NO. 94593-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER, on behalf of themselves and all persons similarly situated

Plaintiffs/Respondents/Cross-Petitioners,

v.

GARDA CL NORTHWEST, INC., f/k/a AT SYSTEMS, INC. a Washington Corporation

Defendant/Petitioner

ANSWER AND CROSS-PETITION FOR REVIEW

Daniel F. Johnson, WSBA No. 27848
BRESKIN JOHNSON & TOWNSEND PLLC
1000 Second Avenue, Suite 3670
Seattle, Washington 98104
Phone: (206) 652-8660
Fax: (206) 652-8290

Adam J. Berger, WSBA No. 20714
SCHROETER GOLDMARK & BENDER
500 Central Building
810 Third Avenue,
Seattle, WA 98104
(206) 622-8000

Attorneys for Plaintiffs/Respondents

TABLE OF CONTENTS

I. INTRODUCTION AND IDENTITY OF CROSS-PETITIONERS 1

II. ISSUES PRESENTED FOR REVIEW IN CROSS-PETITION.....2

III. STATEMENT OF THE CASE 2

IV. ANSWER TO PETITION FOR REVIEW.....5

A. The Court Of Appeals Did Not "Fail to Reconcile" Its Own Decisions In *Pellino* And *White v. Salvation Army*. 5

B. There Is No "New Rule" Or Conflict Arising From Denial Of Garda's FAAAA Preemption Defense. 8

C. Garda's Only Argument In Support Of Its Meal Period "Waiver" Defense Is Fundamentally Flawed. 10

D. Plaintiffs Sought "On Duty" Meal Periods Under Washington Law, Not Under Garda's CBAs. 13

E. Damages for Meal Period Violations Are "Wages." 14

V. ARGUMENT IN SUPPORT OF CROSS-PETITION.....15

A. The Court Of Appeals Erred In Reversing The Trial Court's Award Of Double Damages For Denial Of Meal Breaks Because Garda's Waiver Defense Was Not Fairly Debatable. 15

B. Prejudgment Interest Is Appropriate On Compensatory Damages Regardless Whether Exemplary Damages Are Also Awarded. 18

VI. CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

Blake v. Grant, 65 Wn.2d 410, 397 P.3d 843 (1965) 19

Brady v. Autozone Stores, Inc., - Wn.2d - , No. 93564-5 (June 29, 2017) 7

Cal. Tow Truck Ass'n v. City of San Francisco, 693 F.3d 847 (9th Cir. 2012)..... 9

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)..... 13

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)..... 12

Demetrio v. Sakuma Bros. Farms, Inc., 183 Wash. 2d 649, 355 P.3d 263 (2015)..... 6

Dept. of Labor & Ind. v. Overnite Transp. Co., 67 Wn. App. 24, 834 P.2d 638 (1992)..... 16, 18

Dilts v. Penske Logistics, LLC, 769 F.3d 637 (9th Cir. 2014)..... 8, 10

Dunbar Armored, Inc. v. Rea, 2004 U.S. Dist. LEXIS 31685 (S.D. Cal. July 8, 2004)..... 10

Durand v. HMC Corp., 151 Wn. App. 818, 214 P.3d 189 (2009)..... 20

Hill v. Garda CL NW, 179 Wn.2d 47, 308 P.3d 635 (2013)..... 4

Hill v. Garda CL NW., Inc., 198 Wn. App. 326 (2016)..... passim

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 93 P.3d 108 (2004)..... 13

Kalmanovitz v. Standen, 2016 U.S. Dist. LEXIS 27478 (W.D. Wash. March 3, 2016)..... 20

Metro. Life Ins. Co. v. Mass., 471 U.S. 724 (1985)..... 12

Morgan v. Kingen, 166 Wash. 2d 526, 210 P.3d 995 (2009) 19

Rayonier, Inc. v. Polson, 400 F.2d 909 (9th Cir. 1968) 19

Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 961 P.2d 371 (1998) 16, 19

Stevens v. Brink's Home Sec., Inc., 162 Wn.2d 42, 169 P.3d 473 (2007) 19

Valadez v. CSX Intermodal Terminals, Inc., 2017 U.S. Dist. LEXIS 66923 (N.D. Cal. Apr. 10, 2017) 9

