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7 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
8 IN AND FOR KING COUNTY

9 GARY CARROLL and BRIAN BALL,
10 individually and on behalf of others similarly
11 situated,

11 Plaintiffs,

12 v.

13 NUPRECON, INC. d/b/a RENU
14 RECYCLING SERVICES,

15 Defendant.

NO. 05-2-31113-4SEA

Curt
~~PROPOSED~~ ORDER DENYING
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION

16 This matter came before the Court on Plaintiffs' Motion for Class Certification pursuant
17 to CR 23. Defendant employs truck drivers who drop off empty roll off containers (dumpsters)
18 at both demolition and new construction sites; pick them up when they are full; and haul the
19 debris to various disposal sites. Plaintiffs ask this Court to certify a class consisting of all
20 these truck drivers for the purpose of determining if the work they do at public works sites is
21 covered by Washington's prevailing wage statute, RCW 39.12. This Court finds Plaintiffs have
22 not met their burden under CR 23 and thus denies their motion for class certification.

23 **A. The Record Reviewed**

24 In reaching its decision the Court heard oral argument and reviewed the following
25 pleadings:

- 26 1. Second Amended Class Action Complaint;

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2. Defendant's Answer, Affirmative Defenses, and Counterclaim to Second Amended Complaint;
3. Plaintiffs' Answer to Defendant Nuprecon's Counterclaim to Second Amended Complaint;
4. Plaintiffs' Motion for Class Certification;
5. Declaration of Martin Garfinkel in Support of Plaintiffs' Motion for Class Certification;
6. Declaration of Counsel Dmitri Iglitzin in Support of Motion for Class Certification;
7. Declaration of Brian Ball;
8. Defendant's Opposition to Motion for Class Certification;
9. Declaration of Nancy Pacharzina in Support of Defendant's Opposition to Motion for Class Certification;
10. Declaration of John Hennessy;
11. Declaration of Todd J. Smith in Support of Defendant's Opposition to Motion for Class Certification;
12. Praecepte Regarding Declaration of Todd J. Smith;
13. Praecepte Regarding Declaration of John Hennessy;
14. Defendant's Submission of Supplemental Authority in Support of Defendant's Opposition to Plaintiffs' Motion for Class Certification;
15. Plaintiffs' Reply in Support of Motion for Class Certification;
16. Second Declaration of Martin Garfinkel in Support of Plaintiffs' Motion for Class Certification;
17. Declaration of Michael Cabuco;
18. Declaration of Steven Thompson;
19. Declaration of Gary Carroll; and
20. Second Declaration of Counsel Dmitri Iglitzin in Support of Motion for Class Certification.

1 **B. Basis for the Court's Holding**

2 1. CR 23(a) Requirements

3 a. *Numerosity*

4 The Court finds Plaintiffs' proposed class comprised of 48 current and former truck
5 drivers meets CR 23(a)'s numerosity requirement.

6 b. *Commonality*

7 Plaintiffs must establish that a class action raises "questions of law and fact common to the
8 class." CR 23(a). Washington's prevailing wage law requires employers to pay prevailing
9 wages to all "laborers, workers, or mechanics" who work "upon all public works and under all
10 public building service maintenance contracts of the state or any county, municipality or
11 political subdivision created by its laws." RCW 39.12.020. The question presented in this case
12 is whether the work conducted by Defendant's 48 different drivers at thousands of different
13 public works sites meets the "work upon" standard of the statute. The record before this Court
14 shows the question of whether the statute is applicable to any given driver at any given job-site
15 depends on many site specific factors. Here, the record shows these factors vary from site to
16 site and from driver to driver. As such, Plaintiffs have not demonstrated the questions
17 presented by their claims are common to those of all class members.

18 In determining the questions presented here are individualized and not common, the
19 Court notes there is a paucity of Washington case law discussing the "work upon" standard.
20 The Court did, however, find the analysis performed in both *Silverstreak, Inc. v. Wash. State*
21 *Dept. of Labor & Indus.*, 125 Wn. App. 202, 104 P.3d 699 (2005), and *Superior Asphalt and*
22 *Concrete Co. v. Dep't of Labor and Indus.*, 112 Wn. App. 291, 49 P.3d 135 (2002), while not
23 on point, to be instructive by analogy. Those cases illustrate the highly individualized and site
24 specific nature of the analysis conducted by Courts to determine the statute's applicability.

25 2. Typicality

26 "A plaintiff's claim is typical if it arises from the same event or practice or course of
conduct that gives rise to the claims of other class members, and if his or her claims are based

1 on the same legal theory.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665
2 (2002). Here, while the claims of both Plaintiffs and the class may be based on the same legal
3 theory, Plaintiffs have failed to show the named Plaintiffs’ claims are based on facts typical of
4 all class members. The record before the Court shows the facts relevant here will vary from
5 class member to class member, site to site, and even load to load. Thus, Plaintiffs have failed
6 to show their claims are typical of the class.

7 3. Adequacy of Representation, CR 23(a)(4)

8 Courts will not certify a class action unless the plaintiff can establish “the representative
9 parties will fairly and adequately protect the interests of the class.” CR 23(a)(4). Here, the
10 Court finds the class representatives are marginally adequate to represent the class and Class
11 Counsel are also more than adequate to represent the class.

