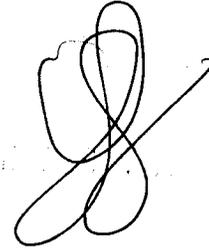


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2011



No. 65372-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK LITCHFIELD and a class of similarly situated individuals,

Petitioners,

v.

KPMG, LLP,

Respondent.

REVIEW FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE STEVEN C. GONZALEZ

**REPLY BRIEF OF
PETITIONERS/CROSS RESPONDENTS**

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I. INTRODUCTION

To be a “bona fide professional” within the overtime exemption, RCW 49.46.010(5)(c), an employee must have both: (1) “*advanced knowledge*” of a profession that is “*acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education;*” and (2) the *employee who has the advanced knowledge required for the profession must also perform professional work* that both “requires consistent exercise of discretion and judgment” and that is “predominantly intellectual and varied in character.” WAC 296-128-530(1)-(3) (emphasis added).¹ KPMG ignores the “advanced knowledge” requirement for exemption, collapsing it into the second

¹ KPMG’s brief, pp. 8-9, contends that its audit associates “perform complex and substantive tasks requiring the exercise of professional care, discretion and judgment.” But KPMG never moved for summary judgment and plaintiff’s motions for partial summary judgment were based solely on the “advanced knowledge” requirement, not on whether unlicensed audit associates also actually perform professional work. Thus, the actual work performed by audit associates was not an issue addressed by the trial court, nor is it an issue before this Court. In any event, Litchfield’s declaration and KPMG’s own evidence dispute KPMG’s characterization of the work.

and separate requirement that the employee actually perform the professional work of the profession at issue – here, auditing.²

KPMG made the same argument that *only duties count* in the trial court, contending that exemptions from overtime for its unlicensed audit associates must be determined individually for each employee through a person-by-person, week-by-week, retrospective look at “the job duties actually performed by each unlicensed accountant, on an employee-by-employee basis.” (CP 1722) Not only is KPMG’s retroactive, ad hoc test completely unworkable, it is also not how KPMG acts. KPMG treats its audit associates as exempt professionals from the moment they are hired and it never engages in any individualized retroactive look at their work.

The trial court properly rejected KPMG’s job-duties-are-all argument because professional work by itself is not sufficient. (CP 2090, ¶1) Performing professional work is only one part of the

² KPMG Br. p. 16 (“Simply put, exempt status turns on the individual’s actual job duties”); *see also* KPMG Br. p. 1 (“[T]he proper analysis of whether a given worker is exempt depends primarily upon his or her actual job duties”); Br. p. 15 (“exempt status depends upon the performance of job duties requiring advanced knowledge”); Br. p. 20 (“It is job duties, not licensure, that determines exempt status”); Br. p. 27 (“exempt status turns not on licensure, but on the job duties actually performed by the employee in question”).

objective meaning of “bona fide professional.” Otherwise, any employer could transform any employee into an exempt professional simply by having the employee perform “exempt” work, e.g., a paralegal could be transformed into an exempt professional simply because paralegals admittedly do legal work.

The Superior Court instead correctly looked to the Accountancy Act and its regulations to determine the “advanced knowledge” required to be a “bona fide professional” auditor, because neither the Minimum Wage Act (MWA) nor Department of Labor and Industries (DLI) interpretive WACs address which professions are exempt or what “advanced knowledge” is required for any specific profession. Similar to medicine, law, teaching or nursing, the Superior Court determined that “the prolonged course of specialized intellectual study and instruction” required of a professional auditor is the study and instruction, including on-the-job training and instruction, defined by the Accountancy Act and its regulations.

The Superior Court correctly determined that Litchfield and the plaintiff class members are not exempt from overtime until they have the “advanced knowledge” required by the Accountancy Act regulations – both a Bachelor’s degree with an accounting

concentration (WAC 4-30-060) and one year of on-the-job training and instruction to “obtain the competencies” required by WAC 4-30-070. The Superior Court only erred in determining that the remaining elements of “advanced knowledge” required – studying for and passing all parts of the CPA exam, including the section on auditing (WAC 4-30-62), and thus qualifying for a license to practice as a CPA (WAC 4-30-080) – are not also necessary for an audit employee to be exempt from overtime regulations as a “bona fide professional” auditor.

II. ARGUMENT

A. The Trial Court Did Not Err In Looking To The Accountancy Act In Determining That KPMG’S Audit Associates Are Not Exempt As Bona Fide Professionals.

1. In Looking To The Accountancy Act And Its Regulations, the Trial Court Did What Courts Normally Do In Deciding Whether An Employee Is A Bona Fide Professional With “Advanced Knowledge.”

