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

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER WASHINGTON STATE  
NURSES ASSOCIATION

---

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## INTRODUCTION

The Court of Appeals erroneously reversed a Spokane County superior court decision which held that denied state mandated rest periods must be treated as additional time worked and compensated in accordance with the requirements of the Washington Minimum Wage Act (“MWA”), RCW 49.46. The Spokane court ordered Respondent Sacred Heart Medical Center (“SHMC”) to pay its Registered Nurses (“RN” or “Nurses”) the premium overtime rate for missed rest breaks that resulted in more than 40 hours of work in one week. This Court granted the request by Petitioner Washington State Nurses Association (“WSNA”), a labor organization representing approximately 1,200 Nurses at SHMC, for review of the Court of Appeals decision on January 5, 2012.

## ARGUMENT

**I. RESPONDENT SHMC’S FAILURE TO PROVIDE STATE MANDATED REST PERIODS VIOLATED THE INDUSTRIAL WELFARE ACT, RCW 49.12, AND ALSO THE MINIMUM WAGE ACT, RCW 49.46, FOR THE DENIED REST PERIODS THAT RESULTED IN HOURS WORKED OVER FORTY IN A WEEK.**

Respondent SHMC violated WAC 296-126-092(4),<sup>1</sup> the state regulation promulgated pursuant to the Industrial Welfare Act (“IWA”), RCW 49.12, which imposes a “mandatory obligation” on employers to

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<sup>1</sup> Appendix to Petition for Review, A-55.

provide a paid rest period of not less than ten minutes for each four hours of work, when it denied its employee Nurses 23,018 15-minute rest periods during the time period relevant to this lawsuit. See CP 1256; *Pellino v. Brinks, Inc.*, 164 Wn. App. 668, 2011 WL 5314222, \*12 (2011) (WAC 296-196-092 imposes a mandatory obligation to provide meal and rest breaks) (citing *Wingert v. Yellow Freight*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002) (holding that WAC 296-196-092 “clearly and unambiguously prohibits working employees for longer than three consecutive hours without a rest period”)).

*Wingert, supra*, held that “a rest period violation can constitute both a condition of labor violation and a wage violation.” 146 Wn.2d at 849. This is because employees denied the mandated rest periods provided “additional labor” to their employer when they were worked through a rest period. *Id.* This state’s labor standards require that instead of working, employees must be relieved of “work or exertion” for “not less than ten minutes” for each four hours of work. *Pellino*, 2011 WL 5314222, \*12 (citing *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003)). This rest period is for “personal rest and relaxation” and, as the superior court held below, the “nature of the work” of nursing requires that these breaks be uninterrupted. *Pellino*, 2011 WL 5314222, \*13 (citing Department of Labor and Industries Administrative Policy

ES.C.6, *see* <http://www.lni.wa.gov/workplacerrights/files/policies/esc6.pdf>); Spokane Court Order, CP 1556, p. 4 (“nature and type of nursing work does not allow for intermittent rest breaks”). The WAC 296-196-092 mandates that this rest period time is “on the employer’s time” and must be paid. App. A-55.

However, Respondent SHMC did not compensate the additional labor it obtained from the denied rest periods as compensable “time worked” in its timekeeping system. CP 216, SHMC Answer to Complaint (“Sacred Heart Medical Center pays for fifteen minutes of missed rest breaks at the straight time rate”). Instead, SHMC paid a lump sum equal to 15-minutes of pay for each recorded missed rest break, and concededly did not treat the missed rest period time as time worked for purposes of the overtime requirement of RCW 49.46.130, which requires that the overtime rate of pay be paid for hours in excess of 40 worked in one week. By doing so, SHMC extracted overtime hours of work from its RNs without paying the required premium overtime rate for overtime hours obtained through the denial of rest periods.

The Court of Appeal’s decision, which reversed the Spokane court’s decision, permitted SHMC’s characterization of the time associated with denied rest periods as not “time worked” and thus not subject to RCW 49.46.130, resulting in a perverse incentive that makes it

less expensive for SHMC to extract overtime hours from its RNs by denying them rest breaks than by simply scheduling them for more than 40 hours in a week and providing rest periods.

For illustrative purposes, consider two RNs, each working their fourth 12-hour shift of the workweek.<sup>2</sup> One RN takes the rest periods she is entitled to under the law, but the second RN is worked through all her of her rest periods. Although SHMC has plainly extracted additional labor from the second RN (she worked without breaks for 12 hours), SHMC does not treat this additional labor as “time worked” compensable at the overtime rate. This is so despite the fact that the second RN performed more than 40 hours in one week (when she had began her shift, she had already completed three 12-hour shifts during the week), which was added to when she was worked through her missed rest periods. SHMC does not treat this “additional labor” provided due to the denied rest periods – which result in additional time worked over 40 in one week – because it does not recognize that it obtained additional work from an RN denied a rest period.

