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STATE OF WASHINGTON

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**WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO**

[Pierce County Superior Court No. 08-2-08739-1]

LARRY WESTBERRY, and a proposed class  
of similarly situated individuals,

Appellants/Plaintiffs,

v.

INTERSTATE DISTRIBUTOR CO.,

Respondent/Defendant.

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**APPELLANTS' BRIEF**

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## **I. INTRODUCTION**

Respondent Interstate Distributor Co. (IDC) is a Washington trucking company that operates throughout the U.S. It generally pays interstate truckers a per-mile rate that is not increased after a truck driver exceeds 40 hours. Under *Bostain v. Food Express*, 159 Wn.2d 700, 153 P.3d 846 (2007), IDC's drivers are entitled to overtime pay when they work more than 40 hours in a week, whether the work is inside or outside Washington. 159 Wn.2d at 715-21. IDC expressly admitted that the appellant, plaintiff Larry Westberry, "was not paid overtime" (CP 42) and he did not receive an increase in his per-mile rate when he worked more than 40 hours in a week. CP 41-43. IDC argued that Westberry was not entitled to overtime because he was not a Washington resident. CP 73, 228-30.

The parties submitted distinctly different computations of the amount of overtime due to Westberry, assuming he was entitled to overtime.<sup>1</sup> CP 118-20 (Westberry pay computation); CP 41-43, 96-97 (IDC computation). Westberry's method of calculating overtime on a per-mile basis was based on the Washington Department of Labor and Industries (DLI) regulations and policies at that time. CP 106-07; 138-51.

The superior court dismissed the case on summary judgment based

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<sup>1</sup> IDC removed the case to federal court, arguing his personal claim was over the diversity jurisdiction minimum of \$75,000. The parties disagreed on the amount owed and the federal court remanded. CP 16.

on IDC's argument that the claims here were "already determined" in an *ex parte* DLI procedure. CP 311. In that *ex parte* procedure IDC obtained a letter from DLI, after this action was commenced, *retroactively* finding IDC's pay scheme was "reasonably equivalent" to overtime pay. CP 275-76.

## **II. ASSIGNMENT OF ERROR**

### ***Error Assigned***

The trial court erred in dismissing this case on summary judgment based on an *ex parte* application from IDC to DLI and DLI's subsequent approval letter, which purported to retroactively decide disputed facts and law on this overtime pay claim, without any notice or opportunity to be heard by the affected employees. CP 320-21.

### ***Issue Pertaining to Assigned Error***

Did the trial court err in granting summary judgment to the defendant employer IDC based on an *ex parte* DLI factfinding procedure while this case was pending, resulting in a "reasonably equivalent" determination letter from DLI, instead of the court independently deciding the law and facts?

## **III. STATEMENT OF THE CASE**

### ***Proceedings Below***

Defendant IDC moved for dismissal under CR 12(b)(6) and CR 56. In moving under CR 12(b)(6), IDC argued that *Bostain* does not apply to a Washington employer to the extent its employees are not Washington

residents. CP 228-32. The superior court denied IDC's CR 12(b)(6) motion.<sup>2</sup> CP 320.

IDC also moved for summary judgment under CR 56 arguing the overtime claims had "already been determined" (CP 311), based on a letter from the Department of Labor and Industries (DLI). DLI's letter stated that it had determined, *retroactively*, that IDC's flat per-mile payment system was "reasonably equivalent" to overtime. CP 238-40, 255-80. DLI's "retroactive" letter determination arose from an entirely *ex parte* procedure upon IDC's application to DLI, without any notice to IDC's truck drivers such as Westberry, or any other truck drivers, and without any chance for them to be heard. DLI purported to decide both the facts and the law and thereby determine IDC had no overtime liability with *no* input from the drivers. *Id.*

### ***Trial Court's Decision***

The Pierce County superior court, Judge Kathryn Nelson, denied IDC's CR 12(b)(6) motion to dismiss. The court granted IDC's motion for summary judgment based on DLI's "reasonably equivalent" analysis in