Ventoza v. Anderson, 14 Wn. App. 882, 545 P.2d 1219 (1976) 19

Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr., 175 Wn.2d 822, 287 P.3d 516 (2012) 13

White v. Salvation Army, 118 Wn. App. 272, 75 P.3d 990 (2003) 5

Wingert v. Yellow Freight Sys., 146 Wn.2d 841, 50 P.3d 256 (2002) 15

Statutes

29 U.S.C. § 185(a) 13

RCW 49.12 ..... 9, 11, 12

RCW 49.12.187 11

RCW 49.52 ..... 2, 20

RCW 49.52.050 16

RCW 49.52.070 ..... 15, 16

Other Authorities

Wash. Dept. Labor & Ind. Admin. Policy ES.C.6 ..... 11, 17

Regulations

WAC 296-126-092 ..... passim

I. INTRODUCTION AND IDENTITY OF CROSS-PETITIONERS

Plaintiffs and Cross-Petitioners Larry Hill, Adam Wise, and Robert Miller represent a class of 480 truck crew employees of Petitioner Garda CL Northwest, an armored car company operating throughout the state of Washington. Clerk's Papers ("CP") 4, 3807. Garda did not provide class members with rest or meal breaks while working, as required by state law. Instead, Garda required truck crews to remain constantly vigilant in guarding its armored cars and currency and forbade them to engage in any personal activities while on their routes. *See, e.g.*, CP 2780-81. Plaintiffs sued in February 2009 and after years of litigation, including review by this Court, there was a bench trial in 2015 which resulted in a judgment for the Plaintiffs for over $9 million. CP 3977, 4200, 4209.

The Court of Appeals affirmed in all respects except that it overturned the court's award of double/exemplary damages on Plaintiffs' meal break claim and the award of pre-judgment interest on Plaintiffs' rest break claim. Garda seeks review in this Court on five grounds, all of which are baseless. Washington wage law is not preempted by federal laws, Plaintiffs could not and did not waive their right to lawful meal breaks through Garda's collective bargaining agreements, and there was no material factual dispute to warrant a trial on Plaintiffs' rest break claim. This Court should deny Garda's Petition for Review.

This Court should grant review of the Court of Appeals' decision insofar as it overturns the trial court's findings and conclusions concerning damages. The Court of Appeals erroneously narrowed the application of RCW 49.52 by holding that an employer may avoid exemplary damages simply by asserting a legal defense, even if it has no basis in fact or law. And the court wrongly applied a rule from timber trespass cases to the Washington wage statute, holding for the first time that pre-judgment interest on compensatory damages cannot be recovered when exemplary damages are awarded for willful withholding of wages due. The Court should take review and reverse on these two important issues.

II. ISSUES PRESENTED FOR REVIEW IN CROSS-PETITION

1. Whether an employer may avoid exemplary damages for willful withholding of wages due under RCW 49.52 based on a legal defense that has no merit and is not fairly debatable in fact or law.

2. Whether prejudgment interest should be denied to employees who recover wages willfully withheld because they also are entitled to exemplary damages.

III. STATEMENT OF THE CASE

Members of the Plaintiff class are current and former driver/messengers employed by Garda to transport currency and other valuables to and from commercial clients and banks. CP 2857-58. They work in teams of two and perform an assigned route. CP 2859. Routes do not include any scheduled breaks. *See* CP 4288.

Garda policy prohibits all personal activities and use of personal materials by crew members while on route. CP 2772-2773; CP 3337, 3351. Representative class members from all of Garda's Washington branches testified that they do not get true rest or meal breaks during which they can relax and exercise personal choice over their activities, and there was insufficient time for anything other than a quick run to the bathroom or to grab a sandwich or snack to eat in the truck while driving.[1]

Furthermore, Plaintiffs were required to remain "on duty" and vigilant to threats against the truck and its liability at all times.

> Each member of the armored crew must remain alert at all times for the success of our operations. Look alert and be alert. Don't take anything for granted…. Certainly, be alert from a security standpoint. Be suspicious of anyone or anything you observe that looks unusual…. The criminal is always looking for opportunities to attack the armored crew who are doing their job in a lackadaisical and routine way….

