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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 IN RESPONSE TO AMICI CURIAE

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

A. Establishing Liability For Missed Rest and Meal Breaks Requires Individualized Evidence, Defeating Predominance and Superiority. 1

B. Intermittent Breaks Turn On Nature of Work; A Per Se Rule For Nursing Is A Legislative Issue. 5

II. CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Hill v. Garda CL NW, Inc., 198 Wn. App. 326, 394 P.3d 390 (2017) 3

Pellino v. Brink's, Inc., 164 Wn. App. 668, 267 P.3d 383 (2011) 3, 4

Wal-mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541 (2011).. 2, 3

White v. Salvation Army, 118 Wn. App. 272, 75 P.3d 990 (2003)..... 4

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WAC 296-126-092 7

I. INTRODUCTION

Respondents-defendants Our Lady of Lourdes at Pasco and John Serle offer this brief response to the amicus curiae brief filed by Washington Employment Lawyers Association (WELA), and the amici curiae brief filed by Washington State Labor Council, Washington State Nurses Association, United Food and Commercial Workers Local 21 and SEIU Healthcare 1199NW (collectively referred to as "the Unions"). Respondents have already provided substantial briefing of most of the points raised by amici in its petition and supplemental brief. They have already provided argument addressing the point raised by Washington State Association for Justice Foundation and many of the points raised by WELA and the Unions as well. Respondents briefly address two arguments raised by amici curiae: 1) The importance of individualized evidence to liability in this case; and 2) the availability of intermittent breaks for the nursing profession.

A. Establishing Liability For Missed Rest and Meal Breaks Requires Individualized Evidence, Defeating Predominance and Superiority.

WELA asserts in its brief that "To the extent the courts below were concerned with the *reason* breaks were being missed, that is not part of the analysis." WELA Brief at 4 (emphasis in original). It goes as far as to urge the Court to hold as a matter of law that liability for rest and meal breaks

never turn on individual experiences and thus are always manageable as class actions. WELA Brief at 3. To a lesser extent, the Unions also join the refrain that differences between RNs were "simply an issue of damages." The Unions' Brief at 9.

Yet these assertions stand in direct conflict with WELA's contention – with which respondents and the trial court agreed – that an issue for class certification is "whether the important common questions can be resolved with class-wide proof or will turn on individual evidence that is unique to each class member." WELA Brief at 13. The trial court rightly concluded that individualized evidence and inquiries would predominate and render a class unmanageable. Just because each plaintiff or even each RN at Lourdes may have at some time missed a rest break or a meal period, does not mean they represent a class in which common liability questions predominate and only damages differ. To the contrary, prior cases emphasize that just because a group of people may allege a common question does not mean liability stems from class-wide facts.

The US Supreme Court, in *Wal-mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011), addressed this very premise. In *Dukes*, female employees sought to certify a nation-wide class for sex discrimination in pay and promotions. The Court reversed certification, holding that individual stores had discretion and no general policy of

discrimination for the organization as a whole had been evidenced. It explained that a common question did not suffice; instead, it needed a common injury such that a "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke". *Id.* at 350. While *Dukes* addressed the issue in the context of commonality, it recognized that in the context of predominance, the cohesiveness and differences among class members would be central.

WELA also relies on *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), again as if it sets out a per se rule that meal and rest break issues are always universal without any individualized component. That is an overreach of *Pellino* – a case the parties and the trial court addressed extensively in evaluating class certification of the present case. Similar to the analysis in *Dukes*, the Washington court in *Pellino* did not stop the analysis on class certification by ignoring evaluation of individualized components. Rather, in *Pellino*, the court found all drivers were always engaged in work during their routes in large part because of written company instructions to remain on guard, not stop for breaks, and a prohibition on any personal activities. *Pellino* at 678, 694. See also *Hill v. Garda CL NW, Inc.*, 198 Wn. App. 326, 394 P.3d 390 (2017) (finding company policies requiring armored guards to remain on constant alert,

not deviate from routes, and prohibiting personal activities meant employees did not have rest breaks).

WELA and the Unions ignore that the trial court and Division III here found no such common, overarching policy that applied equally to all RNs regardless of shift, department and roles. In stark contrast to the armored car drivers, RNs in many departments and on many shifts can and do engage in personal activities while assigned patients. (CP 1918, 1941-42, 1978-1997). No policy prohibits those activities. In many cases, RNs with assigned patients more closely resemble the on-call counselors in *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003) than the armored truck guards in *Pellino*. The absence of a common policy is coupled with a high degree of variation in RN roles and duties and even shift lengths. For class certification, the question is not whether multiple persons may have a claim for unpaid wages; it is whether the claims have a cohesiveness such that liability can be determined by class-wide, not individual proof. In this case, individualized evidence by department, shift, and more will be necessary to determine injury. Christiansen related missed breaks to telemetry monitoring and high acuity patients. Jones related missed breaks to a prior manager. Garcia blamed one particular charge nurse for not giving her breaks. Each plaintiff has reported a missed meal break through Kronos and received pay. These represent

individual liability issues, and confirm that a trial will require so much individualized evidence that it would not be easily managed.

