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CASE NO. 360172 No. 97532-9

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

WASHINGTON STATE NURSES ASSOCIATION,

Respondent/Cross-Appellant/Plaintiff,

v.

YAKIMA HMA LLC, d/b/a YAKIMA REGIONAL MEDICAL AND CARDIAC CENTER,

Appellant/Cross-Respondent/Defendant.

REPLY BRIEF OF APPELLANT

Paula L. Lehmann, WSBA #20678
Mary R. Sanden, WSBA #45608
Davis Wright Tremaine LLP
777 108th Avenue NE, Suite 2300
Bellevue, WA 98004
(425) 646-6100 Phone
(425) 646-6199 Fax

Attorneys for Appellant/
Cross-Respondent/Defendant
Yakima HMA LLC

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I. INTRODUCTION

Associational standing, which is at the heart of this appeal, should not be expanded to cases in which individual testimony is needed to establish liability and damages. Contrary to WSNA's response, *Pugh* is not dispositive here. And, contrary to WSNA's response, this issue has not been "thrice rejected." Rather, Judge Federspiel, who ruled on cross-motions for summary judgment,[1] certified his ruling for discretionary review. CP 1345-1347. This Court declined to review the associational standing issue pre-trial "[b]ecause of the need for more factual development as to whether the Association's expert based his conclusion on reliable evidence." CP 1633-1638. The record is now fully developed – the trial court declined to rely upon WSNA's expert to establish either liability or damages. CP 2886-2897. Instead, the trial court impermissibly relied on the individual and disparate testimony of various nurses to ascertain both liability and damages and then extrapolated those findings to non-testifying nurses. *Id.* Associational standing is improper here.

YRMCC also disputes as error the trial court's findings of damages – WSNA's convoluted "virtually identical" reconstruction is a tacit admission that it has no more idea how damages were reached than YRMCC. YRMCC's undisputed policies and instructions related to the

[1] Judge Federspiel recused himself shortly before trial. CP 1639.

allowance of meal periods for nurses working independently in the field fully satisfied its obligations under RCW 49.12 and WAC 296-126-092. The award of double damages is improper, and the trial court's evident partiality is essentially conceded by WSNA's response which simply ignores the numerous examples of partiality identified by YRMCC. Finally, YRMCC disputes WSNA's cross-appeal that an award of prejudgment interest is warranted here.

II. ARGUMENT

A. WSNA Lacks Associational Standing.

Washington courts permit associational standing for the practical reason that it will provide a "convenient and efficient method of litigating" individual claims for association members. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213, 45 P.3d 186, 189 (2002). Consistent with this rationale, the amount of money sought on behalf of the association members must be "certain, easily ascertainable, and within the knowledge of the defendant." *Id.* at 215-16; *Teamsters Local Union No. 117 v. State, Dep't of Corr.*, 145 Wn. App. 507, 512-13, 187 P.3d 754, 756 (2008). The Washington Supreme Court has narrowly construed this "practical and sensible remedy" by ***only*** permitting it when the relief requested does not require the participation of individual union members. *Int'l Ass'n of Firefighters, Local 1789*, 146 Wn.2d at 216.

There can be no dispute that associational standing is improper here based on these well-established cases. This case could not have proceeded without the individual testimony of nurses on liability and damages. The Employer's records were not sufficient because nurses testified that these time records, individually verified by each nurse each pay period, were actually inaccurate. App. Br. at 11-25. The trial court found the nurses' handwritten records contained errors and expressly refused to rely on WSNA's expert's testimony. CP 2886-2897. The trial court had no basis for its findings other than the highly detailed and personalized narratives from each nurse about the existence – and extent – of their unpaid hours and missed meal breaks. *Id.* This testimony was then improperly extrapolated to non-testifying nurses who themselves had variable hours and experiences.