[1] *See* CP 2854 (stopping to use the bathroom was "as fast as possible, a few minutes"); CP 2972-2974 ("we had to make time [to use the bathroom at a stop we serviced] because we weren't allowed specific time for that"); CP 2880-2882 (bathroom breaks were "just quick at the rest stop if you had to go" and folks would "run into like a gas station or after they picked up McDonalds on the way out they would grab something"); CP 2885 ("You didn't have a lunch break. You couldn't stop anywhere."; "if you got something on the way out, it was quick, grab something, pay for it and you're out"). *See also* CP 2890, 2897, 2899, 2902, 2852-53, 3143; CP 4360, 4362; CP 4393, 4410, 4411; CP 2872. Many class members testified that they had to urinate in bottles while remaining on the truck due to time pressures. *See* CP 3129; CP 2933-2934 (peeing in bottles was a common occurrence); CP 2925 (manager acknowledges that he was aware that employees peed in bottles).

CP 2776. Garda's own CR 30(b)(6) witness flatly admitted that the company does not provide truck crews with work-free, vigilance-free rest breaks or meal periods. CP 2966-2967.

Garda requires its truck crew employees to sign a "labor agreement." *See Hill v. Garda CL NW*, 179 Wn.2d 47, 50, 308 P.3d 635 (2013).[2] As this Court observed in a prior appeal regarding the arbitration clause in those contracts, although they are ostensibly "negotiated" between Garda and the "employee associations" at each branch, the associations are not "unions" in the conventional sense. *Id.* Employees do not pay dues, and the associations have no resources. *Id*. The associations are not able to truly "negotiate" with the company and for the most part have to accept whatever contract is offered. *Id.* at 51. The language of all the agreements at each branch is nearly identical. *See id.*

There are at least 17 Labor Agreements that were in use across the seven Garda branches during the nine-year class period. *See* Garda's Opening Brief Appendix.[3] Three contain a provision that purports to waive meal periods. *See* Appellant's Appendix; CP 2609, 2613, 2617. These three agreements were executed after this lawsuit was filed and

[2] Some employees did not sign these CBAs, and many did not recall signing or receiving a copy of the applicable agreement. *See, e.g.*, CP 1000-01; CP 1012; CP 1024, 1027; CP 1843.

[3] At least two agreements are missing from the Appendix: one used in Seattle starting in 2012 and another used in Tacoma starting in 2013. *E.g*, CP 4230-59.

after the class had been certified, were in use for only a few years in Garda's smallest branches, and were individually signed by only 29 out of 480 class members. *See id*. The origin of the change to add these waiver provisions is unexplained and apparently unknown, even to Garda. 9/21/15 Report of Proceedings (RP) at 53, 66-68. There is no evidence that any individual employees were aware of the change.

All of the other Labor Agreements—covering a vast majority of the class—do not say the employees waive their meal breaks. Instead, some of those agreements provide for an "unscheduled" meal period, while the others provide for an "on duty" meal period.[4] *See* Appellant's Appendix. There is no evidence that any employee or association has ever negotiated with Garda about its meal and rest break policies or practices.

IV. ANSWER TO PETITION FOR REVIEW

A. The Court Of Appeals Did Not "Fail to Reconcile" Its Own Decisions In *Pellino* And *White v. Salvation Army*.

Garda contends the Court of Appeals "failed to reconcile" *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), and *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003). Pet. at 8. However, the court did distinguish *White*, in this case and in *Pellino*. *Hill*

[4] The agreements also purport to permit employees to take an "off-duty" meal period if they "make arrangements with their supervisors in advance." *See* Appellant's Appendix. It is undisputed that no class member has ever received an "off-duty" meal period.

v. Garda CL NW., Inc., 198 Wn. App. 326, 356 (2016); *Pellino*, 164 Wn. App. at 691.[5] As the court noted in *Pellino*, *White* held that requiring employees to be on call during rest breaks does not violate the rest break requirement so long as the breaks truly offer "relief from work or exertion." *Pellino*, 164 Wn. App. at 691 (quoting *White*, 118 Wn. App. at 283). However, armored vehicle crews who must remain constantly on guard are not merely "on call" and are not relieved from work or exertion. *Id.* at 692. The inconsistency imagined by Garda does not exist and offers no basis for this Court's review.

