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No. 94592-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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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/Plaintiffs,

vs.

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.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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Daniel E. Huntington  
WSBA No. 8277  
422 W. Riverside, Suite 1300  
Spokane, WA 99201  
(509) 455-4201

Valerie D. McOmie  
WSBA No. 33240  
4549 NW Aspen St.  
Camas, WA 98607  
(360) 852-3332

James W. Beck  
WSBA No. 34208  
1201 Pacific Ave., Suite 2100  
Tacoma, WA 98402  
(253) 620-6500

On Behalf of  
Washington State Association  
for Justice Foundation

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7 C. Wright & A. Miller, *Federal Practice*, §1754 (1972) 6

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the trial court procedure for determining whether a class action may be maintained under CR 23, and the application of the abuse of discretion standard on review of a trial court determination of whether a class action may be maintained.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

Judith Chavez, Kathleen Christianson, Oralia Garcia and Marrietta Jones (Nurses) are currently or formerly employed nurses at Our Lady of Lourdes Hospital (Hospital) who brought a cause of action against the Hospital for failing to provide nurses with required rest periods and meal periods and failing to pay wages owed as a result of the failure to provide the rest periods and meal periods. The trial court refused to certify a class action under CR 23(b)(1) and (2) because it held the requested relief was primarily a claim for damages, and refused certification under CR 23(b)(3) because the trial court held the proposed class did not meet the requirements of predominance and superiority. The Court of Appeals affirmed the trial court's denial of class action certification. The facts are drawn from the Court of Appeals' unpublished opinion and the briefing of the parties. *See*

*Chavez, et al. v. Our Lady of Lourdes Hospital, et al.*, 197 Wn. App. 1067, 2017 WL 532486, *review granted*, 189 Wn.2d 1009 (2017); Pet. Br. at 4-38; Resp. Br. at 2-19; Pet. for Rev. at 2-5; Ans. to Pet. for Rev. at 2-5.

The Nurses filed suit alleging the Hospital violated several legal requirements for providing rest breaks and meal breaks to its employed nurses, including: failure to record and compensate nurses for missed rest periods; failure to provide scheduled rest periods; failure to compensate nurses for on-call meal periods; failure to provide nurses with a second meal period during 12 hour shifts; failure to compensate nurses for missed meal periods and discouraging the nurses to report missed meal periods.

The Nurses moved for class certification, seeking a class of all registered nurses who worked at least one hourly shift at the Hospital to litigate common liability questions related to the rest and meal breaks, and alternatively proposed subclasses of nurses based upon shifts or hospital departments. The Hospital objected to class certification, arguing that operational differences within the departments created different liability and damages issues among the proposed class of nurses. The trial court did not initially rule on the motion, but rather suggested the Nurses bring summary judgment motions to clarify the Hospital's liability exposure.

The Nurses brought three motions for partial summary judgment concerning: (1) rest periods; (2) tracking time and paying for missed rest periods; (3) the requirement for a second meal period during a 12 hour shift. The Hospital filed a cross-motion for summary judgment on the motion

concerning rest periods. The trial court found that genuine issues of material fact existed which prevented granting any of the motions for partial summary judgment.

The Nurses amended their complaint and renewed their motion for class certification. The trial court found the Nurses met the class certification requirements of CR 23(a), but denied the motion because the Nurses' action did not fit the three types of class actions authorized by CR 23(b). The trial court entered an order holding that the action was not maintainable under CR 23(b)(1) because the primary objective of the lawsuit is money damages and plaintiffs failed to show prejudice to absent class members would occur, and an action was not maintainable under CR 23(b)(2) because the primary objective of the lawsuit is money damages and plaintiffs failed to establish the need for declaratory or injunctive relief. Regarding CR 23(b)(3), the trial court held:

The Court finds plaintiffs have not met the required showing that a class action would be maintainable under CR 23(b)(3). The Court finds that common class issues do not predominate over individual questions because issues regarding shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department cause the specifics for each class member to overrun any generalities. The Court also finds that a class action is not superior to alternatives such as joinder or individual lawsuits for fair and efficient adjudication of the claims. Finally, the Court also finds that the proposed class, or the proposed nine subclasses by department, would be unmanageable at trial.