B. *Pugh* Is Not Dispositive.

WSNA argues that individual testimony was not "necessary" and the trial court's allowance of such testimony was consistent with associational standing under *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 312 P.3d 665 (2013), a Division I decision. WSNA's repeated insistence that *Pugh* is dispositive is simply wrong. In February of this year, the Washington Supreme Court expressly found that there is no horizontal stare decisis in Washington. *Matter of Arnold*, 190 Wn.2d 136,

148, 410 P.3d 1133, 1139 (2018). While Pugh should be given "respectful consideration," it is *not* dispositive.[2]

Respectful consideration of *Pugh* confirms that associational standing is improper here. First and foremost, *Pugh* affirms the fundamental principle that "a union has standing to sue in its associational capacity . . . ***when, as here, damages can be established without requiring the participation of the individual union members***." *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 365, 312 P.3d 665, 666 (2013) (emphasis added). The *Pugh* court emphasized that an association must show "that it was prepared to establish damages that did not require participation of the individual members." *Id. at* 368.

Second, in *Pugh*, the association could establish standing because the parties agreed that they would ***not need*** individual member participation to establish rest break damages for union members:

> Indeed, WSNA and Evergreen considered various damages calculations and in fact determined damages owed to the nurses for the settlement agreement without requiring participation of the individual nurses.

Id. at 368 and fn. 8.

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[2] WSNA also incorrectly argues that *Pugh* involved "one of the <u>same claims</u> asserted here." Resp. Br. at 9. *Pugh* addressed rest breaks (in a hospital), not meal breaks (in home health). *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 312 P.3d 665, 666 (2013). The two claims are not the same.

There is no such agreement here. YRMCC never agreed to *any* damages of any kind or that there was any way to calculate claimed damages without the individual participation of nurses.

In sum, the facts in *Pugh* are distinguishable. WSNA's interpretation of the case is wrong, *see* App. Br. 30-32, as is WSNA's contention that its reading of the case is dispositive here.

C. Representational Testimony Should Not Be Permitted In Associational Claims.

WSNA's proposed expansion of associational standing to include cases in which representational testimony is necessary is inconsistent with Washington law, which has created a narrow exception for associational standing cases. Associational standing is permitted for the efficient judicial consideration of previously documented or undisputed facts. With associational standing, there is only one party, the association, which brings its own claim for relief.

Employees have other routes to pursue collective claims that require representational testimony, such as class actions or bargaining unit-wide arbitrations permitted by the collective bargaining agreement. Each nurse here also had standing to assert their rights via state or federal agencies or through individual lawsuits. WSNA initially pursued this claim through the grievance and arbitration process in the collective

bargaining agreement. RP 1011:1-14. Its decision to withdraw that grievance does not create associational standing.

Furthermore, WSNA's reliance on class action cases is unavailing. Representational testimony is permitted in the federal class action cases WSNA cites (federal courts have not permitted associational claims when actual damages are sought[3]). Resp. Br. at 9-10. However, in contrast to associational standing cases, a class action allows multiple third parties' distinct claims to be resolved through the resolution of a representative claim. Procedural protections are in place to test the proper size and scope of the proposed class, appropriate representatives and the requisite uniformity of the claims. That rigor is absent in associational standing cases.

WSNA's proposed expansion of associational standing is also inconsistent with decisions in other states.[4] For all these reasons, this Court should find that WSNA lacks associational standing here.

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[3] *E.g., United Union of Roofers, Waterproofers, and Allied Trades No 40 v. Insurance Corp of America,* 919 F.2d 1398, 1400 (9th Cir 1990) noting that "no federal court has allowed an association standing to seek monetary relief on behalf of its members" because they "have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the Hunt test."

[4] Other states similarly restrict associational standing to situations in which the participation of individual members is not required. *See Fla. Paraplegic Ass'n v. Martinez*, 734 F. Supp. 997, 1000–01 (S.D.Fla.1990) (recognizing associational standing may exist when the association seeks damages on behalf of its members without reference to their individual circumstances); *Concerned Owners of Thistle Hill Estates Phase I, LLC v. Ryan Rd. Mgmt., LLC*, 2014 WL 1389541, at *6 (Tex. App. Apr. 10,

D. Representational Testimony Is Impermissible Here Because Requisite Commonality Is Absent.

Even if this Court determined that representational testimony should be allowed in an associational case under appropriate circumstances, those circumstances do not exist here. App. Br. 32-35. Representational testimony requires uniformity. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 683, 66 S. Ct. 1187, 1190, 90 L. Ed. 1515 (1946) (representative testimony permitted for pottery plant employees with uniform and consistent working conditions and working time); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588 (9th Cir. 1988) (representative testimony for employees working the "same general hours" all paid piece-rate wages at a garment factory). In both of these class action cases, unlike here, employees had near-identical working conditions and liability issues that resulted in easily ascertainable damages.