Garda also contends the Court of Appeals contradicted *Pellino* itself, by deciding Plaintiffs' rest break claim as a matter of law, "when *Pellino* decided it as an issue of fact." Pet. at 9. Garda misunderstands summary judgment; cases can and should be decided as a matter of law where, as here, there is no genuine dispute about material facts. In affirming, the Court of Appeals pointed to Garda's unequivocal written policies that require constant vigilance and prohibit personal activities and the explicit admission of Garda's designee that crews always had to remain alert and on guard for threats to themselves and Garda's property. *See Hill*, 198 Wn. App. at 356; CP 2966-67; *see also Hill* at 358 (because

[5] This Court has also referred to both cases and found no inconsistency. *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wash. 2d 649, 658, 355 P.3d 263 (2015).

Garda conceded it did not provide vigilance-free breaks, "the trial court did not have to weigh evidence").

Garda refers the Court to anecdotal testimony that crew members sometimes managed to eat, drink, text, smoke, or make calls while on duty, which Garda characterizes as "intermittent rest breaks." Pet. at 1, 9 n.26. Yet Garda admitted these hurried activities did not alter the requirement of being constantly alert and on guard against threats, which is contrary to "relief from work or exertion." *See* CP 2999 n.4. Furthermore, it is undisputed that any class members who managed to engage in such "personal activities" were acting against Garda's rules, and "if employees may take meaningful breaks only by violating the company's official policies, Garda has still created a culture that discourages meaningful breaks." *Hill*, 198 Wn. App. at 358; *see also Pellino*, 164 Wn. App. at 686 ("the fact that drivers and messengers were able to eat while the truck was in motion or that drivers could eat while the messenger was making a pick up or delivery does not mean that they received lawful breaks.") (quoting trial court findings); *Brady v. Autozone Stores, Inc.*, - Wn.2d - , No. 93564-5, slip op. at 7-9 (June 29, 2017) (adopting *Pellino*'s holding that the rules impose a "mandatory obligation" on employers to provide breaks).

The Court of Appeals properly considered the facts and concluded, like the trial court, they led to only one reasonable conclusion.

B. There Is No "New Rule" Or Conflict Arising From Denial Of Garda's FAAAA Preemption Defense.

Garda asks this Court to review the lower courts' rejection of its affirmative defense of federal preemption under the Federal Aviation Administration Authorization Act, or "F4A." It claims the rulings below conflict with settled law and have "a substantial impact on the public interest," though Garda fails to support the latter assertion. As for the former, Garda fails to mention that the "settled law" in the Ninth Circuit—which is not contradicted in any other circuit—unequivocally rejects F4A preemption of rest and meal break laws. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014) ("we have in the past confronted close cases [under the F4A and] we do not think that this is one of them").[6]

In the courts below, Garda attempted to distinguish *Dilts*, saying its own unique security concerns made vigilance-free breaks impossible. *See Hill*, 198 Wn. App. at 346.[7] But *Dilts* was not limited to the particular

[6] Notably, Garda did not even think to raise an F4A preemption defense until December 2014, nearly six years after this lawsuit had been filed, and even after *Dilts* had been decided. CP 1273.

[7] As Garda points out, the Court of Appeals initially appeared to agree with its assertion that providing breaks would have a "significant impact" on its services, 198 Wn. App. at 346, but the court went on to find Garda failed to distinguish *Dilts*, and that the impacts of providing breaks "are not significant enough to warrant preemption." *Id.* at 348. The court also correctly noted: (1) the proponent

facts presented; it broadly rejected F4A preemption of meal and rest break laws, finding that these are not the type of laws the F4A was intended to preempt. *Dilts* also questioned whether a court *could* hold that "federal law preempts state law when applied to certain parties, but not to others." *Dilts*, 769 F.3d at 648 n.2 (quoting *Cal. Tow Truck Ass'n v. City of San Francisco*, 693 F.3d 847, 865 (9th Cir. 2012)). This issue remains open in the federal courts, *see Valadez v. CSX Intermodal Terminals, Inc.*, 2017 U.S. Dist. LEXIS 66923, at *14 (N.D. Cal. Apr. 10, 2017), which makes this a particularly poor ground upon which to grant review.

