

No. 63006-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

General Teamsters Local No. 174, on behalf of certain of the employees it represents, and Carl Gasca, Dane Radke, and James Holcomb, individually and on behalf of others similarly situated, *Appellants*,

v.

Safeway, Inc., *Respondents*.

BRIEF OF APPELLANTS

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I. INTRODUCTION

On December 12, 2008, King County Superior Court Judge Catherine Shaffer entered summary judgment in case number 07-2-25798-5 SEA, an action brought by General Teamsters Local 174, on behalf of certain of the employees it represents, and Carl Gasca, Dane Radke, and James Holcomb, individually and on behalf of others similarly situated, to recover overtime pay owed to them under RCW 49.46.130, Washington's Minimum Wage Act ("MWA"). The decision dismissed the claims of the Plaintiffs, who are or represent employee truck drivers for Defendant Safeway, Inc. ("Safeway"); individual workers who make deliveries wholly within the state of Washington.

In dismissing the action, the trial court accepted Safeway's argument that its employees were exempt from the overtime provisions of the MWA pursuant to the provisions of RCW 49.46.130(2)(f), which permits an employer to avoid paying traditional overtime pay to drivers who are subject to the provisions of the Federal Motor Carrier Act ("FMCA") (49 U.S.C. § 3101 et seq. and 49 U.S.C. § 10101 et seq.), and who are paid under a compensation system which includes overtime pay reasonably equivalent to that required by the MWA.

The trial court's ruling was erroneous, as a matter of law, for three reasons.

First, the trial court erred in error in finding the Plaintiff employees, who make deliveries wholly within the state of Washington, were covered by the FMCA.

Second, even if Plaintiffs were covered by the FMCA, the trial court erred in finding that the drivers are paid under a compensation system which includes overtime pay reasonably equivalent to that required by the Washington MWA, because Safeway did not establish that the pay actually received by Plaintiffs is in fact “reasonably equivalent” to that required by RCW 49.46.130.

Third, the trial court erred in finding that Safeway could claim the RCW 49.46.130(2)(f) exemption even though it never obtained approval for its alternative compensation system from the Washington State Department of Labor and Industries (“L&I” or “DLI”).

Because the trial court erred in entering judgment for Safeway, the trial court also erred in awarding Safeway its costs and fees.

For these reasons, Plaintiffs respectfully request that this Court reverse the lower court’s decisions.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in entering an order on December 12, 2008 denying Plaintiffs' Motion for Partial Summary Judgment, granting Defendant's Motion for Summary Judgment, and dismissing this action.

2. The trial court erred in entering an order on January 16, 2009 awarding costs and fees to Defendant.

3. The trial court erred in entering an order on January 21, 2009 denying Plaintiffs' Motion for Reconsideration of the December 12, 2008 order.

B. Issues Pertaining to Assignments of Error

1. Are truck drivers not covered by the provisions of the Federal Motor Carrier Act, and therefore not subject to the RCW 49.46.130(2)(f) exemption from Washington's Minimum Wage Act, where they drive exclusively within the boundaries of the State of Washington and there is no evidence their cargo was designated for specific stores on the drivers' routes before being shipped into the state of Washington? (Assignments of Error 1 through 3).

2. Where an employee is paid for tasks without regard to the actual hours worked, and receives premium pay without regard to whether the hours are or are not in excess of 40 per week, must the premium pay be included in the regular rate for purposes of determining the "regular rate at which he is employed" under RCW 49.46.130(1)? If so, can employees be considered to receive the "reasonable equivalent" of traditional overtime, as required by the RCW 49.46.130(2)(f) exemption from the MWA, when none of them receive equal to or more than what they

would have received had they been paid one-and-one-half of their regular rate of pay for hours worked over forty in one week? (Assignments of Error 1 through 3).