WSNA made no attempt to show how the testifying nurses were representative of the non-testifying association members, nor could it truthfully have done so given the evidence at trial. First, WSNA did not offer any expert testimony to support its efforts to establish representative testimony. Dr. Munson clearly testified that he did not do anything beyond looking at the HomeBase data. RP 1054:1-1058:15. In addition,

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2014) (associational standing when neither the claim asserted nor the prospective relief sought by the association required individual participation of any of its members).

WSNA has never produced any type of statistical analysis, sampling data, questionnaires, interviews, surveys, or other data that could support its representational testimony theory. *Compare McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588 (9th Cir. 1988) (Plaintiff represented during her case-in-chief that the testimony of the remaining non-testifying employees would be "largely similar, and that all employees worked the same general hours and were paid on a piece-rate basis, and so the district court permitted only those five to testify on behalf of the plaintiff."); *Espenscheid v. DirectSat USA LLC*, 705 F.3d 770, 774 (2013) (class decertified because of variance in damages across class).

1. Liability Issues Not Common To All.

Liability issues are not common to every testifying nurse.[5] Nurse Dedmore (hospice) and Nurse Hudson (home health) testified during trial that they experienced no issues with unpaid work or missed meal breaks.

> Q. So from the time period that you started as a hospice R.N. until August 31, 2017, have you been paid for all of the hours you reported?
> A. Yes.
> Q. For that same time period, were you able to take your meal breaks every day?
> A. Yes.
> Q. And for that same time period have you been paid for all overtime you reported?

[5] *Contra Teamsters Local Union No. 117 v. State, Dep't of Corr.*, 145 Wn. App. 507, 514, 187 P.3d 754, 757 (2008) ("Here, the calculation of damages does not require individual determination ***and the liability issues, though of a factual nature, are common to all***.") (Emphasis added).

> A. Yes.
> Q. And for that same time period have you worked any hours for which you have not been paid?
> A. No.

RP 1686:5-17 (Nurse Dedmore). Nurse Hudson similarly testified that she was paid for every hour worked, including overtime. RP 1325:7-17.[6] WSNA disregards this key contrasting testimony as well as the variations in experience of its own witnesses, all of which affirm the lack of commonality needed for representational testimony.

2. Damages Require Individual Determination.

In this case, every nurse testified to unique working conditions that resulted in widely varying (or non-existent) damages. As WSNA notes, representative testimony should properly operate so that "calculation of damages is a formulaic determination." Resp. Br. at 13-14. Such a simple calculation is not possible here. Each "representative" nurse testified about his or her own unique and, by WSNA's own admission, highly variable experiences. App. Br. at 11-25. Two nurses testified that they had no unpaid work or missed meal breaks. RP 1686:5-17; RP 1325:7-17. The association members lack the requisite commonality that would

[6] The trial court determined that Nurse Hudson "was not telling the truth" when she testified she was done working by 4:30, every day. At the same time, the trial court did not even remark on Nurse Hudson's credibility in her testimony on paid work and meal breaks. RP 1864:6-1865:1.

permit representative testimony to be extrapolated from one nurse to another.[7]

Unlike the factory setting in *Anderson v. Mt. Clemens Pottery Co.* and *McLaughlin v. Ho Fat Seto*, the evidence shows that home health and hospice nurses worked in the field as independent professionals who cared for patients with unpredictable and variable needs. Nurses testified to working in different territories with changing patient needs that resulted in no two work days ever being the same. App. Br. at 11-25.

