Supreme Court No. 1035896

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RHEANNON ANDROCKITIS, individually and on behalf of all persons similarly situated

Respondents/Plaintiffs

v.

VIRGINIA MASON MEDICAL CENTER, a Washington corporation

Petitioner/Defendant

BRIEF OF AMICUS CURIAE WASHINGTON STATE HOSPITAL ASSOCIATION IN SUPPORT OF APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

Washington State Hospital Association ("WSHA") hereby files this *amicus curiae* brief supporting Appellant Virginia Mason Medical Center's ("Appellant" or "VM") Petition for Review.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

As detailed in WSHA's accompanying Motion for Leave to file this brief ("Motion"), incorporated herein, WSHA is a nonprofit organization representing all of Washington's 113 hospitals, employing more than 120,000 people, and partners with member organizations to achieve their missions to serve Washington communities. WSHA thus provides the Court with a state-wide perspective of the impacts of this case on the provision of health care in our state.

With respect to the decision at issue, *Androckitis v. Virginia Mason Med. Ctr.*, __ Wn. App. 3d __, 556 P.3d 714, 719 (2024) (hereinafter, "Opinion" or "Op."), WSHA requests this Court grant review for two reasons: (1) as correctly noted

by Appellant, the Opinion directly conflicts with previous decisions of this Court and the Washington Courts of Appeals, and (2) the Opinion's potential financial liability and resulting impacts on patient care are truly extraordinary. Indeed, the Opinion purports to require a heretofore unknown "opportunity compensation"[1] for meal periods in Washington State which long-established law does not recognize. This Court should reverse this plainly erroneous, novel legal theory which conflicts with RCW 49.12.483 and creates both *quadruple* damages for meal period violations[2] and grave danger for Washington patients.

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[1] What is more accurately a *penalty* (or punitive damages) and not *compensation* as those terms are understood in law.

[2] According to Plaintiff/Appellee's theory, a fully missed meal break (regardless of the reason) would result in damages of: 30 minutes of pay and 30 minutes of pay for a "missed opportunity," all doubled for "willfulness," despite no prior authorization of this damages theory for unpaid meal periods. In total, the damages would be enormous: 120 minutes of pay for *each* missed break.

III. ISSUES OF CONCERN TO AMICUS CURIAE

A. Whether the Opinion erred in ruling the measure of damages for an employee performing any work during an unpaid meal period includes the time worked plus an additional 30-minute penalty.

B. Whether the Opinion erred in ruling the 30-minute penalty payment for missed meal periods was "compensatory" in nature.

C. Whether the Opinion erred in finding VM willfully withheld wages to employees for not making 30-minute penalty payments for missed meal periods.

IV. STATEMENT OF THE CASE

WSHA relies on Appellant's statement of the case.

V. ARGUMENT

A. Review Is Justified Under RAP 13.4(b)(1) and (2)

This Court should review the Opinion because it conflicts with long-established law of this state holding that only the Legislature, not the courts, can authorize penalties for violation of law, exacerbated by creation of a penalty for an alleged violation of an agency rule, and reliance on agency policy to determine "willfulness." Additionally, the Opinion's rigidity will contribute to a riskier patient care environment, prioritizing

that a break not be even one minute late over the needs of sick patients. It is well established[3] that patient handoffs from one staff member to another – including during breaks - are one of the most dangerous components of care delivery, especially when they are rushed or taken at a suboptimal time.

The Opinion held that 30 minutes of compensation is owed where a hospital denies an employee's "right to have the respite of a 30-minute meal period." Op., ¶ 47. The Opinion's core theory is that this Procrustean penalty "equates to the opportunity cost of the missed break." *Id.* at ¶ 59.

This statement of the Court of Appeals is plainly inaccurate in *most* circumstances in which it might arise. It fails to account, for example, for a scenario where an employee has the opportunity to take 29 minutes of a meal break but returns to work during the final minute. Thirty minutes is obviously not "time the employee would have spent not working but for the

[3] *See* Motion, at 4-6.

employer's decision to deny a meal break" in that situation. *Id.* Consider another scenario, where an employee who is eligible to receive a meal period does not begin their first meal period until five hours and one minute into their shift, when the employee receives a full uninterrupted meal period. The employee thus receives a meal period which technically does not comply with the timing requirements of WAC 296-126-092(1). However, again, it is plainly incorrect to say that 30-minutes of pay is "time the employee would have spent not working." While the employee may not have taken their meal period within the regulatorily prescribed period (by one minute), the employee *did* in fact have the respite of a full meal break. Despite that concrete, ascertainable reality, Respondents seek to create a new legal fiction that an additional 30-minute pay damage remedy "compensates" an employee in this situation—despite the employee in fact receiving a full break and regardless of whether the employee even *wanted* to begin his or her meal period before the five-hour mark.