3. In the alternative, even assuming (contrary to WAC 296-128-550) that the employer is entitled to a credit for premium payments not paid on the basis of hours worked in excess of forty in a given workweek, where the evidence shows that about 20 percent of drivers working for an employer are paid less under the employer's alternative compensation scheme than they would be under normal hourly overtime requirements, does this show that the drivers are not paid the "reasonable equivalent" of normal hourly overtime, and therefore are not subject to the RCW 49.46.130(2)(f) exemption? (Assignment of Error 1 through 3).
4. Is an employer precluded from asserting the RCW 49.46.130(2)(f) exemption from its obligation to pay overtime pay in compliance with RCW 49.46.130 when that employer has failed to either apply for or receive approval of its alternative compensation system from the Department of Labor and Industries? (Assignment of Error 1 through 3).

III. STATEMENT OF THE CASE

On August 7, 2007, General Teamsters Local No. 174 ("Local 174") brought an action for unpaid overtime wages on behalf of certain of its members against Safeway. CP____-(Complaint).¹ Local 174's membership includes more than 130 people who were employed by Safeway at some time during the three years prior to the filing of the original complaint in this action, or who are currently employed by

¹ Appellants' have filed a Supplemental Designation of Clerk's Papers concurrently with this brief. Updated CP citations will be provided when the Index is created by the Superior Court.

Safeway in King County, Washington, in the job classifications of drivers, loaders, or driver-loaders (hereinafter, "Plaintiff employees" or "Plaintiff drivers"). CP___ (Complaint).

On July 8, 2008, the trial court granted Local 174's motion to amend its complaint to add the claims of Carl Gasca, Dane Radke, and James Holcomb as putative class representatives of similarly situated workers at Safeway (Local 174, Gasca, Radke and Holcomb collectively are "Plaintiffs"). CP___-___(Order Granting Motion to Amend). Gasca, Radke and Holcomb brought the same underlying factual and legal allegations against Safeway as Local 174. CP___-___(Amended Complaint).

The individuals involved are truck drivers for Safeway who transport goods between Safeway's Auburn, Washington distribution center and Safeway retail stores throughout the state. CP 701-702 (Statement of Stipulated Facts). It is undisputed that their driving is wholly within the state of Washington. CP 1204-1205 (Plaintiffs' Response to Safeway's Motion for Summary Judgment), CP 1223, CP 1227-1310 (Declaration of Jennifer Woodward in Support of Plaintiffs' Response to Defendant's Motion for Summary Judgment).

Up until May 2003, the collective bargaining agreements ("CBAs") between Safeway and Local 174 provided that truck drivers

were paid on an hourly basis, with overtime pay at one-and-one-half times their regular rate if they worked more than 40 hours per week and under other circumstances specified in the CBAs. CP 702, ¶ 6 (Statement of Stipulated Facts). In 2003, Safeway and Local 174 negotiated a new CBA, effective from May 1, 2003, to July 9, 2005, that sets forth a method for compensating drivers based on mileage and activity rates rather than hours worked. CP 702-703, ¶ 7 (Statement of Stipulated Facts).

This “activity-based compensation” system (which is known as the “ABC system”) pays certain amounts of money based on pre-set time values for delivery routes and activities (“Standard Time”). CP 703, ¶ 9 (Statement of Stipulated Facts). The ABC system provides for the payment of what the CBA calls overtime (“Contract Overtime”) if an employee completes more than 40 Standard Time unit “hours” in a week, and under other circumstances specified in the CBA. CP 704, ¶ 12 (Statement of Stipulated Facts).²

The ABC does not provide for the payment of the overtime rate for *actual hours* worked over forty in one week. Instead, drivers receive the premium rate only when they have completed more than 40 “Standard Time” unit “hours” (which are not actual hours) in one week. For example, a driver moving very quickly could complete more than 40

² Importantly, although “Standard Time” units are referred to as “hours,” it is a unit of task performance – “activities completed by the driver,” *not* a unit of time.

“Standard Time” unit “hours” in one week, based on the pre-set time value assigned to the routes completed by the driver, and receive the premium overtime rate although she did not work more than forty actual hours in one week. Conversely, a driver moving more slowly could work more than 45 actual hours in one week, but have only completed 40 “Standard Time” unit “hours”. This driver would not receive any overtime pay for the hours worked in addition to 40 because the driver did not complete more than 40 “Standard Time” unit “hours” in the week.³

In 2005, Safeway and Local 174 negotiated a subsequent CBA, effective from July 10, 2005, to July 11, 2011, that also provides for compensation under the ABC system. CP 703, ¶ 8 (Statement of Stipulated Facts).

