

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

II. EVIDENCE REVIEWED

In ruling on this motion for class certification, the Court has considered the following briefing and evidence submitted by the parties and heard oral argument:

- Plaintiffs' Motion for Class Certification;
- The Declaration of Ian S. Birk in Support of Plaintiffs' Motion for Class Certification and the attached Exhibits A-L;
- The Declarations of M.N., A.B., and G.T. in support of the Motion to Certify Class;
- Defendant MultiCare Health System, Inc.'s Response to Plaintiffs' Motion for Class Certification;
- The Declaration of Jennifer D. Koh in Support of Defendant's Response to Plaintiffs' Motion for Class Certification and the attached Exhibits 1-5; and
- Plaintiffs' Reply in Support of Motion for Class Certification.

III. PROCEDURAL HISTORY AND FACTS RELEVANT TO CLASS CERTIFICATION

Factual allegations were brought to the Court's attention relevant to class certification under CR 23 and support the Court's Order granting class certification. However, the Court makes no findings at this time regarding the application of such facts to any substantive claims or defenses in the action and specifically does not pre-judge the outcome of any factual dispute in the action.

A. **Timeline of the Hepatitis C Outbreak and Resulting Investigation.**

On December 7, 2017, a male patient visited MultiCare's Good Samaritan ED with acute appendicitis. Birk Decl., Ex. D at 8. In the ED, the patient received an injection of hydromorphone from MultiCare Nurse Weberg. *Id.* He returned to Good Samaritan on January 11, 2018, with an acute case of Hepatitis C. *Id.* The patient had no known history of Hepatitis C, prior blood transfusions, or intravenous drug use. *Id.*

- Electronic Experte (3738505) -

1 On March 20, 2018, a second Hepatitis C-positive patient reported to the Good
2 Samaritan ED. *Id* at 7. The second patient, a female, had visited the Good Samaritan ED on
3 December 16, 2017, with complications following cervical spine surgery. *Id*. She was given
4 multiple doses of fentanyl by Nurse Weberg. *Id*. Like the first patient, the second patient had
5 no known history of Hepatitis C, prior blood transfusions, or intravenous drug use. *Id*.

6 The infections were hospital-originated. Birk Decl., Ex. A at 60:25-61:25; 102:18-
7 104:5. Nurse Weberg was placed on administrative leave on March 13, 2018. Birk Decl. Ex. E.
8 After a meeting with representatives from MultiCare's Human Resources and Good Samaritan
9 ED's Clinical Nursing Director Kelsey Petersen on March 19, 2018, Nurse Weberg submitted
10 to a Hepatitis C test and was placed back on the schedule. Birk Decl. Exs. F at 125:14-16;
11 216:8-25 and E.

12 Nurse Weberg's test results showed that she had antibodies to Hepatitis C, but no
13 Hepatitis C viral RNA was detected, indicating Nurse Weberg had a prior Hepatitis C infection,
14 but had no active virus on March 19, 2018, when she gave blood for testing. Birk Decl, Ex. G.
15 Prior to testing, Nurse Weberg was not ruled out as the source of the infection. She returned to
16 work on March 23, 2018, until she was pulled from the floor and given a drug screen upon
17 MultiCare's receipt of her Hepatitis C test results. Birk Decl. Ex. E. Nurse Weberg's initial
18 drug screen was clean, but when requested to provide a hair follicle for more extensive testing,
19 she resigned. Birk Decl., Exs. D at 7, H, I.

20 Officials genetically-matched the two known Hepatitis C cases to another case of
21 known Hepatitis C that was treated in Good Samaritan's ED in November 2018. Birk Decl.,
22 Exs. A at 102:18-104:5 and B at 1-2. Eventually, all twelve hospital-originated cases of
23 Hepatitis C were genetically linked. Birk Decl., Ex. B at 1. The common link between all was
24 injection of narcotics by Nurse Weberg. *Id*. at 3.

25 On March 12, 2019, the Washington Nursing Care Quality Assurance Commission
26 issued formal findings and suspended Nurse Weberg's nursing license for eighteen months

[PROPOSED] ORDER- 3

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

0700
1243
0303/23/1

1 beginning May 9, 2018, followed by a three-year probation period, for diversion of injectable
2 fentanyl and hydromorphone for personal use. Birk Decl., Ex. J at 4-5. A formal investigation
3 by the CDC concluded Nurse Weberg was the probable source of the Hepatitis C outbreak as a
4 result of drug diversion. Birk Decl., Ex. B at 2-3. MultiCare has stated that it agrees with the
5 CDC's conclusions that Nurse Weberg was the source. Birk Decl., Ex. A at 102:18-104:5.