The Court of Appeals also held that Garda could not prove that providing rest and meal breaks would significantly impact its services because it had not taken advantage of the option to obtain a variance from meal and rest break rules under RCW 49.12.105. *Hill*, 198 Wn. App. at 346-47. It noted that at least one of Garda's competitors had already obtained such a variance, allowing workers to take breaks from all work duties except vigilance against threats. *Id.* at 347; CP 4281-86.

Garda seeks review of this portion of the decision, claiming there is "no legal support" for the court's reliance on a variance procedure to

---

of preemption bears the burden of establishing it; (2) there is "a strong presumption against preemption" of state labor laws; and (3) general workplace rules that have only indirect connection to a carrier's relations with its customers are generally not preempted, even if they have some effect on prices, routes or services. *Id.* at 343-44 (citations omitted).

avoid preemption. Pet. at 11. But in fact there is: *Dunbar Armored, Inc. v. Rea*, 2004 U.S. Dist. LEXIS 31685, *18 (S.D. Cal. July 8, 2004), rejected an armored car company's F4A challenge to California's rest break law (prior to *Dilts*) because, under that law, the employer could apply for an exemption. Thus, "it is possible for [Dunbar] to comply with the Regulations without altering its operation to the drastic extent projected." *Id*. As the Court of Appeals noted, it is Garda that "cites no authority for [its] position." *Hill*, 198 Wn. App. at 348. There is no basis for this Court to accept review of Garda's F4A preemption defense.

C. Garda's Only Argument In Support Of Its Meal Period "Waiver" Defense Is Fundamentally Flawed.

There has never been any genuine dispute that Garda did not provide its truck crew workers with meal breaks. Garda did not even oppose summary judgment on this claim. CP 2993 n.1. Its only defense has been that Plaintiffs "waived" the right to any meal period, and its only basis for this assertion has been the Collective Bargaining Agreements (CBAs) that Garda had with its "employee associations." CP 3818. The trial court dismissed this defense on summary judgment *three different times*. *See* CP 1270, 2731, 2987. Multiple grounds were offered to reject this defense, principally, that any waiver must be made individually, not collectively, and that Garda's CBAs generally did not contain "waivers" in

any event. *See* CP 1556-66. The Court of Appeals affirmed on the ground that an employee's choice to waive a meal period cannot be founded on language in a CBA. *Hill*, 198 Wn. App. at 354.

The possibility that the right to meal breaks can be waived does not appear in the rest and meal break rule, WAC 296-126-092, which uses the same mandatory language with respect to both rest and meal breaks. Instead, it comes solely from L&I's Administrative Policy ES.C.6. That same Policy also *explicitly* says neither rest nor meal periods may be altered through CBAs, except in public sector and construction jobs. Wash. Dept. Labor & Ind. Admin. Policy ES.C.6 ¶ 15:

> **15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?**
>
> No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA.[8]

Thus, the Administrative Policy, which is the only source of Garda's "waiver" defense, is unequivocal that only individual employees may waive the right to a meal period, and unions may not. As the Court of

[8] The legislature created the exceptions for construction and public employers in 2003 when it enacted 49.12.187 (containing, ironically, the same "savings clause" Garda relies on here, *see infra*).

Appeals observed, the Policy emphasizes "an individual's choice whether to waive meal periods." *Hill,* 198 Wn. App. at 352.

Garda cannot have it both ways; it cannot rely on the Policy for the proposition that meal periods can be waived, but avoid the Policy's parameters for a waiver. And, because the regulation itself does not permit *any* waivers, if the Policy is wrong, it is wrong that meal periods can be waived, not about the conditions it imposes for such a waiver.[9]

Ignoring all of this, Garda claims the Court of Appeals created a "new rule" that contradicts the "savings clause" in RCW 49.12.187 because it diminishes collective bargaining rights by allowing individuals to negotiate on a subject that unions cannot.[10] As noted above, that very statute clearly refutes this argument, by carving out an exception allowing public sector and construction unions to negotiate different rest and meal breaks. This exception would be pointless and mere surplusage if all unions could vary or waive meal and rest breaks in CBAs. Washington law is clear that meal breaks cannot be waived in a CBA.[11]

---

[9] As Garda agrees, courts do not defer to an agency interpretation that is inconsistent with the statute or regulation it is interpreting. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

[10] Garda fails to mention that it raised this argument for the first time on appeal, and the Court of Appeals declined to consider it. *Hill*, 198 Wn. App. at 353.

