

NO. 66857-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEBRA PUGH & AARON BOWMAN

Appellants,

v.

WASHINGTON STATE NURSES ASSOCIATION &
EVERGREEN HOSPITAL

Respondents.

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APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This lawsuit was brought by a union, Washington State Nurses Association (“WSNA”), seeking lost wages suffered by current and former employees of Evergreen Hospital Medical Center (“Evergreen”) arising from ongoing and systemic violations of Washington wage laws regarding rest breaks. WSNA had acquiesced to Evergreen’s unlawful practices for several years despite having negotiated a collective bargaining agreement that expressly provided for rest breaks in excess of those provided under Washington law. WSNA filed suit only upon learning that its members had hired private counsel to file a class action lawsuit to vindicate their rights under state law. When WSNA attempted to settle the claims for five cents on the dollar of estimated damages, two of WSNA’s members (“Nurses”) who had already filed their own class action lawsuit asserting, among others, claims identical to those of WSNA, moved to intervene to protect their own interests and to challenge the WSNA’s standing to bring a lawsuit for damages on behalf of current and former employees of Evergreen. The trial court struck the Nurses’ motion to intervene on the basis of

improper service and delayed any re-filing of the motion. Before the issue of standing and the Nurses right to intervene was addressed, WSNA and Evergreen rushed into a settlement of the claims and, on the eve of the hearing on the motion to intervene, they stipulated to dismiss this lawsuit with prejudice. The trial court entered an order dismissing the case with prejudice before the standing and intervention issues were addressed.

The trial court committed several errors. First, it erred in striking the Nurses' initial Motion to Intervene because (1) it struck the motion without considering the responsive briefing submitted by the Nurses, (2) the parties had actual notice of and time to meet the questions raised in the motion and there was no evidence in the record that the alleged untimely service prejudiced the parties, and (3) it exceeded its authority in striking the motion, which is not permitted under the civil rules. Second, the trial court erred in ordering that the stricken motion could not be immediately re-filed when it lacks any authority to delay a party's right to intervene. Third, the trial court abused its discretion when it dismissed the case with prejudice when the issue of standing had been raised and before

it had been addressed.

Due to these errors, the trial court permitted WSNA—a union that lacked standing to bring these claims under Washington law—to dispose of the Nurses claims by entering into a settlement agreement with Evergreen. The Nurses request that this Court vacate the trial court’s order dismissing this case with prejudice and enter an order dismissing this case with prejudice only as to WSNA for lack of standing.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in striking Appellant’s initial Third-Party Motion to Intervene?
2. Did the trial court err in ordering that the Motion to Intervene could not be immediately re-filed?
3. Did the trial court err in dismissing this case with prejudice before considering the Nurses Third Party Motion to Intervene, which alleged that WSNA lacked standing to bring the case?
4. Did WSNA lack associational standing to bring this lawsuit for damages on behalf of current and former employee nurses of Evergreen when the parties concede that no employer records exist

by which damages can be calculated with certainty?

III. STATEMENT OF THE CASE

A. Summary of the Case

Debra Pugh and Aaron Bowman are former employees of Evergreen Hospital Medical Center (“Evergreen” or “Hospital”).¹ CP 48. While working at Evergreen as registered nurses engaged in patient care, they rarely if ever received rest breaks as required under Washington law. *Id.* Furthermore, they often worked more than five hours and up to sixteen hours without receiving a thirty-minute meal break as required under Washington law. *Id.*

Ms. Pugh and Mr. Bowman complained to Evergreen and their union, the Washington State Nurses Association (“WSNA”), stating that they did not receive the rest or meal breaks as required under an existing collective bargaining agreement (negotiated by WSNA) and Washington law. CP 336, 339-340. Despite the complaints, WSNA failed to take any action. CP 337, 340. WSNA representatives responded to the complaints by telling Ms. Pugh to “get her own lawyer.” CP 337.

¹ Ms. Pugh and Mr. Bowman’s employment with Evergreen Hospital was terminated after the lawsuits against Evergreen were filed. CP 72.

Ms. Pugh did obtain counsel to represent her and a class of similarly situated individuals on the rest and lunch break claims. Before filing a complaint, Pugh's counsel contacted WSNA representative, Sara Frey, to inquire about the extent to which WSNA was aware that Evergreen was violating Washington law. CP 285. Ms. Frey referred the matter to WSNA's Assistant Director of Labor Relations, who failed to respond to the inquiry. Id.