The Superior Court did not err in considering not only the Minimum Wage Act (MWA) and its regulations, but also the Accountancy Act, RCW Ch. 18.04 and its regulations, in deciding that Litchfield and the plaintiff class are not exempt from overtime protections until they have acquired the advanced knowledge required by the Accountancy Act and its regulations (WAC 4-30-

060 and -070), contrary to KPMG's argument. KPMG Br. pp. 2, 22-24, 28, 30. The MWA exempts from overtime those employed as a "bona fide . . . professional." RCW 49.46.010(5)(c). But the MWA does not define what the "bona fide" professions are, nor what is required to be a "bona fide professional" within a specific profession. A DLI regulation contains a general definition of what constitutes a "bona fide professional" for overtime exemption purposes. WAC 296-128-530(1)(a). But DLI's interpretive WAC 296-128-530(1)(a) is general, not specific, stating only the *kinds* of occupations that may be professional positions – those that "requir[e] knowledge of an advanced type" acquired by "a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education." DLI's regulation does not state either what the required "prolonged course of specialized intellectual instruction and study" is for any specific profession, or which professions are exempt.

The trial court therefore properly looked to the Accountancy Act and its regulations, because they specifically govern professional auditors, establishing the education, instruction and training requirements to be a "bona fide professional" in auditing. The courts routinely look to licensing laws in deciding whether a

position satisfies the advanced knowledge requirements to be exempt as a bona fide professional under the federal Fair Labor Standards Act (FLSA). For example, in *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737, 742 (6th Cir. 2000), the Sixth Circuit determined that a funeral director was a learned professional with advanced knowledge because he was licensed by the state. The director had the “advanced knowledge” needed to be a learned professional because the licensing law required specialized education, a one-year on-the-job apprenticeship training, and passing both the national board test and a state exam.

Similarly, the Fifth Circuit held that school athletic trainers were exempt learned professionals with advanced knowledge because they had attained a license from the state in *Owsley v. San Antonio Independent School District*, 187 F.3d 521, 524-26 (5th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000). To obtain the license, trainers had to have a Bachelor’s degree, serve an apprenticeship training of 1,800 hours, and take and complete specialized courses. *See also Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, 172-73, *reh’g denied*, 714 F.2d 137 (5th Cir. 1983) (airline pilot was learned professional because he was licensed as a commercial pilot by the FAA); *Campbell v.*

PricewaterhouseCoopers, LLP, 602 F.Supp. 2d 1163 (E.D. Cal. 2009) (auditor is one of the learned professions requiring a license to practice; therefore unlicensed audit associates are not professionals exempt under California law from overtime).

Given the general guidance of DLI that “advanced knowledge” is necessary to trigger the “bona fide professional” exemption, the trial court properly examined the requirements of the Accountancy Act in determining the requirements for the exemption. Contrary to KPMG’s argument, DLI has never decided that the Accountancy Act and its requirements are irrelevant. KPMG Br., p. 15. Rather, as stated below, DLI *never* looked at the Accountancy Act, and *has no administrative interpretation* of it. (CP 1975) In looking not only to the MWA and DLI’s regulations, but also to the Accountancy Act and its regulations, the trial court was doing what DLI normally does when deciding whether Litchfield and the plaintiff class members are bona fide professionals with advanced knowledge.

2. DLI’s General Guidance Supports the Trial Court’s Decision and Litchfield’s Position.

KPMG contends that instead of looking to the Accountancy Act and its regulations, the trial court should have deferred to DLI’s

Administrative Policy ES.A. 9.5, arguing “[t]hat interpretation is controlling here.” KPMG Br., p. 16. This argument fails for at least three reasons.

First, DLI guidance is not “controlling.” Rather, it is at most a “policy statement” under the APA, RCW 34.05.230(1), which allows an agency to provide non-binding “advisory” interpretations and policies to the public or the courts without complying with the APA rule-making procedures. *Association of Washington Business v. Washington State, Dept. of Revenue*, 155 Wn.2d 430, 442-443 and n. 12, 446-47, 120 P.3d 46 (2005) (courts do not defer to interpretive rule, which is “accorded no deference other than the power of persuasion”); *Washington Education Ass’n. v. Washington State Public Disclosure Com’n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003) (policy statements under RCW 34.05.230(1) are “advisory only” and have “no legal or regulatory effect”).

Second, DLI “has not considered or been asked to consider the requirements of the Washington Accountancy Act in analyzing whether an employee qualifies for exemption from the MWA’s overtime laws.” (CP 1975 (testimony of DLI employee Richard Ervin)) Thus, there is no pertinent DLI administrative interpretation

of the applicability of the Accountancy Act and its regulations to which the courts could defer.

Finally, the DLI policy statement actually supports the trial court's decision and Litchfield's position. DLI's administrative guidance states that doing exempt work by itself is not sufficient to trigger the "bona fide professional" exemption. ES.A. 9.5.8.2. KPMG accurately quotes the DLI policy guidance that whether an employee is an exempt professional "must be determined on the basis of the individual employee's duties *and the other criteria in the regulations.*" KPMG Br. p. 16 (emphasis added), *quoting* ES.A. 9.5.8.2. But in its job-duties-are-all theory, KPMG reads out of the policy the second half of the guidance – the "other criteria in the regulations" that are at issue here, and which were the basis for the trial court's decision.

