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Supreme Court No. 94592-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

CA No. 33556-9-III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly situated registered RNs employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners/Plaintiffs,

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 officer of
Lourdes Medical Center,

Respondents/Defendants.

RESPONDENTS' SUPPLEMENTAL BRIEF ON THE MERITS

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I. NATURE OF CLASS ACTIONS AND REVIEW STANDARD

A party seeking class certification must establish strict compliance with each of the four requirements of CR 23(a) and one of the requirements of CR 23(b). *Lacey Nursing v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995); *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). Certification of a class is discretionary. *Lacey Nursing* at 47. Therefore, this Court reviews for abuse of discretion and affords the trial court decision substantial deference. *Schnall v. AT&T Wireless Servs, Inc.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011). "...It is not our place to substitute our judgment for that of the trial court." *Id.* In *Schnall*, Division I had reversed a trial court and certified a class. The Supreme Court reinstated the trial court's denial of certification. *Id.* It held that if the trial court properly considered the CR 23 criteria, it would not disturb the decision unless manifestly unreasonable or untenable. *Id.* (citing *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007) and *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)). While affirming the abuse of discretion standard, this Court has favorably cited the Court of Appeals practice of resolving close cases in favor of certifying a class. *Nelson*, 160 Wn.2d 173, 188-89 (citing *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003)). The court in *Moeller v. Farmers Ins. Co. of Wash.*, 155 Wn. App.

133, 147, 229 P.3d 857 (2010), *aff'd*, 173 Wn.2d 264 (2011) cautioned “although we liberally construe CR 23 in favor of certification, class actions must strictly conform to the rule’s requirement.”

Plaintiffs’ various assignments of error stem from a common, general assertion that liberal interpretation of CR 23 and the importance of wage laws mean their class should have been certified. CR 23 and court precedent does not allow certification based on these general principles or the fact other wage and hour cases have been certified. If that were the case, CR 23 could be much shorter and the multiple prior cases where denial of certification was upheld – including in wage and hour cases – would be wrong. Even if the “close tie goes to certification” effects the standard of review, it does not replace the abuse of discretion standard. It would have minimal effect only in those cases where a reviewing court found it a close question if a decision was manifestly unreasonable or untenable.

Division III did not identify this as a close case, nor did the trial court. Interestingly, plaintiffs argue for liberal interpretation of CR 23 and importance of wage laws, but do not identify any ruling by the trial court that shows a lack of liberal interpretation. The trial court did not eschew a “liberal interpretation” or express disagreement with the purpose of wage and hour laws below. For example, plaintiffs urged the trial court to

consider subclasses as part of this liberal interpretation requirement, and it did expressly consider subclasses by department. (RP 114-15; 407).

Plaintiffs apparently presume the trial court failed to apply a liberal interpretation because it did not certify a class. Liberal interpretation does not mean a court must rubber stamp certification.

To the contrary, the trial court applied a rigorous analysis to determine if plaintiffs met all the requirements of CR 23, reviewing a large volume of evidence, briefs, and oral arguments. Judge Spanner's discussion during hearings revealed that he carefully reviewed the statutes, rules, and cases cited by the parties. He expressly considered and addressed each criteria of CR 23. His conclusion that plaintiffs did not meet CR 23(b) is reasonable, tenable, and not an abuse of discretion.

II. TRIAL COURT DENIAL OF CLASS CERTIFICATION SHOULD BE UPHELD.

Plaintiffs moved for certification of a class of "all registered nurses who worked at least one hourly shift at Our Lady of Lourdes Hospital at Pasco from June 25, 2009 to March 10, 2013". (CP 1583). Based on their own loosely-defined "continuity of care" concept, plaintiffs argue that all RNs had identical job duties and responsibilities. Defendants disagree: A nurse is not a nurse is not a nurse. This goes to the core of the CR 23(b)(3) requirements. If every RN at Lourdes had identical roles and patient care

responsibilities, identical rest break and meal period procedures, and an improper policy had been shown, then an answer about missed rest breaks or meal periods for one nurse might be representative of all hourly nurses.¹ But the trial court had to provide a “rigorous analysis” and look beyond sweeping generalizations. It could not simply decide that, all being RNs in the same hospital, the class members must be a homogenous group. While plaintiffs asked the trial and appellate courts to find RNs had largely undifferentiated jobs, the evidence before the trial court bore out the wide variation in RN responsibilities and break procedures.

