

No. 33094-6-II

STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

FRANCIS M. WOODS et ux. *Appellants,*

v.

MITCHELL BROS. TRUCK LINE, INC., *Respondent.*

REPLY BRIEF OF APPELLANT

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pm 9-17-07

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A. INTRODUCTION

On March 1, 2007 the Supreme Court decided Bostain v. Food Express, Inc., 159 Wn.2d 700, 153 P.3d 846 (2007), which held that hours worked out of state by a Washington-based employee count toward overtime under the Washington Minimum Wage Act (hereinafter, MWA).

The Brief of Appellant in the case at bar was filed in July of 2005 but subsequently the Commissioner, at Plaintiffs' request, stayed briefing pending a decision in Bostain by the Supreme Court.

Since the Brief of Appellant was written before the Supreme Court's decision in Bostain, some parts of it are no longer relevant.

B. SUMMARY OF ARGUMENT

Under Bostain v. Food Express, Inc., Plaintiff herein is a Washington-based employee. Although Defendant argues without citation that Plaintiff should not be so considered because he is an Oregon resident, reviewing Plaintiff's contacts using a choice of law analysis, it is clear that most of his contacts are with Washington rather than any other state. Additionally, the Bostain decision and a case on which it relies, Burnside v. Simpson Paper Co., 123 Wn. 2d 93, 864 P.2d 937 (1994), make it clear that a resident of another state can be a Washington-based employee.

Also, the Bostain decision demonstrates that Plaintiff's interpretation of the Washington Minimum Wage Act does not violate the Commerce Clause of the United States Constitution; Defendant concedes this.

Finally, since the trial court decided this case on summary judgment and since Plaintiffs provided full, detailed proof of damages, this Court can determine damages and prejudgment interest without the necessity of a remand.

C. ARGUMENT

1. Under the MWA, Plaintiff Is a Washington-Based Employee and Is Therefore Due Overtime for Hours Worked out of State.

In Bostain v. Food Express, Inc., 159 Wn.2d 700, 153 P.3d 846 (2007) the Supreme Court held that a trucking company is liable to a Washington-based truckdriver "under Washington's Minimum Wage Act (MWA), chapter 49.46 RCW, for overtime based on all hours worked, whether within Washington State or outside the state." Id. at p. 705, ¶1. Plaintiffs herein list as the first issue in their issues pertaining to the assignment of error, "In determining whether Defendant was required to pay Plaintiff Francis M. Woods overtime, does RCW 49.46.130(1) apply

to hours he worked outside the confines of the State of Washington?”

Brief of Appellants, p. 1. Thus, the principal issue in Bostain and the case at bar are identical.

The Bostain Court also states, “Whether overtime under RCW 49.46.130(1) must be paid for an employee as a Washington-based employee will depend on factors that courts routinely use for deciding choice of laws issues.” Bostain, 159 Wn.2d at 713, n. 5.

Thus, it is important to compare the facts in Bostain, where the Supreme Court found Washington law to apply under a choice of law analysis, to the facts in the case at bar. A comparison of the facts in both cases shows they are quite similar:

1. Mr. Bostain was hired “as an interstate driver based at the Vancouver terminal” and he “worked out of the Vancouver terminal the entire time he worked for Food Express.” Bostain, 159 Wn.2d at 706, ¶3. Plaintiff herein “was hired by Defendant in Vancouver, WA. CP 50. He always started and ended his runs at the Vancouver, WA terminal.” Brief of Appellants, p. 2.

2. Both Mr. Bostain and Plaintiff herein were hired by companies that had a substantial presence in Washington. Bostain, 159 Wn.2d at 706, ¶2; Brief of Appellants, p. 2.

3. Both Mr. Bostain and Plaintiff herein received orders from dispatchers in Vancouver, WA and both began and ended their runs at their respective terminals in Vancouver, WA. Bostain, 159 Wn.2d at 706, ¶3; Brief of Appellants, pp. 2-3.

4. Mr. Bostain turned in his time at the Vancouver, WA terminal. Bostain, 159 Wn.2d at 706, ¶3. Similarly, Plaintiff herein turned in his bills of lading (which the company required him to do before he was paid) in Vancouver, WA. Brief of Appellants, p. 3.

5. Both Mr. Bostain and Plaintiff herein spent a substantial amount of time driving to states other than Washington. Bostain, 159 Wn.2d at 706-07, ¶4; Brief of Appellants, p. 2.