WELA and the Union ask the Court to endorse a position contrary to CR 23 and case law. They ask the Court to focus simply on the allegation that multiple RNs assert they have missed occasional rest breaks and meal periods, and ignore that to determine if an RN missed rest breaks or meal periods evidence will vary greatly for different departments, on different shifts, and under different managers. While agreeing that the focus is the ability to present common proof, they fail to elaborate on what that common proof would entail in this case.

Hours worked is a fact-based, individualized question. Robust remedies, including attorney fees and even penalties, exist to facilitate an individual employee in pursuing unpaid wages. CR 23(b)(3) provides the framework to determine if the claims plaintiffs allege are best handled as a class action. Ample evidence supports the trial court's finding that at least nine subclasses by department would be needed, individualized factors would overrun generalities, and a class action is not superior.

B. Intermittent Breaks Turn On Nature of Work; A Per Se Rule For Nursing Is A Legislative Issue.

The Unions focused much of their argument on the premise that long nursing shifts and nurse fatigue can impact patient care, and as a

result, intermittent breaks must be declared as unavailable for RNs as a matter of law. The Unions present a policy argument within the purview of the legislature, not an argument with roots in the facts presented here for class certification.

Respondents have never argued RNs should not take rest breaks or meal periods. To the contrary, it highlights employee welfare as part of its mission and culture, and provides multiple avenues for employees to raise concerns. (CP 1917-20, 1947-50, 1970-74). When RNs miss a rest break or meal period, they receive appropriate compensation.

Rather than focusing on the requirements of CR 23(b)(3) or facts regarding the nature of the work of the RNs in the present record, the Unions urge the Court to declare as a matter of law that "due to their professional and ethical obligations" a nurse cannot take a break while working and thus, intermittent breaks are not available for RNs. The Union's Brief at 14. The Unions do not point to class-wide policies or evidence in the current record that show that the nature of RN's work at Lourdes prohibits intermittent breaks in some or any situation. The Unions do not pretend to limit their argument to the current class at all; instead, they seek a declaration that intermittent breaks are never allowed by the nature of the nursing profession. WSNA has been proactive in attempting to secure this policy change for the nursing profession in Washington. It

has repeatedly introduced legislation seeking a statute or rule that prohibits intermittent breaks for nursing professions. Most recently, in HB1715 (2017), WSNA asks the legislature to "require nurses be provided with uninterrupted meal and rest breaks, and says an employer may not require intermittent meal or rest periods." [1]

Yet, as cited by the Unions, WAC 296-126-092 and DLI Policy ES.C.6 already provide a framework for deciding when intermittent breaks meet the rest break requirement. To date, the Legislature and the Department of Labor and Industries have not defined the nursing profession as a per se exception to intermittent breaks. Lacking such a change by the Legislature, the courts rely on the framework provided in analyzing availability of intermittent breaks in any particular dispute. The trial court directly addressed the intermittent breaks issue when presented by plaintiffs below. It found a dispute of evidence such that it could not be determined on a class-wide basis for all RNs at Lourdes. This was the proper approach and the decision was sound.

Neither the rule nor the agency guidance suggest that the nursing profession as a matter of law is of such nature that it would never allow intermittent breaks. A production line is described as an example of work

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[1]See https://www.wsna.org/legislative-affairs/priorities/guarantee-rest-breaks-limit-mandatory-overtime. (last accessed 1/1/2018).

that does not allow for intermittent periods of rest from work. But nursing is rarely like a production line. Instead, it is often like being "on call" in that an RN may be waiting for patients, may be at less than full capacity, or may have a full complement of patients assigned. Even with patients assigned, an RN between active patient rounds may simply be available to respond if those patients have needs. Not all situations of nursing allow for intermittent breaks: a surgical nurse in the midst of a six-hour surgery cannot take 3 or 4 minutes here and there to text friends, go to the bathroom, eat a snack, or read the newspaper. But a rehabilitation nurse with relatively low-acuity patients may be able to read a magazine or talk with a coworker for short or even long periods of time without any active patient responsibility other than to respond if called.

The Unions ask this Court to define policy rather than address the facts specific to the RNs in the proposed class. In doing so, they offer no discussion of the various levels of patient acuity or census. They forget that some RNs in the proposed class have no patients. They ignore that plaintiffs themselves highlighted a problem with determining on a class-wide basis when RNs are "in patient assignment" and what suffices as a "hand off" sufficient to temporarily transfer patient responsibilities for breaks. In the context of class certification, these management issues and more support the trial court's determination that class treatment is not

superior and class generalities do not predominate over individual differences.

II. CONCLUSION

The trial court did not abuse its discretion in denying class certification. The arguments of WELA, the Unions, and the Washington State Association of Justice Foundation do not establish a basis for reversal.

Dated: January 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed **RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPOSNE TO AMICI CURIAE** via efiling on the following:

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Respondents' Supplemental Brief In Response To Amici Curiae

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