[11] Garda half-heartedly invokes "federal labor law principles" but its only authority contradicts its position. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 754-56 (1985) ("No incompatibility exists, therefore, between [the National

Garda offers no basis for review of the Court of Appeals' decision affirming dismissal of Garda's meal period waiver defense.

D. Plaintiffs Sought "On Duty" Meal Periods Under Washington Law, Not Under Garda's CBAs.

Garda contends Plaintiffs' meal break claims are preempted by Section 301 of the Labor Management and Reporting Act (LMRA), 29 U.S.C. § 185(a). Section 301 preempts claims that are based on a CBA or whose resolution is "substantially dependent" on analysis of a CBA. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987). It does not preempt claims that are based on independent state law rights. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864, 93 P.3d 108 (2004). "Washington courts have consistently and repeatedly rejected the idea that reference to a CBA extinguishes a claim based on state law." *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 833, 287 P.3d 516 (2012). Plaintiffs' claims are based solely on state law and are completely independent of the CBAs.

Plaintiffs contend they were denied meal periods required by WAC 296-126-092. Under that regulation, "meal periods shall be on the employer's time when the employee is required by the employer to remain

---

Labor Relations Act] and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements.").

on duty on the premises or at a prescribed work site in the interest of the employer." WAC 296-126-092(1) (emphasis added).

Garda ignores this language, insisting there is no "independent right to a paid on-duty meal break" under Washington law, and asserting that WAC 296-126-092 only requires an unpaid "off-duty" meal period. Pet. at 16. It argues that because the Plaintiffs invoked the term "on duty meal periods," and because *some* of its CBAs say the employees agree to an "on duty meal period," Plaintiffs' claims depend on the CBAs and are preempted by Section 301. Yet, as shown by the rule quoted above, this is simply incorrect. Washington law clearly establishes the right to an "on duty" paid meal period when employees are required to remain on call or on the work premises. WAC 296-126-092(1); *Pellino*, 164 Wn. App. at 688.

Plaintiffs' claim in no way implicates Garda's CBAs, and its preemption argument is meritless.

E. Damages for Meal Period Violations Are "Wages."

Finally, Garda relies on the same false premise—that there is no state law right to an on-duty paid meal period—to argue that because it paid Plaintiffs during their missed meal breaks, the damages owed are not "wages" and are therefore outside the scope of the double damages statute,

RCW 49.52.070.[12] As noted above, employees *are* entitled to a paid, on-duty meal period when they must remain on call or on the employer's premises. WAC 296-126-092.

Garda cites no authority for its argument, which directly contradicts *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002) (employees who miss paid rest breaks are entitled to "wages" as a remedy) as well as *Pellino,* 146 Wn. App. at 690 ("*Wingert* applies with equal force" to on-duty meal breaks). As explained in *Pellino*, an "on-duty" meal period is functionally the same as a rest break—the employees must receive a total of 30 minutes without engaging in work activities, and it must be paid time. *Id.* at 690. A missed "on duty" meal period triggers a back pay obligation by the employer. *Id.*

Garda's Petition for Review should be denied.

V. ARGUMENT IN SUPPORT OF CROSS-PETITION

A. The Court Of Appeals Erred In Reversing The Trial Court's Award Of Double Damages For Denial Of Meal Breaks Because Garda's Waiver Defense Was Not Fairly Debatable.

The Court of Appeals reversed the trial court's decision to award double damages to the class for Garda's denial of meal periods. As noted above, there was never any real dispute that Garda did not provide meal periods to its workers. CP 2993 n.1. Throughout this litigation it argued

[12] It is not clear what relief Garda seeks by asserting this argument in this Court, because the Court of Appeals reversed the trial court's award of double damages for meal period violations on another ground. *Hill*, 198 Wn. App. at 364. Plaintiffs cross-petition for review of that decision below, however.

only that the workers had waived the right to meal periods. The trial court rejected this affirmative defense *three times*, and the Court of Appeals agreed. CP 1270, 2731, 2987. Yet, the Court of Appeals concluded there was a bona fide dispute over the defense. Its decision conflicts with this Court's precedents and involves an issue of substantial public interest.