The guidance states that to be exempt the position must require "advanced knowledge," and that this advanced knowledge must be acquired "by a prolonged course of specialized intellectual instruction and study *that is different from a general academic education.*" ES.A. 9.5.8 (emphasis added). Moreover, DLI's discussion in its guidance of what is "customarily" required for

advanced knowledge for learned professions, including accounting, does not support KPMG:

Generally speaking the requisite knowledge which meet the requirement for a prolonged course of specialized intellectual instruction and study include nursing, *accounting*. . . . The professional must be able to use the advanced knowledge gained in the job performed.

The typical symbol of the professional training and the best evidence of its possession is, of course, the appropriate academic degree, and *in these professions an advanced academic degree is standard*.

ES.A. 9.5.8 (emphasis added).

KPMG does not require its audit associates to have an “advanced academic degree,” and employs audit associates with a “general academic education,” *i.e.*, a Bachelor’s degree. DLI’s guidance thus does not support KPMG’s argument on what “advanced knowledge” an exempt professional must have. *Accord, Dybach v. State of Fla. Dept. of Corr.*, 942 F.2d 1562, 1565-66 (11th Cir. 1991). In *Dybach*, plaintiff had a specialized Bachelor’s degree in criminal justice. But the Probation Officer job he held was available to those who did not have a specialized Bachelor’s degree. The Court held that *Dybach*’s position is not “professional because it did not require a college or advanced degree in a specialized field of knowledge.” 942 F.2d at 1566; *see also Fife v.*

Harmon, 171 F.3d 1173, 1176 (8th Cir. 1999) (Bachelor's degree is not sufficient to exempt "airfield operation specialists" as professional employees).

Moreover, KPMG selectively quotes only a small portion of DLI's guidance about the work an exempt "bona fide professional" must perform. See KPMG Br., pp. 16-17 (quoting two sentences from ES.A. 9.5.8.2). DLI's guidance specifically states that "junior accountants" (such as Litchfield and the plaintiff class members who have entry-level jobs on KPMG's audit teams) are normally *not* exempt professionals, because they do routine work under close supervision.³

Accounting clerks, *junior accountants*, and other accountants, on the other hand, normally perform a great deal of routine work that is not an essential part

³ KPMG never moved for summary judgment, but in opposing plaintiff's motion for class certification relied on declarations focusing on one or two instances where audit associates found an exception or discrepancy during a year or two of work. KPMG's declarations exaggerate the non-routine nature of the work performed by audit associates, and in any event could only raise an issue of disputed fact concerning the nature of the work performed. See Litchfield Dec. (CP 161-77), describing the routine work performed by audit associates. Even KPMG's audit associate witnesses disclose that they are doing entry-level jobs closely supervised by other members of the audit team, and that they cannot institute actions independently and instead must obtain approval from their supervisors before acting. (CP 1425-26, ¶¶14-16; 1437, ¶¶16-17; 1440-41, ¶¶25-28; 1453, ¶¶9-10; 1455-56, ¶¶14-15; 1477, ¶¶17-19; 1478, ¶¶20-21; 1479-80, ¶¶26-27; 1486, ¶11; 1495-96, ¶¶10-11; 1498-1500, ¶¶15-19; 1502, ¶24; 1508, ¶10; 1511, ¶16; 1517, ¶11; 1529, ¶15)

of and necessarily incident to any professional work which they may do. Such accountants are not normally exempt when the majority of their work is routine work.

ES.A. 9.5.8.2 (emphasis added). KPMG also ignores DLI's guidance stating that those, like Litchfield and the plaintiff class members, who are being trained on the job to become bona fide professionals are not exempt:

Trainees. The exemption for professional employees does not apply to workers in training for these positions and not actually performing the duties of a full-fledged professional employee. However, a bona fide professional employee does not lose his or her exempt status merely by undergoing further training for the job performed.

ES.A. 9.5.7.

KPMG focuses (Br. p. 16) on two sentences of DLI's guidance which mention CPAs in arguing that DLI's guidance supports its position that licensing as a CPA is irrelevant and that job duties are all that matter:

Certified public accountants who meet the salary requirement of the regulations will, except in unusual cases, meet the requirements of the professional exemption. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work that requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of professional employee.

