No. 94592-6

IN THE 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 office of Lourdes Medical Center

Respondents.

AMICUS CURIAE MEMORANDUM OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association ("WELA") is an organization of approximately 188 lawyers licensed to practice law in Washington. WELA is a chapter of the National Employment Lawyers Association. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA's members frequently represent employees in cases brought under Washington wage statutes. WELA members have an interest in ensuring that employees can pursue wage-and-hour claims in class actions.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

A single hourly worker's claim for unpaid wages is often a relatively low-dollar-amount claim, making it difficult for an attorney to represent the worker on an individual basis. But timekeeping procedures and workplace policies that result in underpayment of one employee's wages frequently result in underpayment of the employee's coworkers as well. Class actions are thus a necessary and appropriate tool to ensure payment of employee wages. The Court should accept the petition for review in this matter to guide trial courts grappling with the interaction between the substantive requirements of Washington's wage and hour laws and the procedural requirements of Civil Rule 23.

III. AUTHORITY AND ARGUMENT

A. The standards of review applied by Division III conflict with the standards applied by this Court and the Courts of Appeal in published decisions.

Class certification decisions are reviewed for abuse of discretion. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). That said, "[a]n appellate court resolves close cases in favor of allowing or maintaining the class." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188–89, 157 P.3d 847 (2007).

This Court has recited and applied these two standards together—indeed, sometimes in the same paragraph—and found no conflict between them. *Nelson*, 160 Wn.2d at 188–89; *Moeller*, 173 Wn.2d at 278. Division III of the Court of Appeals, however, evidently found a conflict and concluded the abuse of discretion standard trumps the requirement of resolving close cases in favor of class certification. *Chavez v. Our Lady of Lourdes Hospital at Pasco*, No. 33556-9-III (Feb. 9, 2017) ("Opinion") at 33. The appellate court's conclusion is at odds with decisions of this Court and published decisions of Division I. RAP 13.4(b)(1)–(2).

In the ruling from which review is sought, the Court of Appeals emphasized the deferential nature of its abuse-of-discretion review. *See, e.g.*, Opinion at 30–31, 33, 37–38. For example, the court acknowledged that the parties put forward conflicting facts, "including facts important to

determining whether to grant class certification." Opinion at 30. Although the trial court "[had] not expressly resolve[d] conflicts in the evidence," the Court of Appeals said the trial court "must have [tacitly] done so when issuing its decision." *Id.* at 31. The appellate court concluded: "We must assume the hospital's testimony to be accurate or else we do not bestow full deference to the court's ruling favoring the hospital." *Id*. As such, the court reviewed the facts "in the light most favorable to Lourdes Medical Center." *Id.* at 30. The court acknowledged that in an appeal from a class certification decision, there is no authority for applying the standard used for reviewing factual findings made after a trial. *Id*. But the court used this standard anyway. *Id.*

The practical effect of the deferential standard of review applied below is to render a denial of class certification unreviewable on appeal. This Court's guidance is necessary to clear up the tension identified by the Court of Appeals between the deferential abuse of discretion standard and the requirement that both trial and appellate courts resolve close cases in favor of class certification. Federal courts, for example, handle this by affording more deference to a trial court order granting class certification than to one denying certification. *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016).

Division III's deference to factual findings that it "assume[d]" the trial court made is inconsistent with *Miller v. Farmer Brothers Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003). In *Miller*, Division I reviewed a class certification order in a case brought by employees to recover overtime wages. A question on appeal was whether Civil Rule 23(a)(1)'s numerosity requirement was satisfied. *Miller*, 115 Wn. App. at 821. The court did not resolve that question but instead remanded to the trial court to make adequate findings on the issue. "Although some portions of the record favor a finding of impracticability, some do not, and the trial court failed to make any findings or articulate its reasoning on this issue. We are therefore unable to conduct meaningful appellate review of the trial court's decision." *Id.*

As in *Miller*, the trial court below failed to make factual findings or fully articulate its reasons for denying class certification. Accordingly, the Court of Appeals should have remanded. Instead, the court engaged in a wide-ranging recitation of the facts and then "assume[d]" that the trial court resolved all factual disputes in the Hospital's favor. Opinion at 2–25, 31. This Court should accept review to resolve the conflict between the *Miller* approach and the Opinion here.

B. The petition raises issues of substantial public interest.

Ensuring payment of employee wages is an issue of substantial public importance that warrants this Court's review. RAP 13.4(b)(4). Washington State is a pioneer in the protection of employee rights. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 998 P.2d 582 (2000). The "Legislature's concern for the health and welfare of Washington's workforce" supports outcomes that ensure payment of employee wages. *Id.* Washington has adopted a "comprehensive legislative system" that reflects a "strong legislative intent to assure payment to employees of wages they have earned." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 154, 159, 961 P.2d 371 (1998). This remedial statutory scheme is construed liberally. *Id.*; *Brady v. Autozone Stores, Inc.*, No. 93564-5, ---Wn.2d---, 2017 WL 2829439, at *3–4 (June 29, 2017) (adopting an interpretation that "provides greater protection for workers" than the employer's proposed alternative).

Class actions are often the only economically feasible way to vindicate employees' claims for unpaid wages. By restricting the ability of employees and others making small-dollar claims to obtain class certification, the Court of Appeals' flawed superiority analysis undermines public policy favoring payment of wages.

The individual Nurses' unpaid wage claims are relatively small.

