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Court of Appeals
Division III
State of Washington

No. 94592-6

No. 33556-9-III

IN THE COURT OF APPEALS FOR 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 RNs 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.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Plaintiffs appeal the trial judge's denial of their motion to certify a class of all registered nurses (RNs) who have worked one or more hourly shifts at Lourdes in the relevant time period for claims of unpaid wages and overtime related to rest breaks and meal periods. Over the span of three years and with a voluminous record, Judge Spanner fully considered the requirements of class certification and determined class treatment was not appropriate in this case. The duties and experiences performed by one RN at Lourdes cannot be generalized to all other RNs. Rather, they vary by department, by shift, by nurse type, by assigned role, by patient census, by patient acuity and even by manager – and all these individual factors play a part in determining liability and damages for missed rest breaks and meal periods.

Judge Spanner acted well within his discretion in denying class certification. On appeal, plaintiffs fail to identify any untenable ruling or wanton disregard by the judge. Instead, they rehash their evidentiary arguments in support of their theories. Defendants ask this court to affirm the trial judge.

II. ASSIGNMENT OF ERROR

The trial court did not abuse its discretion in denying plaintiffs' motion to certify a class.

III. STATEMENT OF THE CASE

Defendants reject plaintiffs' statement of the case as it does not present "a fair statement" of the relevant facts and procedure but instead consists largely of argument.

A. Procedural History

Plaintiffs are four registered nurses currently or previously employed by Our Lady of Lourdes at Pasco. In June 2012, they filed a claim for unpaid wages under state law against Lourdes and its CEO John Serle, asserting that they missed rest breaks and meal periods without being compensated. (CP 979-90). They brought claims on their own behalf and also on behalf of a proposed class of all hourly RNs within the limitations period. (CP 979-90).

The parties engaged in preliminary motions on the pleadings and discovery. Approximately a year after filing their lawsuit, plaintiffs filed a motion for class certification. (CP 938-71). Before the class motion was heard, they filed a motion for summary judgment on second meal periods. (RP 126). Judge Spanner presided over a half-day hearing in May 2013. (RP 5). On that day, he did not certify a class because he was unconvinced by the broad theories of commonality plaintiffs proposed. He suggested a series of summary judgment motions on those theories. (RP 122-25).

Plaintiffs filed three separate summary judgment motions presenting their theories of commonality. (CP 53-66, 118-33, 1709-19). Defendants brought one cross motion. (CP 68-84). After extensive briefing and oral arguments, the judge denied all the motions, unconvinced that any theory proposed applied to all RNs at Lourdes. (CP 1646-52).

In March 2015, plaintiffs renewed their motion for class certification. (CP 1583-1618). After further oral arguments, Judge Spanner denied the motion to certify a class. (RP 345; CP 995-97). Plaintiffs now seek discretionary interlocutory review of the denial of class certification. (CP 992-93).

B. Key Facts Regarding Hourly RNs at Lourdes

Rather than simply replicate parts of the record, Lourdes refers the court to its in depth factual statement in its response to Plaintiffs' Motion for Certification. (CP 227-53). A more succinct factual statement is set out here for convenience of the court.

At all times relevant, Lourdes was a Catholic, faith-based, non-profit hospital serving the Tri-Cities area. (CP 1947-50). Lourdes views its employees as its team and family. (CP 1947-50). It stresses an open, approachable environment; employees can bring concerns to any management including CEO John Serle, human resources, chaplains, the

ethics committee, or the Director of Mission, Sister Esther Polacci. (CP 407, 410, 570, 1917-20, 1947-50, 1970-74).

1. Timekeeping and payroll at Lourdes

Lourdes strives to provide its employees, including its RNs, with the rest breaks and meal periods required by law; when rest breaks and meal periods cannot be taken due to the circumstances of an individual shift, Lourdes appropriately compensates employees for hours worked at the proper rate. (CP 1917-20, 1970-74). Lourdes has a meal and rest break policy (Policy No. 5100.7) applicable to all nonexempt employees of the hospital, which includes nonexempt hourly RNs. (CP 310, 358, 568, 1843-48, 1862-67, 1873-81, 1922-27). The supervisors and managers of various departments implement how rest breaks and meal periods are planned, taken and reported in their departments.

At all relevant times, Lourdes utilized a web-based timekeeping system called Kronos to record employee work time. While Kronos keeps track of time, Lourdes utilizes a second system for payroll, called Meditech. Through an interface, the Kronos time input is translated through Meditech into the proper rates and generates paychecks. (CP 671-72). When an employee misses a meal period, they hit the cancel meal deduct button in Kronos. (CP 402, 452, 503, 505, 1883-87). An employee who misses a rest break or meal period or has other timekeeping or payroll

corrections can also report this to their supervisor or the Payroll Department. (CP 391-92, 411, 1883-87, 1922-27).

All Lourdes employees receive training on timekeeping, rest breaks and meal periods from the payroll department during new hire orientation. This includes the right to rest breaks and an uninterrupted meal period, as well as the need to report missed rest breaks or meal periods so they can be paid. (CP 502, 1905-07). Most if not all departments also have department-specific orientations that include procedures for rest breaks and meal periods in that department. (CP 345, 361, 1813-14).

When RNs report missed meal periods or rest breaks, the missed breaks are entered as time worked, and paid at the appropriate regular or overtime rate. (CP 514, 562, 1905-07). Garcia and Jones testified that every time they reported missing a meal period, they were paid at the appropriate rate. (CP 391, 557, 564). Payroll personnel have added time to employees' time records for both missed meal periods and rest breaks. (CP 1883-87, 1905-07). The plaintiffs testified they have never been disciplined for missing meal periods or reporting missed breaks or meal periods. (CP 391, 452, 507, 556).

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2. Departments where hourly RNs work

During the relevant period, Lourdes employed hourly RNs in nine departments as well as Pre-Admit: (1) Emergency Department (ED); (2) Surgery; (3) Post-Anesthesia Care Unit (PACU); (4) Medical/Surgical Unit; (5) Intensive Care Unit (ICU); (6) Inpatient Rehabilitation Unit; (7) Same Day Surgery /Ambulatory/GI Lab Department; (8) Observation; (9) Obstetrics/Birthplace (OB); and in Pre-Admit (where RNs take vitals and information before patients are admitted). (CP 319, 357, 384). RNs are employed full-time, part-time, or on a per diem basis. (CP 1825-36).

a. Emergency Department

The ED serves trauma patients arriving without appointment as walk-ins or by ambulance, most whom average only two hours in the Department. (CP 541). Until she left Lourdes in June 2012, Garcia worked three 12-hour weekday shifts in the ER. (CP 544). The ED is less controlled or predictable than other departments, with fluctuating patient census and acuity levels. (CP 540, 544, 548, 1976-80, 1825-36). Garcia testified that the ED cannot be compared to other departments because other departments have a much more controlled setting. (CP 548). There may be no patients or a full house of patients. (CP 1976-80, 1982-85).

Over the relevant period, four different managers have overseen the ED: Janet Hanna, Suzanne Hannigan, Joan Funderburk, and Jody

Ulrich. (CP 1843-48). Seventeen part-time and full-time RNs work in the ED, on 8-hour or 12-hour shifts. (CP 1909-15, 1982-85). One RN, generally the most experienced, is designated as charge nurse. The charge nurse assesses work-flow and patient placement and generally does not have patient assignments. (CP 1843-48, 1895-96). Typically, one RN is assigned to triage, one to ordering supplies, and one to "super track" patients. (CP 1843-48). The triage nurse also does not have patient assignments, while the remaining RNs are assigned to rooms. (CP 1895-96).