Safeway runs weekly comparisons of Standard Time and actual time to determine driver performance. CP 705, ¶ 17 (Statement of Stipulated Facts). Each driver is given an efficiency rating (which is Standard Time divided by actual time) for the week. *Id.* Similarly, Safeway calculates the efficiency rating for the drivers as a group. *Id.*

³ In some cases, depending on the driver, the overtime rate may be paid after 8 or 10 hour-units of Standard Time completed in a day, or for work on a sixth or seventh straight work day. CP 704, ¶ 12 (Statement of Stipulated Facts). Contract Overtime is typically paid at a rate of one-and-one-half times the “base rate” in the CBA; however, at times, double time is paid. CP 704, ¶ 12 (Statement of Stipulated Facts).

These efficiency calculations do not include “Delay Time” or other non-driving hourly work. *Id.*

Safeway considers drivers who work more “actual time” hours than the amount of “Standard Time” unit “hours” they accomplish to be “low efficiency” drivers, while drivers who perform more “Standard Time” unit “hours” than the number of actual hours they work are considered to be “high efficiency” drivers. CP 1134 (Plaintiffs’ Motion for Partial Summary Judgment).

In the trial court, Plaintiffs contended that the drivers were denied proper overtime compensation under RCW 49.46.130(1) because they were not paid one-and-one-half times their regular rate of pay for all hours worked in excess of 40 in any given work week. CP 1132 (Plaintiffs’ Motion for Partial Summary Judgment). Plaintiffs claimed, according to RCW 49.46.130(1) they were entitled (1) to have their “regular rate of pay” for any given workweek be computed “by adding together the total earnings for the workweek,” including any premium pay received for completing a large number of “Standard Time” unit “hours”; (2) that this sum was then to be “divided by the total number of hours worked in that week” to yield the “regular rate” for that week; and (3) that they should then have been paid, in addition to their total weekly earnings, “one half the regular rate for each hour over 40 in the workweek.” CP 1134

(Plaintiffs' Motion for Partial Summary Judgment). CP 1093-1102 (L&I Employment Standards Administrative Policy ES.A.8.1, p. 4, ¶ 17) (Declaration of Dmitri Iglitzin, Ex. C).

On November 14, 2008, Plaintiffs filed a motion for partial summary judgment as to the issue of whether Plaintiffs were entitled to overtime under the MWA notwithstanding the exemption for certain drivers under RCW 49.46.130 (2)(f), because the RCW 49.46.130 (2)(f) exemption did not apply to Plaintiffs. CP 1129-1149 (Plaintiffs' Motion for Partial Summary Judgment). Specifically, Plaintiffs argued that the exemption did not apply because L&I had not approved of the ABC system in advance and would not grant approval retroactively; Safeway did not record the hours actually worked by its employees; and the ABC system did not pay overtime reasonably equivalent to that required by the MWA. CP 1129-1149. In their reply in support of their motion, Plaintiffs also argued that the drivers were not subject to the FMCA and thus Safeway was not entitled to rely on any exemption from the MWA overtime requirements. CP 1400-1407 (Plaintiffs' Reply in Support of Their Motion for Summary Judgment).

When Plaintiffs filed their motion for partial summary judgment, they did not have complete information for all of the weeks in question in the lawsuit. CP 1134 (Plaintiffs' Motion for Partial Summary Judgment).

However, based on the documents in Plaintiffs' possession at this time, Plaintiffs calculated that Gasca, Radke, and Holcomb's compensation under the ABC system had been less than what they would have been paid under an hourly overtime system. CP 948-949 (Declaration of Jennifer Woodward in Support of Plaintiffs' Motion for Partial Summary Judgment). These calculations showed that Gasca's compensation was deficient by at least \$1,232.41, Radke's was deficient by at least \$25,774.65, and Holcomb's was deficient by at least \$17,795.32. CP 948-949 (Declaration of Jennifer Woodward). Plaintiffs moved for summary judgment on the grounds that this could not be "reasonably equivalent" as a matter of law. CP 1139-1142 (Plaintiffs' Motion for Partial Summary Judgment).

