

FILED
MAR 07 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293661

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

WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain
employees it represents, and VIVIAN MAE HILL, individually and on
behalf of others similarly situated,

Plaintiffs-Respondents,

v.

SACRED HEART MEDICAL CENTER,

Defendant-Appellant.

REPLY BRIEF OF APPELLANT

Paula L. Lehmann
Michael J. Killeen
DAVIS WRIGHT TREMAINE LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

Counsel for Appellant Sacred Heart Medical Center

TABLE OF CONTENTS

I. NO DISPUTE REGARDING ASSIGNMENTS OF ERROR, ISSUES, STATEMENT OF CASE, AND STANDARD OF REVIEW 1

II. PLAINTIFFS’ CLAIM IS BARRED BY PRIOR LITIGATION..... 1

III. NO EVIDENCE THAT THE STATE LAW REGARDING REST BREAKS WAS VIOLATED 2

IV. WORKING THROUGH REST BREAKS DOES NOT CREATE OVERTIME 4

V. PLAINTIFFS MISREAD *WINGERT*..... 7

VI. PLAINTIFFS HAVE NO DAMAGES..... 9

VII. PLAINTIFFS’ POSITION, AND THE SUPERIOR COURT’S ORDER, REST ON AN ARGUMENT THAT IS PREEMPTED..... 10

VIII. PLAINTIFFS’ EXPENSES INCURRED IN LITIGATION ARE NOT AVAILABLE 11

IX. DOUBLE DAMAGES AND ATTORNEYS’ FEES UNDER RCW 49.52 SHOULD NOT HAVE BEEN AWARDED BECAUSE THERE IS A BONA FIDE DISPUTE REGARDING PLAINTIFFS’ CLAIM FOR OVERTIME PAY 12

X. PARTICIPATION OF NURSE MEMBERS WAS REQUIRED TO DETERMINE MISSED REST BREAKS AND DAMAGES 13

XI. CONCLUSION..... 13

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Dept. of Labor and Industries v. Overnite Transportation Co.,</i> 67 Wn. App. 24, 834 P.2d 638 (1992).....	12
<i>DeYoung v. Cenex Ltd.,</i> 100 Wn. App. 885 (2000)	1
<i>Flower v. T.R.A. Indus., Inc.,</i> 127 Wn. App. 13, 111 P.3d 1192 (2005).....	12
<i>Hanson v. City of Snohomish,</i> 121 Wn.2d 552 (1993)	1
<i>Lybbert v. Grant County,</i> 141 Wn.2d 29 (2000)	2
<i>McConnell v. Mothers Work, Inc.,</i> 131 Wn. App. 525 (2006)	11
<i>Wingert v. Yellow Freight Systems, Inc.,</i> 146 Wn.2d 841 (2002)	passim
STATE STATUTES	
RCW Chapter 49.12.....	7
RCW 49.48.030	12
RCW 49.52	12
RCW 49.52.050(2).....	12
RCW 49.52.070	12
RCW 296-126-092(4)	4

REGULATIONS

WAC 296-126-092.....10

WAC 296-126-092(4).....2, 7

I. NO DISPUTE REGARDING ASSIGNMENTS OF ERROR, ISSUES, STATEMENT OF CASE, AND STANDARD OF REVIEW

Plaintiffs do not take issue with SHMC's assignments of error, issues related to assignments of error, statement of the case, and standard of review.

II. PLAINTIFFS' CLAIM IS BARRED BY PRIOR LITIGATION

Plaintiffs do not deny—because they cannot—that WSNA raised the identical issue in the grievance and arbitration process as is raised here, namely, whether damages in the form of payment for missed rest breaks should be at overtime rates under Washington law. CP 774, 776-77 (plaintiffs' claim in arbitration was based on Washington state law). The arbitrator ruled that they should not. CP 299. The fact that plaintiffs previously pursued their claim utilizing the CBA arbitration process rather than a separate MWA lawsuit does not change the fact that the fundamental issue litigated in both proceedings is the same. The bar to repeated litigation is not based on artificial labels. Collateral estoppel is based on “the issue decided,” *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561 (1993), and *res judicata* is based on a concurrence of identity of the “subject matter.” *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891 (2000). Here, plaintiffs relied on the MWA to support their overtime pay

argument in the arbitration and again in this lawsuit. As a consequence, they are precluded from relitigating it.