The ED orientation includes discussing meal periods and rest break. (CP 545, 1326, 1825-36, 1843-48, 1909-15). Generally, an RN notifies the charge nurse that he or she is taking a break, although each charge nurse deals with meal periods and breaks differently. (CP 549-52, 1362, 1909-15, 1982-85).

Garcia testified she believed she missed her meal periods 90% of the time. (CP 562). Plaintiffs also submitted declarations of past ED RNs Vicki Haines and Melanie Bell, who asserted they did not get breaks. (CP 1722-34). Conversely, others testified that day and night shift RNs are usually able to take a 30-minute uninterrupted meal period and rest breaks. (CP 1936-45, 1982-85). As even Garcia admitted, there are times during shifts when patient flow allows RNs to take small incremental breaks and

chat about personal matters, surf the internet, check emails, read magazines or newspapers, or grab a snack. (CP 547-49, 1825-36, 1843-48, 1895-96, 1909-15, 1982-85).

b. Surgery/Operating Room

Surgery is usually open from 7:00 a.m. to 3:30 p.m., Monday through Friday, although emergency surgeries may occur at any hour. (CP 1898-1903, 1929-34). Patient flow is fairly predictable in the Surgery department because most surgeries are scheduled, allowing windows throughout the day when rest breaks and meal periods are taken. (CP 1929-34). Over the relevant period, Thomas Pizzo has been the Director over the Surgery department. (CP 1929-34).

Eight full-time RNs work 8-hour shifts in Surgery. (CP 1898-1903, 1929-34).While RNs in Surgery perform some basic nursing tasks, the department is very different than other nursing units. (CP 1898-1903, 1929-34). Surgeries are very technical and precise; RNs work closely with surgeons and must have a highly specialized skill set including knowledge of surgical equipment. (CP 1869-71, 1898-1903, 1929-34). Typically, one RN is designated as a charge nurse, has no patient assignments, and helps coordinate and cover breaks.

Surgery orientation includes discussion of meal periods and rest breaks. (CP 1929-34). Meal and rest breaks are rarely missed in Surgery,

and when they are missed, they are compensated accordingly. (CP 1898-1903, 1929-34, 1957-60). The charge nurse is notified prior to a break and it is recorded on the white board. (CP 1857-60, 1898-1903). For each two surgery rooms, three RNs are assigned. The fifth RN is designated as a floating RN, assists with patient care, and also helps cover meal periods and rest breaks. (CP 1857-60, 1898-1903). An RN will be relieved in the course of a longer surgery for a rest break or meal period. (CP 1857-60, 1869-71, 1957-60)

c. Patient Acute Care Unit

The PACU operates closely with Surgery, assessing surgical patients for pre-operative and intra-operative surgical care. (CP 1957-60). Three full-time and two part-time RNs work 8-hour shifts in the department, with the exception of one RN who also works in Ambulatory. On average, there are four RNs working at one time. (CP 1929-34). RNs in PACU go through department orientation that includes training on meal periods and rest breaks. (CP 1929-34). Rest breaks and meal periods are rarely missed by RNs in the PACU. (CP 1929-34).

d. Same Day Surgery/Ambulatory/GI Lab

Same Day Surgery/Ambulatory/Gastrointestinal Lab (Same Day Surgery) is scheduled to be open from 6:00 a.m. to 6:30 p.m., but often closes by 3:00 p.m. when surgical procedures have been completed.

(CP 1936-45, 1976-80). Patient flow is fairly predictable in Same Day Surgery because surgeries tend to be scheduled in advanced. (CP 1936-45). This creates more predictable rest breaks and meal periods; in most cases such breaks are taken within set windows of time. (CP 1936-45).

Over the relevant period, Pizzo has been the Director over Same Day Surgery. (CP 1929-34). Since January 2012, Pleyo has been the Manager of Same Day Surgery. (CP 1936-45). Seven full-time and three part-time RNs work in the department. Although most work 12-hour shifts, three RNs work 8-hour shifts, and one works two 8-hour shifts and two 12-hour shifts. (CP 1909-15, 1936-45). Each RN attends Same Day Surgery specific training, where meal periods and rest breaks are discussed. (CP 1936-45).

e. Obstetrics/Birthplace

Until it closed in June 2013, the Obstetrics/Birthplace department (OB) was open twenty-four hours a day, seven days per week. (CP 1001-03, 1936-45). Both laboring mothers and postpartum couplets (mom-baby pairs) are served in OB. Except for induced births, births cannot be scheduled or anticipated, and as a result, OB has extreme unpredictability and fluctuation in its schedule. (CP 1825-36, 1936-45). Sometimes, OB went weeks without a patient, and then got a flood of laboring mothers. (CP 492, 1976-80).

Chavez worked for Lourdes in OB on three 12-hour shifts per week up until the department closed. (CP 483, 1001-03). Tom Pizzo replaced Sara Barron as Director of OB in 2009, when Michelle Stevenson also became Manager. Ms. Stevenson worked as Manager until April 2011; from April 2011 until its closure, Teresa Pleyo was Manager of OB. (CP 484, 1936-45). Eleven full-time and two part-time RNs worked in OB, all on 12-hour shifts. (CP 1936-45). OB had minimum core staffing of four regardless of whether patients were present: two labor RNs, one postpartum RN or LPN, and one technician. (CP 488, 1936-45, 1976-80). One RN acts as a charge nurse and assists in operation of the department. (CP 484). The charge nurse is responsible for handing out assignments, for checking the crash carts, refrigerators, the warmer, the C-section room, mailing out PKU's, making sure that all of the labs and reports are put in patient charts, and addressing concerns from physicians. (CP 481). Ideally, two RNs per shift have specialty training in labor and delivery, while other RNs deal primarily with postpartum patient care. (CP 1869-71, 1936-45).

Each OB RN receives department-specific training where meal periods and rest breaks are discussed. (CP 1936-45). Scheduling on any particular shift is controlled by a combination of the manager and charge nurse, with input from individual RNs. (CP 484, 498). Typically, an RN

will tell the charge nurse he or she is taking a break, and give a report about any patient status to another RN to cover. (CP 492, 516-17).

Due to the relatively low numbers of patients served (30 per month on average) and core staffing levels, RNs in the OB often had prolonged periods of downtime. (CP 1813-18, 1825-45). Some days, there were no patients, so they had breaks. (CP 492-93). When there are no patients, they have a lot of time to do non work-related tasks. (CP 493). The RNs in OB would take a second meal together on a slow day. (CP 514). The majority of the time, when there were no or a low number of patients, taking meal periods or rest breaks was not an issue. RNs take both lunch and dinner as well as rest breaks. (CP 492-93, 520, 1813-18, 1936-45). In fact, RNs in OB helped to cover breaks and meal periods for RNs in other departments when slow. (CP 487, 491, 1936-45). Most days, even with patients, RNs in OB also had the ability to take small breaks to use cell phones, check email, read magazines, get coffee, and grab snacks that add up to at least ten minutes every four hours worked. (CP 493, 495, 516, 1813-18, 1825-45, 1976-80).

f. Observation Department

The Observation department is open twenty-four hours per day, seven days per week; however, if it has no patients, it will close. (CP 1825-36, 1936-45, 1976-80). Observation monitors patients coming

from the ED and Surgery, and helps outpatients who come in for short periods for monitored blood transfusions, administration of antibiotics, or IV fluids. (CP 384, 1936-45). Jones worked three, 12-hour weekday shifts in Observation and Pre-admit until her retirement. (CP 379, 381, 1001-03).