ES.A. 9.5.8.2. These statements are not inconsistent with the trial court's decision or Litchfield's position, particularly since DLI "has not considered or been asked to consider the requirements of the Washington Accountancy Act." (CP 1975, ¶16) Certified Public Accountants would normally be exempt because they have the advanced knowledge required and they would normally be doing CPA work. But a CPA who was doing routine bookkeeping would not be exempt, because even though he or she had advanced knowledge, the CPA would be working as a non-exempt bookkeeper.⁴

Similarly, the statement that accountants who are not CPAs "may also be exempt" based on the work performed, is also correct for those accountants who have the advanced knowledge required for the particular type of accounting work they are performing if they are performing accounting services that are not regulated by the Accountancy Act, such as tax accounting. See RCW 18.04.350(10). But auditing is one of the services that the

⁴ KPMG's cases addressing job duties and misclassification are all distinguishable on this ground. This case concerns the "advanced knowledge" necessary to be a bona fide professional, not whether an employee with a professional title is actually performing non-professional job duties.

Accountancy Act does regulate, and the Act specifically prohibits an unlicensed individual from issuing the reports and opinions required of an auditor. See Arg. B.1 *infra*, p. 20. Thus, DLI's guidance does not address the issue presented here: whether an employee must fulfill all the educational requirements of the Accountancy Act and its regulations in order to be a "bona fide professional" auditor.

3. The Trial Court Did Not Err in Deciding That the Legislature Required Additional On-the-Job Training Before Assistants Of Auditors Could Be Exempt As "Bona Fide Professionals."

KPMG contends the Superior Court erred in its interpretation of the Accountancy Act and its regulations by "conflating experience with education" because these are "separate and distinct concepts within the Accountancy Act and its regulations," and that this supposedly "confirm[s] that the MWA's knowledge requirement does not incorporate work-experience requirements." KPMG Br. p. 34. There are two major errors in this argument:

First, the trial court was determining both the meaning of "bona fide . . . professional" used in the MWA and the "advanced knowledge" requirement in DLI's general regulations establishing the requirements for exemption as a professional. An employee can obtain the advanced knowledge required to be a learned

professional through a combination of education and actual work experience. *Owsley, supra*, 187 F.3d at 524-26; *Rutlin, supra*, 220 F.3d at 742; *Hashrop v. Rockwell Space Operations Co.*, 867 F. Supp. 1287, 1296-97 (S.D. Texas 1994); *Reich v. State of Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993); *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 550, 544-45 (7th Cir. 1999).

Second, while Accountancy Board regulation WAC 4-30-70 refers to the requirement as “experience,” the experience is required in order “to obtain the competencies” needed to practice public accounting, which includes auditing, and requires a license. WAC 4-30-070(2) and (3). “Obtain” means: “To gain or attain possession;” its synonym is “get.” *Webster’s Third International Dictionary*, p. 1559 (1976 ed.). One does not “obtain” that which one already has. Thus, an accountant (including an audit associate) must work for a public accounting firm for at least a year to obtain the knowledge and skills needed to practice public accounting, which includes auditing. Indeed, Robert Carlile, the head of KPMG’s audit practice, acknowledged that an audit associate obtains the “competencies” and “abilities” to do the specialized audit work required of professional auditors only by working as an audit associate for a year, during which KPMG’s

“Senior Associates mentor and teach Associates on engagements.”
(CP 1349-51, ¶¶22-30; CP 1357, ¶55; see also CP 1352, ¶35)
Carlile himself certified to the Accountancy Board that Litchfield had
acquired the required “competencies” and “abilities” by working on
audits for a year. (CP 1578, ¶88. See also CP 1576, ¶86)

Thus, the “experience” requirement in the Accountancy Act
and regulations actually encompasses part of the specialized
“advanced knowledge” required to be a bona fide professional
auditor, which is obtained through one year of on-the-job training
and instruction. Indeed, Policy No. 2001-2 of the Washington State
Board of Accountancy, titled “Experience,” expressly provides that
the 12-month experience requirement is an “apprenticeship,” *i.e.*, a
period of required instruction and on-the-job training for the CPA
candidate:

The Board’s goals with establishing competency
requirements are to define the experience
requirement in a manner that is applicable to
candidates’ obtaining their experience in a variety of
fields and organizations, to provide a thorough guide
to the licensed CPA to support a candidate during the
apprenticeship . . . And in assessing whether a
candidate’s experience supports *the attainment of the
competences, to meet statutory requirements for
determining competency requirements for applicants
for licensure, and to support public protection through
clearly-defined requirements for an apprenticeship
period prior to licensure.*

(CP 1630) (emphasis added).

