FILED
SUPREME COURT
STATE OF WASHINGTON
1/2/2018 2:11 PM
BY SUSAN L. CARLSON
CLERK

NO. 94592-6

SUPREME COURT OF THE
STATE OF WASHINGTON

No. 33556-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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,

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.

**JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES' ANSWER TO
AMICI CURIAE BRIEF OF
WASHINGTON STATE HOSPITAL ASSOCIATION AND
ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL
DISTRICTS**

Jack B. Krona Jr. (WSBA #42484)
Law Offices of Jack B. Krona Jr.
6509 46th St. NW
Gig Harbor, WA 98335
PH: (253) 341-9331
j_krona@yahoo.com

James G. McGuinness, Esq., WSBA #23494
Aaron M. Streepy, Esq., WSBA #38149
5030 1st Ave. South, Ste. 101
Seattle, WA 98134
PH: (253) 528-0278
FX: (253) 528-0276
Jim@mcguinnessstreepy.com
aaron@mcguinnessstreepy.com

Attorneys for Petitioners

Table of Contents

I. ANSWER.....1

A. If there is a statewide and national "wave" of nurses seeking redress for missed meals and rest periods, this suggests a systemic problem that is best resolved by the class-action procedure.....1

B. If Washington law requires that "staffing decisions, including implementing rest and meal breaks, occur at the departmental level" and be "tailored to each particular practice environment," then Lourdes systematically violated this law by treating each nurse in the same unlawful ways.....3

C. The WSHA's assertion that there are no common questions about whether "breaks were missed" is simply false.....10

D. The WSHA's cases from outside this jurisdiction do not apply to the facts of this case.....11

E. The Nurses are not resting on "bare allegations." 17

II. CONCLUSION.....18

Table of Cases and Authorities

Cases **Page**

Alberts v. Aurora Behavioral Health Care, 241 Cal. App. 4th 388, 193 Cal. Rptr. 3d 783 (2015) 15

Champagne v. Thurston County, 163 Wn.2d 69, 178 P.3d 936 (2008) 3

Drinkwitz v. *Alliant Techsystems*, 140 Wn.2d 291, 996 P.2d 582 (2000) 3

Hill v. Garda CL Northwest, Inc., 198 Wn. App. 326, 394 P.3d 390 (2017) 13

Hinterberger v. Catholic Health Sys., 299 F.R.D. 22 (W.D.N.Y. 2014) 11

Hollywood Med. Ctr., No. 2:12-CV-07550, 2013 WL 5775129 (C.D. Cal. Oct. 25, 2013) 14

Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 42 P.3d 1265 (2012) 3

Moore v. Health Care Authority, 181 Wn.2d 299, 332 P.3d 461 (2014) 14

Pellino v. Brink's Inc., 164 Wn.App. 668, 267 P.3d 383 (2011) 8

Schwendeman v. USAA Cas. Ins. Co., 116 Wn. App. 9, 65 P.3d 1 (2003) 18

Wal-Mart v. Dukes, 564 U.S. 338, 131 S.Ct. 254 (2011) 16

Washington State Nurses Ass'n v. Sacred Heart Medical Center, 175 Wn.2d 822, 287 P.3d 516, (2012) 1, 2

Wingert v. Yellow Freight Systems, Inc., 146 Wn.2d 841, 50 P.3d 256 (2002) 7

Codes & Statutes **Page**

RCW 70.41.420 (3) (IX).....4

WAC 246-320-136 (1) 6

WAC 296-126-092 7,8,11

Rules

CR 23.....3, 17, 18

CR30(b)(6) 4, 9, 10

Policies

Administrative Policy ES.C.6.....8

I. Answer

A. If there is a statewide and national "wave" of nurses seeking redress for missed meals and rest periods, this suggests a systemic problem that is best resolved by the class-action procedure.

The Washington State Hospital Association and Association of Washington Public Hospital Districts (collectively the "WSHA") represents in its Introduction that this case is part of a "wave of wage and hour disputes lawsuits filed against hospitals and large healthcare systems in Washington and across the country, requesting class certification for claims of missed and unpaid rest and/or meal periods." (WSHA Br. 1.) Indeed, this is not the first time this court has confronted a case where a group of nurses have sought to collectively vindicate their rights to adequate rest periods and compensation for missed rest period time.[1] When a Hospital's unlawful policies deprive nurses working at Washington acute-care hospitals of both adequate rest during their shifts and legally required compensation when they miss meal and rest periods, the class vehicle is the best way to address and remedy their claims, not small claims court.