Initially, Dee Hazel managed the department, but in January 2012, Pleyo became Manager. (CP 1936-45). Jones admits that different managers implement policies differently. (CP 405). A number of procedural changes have occurred since Teresa Pleyo replaced Dee Hazel in Observation and Melissa Lindfoot replaced Hazel in Pre-Admit. (CP 406-07). Under Pleyo, Jones feels comfortable reporting if she misses a meal period. (CP 393-95). Five full-time and one part-time RN work in Observation, all working 12-hour shifts. (CP 1936-45).

Observation has specific department training which covers department-specific procedures, including meal periods and rest breaks. (CP 1936-45). For breaks and meal periods, an RN is required to notify the charge nurse or coworkers, but does not require pre-approval from the manager. (CP 1936-45). The transfer of patient care to another RN for meal periods or rest breaks is easier because Observation serves lower acuity patients. (CP 1936-45). At night, the process is different because there is only one RN working. (CP 1962-68, 1976-80, 489, 491).

Except when patient census is high, rest breaks and meal periods are rarely missed. (CP 1825-36, 1936-45). At night, Observation patients are usually sleeping and quiet, so with less direct patient care, RNs working night shifts have even more time to engage in personal activities. (CP 1936-45, 1976-80). RNs also take breaks from work in small increments throughout the shift to chat about personal matters, check Facebook or email, use cell phones or stand by an open window to "regroup" as Jones preferred. (CP 397, 400, 1936-45).

g. Medical Surgery Unit

The Medical/Surgery Unit (Med Surg) is open twenty-four hours a day, seven days per week and treats patients needing to stay at the hospital for over twenty-four hours. (CP 1873-81). RNs assist with routine physical assessments, administering daily morning and night medications, preparing patients for surgery, and post-surgery patient monitoring for any complications. (CP 1873-81). They may assist with mobility, dieting and toileting needs, check doctor orders, provide patient education and discharge instructions, work with RN students, and document treatment. (CP 1873-81). Patient flow can be unpredictable; the RNs work together to coordinate breaks based on personal preference and patient care. (CP 1820-23, 1873-81). Each Med Surg RN partakes in a department orientation that discusses meal periods and rest breaks. (CP 1873-81).

Sara Barron was the Director of the Med Surg until May 2010, Janet Hanna next held the position, and Suzanne Hannigan has been Director since January 2012. (CP 1813-18, 1873-81). Full-time, part-time, and per diem RNs work in Med Surg, typically on 12-hour shifts. (CP 1873-81). RNs rotate into the role of charge nurse. The charge nurse has additional duties of assigning patients, patient admissions, and assisting in scheduling. (CP 1873-81).

At night, because patients in Med Surg are usually sleeping and no routine surgeries or x-rays take place, RNs do not have issues taking meal periods and rest breaks. (CP 1825-36, 1873-81). Certain RNs in Med Surg tend to waive meal periods on a regular basis despite coverage being offered. (CP 1962-68).

h. Intensive Care Unit

The ICU treats patients requiring higher level care. (CP 445, 1873-81). It uses specialty equipment such as telemetry, respirators, central lines, and pacemakers. (CP 435). Job duties can include very close monitoring of medications, monitoring ventilators, heavy sedation, managing drips and engaging in emergency protocol and care for critically ill patients. (CP 1825-36, 1873-81). Christianson has worked for Lourdes for over 26 years, exclusively in the ICU department since 2005. (CP 431, 449).

Over the relevant period, Suzanne Hannigan, Janet Hanna, and Sara Barron have all served as Directors of the ICU. (CP 1813-18, 1873-81). Full-time, part-time, and per diem RNs work in the ICU on 12-hour shifts. (CP 1873-81). One RN performs the role of charge nurse on a shift; experienced ICU RNs share this responsibility. (CP 440, 449). The charge nurse will coordinate patient admissions, monitor cardiac equipment, and assist in scheduling. (CP 1873-81). Although no RNs need to be present when there are no patients, once there is one ICU patient, there must be two ICU-qualified RNs at the hospital. (CP 1873-81). An ICU RN can only take two ICU patients at a time, but often there are no ICU patients; in such circumstances, ICU RNs will take up to five lower acuity Med Surg patients. (CP 485, 489, 496, 1873-81, 1976-80).

Typically, Fridays are very busy while Sundays and night shifts have more downtime. However, this is not always the case. (CP 481, 489, 492). There are times when the ICU is full and each RN has patient assignments; other times, there are very few patients. (CP 1825-36). The ICU has averaged only one to two patients per day, and may go weeks without an ICU level patient. (CP 1873-81). Staffing levels generally allow ICU RNs to take meal periods and rest breaks. (CP 1873-81).

The ICU has a department-specific orientation for RNs, and this orientation discusses target times and protocols for meal periods and rest

breaks. (CP 434, 1873-81). In most cases, when there are two ICU RNs, breaks and meal periods can be taken. (CP 443, 447, 452). Christianson identified acuity of ICU level patients and telemetry monitoring as the primary factors influencing if she received rest breaks or meal periods. (CP 433, 435, 443, 446-47, 464). If a second ICU RN that she trusts is working, she usually gets rest breaks and meal periods. (CP 446-47). The required certification level for ICU RNs can make it more difficult to find relief for meal periods and rest breaks when there is a high acuity patient, but it is rare that there is not another ICU RN or certified PCC to provide relief. (CP 1857-60, 1873-81). Even on these busy days, RNs generally have time to take breaks, eat a little, go to the coffee shop, go online or text. (CP 1813-18, 1820-23, 448).

i. Inpatient Rehabilitation Department

The Inpatient Rehabilitation Department (Rehabilitation) serves inpatients needing intense rehabilitation following surgery or trauma. Patient flow is fairly predictable. (CP 1825-36). RNs perform standard nursing tasks such as checking vitals, medication management, handling IVs, and assisting with patient transfers. (CP 1850-55). Up to May 2010, Sara Barron served as Director for Rehabilitation. (CP 1813-18). Since May 2010, Shelly Pease has managed the RNs in the department. (CP 1922-27).

Rehabilitation employs four full-time RNs and three per diem RNs, all whom work 12-hour shifts. (CP 1850-55, 1922-27). On RN will be designated as charge nurse; other RNs may be assigned specifically to assist with trauma patients. (CP 1850-55). On Tuesdays and Thursdays, RNs have additional duties, including staff meeting and family rounds. The night RNs on Mondays also have to perform chart reviews for Tuesday staff meetings. (CP 1922-27).

Rehabilitation RNs undergo a department-specific orientation that covers meal periods and rest breaks. (CP 1850-55, 1922-27). The meal period and rest break schedule is discussed at the onset of each shift. (CP 1850-55). Rehabilitation has a more predictable flow that some departments. Usually, in early morning and around meal times, RNs are busy. But mid-morning and between 1:00 p.m. and 4:30 p.m. it is very slow in Rehabilitation because patients leave the department for therapy. (CP 1922-27). Similarly, RNs working night shift usually begin with a couple of hours of patient assessment and care, but then patients go to sleep and require little attention. (CP 1922-27). As a result, RNs working in Rehabilitation can have significant periods of downtime without patient care or responsibilities. During this time, they can chat about personal matters, use the internet, go to the espresso bar or gift shop, make personal calls, use their smart phones or read. (CP 1813-18, 1850-55, 1922-27).