After years of inaction and within a week of receiving notice that Ms. Pugh had obtained counsel, WSNA filed this case, *WSNA v. King County Public Hospital District No. 2 d/b/a Evergreen Hospital Medical Center*, Case No. 10-2-32896-3 SEA in King County Superior Court on September 16, 2010 (WSNA Lawsuit). CP 1-4. The WSNA Lawsuit was assigned to the Honorable Laura Gene Middaugh. CP 6. WSNA's complaint alleged that Evergreen's practices violated state wage laws. CP 3-4. WSNA's complaint did not seek injunctive relief but sought damages for lost wages suffered by its members. CP 4. Inexplicably, WSNA failed to enforce their own collective bargaining agreement, which provides that nurses are entitled to rest breaks of 15-minutes for

every four hours worked as opposed to the mere 10-minute rest breaks required under Washington law. CP 274.

Because WSNA had failed to enforce their own collective bargaining agreement, acquiesced to Evergreen's unlawful practices for a number of years, and failed to bring an action until notified that Ms. Pugh and Mr. Bowman intended to do so, neither Ms. Pugh nor Mr. Bowman believed that WSNA could adequately represent their interests or those of similarly situated nurses employed by Evergreen. CP 337, 340. Accordingly, on September 17, 2010, Debra Pugh and Aaron Bowman on their own behalf and on behalf of over 1,300 persons similarly situated ("Nurses") proceeded to file *Pugh et al., v. Evergreen Hospital Medical Center a/k/a King County Public Hospital District #2* ("Class Action"). CP 47-51. The Class Action was assigned to and is pending before the Honorable Gregory Canova. CP 53.

B. Procedural Background

Both WSNA's complaint and the Nurses' complaint alleged that Evergreen denies registered nurse employees a 10-minute rest break for every four hours worked in violation of Washington wage

laws. CP 104, 47-51.² Because the claims in both lawsuits were identical to and arose from the same set of facts, the Nurses filed a Motion to Consolidate the two cases on December 7, 2010. CP 311. After the motion was filed, WSNA requested that Class Counsel strike the motion to consolidate so it could join the Nurses as the moving party. CP 289, 33-34. In an effort to work cooperatively with WSNA, the Nurses struck the motion with the express agreement that WSNA would join the motion to consolidate. Id.

Despite this agreement, drafting and sending a joint motion to WSNA on December 22, 2010, and sending numerous requests for approval to file the motion, WSNA inexplicably delayed the joint motion. Id. WSNA's counsel would not agree to motion as drafted, but also failed to send any suggested changes despite numerous requests. Id.

On January 31, 2011, WSNA engaged in mediation with Evergreen. CP 289-290, 34-35. According to WSNA Counsel David Campbell, Evergreen would not agree to engage in mediation

² The pending Class Action lawsuit is more comprehensive in that it also alleges that Evergreen has denied nurses legally adequate lunch breaks. CP 49-51.

with Class Counsel, but Mr. Campbell, who wanted to learn what Evergreen was offering, assured Class Counsel that WSNA would not settle any claims without approval and participation of the Class Action plaintiffs. CP 290.

At approximately 4:15 p.m. on January 31, 2011 WSNA Counsel Carson Glickman-Flora telephoned Class Counsel to advise that Evergreen had provided an offer of settlement at the mediation. Id.; CP 34. Evergreen's settlement offer included only a token reimbursement for the 1,300 former and current nurses in the amount of \$50,000. CP 290. She asked that Class Counsel approve it on the spot without consulting plaintiffs and putative class representatives Ms. Pugh and Mr. Bowman. CP 34, 290. During the phone call, WSNA's counsel indicated they were inclined to accept the settlement because it achieved WSNA's primary goal of implementing a procedure that would allow nurses to take breaks in the future, even if it was at the expense of providing Evergreen nurses with any meaningful recovery of back pay for unpaid rest breaks over the past three years. CP 34, 290. Class Counsel indicated that this amount was unacceptable. Id. As of the

following morning, the settlement offer had increased to \$325,000.

Id. Even this amount constituted less than 5% of Class Counsel's estimated damages (approximately \$3,000,000 without double damages or overtime pay) and only a fraction of the lost wages due to Evergreen nurses as calculated by WSNA (over \$1,000,000). CP 34, 290-291.

Upon learning of WSNA's obvious conflict of interest with its members—particularly former employees who would not benefit from the “going forward” relief—the Nurses promptly filed a Third Party Motion to Intervene in the WSNA Lawsuit, noting a hearing date of February 14, 2011. CP 19. On the same day, the Nurses re-filed the previously noted Motion to Consolidate the cases. CP 203. Counsel for the Nurses served all parties with full copies of both motions via email and fax on February 4, 2011. CP 127-128. A hard copy of the Motions were delivered by personal messenger to Evergreen's Kirkland offices on the morning of February 7, 2011. CP 128.