---

[1] *See, e.g.*, *Washington State Nurses Ass'n v. Sacred Heart Medical Center*, 175 Wn.2d 822, 287 P.3d 516, 516-17 (2012) ("Washington State Nurses Association (WSNA) seeks overtime pay pursuant to the Minimum Wage Act (MWA), RCW 49.46.130, for work performed by the approximately 1,200 registered nurses employed by Sacred Heart Medical Center in Spokane, Washington.").

The Brief of *Amici Curiae* of the Washington State Labor Council, the Washington State Nurses Association, SEIU Healthcare 1199NW, United Food and Commercial Workers Local 21, (collectively the "WSLC") documents the critical public-health-and-safety issues at stake in ensuring nurses receive their statutorily required rest and meal periods. (WSLC Br. 2-5.) Discouraging class actions for missed rest and meal periods would incentivize hospitals like Lourdes to cut budget corners by maintaining insufficient nurse staffing and compensation procedures to comply with meals-and-breaks and wage-and-hour laws.[2]

If the goal is to resolve these numerous, common wage-and-hour claims, where the amount in controversy is relatively small, and where there is at least a perceived risk of employer retaliation against employees who bring them, the class vehicle is superior to individual suits. As demonstrated by the Brief of *Amicus Curiae* of the Washington Employment Lawyers Association ("WELA"), the class vehicle provides a fair, effective, and efficient vehicle allowing employees to collectively

---

[2] *See, e.g.*, *Sacred Heart*, 287 P.3d at 520-21 (2012) ("As noted by WSNA, if this court were to accept Sacred Heart's argument, Sacred Heart would be incentivized to employ fewer nurses for each shift, relying on those nurses to bear a heavy burden on busy days. In contrast, compensating employees who forgo their rest periods with overtime pay will help to ensure that employers continue to provide these breaks to their employees. Rest periods are mandatory and promote employee efficiency. 29 C.F.R. § 785.18. Further, rest periods help ensure nurses can maintain the necessary awareness and focus required to provide safe and quality patient care.").

assert their rights without the fear of retaliation inherent in an individual suit against their employer. (WELA Br. 13-20.)

On the other hand, if the goal is to suppress those claims, the WSHA's solution of forcing employees with small individual claims who fear employer retaliation to file individual claims against their employer is the superior vehicle to do so. The Nurses submit that this case presents an opportunity for this Court to act by directing lower courts of this state to protect workers' rights and public safety by certifying class actions when the employees meet the requirements of CR 23.[3]

B. If Washington law requires that "staffing decisions, including implementing rest and meal breaks, occur at the departmental level" and be "tailored to each particular practice environment," then Lourdes systematically violated this law by treating each nurse in the same unlawful ways.

The WSHA represents that "as a matter of Washington law, staffing decisions, including implementing rest and meal breaks, occur at the department level and are tailored to each particular practice environment." (WSHA Br. 1.) If true, the Hospital's uniform policies of general application at issue in this case—which treat each nurse in the same unlawful ways—independently violate the law requiring departmental-level

[3] *Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008); *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002); *Drinkwitz* v. *Alliant Techsystems*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

tailoring of meal-and-break policies. Lourdes' systemic violation of Washington laws regarding nurse-staffing decisions is not a viable defense to class certification.

The WSHA represents that hospitals "must plan their staffing at the level of each individual 'patient care unit' and shift." (WSHA Br. 9.) The WSHA also represents that "staffing must consider those times when nurses are relieved for meal and rest breaks." In fact, the law requires Hospital to implement "strategies to enable registered nurses to take meal and rest breaks as required by law or the terms of an applicable collective bargaining agreement, if any, between the hospital and a representative of the nursing staff," *i.e.*, the Hospital is required by law to plan for and provide sufficient staff to *relieve nurses of duties to take meal and rest periods.*[4] (WSLC Br. 10-17.) But *there is no evidence in the record in this case* that the Hospital has any official department-level policies regarding meals and breaks at all, let alone department-level staffing policies that would absolve the Hospital of class liability for its uniformly illegal, class-wide polices.