Similarly, both GAAS and AICPA rules of professional conduct, which govern auditors under WAC 4-30-048(1), require the auditor to properly instruct and supervise “assistants.” AICPA Statement on Auditing Statements Planning and Supervision, AU Section 311 ¶¶28, 31. And AICPA, AU Section 210.03 requires that a “*junior assistant, just entering upon an auditing career, must obtain his professional experience with the proper supervision and review of his work by a more experienced superior.*” (emphasis added) It is undisputed that Litchfield and the plaintiff class members are just such “assistants,” occupying entry level jobs on KPMG audit teams that normally include a partner, senior manager or managers, one or more Senior Associates, and one or more audit associates. (CP 162-63, ¶¶8; 1377-78, ¶¶36; 1412, ¶¶15)

KPMG argues that these professional standards apply only to the auditor in charge, and thus that the “argument proves far too much” because it would mean that licensed CPAs assisting the auditor in charge would be exempt. KPMG Br., pp. 34-35. This argument misses the point. Litchfield and the plaintiff class members are not licensed and thus they cannot be auditors, as the trial court correctly found. (CP 2090, ¶¶1) They accordingly cannot

be the auditor in charge who supervises “assistants” and issues the required report and opinion, because they are not licensed to practice as CPA. In contrast, members of KPMG’s audit team who are licensed to practice as CPAs could be auditors in charge and supervise unlicensed audit associates. It is KPMG’s argument that “proves too much,” in its premise that audit associates are not limited by the professional standards governing licensed auditors.

The trial court correctly looked to the Accountancy Act and its regulations and did not err by agreeing with the Legislature that an audit associate is not eligible to be an exempt “bona fide professional” employee until he or she has completed the prolonged course of specialized study and instruction specified by the Accountancy Board’s WAC: a bachelor’s degree with an accounting concentration (4-30-060) and one year of on-the-job training and instruction, so that the audit associate may attain the competencies and abilities needed to perform audit work as a professional (4-30-070). As explained below, the trial court only erred in not recognizing that the proof that an audit employee has acquired the requisite “advanced knowledge” to be exempt as a bona fide professional requires also studying for and passing the CPA exam and obtaining a license to practice.

B. The Trial Court Erred In Concluding That Passing The CPA Exam And Obtaining A License To Practice Are Not Also Required To Prove The “Advanced Knowledge” Necessary To Be An Exempt Bona Fide Professional Auditor.

1. The Accountancy Act Prohibits Unlicensed Audit Associates From Professional Practice As Auditors. Passing the CPA Exam and Obtaining A License Are Required To Be A Bona Fide Professional Auditor Because It Confirms The Employee Has Obtained The “Advanced Knowledge” Necessary For The Profession.

The trial court correctly rejected KPMG’s argument that the Accountancy Act does not prohibit unlicensed audit associates from practicing as auditors. KPMG Br. pp. 24-25. (CP 1553-54, ¶¶11, 13; *see also* CP 1349, ¶21; 1378, ¶37; 1413, ¶19; 2090, ¶1) The trial court then erred, however, in holding that a CPA license was nevertheless not required to exempt audit employees from the MWA. Given the specialized nature of auditing, the trial court erred in holding that the remaining requirements of the Accountancy Act and its regulations – studying for and passing the CPA exam, including the section on auditing, and obtaining a license to practice public accounting – were not needed to have the advanced knowledge required of a bona fide professional auditor.

Accounting is not a single occupation, but rather a bundle of occupations, some of which (including auditing) are state-regulated

and some (e.g., tax accountants) are not. See, e.g., *Brock v. National Health Corp.*, 667 F. Supp 557 (M.D. Tenn. 1987) (staff accountants who audited nursing home books prepared by bookkeeper and reported discrepancies and recommended changes to their supervisors not exempt from overtime). Auditing is specialized professional work that is part of public accounting but distinct from other aspects of public accounting and from accounting in general. Unlike other aspects of public accounting or accounting in general, by law auditors must be completely independent of the companies and the management of the companies that are audited and cannot provide accounting advice.

An accountant who is not licensed as a CPA cannot practice as a professional auditor and cannot issue the reports and opinions on financial statements that are required of auditors. RCW 18.04.025 (1)(19)(22), .345(7)(9), .350 (10). RCW 18.04.025(19) defines the "Practice of Public Accounting" to include "the issuance of 'audit reports,' 'review reports,' or 'compilation reports' on financial statements." RCW 18.04.025(22) defines the "reports on financial statements" that only licensed individuals may provide to include those that are *sine qua non* of an auditor:

“Reports on financial statements” means any reports or opinions **prepared by licensees** or persons holding practice privileges under substantial equivalency, based on services performed in accordance with generally accepted auditing standards, standards for attestation engagements, or standards for accounting and review services as to whether the presentation of information used for guidance in financial transactions or for accounting for or assessing the status or performance of commercial and noncommercial enterprises, whether public, private, or governmental, conforms with generally accepted accounting principles or another comprehensive basis of accounting.⁵

RCW 18.04.025(22) (emphasis added). RCW 18.04.025(13) defines “License” as a “license to practice public accountancy issued to an individual under this chapter.” RCW 18.04.25(14) defines a “Licensee” as “the holder of a license to practice public accountancy issued under this chapter.” RCW 18.04.025(19) and

⁵ RCW 18.04.025(1) defines the attestation services that only a licensed individual may practice as:

(1) “Attest” means providing the following financial statement services:

(a) Any audit or other engagement to be performed in accordance with the statements on auditing standards;

(b) Any review of a financial statement to be provided in accordance with the statements on standards for accounting and review services;

(c) Any examination of prospective financial information to be performed in accordance with the statements on standards for attestation engagements; and

(d) Any engagement to be performed in accordance with the public company accounting oversight board auditing standards.