Three days later at approximately 10 am on February 10, 2011, Evergreen's counsel advised Class Counsel that Evergreen

would object to the Motion to Intervene being heard on February 14 despite actual receipt of a copy of the motion by fax and email, because it had not been served a hard copy by personal messenger until Monday, February 7. CP 156. Evergreen's counsel advised that Evergreen would file a motion to strike and a motion to shorten time. Id. In response, Class Counsel offered to re-note their motion to be heard on Tuesday, February 15, thereby giving the parties an extra day to respond. CP 157. Notice of the re-note was provided to all parties and the court before the noon deadline for responses. CP 70-171. Nevertheless, Evergreen filed a motion to strike and a motion to shorten time at noon on February 10, asserting that it had not received the motion by messenger until Monday, February 7 and the motion should not be heard because of inadequate service under CR 5. CP 95-99, 386-389. Evergreen went on to act consistently with the new hearing date of February 15, filing its response to the Motion to Intervene just before noon on February 11, 2011. CP 100-110, 157.

In contrast, WSNA did not move to strike the motion; instead it tactically chose to forego substantive argument in opposition and

instead argued (contrary to law) that the court must deny the Motion to Intervene on the sole basis that it was not timely served. CP 81-84. WSNA then submitted a second brief in opposition on February 11, 2011. CP 114-117. In its second brief in opposition, it requested denial of the Motion to Intervene, now without prejudice, until after the parties presented a Joint Motion for Approval of Settlement. CP 116. A settlement agreement between WSNA and Evergreen was executed that same day. CP 226.

On February 14, 2011, the trial court granted Evergreen's Motion to Strike the Third Party Motion to Intervene, finding it was not timely served on the parties. CP 378-379. It further inexplicably ordered sua sponte that the motion could be re-noted only after the Chief Civil Judge ruled upon the pending motion to consolidate.³ CP 379.

On February 18, 2011, WSNA and Evergreen filed a Joint Motion to Approve Settlement of this case. CP 205. Attached to the Motion was a settlement agreement, executed on February 11, 2011. CP 226. The proposed settlement sought to resolve the claims of

³ Per King County Local Civil Rule 40(b)(4), Motions to Consolidate cases must be filed with the Chief Civil Judge.

nearly 1,300 nurses for approximately 5% of the estimated damages in the case. CP 290. Despite the fact that WSNA was openly sacrificing the interests of former nurse employees in favor of nurses still employed at Evergreen, the proposed settlement sought to resolve all claims of missed rest breaks of not only current WSNA member employees of Evergreen, but former employees and non-union members as well. CP 219. Per the agreement, the settlement was expressly contingent upon “approval by the King County Superior Court . . . as may be deemed appropriate and necessary and/or required.” CP 225.

On February 16, 2011, Evergreen informed Class Counsel that the Court set a briefing schedule for the Motion to Approve Settlement through a signed stipulation only by Evergreen and WSNA’s counsel. CP 232. In the stipulation, WSNA and Evergreen agreed and the trial court ordered that WSNA and Evergreen were to “provide a copy of this stipulation and order and copies of all pleadings in accordance with the [briefing] schedule to [the Nurses], who are expected to oppose the joint motion.” CP 342-343.

On February 23, 2011, the chief civil judge denied the Motion to Consolidate without prejudice, expressly relying on WSNA and Evergreen's stipulation that a Joint Motion to Approve Settlement had been filed, noted for oral argument, and would be heard by the trial court. CP 385. In the order, Chief Civil Judge Inveen stated that the motion "may be renewed should reasonableness of the settlement of the [WSNA Lawsuit] be disapproved." CP 385.

Consistent with Judge Middaugh's February 15, 2011 order, the Nurses re-filed their Motion to Intervene immediately upon learning the chief civil judge had issued a ruling on the Motion to Consolidate. CP 269. The Nurses noted a hearing date of March 4, 2011 with oral argument. CP 267. WSNA and Evergreen jointly submitted a Response in Opposition to the Motion to Intervene on March 2, 2011. CP 351-360. The Nurses filed their Reply on March 3, 2011. CP 361.

In a clear effort to deprive the Nurses of their right to intervene in the WSNA Lawsuit and contradicting its own repeated assurances to the Nurses, the trial court, and the chief civil judge that the Nurses would have an opportunity to present disagreement with

the settlement and address the issue of standing in open court, WSNA and Evergreen submitted a Stipulation and Order of Dismissal with prejudice on March 3, 2011. CP 371-372, 115 (where WSNA concedes that it “has repeatedly assured [the Nurses’] counsel that he will have the opportunity to present any disagreement with the settlement at a time of [sic] the parties seek th[e] court’s approval.”).

The trial court signed the order and filed it on March 4, 2011—the very day it was scheduled to hear oral argument on the Nurses Motion to Intervene. CP 371-372. As a result of dismissal, all pending motions were effectively stricken without rulings from the court, including the Nurses Motion to Intervene and WSNA and Evergreen’s Joint Motion to Approve Settlement, which WSNA and Evergreen apparently abandoned in their effort to avoid intervention. By dismissing the action before the Nurses’ Motion to Intervene was ruled upon, the trial court effectively denied the Nurses their right to intervene and challenge WSNA’s standing to bring this case. CP 383.