Also on November 14, 2008, Safeway filed a motion for summary judgment as to all of Plaintiffs' claims. CP 1150-1173. Safeway sought summary judgment on the grounds that Plaintiff employees were paid pursuant to the ABC system which purportedly paid them overtime that was "reasonably equivalent" to that required by the MWA. CP 1150-1151 (Defendant Safeway's Motion for Summary Judgment). Therefore, Safeway argued, Plaintiffs were exempt from the right to time-and-one-half overtime pay under the MWA pursuant to RCW 49.46.130 (2)(f). CP 1150-1173 (Defendant Safeway's Motion for Summary Judgment).

In arguing that the ABC system paid overtime “reasonably equivalent” to regular overtime, Safeway relied on a declaration it filed the same day with new data purporting to show there was no deficiency. CP 427-700 (Declaration of Joel Leisy).

In its motion for Summary Judgment, Defendant also asserted that the Plaintiff employees were covered by the Federal Motor Carrier Act (FMCA), citing a stipulation and declarations, and therefore subject to the exemption. CP 1163 (Defendant Safeway’s Motion for Summary Judgment).

On December 1, 2008, Plaintiffs filed a response to Safeway’s motion for summary judgment. CP 1198-1222 (Plaintiffs’ Response to Defendant’s Motion for Summary Judgment). In this response, Plaintiffs disputed Safeway’s argument that Plaintiff employees were subject to the FMCA as a matter of law, and thus subject to the exemption in RCW 49.46.130(2)(f). CP 1198-1222 (Plaintiffs’ Response to Defendant’s Motion for Summary Judgment). Plaintiffs also continued to dispute whether the ABC system in fact paid a reasonable equivalent of overtime and whether Safeway could take advantage of RCW 49.46.130(2)(f) even though it had not received approval from L&I in advance. CP 1211-1216 (Plaintiffs’ Response to Defendant’s Motion for Summary Judgment).

Plaintiffs explained that Safeway's new calculations failed to take into account that traditional overtime requires that drivers be compensated for one-and-one-half times their "regular rate of pay." CP 1214-1215 (Plaintiffs' Response to Defendant's Motion for Summary Judgment). Additionally, Plaintiffs asserted that even under Safeway's methodology, a significant minority of drivers would *still* be underpaid under the ABC system compared to traditional overtime. CP 1217-1218 (Plaintiffs' Response to Defendant's Motion for Summary Judgment).

On December 12, 2008, Safeway's motion for summary judgment was granted by the trial court. CP 1408-1411 (Order Granting Defendant's Motion for Summary Judgment, Denying Plaintiffs' Motion for Partial Summary Judgment and Dismissing Action). By the same order, the trial court denied Plaintiffs' motion for partial summary judgment. CP 1408-1411 (Order Granting Defendant's Motion for Summary Judgment, Denying Plaintiffs' Motion for Partial Summary Judgment and Dismissing Action).

On December 22, 2008, Safeway filed a memorandum of costs and necessary disbursements, alleging it was entitled to costs because it prevailed at summary judgment. CP 1412-1417 (Defendant Safeway Inc.'s Memorandum of Costs and Necessary Disbursements). On January

16, 2009, the trial court issued an Order Granting Judgment on Award to Defendant. CP 1539-1540 (Judgment on Award).

On December 23, 2008, Plaintiffs filed a motion for reconsideration. CP 1422-1426 (Plaintiffs' Motion for Reconsideration). The motion for reconsideration was denied on July 21, 2009. CP 1548-1549 (Order Denying Plaintiffs' Motion for Reconsideration).

Plaintiffs filed a notice of appeal on February 11, 2009 pursuant to Court Rule 5.1(a). CP 1550-1563 (Notice of Appeal). Plaintiffs were directed to file this Brief by July 6, 2009.