(22) respectively specify that “public accounting” and “reports on financial statements” do not include the accounting services allowed by RCW 18.04.350(10). While RCW 18.04.350(10) allows certain types of accounting work to be performed by unlicensed individuals, auditing is not one of those services. The statute further specifically prohibits an unlicensed person from issuing the reports and opinions on financial statements that auditors produce. *See also* RCW 18.04.345(7) (prohibiting an unlicensed individual from issuing “any report prescribed by professional standards unless the individual holds a license to practice.”); RCW 18.04.345(9) (“No individual . . . not holding a license to practice . . . may hold himself . . . out to the public as an ‘auditor.’”)

Thus, by statute, an auditor must be an independent professional or a certified public accountant. This requirement of professional independence (together with specialized knowledge) established auditing as a separate licensed profession within accounting. The U.S. Supreme Court explained that those requirements are intended to insure the public’s confidence in the professional audit:

Corporate financial statements are one of the primary sources of information available to guide the decisions of the investing public. Securities and

Exchange Commission . . . **regulations stipulate that these financial reports must be audited by an independent certified public accountant in accordance with generally accepted auditing standards.** By examining the corporation's book and records, the independent auditor determines whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period. (Emphasis added; footnotes omitted).

U.S. v. Arthur Young & Co., 465 U.S. 805, 810-811, 104 S. Ct. 1495, 79 L.Ed.2d 826, *cert. denied*, 466 U.S. 936 (1984). Unlike other aspects of public accounting, because of the auditor's legally required independence and unique role, auditors are required to act in the interest of the public, shareholders, and creditors, not the company being audited:

By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. **The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.**

465 U.S. at 818 (emphasis in original; bold added). *Accord, Micro Enhancement Inter., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App.

412, 434, 40 P.3d 1206 (2002) (“an independent auditor’s primary duty is to the public.”)

The professional standards for auditing, incorporated by reference in WAC 4-30-048 and referred to by the U.S. Supreme Court in *Arthur Young*, also expressly acknowledge that auditing is specialized independent professional work that requires extensive instruction and training in all aspects of accounting and in auditing:⁶

.02 This standard recognizes that however capable a person may be in other fields, including business and finance, he cannot meet the requirements of the auditing standards without proper education and experience in the field of auditing.

. . .

.03 . . . the independent auditor holds himself out as one who is proficient in accounting and auditing. The attainment of that proficiency begins with the auditor’s formal education and extends into his subsequent experience. The independent auditor must undergo training adequate to meet the requirements of a professional. . . . The junior assistant, just entering upon an auditing career, must obtain his professional experience with the proper supervision and review of his work by a more experienced superior.

AICPA, AU, Section 210.

⁶ These professional standards were previously found in WAC 4-25-622(1) and 631. The standards were re-codified as WAC 4-30-048.

KPMG recognizes that auditing is a very specialized part of public accounting that must be independently performed, and for this reason KPMG auditing work is performed by its separate audit practice section. (CP 1346, ¶7. See also CP 1562, ¶54 (“Auditors have to be independent of the [audit] company’s management, the preparers of financial statements.”) (emphasis added); CP 1563-65, ¶¶55-59; CP 1373-75, ¶¶24-27)) KPMG expert witness Dan Guy acknowledged that auditors are required by law to be independent of management, because they are auditing management’s financial statements, to protect the public and to assure third parties that management’s financial statements are not materially inaccurate or misleading. (CP 1557-58, ¶¶34-35; CP 1559-60, ¶¶42-45; CP 1562, ¶53) KPMG also agreed below that the independent auditor is thus required by law to express an opinion on the adequacy of the audited company’s internal controls, not to advise management how to create adequate controls in the first instance. (CP 1568-71, ¶¶67-72 (KPMG’s expert witness Dan Guy).

Thus, a professional auditor necessarily must have the “advanced knowledge” necessary to properly fulfill all of these independent obligations. Passing the CPA exam and being eligible to be licensed as a CPA proves the exempt employee’s acquisition

of this required advanced knowledge. WAC 4-30-062 provides that “[t]he CPA examination shall test the knowledge and skills required for performance as an entry-level certified public accountant,” and specifies that “auditing” is one of the exam’s tested subject areas that the individual must pass. KPMG’s expert witness Dan Guy confirmed that only after an individual was licensed to practice as a CPA could issue the audit reports and opinions that are required of an auditor:

Upon passage of the CPA Examination, completion of the State of Washington experience requirement, successful completion of the ethics examination with a passing grade of 90 or better, and obtaining a license to practice, Litchfield was at that point qualified to practice public accountancy in the State of Washington as a certified public accountant. In fact, after meeting these requirements and obtaining a CPA firm license from the State, Litchfield would have been able as a sole practitioner in the practice of public accountancy to perform audits of financial statements and sign his name on audit reports as a certified public accountant.