Lourdes designated Anita Kongslie, the Hospital's Risk Manager, as its CR 30(b)(6) representative to testify definitively about its relevant

[4] RCW 70.41.420 (3) (IX). The Nurses note that this regulation is inconsistent with the notion that intermittent breaks are consistent with that nature of nurses' work, who need relief from duty by another qualified nurse before they are considered off duty. (WSLC Br. 10-17.)

policies. (CP303-305, CP858-64 at ¶¶1-3, 6-7, 11.) She helped prepare the Hospital's written discovery responses, including its sworn responses to the first and second set of interrogatories, and verified under oath that the Hospital's interrogatory responses were true and correct. (CP307-309, CP633-663, CP732-740.) The sum-total of the Hospital's official written meal-and-breaks policies are reflected in documents titled: (1) Policy No. 5100.07 (Rest and Meal Periods); (2) Lourdes Medical Center Payroll Policies and Procedures; (3) Payroll General Orientation; (4) Policy No, 5100.06 (Advances in Pay); and (5) Payroll Calendar. (CP309, CP742-755.) Kongslie testified that these policies control, unless expressly modified by the Collective Bargaining Agreement ("CBA"). (CP309, CP690-730.) These meal-and-break policies are HR policies of general application and apply to all nurses in all departments. (CP309.)

Kongslie was tasked with ensuring the Hospital has policies and processes that comply with wage-and-hour laws. (CP304.) The Hospital's "Senior Leadership" is responsible generally for making official policies. (CP309.) An official policy is created when—and only when—there is a "consensus" and Senior Leadership reduces the policy to writing. (CP309-310.) If the policy involves nursing practices, by law it must also be in

writing and approved in advance by the Nursing Director.[5] Kongslie admitted that written—as opposed to oral—policies are necessary in a hospital setting to: (1) reduce or eliminate ambiguity; (2) show that the policy was authorized by Senior Leadership; (3) give clear instructions to staff; (4) allow consistent training; and to (5) promote continuity when there is staff or management turnover. (CP310.) Written—as opposed to oral—policies are also required by the CBA and must be communicated to the nurses if they are changed. (CP315, CP697, CBA § 6.7.2.). The Hospital did not produce any department-level written policies in discovery governing meals and breaks, although there are, in fact, department-level policies that cover other matters. (*E.g.*, CP618-621.) In other words, there is no evidence in the record that Lourdes complied with the alleged law requiring implementing department-level tailoring of meal-and-break policies, assuming there is such a legal requirement. To the contrary, Lourdes treated all the nurses the same in the following illegal ways.

First, the law requires the Hospital to provide nurses with mandatory rest periods on its time, and pay them for extra hours worked if the

[5] *See* WAC 246-320-136(1) ("The hospital leaders must: (1) Appoint or assign a nurse at the executive level to: (a) Direct the nursing services; and (b) Approve patient care policies, nursing practices and procedures.").

mandatory rest periods are not enforced.[6] Nevertheless, the Hospital systematically failed to track time for missed rest periods (*i.e.*, track hours worked as required by law) and failed to pay *any* nurse for *any* missed-rest period during the back-pay period. Nor did the Hospital provide nurses with a way to report missed rest period time like it did for missed meal periods. The Hospital's own evidence submitted by way of declarations from managers along with evidence submitted by the Nurses shows that every nurse, in every department, missed some rest periods when the Hospital is busy or when patient acuity required it. Thus, every nurse, regardless of department, is entitled to back pay for missed rest periods.

Second, the law requires the Hospital to "schedule" breaks at regular intervals if the "nature of the work" prohibits intermittent breaks.[7] The Hospital's own policy of general application provided for "scheduling" and "a" 15-minute block break and did not authorize intermittent breaks during the back-pay period, but this policy allegedly changed when Lourdes rolled out its "Symphony" policy after depositions in this case occurred. (*E.g.*, CP669, CP833-834.) The Hospital concedes through its litigation position that it did not regularly schedule rest periods for nurses who were in patient

---

[6] *See, e.g.*, *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 850-51, 50 P.3d 256 (2002).