RNs and LPNs do most of the same tasks, so LPNs can help cover for RNs. (CP 1922-27). Also, the manager is certified and can provide coverage when needed. (CP 1922-27). On nights and weekends when there is only one RN, the PCC can assist or float an RN from another department, usually OB, to provide coverage. (CP 489, 491, 1922-27). While the staffing ratio is five to one, the department averages two to three patients per RN, allowing coverage for breaks and meal periods. (CP 1813-18, 1922-27).

IV. STANDARD OF REVIEW

The appellate courts review a trial court decision on class certification for abuse of discretion. *Schnall v. AT&T Wireless Svcs, Inc.*, 171 Wn.2d 260, 259 P.3d 129 (2011). A trial court abuses its discretion only if the decision is "manifestly unreasonable" or untenable. *Id.*; *Lacey Nursing Ctr., Inc. v. Department of Revenue*, 128 Wn.2d 49, 47, 905 P.2d 338 (1995); *Moeller v. Farmers Insurance Company of Washington*, 155 Wn. App. 133, 147, 229 P.3d 857 (2010). If a record shows a judge rigorously considered all the requirements of CR 23, the appellate courts will not disturb that decision. *Schnall* at 266; *Lacey Nursing Ctr.* at 47.

V. ARGUMENT

Judge Spanner invested significant time and consideration in deciding the class certification issue. He considered class requirements

first in May 2013, and when not convinced by plaintiffs' expansive theories to certify a class on that occasion, he provided them the opportunity to further brief the theories and try again. After summary judgment motions and a renewed class motion, Judge Spanner denied certification. (CP 995-97). He provided a rigorous evaluation of the requirements under CR 23 and acted well within judicial discretion.

A. Class Certification Requirements

To certify a class, plaintiffs must establish the four requirements of CR 23(a), including numerosity, commonality, typicality, and adequate representation; and additionally establish one of the requirements of CR 23(b). *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383 (2011). These requirements, while distinct, are closely interrelated and go to the core of class certification; namely, whether claims of a class can be adjudicated based on the claims of individuals. In addition to meeting the requirements of CR 23(a), a class must also meet one of the more demanding requirements of CR 23(b): 1) that individual suits create prejudice or risk inconsistent judgments; or 2) that injunctive relief may be necessary; or 3) that a class action is superior to other means of proceeding. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013); *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 65 P.3d 1 (2003).

Plaintiffs must prove each element. *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007).

While courts liberally interpret the requirements of CR 23, this does not equate to a *pro forma* or automatic grant of a class certification motion. *Id.* Class actions are specialized types of actions that necessitate strict conformity with the requirements of CR 23. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). Actual, not merely presumed, conformance with the certification requirements must exist. *Oda v. State*, 111 Wn. App. 79, 93, 44 P.3d 8 (2002); *General Telephone Co. v. Falcon*, 102 S.Ct. 2364 (1982).

B. Judge Spanner Conducted a Rigorous Analysis of the CR 23 Requirements.

Plaintiffs argue the merits of their case, rehashing bits and pieces of the evidence they think establish one or more of their vague common theories. The real question before the appellate court is whether Judge Spanner complied with his duty to conduct a rigorous analysis of the requirements of class certification. Once such a conclusion is reached, his ruling is reviewed only for abuse of discretion. The detail of arguments, the size of the record, the repeat opportunities he provided plaintiffs, and numerous oral arguments held illustrate the rigor of Judge Spanner's analysis.

At the start of the original class motion hearing, Judge Spanner assured the parties he had read all of the submitted materials. (RP 4). His questions throughout that hearing revealed his preparation as he challenged the parties on where the record supported certain contentions. (RP 18). Plaintiffs submitted over 600 pages with their motion and with defendants' response, the record stretched to nearly 1,000 pages. Through the subsequent series of three motions plaintiffs chose to present, the judge had the opportunity to consider more evidence and delve more deeply into specific theories posed by plaintiffs including tracking rest breaks, an "in assignment" or on call theory, availability of intermittent breaks, and paid second meal periods. The transcripts from these motions reveal Judge Spanner's analysis of whether plaintiffs presented the type of common theories amenable to class treatment. At each turn, Judge Spanner concluded that the themes plaintiffs proposed were not legal questions answerable for all Lourdes RNs as a group, but instead turned on each department, role, manager, shift, and duties of individual RNs.

Judge Spanner's initial ruling that he was not convinced to certify a class in May 2013 highlights his careful consideration. He questioned the ability to prove missed and unpaid rest breaks or meal periods on a class-wide basis. (RP 60-61). He also challenged plaintiffs to address how they proposed to deal with damages. (RP 67). He gave plaintiffs the

opportunity to establish one or more of their broad legal theories through motions because that could negate distinctions between various RNs; otherwise he thought the responsibilities of a RN at a particular moment in time would be individual and not subject to class treatment. (RP 122-24). He later clarified that some of the conclusions that plaintiffs offered based on rules or laws "just didn't seem to be ringing true", so he proposed summary judgment motions on the issues. (RP 177-78).

Ultimately, after a series of summary judgment motions and a renewed class certification motion, Judge Spanner concluded the individualized circumstances overwhelmed any class commonalities. His rulings on summary judgment projected this conclusion. At the August 22, 2014 hearing, he cited *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003) as "significant because it suggests that there may have to be some individualized consideration of duties of RNs" that would depend on department differences or shift differences. (RP 178). He went on to explain that in absence of a policy or culture of prohibiting breaks or not paying for them "the determination of liability and the amount would of necessity have to be on an individualized basis, either as to employee, department, shift or other relevant category." (RP 180-81). In response to motions on the availability of intermittent breaks and citing to "declaration after declaration after declaration", Judge Spanner ruled that to determine

if intermittent breaks are appropriate, "we have to define which specific duties on which specific shift with which specific case load" and even the practicality of certain lengths of break time. (CP 251-52).

Addressing plaintiffs' second lunch theory, Judge Spanner again revealed his examination of the individual versus class issues. He emphasized the need to examine each RN's ability to receive an aggregate 30 minutes for the meal period. "As I've ruled before, whether or not they're sufficiently relieved of their duties under – is a question of fact because of the complexity. You have a number of departments. There is a difference between day shift and a difference between night shift and so on it goes..." (RP 305). He noted, for example, in the middle of a night shift with sleeping patients a RN may have plenty of time to have 30 minutes for a second meal period. (RP 304-05).

Judge Spanner's denial of class certification focused on CR 23(b)(3), tied to the requirement of commonality. Judge Spanner concluded that:

> "the class issues do not predominate. There are certainly some important class issues that are there and that exist, but, when the rubber meets the road, what happens from shift to shift, from nurse to nurse, from nurse type to nurse type, from census to census and so on, and so on it goes, if we had a class the generalities of what happened at Lourdes or what happens at Lourdes, I believe, would consume and

> overrun the specifics[1]. So, I don't find that the class issues predominate because those specifics are just so important to really understand what's going on in the hospital there." (RP 406-07).

He went on to explain that a class "would not be a [sic] superior because of that confusion that could arise from trying to manage nine sub classes, and I think those sub classes would be essential because of the differences in each of these different departments in the hospital." (RP 407).

He challenged plaintiffs at hearing to explain how the court could handle the determination of which nurse in any of the nine departments had patients at any particular time on a class-wide basis. Plaintiffs proposed looking at individual patient records or patient census records to see what RN had been assigned to patients. (RP 355-56). Even assuming these are viable options, looking at each patient-nurse assignment to determine "in assignment" status is not a class-wide method of proof. Judge Spanner also challenged plaintiffs' contention that Lourdes had "policies" against paying for missed rest breaks or imposing discipline for reporting missed rest breaks or meal periods. (RP 51-53, 357, 370). He pointed out that plaintiffs continually skipped over the difficulties in determining liability and tried to forward their theories as pure damages issues. (RP 356-57).