6 **B. MultiCare's Response to the Hospital-Originated Hepatitis C Outbreak.**

7 On April 28, 2018, MultiCare mailed letters to approximately 2,800 patients who
8 visited the Good Samaritan ED between August 4, 2017, and March 23, 2018, notifying them
9 that they should be tested for Hepatitis C following the confirmation that two patients who
10 were treated in December likely contracted the disease while in the facility ("Notification
11 Letter"). Birk Decl., Exs. B at I and K. MultiCare asked each of the 2,762 patients, including
12 Plaintiffs and class members, to take a free, confidential test for, Hepatitis C and other diseases
13 in accordance with the Center for Disease Control and Prevention's Protocols. Birk Decl. Ex K,
14 Declaration of M.N. ("M.N. Decl."), ¶ 3; Declaration of A.B. ("A.B. Decl."), ¶ 3; and
15 Declaration of G.T. ("G.T. Decl."), ¶ 3. Of the 2,762 patients notified, 208 were treated directly
16 by Nurse Weberg. By late August 2018, thirteen genetically-matched cases of Hepatitis C were
17 identified by the CDC, including the pre-existing case of Hepatitis C that also received
18 injectable narcotics from Nurse Weberg. Birk Decl, Ex. B at 2.

19 **C. Procedural History of This Case and the Named Plaintiffs' Experiences.**

20 M.N. filed the current action on behalf of herself and those similarly situated on May
21 11, 2018. M.N. amended the Complaint on August 2, 2018, to add A.B., G.T., and W.N. On
22 August 28, 2018, W.N. was dismissed without prejudice from the litigation. The Amended
23 Complaint alleges negligence by MultiCare for failing to exercise a degree of care expected of
24 a reasonably prudent hospital and a duty to safeguard patients' well-being.

25 All Plaintiffs were patients in Good Samaritan ED when Nurse Weberg was on duty,
26 received injectable narcotics during their time in the ED, and received the Notification Letter

1 from MultiCare. A.B. was treated by Nurse Weberg, while it is believed that M.N. and G.T.
2 were not.

3 M.N., A.B. and G.T. tested negative upon initial testing for Hepatitis B, Hepatitis C and
4 HIV, but they, as well as class members generally, allege anxiety, emotional distress, and
5 inconvenience as a result of the risk of exposure to serious communicable diseases caused by
6 MultiCare's alleged breach of the standard of care with respect to Nurse Weberg's hiring and
7 supervision. A.B. was seen by Nurse Weberg, but M.N. and G.T. were not.

8 On December 6, 2019, the Court heard oral argument on Plaintiffs' motion for class
9 certification of their claims against MultiCare. At the hearing, the Court orally granted
10 Plaintiffs' motion and certified two classes.

11 The first class contains the 208 persons who were patients in Good Samaritan ED when
12 Nurse Weberg was on duty, were treated by Nurse Weberg, received injectable narcotics during
13 their time in the ED, and received the Notification Letter from MultiCare. A.B. is the
14 representative for this class.

15 The second class contains the remaining 2,584 persons who were patients in Good
16 Samaritan ED when Nurse Weberg was on duty, received injectable narcotics during their time
17 in the ED, and received the Notification Letter from MultiCare, but are not believed to have
18 been directly treated by Nurse Weberg. This class is represented by M.N. and G.T.

19 IV. ANALYSIS

20 A. General standards for certifying class actions.

21 As summarized by our Supreme Court in *Chavez*:

22 Washington courts liberally interpret CR 23 because the "rule avoids
23 multiplicity of litigation, 'saves members of the class the cost and trouble of
24 filing individual suits[,] and ... also frees the defendant from the harassment of
25 identical future litigation.'" *Smith v. Behr Process Corp.*, 113 Wash.App. 306,
26 318, 54 P.3d 665 (2002) (alterations in original) (quoting *Brown*, 6 Wash.App.
at 256-57, 492 P.2d 581). Accordingly, courts should err in favor of certifying a
class because the class is always subject to the trial court's later modification or
decertification. *See Oda v. State*, 111 Wash.App. 79, 91, 44 P.3d 8 (2002).