There are also two factual differences between Bostain and the case at bar. Mr. Bostain is a Washington resident whereas Plaintiff herein is an Oregon resident. Bostain, 159 Wn.2d at 706, ¶3; Brief of Appellants, p. 2. The trucking company in Bostain is a California corporation (though doing business in Washington) whereas Defendant herein is a Washington corporation. Bostain, 159 Wn.2d at 706, ¶2; Brief of Appellants, p. 2.

In addition, there are several facts in the case at bar that have no analogues mentioned in the opinion of the Supreme Court: “On the average, [Plaintiff herein] was back at the Vancouver, WA terminal every

third day. Then he would go back to the Vancouver, WA terminal the next day and wait to be dispatched from there again.” Brief of Appellants, p. 3.

As well,

Plaintiff [herein] always turned in his miles and expenses at the Vancouver, WA terminal. Id. The bookkeeper in Vancouver, WA calculated his pay and then it would be signed by David Braman, the general manager, who worked out of the Vancouver, WA terminal, and by Gordon Cahoon, the owner, who lived in Vancouver, British Columbia but spent Monday through Friday in Vancouver, WA. CP 50-51. The company had Plaintiff take the physicals required by law in Vancouver, WA. CP 51.

Brief of Appellants, p. 3.

Defendant baldly asserts without citation to authority or argument that the result in the case at bar should be different because Plaintiff herein is not a Washington resident whereas Mr. Bostain is. Brief of Respondent, p. 5.

However, Defendant cannot seriously contend that the MWA covers only residents of the State of Washington; in Bostain the Supreme Court ruled that despite language in the declaration section of the MWA, RCW 49.46.005, the work covered under the MWA need not be performed in Washington. Bostain, 159 Wn.2d at 711, 712-13, ¶¶17, 21. There is no reason to believe the Supreme Court’s response would be any

different to the argument that language of the declaration section of the MWA excludes residents of other states from coverage under the MWA.

In fact, the Court states:

... the pertinent references in [RCW 49.46.005] are similar to those we addressed in *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994), where an employer argued that an employee could not sue the employer under the Washington Law Against Discrimination (WLAD) because RCW 49.60.010 provides that the purpose of the act is to prevent discrimination against any of the state's "inhabitants" and the employee was not an "inhabitant." We rejected this argument because the fundamental purpose of the WLAD is to prevent discrimination, and limiting the act to inhabitants would contravene that purpose by allowing discrimination against noninhabitants.

Bostain, 159 Wn.2d at 711-12, ¶18. Because of the continuing authority of Burnside, it seems unlikely that this slight factual difference would keep the Supreme Court from applying Washington law under a choice of law analysis.

Furthermore, it should be noted that the facts in the case at bar show more contacts or stronger contacts in several ways than the facts in Bostain: (1) Defendant herein is a Washington corporation, Brief of Appellants, p. 2, rather than merely an out-of-state corporation doing business in Washington, Bostain, 159 Wn.2d at 706, ¶2; (2) Plaintiff herein went back to the Vancouver, WA terminal every third day and then would go back to the terminal the next day and wait to be dispatched from

there again, Brief of Appellants, p. 3, whereas the opinion in Bostain is silent on this point; (3) Plaintiff herein turned in his miles and expenses at the Vancouver, WA terminal, and his pay was calculated at the terminal and his paycheck was signed in Vancouver, WA, id., whereas in Bostain the paycheck was issued from the company's Arcadia, CA office, Bostain, 159 Wn.2d at 706, ¶3; and (4) Plaintiff herein took the physicals required by law in Vancouver, WA, Brief of Appellants, p. 3. It should be noted that the Bostain opinion is silent on the last point.

Moreover, counting up the contacts in the case at bar, it is clear that the contacts with Washington in the case at bar are much stronger than the contacts with any other state. Indeed, Defendant has never contended in this case that the law of some other state should apply. Thus, Defendant is a Washington corporation and Plaintiff, though an Oregon resident, was a Washington employee and so the MWA should apply to all hours he worked, both in-state and out-of-state.