Unsurprisingly, nurses' testimony about their unpaid hours was fact-specific and varied, not the "math exercise" WSNA asserts. App. Br. at 11-25. Nurses also testified inconsistently about their own damages. For example, Nurse Stillwaugh first testified that, prior to the spring of 2014, she was able to complete her work within eight hours, but later changed her testimony to state that she actually worked two unpaid hours each day during this same time period. RP 644:9-23; 647:7-15. Nurse McVey testified that she "did not very often" work hours beyond eight that were unpaid between 2012 and 2014 but later stated that she did work,

[7] WSNA cannot have it both ways. On the one hand, WSNA argues that *Pugh* is dispositive because YRMCC did not keep adequate records. Resp. Br. at 12. In an effort to diminish the level of participation of its individual members, however, WSNA simultaneously argues that liability and damages can be ascertained from the employer's records. But if the employer's records are able to capture "variations in damages and the number of missed meal periods to which nurses are entitled," as WSNA argues, representational testimony is not permitted and the court erred as a matter of law in allowing it. Resp. Br. at 12 and 13, fn. 9.

on average, 30 minutes off the clock every day during this time. RP 395:14-16; 412:25-413:9. These individual and collective inconsistencies make extrapolation from one nurse's damages to another impossible.

WSNA's argument that "unlawful pay practices . . . applied to the group as a whole in nature and extent" is simply a mischaracterization of the record. The trial court found that YRMCC engaged in unlawful pay practices by not maintaining accurate records of hours worked and by discouraging nurses from reporting their actual working times. *See* CP 2888-89. Given that each nurse had "different patient visit times . . . different travel times . . . and different charting times" (Finding of Fact #12) and worked in a highly independent, self-directed manner to attend to various patient needs while facing varying work challenges, it is not possible for these pay practices to identically affect each nurse. The nurses' testimony at trial confirms this. App. Br. at 11-25.

Each nurse's unique story creates unique defenses. Nurse Stillwaugh testified that she received compensation for four shifts a week when she only worked three, which compensated her at least in part for hours worked beyond eight in any given shift. RP 770:6-16.[8] Nurse Campeau admitted that he had entered into an agreement with YRMCC

[8] During Ms. Stillwaugh's testimony, the Court aptly questioned whether a discussion of her FTE status and associated benefits was in fact "an issue between the employer and this particular employee as opposed to the association." RP 772:21-773:9.

that he would comply with timekeeping procedures as part of a grievance settlement but breached that agreement to keep a private record of hours he did not properly report. RP 912:13-18; 1013:4-23; 838:6-14; Ex. 93, 59.

Home health and hospice nurses undisputedly worked independently in remote locations with a high degree of variability in their job tasks each day, all of which impacted both the number of hours worked and meal periods. App. Br. at 7-8, 11-25; CP 2890 ("There were different patient visit times, there were different travel times, and there were different charting times."). These nurses also testified to varying degrees of technical proficiency (allowing some nurses to complete their job responsibilities more quickly than others). RP 395:14-16, 376:4-18; 448:11-20, 572:2-13, 1310:4-16. Other nurses testified to encountering issues specific to their program. RP 145:11-146:7, 620:9-19; 644:9-645:9 (loss of in-house pharmacist only in hospice program). With two exceptions, nurses worked only a portion of the time period at issue, 2012 – 2017. App. Br. at 11-25.

Nurses testified to damages that are neither easily ascertainable nor simple to calculate and – as WSNA admits in its response – not evident from the employer's own payroll records. Resp. Br. at 12. Accordingly, individual testimony from nurses was both necessary and indispensable.

Under these circumstances, WSNA lacks associational standing.

E. YRMCC Maintained a Legally-Adequate Meal Period System.

Employees "shall be allowed" meal breaks under WAC 296-126-092. In assessing a missed meal period claim, the issue is whether the employer maintained an adequate system for ensuring that nurses could take meal periods and record missed breaks. *See Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 518, 415 P.3d 224, 231 (2018). As the plaintiff, WSNA bears the burden of proving that nurses did not receive timely meal breaks as required by WAC 296-126-092. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 582, 397 P.3d 120, 123 (2017). Employers are not automatically liable for missed meal breaks because the employee may waive the meal break. *Id.*[9]

YRMCC developed and maintained procedures to allow nurses to take meal periods and to report meal periods when missed.[10] Numerous