IV. ARGUMENT

A. Standards for Decision and Review.

The denial of a party's motion to intervene as a matter of right is reviewed de novo. Westerman v. Cary, 125 Wn.2d 277, 302, 885 P.2d 827 (1995) (citing 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1902, 1923 (2d ed. 1986)). An appellate court reviews a ruling on the timeliness of a CR 24 motion to intervene for abuse of discretion. Kreidler v. Eikenberry, 111 Wn.2d 828, 832, 766 P.2d 438 (1989). But when a trial judge does not exercise discretion, and instead rules that intervention is barred as a matter of law, the decision is reviewed de novo. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 560, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974).

An appellate court reviews a trial court's interpretation and application of court rules de novo. Spokane County v. Specialty Auto, 119 Wn. App. 391, 396 (2003)(citing City of College Place v. Staudenmaier, 110 Wn. App. 841, 845, 43 P.3d 43, review denied, 147 Wn.2d 1024, 60 P.3d 92 (2002)). Where a trial court erroneously dismisses an action under CR 41, the remedy is by

appeal. State ex rel. Heyes v. Superior Court, 12 Wn.2d 430, 121 P.2d 960 (1942); State ex rel. Craig v. Superior Court, 18 Wn.2d 441, 139 P.2d 615 (1943).

Standing is a jurisdictional issue that can be raised for the first time on appeal. See Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 103 Wn. App. 764, 768, 14 P.3d 193 (2000) (citing RAP 2.5(a); Mitchell v. Doe, 41 Wn. App 846, 847, 706 P.2d 1100 (1985)), review granted, 143 Wn.2d 1019, 25 P.3d 1019 (2001). An appellate court reviews the issue of standing de novo. Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs., 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

B. The Trial Court Erred by Striking the Nurses' Initial Third-Party Motion to Intervene.

Third party intervention is governed by CR 24(a)(2) and CR 24(b)(1)(B). They provide in pertinent part as follows:

(a) Intervention of Right: On timely motion, the court must permit anyone to intervene who:

.....

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately protect that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

....

(B) has a claim or defense that shares with the main action a common question of law or fact.

....

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

CR 24(a)(2) imposes four requirements: (1) timely application for intervention; (2) an applicant claims an interest that is the subject of the action; (3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and (4) the applicant's interest is not adequately represented by the existing parties. These factors are to be “interpreted broadly in favor of intervention.” Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1061 (9th Cir., 1997). “Not much of a showing is required to establish an interest [, and] an insufficient interest should not used as a factor for denying intervention.” Columbia Gorge Audubon Society v. Klickitat County, 98 Wn. App. 618, 630, 989 P.2d 1260 (1999 (citing American Disct. Corp. v.

Saratoga W., Inc., 81 Wn.2d 34, 41, 499 P.2d 869 (1972)). Once an applicant has shown an interest, the applicant must then establish that the interest may be inadequately represented by existing parties. Fritz v. Gorton, 8 Wn. App. 658, 661-662 (1973). “The burden of making that showing should be treated as minimal.” Id; See also Columbia Gorge, 98 Wn. App. 618, 629 (“The intervener need only make a minimal showing that its interests may not be adequately represented.”)(citing United States v. Brooks, 163 F.R.D. 601, 604 (D. Or. 1995) and California v. Tahoe Reg’l Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986). As this test illustrates, “[i]n Washington, the requirements of CR 24(a) are liberally construed in favor of intervention.” Columbia Gorge, 98 Wn. App. at 623.

In this case, the trial court granted Evergreen’s Motion to Strike the Nurses Third-Party Motion to Intervene on the basis that it “was not timely served on the parties,” and it found that the failure to timely serve the Motion to Intervene prejudiced the parties. CP 204. This was error for three reasons.

First, the trial court inexplicably failed to review all of the documents that were submitted in response and reply to the motion

and selectively reviewed others unrelated to the motion. In making its order, the trial court considered the following documents: (1) Motion to Shorten Time and Subjoined Declaration of Counsel, (2) Third Party Opposition to Evergreen's Motion to Shorten Time and Declaration of Annette Messitt, (3) Opposition of Pugh et al.'s Renoted Motion to Intervene and Request for Continuance and Oral Argument, (4) Motion to Strike Third Party Motion to Intervene and Subjoined Declaration of Counsel, and (5) the Motion to Intervene for purposes of obtaining background information. CP 203.