Opinion at 38. The court concluded that an employee's ability to pursue relief for unpaid wages in small claims court indicates that a class action is not superior to other methods of adjudication. *Id.* at 38. This analysis conflicts with prior opinions of this Court and warrants review. RAP 13.4(b)(1). Correction of this flawed superiority analysis is particularly important given the limited guidance from this Court on the application of Rule 23's superiority requirement.[1]

Public policy in Washington favors the class action device because "aggregation of small claims" promotes "efficiency, deterrence, and access to justice." *Moore v. Health Care Auth.*, 181 Wn.2d 299, 309, 332 P.3d 461 (2014) (quoting *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007)). This Court, for example, has held that the class actions are necessary for effective vindication of the public interests served by Washington's Consumer Protection Act. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007); *see also Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 275, 259 P.3d 129 (2011) (finding a nationwide class action was not superior because consumers in each state could file a class action: "no one state's citizens will be left out in the class

[1] Counsel for WELA have identified only two decisions from this court containing substantive analysis of the superiority requirement. *See Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 275–76, 259 P.3d 129 (2011); *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 193–97, 35 P.3d 351 (2001).

action cold without the possibility of amassing enough individual claims within their state to cover litigation costs."). The Court's reasoning in *Dix* is applicable in wage-and-hour cases as well. The state's policy of ensuring payment of employee wages is at least as important as its policy of enforcing the Consumer Protection Act. As with consumer claims, wage claims "may be so small that it would otherwise be impracticable to bring them," even in small claims court. *Dix*, 160 Wn.2d at 837. An employee's ability to bring an individual wage claim in small claims court does not undermine superiority. Division III's contrary conclusion is inconsistent with public policy, and should be corrected by this Court.

C. The Court of Appeals' endorsement of the trial court's consideration of the merits prior to ruling on class certification was improper.

After hearing the Nurses' class certification motion, the trial court directed the Nurses to file motions for summary judgment so that the court could better understand their substantive claims. Opinion at 26. In deciding those motions, the court considered the claims of members of the proposed class who were not before the Court because no class had been certified. For example, the trial court concluded: "An individualized inquiry into the duties of nurses across departments and shifts is needed to determine if a particular nurse had a rest break." App'x at 59.

The Court of Appeals endorsed the trial court's approach, stating:

"the trial court astutely postponed a decision on the motion [for class certification] and offered the nurses an opportunity to present summary judgment motions to clarify the legal theories controlling Lourdes Medical Center's exposure to liability." Opinion at 26.

The trial court's insistence on considering the merits before class certification was improper. *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 26, 65 P.3d 1 (2003) ("when deciding whether to certify a class, the trial court should not conduct a preliminary inquiry into the merits"); *Schwarzchild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("[C]ourts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified."). There are procedural tools open to a trial court needing more information about the elements of a named plaintiff's claim to conduct a rigorous analysis of the requirements of Civil Rule 23. A court may request supplemental briefing on the governing law or deny the motion for class certification without prejudice. It may not, however, require a proposed class representative to move for summary judgment and then issue a ruling that considers the merits of the claims of absent members of an uncertified class—before they receive notice of the action or opportunity to opt-out—as the trial court did here. App'x at 000059 ("There is a genuine issue of material fact as to whether the duties of any nurse, or group of nurses are performing work activities

without being relieved of patient responsibility."). This Court should examine Division III's endorsement of the trial court's consideration of the merits of the Nurses' claims before class certification.

D. The Hospital effectively conceded that the requirements of RAP 13.4(b) are met in its motion to publish the Opinion.

The Hospital filed a motion for publication of the Court of Appeals' Opinion. App'x at 000043–52. A second employer, Evergreen Hospital Medical Center, joined the motion. *Id.* at 000043–46. The two employers sought publication under Rule of Appellate Procedure 12.3(e)(2) and (3) on the ground that the unpublished opinion "modifies, clarifies or reverses an established principle of law" and is of "general public interest or importance." RAP 12.3(e)(2)–(3). The second factor tracks closely with one of the considerations governing acceptance of discretionary review: whether the decision "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

The Hospital's arguments in support of its motion to publish the opinion were broader than its response to the petition for review suggests. The Hospital argued: "The Chavez opinion provides guidance to unsettled questions in Washington law regarding class action certification. The case is of *general importance to the public*." *Id.* at 000045 (emphasis added).

The Hospital said the Opinion "addressed and clarified both the standard of review of class certification decisions as well as the trial court's discretion on procedure in deciding class questions." *Id.* at 000047. The Hospital also argued: "Employers in general, and the healthcare industry in particular, have great interest in obtaining further guidance on when individual claims become class claims." *Id.* at 000049. Employees, like their employers, have great interest in obtaining this Court's guidance on the factors relevant to superiority under Civil Rule 23(b)(3).

The Hospital's motion also previews the arguments employers will make if the Court of Appeals' unpublished opinion stands uncorrected. Employers will argue that *Chavez* holds that certification of wage-and-hour claims is improper in any case where hourly workers work in different departments. The length of the Opinion also increases the likelihood that trial courts will find the unpublished Opinion persuasive under General Rule 14.1.

IV. CONCLUSION

For all of the foregoing reasons, WELA respectfully requests that the Court grant the petition for review.

RESPECTFULLY SUBMITTED AND DATED this 2nd day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that on July 31, 2017, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of July, 2017.

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