SHMC’s failure to pay the overtime rate conflicts with *Wingert’s* recognition of the remedial policies of the IWA and the MWA and also its explicit directive that denied rest periods result in “additional labor.”

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<sup>2</sup> The 12-hour shift is the most common length shift at SHMC.

Under *Wingert*, when employees are worked through their breaks, they must be provided an *additional* ten minutes of pay as “hours worked.” The Court of Appeals erred when it held that denied rest periods do not result in additional time worked. *Wingert* established that “additional labor” is the precise result of a denied rest period, and there is no basis in Washington law to treat this additional labor as noncompensable for purposes of overtime under the MWA.

**II. THE MINIMUM WAGE ACT REQUIRES THE OVERTIME PAY RATE FOR ANY HOURS WORKED OVER 40 IN ONE WEEK, WITH NO CONSIDERATION OF AN EMPLOYEE’S “NORMAL” WORKDAY OR SHIFT.**

The Court of Appeals compounded its erroneous conclusion that denied rest periods do not result in additional labor when it grafted a daily workday component onto the MWA’s weekly overtime requirement. The Court of Appeals held that because a denied rest period occurred “during the workday,” and did not “extend the work day,” App., A-10, it was not of the type of labor that is eligible for the overtime rate under the MWA.<sup>3</sup>

RCW 49.46.130(1) prohibits employers from “employ[ing] any of his or her employees for a work week longer than forty hours unless such employee receives compensation for his or her employment in excess of

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<sup>3</sup> The Court of Appeals appears to put undue emphasis on the term “during” a workday as used in *Wingert*. App., A-10 – A-11.

the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.” App., A-45.

The only prerequisite for the premium overtime rate is that the time worked be in excess of forty hours in one work week.<sup>4</sup> The length of a shift or the number of hours worked each day is entirely irrelevant to the determination of whether the premium time-and-one-half overtime rate is owed. RCW 49.46.130; *Stevens v. Brinks*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007) (same); Administrative Policy ES.A.8.1 (“Overtime”) (*see* <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa81.pdf>) and also ES.A.8.2 (“How To Compute Overtime”) (*see* <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa82.pdf>) (explaining that a workweek is a “recurring period of 168 hours during seven consecutive 24-hour periods” and that employers must pay the 1.5 rate for all hours in that week “in excess of 40”).

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<sup>4</sup> WSNA does not claim, and the trial court did not order, overtime pay for missed rest periods that occurred in a week in which a nurse did not work 40 hours in one week.

**III. THE SUPERIOR COURT'S FINDING OF LIABILITY DID NOT REST UPON AN INTERPRETATION OF ANY COLLECTIVE BARGAINING AGREEMENT AND, EVEN IF THE COURT HAD REFERENCED THE PARTIES' CBA (WHICH WAS NOT NECESSARY DUE TO SHMC'S ADMISSION THAT IT PAID "STRAIGHT TIME" FOR OVERTIME REST PERIODS), SUCH A REFERENCE WOULD NOT ELIMINATE SHMC'S LIABILITY FOR THE DENIED REST PERIODS.**

The Court of Appeals erroneously held that WSNA did not have a MWA claim on behalf of its RN members on the basis that the superior court must have interpreted the collective bargaining agreement ("CBA") between WSNA and SHMC. App. A-12. Respondent SHMC previously argued that this case was preempted when it removed WSNA's MWA lawsuit to Washington Eastern District Federal Court in 2008. That federal court found that the parties' "CBA need not be interpreted in order to determine whether Sacred Heart complied with the MWA...In the event that the Association is successful and damages need to be calculated, *reference* to the CBA will be required, but there is no indication that determining a particular nurse's wage rate will require *interpretation* of the CBA." App. A-72 (emphasis in original).

**A. Reference To A Collective Bargaining Agreement Does Not Extinguish Statutory Minimum Wage Act Claims.**

While it is true that an employee cannot enforce a collective bargaining agreement in state court, *see Hisle v. Todd Pacific Shipyards*

*Corp.*, 151 Wn.2d 853, 863, 93 P.3d 108 (2004), Washington courts have consistently and repeatedly rejected the idea that reference to a CBA extinguishes a claim based on a state law. *See e.g., Ervin v. Columbia Distributing Inc.*, 84 Wn.App. 882, 889, 930 P.2d 947 (1997) (reference to the CBA's rate of pay to determine the denied overtime rate did not prevent the workers' MWA claim); *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 131, 839 P.2d 314 (1992) (nonnegotiable or independent negotiable claims are not subject to federal preemption and can be pursued in state court irrespective of a CBA).