IV. ARGUMENT

A. THE STANDARD OF REVIEW OF THE TRIAL COURT'S HOLDINGS RELATING TO THE APPLICABILITY OF RCW 49.46.130(2)(f) IS DE NOVO.

The trial court's order granting summary judgment for Safeway is reviewable de novo by this Court. *See, e.g., Lunsford v. Saberhagen Holdings, Inc.*, slip op., __ Wn.2d __, 2009 WL 1547826, *2 (June 4, 2009) ("We review summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party") (quoting *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006)). The trial court's findings that the FMCA applied to the

drivers, and that its compensation system qualified as “reasonably equivalent” as required by RCW 49.46.130(2)(f), are reviewable de novo. *See Mackey v. American Fashion Institute Corp.*, 60 Wn. App. 426, 429, 804 P.2d 642 (1991) (“The question of whether a statute applies to a factual situation is a question of law and fully reviewable on appeal”).

The factual findings made by the trial court on grant of summary judgment are also reviewable de novo. *See Hubbard v. Spokane County*, 146 Wn.2d 699, 707 n. 14, 50 P.3d 602 (2002) (“Although the trial court entered findings of fact, because summary judgment motions are reviewed de novo, these findings are superfluous and need not be considered”) (citing *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978)).

Additionally, “[t]he fact that both parties to an action move for summary judgment does not compel the conclusion that a judgment must be granted. Each motion must be considered separately...” *Burris v. General Ins. Co. of America*, 16 Wn. App. 73, 76, 553 P.2d 125 (1976), *rev. denied*, 87 Wn.2d 1014 (1976).

B. PLAINTIFF EMPLOYEES ARE NOT SUBJECT TO THE INTERSTATE TRUCK DRIVER EXEMPTION FROM THE WASHINGTON MINIMUM WAGE ACT OVERTIME PROVISIONS (RCW 49.46.130(2)(f)), BECAUSE THEY ARE NOT SUBJECT TO THE FEDERAL MOTOR CARRIER ACT.

1. RCW 49.46.130(2)(f) Only Applies To Employees Covered By The Federal Motor Carrier Act.

The MWA mandates that employers pay their employees a premium rate, not less than one-and-one-half times their regular pay rate, for all hours worked in excess of forty hours in a work week. RCW 49.46.130(1). RCW 49.46.130(2) contains exemptions from the overtime requirement. The exemption at issue here is set forth in RCW 49.46.130(2)(f), and provides as follows:

[The overtime requirement does not apply to] [a]n individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week[.]

RCW 49.46.130(2)(f).

By its plain language, the availability of this exemption is dependent on whether the truck or bus driver is subject to the FMCA. Where the meaning of a statutory provision is plain on its face, a court must give effect to that plain meaning as an expression of legislative

intent. *City of Olympia v. Drebeck*, 156 Wn.2d. 289, 296, 126 P.3d 802 (2006); *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

2. The Federal Motor Carrier Act Only Applies To A Limited Class Of Wholly Intrastate Drivers – Those Whose Deliveries Are A “Practical Continuity Of Movement” From Out-Of-State.

Because the MWA interstate truck driver overtime exemption only applies to employees covered by the FMCA, a federal statute, it is necessary to look to the federal courts to determine when the FMCA applies. *State v. Williams*, 17 Wn. App. 368, 371, 563 P.2d 1270 (1977) (“When a statute borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts”) (citing *State v. Carroll*, 81 Wn.2d 95, 109, 500 P.2d 115 (1972)). *See also Juanita Bay Valley Community Ass'n v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973); *Sauve v. K.C. Inc.*, 19 Wn. App. 659, 577 P.2d 599 (1978), *aff'd*, 91 Wn.2d 698 (1979) (same).

Additionally, because the MWA’s interstate truck driver exemption tracks the FLSA interstate truck driver exemption,⁴ and

⁴ The overtime exemption presently codified in RCW 49.46.130(2)(f) was enacted in 1989 (Laws of 1989, c. 104 § 1) in response to a Washington Supreme Court decision, and brought the state’s overtime laws in line with the federal Fair Labor Standards Act (FLSA), which already contained an overtime exemption for truck drivers covered by the FMCA. *See* 29 U.S.C. § 213(b)(1).