(CP 1578, ¶189) Indeed, KPMG’s Code of Conduct, posted on its website, acknowledges that a license to practice is a requirement for auditors:

Q: I am a manager in the Audit practice and maintain an active CPA license. Must I comply with the licensing requirements of other states in which I perform professional services?

A: Yes. In many states, licensing requirements apply to all CPAs, not just partners. **You must ensure that you are compliant with CPA licensing requirements prior to performing professional services in states where you do not maintain an active license.**

(CP 1632) (emphasis added).

In order to practice as an auditor, one must be licensed by the State as a CPA. Studying for and actually passing the CPA exam is part and proof of the “advanced knowledge” required to be a bona fide professional auditor. Because auditing is a separate, licensed occupation within the general occupation of accounting, the trial court erred in failing to recognize that the “advanced knowledge” requirement means that an audit associate must study for and pass the CPA exam and be licensed to practice to be exempt from overtime as a bona fide professional. Passing the CPA exam and actually obtaining the CPA license required to practice as an auditor is required to exempt audit employees as bona fide professionals.

2. DLI’s Guidance Confirms The Importance Of Licensing In Other Exempt Professions.

Although DLI has never been called upon to determine the licensing requirements for professional auditors (CP 1975), DLI in other guidance takes into account the Legislature’s requirements

for licensing in other professions. That analysis also supports Litchfield's position that a CPA license is necessary for an audit associate to be considered a bona fide professional.

For instance, DLI's administrative guidance notes that teaching is an exempt profession. The guidance incorporates the Legislature's requirement that a teacher must be certified by the state in order to be a "bona fide professional under the MWA," because certification proves that the teacher has "advanced knowledge" required by DLI's regulations.⁷ ES.A. 9.5.8.3. As Litchfield has consistently argued, DLI's guidance confirms that both the nature of the employee's work, and professional certification, are necessary to trigger the exemption: "Mere certification by the State, or employment in a school will not suffice to qualify an individual for the exemption if the individual is not in fact both certified and engaged as a teacher." ES.A. 9.5.8.3. Thus, under DLI's guidance, to be exempt as a professional a teacher must be both licensed and working as a teacher. Those who are

⁷ RCW 28A.410.025 requires school teachers to obtain a certificate to teach from the state. To obtain a certificate, the candidate must have a Bachelor's degree in the applicant's proposed teaching area (history, science, etc.), must have completed a state-approved college/university teacher education program, and must have passed a skills and knowledge test. RCW 28A.410.040, .210 and .220.

doing the work of a teacher, but who do not have the required state license, are not exempt.

DLI's guidance similarly incorporates the Legislature's licensing requirements for registered nurses. Nurses "who are registered by the appropriate State examining board will continue to be recognized as having met the professional requirement."⁸ ES.A. 9.5.8.1. Thus, registered nurses are exempt in DLI's view, but licensed practical nurses are not exempt.⁹

DLI's guidance thus confirms the importance of licensing in other exempt professions. An employer cannot transform a licensed practical nurse into an exempt nurse by having the individual perform the same work as a registered nurse. To be exempt the nurse must *both* be registered *and* perform the work of a registered nurse. Similarly, to be exempt a teacher must not only

⁸ RCW Ch. 18.79 governs registered nurses. To be eligible to obtain the license, the individual must have graduated from "an approved program of nursing" and pass the registered nurse exam. RCW 18.79.160-170. An unlicensed individual may not practice or offer to practice as a registered nurse, or use the titles "nurse" or "registered" nurse. RCW 18.79.030(1).

⁹ Though licensed practical nurses (LPNs) also are licensed, the educational requirements for that license are less stringent than the RN requirements, requiring only "completion of an approved practical nurse program." RCW 18.79.160. Also, LPNs must work "under the direction and supervision of a licensed physician." RCW 18.79.060. In that regard they are like unlicensed audit associates, who must be supervised by a licensed auditor when performing auditing work. See *supra*, pp. 17-18.

be working as a teacher, but must be certified to teach. KPMG's unlicensed audit associates who assist auditors are similar to LPNs, who can do some of the work of registered nurses, but are not thereby transformed into exempt registered nurses, just as those assisting teachers who do not have a teaching certificate are non-exempt, and paralegals are not converted into exempt professionals merely because they do a lawyer's work. To the extent it is relevant, DLI's guidance confirms the importance of licensure in professions, such as auditing, where a license is necessary for an individual to engage in the bona fide profession for which an employer seeks a professional exemption from the MWA.