The Court of Appeals granted discretionary review solely on the issue of certification of the class action. The Court of Appeals noted that the order denying class certification omitted any reference to the declarations and

affidavits that the trial court reviewed when considering the motion for class certification. *See Chavez*, 2017 WL 532486 at \*1. The Court of Appeals stated that the declarations and affidavits filed by the Nurses and the Hospital set forth conflicting facts, “including facts important to determining whether to grant class certification.” *Chavez*, at \*13. The Court described its method for reviewing the conflicting facts the parties submitted to the trial court:

We determine that we must review the facts in a light most favorable to Lourdes Medical Center. We find no case that explicitly directs us to view the facts in such a gloss for purposes of reviewing a class action ruling, but logic and other tangential rules compel such a conclusion. A reviewing court must defer to the trial court’s findings of fact entered when certifying or denying certification.... Although our trial court did not expressly resolve conflicts in the evidence, the court must have done so when issuing its decision.... This resolution of the conflict would have included some determination of the credibility of the respective evidence presented by the parties. 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. After a bench trial, we view the evidence in the light most favorable to the winning party.... Even when the trial court issues a ruling based on affidavits, we view the evidence in favor of the prevailing party if the trial court weighed credibility of declarants.

*Id.* (citations omitted). The Court of Appeals affirmed, holding the trial court did not abuse its discretion in denying class certification. *See Chavez* at \*17.

This Court granted the Nurses’ Petition for Review.

### **III. ISSUE PRESENTED**

Did the trial court abuse its discretion by denying class certification without articulating its application of the CR 23 criteria to the specific facts relevant to class certification?

#### IV. SUMMARY OF ARGUMENT

Washington favors class actions in appropriate cases. Class actions benefit the community because they can improve access to courts and deter wrongful conduct. Washington courts liberally interpret CR 23 to favor class certification because the rule avoids multiplicity of suits, helps to prevent inconsistent judgments, saves class members costs, frees defendants from duplicative litigation, and is always subject to modification or later decertification.

In order to certify a class under CR 23(b)(3), a party must show that a common issue predominates over individual issues, and that a class action is superior to other available methods for adjudication of the controversy. When a trial court declines class certification under CR 23(b)(3), the court must sufficiently articulate its reasons for finding that a party failed to show a common issue predominates over individual issues or that a class action is not superior to other forms of adjudication so that a reviewing court may determine whether the trial court abused its discretion by denying certification.

Here, the trial court abused its discretion in refusing to certify a class without specifying facts to support its opinion that the plaintiffs could not meet the predominance and superiority requirements of CR 23(b)(3). The Court of Appeals erred by interpreting conflicting facts in favor of the defendant opposing class certification in order to show deference to the trial court's decision denying certification.

## V. ARGUMENT

### A. Washington Favors Class Actions And Liberally Interprets CR 23 To Certify A Class

Washington favors the resolution of appropriate cases through class actions. “Washington’s CR 23 authorizes class actions and demonstrates a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007). Class actions serve important functions in our justice system, including the resolution of many individual claims in a single action, the elimination of repetitious and possibly inconsistent adjudications involving common questions, and improving access to the courts for those whose economic circumstances would not allow individual lawsuits. *See Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982) (citing 7 C. Wright & A. Miller, *Federal Practice*, § 1754 at 543 (1972)).<sup>1</sup> The purpose of class actions “is to provide relief for large groups of people with the same claim, particularly when each individual claim may be too small to pursue.” *Moore v. Health Care Authority*, 181 Wn.2d 299, 309, 332 P.3d 461 (2014). “Class remedies not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the community as a

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<sup>1</sup> *Scott* involved a claim against a wireless service carrier for overcharges (*see* 160 Wn.2d at 847), and *Darling* concerned allegations of damages caused by exposure to toxic fumes in mobile homes (*see* 96 Wn.2d at 702). Wage claims are often suitable for resolution through a class action: “Although double damages and attorney fees are available for [minimum wage act] claims..., a minimal claim might still deter a plaintiff from going through the trouble of finding an attorney and filing suit or deter an attorney from taking a case on a contingency fee basis.” *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 828 n.5, 64 P.3d 49 (2003).

whole.” *Scott*, 160 Wn.2d at 852. “CR 23 is liberally interpreted because the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and... also frees the defendant from the harassment of identical future litigation.... A class is always subject to later modification or decertification by the trial court, and hence the trial court should err in favor of certifying the class.” *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011) (citations and quotations omitted). “An 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) (citation omitted).

**B. The Trial Court Abused Its Discretion By Failing To Specify Facts And Articulate Reasoning That Support Its Conclusion That The Nurse’s Did Not Meet The Predominance And Superiority Requirements Of CR 23(b)(3)**

Generally, class actions must be brought in conformity with the requirements of CR 23. *See Lacey Nursing Center, Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995). CR 23(a) lists the prerequisites for class certification: numerosity, commonality, typicality, and adequacy of representation. *See Schnall v. AT&T Wireless Services Inc.*, 171 Wn.2d 260, 269, 259 P.3d 129 (2011). If the requirements of CR 23(a) are satisfied, the action must fit within one of the three types of class actions authorized by CR 23(b): (b)(1), where individual lawsuits create a significant risk of collateral estoppel or threaten inconsistent judgments; (b)(2), where injunctive relief may be necessary; (b)(3), where common legal and factual issues predominate over individual issues and a class action is superior to

other forms of adjudication. *See Wash. Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 789, 613 P.2d 769 (1980).