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[9] WSNA does not reference any controlling authority for its assertion that YRMCC's workplace culture violated the law. Resp. Br. at 24-25. In its response, WSNA misrepresents language from *Demetrio v. Sakuma Bros. Farms*, which states in full, "A workplace culture that encourages employees to skip breaks violates WAC 296–126–092 ***because it deprives employees of the benefit of a rest break "on the employer's time***." *Demetrio v. Sakuma Bros. Farms*, 183 Wn.2d 649, 658, 355 P.3d 258, 263 (2015) (emphasis added). Unlike rests breaks, meal breaks can be waived and only need to be "on the employer's time" in limited circumstances. *See Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 582, 397 P.3d 120, 123 (2017) (no strict liability for missed meal breaks). Furthermore, WSNA does not accurately reference *United Food and Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins.*, which does not address breaks at all. 84 Wn. App. 47, 54, 925 P.2d 212 (1996).

[10] YRMCC clearly contested the trial court's finding regarding its meal period processes in Issue #4 associated with Assignment of Error #3. App. Br. at 3-4, 5-6. WSNA's

nurses testified that they knew YRMCC's policy required them to take uninterrupted 30-minute meal breaks and to promptly report meal breaks that were not taken. App. Br. at 35-38.

YRMCC recognized that there could be emergencies or other circumstances that made it difficult or impossible for nurses to take a meal period on a given eight-hour shift. Nurses were instructed to call for assistance before the meal period was missed. *Id*. These calls were used to "problem-solve" by discussing whether a patient could be moved to another day or rescheduled for another caregiver, whether the supervisor could assist with phone calls and the like. *Id*. If a solution could not be found, the nurse was instructed to report the missed meal period using a time adjustment form. *Id*. Many nurses testified that they knew meal periods were required but chose not to take them. *Id*.

When nurses reported their missed meal breaks, YRMCC paid them. *Id*. Importantly, YRMCC took the additional step of ensuring that missed meal periods were properly reported and paid by negotiating contract language with WSNA in 2016 that mandated reporting of missed meal breaks. *Id*. The nurses' failure to follow this contractual

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assertion that YRMCC did not properly appeal the corresponding Findings of Fact is incorrect. An error will be considered if it is "included in an assignment of error ***or clearly disclosed in the associated issue pertaining thereto***." RAP 10.3(g) (emphasis added).

requirement should bar WSNA from seeking recovery based on unreported meal periods.

Here, where employees self-schedule their work in the field and are without direct supervision, the employer must rely on them to comply with policies that allow timely 30-minute meal periods. RP 88:3-89:6, 112:7-14, RP 462:2-643:11, RP 739:2-11, RP 864:18-24. Where, as here, employees deliberately fail to follow those instructions without notifying the employer, they cannot benefit from that and they must be deemed to have waived the meal period.

F. Damages Cannot Be Explained.

Despite its best efforts, WSNA cannot explain the trial court's damages calculation any better than YRMCC. WSNA spent seven pages trying to clarify calculations which, if entered correctly, should have required no clarification. Resp. Br. at 28-34. WSNA was only able to generate a number that was ***similar, not identical***, to the trial court's principal damages amount. Resp. Br. at 33. Because the trial court did not adequately show the basis and method for its calculation of damages, Conclusions of Law #12 and #13 are in error.

Trial courts must enter findings showing the basis and method for its computation of damages. *See Peterson v. Neal*, 48 Wn.2d 192, 292 P.2d 358 (1956); *Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934

(1953); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840–41, 786 P.2d 285, 293 (1990). The trial court here has not done so.

After trial, the parties attempted to clarify the basis and method for the trial court's damages. WSNA inserted proposed language into Findings of Fact #21 and #23 – that the court rejected – which would have made explicit the trial court's reliance on Dr. Munson's methodology. WSNA included the following suggested language for Finding of Fact #21: "The Court ***relied on*** the methodology of Plaintiff's expert, Dr. Jeffrey Munson, for calculating damages, including Trial Exhibits 96, 97 and 98." (Emphasis added). The trial court revised this language to instead state: "The Court ***found*** the methodology of Plaintiff's expert, Dr. Jeffrey Munson, for calculating damages, including Trial Exhibits 96, 97 and 98, ***to be helpful***." (Emphasis added). CP 2892.