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[1] This was a slip of tongue corrected in the Order to read the specifics would overrun the generalities. (CP 997).

Judge Spanner meticulously considered the proposed class theories over a two-year span. He considered all the evidence submitted by plaintiffs and defendants. He allowed concentrated briefing and argument regarding the common themes plaintiffs chose to present.[2] His clearly voiced concern throughout has been that the themes presented could not be commonly answered for RNs as a whole but would necessarily be dependent on the work settings of each RN – by department, by shift, by census, by duties. The four plaintiffs themselves illustrate that particular managers or patient assignments or tasks influenced if they received rest breaks and meal periods.

Plaintiffs offer no convincing argument that Judge Spanner failed to rigorously evaluate the elements of class certification. Having performed this rigorous analysis, his ruling on certification should not be set aside. *Schnall* at 266; *Lacey Nursing Ctr.* at 47.

C. Judge Spanner Did Not Commit an Abuse of Discretion.

Examination of the evidence and the judge's various rulings confirms he was well within his discretion to deny class certification. Judge Spanner concluded that RNs at Lourdes have different duties and

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[2] Judge Spanner provided suggestions but did not dictate the issues for summary judgment. (CP 122-26). Plaintiffs presented some of these issues, and chose their own. They decided to end their motions and proceed to renewing the class certification motion at the end of the third hearing. (CP 309).

experiences that impact the ability to take meal periods and rest breaks – varying by department, by shift, by assignment, by number of patients, and more. The record amply supports these findings.

On appeal, plaintiffs assert their view of the evidence supports class certification, but none of their arguments reveal the judge's decision as manifestly unreasonable. *Schnall* at 266; *Lacey Nursing Ctr.* at 47; *Moeller*, 155 Wn. App. 133, 147. It is difficult to pinpoint exactly what error plaintiffs identify. They nebulously contend the trial judge abused his discretion by failing to liberally construe CR 23 in favor of certification, failing to give consideration to the purpose of wage and hour laws, and failing to liberally construe remedial statutes. PETITIONER'S OPENING BRIEF, p. 42-43. These charges do not point to specific rulings or statements by the court that illustrate such failures. To the contrary, Judge Spanner fully explored both class certification requirements and the wage and hour laws at issue, citing to the leading cases on point. In fact, the parties and the court agreed on the basic legal requirements for meal periods and rest breaks. Plaintiffs' vague accusations of abuse of discretion lack clarity or merit.

1. No procedural abuse of discretion

At various points in their argument, plaintiffs accuse the trial judge of procedural abuses of discretion, primarily because he held the class-

certification ruling in abeyance and directed plaintiffs to file a series of summary judgment motions. They also attack the judge for not holding an evidentiary hearing. These "procedural" attacks are a farce.

A trial court has broad discretion to determine the course of proceedings in class action cases. CR 23(d); *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 807, 123 P.3d 88 (2005). This includes delaying a ruling on class certification until after deciding motions for summary judgment. *Id.* Here, Judge Spanner was unconvinced by plaintiffs' class theories at their initial motion for certification. Nonetheless, instead of immediately denying certification, he provided them an opportunity to convince him on their case theories. He emphasized in particular the "in assignment" theory as possibly making distinctions between RNs irrelevant, if plaintiffs established it on dispositive motion. (RP 122). Plaintiffs did not object, and seem to forget that they had already filed a motion for summary judgment on second meal periods at that point in the litigation. (RP 126-29). The lack of any objection below and the fact plaintiffs started the process they now take issue with should preclude plaintiffs from raising this as a "procedural" abuse of discretion on appeal.

Similarly, plaintiffs' contention that the judge erred in failing to conduct an evidentiary hearing lacks merit. Plaintiffs chose not to present

live witnesses at the class certification hearing. (RP 7). The record shows the decision not to have a more formal evidentiary hearing was made by the parties, not denied by the court. Plaintiffs do not cite to any time when the court denied their request for an evidentiary hearing. Moreover, the trial court did not decide any merits of the class claims, as plaintiffs seem to assert (without identifying what factual merits were decided). Maybe plaintiffs now wish they had gone forward with or formally requested an evidentiary hearing; an appeal is not a "do over" for litigation tactics that proved unsuccessful.

The trial court did not abuse its discretion in holding off on class certification ruling until after summary judgment rulings or in any other manner. To the extent these issues are properly raised by plaintiffs at this juncture, they should be disregarded.

2. No merit to Rule 23(b)(1) or 23(b)(2) arguments

Plaintiffs briefly contend they meet 23(b)(1) and (b)(2) requirements and the trial court erred by ruling otherwise. They fail to identify any manifestly unreasonable finding by the judge. Instead, they appear to ask the appellate court to re-weigh their arguments and find in their favor; that is not the proper role of appeal.

CR 23(b)(1) and 23(b)(2) classes are "mandatory", meaning they bind all potential class members and give individual members no option to

opt out. *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003). CR 23(b)(1) classes are intended towards cases where prejudice to absent class members will occur; 23(b)(2) classes pertain to those where the primary goal is injunctive relief. When the primary objective of an action is monetary damages, certification under CR 23 (b)(1) and (b)(2) is not appropriate. *Sitton*, at 252; *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001).[3]

Plaintiffs' arguments in support of (b)(1) and (b)(2) are curious because from the beginning the judge expressed doubt these were appropriate and plaintiffs have never answered the doubts raised. In May 2013, Judge Spanner indicated that he did not think injunctive or declaratory relief was appropriate for this case. (RP 124-25). In their original class motion, plaintiffs' counsel agreed that it is not appropriate to obtain a declaratory judgment for liability and could not explain why a declaratory judgment was appropriate to restate what the law already says. (RP 111-12). Plaintiffs have yet to provide such an explanation.

The judge was not manifestly unreasonable in deciding plaintiffs primarily seek monetary damages – the pleadings and arguments all focus on alleged unpaid wages for missed rest breaks and missed meal periods.

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[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; *Schwendeman*, 116 Wn. App. 9, n. 24.

Plaintiffs claim prejudice but fail to explain what ruling as to the four plaintiffs could possibly prejudice other RNs from asserting statutory claims for their own unpaid wages. To the contrary, the judge's repeated findings that factual issues prevent ruling as a matter of law shows that no ruling as to the plaintiffs will bind the parties in future claims. Plaintiffs also fail to explain why injunctive relief is necessary, particularly since they admit their proposed class theories do not apply after March 10, 2013 – seemingly negating any need for declaratory or injunctive relief. (CP 1639-40). Amorphous claims of inconsistent rulings or prejudice do not establish a basis for certifying a class for injunctive or declaratory relief.

Judge Spanner acted well within his judicial discretion when he concluded plaintiffs had failed to establish class certification under 23(b)(1) or 23(b)(2). (CP 996).

3. The trial court did not abuse its discretion in finding plaintiffs failed to establish a CR 23(b)(3) class.

The primary focus of plaintiffs' appeal is the determination that plaintiffs failed to satisfy the predominance requirement of CR 23(b)(3).[4] Plaintiffs do not identify any decision by Judge Spanner as "untenable" or "manifestly unreasonable". Instead, they broadly assert he reached the

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[4]Defendants do not agree plaintiffs met the CR 23(a)(2) commonality requirement, and certainly agree common questions do not predominate as required under CR 23(b)(3). The evidence rebuts any common questions; it overwhelmingly shows individual issues predominate in this unpaid wage action.

wrong conclusion on every one of their theories – without showing where or how the judge abused his discretion. Plaintiffs appear to be presenting the evidence supportive of their theories and asking the appellate court to weigh that selective information and agree with them. This is not *de novo* or substantial evidence review. On appeal, the question is whether Judge Spanner abused his discretion in denying class certification; plaintiffs do not have carte blanche opportunity to present all arguments to date anew.