Here, the trial court held that the Nurses met all of the CR 23(a) criteria, and that holding was not appealed. The trial court held that the Nurses could not maintain a class action under CR 23(b)(1), (2) or (3).

An appellate court reviews a trial court's denial of class certification for abuse of discretion, and will not disturb that decision "if the record indicates the court properly considered all CR 23 criteria." *Schnall*, 171 Wn.2d at 266; *see Nelson*, 160 Wn.2d at 188. A trial court should provide findings and conclusions regarding a class certification decision, and support its conclusions with reference to the CR 23 requirements sufficient for a reviewing court to determine whether the trial court's decision rests on tenable bases. *See Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820-21, 64 P.3d 49 (2003); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 300, 38 P.3d 1024, *review denied*, 147 Wn.2d 1016 (2002). A reviewing court will overturn a trial court's refusal to certify a class if the trial court fails to articulate its application of the criteria of CR 23 to the facts relevant to class certification. *See Wash. Educ. Ass'n*, 93 Wn.2d at 793.

Here, the trial court failed to set forth factual findings that would support an order denying class certification. As the Court of Appeals noted, the trial court was presented with conflicting facts important to determining whether to grant class certification, and the court did not identify the evidence it reviewed to support its conclusions denying class certification.

While the trial court's order lists the CR 23(b)(3) requirements, the court failed to cite specific facts to support its conclusions that the Nurses had not shown predominance of common issues or superiority of a class action to other available methods of adjudication.

The trial court's finding regarding the superiority requirement is conclusory ("[t]he Court also finds that a class action is not superior to alternatives such as joinder or individual lawsuits for fair and efficient adjudication of the claims"). The trial court's listing of "issues regarding shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department cause the specifics for each class member to overrun any generalities" in its order does not suffice as articulate reasoning for its conclusion that the Nurses failed to show that common issues predominate over questions affecting only individual members.

The trial court is required to set forth its reasoning as to why it found the Nurses failed to show that common issues predominated over individual issues for CR 23(b)(3) purposes so that a reviewing court can determine whether the trial court's decision rests on a tenable basis. In *King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160 (1994), this Court stated:

Complete unanimity of position and purpose is not required among members of a class in order for certification to be appropriate.... This Court has stated that a class action is not precluded by the possibility that individual issues may predominate once the general illegality of the questioned practice is determined.... Similarly, the Court of Appeals held that although different facts and different questions of law existed within a potential class, the fact that the defendant was engaged in a "common course of conduct" in relation to all potential class members made certification

appropriate. *Brown v. Brown*, 6 Wn. App. 249, 255, 492 P.2d 581 (1971).

Court of Appeals' decisions in class action wage and hour cases are in accordance with the above-quoted statement from *King*. In *Miller v. Farmer Bros. Co.*, *supra*, the Court stated:

[T]he predominance requirement is not defeated merely because individual factual or legal issues exist; rather, the relevant inquiry is whether the issue shared by the class members is the dominant, central or overriding issue shared by the class... Further, "[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions."

115 Wn. App. at 825 (citing and quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, §4.25 at 4-84, 85 (3d ed. 1992)). In *Miller*, the Court noted that to invalidate the class on the basis of predominance "would practically preclude class certification for any similar claim under the [minimum wage act], since any group of employees claiming they were illegally classified as exempt will inevitably have some variations in their job duties," and "[s]uch a reading of the predominance requirement would contravene the clear policy in this state that CR 23 should be read liberally in the interest of judicial economy." 115 Wn. App. at 827; *see also Hill v. Garda CL NW., Inc.*, 198 Wn. App. 326, 339-41, 394 P.3d 390 (finding the single issue of whether employees were allowed legally sufficient rest or meal breaks overrode individual questions), *review granted in part, review denied in part*, 189 Wn.2d 1016 (2017) (petitioner/employer's petition for review denied; respondent/employee's cross-petition granted); *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 682-83, 267 P.3d 383 (2011) (affirming a

trial court's finding that the principal legal and factual issues whether class members were entitled to compensation for missed rest and meal breaks under Washington law predominated over questions affecting individual members).