Here, the superior court did not "interpret" the CBA in order to find that SHMC violated the MWA. SHMC admitted that it provided a 15-minute length rest period and paid a lump sum equal to 15 minutes of pay for each denied break, regardless of whether that break resulted in overtime hours worked. CP 216. No interpretation – nor even reference – to the CBA was necessary, and the superior court's decision did not rest on the parties' CBA. Nor did the calculation of damages, which was done entirely through expert analysis of SHMC's payroll records that showed the hours worked in a week by each RN, each RN's regular rate of pay, and the number of denied rest periods per RN. CP 1557-1559.

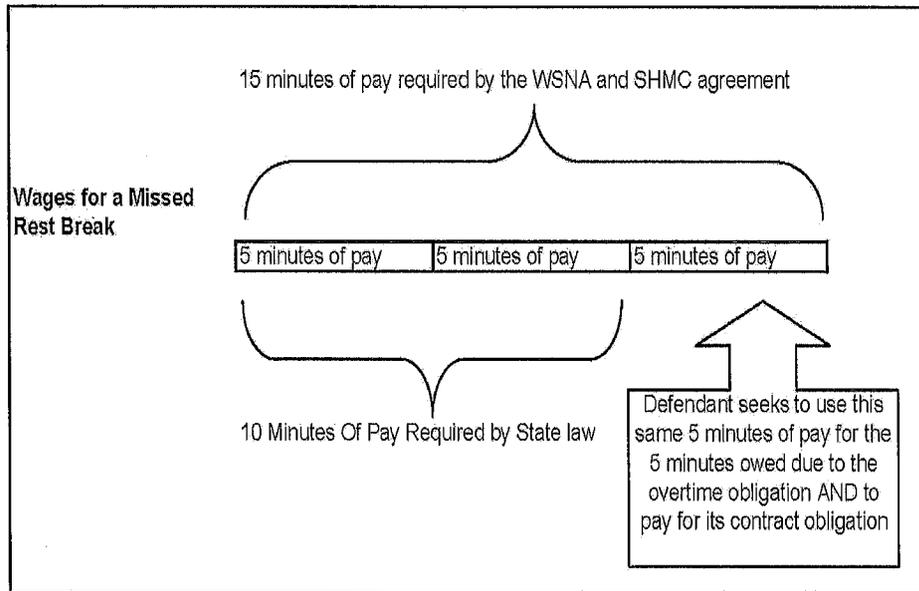
In *Wingert*, this Court held that "[a] collective bargaining agreement cannot thwart the fundamental purpose of the statute which

‘evidences a strong legislative intent that employees be afforded healthy working conditions and adequate wages.’” *Wingert, supra*, 146 Wn. 2d at 852. There mere fact that the parties have a CBA does not mean that these RNs right to the statutory overtime rate for denied rest periods resulting in overtime hours work is extinguished. Moreover, a fair reading of the Spokane court’s decision shows that the CBA was not referenced (much less interpreted) for purposes of determining liability and damages. However, even had the superior court referenced the CBA itself to determine the length of a rest period or the rate of pay, such a *reference* does not void a MWA claim.

**B. The Spokane Court Did Not Interpret the CBA When It Correctly Rejected SHMC’s Proposal To Retroactively Repurpose A Different Payment Made To The RNs In Order To Satisfy Its MWA Overtime Obligation.**

As a defense to this MWA action, SHMC proposed that it could retroactively re-designate a payment made pursuant to its CBA for the last 5 minutes of each missed rest break period, and call this payment statutory “overtime” pay for the first ten minutes of the missed rest period. The Spokane court rejected SHMC’s attempted legerdemain with its payroll record, as allowing it would permit the evasion of the overtime obligation. A retroactive “double counting” of the pay made for a non-overtime purpose would also result in a violation of the state’s payroll keeping

requirement, RCW 49.46.070, which requires the accurate recording of time and pay. Nonetheless, the Court of Appeals reversed, and approved of SHMC's proposed payroll scheme, which looks like this:



As the superior court recognized, this deception would result in breach of the CBA, because the final five minutes of these RNs' rest periods would be unpaid if missed. Moreover, SHMC had never previously treated this payment as "overtime" (and argues that it need not). In this scenario, SHMC could merely re-purpose that same five minutes of pay as "overtime" for the first ten minutes, the RNs would be without pay for the last five minutes of a denied rest period. It is impossible to reconcile such a result with this Court's direction that a

CBA “cannot thwart the fundamental purpose” of Washington’s statutory wage and hour protections.” *Wingert* at 852.

**IV. DOUBLE DAMAGES PURSUANT TO RCW 49.52.070 SHOULD BE AWARDED HERE BECAUSE THE EMPLOYER VIOLATED THE INDUSTRIAL WELFARE ACT BY DENYING REST PERIODS AND THEN INTENTIONALLY WITHHELD THE OVERTIME RATE FOR THOSE DENIED REST BREAKS THAT RESULTED IN HOURS WORKED OVER 40 IN ONE WEEK.**

RCW 49.52.070 provides civil liability for double damages for wage violations:

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages...