[7] *See* WAC 296-126-092(4) & (5).

assignment, and relies solely on "intermittent breaks" to defend its systematic scheduling violations.

Third, the law requires the Hospital to provide a presumptively *paid* meal period if the nurse is required to remain on call to respond to patient needs while eating. (*E.g.*, CP1650 ¶¶4 & 5.)[8] Despite the overwhelming evidence that nurses were systemically required to remain on the premises, on duty, and tend to patient needs, and thus that they were entitled to a paid, on duty meal period, *the Hospital uniformly treated them as if they were always off duty and not on call through their uniform Kronos-time keeping system.* The Hospital did not engage in any individual inquiry when it classified every nurse as being "off duty" for every meal period. Thus, the Nurses contend the Hospital (mis)classified them in every single department as presumptively being "off duty" during their first meal period by automatically deducting 30-minutes time from their hours worked through their Kronos time system. Substantial evidence, including inferences to be drawn from the Hospital's manger-provided declarations, shows the Nurses in every department were on call during their first meal

[8] *See also Pellino v. Brink's Inc.*, 164 Wn.App. 668, 688-91. 267 P.3d 383 (2011) ("Accordingly, if an employee is on duty, the paid meal period or rest break may be interrupted, but the employee is entitled to a full 30 minutes of paid meal time and a full 10 minutes for a rest break without performing work duties on behalf of the employer.") (citing WAC 296-126-092 and Administrative Policy ES.C.6.).

period and subject to recall, but were uniformly misclassified. (Pet's Br. 31, 61-62; *see also* CP395; CP1725 ¶¶10-12, CP1732-33 ¶¶11-13, CP600-601 ¶¶9-12, CP605-606 ¶¶9-12; CP143-144 ¶¶3-4, 8, CP150-151 ¶¶9, 13, CP157-158 ¶¶9-11, JA835, CP163 at ¶10; CP167-168 at ¶¶3, 9-11.) The Hospital's policy required nurses to "clock out" only if they left the premises after receiving special permission to clock out. (*E.g.*, CP746 ¶9; *see also* RP264-307, 374-380; CP1650 ¶4.).

Fourth, Although the Hospital was legally required to provide 12-hour shift nurses with two meal periods (CP1651), its Nursing Director and designated representative to testify about the Hospital's nursing practices admitted in a CR 30(b)(6) deposition that it only provided 12-hour shift nurses with one meal period as a matter of course. The Nurses confirmed by declaration and deposition testimony that the Nursing Director's admission was correct: they were systematically deprived of a second meal period. (*E.g.*, CP145 ¶8, CP150 ¶9, CP157 ¶9, CP163 ¶10, CP167 ¶¶3, 9, CP346, CP395, CP600 ¶9, CP605 ¶10, CP1721 ¶10, CP1732 ¶12.)

Fifth, the Hospital discouraged reporting even completely missed, presumptively unpaid first lunches for payment, through its official written no-unauthorized-overtime-without-advance-approval policy. If a nurse misses a meal period without pre-authorization, and this pushes the nurse into daily overtime, the Hospital's official policy subjects him or her to

disciplinary action. (CP326, CP746 ¶¶6 & 8, *see also* CP605-606 ¶¶11-12, CP1725 ¶12, CP1733 ¶14, CP601 ¶11.) The Hospital admitted this policy uniformly applied to every nurse. (CP309.)

In short, because Lourdes treated the Nurses in uniform, unlawful ways when it benefitted the Hospital to do so, it should not be heard to complain that common claims arising from its unlawful conduct are fairly and efficiently resolved on a class-wide basis.

C. The WSHA's assertion that there are no common questions about whether "breaks were missed" is simply false.

The WSHA represents that there are no "common questions" about whether any individual break was "missed." (WSHA Br. 1.) Then, WSHA asserts that the trial court must assess in each case whether each nurse received "intermittent breaks" that comply with "WAC 296-126-092(5)" to assess damages. This is simply false, as the Nurses contend that intermittent breaks are inconsistent with the nature of their work. As such, resolving that question on a class basis is a necessary precondition to resolving any individual nurse's damage claim.