Respondent Androckitis argues that 30-minutes of compensation is the measure of damages not for the actual, quantifiable amount of missed break time, but for the intangible missed "opportunity" for a break. Op., ¶¶ 47, 59. No court has heretofore recognized a meal break claim for missed "opportunity," nor pronounced 30-minutes to be the measure of damages for a missed meal period "opportunity." As illustrated by the examples above, 30-minutes is in no way an accurate measure of *compensatory* damages where an employee is not required to be on duty throughout all of their breaks.[4] It is plainly an entirely arbitrary amount unrelated to the amount of actual damage. When Appellant's employees regularly received breaks and were not required to be on duty during them, Respondents may not create a penalty—a power, as this Court has observed, that is reserved for the Legislature.

It is a fundamental principle of Washington law that

[4] As was the case in the extreme factual scenarios of *Hill* and *Pellino*, discussed below.

"punitive or exemplary damages are not recoverable except in those instances where the statute expressly makes them so." *Long v. 500 Co*., 123 Wash. 347, 352 (1923); *Anderson v. Dalton*, 40 Wn.2d 894, 898 (1952) (punitive damages only "when explicitly allowed by statute."); *Dailey v. N. Coast Life Ins. Co*., 129 Wn.2d 572, 574 (1996).[5] This Court has recognized that penalties are "generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation," *Dailey*, 129 Wn.2d at 574, and improper without a "statute [that] has contained an explicit authorization." *Id.* at 577. And, the statute must indeed be explicit: "ambiguity cannot overcome Washington's policy against punitive damages." *Id.* at 576.

In contrast, compensatory damages are "the award that will cover a loss and not a thing more." *Compensatory Damages*, *Black's Law Dictionary* (11th ed. 2019).

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[5] *See also* WPI 35.01(no punitive damages "unless expressly authorized by statute.").

Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).

The 30-minute penalty payment is not compensatory. It is a punitive measure of damages that ignores interrupted, shortened, or untimely meal periods, and the role of the Legislature in prescribing punitive or exemplary damages. The Courts' rulings below are flawed in that they treat VM's failure to timely release an employee from duty by one minute for an unpaid meal break the same as requiring an employee to entirely work through paid rest or paid meal breaks.

In analyzing the troubling penalty damages theory urged by Respondents, the Court must bear in mind the difference between rest breaks and unpaid meal periods. An employer is not automatically liable if a meal break is missed because the employee may waive a meal break. *Brady v. Autozone Stores,*

Inc., 188 Wn.2d 576, 584 (2017). Conversely, rest breaks cannot be waived, and rest breaks are always on the employer's time. *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 832 (2012). Meal periods are not the one-to-one comparison to rest breaks Androckitis urges. An employee's entitlement to ten minutes of paid rest time for not working is not the same as a 30-minute entitlement to *no pay* for *not working*. Thus, Androckitis' reliance on *Wingert* is in error. That case solely interpreted the law as to rest breaks, and is thus not applicable here, other than to establish that a missed paid break can only identify a measure of damages necessary to make a claimant whole (in that case, 10 minutes of appropriated work time). *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848–49 (2002).

An employer's obligation under WAC 296-05-092 is to release an employee from work for 30 minutes for a meal period. If the employer does not fulfill that obligation, the employee's injury is that he or she was not released from duty.

The compensatory damages for that failure is to pay the employee for the time he or she was not released from duty. This is the ordinary remedy under the wage and hour laws when it is determined that an employee is entitled to be paid for time the employer thought was unpaid. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 50-51 (2007) (when commute time is compensable, damages are actual minutes driving); *Hill v. Xerox Bus. Servs.*, 2024 WL 580788 (W.D. Wash. 2024) (employees entitled to be paid for non-productive time are to be paid by the minutes worked). Anything beyond that is not compensatory for the injury actually sustained.