According to its order, the trial court erroneously failed to consider any responsive briefing, including the Nurses' Opposition to Evergreen's Motion to Strike Third Party Motion to Intervene and the accompanying declarations.⁴ CP 151-182, 203. By failing to review timely filed responsive briefing without explanation or legal basis, the trial court so far departed from the accepted and usual course of judicial proceedings that it abused its discretion in granting the motion to strike.

Second, because the parties had actual notice and time to

⁴ It also inexplicably failed to consider Evergreen's Reply in Support of Motion to Strike Third Party Motion to Intervene. CP 183-185.

prepare to meet the questions raised by the Nurses Third Party Motion to Intervene, the trial court should not have stricken the motion under Loveless v. Yantis, 82 Wn.2d 754. In Loveless, the Washington supreme court held that the failure of an intervener to follow the civil rule requiring service of motions 5 days before the time specified for the hearing will not be fatal to a motion to intervene where the party had actual notice and time to prepare to meet the questions raised by the motions of the adversary. Loveless v. Yantis, 82 Wn.2d at 759, 513 P.2d 1023 (1973)(citing, Herron v. Herron, 255 F.2d 589, 593 (5th Cir. 1958) (stating that Civil Rule 6(d) is not a hard and fast rule, and if it is shown that a party had actual notice and time to prepare to meet the questions raised by the motion of an adversary, Rule 6(d) should not be applied.).

Here, there is no dispute that Evergreen and WSNA had actual notice of the issues raised in the Motion to Intervene on February 4, 2011, the date it was filed. CP 159-169. Evergreen admitted in its Motion to Strike that it indeed received full copies of the pleadings via fax and email on that date. CP 96. The evidence shows that WSNA also received the actual notice at the same time as

Evergreen. CP 159-169.

Furthermore, there is absolutely no evidence in the record to support the court's finding that Evergreen was prejudiced by untimely service. None of the documents the trial court considered in making its order provided any factual support for the court's finding of prejudice to the parties. For example, Evergreen does not make any allegations in its Motion to Strike that it was prejudiced by receiving the pleadings by fax and email on February 4, 2011 and personal service by messenger on Monday, February 7, 2011.⁵ CP 95-99. Neither did WSNA. WSNA did not join Evergreen's Motion to Strike. CP 95. Instead, it made the tactical decision to substantively oppose the Motion to Intervene solely on the basis it was not timely served, and requested the motion be outright denied on that basis (not stricken). CP 81. In the opposition, it did not claim the alleged untimely service prejudiced them.⁶ Id. In fact, the

⁵ Although the trial did not consider it, Evergreen also failed to assert anywhere in its Reply that it was prejudiced by the alleged untimely service. CP 183-185.

⁶ Only after the Motion was re-noted, did WSNA allege that it was prejudiced in any manner. In a separate objection to the re-note, WSNA argued that the Nurses attempt to cure any deficiency in service by re-noting the motion from February 14, 2011 to February 15, 2011 prejudiced WSNA, because it gave them only one day to respond to the

record shows that the parties had actual notice of and ample time to respond to the issues presented. CP 159-169. Without any evidence to support a finding of prejudice, the trial court abused its discretion when it granted Evergreen's Motion to Strike on the basis of prejudice to the parties.

Third, the trial court exceeded its authority when it granted Evergreen's Motion to Strike the Nurses Motion to Intervene. The civil rules do not provide a mechanism by which to "strike" a motion. Motions to strike are governed by CR 12(f), which limits their use to responding to pleadings:

Upon Motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, or scandalous matter.

The term "pleadings" is defined in CR 7(a) and does not include motions.

substantive issues. CP 115. But refusing to respond to the substantive issues raised by the motion was a tactical decision on the part of WSNA, particularly in light of the fact they failed to allege that due to late service they were unable to respond to the issues raised in the Motion to Intervene. In its objection, WSNA requested again that the trial court deny the motion to intervene outright—this time without prejudice—and delay hearing it until after the Joint Motion for Approval of Settlement. CP 114-116.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

These Washington rules are drawn from federal counterparts, which courts and commentators have consistently construed to prohibit motions to strike motions and other non-pleadings. *See, e.g., Trujillo v. Bd. of Educ. of Albuquerque Pub. Sch.*, 230 F.R.D. 657, 660 (D.N.M. 2005) (denying motion to strike party's brief because a brief is not a "pleading" under FED. R. CIV. P. 7(a)). Under the civil rules, the trial court simply had no authority to strike the motion.

In summary, the trial court erred when it granted Evergreen's Motion to Strike because it failed to consider any responsive documents to the Motion, there was no evidence in the record to support the court's finding that Evergreen and WSNA were prejudiced by untimely service, and it did not have the authority to strike the motion under the civil rules. By striking the Motion to

Intervene and effectively refusing to consider it, the trial court deprived the Nurses of their right to intervene under CR 24.