The Nursing Director and the Hospital's CR 30(b)(6) representative admitted that, when nurses are "in patient assignment," *i.e.*, when they are assigned to care for a specific patient(s), a universal nursing standard makes them responsible for that patient's care until they are relieved by another

competent nurse or the patient is discharged. (*See also* WSLC Br. 12-15.) This universal nursing standard imposes an obligation on the Hospital to schedule breaks and relieve a nurse of patient assignment to comply with WAC 296-126-092(4), and renders 296-126-092(5) inapplicable based on the "nature of the work." As demonstrated by the WSLC, if the Nurses are correct—and Lourdes was unlawfully relying on intermittent breaks to comply with WAC 296-126-092—then the Hospital is required to compensate each nurse for each break period during each shift he or she worked because the Hospital's intermittent breaks practice was illegal and does not comply with WAC 296-126-092. (WSLC Br. 17.)

D. The WSHA's cases from outside this jurisdiction do not apply to the facts of this case.

The WSHA's lead case for affirming denial of class certification is a federal class out of New York, *Hinterberger v. Catholic Health Sys.*, 299 F.R.D. 22, 29-30, 50-51 (W.D.N.Y. 2014), in which a hospital had delegated authority to implement facially valid meal-and-break policies to department-level managers. There is no evidence that the *Hinterberger* situation is present here: Lourdes did not produce any department-level policies or official policies that authorized meals-and-breaks policies to be implemented at the department level.

The WSHA also relies on cases declaring that, "a Hospital is not liable where a nurse fails to follow its reasonable time-keeping policy, thwarting its ability to pay for missed breaks and comply with the law." (WSHA Br. 7.) Here, however, the Hospital's actual policy was to: (1) not pay for missed rest periods or maintain any viable means for nurses to report missed rest periods resulting in time not being recorded as hours worked; (2) refuse to schedule breaks for nurses in patient assignment and then defend subsequently filed litigation using an alleged "intermittent break" defense that is inconsistent with the nature of the Nurses' work; (3) misclassify each nurse as being "off duty" for meal periods when its policies of general application required them to remain on call and remain working during lunch to respond to patient needs; (4) not provide second meal periods to 12-hour shift nurses as a matter of course; and (5) punish Nurses who report missed meal periods (which were reported and tracked unlike missed rest periods) through its no-unapproved-overtime policy of general application. The WHSA fails to explain how any of these illegal policies were caused by nurses failing to follow "reasonable timekeeping procedures." So, nurses-who-fail-to-follow-reasonable-procedures cases do not apply here.

The WSHA also contends that the Nurses "acknowledge that factual differences exist for the nurses alleged damages, but claim that any

difficulties can be dealt with by certifying a class for liability only." (WSHA Br. 11.) While it would be proper to certify a "liability-only class" in some cases, or as an alternative to denying a class altogether, the Nurses do not concede that damages cannot be handled fairly and efficiently on a class basis, just like they were handled fairly and efficiently in cases like *Brink's* and *Hill v. Garda CL Northwest, Inc.*[9]

The WSHA relies mostly on cases involving nurses that were multi-state and multi-hospital proposed classes proceeding under federal law or some other states' laws. (*E.g.*, WSHA Br. 7-8.) That fact pattern is not present in this case and those types of cases denying class certification are simply not applicable.

The Hospital also argues there are "only three cases" in which a court certified a "missed break class" where there was no "unlawful policy or practice uniformly applied." (WSHA Br. 6 at n.3.) Here, the Nurses provided evidence that Lourdes had at least five unlawful policies that were uniformly applied: (1) it failed to pay for missed rest periods; (2) its "intermittent break" practice where nurses are not relieved of their patient care duties is illegal and inconsistent with the nature of the work; (3) it misclassified each nurse as being "off duty" for meal periods when its

---

[9] *See Hill v. Garda CL Northwest, Inc.*, 198 Wn. App. 326, 394 P.3d 390 (2017).

policies of general application required them to remain on call and working during lunch; (4) it failed to provide second meal periods to 12-hour shift nurses as a matter of course; and (5) its official overtime policy of general application discouraged nurses from reporting missed meal periods in addition to its illegal misclassification policy. Every one of the WSHA's cases rely on two independent premises that do not apply here: (1) no illegal policies at issues at all; and (2) conflicting department-level implementation of legal policies that may or may not have rendered the official policy illegal.