1 *Chavez*, 190 Wn. 2d at 515.

2 To prevail, a movant must show that the four threshold factors of CR 23(a) are satisfied
3 and that at least one of the three subsections of CR 23(b) is met. *See Wash. Educ. Ass'n v.*
4 *Shelton Sch. Dist.*, 93 Wn.2d 783, 789, 613 P.2d 769, 773 (1980).

5 **B. CR 23(a)**

6 Pursuant to CR 23, four initial prerequisites must be met for class certification:
7 numerosity, commonality, typicality, and adequacy of representation. Here, the Court finds that
8 all four are met for each class.

9 **1. Numerosity**

10 Under CR 23(a)(1), the question for the Court is whether the class is so numerous that
11 joinder of all the members is impractical. The two classes combined consist of 2,762 patients
12 who visited the MultiCare Good Samaritan Emergency Department between August 4, 2017,
13 and March 23, 2018, when Nurse Cora Weberg was on duty and received injectable narcotics.
14 “As a general rule, joinder is impracticable where a class contains at least 40 members.”
15 *Chavez*, 190 Wn. 2d at 520, *citing Miller v. Farmer Bros. Co.*, 115 Wn. App: 815, 821 (2003)
16 (collecting cases).

17 Given the large number of members in each class—208 in the first class and 2,584 in
18 the second class—the Court finds that numerosity has been satisfied making joinder of all class
19 members impracticable.

20 **2. Commonality**

21 A representative of a putative class also must show that “there are questions of law or
22 fact common to the class.” CR 23(a)(2). “[T]here is a low threshold to satisfy this test.” *Smith*
23 *v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665 (2002). “[C]ommonality exists
24 when the legal question linking the class members is substantially related to the resolution of
25 the litigation even though the individuals are not identically situated.” *Miller*, 115 Wn. App. at
26 824. “The commonality test ‘is qualitative rather than quantitative, that is, there need be only a

- Electronic Experte (3738505) -

1 single issue common to all members of the class.” *Smith*, 113 Wn. App. at 320 (citations
2 omitted).

3 The Court finds that at least the following common questions of law and fact exist for
4 the first class:

- 5 • All class members were patients at the Good Samaritan ED during the time
6 period in which Cora Weberg was employed;
- 7 • All were treated by Nurse Weberg;
- 8 • All received injectable narcotics in the MultiCare Good Samaritan ED when
9 Nurse Weberg was on shift;
- 10 • All received the Notification Letter from MultiCare;
- 11 • Whether Defendant was negligent in its hiring practices regarding Cora Weberg;
- 12 • Whether Defendant was negligent in its supervision of Cora Weberg during her
13 employment with MultiCare; and
- 14 • Whether Defendant was negligent in its management of narcotic pain
15 medications.

16 Likewise, the Court finds the same common questions and fact exist for the second
17 class, with the only difference that none of the class members are believed to have been directly
18 treated by Nurse Weberg.

19 Because each of the two classes contains at least one issue common to all members of
20 that particular class, the Court finds that commonality in each class has been met.

21 **3. Typicality**

22 CR 23(a)(3) requires that the claims or defenses of the representative parties be typical
23 of the claims or defenses of the class. “The requirements of commonality and typicality tend to
24 merge, and are often addressed as a single issue.” *Oda v. State*, 111 Wn. App. 79, 89, 44 P.3d 8
25 (2002), citing *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364
26 (1982).

[PROPOSED] ORDER- 7

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

4700
1242
0202/23/1

- Electronic Experte (3738505) -

1 A proposed class representative's claim is considered typical if it "arises from the same
2 event or practice or course of conduct that gives rise to the claims of other class members, and
3 if his or her claims are based on the same legal theory." *Smith*, 113 Wn. App. at 320.

4 Here, Plaintiffs' claims rely on the same underlying facts—all class members were
5 patients at MultiCare and received the Notification Letter from MultiCare offering testing for
6 Hepatitis C, Hepatitis B, and HIV. To recover on their claims, all members of both classes will
7 be required to make the same showing that MultiCare breached the standard of care in its hiring
8 or supervision of Cora Weberg, or its management of narcotic pain medications, thereby
9 causing damages.

