeal. As the U.S. Supreme Court explained:

> Courts have the authority, when parties are brought before them in accordance with the requirements of due process, "to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.

Chico! Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376, 60 S.Ct. 317, 84 L.Ed. 329 (1940). *See also Snell v. Cleveland, Inc.*, 316 F.3d 822, 827-28 (9th Cir. 2002) (despite pleading defect in closed tort action, the district court "was not free to attack the final judgment entered in the closed tort action").

Washington courts recognize this same principle. In *Anderson v. Anderson*, 52 Wn.2d 757,761-62,328 P.2d 888 (1958), the Court held:

> A judgment rendered by a court having jurisdiction of the parties and of the subject matter, not reversed and not vacated, is not open to contradiction or impeachment by parties or privies by a collateral attack, except for fraud of a character going to the jurisdiction of the court which prevents it from obtaining the requisite power to entertain or decide the issues in controversy."

Moreover, "it is only where the fraud practiced by the successful party goes to the very jurisdiction of the court itself that the judgment is subject to collateral attack." *Anderson,* 52 Wn.2d at 761. If "[t]he fraud... [was)...of such a nature that it could be presented to the court only in a proceeding to directly set aside the judgment originally rendered[,] [i]t cannot be used as a basis for a collateral attack." *Id.*

B. Here, Plaintiffs Dropped Their Appeal Of Judge Middaugh's Order.

On March 3, 2011, Judge Middaugh "ORDERED that the above-titled and numbered action *[WSNA* v. *Evergreen,* No. 10-2-32896-SEA] be dismissed with prejudice..." Evergreen's Petition for Review, App. 836, 863-865, Case No. 68550-3-1. The stipulated dismissal stated the WSNA and Evergreen Hospital had reached a settlement and that due to the Court's comments on February 25, 2011 regarding its lack of authority to approval the settlement, no approval was requested. *Id.* at 864-865.

Judge Middaugh's Order dismissing the WSNA case with prejudice was a final order. While a voluntary dismissal *without* prejudice

ts not a fmal judgment as contemplated under RCW 4.84.330, *see Wachovia SEA Lending, Inc. v. Kraft,* 165 Wn.2d 481, 494, 200 P.3d 683, 689 (2009), a voluntary dismissal *with* prejudice is a final judgment on the merits, and the threshold requirement for res judicata is satisfied. *Thompson v. King Cnty.,* 163 Wn. App. 184, 192,259 P.3d 1138, 1142 (2011).

Indeed, Pugh directly appealed from Judge Middaugh's order dismissing the WSNA case on March 24, 2011, to the Court of Appeals, Division I, Case No. 66857-9-1. A year later, on March 19, 2012, the Pugh plaintiffs voluntarily withdrew their request for Court of Appeals review of Judge Middaugh's March 3, 2011, Order. On April6, 2012, the Court of Appeals terminated the review and mandated the case (No. 10-2-32896-3) back to King County Superior Court.

If there were occasion for this Court to consider application of Rule 23.2 to union-employer litigation, it should not be via a collateral attack in later litigation. Judge Middaugh expressly considered the need for court approval in her final judgment and rejected it. Evergreen's Appendix *supra* at 864-865. Pugh's decision to drop their appeal of Judge Middaugh's decision was voluntary. Had that appeal continued, this Court would be in a position to decide the CR 23.2 question and, if necessary, remand and reinstate the case to Judge Middaugh. Here, in the event the

Evergreen-WSNA settlement agreement is collaterally overturned, equity would require this Court to take the unprecedented step of collaterally overturning Judge Middaugh's final order of dismissal with prejudice and collaterally reinstating the earlier *WSNA v. Evergreen* case. Any other result would destroy the rights of WSNA as the Evergreen nurses' chosen collective bargaining representative to secure improved working conditions for its members.

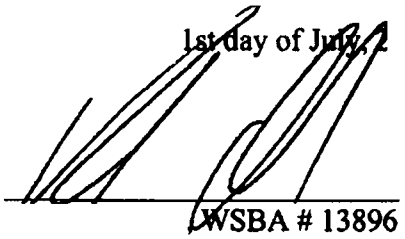
Considerations of jurisdiction, finality, judicial economy and equity all cut against consideration of a novel Rule 23.2 question in a case potentially calling for an unprecedented collateral remedy.

CONCLUSION

Because CR 23.2 does not apply to incorporated non-profit organizations like WSNA, the Court should not apply the rule to the WSNA settlement. Moreover, as the WSNA settlement had no preclusive effect on any individual, there are no policy reasons supporting extending the application of CR 23.2 to *WSNA* v. *Evergreen.* WSNA respectfully requests that, as Judge McCarthy's Order invalidating the WSNA settlement and the thousands of individual settlements was improper, this Court overturn his ruling.

//

//



RESPECTFULLY SUBMITTED this 013.