C. The Trial Court Erred by Ordering that the Motion to Intervene Could not be Immediately Re-filed.

Even if the trial court did not err by striking the Motion to Intervene and refusing to consider the motion, it exceeded its authority when it ordered the Motion to Intervene could not be re-filed until after the pending Motion to Consolidate was ruled upon by the Chief Civil Judge. The trial court has no discretionary authority to delay a party's right to intervene.

Unlike a Motion to Consolidate or a motion relating to an evidentiary issue, whether to grant a Motion to Intervene under CR 24(a) is not a discretionary decision when the timeliness of the motion is not at issue. CR 24(a); compare CR 42(a). In this case, the Motion to Intervene was timely as a matter of law. See Columbia Gorge v. Klickitat County, 98 Wn. App. 618, 623 (1999) (a motion to intervene is timely as a matter of law when it is filed before the commencement of the trial).

Furthermore, the trial court was well informed by the briefing of the parties that a settlement of WSNA's claim was imminent and

that the Nurses were in a position where the disposition of the action by a party without standing could impair their ability to protect their interests. CP 114-116; See Fisher v. Allstate Ins. Co., 85 Wn. App. 594, 933 P.2d 1094 (1997), aff'd, 136 Wn.2d 240, 961 P.2d 350 (1998) (Anyone may intervene in an action where they claim an interest in the action and their interest may be affected by the proceeding, so long as they are not adequately represented by existing parties). Under these circumstances, there was simply no basis in the law by which the trial court was permitted to delay the Nurses right to intervene by ordering the Motion to Intervene could not be immediately re-filed. This is particularly true where the purpose for the delay—a ruling on a discretionary Motion to Consolidate—has no affect on the Nurses' right to intervene.

In light of these facts and the absence of authority to delay the Motion to Intervene, the trial court's decision to order that intervention could not occur until the Chief Civil Judge ruled on a pending Motion to Consolidate was untenable, and it ultimately prevented the Nurses from protecting their interests and challenging WSNA's standing to represent them. This was clear error.

D. The Trial Court Erred Under the Facts in This Case When It Dismissed this Case Before Considering the Nurses Third Party Motion to Intervene, Which Alleged that WSNA Lacked Standing to Bring this Suit on Behalf of its Members.

Under the facts presented here, the trial court erred in dismissing this case with prejudice on the basis that the parties “had reached a settlement” before considering whether WSNA had standing to bring the lawsuit (and standing to settle it) in the first instance. By dismissing the case, the trial court allowed WSNA and Evergreen to simply avoid intervention by rushing into a “settlement” of claims that WSNA had no standing to bring and by which Evergreen paid only a tiny fraction of the damages owed.⁷

It was clear to the parties and the court that the issue of standing was in controversy from the beginning of the case. It was first raised in the Complaint. CP 3. In its Answer, Evergreen raised lack of standing as an affirmative defense, asserting that “Plaintiff lacks standing to bring this claim for damages on behalf of its members.” CP 14. The trial court was undoubtedly made aware that

⁷ There is no dispute that through this “settlement,” Evergreen has paid Evergreen nurses less in wages owed than the amount that Evergreen itself calculated it owed to its employees at the time of settlement.

the Nurses sought to intervene in part to challenge standing, because they raised the issue in their initial Motion to Intervene, their Motion for a Change in Briefing Schedule on Motion for Joint Approval of Settlement, and then again in their second Motion to Intervene. CP 27-28, 279-280, 259-261. Significantly, Evergreen and WSNA dedicated a large portion of their Motion to Approve Settlement to the issue of standing.⁸

The record shows that Evergreen and WSNA consistently represented to the trial court that they would be seeking approval of their settlement, which would provide the Nurses an opportunity to object to the settlement and address the issue of standing. CP 82, 115-116, 186-187, 205-217. This is evidenced by the stipulation and order regarding the briefing schedule for the Joint Motion to Approve Settlement, which expressly provided a deadline for “filing of opposition to the motion” and service of a copy of the pleadings on the Nurses’ counsel. CP 342-344. It was also the understanding of the chief civil judge as reflected in her order on consolidation of

⁸ Not surprisingly, Evergreen changed its position on the issue of whether WSNA had standing to bring a claim for damages when arguing that the trial court should approve the settlement in this case, which benefited them by awarding only 5% of the estimated damages in the case. CP 211.

cases. CP 385.

Only after a telephone conference wherein the trial court confirmed that the oral argument on the Motion to Intervene would occur prior to the Joint Motion to Approve Settlement and questioned whether it had the authority to approve the settlement, Evergreen and WSNA decided that “approval was not necessary” and submitted a stipulated order of dismissal with prejudice. CP 352. This was an obvious effort to prevent the court from ever addressing the issue of whether WSNA had standing to bring this lawsuit and then settle the claims on behalf of its members. Under these circumstances, the court’s order of dismissal with prejudice based merely on the stipulation of the parties they had entered into a “settlement” was an abuse of discretion.