10 The Court is certifying two classes at this time because it is unclear whether the 208
11 member class treated by Nurse Weberg will be subject to different standards than the 2,584
12 member class who were not directly treated by Nurse Weberg. A.B. was treated by Nurse
13 Weberg and M.N. and G.T. are not believed to have been treated by Nurse Weberg. Therefore,
14 the class representatives' claims are typical of the other class members in each of their
15 respective classes.

16 **4. Adequacy**

17 CR 23(a)(4) requires that "the representative parties will fairly and adequately protect
18 the interests of the class." Courts look to whether the named plaintiffs and their counsel have
19 conflicts of interest with other class members and whether the named plaintiffs and their
20 counsel will fairly and adequately represent the class. *Marquardt v. Fein*, 25 Wn. App. 651,
21 657, 612 P.2d 378, 381 (1980).

22 The Court finds that A.B. fairly and adequately represents the class composed of 208
23 members treated by Nurse Weberg and M.N. and G.T. fairly and adequately represent the class
24 composed of 2,584 members who were not directly treated by Nurse Weberg. The Court does
25 not find any facts demonstrating that the named Plaintiffs have any interests that conflict with
26 other members in their respective classes that would prevent them from fairly and adequately

0045
1243
0200

1 representing the interests of each class. The Court also finds that Plaintiffs' counsel is qualified
2 to represent both classes.

3 In sum, the Court finds that numerosity, commonality, typicality, and adequacy have
4 been met within each class based on the factual record.

5 **C. CR 23(b)(3)**

6 Certification under this subsection is appropriate if “[t]he court finds that the questions
7 of law or fact common to the members of the class predominate over any questions affecting
8 only individual members, and that a class action is superior to other available methods for the
9 fair and efficient adjudication of the controversy.” CR 23(b)(3). Both the predominance and
10 superiority components are met here.

11 **1. Predominance**

12 “To determine whether common issues predominate over individual ones, a trial court
13 pragmatically examines whether there is a common nucleus of operative facts in each class
14 member’s claim. The relevant inquiry is whether the issue shared by class members is the
15 dominant, central, or overriding issue in the litigation.” *Chavez*, 190 Wn. 2d at 516 (citations
16 omitted). “A single common issue may be the overriding one in the litigation, despite the fact
17 that the suit also entails numerous remaining individual questions.” *Sitton v. State Farm Mut.*
18 *Auto. Ins. Co.*, 116 Wn. App. 245, 254, 63 P.3d 198 (2003) (citation omitted). “That class
19 members may eventually have to make an individual showing of damages does not preclude
20 class certification.” *Smith*, 113 Wn. App. at 323.

21 The Court finds that the central issue in this case—whether MultiCare breached a duty
22 of care owed to 2,792 class members through negligent hiring and monitoring of Nurse Cora
23 Weberg—is common among all class members and predominates over any individual issues.
24 All class members were patients in the MultiCare Good Samaritan ED between August 4, 2017,
25 and March 23, 2018, and all received the Notification Letter beginning in April 2018. All class
26 members’ claims for damages stem from the alleged breach of the standard of care as to the

1 hiring and monitoring of Nurse Weberg. The creation of two classes eliminates any concern
2 that patients not directly treated by Nurse Weberg may not be entitled to relief under the same
3 cause of action. And to the extent there may be differences among some of the class members'
4 individual facts as to damages, this does not preclude class certification.

5 Accordingly, the Court finds that within each class, common issues predominate over
6 individual ones in this case.

7 **2. Superiority**

8 Consideration of whether a class action is superior "is a highly discretionary
9 determination that involves consideration of all the pros and cons of a class action as opposed
10 to individual lawsuits." *Miller*, 115 Wn. App. at 828. Relevant findings include:

- 11 (A) the interest of members of the class in individually controlling the prosecution or
12 defense of separate actions;
- 13 (B) the extent and nature of any litigation concerning the controversy already
14 commenced by or against members of the class;
- 15 (C) the desirability or undesirability of concentrating the litigation of the claims in the
16 particular forum;
- 17 (D) the difficulties likely to be encountered in the management of a class action.

18 CR 23(b)(3).

19 Here, the Court finds that a class action is the superior method for resolution of each
20 class's disputes compared to the potential for thousands of individual claims.