To the extent that the WSHA has cited cases holding that individual-damage issues under other states' laws might predominate, that is not the law in this state. Under this Court's decision in *Moore*, variations in individual damages is not a legally permissible reason to deny certification.[10]

WSHA also relies on the unpublished federal case of *Roth v. CHA Hollywood Med. Ctr.*, No. 2:12-CV-07550, 2013 WL 5775129 (C.D. Cal. Oct. 25, 2013), for the position that differences in nurse's experiences under a rest and meal period policy "preclude" commonality. Again, the facts in *Roth* are very different than what is presented here. In *Roth*, a United States

[10] *See Moore v. Health Care Authority*, 181 Wn.2d 299, 305-15, 332 P.3d 461 (2014).

District Court found a California employer's facially valid rest and meal policy did not present a common question suitable for class certification. Indeed, in that Court's view, individual issues would likely predominate because no uniform unlawful policy or practice existed.

To the extent cases from other jurisdictions are persuasive, this case presents far-more uniform illegal policies than were alleged in *Alberts v. Aurora Behavioral Health Care*,[11] which still reversed the trial court's decision to deny class certification. In *Alberts*, California Court of Appeals reversed a trial court's order denying class certification where Plaintiffs asserted that the employer maintained a policy of understaffing that unlawfully deprived them of rest and meal periods. That case involved two psychiatric facilities, five job classifications, including registered nurses, and over a thousand putative class members. Plaintiffs alleged, among other things, that: (1) they were denied adequate relief for rest and meal periods under state law due to chronic understaffing; (2) they were denied required compensation because the employer had an ineffective reporting system for missed rest periods; and (3) the employer's policy was illegal because it denied them a second meal period. The Court of Appeals reversed the trial court's order because—like the trial court in this case—it focused on

[11] *See Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 193 Cal. Rptr. 3d 783 (2015).

irrelevant criteria, such as the potential for variations in damages among class members.[12] The illegal policies in this case are much more uniform than the facts presented by the plaintiffs in *Alberts*, so refusing certification is this case was an even greater abuse of discretion.

Finally, even a cursory review of *Wal-Mart v. Dukes*, in which the plaintiffs sought to certify "a nationwide class of some 1.5 million female employees, because of Wal–Mart's alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964," shows that the U.S. Supreme Court's concerns in that case do not apply here.[13] In Wal-Mart, the "only evidence of a general discrimination policy was a sociologist's analysis asserting that *Wal–Mart's co*rporate culture made it vulnerable to gender bias. But because he could not estimate what percent of Wal-Mart's employment decisions might be determined by stereotypical thinking, the Court found his testimony was worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[14]

The Nurses here are not seeking a nation-wide, multi-facility discrimination class using flimsy proof of a general policy like the plaintiffs were in Wal-Mart. Moreover, this case is not a case involving a large,

---

[12] *See id.*, 193 Cal. Rptr. 3d at 399-420.

[13] *See Wal-Mart v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541 (2011).

[14] *See* 564 U.S. at 338, 355.

multistate "health care system," it is about nurses in one Hospital operating under one set of unlawful policies of general application. (Cf. WSHA Br. 18.) Finally, the Nurses evidence of the Hospital's policies include testimony directly from Lourdes' designated CR 30(b)(6) representatives and shows that the policies are uniform and illegal. This case is not in any way comparable to *Wal-Mart v. Dukes*.

E. The Nurses are not resting on "bare allegations."

On page 15 of its Brief, the WSHA presents a strawman: "Petitioners and amicus WELA appear to argue that a trial court must accept as true plaintiffs' bare, unsupported allegations." (WSHA Br. 15.) The Nurses' presented over 1000 pages of evidence and relied mostly on the CR 30(b)(6) testimony of the Hospital's representative to establish that it had uniform illegal policies. The Nurses at no point argued that the trial court was required to accept bare, unsupported allegations.