In fact, plaintiffs' waiver argument concedes that their prior claim was based on MWA, but asserts that an employee's prospective rights under the MWA cannot be waived by a collective bargaining agreement. SHMC is not asserting that plaintiffs waived their prospective rights to overtime pay in the CBA; rather, SHMC is asserting that plaintiffs, having litigated the issue of overtime pay under the MWA and lost, waived the right to re-litigate the claim. They did not seek to vacate the arbitrator's decision. Thus, the claim for overtime pay for missed rest breaks is waived. *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39 (2000).

III. NO EVIDENCE THAT THE STATE LAW REGARDING REST BREAKS WAS VIOLATED

WAC 296-126-092(4) provides that employees must be "allowed" 10 minutes of rest break time. The rest break may either be scheduled as a block or taken intermittently over the course of a shift. There is no requirement that SHMC choose between intermittent breaks and scheduled block breaks to demonstrate compliance with state law. Similarly, state law does not prohibit SHMC from complying with the state law by allowing both intermittent breaks and scheduled block breaks.

Plaintiffs submitted no evidence demonstrating that nurses at SHMC were denied 10 minutes of rest every four hours as required under Washington law. The nurses only presented evidence that they missed contractual block rest breaks totaling 15 minutes. Such evidence does not establish liability for denial of 10-minute rest breaks. To demonstrate a denial of 10-minute rest breaks, the nurses must show that the nature of the work did not permit them to get 10 minutes of rest every four hours—which they haven't—and that 10 minutes of their scheduled break time was missed—which they haven't. CP 472; 945.

The superior court's conclusion that the nature of the work at SHMC does not allow for intermittent breaks lacks any foundation, CP 1556, and plaintiffs have cited no evidence justifying the superior court's conclusion. On the contrary, the evidence is that the nature of the work allows nurses to take intermittent rest breaks, which fully satisfies state law. CP 263-67; 471-72; 944-47. Accordingly, summary judgment for plaintiffs was granted erroneously.

The only evidence of missed rest breaks are the forms submitted by nurses when they did not get a full 15-minute contractual rest break. They asked the superior court to infer that, by submitting a form to claim payment for not getting a full 15-minute contractual break, the nurses established that they did not get 10 minutes of rest either intermittently or

as a block break. In fact, there is no evidence in the record demonstrating that such an inference is justified. Consequently, plaintiffs' failed to demonstrate, as a matter of law, that they were denied rest breaks required under RCW 296-126-092(4).

IV. WORKING THROUGH REST BREAKS DOES NOT CREATE OVERTIME

If a nurse working an eight-hour shift misses both of her rest breaks, the nurse has eight hours of productive work for which the nurse receives eight hours of pay and is credited with eight hours of time worked. There is no unpaid work time. She is not shorted in her "hours worked."

This is undisputed.

It is also undisputed that *missing a rest break doesn't increase the length of the shift*. When a nurse misses a rest break she leaves at the end of her shift. She does not extend the shift or stick around and take a makeup break. She stops working and goes home. CP 472. The length of her work day and work week does not increase.¹

To compensate a nurse for working through a paid break, SHMC pays the nurse for her work plus an additional 15 minutes for each missed rest break. In other words, a nurse who misses a rest break gets paid more

¹ To be sure, a nurse who skips breaks performs more productive work, during the eight-hour shift than her counterpart who takes her breaks. But, in both cases, the shift is the same length.

than double for the missed break—she gets paid once for the 10 minutes of productive work performed during the time she otherwise would have been on a paid rest break and she gets paid an additional 15 minutes for missing her paid rest break. Stated another way, a nurse who works an eight-hour shift and takes her breaks gets 8 hours of pay, whereas a nurse who works an eight-hour shift and skips her breaks gets 8-1/2 hours of pay. The extra pay, which is mandated by *Wingert*, compensates the nurse for loss of the benefit of a paid rest break.