The holdings in *Miller*, *Hill* and *Pellino*, *supra*, stand for the proposition that in wage and hour class action cases, for purposes of CR 23(b)(3) requirements, the principal issue of whether an employer complied with laws regarding paying for overtime and providing meal and rest periods may predominate over class members' individual issues regarding their job duties. The order in *Chavez* does not provide a record that allows the reviewing court to determine whether there is a tenable basis for the trial court's decision that common issues do not predominate over individual issues, because the court failed to include facts and reasoning to support its conclusion.

The trial court's failure to specify facts in support of its decision is demonstrated by the Court of Appeals' need to interpret contested facts in favor of the Hospital in order to affirm the trial court. The trial court's failure to list specific facts and articulate its reasoning to support its order denying class certification should not be rectified by the Court of Appeals' determination to fill the void by viewing all of the conflicting facts in the light most favorable to the Hospital. The trial judge did not state that he was interpreting all contested facts in favor of the Hospital; the Court of Appeals

should not review all contested facts in a light most favorable to the Hospital in order to affirm the trial court's denial of class certification.

The Court of Appeals interpreted conflicting facts important to the determination of whether to grant class certification in a light most favorable to the party opposing certification. This resolution of disputed facts contravenes this Court's holding that an appellate court resolves close cases in favor of allowing or maintaining a class. *See Nelson*, 160 Wn.2d at 188-89. Where conflicting facts important to the determination of whether to grant class certification are presented by declarations and affidavits, a trial court should favor allowing the class.

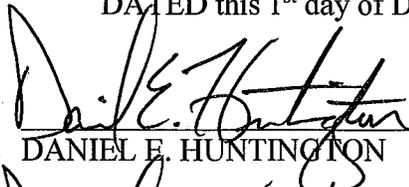
A trial court's decision to deny class certification is reviewed for abuse of discretion. *See Schnall*, 171 Wn.2d at 266. The trial court's decision will be granted deference by the reviewing court if the record demonstrates that the court properly considered all of the CR 23 criteria. *See id.* The reviewing court should not grant deference where the trial court decision does not include facts that support its reasoning to deny class certification; nor should the reviewing court assume fact findings not in the record in order to show deference to the trial court's decision denying class certification.

The trial court's refusal to certify the Nurses' class without specifying facts supporting its determination and without appropriate consideration and articulate reference to the criteria of CR 23(b)(3) was an abuse of discretion.

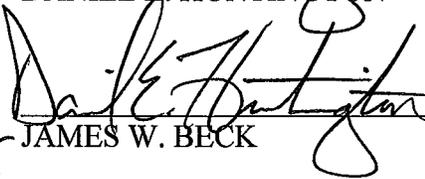
**VI. CONCLUSION**

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 1<sup>st</sup> day of December, 2017.

  
DANIEL E. HUNTINGTON

  
for VALERIE D. MCOMIE

  
for JAMES W. BECK

On Behalf of WSAJ Foundation

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of December, 2017, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein.

Aaron M. Streepy  
[aaron@mcguinnessstreepy.com](mailto:aaron@mcguinnessstreepy.com)

Aaron J. Bass  
[abass@sbhlegal.com](mailto:abass@sbhlegal.com)

Rebecca A. Watkins  
[rwatkins@sbhlegal.com](mailto:rwatkins@sbhlegal.com)  
[tberistain@sbhlegal.com](mailto:tberistain@sbhlegal.com)

Toby J. Marshall  
[tmarshall@terrellmarshall.com](mailto:tmarshall@terrellmarshall.com)

Blythe H. Chandler  
[bchandler@terrellmarshall.com](mailto:bchandler@terrellmarshall.com)

Jeffrey L. Needle  
[jneedle@wolfenet.com](mailto:jneedle@wolfenet.com)

Jack B. Krona, Jr.  
[j\\_krona@yahoo.com](mailto:j_krona@yahoo.com)

James G. McGuinness  
[jim@mcguinnessstreepy.com](mailto:jim@mcguinnessstreepy.com)

[adeline@pointruston.com](mailto:adeline@pointruston.com)

[vray@pointruston.com](mailto:vray@pointruston.com)

  
Daniel E. Huntington, WSBA #8277  
WSAJ Foundation

# APPENDIX

## Superior Court Civil Rules

### CR 23 CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subsection (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate,

(A) an action may be brought or maintained as a class action with respect to particular issues, or

(B) a class may be divided into subclasses and each subclass treated as

a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

[Adopted effective July 1, 1967; amended effective January 3, 2006; April 28, 2015; September 1, 2017.]

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**RICHTER-WIMBERLEY, P.S.**

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