Dismissal of actions by stipulation is governed by CR 41

(a)(1)(A). It provides in pertinent part as follows:

(a) Voluntary Dismissal.

(1) *Mandatory*: Subject to the provisions of the rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By Stipulation. When all parties who have appeared so stipulate in writing;

...

(4) *Effect*. Unless otherwise stated in the order

of dismissal, the dismissal is without prejudice

Whether a dismissal requested under CR 41(a) is with or without prejudice is at the discretion of the trial court. Spokane County v. Specialty Auto, 119 Wn. App. 391, 396-397 (2003) (CR 41(a)(1)(A) does not create an absolute right to dismissal without prejudice, which is granted only at the discretion of the trial court.).

The trial court abused its discretion when it dismissed this case with prejudice when there existed an active controversy regarding whether one of the parties had standing to settle the claims. Obviously a party without standing to bring a claim cannot stipulate to dismissing those claims with prejudice to those they purport to represent on the basis that it has “reached a settlement.” CP 380.

In their Stipulation and Agreed Order of Dismissal, WSNA and Evergreen acted as though CR 41(a)(1)(A) conferred upon them an absolute right to dismiss the case with prejudice by stipulation. But this is not the law in Washington. No provision of CR 41(a) confers upon a party the absolute right to dismissal with prejudice, even by stipulation. Specialty Auto, 119 Wn. App. at 396-397.

When a court dismisses a case with prejudice under CR 41(a)(1)(A), it must exercise its discretion to do so. Id. The stipulation and proposed order did not inform the court that it must exercise its discretion nor did it request that the court exercise its discretion to dismiss with prejudice. CP 380-381. Rather, it misled the court by suggesting the parties had an absolute right to dismiss with prejudice under CR 41(a)(1)(A). Id. It is clear that the court was indeed misled and erroneously believed that WSNA and Evergreen had an absolute right to immediately dismiss this action with prejudice. CP 383. The trial court's erroneous belief is clearly reflected in correspondence sent by the trial court to Class Counsel after it signed the order of dismissal. CP 383. The judge was not present in courtroom at the time that it had scheduled for oral argument on the Motion to Intervene and then refused to formally strike the oral argument. Instead, the trial court simply referred the Class Counsel to "the rules regarding plaintiffs' right to dismiss an action." Id. Based on the Stipulation and the Court's statements, it is apparent that the order was based on untenable grounds—a clear misunderstanding of the law—and signing the order on that basis

constituted an abuse of discretion. Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (“[A] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.”). Even if the court had not erroneously believed that it was obligated to sign the order of dismissal with prejudice, it still abused its discretion in signing it. It is manifestly unreasonable to dismiss a case with prejudice on the basis that the parties “have reached a settlement” on the eve of a hearing regarding whether one of those parties has standing to settle those claims at all. See CR 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”); Young v. Clark, 149 Wn.2d 130, 133 (2003) (When a court lacks subject matter jurisdiction in a case, dismissal is the only permissible action the court may take.).

E. The Washington State Nurses Association Lacked Standing to Bring this Lawsuit.

Based on the record in this case, this Court should conclude as a matter of law that WSNA lacked standing to bring its claim for damages. Standing is a threshold issue in every case. Lieberhoe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022 (9th Cir. 2003).

Absent a party with standing, courts lack jurisdiction to consider its claim. Postema v. Snohomish County, 83 Wn. App. 574, 579-580 (1996). Here, WSNA claimed it had associational standing to bring a suit for damages on behalf of its members. CP 3. While it is true that in some circumstances, an association may have standing to bring suit on behalf of its members, it must satisfy three criteria: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization's individual members. Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-214 (Wash. 2002).

Under federal law, labor unions have no standing to pursue a damages claim on behalf of their members. See United Union of Roofers, etc. No. 40 v. Insurance Corp. of America, 919 F.2d 1398, 1400 (9th Cir. 1990) (reasoning that claims for monetary relief necessarily involve individualized proof; thus the individual participation of association members runs afoul of the third prong of the associational standing test). In Washington, however, the

Washington Supreme Court has carved out a narrow exception to the bright-line federal rule. In Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, the Supreme Court held that associational standing in a lawsuit involving a claim for damages may be permissible only when the determination of the employee's right to individualized damages and the amount owed to each employee could be determined with certainty from the employer's records. Firefighters, 146 Wn.2d at 216. The reasoning behind the exception was that employer records would vitiate the need for testimony from individual members/employees regarding the amount of damages owed. Id.; See also Teamsters Local Union No. 117 v. Dept. of Corrections, 145 Wn. App. 507, 513 (2008) (finding that a union could sue on behalf of its members when calculating damages was "nothing more than a mathematical exercise" based on the records of the employer.)