12 **C. CR23(b) requirements**

13 Plaintiffs seek to certify this action under CR 23(b)(3). As such, Plaintiffs must show
14 that “the questions of law or fact common to the members of the class predominate over any
15 questions affecting only individual members, and that a class action is superior to other
16 available methods for the fair and efficient adjudication of the controversy.” CR 23(b)(3).

17 1. Predominance

18 To satisfy CR 23(b)(3)’s predominance requirement, Plaintiffs bear the burden to show
19 questions of law and fact common to members predominate over questions affecting only
20 individual members. CR 23(b)(3). Plaintiffs must show “the issue shared by the class
21 members is the dominant, central, or overriding issue shared by the class.” *Miller v. Farmer*
22 *Bros. Co.*, 115 Wn. App. 815, 820 (2003) (citing *Conte and Newberg*, 1 *Newberg on Class*
23 *Actions* § 4.25 at 4–85 (4th ed. 2002)). Moreover, the Court must engage “in a pragmatic
24 inquiry into whether there is a common nucleus of operative facts to each class member’s
25 claim.” *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 26 n.44, 65 P.3d 1 (2003).

1 As noted above, the Court finds the issues presented by any given driver at any given
2 job-site are not common to other class members. To the extent there may be some common
3 issues, Plaintiff has failed to show they are the “dominant, central, or overriding issue shared by
4 the class.”

5 2. Superiority

6 To determine whether a proposed class action meets the superiority requirement, this
7 Court must consider whether concentrating the litigation in a single forum is desirable.
8 CR 23(b)(3)(C). If a case raises “a large number of individual issues that pertain only to
9 individual class members,” class action treatment is not superior to individual actions.
10 *Schwendeman*, 116 Wn. App. at 29. Again, to make determinations of whether the prevailing
11 wage statute applies to Defendant’s drivers, this Court must review evidence and make
12 individualized findings for each class member.

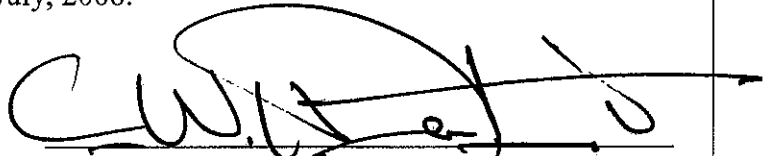
13 Claims such as these require an individualized site-specific investigation. The Court
14 reaches this conclusion in part because this is exactly the type of investigation the Department
15 of Labor and Industries conducts when employees file administrative complaints regarding this
16 same type of issue. RCW 39.12.065. This Court would have to do the same for each class
17 member at each site worked. Because the results of such investigations will vary from site to
18 site and driver to driver, concentrating the litigation in a single forum is not desirable and not
19 superior to individual actions.

20 **CONCLUSION**

21 Plaintiffs have failed to prove this action satisfies the requirement of CR 23 for class
22 treatment. Resolution of this case would require the Court to make individualized findings of
23 fact regarding numerous job-site specific issues. These individualized findings will
24 predominate at any trial. Because these individualized issues so predominate, Plaintiffs cannot
25 demonstrate this action meets the requirements for commonality, typicality, predominance, or
26 superiority.

1 For all the reasons noted above, **IT IS HEREBY ORDERED** Plaintiffs' Motion for
2 Class Certification is **DENIED WITHOUT PREJUDICE**.

3 DATED this 25TH day of July, 2006.

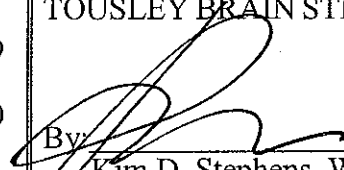
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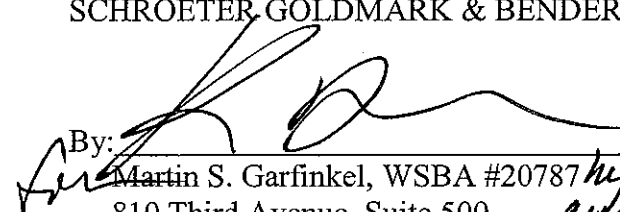
7 Presented by:

Approved as to form; notice of presentation
waived:

8 TOUSLEY BRAIN STEPHENS PLLC

SCHROETER GOLDMARK & BENDER

9
10 By: 
11 Kim D. Stephens, WSBA #11984
12 Nancy A. Pacharzina, WSBA #25946
13 Jennifer Rust Murray, WSBA #36983
14 1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
Tel: 206.682.5600
Fax: 206.682.2992

By: 
11 Martin S. Garfinkel, WSBA #20787 *electronic*
12 810 Third Avenue, Suite 500 *authorization*
13 Seattle, Washington 98104 *of 7/21/06*
14 Tel: 206.622.8000
Fax: 206.682.2305

15 DAVIS GRIMM PAYNE & MARRA
16 John M. Payne, WSBA #11707
17 701 Fifth Avenue, Suite 4040
18 Seattle, Washington 98104
Tel: 206.447.0182
Fax: 206.622.9927

SCHWERIN CAMPBELL BARNARD LLP
Dmitri Iglitzin, WSBA #17673
18 West Mercer Street, Suite 400
Seattle, Washington 98119
Tel: 206.285.2828
Fax: 206.378.4132

19 *Attorneys for Defendant*

Attorneys for Plaintiffs