To the contrary, the Nurses contention on this point on appeal is that: (1) absent an evidentiary hearing, the trial court is not authorized to resolve contested but properly supported evidentiary facts to deny class certification at the initial phase of the litigation; (2) CR 23's requirements are interpreted as a matter of law; (3) unless a trial court resolves disputed facts based on properly supported fact-findings, it should not be granted broad deference on appeal by the reviewing court on what is a legal interpretation of

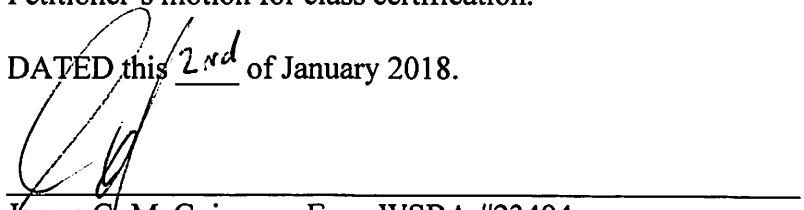
CR 23's requirements; and (4) the court of appeals is not authorized to view the record in a light most favorable to the defendant when reviewing a certification decision that does not even purport to contain fact findings or purport to resolve disputed facts.

The WSHA present no authority to the contrary or that rebuts these points. In fact, WSHA admits on page 16 of its brief that a trial court "is not free to weigh conflicting testimony" when it reviews the record.[15] (WSHA Br. 16.) The WSHA, in fact, agrees that the court of appeals committed error on this specific point. (WSHA Br. 19) (admitting that, "resolving conflicting evidence is unnecessary and improper."). The Court should reverse the court of appeals on this ground alone.

II. CONCLUSION

For the forgoing reasons, Petitioners respectfully ask this Court to reverse the court of appeals with instructions that the trial court grant Petitioner's motion for class certification.

DATED this 2nd of January 2018.



James G. McGuinness, Esq., WSBA #23494
Aaron M. Streepy, Esq., WSBA #38149
5030 1st Ave. South, Ste. 101

[15] *See Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 27, 65 P.3d 1 (2003).

Seattle, WA 98134
PH: (253) 528-0278
FX: (253) 528-0276
Jim@mcguinnessstreepy.com
aaron@mcguinnessstreepy.com

Attorneys for Petitioners

PROOF OF SERVICE

I, James G. McGuinness, certify that on this date, I caused a true and correct copy of the foregoing "Answer to Amicus Brief" to be served on Aaron Bass and Rebecca Watkins, Sather, Byerly & Holloway, LLP, 111 SW Fifth Ave, Suite 1200, Portland, OR 97204, by e-mail transmission by party agreement to serve documents electronically and on all the attorneys for *Amicus Curiae* by the court's e-service mechanism.

DATED this January 2nd, 2018

By:

James G. McGuinness.

JAMES G. MCGUINNESS

January 02, 2018 - 2:11 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94592-6
Appellate Court Case Title:	Judith Q. Chavez, et al. v. Our Lady of Lourdes Hospital, et al.
Superior Court Case Number:	12-2-50575-9

The following documents have been uploaded:

- 945926_Briefs_20180102140821SC307772_5643.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was 2018_01_02_14_03_48.pdf

A copy of the uploaded files will be sent to:

- aaron@mcguinnessstreepy.com
- abass@sbhlegal.com
- bchandler@terrellmarshall.com
- bonitaf@richter-wimberley.com
- carsonf@seiu1199nw.org
- danhuntington@richter-wimberley.com
- franco@workerlaw.com
- hansen@livengoodlaw.com
- j_krona@yahoo.com
- jbeck@gth-law.com
- jneedlel@wolfenet.com
- lizd@seiu1199nw.org
- robbins@workerlaw.com
- rwatkins@sbhlegal.com
- slemonidis@unionattorneysnw.com
- tberistain@sbhlegal.com
- tim.oconnell@stoel.com
- tmarshall@terrellmarshall.com
- tsears@wsna.org
- valeriemcomie@gmail.com
- vray@pointruston.com
- white@livengoodlaw.com

Comments:

Sender Name: James McGuinness - Email: jim@mcguinnessstreepy.com
Address:
5030 1ST AVE S STE 101
SEATTLE, WA, 98134-2438
Phone: 253-528-0274

Note: The Filing Id is 20180102140821SC307772