In *Department of Labor & Industries v. Common Carriers, Inc.*, 111 Wn.2d 586, 762 P.2d 348 (1988), the Washington Supreme Court held that the FMCA did not preempt the MWA overtime requirements. Thus, notwithstanding the applicability of the FMCA (which made the employees exempt from the FLSA’s overtime provisions), the

“[s]ince the Washington MWA is based on the Fair Labor Standards Act of 1938 (FLSA), a review of the federal exemption supports our conclusion.” *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 885, 64 P.3d 10 (2003) (examining Washington retail sales overtime exemption, RCW 49.16.130(3), under federal case law). *See also Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 862 n. 6, 93 P.3d 108 (2005); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2001); *Clawson v. Grays Harbor College*, 109 Wn. App. 379, 386, 35 P.3d 1176 (2001), *aff’d*, 148 Wn.2d 528, 61 P.3d 1130 (2003).

The jurisdiction of the FMCA is set forth in pertinent part in 49 U.S.C. § 13501:⁵

The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that

employer still had to pay overtime to its truck drivers under the MWA. As the Supreme Court recently explained, “this statutory provision... [was in] response[] to this court's holdings in [*Common Carriers.*]” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 713, 153 P.3d 846 (2007), *cert. denied*, 128 S. Ct. 661 (2007). With the adoption of RCW 49.46.130(2)(f), truck drivers covered by the FMCA were made exempt from the overtime provisions of the WMWA, just as they are exempt from the overtime provisions of the FLSA.

⁵ The pertinent portion of the Federal Motor Carrier Act, 1935, Act, ch. 498, § 204, 49 Stat. 546 (Aug. 9, 1935), was originally classified as 49 U.S.C. § 304. A portion of Title 49 was enacted into positive law by Act Jan. 12, 1983, Pub. L. 97-449, 96 Stat. 2413, and 49 U.S.C. § 304 was recodified as 49 U.S.C. § 3102. (The Washington exemption enacted in 1989 refers to “49 USC § 3101 et seq.”).

The provision was then recodified and restated as 49 U.S.C. § 31502 by Act of July 5, 1994, Pub. L. 103-272, §1(c), 108 Stat. 745.

49 U.S.C. § 31502(a) provides in pertinent part: “This section applies to transportation – (1) described in sections 13501 and 13502 of this title[.]” 49 U.S.C. § 31502(a). Thus, the coverage of the FMCA is as described in 49 U.S.C. §§ 13501 and 13502.

passengers, property, or both, are transported by motor carrier--

(1) between a place in--

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

49 U.S.C. § 13501.

The FMCA does not purport to apply to wholly intrastate transportation – it is “only applicable to motor carriers and drivers engaged in interstate commerce.” *Watkins v. Ameripride Services*, 375 F.3d 821, 825 (9th Cir. 2004) (applying California overtime exemption which also tracks the FLSA exemption).

Of course, the *constitutional* reach of Congress over interstate commerce is expansive. It is important to keep in mind that in enacting the FMCA, “Congress did not exercise...the full scope of the commerce

power.” *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir. 1997) (quoting *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570, 63 S. Ct. 332, 336 (1943)). Thus the meaning of “interstate commerce” under the FMCA is much more limited.

To determine whether Plaintiffs were engaged in interstate commerce within the meaning of the FMCA, “we must examine the character of the shipments [they were] charged with delivering, and the intent of the shippers as to the ultimate destination of the goods.” *Watkins*, 375 F.3d at 825 (citing *Klitzke*, 110 F.3d at 1469).

Although wholly intrastate deliveries are not usually considered to be within interstate commerce under the FMCA (*accord, e.g., Watkins, supra*, and *Southern Pacific Transp. Co.*, 565 F.2d 615, 616 (9th Cir. 1977), where drivers making deliveries wholly intrastate were not within the FMCA), the Supreme Court has held that there is an exception where the intrastate delivery “*is a practical continuity of movement from the manufacturers or suppliers without the state, through [a] warehouse and on to customers whose prior orders or contracts are being filled...*” *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568, 63 S. Ct. 332, 87 L. Ed. 460 (1943) (emphasis added).