RCW 49.52.070.

The legislature adopted the double damages provision of RCW 49.52.050(2) in order to ensure that workers received the wages they were due:

[T]he fundamental purpose [of the Act]...is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages. The act is thus primarily a protective measure, rather than a strictly corrupt practices statute. In other words, the aim or purpose of the act is to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay, and, further, to see that the

employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages...

*Schilling v. Radio Holdings, Inc.*, 136 Wn. 2d 152, 159, 961 P.2d 371 (1998) (emphasis in original) (quoting *State v. Carter*, 18 Wn.2d 590, 621, 140 P.2d 298 (1943)). See also *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn. 2d 514, 519-20, 22 P.3d 795 (2001) (citing *Schilling's* holding that the statute should be “liberally construed to advance the Legislature’s intent to protect employee wages and assure payment”).

“[T]he employer’s refusal to pay must be volitional” for double damages to apply. *Schilling, supra*, 136 Wn. 2d at 159-160 (citing *Brandt v. Impero*, 1 Wn.App. 678, 682, 463 P.2d 197 (1969) (willful means merely that the “person knows what he is doing, intends to do what he is doing, and is a free agent); *Ebling v. Gove's Cove, Inc.*, 34 Wn.App. 495, 500, 663 P.2d 132 (1983) (“a non-payment of wages is willful when it is not a matter of mere carelessness, but the result of knowing and intentional action”). An employer’s failure to pay wages is not willful if the failure is because of “the existence of a bona fide dispute.” *Schilling*, 136 Wn. 2d at 160. A bona fide dispute is a “‘fairly debatable’ dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid.” *Id.* at 161–62.

“The question of whether the employer willfully withheld money owed...is a question of fact; our review is limited to whether there was substantial evidence to uphold the court’s decision.” *Lillig v. Becton-Dickinson*, 105 Wn. 2d 653, 660, 717 P.2d 1371, 1375 (1986). *See also, Champagne v. Thurston County*, 163 Wn.2d 69, 82, 178 P.3d 936 (2008) (“[d]etermining willfulness [under the Wage Rebate Act] is a question of fact reviewed for substantial evidence”) (citing *Pope v. University of Washington*, 121 Wn.2d 479, 490, 852 P.2d 1055 (1993)).

Although the question is a factual one, it can be resolved on summary judgment when no material facts are in dispute.<sup>5</sup> *Champagne, supra*, 163 Wn. 2d at 69, 81-82 (citing *Schilling, supra*, 136 Wn.2d at 10). When a trial court has made a factual finding, the standard of review for an appellate court is “whether substantial evidence supports its findings and, if so, whether those findings support the trial court’s conclusions of law and judgment...” *Durand v. HIMC Corp.*, 151 Wn. App. 818, 832, 214 P.3d 189 (2009), *review denied*, 168 Wn. 2d 1020, 231 P.3d 164 (2010). Here, the Spokane court disposed of the issue of exemplary damages on cross motions for summary judgment. CP 1560.

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<sup>5</sup> A genuine issue of fact does not exist where a reasonable person could reach only one conclusion. *White v. Salvation Army*, 118 Wn.App. 272, 284, 75 P.3d 990 (2003).

SHMC argues that having a contrary interpretation of a law is sufficient to avoid double damages even if it is later found to have wrongly interpreted the Minimum Wage Act. However, “absent meritorious argument to that effect and absent citation to authority which supports its view, [an employer’s argument] does not amount to a bona fide dispute which justifies invoking the narrow exception to the statute providing for double damages.” *Department of Labor and Industries v. Overnite Transp. Co.*, 67 Wn. App. 24, 36, 834 P.2d 638 (1992). *See also Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005) (rejecting employer’s argument that there was a bona fide dispute over whether a signing bonus was an expense, holding that “[t]he fact that [the employer] contrived a legal argument that the bonus was actually an ‘expense’ does not make it a bona fide dispute”).

Issue of attorneys fees in wage and hour matters are appropriately left to the trial court to determine, absent abuse of discretion, *see Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, *modified*, 966 P.2d 305 (1998). Likewise, the Spokane court’s determination that no bone fida dispute existed regarding the obligation to pay the overtime, and thus the exemplary double damages were warranted, should be left to stand absent some showing that substantial evidence did not support the superior court’s award. The Spokane court reviewed the evidence as a whole

during the three years this lawsuit was in its courtroom (during which more than 16 motions regarding substantive issues of law were filed) and its determination that SHMC did not show that a bona fide dispute existed should be undisturbed. Considering the remedial purposes of the Act, the Spokane court's decision best ensures that RNs will receive the wages they are owed.

### CONCLUSION

For the reasons stated in WSNA's Petition for Review and in this Supplemental Brief, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted this 6th day of February, 2012.



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