Similarly, WSNA added proposed language to Finding of Fact #23 to clarify the court's damages calculations, which the trial court completely struck: "The Court determined the total damages amount using Ex. 96" and "The court applied that proportion [of damages] to the calculations contained in and determined from Dr. Munson's tool to each of the two varying rates." The trial court provided no alternate explanation for how it calculated the nurses' total monetary damages for unpaid wages and missed meal breaks other than noting it apportioned the

different percentages of unpaid hours worked and meal breaks missed during the liability period. CP 2893.

The parties' dispute over the amount of unpaid hours nurses worked based on the percentages in Finding of Fact #23 highlights this lack of clarity. In an effort to more closely align the findings with the evidence, WSNA's argument and math contorts the Judge's ruling from nurses were "not being paid 37.5% of the hours they worked" into "not being paid 37.5% of the hours they were actually *paid*." Resp. Br. at 32. Finding of Fact #23 corresponds to 3.85 unpaid hours per day per nurse based on hours worked (App. Br. at 40), a number WSNA concedes is inconsistent with the evidence. Resp. Br. at 35, n. 30.

WSNA's efforts to explain the trial court's intentions are futile.[11] The trial court's underlying methodology was not provided and the verdict amount does not fit the evidence. The damages award is clear error.

G. Double Damages Erroneously Awarded.

YRMCC did not abandon its bona fide dispute defense. YRMCC raised this defense in its answer and explicitly reasserted this defense in its proposed findings of fact and conclusions of law.[12] Throughout the

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[11] *See* WSNA's language in footnote 25: "the trial court did not mean to suggest that it was applying a wholly different formula." Resp. Brief at 32-33.

[12] WSNA incorrectly states that YRMCC "did not assert a bona fide dispute until after the trial court issued its oral findings and conclusions." In its statement of issues for the

litigation, YRMCC asserted that the payroll records verified by nurses affirmed no unpaid hours or missed meal periods, that WSNA could not meet its burden of proof, and that WSNA's own representative had no knowledge of the amount of claimed damages when her 30(b)(6) deposition was taken months into the litigation, all of which would necessarily lead to a finding of no willfulness. CP 2020-2044 (Amended Trial Brief), RP 1844-1851 (Defense Closing Argument). The bona fide dispute defense is neither untimely nor abandoned.

A bona fide dispute exists because YRMCC had no knowledge of the claims at issue here until the lawsuit was filed. Ms. Chambard testified that all reported missed meal periods and overtime hours were paid. RP 1464:2-10; RP 1489:25-1490:3; RP 1547:14-16. The record is replete with evidence of overtime payments to nurses. RP 347:11-16; RP 1686:4-8, 12-14; RP 439:2-8; RP 566:11-569:7; 599:13-601:24; Ex.2. Nurses frequently failed to follow the standard procedure for reporting missed meal breaks and overtime worked. App. Br. at 45. Nurses acknowledged that YRMCC had no other way of knowing their unpaid working time given the independent nature of their work. *E.g*. RP 522:2-16. Several nurses kept personal records of their time worked that they did not share with YRMCC. App. Br. at 11-25. Nurse Campeau promised

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trial court to decide, YRMCC raised four discrete conclusions of law relating to the bona fide dispute defense. *See* CP 2122-23 ("Willfulness").

to seek preapproval of overtime and report missed meal periods as part of a grievance resolution but never did so. RP 912:13-18; 1013:4-23; Ex. 59.

WSNA argues nurses provided YRMCC with ample notice of violations, but the evidence indicates otherwise. The majority of nurses expressly repudiated WSNA's grievance on unpaid time, and WSNA subsequently withdrew the grievance from arbitration. Ex. 108, RP 1011:1-14. The record shows that nurses did not contemporaneously report the uncompensated time they claim here. Resp. Br. 39-40. Given the nurses' independent and flexible schedules, reports of time spent charting in the evenings did not automatically or even necessarily translate into unpaid hours and missed meal breaks. *See, e.g.*, RP 1361:11-22. Nurses were asked to work eight hours per day but were free to set their own schedules to accomplish that work. They could, and did, take time off midday that they later made up in the evening hours. *Id*.