Under Washington law, an employer who acts "willfully and with intent to deprive [an] employee of any part of his or her wages" is liable for twice the amount of wages withheld. RCW 49.52.050(2) & 49.52.070. When an employer fails to pay wages due, the act is "willful" unless it was erroneous or there is a "bona fide dispute" about whether it was obligated to pay. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998). This is "a narrow exception to the statute providing for double damages." *Dept. of Labor & Ind. v. Overnite Transp. Co.*, 67 Wn. App. 24, 36, 834 P.2d 638 (1992). A bona fide dispute is one that is "fairly debatable." *Schilling*, 136 Wn.2d at 160. It is the employer's burden to show that a bona fide dispute exists. *Id.*

Here, the Court of Appeals found there was a bona fide dispute. *Hill*, 198 Wn. App. at 362-64. It reasoned that, although L&I's Administrative Policy does not permit waiver of the right to a meal period in a CBA, "the state of the law was not clear," and "Garda's interpretation

of the Policy was not unreasonable." *Id.* at 363. The court did not explain how it reached this conclusion, and there is no apparent explanation.

L&I's Administrative Policy ES.C.6—which is the sole source of Garda's "waiver" defense—could not be clearer regarding CBA waivers. To the question "May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092," it answers "No." Admin. Policy ES.C.6 ¶ 15. This policy is the genesis of Garda's waiver defense, and it is unequivocal that waiver cannot be obtained through a CBA. The issue is not fairly debatable.

Furthermore, for reasons it did not explain, the Court of Appeals declined to "take the next step" in its own analysis, and to actually look at the language in the CBAs that Garda claimed constituted a waiver. *See Hill*, 198 Wn. App. at 364. The court simply said that "Garda's reliance on the purported waivers is sufficient to show its withholding was not willful." *Id.* This is a remarkable conclusion—that a litigant's mere *articulation* of a basis for violating Washington's wage laws, no matter how unsupported, is sufficient to create a "bona fide dispute" and escape the legislature's edict that employers who willfully withhold wages are liable for exemplary damages. It rewards tenacious lawyering, not good faith efforts at compliance.

Had the court actually considered the CBA language on which Garda relied, it would have found that the defense was not fairly debatable on the facts either.[13] As explained above, most of the CBAs called for an "unscheduled" meal period or an "on-duty" meal period. *See supra* at 4-5. Only three CBAs, applicable to about 5% of the class, said employees "waived" meal periods, and each of those was enacted after a class had been certified in this lawsuit. *See id.*

The statutory provision for exemplary damages against employers who willfully withhold wages may only be avoided in the case of a "bona fide" dispute. If a defense so lacking in factual or legal support is enough, the exception will swallow the rule. *See Overnite Transp.*, 67 Wn. App. at 36, (finding no bona fide dispute where employer failed to cite any authority that the established law was wrong). This Court should accept review of this decision.

B. Prejudgment Interest Is Appropriate On Compensatory Damages Regardless Whether Exemplary Damages Are Also Awarded.

An employee who recovers wages is entitled to prejudgment interest on those wages. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42,

[13] Although it did not expressly rely on them, the Court of Appeals cited two decisions of this Court for the proposition that "[g]enerally, an employer who follows the provisions of a CBA … does not willfully deprive employees of" wages due. *See Hill*, 198 Wn. App. at 362. This begs the question that the court declined to answer—whether Garda was actually following the provisions of its CBAs.

50-51, 169 P.3d 473 (2007). Here, the Court of Appeals held for the first time that "an award of prejudgment interest is inappropriate when the court awards double damages." *Hill*, 198 Wn. App. at 365. This issue of first impression involves an issue of substantial public interest.

The court acknowledged there was no published authority on this question under the wage laws, and relied solely on a timber trespass case, *Ventoza v. Anderson*, 14 Wn. App. 882, 897, 545 P.2d 1219 (1976). That case, in turn, relied on the fact that the statute in question "is penal in character, and must be strictly construed." *Id.* (citing *Rayonier, Inc. v. Polson*, 400 F.2d 909 (9th Cir. 1968)). But the statute in *this* case "holds a preferential statutory position," *Morgan v. Kingen,* 166 Wash. 2d 526, 538, 210 P.3d 995 (2009), and must be "liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Schilling*, 136 Wash. 2d at 159. *Ventoza* is inapposite here.