In this case, it is uncontested that WSNA's complaint seeks damages on behalf of its members.⁹ CP 4. Accordingly, under Firefighters, WSNA's standing to file this complaint on behalf of

⁹ Notably, in its complaint, Evergreen seeks only damages and fails to pray for injunctive relief at all. CP 4.

individual nurses is dependant on whether the amount of monetary relief owed is “certain, easily ascertainable, and within the knowledge of [Evergreen].” Firefighters, 146 Wn.2d at 216-217. Based on WSNA’s own admissions and joint statements with Evergreen, WSNA clearly lacked standing to bring this lawsuit under Firefighters. In its Joint Motion to Approve Settlement, both WSNA and Evergreen concede that there exist no records by which damages can be calculated with certainty: “Evergreen has not kept records of missed breaks in any form [and] determining a precise damages amount would be difficult and require the participation of experts to examine the workplace practices in each unit...” CP 215. This is supported by the numerous declarations of nurses submitted by Evergreen and WSNA with the Joint Motion to Approve Settlement, which show that damages vary by department and individual testimony from a WSNA member in each department would be necessary to calculate them. CP 391 (¶8 referring to employee’s own records of missed rest breaks in Exhibit B at CP 395-398); See generally, CP 399-426, 438-446. In the declarations, nurses from 11 different departments testify that Evergreen did not

record missed rest breaks and had no procedure for doing so. CP 390 (¶7), 400 (¶9), 403 (¶9), 406 (¶7), 409 (¶9), 413 (¶9), 421 (¶9), 424 (¶7), 439 (¶6), 442 (¶6), 444 (¶7), 446 (¶7). Without the existence of employer records from which damages can be calculated with certainty, WSNA cannot meet the requirements necessary to bring this lawsuit under the doctrine of associational standing. See generally Firefighters, 146 Wn.2d 207. ¹⁰

Despite these admissions that damages cannot be calculated with certainty under the standard set forth in Firefighters, WSNA and Evergreen argued below that WSNA nonetheless had standing to settle the case on behalf of its members, because “the parties have mutually agreed to a settlement amount without reliance on the participation of each member of WSNA. . .” CP 211. This argument is nonsensical and this court should reject it.

The question of standing is a threshold issue that affects a party’s right to bring a lawsuit and the jurisdiction of the court to hear the claim. See In re Buehl, 87 Wn.2d 649, 655, 555 P.2d 1334

¹⁰ Both WSNA and Evergreen admitted in their briefing to the trial court that Evergreen has no records with which to calculate damages related to missed rest breaks.

(1976 (Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power.”). Because WSNA lacks standing to bring this lawsuit on behalf of its members at all, it certainly also lacks standing to settle such claims on the behalf of its members. And any settlement agreement arising from the lawsuit is void and unenforceable.

Accordingly, the Nurses respectfully request that this Court vacate the trial court’s order dismissing WSNA’s claims with prejudice. See RAP 2.5(a)(“[A] party may raise the following claimed error[] for the first time in the appellate court: (1) lack of trial court jurisdiction”); see also In re Ortiz, 108 Wn.2d 643, 649, 740 P.2d 843 (1987) (A judgment is void if entered without personal jurisdiction, subject matter jurisdiction, or if entered by a court which lacks the inherent power to enter the particular order involved). The Nurses also request that this court conclude the only proper order of dismissal in this case is one dismissing WSNA’s claims with prejudice only as to WSNA and not as to any of its members for lack of standing.

V. CONCLUSION

For the foregoing reasons, the Nurses respectfully request that this Court conclude that the trial court erred in striking the Nurses Third Party Motion to Intervene and ordering any delay in re-filing. Furthermore, this court should conclude that WSNA lacked standing to bring this lawsuit, vacate the trial court's order dismissing this action with prejudice, and order that this case be dismissed with prejudice for lack of standing only as to WSNA, but not as to any former or current nurse employees of Evergreen.

DATED this 15th day of August, 2011.

BRESKIN JOHNSON & TOWNSEND PLLC

By



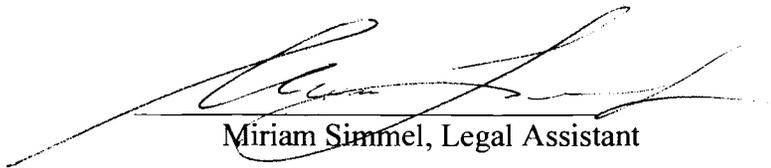
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CERTIFICATE OF SERVICE

I, Miriam Simmel, under penalty of perjury under the laws of the state of Washington, hereby certify that on this 15th day of August 2011, I caused the original of the foregoing to be filed with the appellate court and to be served to the following attorneys of record in the manner indicated below.


 Miriam Simmel, Legal Assistant

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