D 'd ampbell
arson Glickman-Flora
WSBA#37608
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT LLP
18 W. Mercer Street, Suite 400
Seattle, WA 98119
206-285-2828

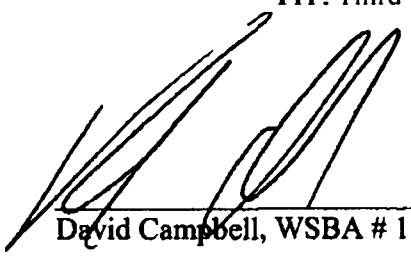
Attorneys for Intervenor/Appellant WSNA

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2013, I caused the foregoing Intervenor/Appellant WSNA's Brief of Supplemental Authority to be filed with the Court of Appeals, Division I, and true and correct copies of the same to be sent via email and U.S. First-Class Mail, per agreement of counsel, to:

James S. Fitzgerald
John J. White, Jr.
Kevin B. Hansen
Livengood Fitzgerald & Alskog, PLLC
121 Third Avenue
Kirkland, WA98083-0908
fitzgerald@lfa-law.com
white@lfa-law.com
Hansen@lfa-law.com

David Bresk:in
Annette M. Messitt
Miriam Simmel
Amber Siefer
BRESKIN JOHNSON & TOWNSEND, PLLC
1111 Third Avenue, Suite 2230



David Campbell, WSBA # 13896
Seattle, WA98101
dbresk:in@bjtlegal.com
amessitt@bjtlegal.com
asiefer@bjtlegal.com
admin@bjtlegal.com

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

DEBORAH PUGH, et al.,

Plaintiffs/Respondents No. 68651-8-I

v.

DECLARATION OF COUNSEL DAVID CAMPBELL

EVERGREEN HOSPITAL MEDICAL CENTER,

Defendant/Appellan

t and

WASHINGTON STATE NURSES ASSOCIATION,

Intervenor/Appellant

I. David Campbell, attorney for Intervenor/Appellant Washington State Nurses Association, makes this declaration based on his personal knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of the corporate registration information for Intervenor/Appellant Washington State Nurses Association listed on the Washington Secretary of State's Corporations Division webpage

I

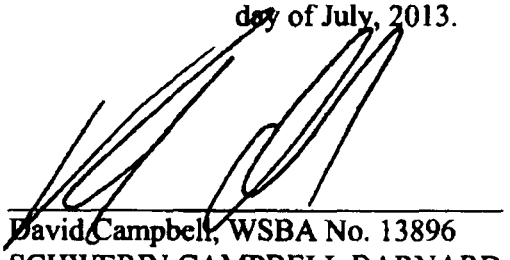
1''\1'\II''III A I

(http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601 1346

24). The attached was printed on June 20, 2013.

I declare under penalty of peijury under the laws of the State of Washington that the forgoing statements are true and correct.

day of July, 2013.



David Campbell, WSBA No. 13896
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT LLP

SIGNED at Seattle, Washington, this I"

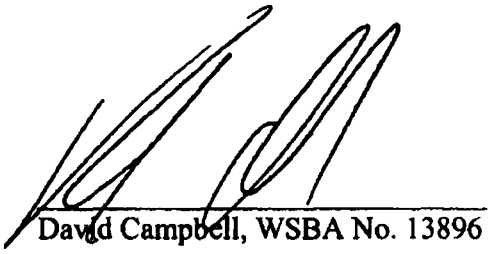
18 W. Mercer Street, Suite 400
Seattle, WA 98119
206-285-2828
campbell@workerlaw.com
Attorneys for Intervenor/Appellant WSNA

CERTIFICATE OF SERVICE

I hereby certify that on this 1" day of July, 2013, I caused the foregoing Declaration of Counsel David Campbell to be filed with the Court of Appeals, Division I, and true and correct copies of the same to be sent via email and U.S. first-class mail, per agreement of counsel, to:

James S. Fitzgerald
John J. White, Jr.
Kevin B. Hansen
Livengood Fitzgerald &Alskog, PLLC
121 Third Avenue
Kirkland, WA 98083-0908
fitzgerald@lfa-law.com
White@lfa-law.com
Hansen@lfa-law.com

David Breskin
Daniel F. Johnson
Breskin Johnson & Townsend, PLLC
1111 Third Avenue, Suite 2230



David Campbell, WSBA No. 13896
Seattle, WA 98101
dbreskin@bjtlegal.com
djohnson@bjtlegal.com

EXHIBIT A

Lorporauons: Kegistrauon uetall

Corporations Division - Registration Data Search

WASHINGTON STATE NURSES' ASSOCIATION

UBI Number	601134624
Category	REG
Profit/Nonprofit	Nonprofit

Active/Inactive	Active
State Of Incorporation	WA
WA Filing Date	09115/1908
Expiration Date	09/30/2013
Inactive Date	
Duration	Perpetual
Registered Agent Information	
Agent Name	Judith Huntington
Address	575 ANDOVER PARK W #101
City	SEATfLE
State	WA
ZIP	98188
Special Address Information	
Address	
City	
State	
Zip	

Governing Persons

Title	Name	Address
		Secretary SUTHERLLIN, VERLEE 17414 N WEST SHORE RD NINE MILE FALLS, WA 99026
		President WEINBERG, JULIA 7078 ERSHIG RD BOW, WA 98232
Treasurer		
	SUTHERLIN, VERLEE FALLS, WA 99026	17414 N. WEST SHORE RD NINE MILE
Vice President	JACOBSON, SUSAN E.	3 S. 76th Ave YAKIMA, WA 98908

Purchase Documents for this Cornoration »