Moreover, *Ventoza* misreads this Court's decision under the timber trespass statute, *Blake v. Grant*, 65 Wn.2d 410, 397 P.3d 843 (1965). In *Blake*, the trial court awarded interest on the *entire* award, including "the punitive two-thirds portion of the award as well as the compensatory one-third." *Id.* at 413. In response to *that*, the Court said that "interest is generally disallowed on punitive damages." *Id.* It did not say interest is disallowed on *compensatory* damages whenever punitive damages are also

awarded. *See Kalmanovitz v. Standen*, 2016 U.S. Dist. LEXIS 27478, *10-11 & n.3 (W.D. Wash. March 3, 2016) (noting that *Ventoza* had mistaken *Blake* and concluding this Court would allow prejudgment interest on the wages wrongfully withheld, but not the penalty); *Durand v. HMC Corp.*, 151 Wn. App. 818, 827, 214 P.3d 189 (2009) (affirming award of double damages and prejudgment interest).

The trial court in this case awarded prejudgment interest on the back wages owed, not on the exemplary damages. CP 3821, 3423. The court recognized that prejudgment interest serves a different purpose than exemplary damages, the former compensating employees for the delay in payment and the latter punishing and deterring the employer's misconduct. The Court of Appeal's decision barring prejudgment interest when an employee receives double damages under RCW 49.52 is error and should be reviewed and reversed.

VI. CONCLUSION

Plaintiffs request that the Court deny Garda's Petition for Review and Grant their Cross-Petition.

Dated this 13th day of July, 2017.

Daniel F. Johnson, WSBA No. 27848
BRESKIN JOHNSON TOWNSEND, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104

Tel: (206) 652-8660
Fax: (206) 652-8290
djohnson@bjtlegal.com

SCHROETER, GOLDMARK & BENDER
Adam M. Berger, WSBA No. 20714
810 Second Avenue, Suite 500
Seattle, WA 98104
Tel: (206) 622-8000
Fax: (206) 682-2305
garfinkel@sgb-law.com
berger@sgb-law.com

Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on July 13, 2017, I caused the foregoing to be filed electronically with:

The Supreme Court of the State of Washington

and a true and correct copy of the same to be delivered to follow to:

Catharine M. Morisset Fisher & Phillips LLP 1201 Third Avenue, Suite 2750 Seattle, WA 98101 cmorisset@laborlawyers.com	[X] Via Hand Delivery [X] Via Email
Clarence M. Belnavis Alex Wheatley Fisher & Phillips LLP 111 SW Fifth Avenue, 4040 Portland, OR 97204 (506) 242-4263 (f) cbelnavis@laborlawyers.com awheatley@laborlawyers.com	[X] Via First Class Mail [X] Via Email

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Jamie Telegin, Legal Assistant

BRESKIN JOHNSON TOWNSEND PLLC

July 13, 2017 - 3:32 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94593-4
Appellate Court Case Title:	Lawrence Hill, et al. v. Garda CL Northwest, Inc.
Superior Court Case Number:	09-2-07360-1

The following documents have been uploaded:

- 945934_Answer_Reply_20170713153028SC491093_9294.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer and Cross Petition 2017 07 13.pdf

A copy of the uploaded files will be sent to:

- awheatley@laborlawyers.com
- berger@sgb-law.com
- cbelnavis@laborlawyers.com
- cmorisset@fisherphillips.com
- garfinkel@sgb-law.com
- jmatautia@fisherphillips.com
- rnelson@skellengerbender.com

Comments:

Answer and Cross-Petition for Review

Sender Name: Jamie Telegin - Email: jtelegin@bjtlegal.com
Filing on Behalf of: Daniel Foster Johnson - Email: djohnson@bjtlegal.com (Alternate Email: jtelegin@bjtlegal.com)

Address:
1000 Second Avenue
Suite 3670
Seattle, WA, 98104
Phone: (206) 652-8660 EXT 213

Note: The Filing Id is 20170713153028SC491093