This highlights a contradiction in plaintiffs’ assignments of error on appeal: they attack the trial court both for doing too little and doing too much. Plaintiffs argue the trial court erred in giving them the opportunity to present further argument on their overarching theories via summary judgment, and then turn around and attack the trial court for not engaging in a rigorous analysis or allowing an evidentiary hearing or explaining its

¹ Consider, as contrast, *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012) where the question was simply the rate of payment for missed rest breaks. Or *Pellino v. Brink’s, Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), where employees all held the same position and had the same vigilance requirement coupled with a prohibition on engaging in personal activities. In contrast, even the nursing rule plaintiffs rely on for their “continuity of care” argument confirms that individual patient condition dictates when continuing care is needed. (RP 68 citing WAC 246-840-0710).

ruling sufficiently. In actuality, the trial court's rigorous analysis and consideration of the CR 23(b) requirements are amply seen throughout the oral arguments, motions, and rulings in the record.²

A. Determination on Superiority Validly Based in Evidence

CR23(b)(3) focuses on whether common questions predominate over individual questions and if a class action is superior to alternative formats for adjudication of a dispute.³ CR 23(b)(3); *Schnall*, 171 Wn.2d 260, 270-76. The superiority element focuses on a comparison of available alternatives. A class action format "must be superior, not just as good as" other alternatives. *Id.* at 275. Here, the trial found a class action would not be superior to other forms of adjudication. (Appx (S.Ct.) 00055). Division III found no abuse of discretion in this finding.

The manageability of a class action is one factor considered as part of predominance and superiority. The trial court expressed concern over the manageability of a class action. It noted subclasses by department would be essential, but unmanageable, meaning the class format would not

² See also *Eriks v. Denver*, 118 Wn.2d 451, 167, 824 P.2d 1207 (1993) confirming that a trial court's reference to authorities and arguments cited by parties made it obvious it considered all CR 23 requirements.

³ Because CR 23 is identical to its federal counterpart, Washington courts look to cases interpreting the federal rule for guidance. *Schnall*, 171 Wn.2d 260, 271; *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001).

be superior. (RP 407). Plaintiffs encouraged the trial court to consider subclasses as part of liberally construing CR 23, actively promoting the use of department-based subclasses. (RP 114-15). Availability of tools to manage a large class – subclasses, etc. – do not necessarily negate individual issues or the need to conduct mini trials to address those individual issues. *Schnall* at 274-5. The trial court’s finding that subclasses would be necessary was reasonable, and its determination they would be unmanageable is also reasonable.

As Division III discussed, alternatives to class action claims include joinder, intervention, consolidation, individual actions, and even small claims actions. Plaintiffs contend that individual RNs may have small damages, discouraging individuals from pursuing their own litigation. In argument before Division III, plaintiffs for the first time gave an indication of their estimation of damages, indicating individual claims might vary between \$2,000 to \$15,000. Even plaintiffs agree such damages cannot be considered *de minimis*, like the few dollars or rebates often seen in large class action settlements against national companies. Pet. Opening Br. (Div. III), p. 65. But another distinguishing factor exists here. Washington wage laws outline awards of attorney fees and costs to prevailing employees. RCW. 49.48.030. This counterbalances arguments that individual employees must pool resources to bring unpaid wage

claims; wage laws have already been fashioned to empower an individual employee to bring suit. This is not a case in which a class action is the only practical opportunity for an RN with unpaid wages to pursue a remedy. Individual lawsuits, small claims, or joinder by additional interested parties – if any – are all viable alternatives. Division III and the trial court did not err in concluding plaintiffs failed to establish a class action is superior.

B. Determination on Predominance Alternatively Supports Trial Court Ruling

Under CR 23(b)(3), plaintiffs must show both superiority and predominance. Predominance is far more demanding than the commonality requirement of CR 23(a). *Schnall*, 171 Wn.2d 260, 269. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). It addresses whether class questions or individual questions will predominate. The trial court clearly addressed the predominance issue and found individual differences would predominate over generalities. (Appx. (S.Ct.) 00055; RP 406-07). Division III, having found the superiority element unmet, did not address predominance in depth. However, it did note that the trial court addressed differences in RNs' ability to exercise breaks, comparing this decision to other cases in which courts did and did not find predominance of individualized factors.