Again, this is all undisputed.

Plaintiffs also do not dispute that SHMC has properly paid the nurses for missed rest breaks as required under the IWA. CP 1230-31. But, astonishingly, plaintiffs insist that they are also entitled to overtime pay under the MWA even though they admit that missing breaks did not cause them to work more than 40 hours in a work week. Thus, the nurse does not go into an overtime situation.

The time spent working productively replaces the time that would have been used for a break—one activity is substituted for (not added to) the other. When a nurse misses a break, the time she works is counted as “hours worked” for which she gets paid. She also receives an additional 15 minutes of pay as a penalty under the IWA as required by *Wingert*

because she was deprived of a paid break. There is no basis for an MWA claim as well.

The situation is similar to an employee who gets double pay for working a paid holiday. The employee is paid eight hours for actually working the holiday plus eight hours for having to miss a paid holiday. The employee only works eight hours but gets 16 hours of pay. Similarly, a nurse who works through a paid rest break gets paid 10 minutes for actually working plus an additional 15 minutes for having missed a paid rest break. Thus the nurse only works 10 minutes but gets paid for 25 minutes.

Plaintiffs invite this court to perpetuate the superior court's error by treating the additional pay for a *missed* rest break under the IWA as representing additional hours worked under the MWA. However, that is not true. Plaintiffs admit that their shift time was not extended when they missed a break.

Because no nurse goes into an overtime situation, i.e., works over 40 hours in a week, as a result of missing her rest break, there is no obligation to credit a nurse with additional "hours worked" under the MWA or to pay a nurse at overtime rates in connection with a missed rest break. The extra pay that a nurse gets for missing a rest break is compensation under the IWA for violating the rest break regulation. The

MWA is not involved because the work week is not extended beyond 40 hours. Plaintiffs' attempt to create a separate remedy under the MWA for a rest break violation is not supported by the facts or the law.

V. PLAINTIFFS MISREAD *WINGERT*

Plaintiffs' entire argument rests on a misreading of *Wingert v. Yellow Freight Systems, Inc.* *Wingert* recognized an implied cause of action for missed rest breaks under the Industrial Welfare Act, RCW Ch. 49.12, and WAC 296-126-092(4) (the rest period regulation). Plaintiffs twist the logic of *Wingert* in an effort to claim it also creates a separate remedy under the MWA. But, a reading of *Wingert* shows that the remedy is limited to an IWA claim.

The *Wingert* court stated that a claim for damages for a missed rest break (unlike an MWA claim) “does not present the usual situation where employees seek to recover wages for uncompensated work.” *Wingert*, 146 Wn.2d at 841. As Yellow Freight pointed out, “employees have been paid for all the time they worked, so [the employer’s] failure to provide rest periods has not resulted in lost wages.” *Id.* at 849. Rather, additional compensation is owed from an equitable standpoint because “[e]mployees who must work through their . . . break are, *in effect*, providing Yellow Freight with an additional ten minutes of labor” during their work shift. *Id.* at 849.

The *Wingert* court was concerned that, even though the employee who missed a rest break was paid for all the hours worked as required by the MWA, the employee “in effect” provided ten more minutes of productive work during the shift for no additional compensation.² The court was offended by the inequity of an employee working through a paid rest break not being paid more than an employee who takes a paid ten-minute rest break. Consequently, the Court held that employees who work a two-hour shift without taking a paid rest break were “entitled to be compensated by Yellow Freight for two hours and ten minutes of work.” *Id.* at 849. The key word here is “compensated.”

This is exactly what SHMC does. When a nurse working a four-hour segment misses a paid rest break, SHMC “compensates” her for four hours and fifteen minutes. Thus, SHMC is in full compliance with *Wingert*, and plaintiffs do not claim otherwise. CP 1230-31.