CR 23(b)(3) requires that common issues not only exist but predominate over individual issues; it focuses on manageability of a class. *Schwendeman*, 116 Wn. App. 9, 20. The predominance requirement focuses on the cohesiveness of the proposed class and if it warrants class treatment. A court must inquire whether, on a practical basis, a "common nucleus of operative facts" applies to each class member. *Id.*; *Sitton*, 116 Wn. App. 245, 255.

This record amply supports Judge Spanner's ruling that individual issues cause "the specifics for each class member to overrun any generalities". (CP 996-97). As argued in depth before the trial court, individual circumstances confronting a particular RN on a given shift in a certain department have overwhelming influence on rest breaks and meal periods.

Plaintiffs cite many "collective or class" claims that addressed rest breaks or meal periods. Conversely, many cases show individualized issues have overwhelmed class claims. *Weston*, 137 Wn. App. 164, 171-73. (CP 258-60). Central to the cases plaintiffs rely upon is a uniform policy or practice applicable across the entire class. In *Sacred Heart*, the hospital only paid missed breaks at regular rate of pay, never as overtime – a uniform practice that did not require delving into individual issues. *Washington State Nurses Ass'n. v. Sacred Heart Medical Center*, 175 Wn.2d 822, 287 P.3d 516 (2012). (*See* RP 226). *Brinks* involved a uniform policy of vigilance coupled with a prohibition on personal activities, making the nature of the job identical for determining the availability of intermittent breaks for security personnel. *Brinks*, 164 Wn. App. 668. This current situation is distinct, and plaintiffs do not present a class-wide issue such as exempt status, or failure to provide itemized pay statements, or a *Brinks*-type "vigilance" policy prohibiting personal activities. The fact that a number of RNs may have missed a rest break or meal period at some point does not mean they all have unpaid wages for the same reason. Just as the proposed class in *Wal-Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541 (2011) similarly claimed gender discrimination, the Supreme Court found that the discretion given to different managers meant claims needed to be individually evaluated. The Court noted that a general common question

did not mean class members all suffered common violations of the same law because many different practices or acts could constitute discrimination. *Id* at 2552. Similarly here, different departments and managers, different types of patients and duties, all influence if a particular RN missed a rest break or meal period and did not receive pay. For example, Garcia claimed she had her meal periods interrupted so that she could assist with interpreting for Spanish-speaking patients; Jones claims she missed meal periods but not for this reason.

Judge Spanner recognized and considered the holdings of *Brinks*, and *Salvation Army*, and found that there was an absence of any such central practice at Lourdes that treated all RNs the same. (RP 248-49; CP 1648-49). Even if the plaintiffs showed some minor commonalities across the class, any such commonalities do not predominate. Defendants have a central meals and breaks policy, but that policy merely echoes the law – nothing in that policy creates a cause of action. The parties and the judge agreed with the basic requirements for breaks and meal periods under the law, and plaintiffs do not point to anything in Lourdes' central policy that provides an actionable cause. In fact, plaintiffs seem to agree that if they reported the missed time, it was properly paid. (CP 391, 557, 564). They cited individualized circumstances that allegedly prevented each of them from having rest breaks or meal periods: Chavez admitted it turned on the

presence of patients (CP 492-93); Christiansen testified that it depended on the acuity level of her patients and the need for telemetry monitoring (CP 435, 443, 445-46); Garcia cited to lack of predictability as well as animus from her charge RN and a former manager (CP 550); Jones focused on one past manager in particular. (CP 394-95). The departments function differently, and require different nursing specializations. (CP 435, 488, 544, 1869-71, 1898-1903, 1929-34). In short, plaintiffs failed to establish any broad theory as a matter of law or as a generally applicable question.

The key issue on appeal is predominance – not simply if some commonality exists but if individual issues overrun those generalities. Plaintiffs' arguments share a common flaw: they do not apply commonly across all RNs. Many individualized questions – managers, job duties, shifts, roles, core staffing, training, reporting, waivers and the nature of work – bear on liability and damages for unpaid wages under any proposed theory. (*See* CP 268-78).

a. Individual issues with "in assignment" theory

The foundational theory plaintiffs put forth is their "in assignment" theory. Several other theories – intermittent breaks or scheduled breaks, illegal auto-deduct, second paid lunch – depend on the "in assignment" theory. The theory is that once an RN has a patient assigned, the nature of

work is wholly contradictory to taking a break or meal period until responsibility for a patient is sufficiently transferred to another, even if the patients are all sleeping and need no active care. Under this theory, plaintiffs at various points have argued RNs never had any rest breaks or meal periods. (CP 206, 946).

Plaintiffs based this theory loosely on nurse licensing standards and the idea of "continuity of care". Judge Spanner rightly found that the WACs plaintiffs relied upon did not say what plaintiffs interpreted them to say.[5] (RP 18). For example, plaintiffs relied heavily on WAC 246-840-710(5)(c), which defines a violation of nursing standards as leaving a nursing assignment without transferring responsibilities "when continued nursing care is required by the condition of the client(s)". The standard itself qualifies a nurse's responsibility "in assignment" on the patient's condition. It also, as plaintiffs recognize, allows for transferring or handing off patients. No law or rule defines a sufficient hand off; plaintiffs admitted they do not know what hand off would be sufficient to transfer responsibilities. (RP 215-16). The theory that an RN "in assignment" is always actively engaged and cannot take a break or meal period lacks

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[5] Plaintiffs cited to RCW 18.79.260, WAC 246-840-700, and WAC 246-840-710 that outline general nursing license requirements, but nothing in those laws mention or defining "in assignment" or if RNs can take breaks or meal periods.

merit. Plaintiffs' inability to define a sufficient report or hand off further undermines the viability of the theory.

Individual factors immediately overwhelm any possible commonality related to the "in assignment" theory. An obvious problem with defining the class is that RNs are not always "in assignment." Some roles and duties (charge nurse, triage, pre-admit) do not have patient assignments, and other RNs may have brief or extended periods without patients. (CP 492-93, 1843-48, 1985-96). For those RNs with patients assigned at a given time, the "hand offs" would need to be explored. Significant evidence in the record (including from the plaintiffs) establishes that RNs commonly hand off patients for breaks and meal periods. (CP 361, 388, 397, 449, 1816-17). The length and type of report given for a "hand off" turns on patient acuity, the length of the break, and prior awareness of patients' status from shift briefing. (CP 1816-17, 1821). Plaintiffs' theory requires examination of whether a hand off occurred and if that hand off was sufficient. These are both individualized inquiries.

Once periods of "in assignment" are determined and "hand offs" scrutinized, then whether an RN missed a given break or meal period must be determined. This is not standard across all RNs. Different departments and managers implement different rest break procedures. (CP 1813-14, 1821-22). In Surgery, for example, procedures are fairly predictable, and

RNs are relieved even during longer procedures for rest breaks or meal periods by a float RN. (CP 1857-58, 1870). In Rehabilitation, the average number of patients is about half the RN-to-patient staffing rations and LPNs can watch over patients, so covering an RN for a break is not a problem. (CP 1923-25). Garcia testified the ED was highly unpredictable and charge nurses handled break scheduling differently. (CP 548-52). Jones testified different managers implemented policies differently. (CP 405-07). Even personal preference plays a role; RNs who smoke, for example, got their breaks and meal periods. (CP 398, 519-20, 1814-16, 1821-22, 1835).