WSNA's argument that knowledge of wage violations can be predicated on productivity standards is simply wrong. Contrary to WSNA's argument that nurses were paid by "stats," the record is clear from both YRMCC and WSNA's own witnesses that the "stats" referenced were guidelines for scheduling purposes, not requirements. RP 476:17-478:23; 598:1-15; 1045:8-15; 1474:1-5. Nurses received pay for hours worked regardless of the number of "stats" earned. *Id.*

A bona fide dispute also exists because YRMCC did not learn the amount of unpaid time that WSNA claimed until trial. See *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160-162, 165, 961 P.2d 371(1998) (genuine belief in the dispute must be known at the time of the wage violation). Even months after the lawsuit was filed, WSNA's corporate designee could not tell YRMCC the amount at issue for either the claimed off-the-clock hours or claimed missed meal periods. App. Br. at 42. WSNA's expert Dr. Munson provided estimates based on information provided by WSNA's counsel in March of 2017 but subsequently updated his estimates all the way through trial. Given the association's inability to quantify these claims pre-trial, there was a bona fide dispute regarding the amount of damages that precludes an award of double damages.

The evidence also shows the nurses who testified to missing meal periods knowingly submitted to the claimed wage violations. There is no testimony that nurses believed their licenses were in jeopardy, but even if they did, the remedy is clear – nurses have the obligation to refuse an assignment. RP 1015:10-13. The record shows nurses did at times refuse an assignment and there were no repercussions. RP 892:23-893:3; RP 894:8-11; RP 895:19-21; Ex. 60.

Nurses disregarded YRMCC's instruction to take meal periods, to seek help to obtain meal periods if their schedules were busy, and to report

missed meal periods for payment. App. Br. at 45. Likewise, the nurses who testified to unpaid overtime also disregarded YRMCC's requirement to seek pre-approval for overtime and to properly report all overtime worked. *Id.* Although each nurse received payment for all reported overtime, they intentionally underreported the hours they worked. *Id.* These nurses also verified time reports they subsequently testified were inaccurate. *Id.* The trial court's finding of double damages must be reversed.

H. The Judge's Partiality.

WSNA's waiver argument is unavailing. Judge Gibson was assigned to this case immediately prior to trial. CP 1646. Prior to the trial, YRMCC was not aware of the trial court's potential for bias, and it raised the issue after the trial court's partiality became evident. *Contra Matter of Welfare of Carpenter*, 21 Wn. App. 814, 819–20, 587 P.2d 588 (1978) (litigant who knows of trial court's potential bias before proceeding to trial waives objection) and *State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715, 719–20 (2008) (same). Furthermore, RAP 2.5(a) provides this Court with discretion to review this issue. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 258 P.3d 70 (2011).

WSNA does not object to – and thereby concedes – the following numerous examples of error and partiality. The trial court reminded

WSNA to introduce evidence and instructed on how best to examine witnesses; made assumptions not grounded in the evidence about how YRMCC could have recorded time differently; and then found that YRMCC "intentionally chose not to adopt" this fictional timekeeping system created by the court; interrupted YRMCC's closing argument to interject his disagreement and introduced new arguments of his own, never made by WSNA, when he issued his decision from the bench. App. Br. at 46-47. And even though the trial court declared his own arguments were not part of his findings of fact, he subsequently allowed WSNA to include his commentary in the findings of fact signed by the court. *Id*. YRMCC was never given an opportunity to respond to this prejudicial argument because WSNA never made it, and the trial court framed it after the closing arguments had ended. *Id*. In a final display of partiality, the trial court ordered YRMCC to pay all expert fees including reports that were not used and were admitted to be wrong. *Id*. These uncontested examples of partiality and prejudice are sufficient to reverse the trial court's decision.

WSNA's accusations of YRMCC "grossly misrepresenting the record" fall flat. Regarding the trial court's outburst on the "unreliable" evidence, WSNA disagrees with the specific portion of record cited (containing the trial court's post-lunch break apology for the Judge's

behavior) but does not dispute the event, which occurred before lunch and during YRMCC's expert questioning at RP 1725:1-16. In the spring of 2014, nurses were provided with a Samsung Galaxy device. App. Br. at 7-8. YRMCC never used the device's software to keep track of the hours nurses worked. *Id*. YRMCC's expert was in the midst of providing an opinion on the unreliability of this information generated from the device's software when the trial court interrupted him to confirm this unreliability. RP 1725:13-16. Later, the trial court permitted WSNA to use information generated from the same unreliable software to cross-examine Nurse Hudson. The trial court also referenced this information in support of its statement that Nurse Hudson was lying.[13]

Justice requires that the court's decision be reversed and if remanded for a new trial, assigned to a different judge.