3. The Trial Court Erred In Accepting "Expert Witness Testimony" That Was The Sole Support For KPMG'S Argument That Licensing Is Irrelevant.

As an additional reason why the trial court erred in deciding the first certified issue, Litchfield's opening brief pointed out that "the trial court's only apparent source for the view that 'bona fide professional' status as an auditor does not require studying for and passing the CPA exam and obtaining the CPA license required by statute for the practice of auditing was legal argument in the form of

supposed 'expert' witness testimony" from Tammy McCutcheon, a D.C. employment defense lawyer. Litchfield Br., p. 23. KPMG maintains that this issue is not before the Court because "[t]he trial court did not certify this issue for review; the parties did not brief this issue in their requests for discretionary review; and this Court did not authorize appeal of this issue when it granted discretionary review." KPMG Br., p. 37. But the evidentiary ruling is expressly part of the trial court's order attached to the notice of discretionary review. (CP 2363 (second Order); CP 2359 (first Order)) Further, the trial court's overruling of plaintiff's evidentiary objection is not a separate "issue," but another legal reason why the trial court erred in part.¹⁰ This decision prejudicially affected the trial court's decision on summary judgment and thus is subject to review here. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 46 P.3d 789 (2002), cert. denied, 540 U.S. 1149, reh'g denied, 541 U.S. 957 (2004).

¹⁰ KPMG's contention that the standard of review is abuse of discretion (KPMG Br., p. 38, n.21) is erroneous, because the Court is reviewing an order on summary judgment. The standard of review is de novo, including the admissibility of evidence. *State v. Lee*, 144 Wn. App. 462, 466, ¶11, 182 P.3d 1008 (2008), rev. denied, 165 Wn.2d 1017 (2009); *Folson v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

On the merits, KPMG maintains the trial court did not err because McCutcheon's testimony merely "describe[s] the policies and enforcement practices" of the federal Wage and Hours Division (WHD). But actually, as noted in Litchfield's Brief, pp. 23-25, McCutcheon's "testimony" reads just like a brief, and her argument that the WHD "never considered" state licensing in deciding exempt status is demonstrably false. (CP 1754, ¶40) For example, WHD issued formal opinions finding paralegals are not professional employees or administrative employees and not exempt from overtime in part because they are not licensed to practice law. December 16, 2005 FLSA 2005-54, 2005 WL 3638473 (quoted at Litchfield App. Br. 30). *Accord* February 19, 1998 FLSA opinion letter, 1998 WL 852701 (DOL Wage-Hour). KPMG attempts (Br., p. 39, n.23) to distinguish the opinion's discussion of state licensing as only pertaining to the administrative exemption, ignoring that the discussion occurs in the context of finding that the paralegal was not exempt as a professional employee, nor as an administrative employee.

McCutcheon's additional statement that satisfying a "state licensing law has never been a requirement for professional exemption" for WHD is equally erroneous. (CP 1754) U.S. Dept. of

Labor (DOL) regulation 29 C.F.R. § 41.301(e)(2) states that “nurses **who are registered by the appropriate State examining board** generally meet the duties requirements for the learned professional exemption.” (Emphasis added)) DOL also expressly adopts State licensing requirements for school teachers: “The possession of an elementary or secondary teacher’s certificate provide a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals.” 29 C.F.R. § 541.303(c).

Because McCutcheon’s “testimony” was the sole support for KPMG’s argument that licensing to practice as a professional is irrelevant, the trial court erred in overruling plaintiff’s objection and relying on this “evidence” in making its decision. This error is an additional legal reason why the trial court’s decision on the first certified issue is erroneous.

III. CONCLUSION

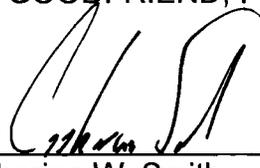
The Superior Court correctly determined that Litchfield and the plaintiff class members are not exempt from overtime until they have the “advanced knowledge” required by the Accountancy Act regulations, including one year of on-the-job training and instruction to “obtain the competencies” required by WAC 4-30-070. The

Superior Court only erred in determining that the remaining elements of “advanced knowledge” required – passing all parts of the CPA exam, including the section on auditing (WAC 4-30-62), and obtaining a license to practice as a CPA (WAC 4-30-080) – are not also required to be exempt from overtime regulations as a bona fide professional auditor.

Dated this 19th day of May, 2011.

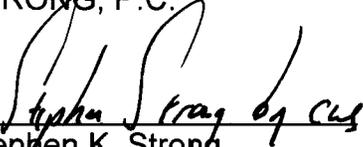
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 19, 2011, I arranged for service of the foregoing Reply Brief of Petitioners/Cross-Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 19th day of May, 2011.



Carrie L. Steen