21 First, the Court finds that any interest that the members of each class have in
22 individually controlling this litigation is outweighed by the fact that the case involves common
23 issues of liability that can and should be resolved through certified classes.

24 Second, the record shows that Plaintiffs have already engaged in extensive discovery
25 and pretrial litigation. It is to the advantage of the class members—and the Court—that this
26 discovery and expert analysis be afforded to all the class members, rather than face repetition in

2400
9451
0503/22/1
1/23/2020 1243

1 claim after claim.

2 Third, the Court finds it desirable to concentrate the litigation of the class claims in
3 Pierce County because MultiCare Good Samaritan Hospital is located in Puyallup, Pierce
4 County, Washington and each of the ED visits giving rise to the class members' claims
5 occurred at this location.

6 Finally, at this time the Court does not find any significant difficulties likely to be
7 encountered in the management of this class action. All members of the two classes are known
8 or can be identified through discovery of MultiCare's records, who sent the notifications to the
9 class members. Allowing this matter to proceed as two class actions instead of numerous
10 individual lawsuits will significantly lessen the burden on the court system and the parties and
11 ensure consistent results among all class members.

12 **V. CLASS DEFINITION & CLASS NOTICE**

13 Consistent with and subject to the analysis and findings of fact outlined in this Order,
14 the Court therefore certifies two classes. The first class defined as the "Weberg Treatment
15 Class" consists of the following:

16 All persons who were treated at the MultiCare Good Samaritan Hospital in
17 Puyallup, Washington, between August 4, 2017, and March 23, 2018, who
18 received care from Cora Weberg, and received notification letters in April 2018
19 from MultiCare.

20 The second class defined as the "General Treatment Class" consists of the following:

21 All persons who were treated at the MultiCare Good Samaritan Hospital in
22 Puyallup, Washington, between August 4, 2017, and March 23, 2018, and
23 received notification letters in April 2018 from MultiCare, but who did not
24 receive care from Cora Weberg.

25 The Court appoints Plaintiff A.B. as representative for the first class consisting of
26 patients treated by Nurse Weberg and Plaintiffs M.N. and G.T. as class representatives for the
second class consisting of patients that are not believed to have been directly treated by Nurse
Weberg. Keller Rohrback L.L.P. is appointed as class counsel for both classes.

- Electronic Experte (3738505) -


1 The Court further directs that notice shall be sent to the members of each class. The
2 parties shall confer on a proposed form of notice. If the parties fail to agree on a proposed form
3 of notice, Plaintiffs shall submit a motion for entry of Plaintiffs' proposed form of notice within
4 14 days of the date of this order and note a hearing consistent with PCLR 7(a). Defendants may
5 file and serve a response in opposition not later than 12:00 noon three (3) court days before the
6 date the motion is scheduled for hearing. Any reply shall be served no later than 12:00 noon
7 two (2) court days before the date the motion is scheduled for hearing.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
[PROPOSED] ORDER- 12

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

6400 0049
1848
0505/22/1
1/23/2020

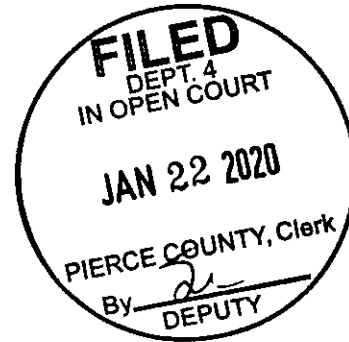
IT IS SO ORDERED this 22 day of January, 2020.


The Honorable Brian Chushcoff
Superior Court Judge

Presented by:

KELLER ROHRBACK L.L.P.

By /s/ Cari Campen Laufenberg
Ian S. Birk, WSBA #31431
Cari Campen Laufenberg, WSBA #34354
Jeff Comstock, WSBA #41575
Mark S. Samson, *pro hac vice*
Attorneys for Plaintiffs



Approved for entry/Notice of Presentation Waived:

Fain Anderson VanDerhoef
Rosendahl O'Halloran Spillane, PLLC

By: /s/ Joseph V. Gardner
Michele C. Atkins, WSBA #32435
Jennifer Koh, WSBA #25464
Todd W. Reichert, WSBA #35557
Joseph V. Gardner, WSBA #53340
Attorneys for Defendant MultiCare Health System, Inc.

0050
1243
0202/25/1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26