For any missed rest breaks or meal periods, the next step requires determining if they were reported and paid. Time edits, emails, and cancel meal deduct records would have to be correlated to identify missed breaks and meal periods. Meal periods also raise the individualized affirmative defense of waiver. These individualized factors pertain simply to liability. After liability is determined, then the amount of damages must be considered, including if missed time bumped a particular RN into overtime.

No question relating to whether an RN "in assignment" is due unpaid wages for missed rest breaks or meal periods can be answered collectively for the proposed class. The facts support Judge Spanner's

decision that the individualized circumstances – shift, RN type, roles and duties, patient assignments and patent census – predominate.

b. Individual issues in intermittent v. scheduled breaks[6]

In similar fashion, plaintiffs argue rest breaks had to be affirmatively scheduled, and the nature of the nursing profession does not allow intermittent breaks. This argument ignores the law, which allows intermittent breaks depending on the nature of the work and ability to engage in personal activities – inherently factual questions. WAC 296-126-092; *Salvation Army*, 118 Wn. App. 272, 275.

To support their argument, plaintiffs attempted to describe patient assignments as creating a level of "constant vigilance" like in *Brinks* such that rest breaks had to be scheduled. *Brinks*, 164 Wn. App. 668. Judge Spanner rightly recognized the facts showing the degree of "vigilance" varied by department, shift, patient census and acuity, and plaintiffs seemingly agreed but nonetheless claimed any level of vigilance precluded intermittent breaks. (RP 29-32). Further, Judge Spanner noted that *Brinks* did not rely only on the concept of "vigilance" but also on the uniform

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[6] Plaintiffs make the new and absurd proposal that intermittent breaks are an affirmative defense, not part of proving liability. This is legally unsound because a worker must establish a missed break that went unpaid. Moreover, it was never raised below. The court should not consider this new argument. RAP 2.5(a); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001)

policy forbidding the security guards from engaging in any personal activities. (RP 248-49). *See also Brinks* at 675, 686; *Salvation Army* at 283 (on call status not inconsistent with relief from work when employees can pursue personal activities). Plaintiffs do not contend Lourdes forbade RNs from engaging in personal activities when "in assignment". To the contrary, plaintiffs and other witnesses agreed that when they have downtime they can engage in personal pursuits. (CP 397, 400, 481, 489, 492-93, 547-49, 1813-18, 1825-45, 1825-36, 1843-48, 1895-96, 1909-15, 1922-27, 1936-45, 1976-80, 1982-85).

Individualized issues quickly take the front stage of determining liability under the intermittent or scheduled break theory. Again, the first obvious problem with plaintiffs' argument is that not all RNs at all times have patients assigned or patient care duties. When RNs do have patients assigned, the nature of their work and availability of short breaks turns on many individual factors. Patient care responsibilities vary greatly by department and even within department. An ICU patient needing constant telemetry monitoring is far different from the sleeping patient in the Rehabilitation department. Despite plaintiffs attempt to focus on nursing as a singular position, RNs do not and cannot hold just any nursing position at Lourdes. Different departments and even different RNs within a department may hold different certifications and qualifications. (CP 490,

1875, 1911, 1923, 1930). RNs perform different duties consistent with the varying needs of the patients they serve.

Substantial evidence in the record reveals that some RNs, in some departments, on some shifts, have downtime to pursue personal activities. Three of the plaintiffs admitted they do get downtime, sometime short breaks and sometimes significant amounts of downtime, where they can engage in personal pursuits. (CP 397, 492-93, 546-47). Non-nursing staff observers (chaplains, doctors, therapists) personally witnessed RNs having downtime to engage in personal activities such as texting, reading, phone calls, chatting with friends or grabbing snacks. (CP 1866, 1891-92, 1918, 1955, 1982-85). This might vary by department or shift or patient census or patient acuity, but supports the judge's determination that no common "vigilance" exists across all nursing positions at Lourdes. Judge Spanner identified the ability to have "relief from work" as a question for "each RN in each situation on each night, each shift". (RP 215). He highlighted that "it depends upon factually what the specific RN is doing, what specific department, how many patients, what is the condition of the patients, on and on and on it goes." (RP 248, 251-52). This finding is manifestly reasonable based on the record.

Similarly, the concept of a unilateral contract promising block breaks does nothing more than add more individualized questions. This is

not a contract claim; no collective bargaining agreement existed and plaintiffs did not pursue a claim under the CBA. (*See* CP 1553-54). Nor does Lourdes policy create a unilateral contract for block breaks. The policy does not specify block or intermittent breaks. (CP 1744). Moreover, an enforceable unilateral contract requires a specific promise in specific situations that creates justifiable reliance to continue employment. *Storti v. University of Washington*, 181 Wn.2d 28, 36, 330 P.3d 159 (2014); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 129, 685 P.2d 1081 (1984). The plaintiffs had no uniform understanding of breaks, and new employees acknowledge that policies are not promises or contracts. (*See* CP 1555-56); *Thompson*, 102 Wn.2d at 230-31 (employers not bound by general statements of policies when policies express they are not contracts). The unilateral contract theory creates more individualized inquiries into an RN's understanding about "block" breaks, acknowledgement that policies are not promises, and reliance on such a promise. Judge Spanner's determination that individual issues predominate is reasonable and sound.

c. Individual issues with meal periods

Similar to their "in assignment" argument, plaintiffs argued RNs never received unpaid first meal periods or second paid meal periods. The argument on unpaid first meal periods was de-emphasized by plaintiffs. It

involves consideration of the individual work settings of RNs. Some RNs have no patients assigned. Some are formally relieved for meal periods by float RNs, PCCs, or others. (CP 1833, 1846, 1923-24, 1959). Some clock out and leave the premises. Others, like Jones, frequently refuse meal periods. (CP 1835). RNs do report and get paid for missed meal periods, as plaintiffs and "exceptions" records confirm. (CP 391, 557, 564, 1749-57). Liability and damages for missed unpaid meal periods involve individual inquiries.

Plaintiffs have consistently asserted that Lourdes failed to provide a second meal period for 12-hour RNs, and brought a motion for summary judgment on this issue before their class certification motion, which they subsequently amended. (RP 126; CP 1704-19). Judge Spanner correctly cited the law as requiring employees with paid meal periods to receive 30 minutes, but that the employee could be on call and interrupted. WAC 296-126-092(1); *Salvation Army* at 279-80. Plaintiffs do not appear to challenge this legal standard. Instead, they contend factually that 12-hour RNs missed second meal periods. Early on, Judge Spanner challenged plaintiffs on the pronouncement that no 12-hour RNs received second meal periods, and plaintiffs' eventually conceded the evidence showed that some 12-hour RNs do get two meals. (RP 283-84). Clearly, the

second meal period issue turns on individual circumstances and cannot be determined on a class-wide basis.