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<sup>2</sup> Westberry was a Georgia resident employed by a Washington employer. IDC maintained that Washington overtime laws as construed in *Bostain* did not apply to Westberry *personally* because he did not reside in Washington and he could not be a representative of a class including Washington residents. CP 228-32. The prospective class action would not be dismissed, however, even if Westberry's personal claims were not governed by Washington law because there are Washington residents in the class and they are available to represent the class. CP 283-84. *O'Brien v. Shearson Hayden Stone*, 90 Wn.2d 680, 682-88, 586 P.2d 830 (1978) (fact that named plaintiff's claim was governed by New York law, while the bulk of the class claim was subject to Washington law, was not fatal to class action).

its letters to IDC. CP 321.

IDC did not seek review of the superior court's denial of its CR 12(b)(6) motion. Plaintiff Larry Westberry appeals the summary judgment decision.

### ***Statement of Facts***

Larry Westberry worked as an IDC interstate long-haul truck driver throughout the 48 states, from 2003 to 2007. CP 41. He was paid a flat per-mile rate (\$0.32 per mile), plus some specified flat amounts for loading and unloading. CP 41. IDC expressly admitted that Westberry "was not paid overtime" when he worked more than 40 hours per week. CP 42. IDC argued that Westberry was personally not entitled to overtime since he did not work more than 40 hours per week inside Washington and he did not reside in Washington. CP 73, 228-30.

### **IV. QUESTION PRESENTED**

May the plaintiff truck drivers pursue their overtime pay claims in court based on the Washington Minimum Wage Act, RCW 49.46.130, as construed in *Bostain v. Food Express, supra*, 159 Wn.2d at 713-18, or has their claim "already been determined" by DLI based on an *ex parte* procedure between IDC and DLI in which DLI retroactively "approved" IDC's pay scheme as "reasonably equivalent" to overtime?

## V. ARGUMENT

**THE SUPERIOR COURT ERRED IN DISMISSING THIS CASE BASED ON A DETERMINATION LETTER FROM THE DEPARTMENT OF LABOR AND INDUSTRIES “APPROVING” DEFENDANT IDC’S PAY SCHEME THAT IDC OBTAINED BY AN *EX PARTE* APPLICATION TO THE DEPARTMENT AND WHICH WAS ISSUED BY THE DEPARTMENT WITHOUT ANY HEARING OR ANY PARTICIPATION IN THE FACTFINDING AND DETERMINATION PROCESS BY THE TRUCK DRIVERS.**

***A. IDC Obtained a “Reasonably Equivalent” Letter of “Approval” from DLI Without Any Input from Affected Truck Drivers and Without Any of the Adjudication Procedures in the Administrative Procedure Act.***

After *Bostain, supra*, 159 Wn.2d at 714-15, in which the Supreme Court struck down portions of DLI regulations, WAC 296-128-011 and -012, the trucking industry went to DLI to seek relief from the Supreme Court’s holding. The trucking industry proposed an amendment to WAC 296-128-012 to provide DLI authority to make retroactive “approvals” of trucking company pay schemes, specifically in order to overcome the effect of *Bostain* on these companies. CP 289-91; CP 239; WAC 296-128-012 (as amended in 2008). DLI adopted the amendment and retroactively “approved” IDC’s “reasonably equivalent” pay scheme, *ex parte* and without notice to IDC’s workers. CP 238-81; 289-91. IDC’s pay scheme did not provide *any* increase in the per-mile rate for work in excess of 40 hours in a week, contrary to DLI’s own overtime policies, CP 106-07, 138-51, and contrary to the policy of the statute.

DLI’s approval of the supposedly “reasonably equivalent” pay scheme at IDC was realistically only a matter of DLI’s prosecutorial

discretion – a statement that *DLI itself* would not bring an overtime action against IDC if it followed the pay scheme approved by DLI. It was not an adjudication of a dispute between parties, *e.g.*, under RCW 34.05.413; -419, nor could it be, because it was an *ex parte* application procedure and it occurred without notice to the affected workers.