In *Jacksonville Paper*, the company had goods shipped into the state by common carrier. 317 U.S. at 567. Truck drivers picked up the

goods at the common carrier's terminal within the state, drove the goods to a company warehouse in the state where the goods were checked and reloaded, and then delivered them to customers within the state during the same day or "as early as convenient." *Id.* The goods were ordered from out-of-state pursuant to pre-existing orders or contracts from the company's customers. *Id.*

The Court found that because the goods had come from out-of-state pursuant to special orders for specific customers, the intrastate delivery to those customers had to be considered a leg of the goods' distinctively interstate journey. The "practical continuity of movement" from out-of-state to the customers "is not ended by reason of a temporary holding of the goods at the warehouse." *Id.* at 569. The goods' in-state stops were "[a] temporary pause in their transit" that did not sever the interstate journey. *Id.* at 568.

Accordingly, in *Klitzke, supra*, a driver delivered goods wholly within the state of Oregon. 110 F.3d at 1467. However, the driver's route was nonetheless within the scope of the FMCA because:

even though the shippers did not know the goods' ultimate destinations, the orders were placed and the goods were shipped to satisfy contracts between Steiner and its customers that *specified a final place of delivery within Oregon other than the Steiner warehouse.* The goods were therefore in "continuous transportation" until delivered to Steiner's customers.

Id. at 1470 (emphasis in original).

However, when drivers deliver goods wholly interstate that have “come to rest” at a warehouse, they are not covered by the FMCA. In *Southern Pacific Transp. Co., supra*, the Court deemed wholly interstate drivers who transported goods from various canneries to a warehouse where they were then shipped out-of-state. 565 F.2d at 616. The Ninth Circuit found that these truck drivers were not subject to the jurisdiction of the ICC, because, it was

...not disputed that Del Monte... **did not decide the final destination of any shipment of goods until after the goods had come to rest in the Stockton warehouse.** The fact that most of the goods in the warehouse were eventually shipped to interstate or foreign destinations is **not sufficient to give rise to a fixed intent to engage in an interstate movement at the time the goods left the canning plants** with their final destination still unknown. Inasmuch as the goods remained under Del Monte’s control at the Stockton warehouse and were **not committed to a common carrier for an interstate or foreign movement until they left that warehouse**, the requisite intent which governs the character of the movement was not formed until shipment from Stockton.

565 F.2d at 618 (emphasis added). Thus, the stop at the warehouse was not a mere temporary pause in an interstate journey like in *Jacksonville Paper*. Rather, it was the point of termination for these truck drivers’ wholly intrastate journey, and the point of origin for separate interstate

shipments.

Likewise, in *Watkins v. Ameripride Services*, 375 F.3d 821, 826 (9th Cir. 2004), an intrastate driver was *not* within the coverage of the FMCA, even though he delivered goods that came from out-of-state. The distinction from *Jacksonville Paper* and *Klitzke* was that the materials did not have a specified destination *other than the company's warehouse* when they were shipped into the state via common carrier and delivered to the company's California plant.⁶ “[T]he new materials were not delivered in interstate commerce, under the reasoning of *Jacksonville Paper*. **Rather, the new materials delivered by Watkins were fungible, and were taken from general inventory after the customer made an order.**” *Id.* at 827 (emphasis added). “Should a customer want a special

⁶ With the exception of mats that were special ordered for one customer, Reynolds Metals, but Watkins apparently did not handle these orders. This demonstrates how the FMCA analysis is specific to the individual driver rather than the workforce en masse, and individual drivers may not be covered by the FMCA even if some of some of Defendant's other drivers *are* engaged in interstate transportation. *See Watkins, supra*, 375 F.3d at 827 (“Only the mats labeled Reynolds Metals might fit within the categories of goods that *Jacksonville Paper* held were shipped in interstate commerce. But Watkins states that in the eight and one-half years of his employment he never delivered any of the mats”); *cf. Reich v. American Driver Service, Inc.*, 33 F.3d 1153, 1154 (9th Cir. 1994) (“ADS indiscriminately assigned any interstate travel to its drivers using a ‘first in, first out’ method, and therefore, all of its drivers reasonably could have been expected to engage in interstate commerce.”).