That Washington law applies is particularly clear from the attitude the Bostain opinion adopts toward suits by workers under the MWA:

... “[s]tatutes should be interpreted to further, not frustrate, their intended purpose.” *Burnside [v. Simpson Paper Co.]*, 123 Wn.2d at 99. Washington has a “long and proud history of being a pioneer in the protection of employee

rights.” *Drinkwitz [v. Alliant Techsystems, Inc.]*, 140 Wn.2d at 300. A restrictive reading of the declaration section and overtime provisions of the MWA would be inconsistent with protecting workers and, specifically, would be inconsistent with the protections afforded Washington employees under the MWA. *See Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002) (remedial statutes in Title 49 should be liberally construed to carry out the legislature’s goal of protecting employees’ wages and assuring payment).

Finally, we must bear in mind that the act is remedial and its exemptions must be "narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz*, 140 Wn.2d at 301; *accord Strain v. W. Travel, Inc.* 117 Wn. App. 251, 254, 70 P.3d 158 (2003). Additionally, the rule of liberal construction means that the coverage provisions of the MWA must be liberally construed in favor of the employee. *Int’l Ass’n of Fire Fighters*, 146 Wn.2d at 34.

Bostain, 159 Wn.2d at 712, ¶ 19-20.

In the case at bar it is true that Plaintiff is an Oregon resident but he is also a Washington-based employee. This Court can take notice of the fact that many people live in one state but work in another and that some, such as Plaintiff, live in one state but are based for their employment in another. Under a choice of law analysis using the most significant contacts test, by far the majority of Plaintiff’s contacts are with Washington, including the most important contact, that Plaintiff started and ended his runs in Washington. Accordingly, this Court should rule that he is a Washington-based employee.

2. Interpreting the Overtime Provisions of the MWA to Require Payment of Overtime to Interstate Truck Drivers Who Do Not Drive More than 40 Hours per Week within the State of Washington Is Not a Violation of the Commerce Clause of the United States Constitution.

The Bostain opinion also rules against the argument that Plaintiffs' interpretation of that statute is a violation of the Interstate Commerce Clause of the United States Constitution. Id. at 717-22. Although Defendant makes its argument to the contrary, it acknowledges that this issue is foreclosed by the Supreme Court's decision in Bostain and that "this court is bound by the decision." Brief of Respondent, n. 4. Accordingly, this Court should rule against Defendant as to this contention as well.

However, there is a second reason this Court should rule against Defendant on this issue: Defendant has waived this affirmative defense by not raising it in the trial court prior to summary judgment.

CR 8(c) states, "In pleading to a preceding pleading, a party shall set forth affirmatively [various affirmative defenses] and any other matter constituting an avoidance or affirmative defense." (Emphasis supplied.)

In Shinn Irrigation Equipment, Inc. v. Marchand, 1 Wn. App. 428, 462 P.2d 571 (1969) the plaintiff in his complaint alleged defendants owed him a sum of money for material and labor sold and delivered. "The defendants answered by a general denial and pleaded no affirmative defense." Id. at 429. At trial "the defendants attempted to show and, upon objection from the plaintiff, made an offer of proof that there was an oral agreement between the parties that if this equipment did not satisfactorily

accomplish its purpose ... there would be no charge.” Id. The Court stated:

The purpose of rule 8 as it relates to denials is apparent: “Denials must be definite enough to inform the adverse party of the issues he must be prepared to meet.” [Citation omitted.] Any matter that does not tend to controvert the opposing party’s prima facie case as determined by applicable substantive law should be pleaded, and is not put at issue by a general denial. [Citation omitted.]

Id. at 430-31. The Court determined that the agreement between the parties was an affirmative defense. Id. at 432. The Court also quoted Lopez v. United States Fid. & Guar. Co., 18 F.R.D. 59 (D.C. Alas. 1959):

Rule 8(f) requires that all pleadings be so construed as to do substantial justice; and the courts will construe a pleading to give effect to all averments if such construction is reasonable; however, such liberal construction does not permit the pleader to unreasonably catch an unwary litigant; and such liberality of construction must be circumscribed by the plain requirements of the rules. The purpose of an answer is to formulate issues by means of defenses addressed to the allegations of the complaint. [Citations omitted.]

Shinn, 1 Wn. App. at 432.

Rainier National Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d

153 (1981) states:

Under CR 8(c), failure of consideration is an affirmative defense and must be specifically pleaded. Here, after Rainier filed its motion and affidavit for summary judgment, Mr. Lewis filed a counter motion for summary judgment and for the first time, raised this defense, having failed to raise it in his answer. In general, if [affirmative] defenses are not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, such defenses are deemed to have

been waived and may not thereafter be considered as triable issues in the case. [Citation omitted.]

(Emphasis supplied.)