***B. DLI's Procedure for "Approving" a "Reasonably Equivalent" Pay Scheme Is Not Binding on the Parties or the Court, Regardless of Whether Its Outcome Was Right or Wrong.***

Even when the agency has authority to make a final determination, an administrative agency's determination is reviewable in court. An adjudication is reviewable by a court upon petition by an aggrieved party. (See the APA, *e.g.*, RCW 34.05.570.) An administrative determination that is not reviewed may be accorded preclusive effect in a subsequent judicial proceeding *only when* the agency was acting in a judicial capacity in making the determination and it resolved disputed issues of fact "which the parties have had an adequate opportunity to litigate." *State v. Dupard*, 93 Wn.2d 268, 274, 609 P.2d 961 (1980); *Mallard v. DRS*, 103 Wn.2d 484, 490-91, 694 P.2d 16 (1985).

DLI's procedure and its "reasonably equivalent" determination letter to IDC, CP 255-56, *met none of the standards to bind parties in court*. DLI's procedure was totally *ex parte*, it provided no notice to affected workers, there was no hearing, and DLI's factfinding process consisted only of communications back and forth to IDC. CP 238-81. While DLI purported in this procedure to decide the facts and law

applicable to IDC's per-mile pay scheme and overtime liability, CP 255-56, the determination was not a formal administrative decision under the APA. IDC cited *no authority* for its argument that DLI's *ex parte* procedure and the DLI determination letter affect anyone but DLI's own actions or inactions regarding IDC.<sup>3</sup> And the trial court cited no authority for basing summary judgment on DLI's *ex parte* "reasonably equivalent" determination without the court deciding the law and facts for itself.

Moreover, in *Bostain*, similar to this case, the defendant Food Express submitted to the court a DLI letter saying Bostain's claim against Food Express was wrong. 159 Wn.2d at 717 n. 7. And beyond that, in the *Bostain* case DLI formally supported Food Express's position with both a WAC regulation and an *amicus* brief. The Supreme Court in *Bostain* rejected DLI's positions and interpretations and decided the case itself. *Id.* at 713-17. DLI's position is therefore plainly not binding in court.

The DLI "approval" procedure did not establish the facts and law through a process in which the affected parties had notice and opportunity to be heard. Therefore, DLI's determination has no effect here. *State v. Dupard, supra*, 93 Wn.2d at 274-77. The superior court should decide the facts itself and determine how to apply the overtime law to the facts.

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<sup>3</sup> IDC contended that Westberry agreed the DLI letter might be a "defense" in Westberry's motion for remand from federal court. CP 235. He certainly did not say that DLI's position is binding on him. Westberry complained that DLI's practice could "arguably" give IDC a "defense" it might use in court. He plainly did not mean DLI could create a *conclusive* defense. CP 303 n. 3. He wanted to litigate the matter in a Washington state court, not federal court.

*Bostain*, 159 Wn.2d at 716 and 717 n. 7.

**C. *The Trial Court Failed to Independently Decide the Law and Facts Here.***

To obtain summary judgment, IDC had to establish there is no genuine issue of material fact and it is entitled to judgment as a matter of law. CR 56(d). However, IDC did not submit the facts for the trial court to decide, nor did it make a legal argument on what constitutes pay that is “reasonably equivalent” to overtime. RCW 49.46.130(2)(f). IDC submitted its application to DLI and DLI’s correspondence with IDC, resulting in DLI’s “retroactive” approval of IDC’s pay scheme. CP 238-40. IDC did not contradict Westberry’s calculations of overtime pay due (CP 106-07, 118-20). Nor did IDC, in its motion for summary judgment, withdraw or contradict its own analysis of the overtime pay due to Westberry by Renee Trueblood (CP 41-43, 96-97), who used a different calculation method and exaggerated Westberry’s overtime hours.<sup>4</sup> And IDC did not withdraw or contradict its own concession that Westberry “was not paid overtime.” CP 42.

IDC instead submitted another declaration by Renee Trueblood describing how IDC had followed an *ex parte* procedure with DLI to obtain DLI’s finding and conclusion that IDC’s pay scheme was “reasonably equivalent” to receiving overtime. CP 238-40. And IDC

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<sup>4</sup> IDC exaggerated the amount of overtime hours Westberry worked to assert his claim was worth more than the \$75,000 to remove the case to federal court. CP 20-26.

submitted the DLI letters making findings on IDC's facts in support of summary judgment, CP 255-56, 280, saying the matter had "already been determined." CP 311.