Plaintiffs mischaracterize *Wingert* as holding that being compensated for four hours and fifteen minutes for a four-hour work segment means that the nurse actually worked more than four hours. That is not true either as a matter of fact or law.

Wingert addressed the fact that employees who missed rest breaks were providing *more productive work during the shift* in violation of the

² In *Wingert*, the shift involved was an overtime shift of two hours, but the same principle applies to a non-overtime shift of four hours.

IWA and, therefore, were deserving of compensation under the IWA in addition to their regular compensation. Read correctly, the rationale in *Wingert* supports extra “compensation” for an employee who performs more productive work in violation of the IWA versus an employee who performs less productive work. But, it does not create an additional remedy under the MWA. Just like the nurses at SHMC, the employees at Yellow Freight did not actually work more hours than the shift they were paid for. There was no “uncompensated work.” Thus the MWA did not come into play. The remedy was compensation under the IWA. The MWA would only apply if the nurses actually worked longer than their scheduled shifts and went into an overtime situation, which they concede they did not.

VI. PLAINTIFFS HAVE NO DAMAGES

Even if the MWA applies, plaintiffs admit that their damages are limited to 15 minutes of pay for each missed rest break. See Brief of Respondents at p. 2 (“SHMC’s obligation for missed rest breaks resulting in overtime hours worked was the overtime rate for the first 10 minutes (which is equal to 15 minutes of pay)”).

It is undisputed that SHMC paid a nurse an additional 15 minutes of pay for every missed rest break claimed. Thus, plaintiffs have no damages.³

VII. PLAINTIFFS' POSITION, AND THE SUPERIOR COURT'S ORDER, REST ON AN ARGUMENT THAT IS PREEMPTED

Plaintiffs concede that they were paid 15 minutes for every missed rest break. But, rather than end the analysis, the plaintiffs invited the superior court to interpret the collective bargaining agreement between the SHMC and WSNA, including an arbitrator's decision, to calculate missed rest break compensation for purposes of the state law. The superior court unfortunately agreed and enmeshed itself in an analysis as to how 15 minutes of compensation that nurses receive for missed rest breaks satisfies SHMC's CBA obligations. This is precisely the type of analysis that is preempted by Section 301. The superior court went beyond referencing the CBA and engaged in interpreting what the payments mean in relation to the collective bargaining obligations and interwove those interpretations into the court's determination as to how the 15 minutes of additional pay should be calculated as to any overtime damages owed under the MWA.

³ It is undisputed that the Washington Department of Labor and Industries reviewed a similar situation at another hospital at the request of WSNA and determined that when an employer "compensates the nurse by paying 15 minutes of straight time" when the nurse misses a rest break, the employer "effectively pays the nurse at overtime rates for the missed mandatory ten-minute rest break as provided by WAC 296-126-092." CP 749-50.

Whether and how the 15 minutes of compensation for a missed rest break relates to the collective bargaining agreement is not a matter that the superior court can interpret. If anything the superior court should have ruled that plaintiffs, having already made and lost their overtime pay argument in the grievance process, were barred from re-litigating the issue in state court. But, if a state court action is not barred, then, interpreting how 15 minutes of pay for missed rest breaks satisfies SHMC's obligations under the collective bargaining agreement is subject matter preempted by federal law and the state court has no jurisdiction to engage in such an analysis. The manner in which 15 minutes of pay satisfies SHMC's collective bargaining agreement obligation is irrelevant. Nurses received 15 minutes of pay for every missed 10-minute rest break, which is the amount that plaintiffs seek in this action.

VIII. PLAINTIFFS' EXPENSES INCURRED IN LITIGATION ARE NOT AVAILABLE

Plaintiffs make no counter argument in their brief and take no issue with SHMC's contention that Plaintiffs' claim for reimbursement for expenses beyond statutory costs is without merit because Plaintiffs do not have a valid MWA claim as required by *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 532-33 (2006).