Again, nothing about the trial court's determination that individual factors would influence whether a particular RN had unpaid wages due to missed, unpaid rest breaks or meal periods remotely hints at an abuse of discretion.

In *Schnall*, the trial court made findings about individual issues that meant common claims would not predominate. *Id* at 270. Here too, the trial court identified specific individual differences between the RNs that would determine if they had "hours worked" from missed rest breaks or meal periods that had not been paid. The trial court rightly identified problems with deciding liability on a class-wide basis. (RP 180-81, 356).

Just a few examples of the numerous individual questions include:

- If an RN's role had patient assignments (RP 13);
- When RNs, working in roles with patient assignments, actually had patients assigned (RP 354-55);
- When RNs had patients assigned, if they handed off patients to have a break. (RP 215);
- What constitutes a sufficient hand off in a particular situation (RP 223);
- The level of "vigilance" required of an RN with assigned patients⁴;
- The availability of intermittent breaks based on the nature of the work of a particular RN (RP 251-52);
- If certain managers gave instructions or imposed discipline that discouraged taking or reporting missed rest breaks or meal periods (RP 45);
- If an RN cancelled a meal period on Kronos and received an additional 30 minutes of pay for a missed meal period;

⁴ The trial court queried: "Don't we have to – at some point in this case isn't one of factual issues where all of these particular tasks of a particular nurse in a particular duty station fall in terms of the vigilance required?" Plaintiffs answered, "certainly." (RP 29-30).

- If an RN reported a missed rest break to a supervisor or payroll and a time edit was added such that the RN was paid (RP 51-52); and
- If an RN waived a meal period (RP 82-83).

The record reasonably supports the predominance of individualized questions – this is not a close call. The trial court found a lack of a company-wide policy like that in *Pellino* which created common class liability for missed rest breaks or meal periods. (CP 180-81; 249). Compare *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011) to *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353-54, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (a single, company-wide policy in compliance with the law does not create a common class when decisions are made by different managers who exercise independent discretion). The trial court also considered if job duties and responsibilities were homogenous such that asking a question for one RN would allow an answer applicable to all. (CP 94-95; 392; 407). Compare *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 171-73, 151 P.3d 1090 (2007) to *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003). Here, departmental differences provided the most apparent distinguishing difference in job duties; but the shift (day, night, weekend), manager, role, patient acuity and census, and even personal preferences all contributed. The record amply supports this variation across RNs and supports the trial court's finding that individual

questions overrun class wide questions.⁵ (Appx. (S.Ct.) 00055; RP 406-07). As Division III recognized, even the named plaintiffs support some of these individual factors influencing the receipt and reporting of rest breaks and meal periods.

Finally, plaintiffs also concede that damages likely cannot be determined on a class basis. Petition for Review, p. 13-14. Courts often consider proposed trial plans and damage models in determining if CR 23(b)(3) requirements are met. *Sitton*, 116 Wn. App. 245, 261; *Moeller v. Farmers, Ins. Co. of Wash.*, 173 Wn.2d 264, 280, 267 P.3d 998 (2011). Federal courts, in fact, have held that a failure to present a plausible damage model capable of class wide measurement defeats 23(b)(3) certification. *Comcast Corp. v. Beherend*, 569 U.S. 27, 36-38, 133 S.Ct. 1426, 185 L. Ed. 2d 515 (2013). Here, plaintiffs have admitted their damage model likely requires a separate calculation for every single class member or decertification of the class for damages. (RP 104-05). Certainly when a class – or subclasses – can only be used for part of litigation, that also weighs against finding a class action a superior alternative.

⁵ See, for example, evidence summarized at CP 230-253.

III. CONCLUSION

Determination of class certification lies within the discretion of the trial court. In this case, the trial court found that individual questions would overrun common class questions. Class treatment would be unmanageable and not a superior to alternative litigation methods. Even construing CR 23 liberally, the trial court's decision to deny certification was well within its discretion. The decision of the trial court, as upheld by Division III, should be affirmed.

Dated: November 3, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed **RESPONDENTS'**
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Respondents' Supplemental Brief On The Merits

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