IDC argued that DLI's retroactive approval letter was not just "a personal opinion letter," but "constitutes a formal analysis." CP 312. IDC argues that, *because of DLI's approval, "IDC's compensation system has already been determined to comply with the MWA [overtime law]."* CP 311 (emphasis added). IDC cited (CP 312) the 2008 amended regulation stating that DLI would consider retroactively approving such schemes. WAC 296-128-012 (2008). No authority (statute or caselaw) was submitted to establish that such a retroactive agency approval could affect any persons who were not parties to the *ex parte* procedure. CP 312.

DLI's approval letter to IDC also contradicts DLI's own policies on calculating overtime for those who work on a piece-work basis, such as the per-mile rate used by IDC. CP 106-07; 138-51. A truly "reasonably equivalent" pay scheme would in some way provide a pay premium to a driver while working in excess of 40 hours in a week. DLI's conclusion that the pre-existing flat per-mile rate was equivalent to overtime for truck drivers is contrary to the overtime pay calculation methods offered by *both Westberry and IDC*. CP 41-43, 96-97, 118-20, 106-07. The statute also requires that truck drivers receive compensation that is at least "reasonably equivalent" to the overtime pay required "for working longer than forty

hours per week.” RCW 49.46.130(2)(f). DLI, however, stated that IDC’s *flat* per-mile rate was “equivalent,” even though the truck drivers had *no* premium or increase in pay “for working longer than forty hours per week.” *Id.*

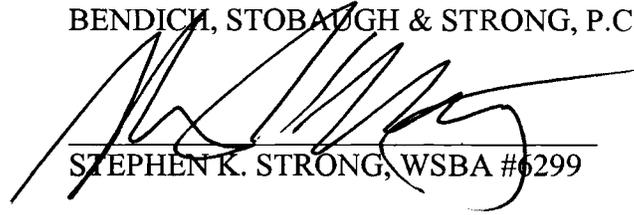
In any event, for the DLI approval to have any “preclusive effect” (or, as IDC put it, to have “already been determined,” CP 311) with respect to the truck drivers in this case, DLI’s procedure had to provide notice and an opportunity to be heard. *State v. Dupard, supra*, 93 Wn.2d at 274. DLI, however, did *not* proceed through a normal adjudication process, *e.g.* RCW 34.05.010(1); 34.05.413. Rather, DLI conducted an entirely *ex parte* procedure without notice to the affected drivers. The overtime pay claims have thus *not* “already been determined” (as IDC said, CP 311) for purposes of this case. *State v. Dupard*, 93 Wn.2d at 274-75. The trial court erred in basing its dismissal under CR 56 on DLI’s procedure and the factfinding determination and analysis resulting from that *ex parte* procedure. CP 320-21. The courts decide the facts and law, not DLI. *Bostain, supra*, 159 Wn.2d at 716-17.

### **CONCLUSION**

The summary judgment below should be reversed and the case remanded for the superior court to decide the law and facts.

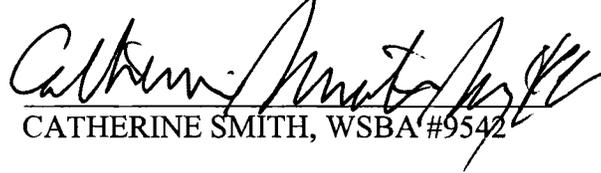
Respectfully submitted this 8th day of October, 2010.

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DECLARATION OF SERVICE

STATE OF WASHINGTON  
DEPUTY

I, Monica I. Dragoiu, declare under penalty of perjury that I am  
over the age of 18 and competent to testify and that the following parties  
were served as follows:

On October 8, 2010, I served via email and USPS regular mail a  
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I hereby declare under penalty of perjury under the laws of the  
State of Washington that the foregoing is true and correct.

DATED: October 8, 2010, at Seattle, Washington.



Monica I. Dragoiu, *Legal Assistant*