IX. DOUBLE DAMAGES AND ATTORNEYS' FEES UNDER RCW 49.52 SHOULD NOT HAVE BEEN AWARDED BECAUSE THERE IS A BONA FIDE DISPUTE REGARDING PLAINTIFFS' CLAIM FOR OVERTIME PAY

It is undisputed that SHMC paid nurses an additional 15 minutes for every missed rest break as required under the IWA and *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 849 (2002). Plaintiffs' novel MWA claim goes beyond *Wingert* and any other Washington appellate case. At the very least, there is a "fairly debatable" dispute as to whether the MWA applies and, in any event, whether the payment of 15 minutes of time for each missed rest break satisfies any obligation SHMC would have under the MWA. This is not a "contrived" legal argument as occurred in *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005) or a situation that is "absent meritorious argument . . . and absent citation to authority" that the court found in *Dept. of Labor and Industries v. Overnite Transportation Co.*, 67 Wn. App. 24, 834 P.2d 638 (1992). Here there is both a meritorious legal argument and authority supporting that argument. Accordingly, the plaintiffs have not satisfied the standard of "willfully and with intent to deprive" under RCW 49.52.050(2).⁴

⁴ Plaintiffs inexplicably argue that they were awarded attorneys fees under RCW 49.48.030. Brief of Respondents at p. 30-31. The superior court's Summary Judgment Order ¶ 9, drafted by Plaintiffs, plainly states that attorneys' fees were awarded "pursuant to RCW 49.52.070." CP 1559.

X. PARTICIPATION OF NURSE MEMBERS WAS REQUIRED TO DETERMINE MISSED REST BREAKS AND DAMAGES

Plaintiffs make the conclusory argument that the damages at issue are “certain, easily ascertainable, and within the knowledge of the Defendant.” Brief of Respondent at p.35. However, Plaintiffs rely on missed rest break forms that provide no evidence that nurses failed to receive at least 10-minute block or intermittent rest breaks. Determining whether any nurse missed a statutory rest break and determining the amount of damages sought for each nurse required the nurse-members’ involvement and is far more than a simple mathematical calculation. Thus, WSNA has no standing to make overtime claims on behalf of individual nurses.

XI. CONCLUSION

The superior court’s Order Granting Plaintiffs’ Motion for Summary Judgment Denying Defendants’ Third Motion for Summary Judgment should be reversed and remanded with instructions to dismiss plaintiffs’ claim and to enter summary judgment for SHMC.

RESPECTFULLY SUBMITTED this 4th day of March, 2011.

By 

Paula L. Lehmann, WSBA #20678

Michael J. Killeen, WSBA #7837

DAVIS WRIGHT TREMAINE LLP

Suite 2200

1201 Third Avenue

Seattle, WA 98101-3045

Telephone: (206) 622-3150

Fax: (206) 757-7700

E-mail: paulallehmann@dwt.com;

mikekilleen@dwt.com

*Counsel for Appellant Sacred Heart
Medical Center*

PROOF OF SERVICE

I, Carol Gary, the undersigned, hereby certify and declare under that the following statements are true and correct:

1. I am over the age of 18 years, not a party to the within cause and am employed by the law firm of Davis Wright Tremaine. My business and mailing addresses are both 1201 Third Ave., Suite 2200, Seattle, Washington 98101-3045.

2. On the 4th day of March, 2011, I caused to be sent for filing an original and one copy of *Reply Brief of Appellant* via overnight mail to:

Clerk of Court
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

3. On the 4th day of March, 2011, I caused to be served a copy of *Reply Brief of Appellant* via overnight mail to:

David Campbell, Esq.
Dmitri Iglitzin, Esq.
Carson Glickman-Flora, Esq.
Schwerin Campbell Barnard & Iglitzin, LLP
18 W. Mercer Street, Suite 400
Seattle, WA 98119-3971

Executed at Seattle, Washington this 4th day of March, 2011.



Carol Gary