First, this theory only applies to 12-hour shifts, not to 8-hour or 10-hour shifts, requiring individual inquiry into the shifts worked by each RN. Additionally, the nature of responsibilities on a given shift, and the ability to take 30 minutes aggregate, are individual, not common questions. Some departments and shifts commonly have more than 30 minutes of downtime during many shifts. For example, in many departments, night or weekend shifts are much quieter and allow for more personal activities than weekday shifts. (CP 1874, 1924-25). RNs working in departments with core minimum staffing and few patients, such as OB, often took second and even third meals over the course of a 12-hour shift. (CP 492-93, 520, 1813-18, 1936-45). As Judge Spanner commented, "whether or not they're sufficiently relieved of their duties is a question of fact because of the complexity. You have a number of departments. There is a difference between day shift and a difference between night shift and so on it goes..." (RP 305; CP1651-52). The judge was well-within his discretion to find this theory did not provide a sufficiently cohesive class claim.

d. Lack of common liability issues in recordkeeping

Plaintiffs also attempted to bind a class together on theories relating to the methods of timekeeping utilized by Lourdes. Judge Spanner rejected plaintiffs' arguments that Lourdes had failed any obligation under the law, and rejected the proposition that inadequate records created liability. (CP 1647-49).

Washington law requires employers to keep records of "hours worked" and does not prescribe any particular methodology. RCW 49.46.070. Lourdes records hours worked through Kronos and Meditech. At the times relevant, RNs clocked in and out through Kronos, a web-based timekeeping system. Kronos automatically subtracted a 30-minute meal period for any shift over five hours, and had a button to cancel that 30-minute deduct when a meal period was missed. (CP 1749-57). Rest breaks, being paid, do not have any automatic time deduction. Instead, RNs report to their managers or to payroll (depending on department and manager preference) when they miss a rest break so that additional time can then be added to their records through an "edit punch" by a manager or Payroll. (CP 668, 678). Kronos time records show all hours worked, including any additions for missed meal periods or rest periods that are reported by RNs, although they do not specifically record that added time

is for a missed meal period or rest break; such exception records are kept in a physical file. (CP 668, 670, 678).

Plaintiffs proposed a class based on the premise that rest breaks were not specifically tracked and recorded, and similarly attacked the auto-deduct method of timekeeping used for meal periods. Judge Spanner rightly rejected the contention that the law required rest breaks or meal periods to be tracked in any particular way. Consistent with many other courts and DLI policy, he ruled that employers can rely on employees to report time or missed breaks and meal periods.[7] (CP 1649).

More relevant to the class issue, the recordkeeping theories do not create common class claims. A method of tracking hours worked does not create liability, and does not equate to unpaid wages for missed rest breaks or meal periods. A failure to adequately record hours worked may lighten the burden to prove with detail the amount of unpaid wages but a worker must first show he or she worked and did not get paid, and produce evidence of the amount of unpaid time. (CP 1648-49). *Anderson v. Mt.*

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[7] There is no prohibition on using a system such as the Kronos system, and no Washington court has declared such system illegal. It is helpful to look to federal law and guidance regarding the FLSA, since Washington courts do reference that law for guidance in the realm of wage and hour laws. *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982). The Department of Labor has provided express guidance approving the use of an auto-deduct policy. (DOL Guidance FLSA 2007-INA, JA 1191-1192). Multiple courts have addressed and dismissed the argument that an auto-deduct policy or process is illegal. *See e.g. Creely v. HCR ManorCare, Inc.*, 920 F. Supp. 2d 846, 851-52 (N.D. Ohio 2013); *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 873 (6th Cir. 2012).

Clemens Pottery Co., 328 U.S. 680 (1946); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2546 (2011) (employer entitled to individualized determinations of liability). The recordkeeping contentions do not answer class-wide questions of liability or damages for all RNs.

e. Trial court did not abuse discretion in deeming class unmanageable.

In addition to finding that individual issues would overwhelm any potential commonalities, Judge Spanner also found a class would not be manageable or the most fair and efficient method of adjudication. The finding that a class claim would not be manageable or preferred flows from the record.

Parties proposing a class have an affirmative obligation to present a workable trial management plan including a model for determining damages. *Comcast Corp.*, 133 S.Ct. 1426, 1433. Plaintiffs have never presented a feasible plan to manage liability, let alone damages, on a class-wide basis. When challenged by the judge to articulate how details of particular theories would be handled, the lack of manageability became evident.

Plaintiffs explained that to handle the question of which RNs were "in assignment" on a class-wide basis, they would go through individual patient records to determine which RN was assigned patients at any given

time. (CP 353-55). If this is possible, it certainly is not easily managed or a class method. After deciding when an RN had at least one patient assigned, plaintiffs propose testimony about whether a break was taken. Presumably, testimony would need to determine if intermittent breaks were possible and taken, and if any missed breaks were reported. That information would then be compared to payroll records to see if time was added and paid for the missed break. Because of wide variations across departments, shifts, patient census and acuity, representative testimony would not be reliable. Each inquiry would need to be answered individually simply to confirm liability; this is not manageable on a class basis.

Similarly, plaintiffs have not proposed a practical damages model for any theory, a requirement for class certification. *Comcast Corp.* at 1433-34. Plaintiffs proposed going to individual records of each class member, plugging missed time into a formula to get the right amount of pay, and thus calculating the amount of unpaid wages for each individual. (RP 104-05). The only testimony on point indicates this would be possible, but very difficult. (CP 672-73). Plaintiffs concede damage calculations will be individual. To handle the process, they proposed alternatives such as appointing a special master to use claim forms and preside over a dispute process, or representative testimony (without

explaining how this would be representative), or even decertifying the class after the liability phase. (RP 106-07). In this case, calculating damages, if any, would be so complex and individualized that it weighs against certification. The fact damages are not susceptible to class-wide measurement serves to confirm that individual questions predominate. *Comcast Corp.* at 1433-34.

Although wage claims are sometimes manageable as a class, wage laws provide a comprehensive scheme to vindicate any violations of employees' rights to wages. *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000). Because of the built-in availability for penalties and attorney fees for willful violations, the assertion that attorneys would not take individual claims lacks merit. This is not a close case, and a class vehicle is not superior.[8] Plaintiffs' inability to propose clear liability and damage management plans confirm the lack of manageability. Even departmental subclasses would require individual inquiries into patient census and acuity, RN roles and responsibilities, and more. (RP 392-94). Judge Spanner's conclusion that class litigation would not be preferred or manageable is manifestly reasonable on the record.

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[8] Plaintiffs attack the judge for considering joinder, but after the ruling denying a class, plaintiffs indicated they had no agreements with other RNs to join the suit. (RP 409). In this context, it is disingenuous to argue the court imposed "clumsy" joinder.

VI. CONCLUSION

Judge Spanner unquestionably conducted a rigorous analysis of class certification requirements. No untenable nor manifestly unreasonable determination has been identified. Even though plaintiffs themselves repeatedly confirmed the differences between departments and managers and specialized tasks, they stubbornly refuse to acknowledge that evidence; instead they argue for class-wide commonalities that do not exist. Their arguments are rife with extreme declarations (no rest break has ever been paid, no 12-hour nurse ever had a second meal period) that the evidence and their own testimony contradicts.

The role of the appellate court is not to reconsider all the evidence before the trial court and second guess its decision to deny class certification. Judge Spanner fully considered plaintiffs' arguments, the evidence, and the law. He did not abuse his discretion, and the Order Denying Class Certification should be affirmed.

Dated: March 24, 2016

Respectfully submitted,

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APPENDIX

As relevant, WAC 296-126-092 dictates:

> (1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.
> (2) No employee shall be required to work more than five consecutive hours without a meal period.
> (3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.
> (4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.
> (5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each four hours worked, scheduled rest periods are not required.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed a copy of

RESPONDENTS' BRIEF via efiling to the following:

Washington Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201-1905

I further certify that on this date, I mailed a copy of the foregoing

RESPONDENTS' BRIEF via first class mail, postage prepaid, with the

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