A number of other cases are to the same effect. Farmers Insurance Company of Washington v. Miller, 87 Wn. 2d 70, 76, 549 P.2d 9 (1976)(failure to raise affirmative defenses of waiver and estoppel is construed as a waiver of them); Northwest Land and Investment v. New West Federal, 64 Wn. App. 938, 944-45, 827 P.2d 334 (1992), rev.den. 120 Wn.2d 1002 (1992)(waiver of D'Oench defense by failure to timely raise it; asserting the defense after another company's insolvency "would have put Northwest on notice within a reasonable time after the defense became available"); Ebling v. Gove's Cove, 34 Wn. App. 495, 500, 663 P.2d 132 (1983)(failure to raise accord and satisfaction is construed as a waiver); Allis-Chalmers Corp. v. Sygitowicz, 18 Wn. App. 658, 660-61, 571 P.2d 224 (1977)(failure to raise affirmative defense of revocation of acceptance is construed as a waiver).

As stated above, Defendant first raised the issue of unconstitutionality in the midst of the summary judgment briefing sequence, CP 132; there is nothing in its Answer or other prior pleadings that even mentions unconstitutionality. Once Defendant raised the issue, Plaintiffs filed a Motion to Strike a Portion of Defendant's Motion for Summary Judgment, CP 152-53, and an accompanying Memorandum, CP 154-58, and argued strenuously against the tardy introjection of a new affirmative defense. See also CP 189.

However, since this introjection occurred in the middle of a summary judgment briefing sequence, Plaintiffs were not able to get a ruling on their Motion until the hearing on the cross motions for summary judgment, when the trial court stated it was moot because it was ruling against Plaintiffs on liability. Because there was a possibility that the trial court would deny Plaintiffs' Motion, Plaintiffs discussed the unconstitutionality issue in their Reply Memorandum. If Plaintiffs had not discussed the issue, they would have risked the possibility of trial court deciding against them on that basis without having had the opportunity to be heard on it.

Defendant argues that because Plaintiffs discussed the issue in their briefing, they waived their right to object to it. Brief of Respondent, p. 8. But this argument is disingenuous; to accept it would be to allow Defendant to profit from its own wrongful act. As Shinn Irrigation Equipment states, "Denials must be definite enough to inform the adverse party of the issues he must be prepared to meet," and as Lopez states, courts should not construe pleadings so as to "permit the pleader to unreasonably catch an unwary litigant...." Thus, there is no legitimate argument that Plaintiffs have waived the issue of Defendant's failure to plead unconstitutionality as an affirmative defense. On the contrary, the authorities cited above demonstrate that it is Defendant that has waived the issue by not pleading it before summary judgment.

3. This Court Can Determine Damages and Prejudgment Interest Without a Remand.

In Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) the Supreme Court stated:

Appellate review of summary judgment is de novo; the reviewing court engages in the same inquiry as the trial court and views the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. [Citation omitted.] A motion for summary judgment is properly granted where “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c). Where the moving party brings forth admissible evidence supporting its claimed absence of any issue of material fact, the “adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e) (emphasis added).

In Cowlitz County Sheriffs’ Association v. Chelan County, 109 Wn.2d 282, 294-95, 745 P.2d 1 (1987) in reviewing a motion for summary judgment the Supreme Court stated:

We must engage in the same inquiry as the trial court. [Citation omitted.] If there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. CR 56(e). The court must consider the facts submitted and all reasonable inferences therefrom in the light most favorable to the nonmoving party. The motion should be granted only if reasonable persons could reach but one conclusion from all the evidence. [Citations omitted.] Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper. [Citation omitted.]

In the case at bar Plaintiffs’ second issue pertaining to the

assignment of error was “Should this Court grant judgment for the amount the Plaintiffs requested in the trial court for unpaid overtime and prejudgment statutory interest?” Brief of Appellants, p. 1.

In the trial court Plaintiffs sought summary judgment on damages. CP 113. Plaintiffs calculated the amount of unpaid overtime owed as \$12,474.13 plus prejudgment statutory interest to November 27, 2004 of \$4,805.54 and provided evidence of how they calculated this sum. Brief of Appellants, pp. 3-4, 42. In its response to Plaintiffs’ motion for summary judgment, Defendant objected to Plaintiffs’ request for double damages, CP 223-25, but Defendant did not contest the amount of damages Plaintiffs calculated in any of its pleadings.