I. No Attorney's Fees for Unsuccessful Claims.

WSNA is not entitled to reasonable attorney's fees associated with unsuccessful claims, such as unsuccessful defenses or cross-appeals. *See Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 850 P.2d 517 (1993); *Bally v. Ocean Transp. Services, LLC*, 133 Wn. App. 1009, 2006 WL 1462180 (2006), *superseded* 136 Wn. App. 1052 (same).

[13] Contrary to WSNA's assertion in its Response, Nurse Hudson never "testified [the HomeCare HomeBase software] reflected the actual times that she completed her charting" but, rather, that she would have to guess because she was unfamiliar with the report and had never verified it. RP 1354:5-8, 1360:21-1361:5.

J. Prejudgment Interest Inappropriate.

This Court should uphold the denial of prejudgment interest. Where, as here, the amount of prejudgment interest cannot be determined from the evidence "with exactness and without reliance on opinion or discretion," it should not be awarded. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846, 858 (2007). *See also McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006) (Overtime hours were liquidated because payments were "determinable by computation" based on the hours worked and the fixed hourly rate).[14]

Amounts are not liquidated when the court must necessarily determine what might be a reasonable amount. *See Maryhill Museum v. Emil's Concrete Constr. Co.*, 50 Wn. App. 895, 903, 751 P.2d 866, review denied, 111 Wn.2d 1009 (1988); *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 51, 169 P.3d 473, 477 (2007) (Liquidated claim because jury did not have to rely on opinion or discretion to calculate amount).

The evidence shows that WSNA itself could not calculate damages pre-trial. RP 1374:17-1375:24; 1376:15-1377:20. The record also shows that damages cannot be calculated with exactness. The trial court extrapolated non-uniform testimony to the remaining association members

[14] YRMCC acknowledges *Hill v. Garda*'s holding that recovery for prejudgment interest and double exemplary damages on the same wage violation is now permitted, but disagrees with WSNA that this issue even needs to be addressed because the evidence here forecloses an award of prejudgment interest regardless of double damages.

and calculated a monetary damages figure as well as a prejudgment interest number that cannot now be explained and, in any event, lacked the required degree of specificity.[15] CP 2886-2897. Because the trial court's opinion and discretion were necessary to calculate the monetary damages, prejudgment interest should not be awarded here.

III. CONCLUSION

For all the foregoing reasons, the judgment of the trial court should be reversed. If remanded, a new judge should be assigned.

DATED this 28th day of November, 2018.

Davis Wright Tremaine LLP
Attorneys for Yakima HMA LLC, d/b/a Yakima Regional Medical and Cardiac Center

By _____
Paula L. Lehmann, WSBA #20678
Mary R. Sanden, WSBA #45608
777 108th Avenue NE, Suite 2300
Bellevue, WA 98004-5149
Telephone: 425-646-6100
Fax: 425-646-6199
E-mail: paulalehmann@dwt.com
marysanden@dwt.com

[15] For example, it is not apparent in Conclusion of Law #14 whether the trial court calculated the prejudgment amount as a percentage of the compensatory or exemplary double damages portion of the monetary damages amount. Prejudgment interest can only be applied to the compensatory portion of the damages award. *Hill v. Garda CL Nw. Inc.*, 191 Wn.2d 553, 577, 424 P.3d 207, 219 (2018).

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that, on the date indicated below, I filed the foregoing document with the Clerk of the Court and had delivered a true and correct copy of the same to counsel of record as follows:

Delivered via U.S. Mail and E-mail

Jennifer Robbins
Laura Ewan
Schwerin Campbell Barnard & Iglitzin LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119-3971

DATED this 28 day of November, 2018.

Jennifer Ronda

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