Androkitis' reliance on *Hill v. Garda CL Northwest, Inc.*, 191 Wn.2d 553 (2018), and *Pellino v. Brink's Inc.*, 164 Wn. App. 668 (2011), is inapt, not only here, but for most employment settings. In those extreme cases, the plaintiffs were *never* permitted to take *any* breaks, and were required to be on guard—and thus on duty—even while they were using the restroom. *Pellino*, 164 Wn. App. at 674. In contrast to armored

car drivers who never had the opportunity for even one second of respite, Appellant provided its employees with meal breaks, rest breaks, and a mechanism for reporting any missed breaks, and its employees were not required to remain constantly "vigilant" during those breaks. App. Br. at 8–13, 15–17.

Thus, in the instance of an unpaid meal period, what Respondents propose is not reimbursement for time that has been appropriated by the employer—it is a penalty for failing to comply with the regulation. Moreover, it is a penalty for not having provided something that is not required under the previous binding interpretations of the regulation.

This interpretation is mandated by the conclusions in *White v. Salvation Army*, 118 Wn. App. 272 (2003) and *Iverson v. Snohomish Cnty.*, 117 Wn. App. 618 (2003). In both *White* and *Iverson*, the Court rejected the arguments for additional pay because the employers did not require employees' constant vigilance during meals. Therefore, because employees were not required to actively work through their entire meal periods, the

Court held that an additional 30 minutes of pay (in addition to the 30 minutes of pay employees already received for their meal periods) was not required.

Indeed, the Department has for decades recognized that there is no violation of WAC 296-05-092 in the instance where an employee is required to remain available for duty (or "on call") during a meal period, so long as the employee is provided a full, uninterrupted meal period that complies with the provisions of WAC 296-126-192, or otherwise, is paid for the entire meal break regardless of the number of interruptions. *See* DLI Administrative Policy ES.C.6.1, § 7 (rev. Dec. 1, 2017) ("As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.").

Recent enactments make clear that when the Washington Legislature seeks to enact a penalty, it knows how to do so.

And, when doing so, the Legislature prescribed a precise schedule of penalties in defined amounts for meal period violations, RCW 49.12.483, not the undifferentiated windfall sought by Respondents in the judgment below. The Opinion usurps the role assigned solely to the Legislature, and should thus be reviewed and reversed.

B. Review Is Justified Under RAP 13.4(b)(4)

As a result of the Opinion, the state of meal break (and even rest break) law is completely uncertain in Washington. The Legislature commands that penalties are assessed against employers for missed meal breaks for amounts certain in RCW 49.12.483. The Court of Appeals has ruled that a "missed opportunity" penalty may also, apparently *in addition* to the explicit Legislatively prescribed penalties, be assessed against employers. And now, the Department carries this interpretation in the Opinion to say that this same type of "opportunity" compensation claim may be brought against employers for missed *rest breaks* as well. *See* DLI Administrative Policy

HLS.A.2, Example 13-3 (finding employee who works through a rest break is entitled to "20 minutes of *additional* paid time") (emphasis added). This is, of course, contrary to the *express* holding of *Wingert*, that when employees' workday is extended by two overtime hours but no additional required rest period is provided, "the employees are entitled to be compensated by [the employer] for two hours and 10 minutes of work." 146 Wn.2d at 849. The "opportunity cost" theory created by the Opinion thus creates confusion where none had existed.

WSHA represents all hospitals in the state of Washington, with approximately 120,000 employees. Additionally, the treatment of every patient in a Washington hospital is directly impacted by the substantial changes to the law urged by Androckitis. This Court should address and resolve these uncertainties, which the Court of Appeals failed to do. The Opinion will have an astounding impact on healthcare delivery in this state. The public interest in this decision is not just "substantial," it is undeniable. RAP 13.4(b)(4).

Moreover, if an "opportunity entitlement" created by a mere agency regulation is remediable by "compensation," then there are no bounds to such a theory. New 'compensatory' remedies for violations of regulations must be recognized where the only cognizable injury is the harm to one's dignity caused by another's alleged violation of a law. For example, if Driver A exceeds the speed limit, causing him to strike the parked car of Driver B, under the logic of the Opinion, Driver B will not only have the full panoply of compensatory remedies currently available, but also a "compensatory" remedy against Driver A to redress her loss of "opportunity" to not have her vehicle hit in the first place. The Opinion thus upends vast swaths of Washington law, not just the provision of meal periods by hospitals. For this additional reason, the Opinion should be reviewed.

VI. CONCLUSION

This Court should review the Opinion.

I certify that this document contains 2,499 words, pursuant to RAP 18.17.

DATED: December 30, 2024.

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DATED this 30th day of December, 2024.

s / *Brie M. Carranza*
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