Under Michak, Defendant was not entitled to rest upon mere allegations or denials; Defendant was required to set forth specific facts showing there was a genuine issue for trial as to damages. Under Cowlitz County Sheriff’s Association, even taking the facts and all reasonable inferences therefrom in the light most favorable to Defendant, there is only one inference that this Court can reach as far as damages: that the amount of damages Plaintiffs have calculated is correct.

The Supreme Court’s opinion in Bostain also settles the issue of double damages in the case at bar. Despite the contention of Plaintiffs herein that double damages apply, such a contention is foreclosed by the opinion in Bostain. Bostain, 159 Wn.2d at 723, ¶48.

As to prejudgment interest, in Bostain the Supreme Court stated:

Once the determination is made that overtime is due Mr. Bostain, the amount of prejudgment interest can be

determined from the evidence with exactness. Accordingly, the trial court did not err in awarding prejudgment interest.

Id. at 723, ¶50. Since Plaintiffs herein have submitted the same type of evidence of damages as the plaintiffs did in Bostain, as well as entering judgment for \$12,474.13, this Court should rule that Plaintiffs are entitled to prejudgment interest in the amount Plaintiffs have calculated.

Brief of Appellants, pp 42-43.

Since Plaintiffs are due overtime, under RCW 49.46.090(1) and RCW 49.48.030 and RAP 18.1(b), they are also due attorney fees for their work in the trial court and in this appeal. The Bostain opinion provides guidance on attorney fees, particularly on three arguments that the Bostain trial court incorrectly accepted and that Defendant herein might be tempted to make: that attorney fees should be smaller because there was a bona fide dispute, because the issue was unsettled and because of the size of the award for overtime damages. Bostain, 159 Wn.2d at 723, ¶45. The Supreme Court states categorically, “We agree that the reasons given by the trial court are not factors that support a reduction in the lodestar amount under the facts of this case.” Bostain, 159 Wn. 2d at 722, ¶46.

D. CONCLUSION

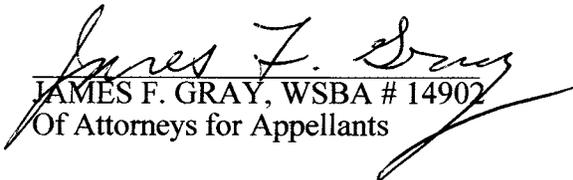
The case at bar is indistinguishable from Bostain; the one difference that Defendant points to, the fact that Mr. Woods is not a Washington resident, is a distinction without a difference. As Defendant concedes, Bostain disposes of Defendant’s argument on

unconstitutionality. Plaintiffs have provided a detailed explanation of how they calculated Plaintiff's damages whereas Defendant did not even contest liability; therefore, this Court should grant Plaintiffs damages in that amount.

In light of the Bostain opinion, Plaintiffs respectfully ask that this Court rule as follows: (1) reverse the judgment of the trial court and find for Plaintiffs on their claim for unpaid overtime under the MWA; (2) grant judgment in the amount of \$12,474.13; (3) rule that Plaintiffs are due prejudgment interest to November 27, 2004 of \$4,805.54 and thereafter at the same rate; (4) grant attorney fees for this appeal under RCW 49.46.090(1), RCW 49.48.030 and RAP 18.1(b); and (5) remand to the trial court for calculation of Plaintiffs' attorney fees in the trial court under RCW 49.46.090(1) and RCW 49.48.030.

DATED this 16th day of September, 2007.

Respectfully submitted,


JAMES F. GRAY, WSBA # 14902
Of Attorneys for Appellants

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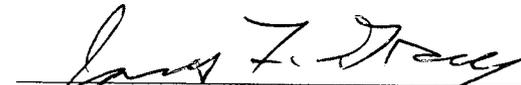
THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

FRANCIS M. WOODS, husband and wife,)	NO: 33094-6-II
)	
Appellants,)
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)	
vs.	DECLARATION OF SERVICE
)	
MITCHELL BROS. TRUCK LINE, INC.,)
a Washington corporation,)
)	
Respondent.)
)	

On September 17, 2007 I sent the following to Mr. David J. Sweeney, attorney for Respondent by United States mail: (1) the Reply Brief of Appellant and (2) a letter to the Clerk of the Washington Court of Appeals dated September 17, 2007.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Signed in Vancouver, WA.

1 DATED this 17th day of September, 2007.

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5 JAMES F. GRAY, WSBA # 14902
6 Of Attorneys for Appellants
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