The Washington statute also by its own terms speaks of exempting *individual employees*, not an employer's general workforce: “[a]n *individual* employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act...” RCW 49.46.130 (2)(f) (emphasis added). *See also Floor Remarks*, SB 5746 (1989). CP 810-811 (Dec. of Patrick Madden, at A-1) (“An *interstate truck driver* is exempt from the overtime provisions of the [WMWA], as long as the pay system reflects overtime pay that is reasonably equivalent.... *Other employees of an interstate carrier are eligible for time and one-half when the work week exceeds 40 hours.*” (emphasis added)); *Accord, Final Bill Report*, SSB 5746 (1989) CP 812-813 (Dec. of Patrick Madden, at A-4);

identification, he would order it by general description and order what identification should appear on the uniform. The uniform or other material would be taken from inventory, and the identification work would be done in the warehouse...” *Id.* at 827.

The Ninth Circuit laid down the following rule by which it decided whether the FMCA covered the drivers in that case:

if a company places orders with an out-of-state vendor for delivery to specified intrastate customers, a temporary holding of the goods within an intrastate warehouse for processing does not alter the interstate character of the transportation chain culminating in delivery to the customer. *If, on the other hand, a company places orders with an out-of-state vendor, with delivery to the company's intrastate warehouse for future delivery to customers yet to be identified, the transportation chain culminating in delivery to the customer is considered intrastate in nature.*

Id. at 826 (emphasis added).

3. The Proper Interpretation Of RCW 49.46.130(2)(f), Consistent With Federal Interpretation Of The Federal Motor Carrier Act, Is That Wholly Intrastate Drivers Are Subject To The Exemption Only If Their Deliveries Are A “Practical Continuity Of Movement” From Out-of-state.

Jacksonville Paper and *Southern Pacific Transp.* set the state of the law for determining whether drivers were subject to the provisions of the Federal Motor Carrier Act when the Washington Legislature enacted RCW 49.46.130(2)(f) in 1989. “[W]hen our Legislature enacts a statute, it

is presumed to be familiar with judicial interpretations of statutes...” *State v. Bobic*, 140 Wn.2d 250, 264 (2000) (citing *In re Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421 (1990); *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992)); *Thurston Co. v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975). In 1989, the legislature should have expected the jurisdiction of the FMCA – and thus the applicability of the RCW 49.46.130(2)(f) exemption – to be determined under *Jacksonville Paper* and *Southern Pacific Transp. Accord: Bobic, supra*, 140 Wn.2d at 264 (“No mention is made anywhere in the legislative history of this statute that the Legislature intended to depart from the federal interpretation proffered in a Supreme Court decision).

4. The Plaintiff Truck Drivers In This Action Are Not Subject To The Provisions Of The Federal Motor Carrier Act, And Therefore Are Not Subject To Any Exemption From The Washington Minimum Wage Act.

Plaintiffs make deliveries for Safeway only within the State of Washington – between Safeway’s Auburn, Washington distribution center and Washington Safeway Stores. *See* CP 1204-1205 (Plaintiffs’ Response to Defendant’s Motion for Summary Judgment), CP 1223 and CP 1227-1310 (Declaration of Jennifer Woodward). This is undisputed. And, there is no evidence that Safeway specially orders its goods from out-of-state to

fill orders, contracts, or expectations of specific customers. There is also no evidence that when any of the goods delivered by Safeway were shipped from out-of-state, they were already specified for the particular destinations on Plaintiffs' routes.⁷

“Employer exemptions from remedial legislation such as the MWA will be ‘narrowly construed and **applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.**” *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 881, 64 P.3d 10 (2003) (emphasis added) (quoting *Drinkwitz, supra*, 140 Wn.2d at 301). “**An employer bears the burden of establishing its exempt status.**” *Id.* (emphasis added). *See also, Clawson v. Grays Harbor College*, 148 Wn.2d 528, 540, 61 P.3d 1130 (2003).

Safeway produced no evidence that Plaintiffs' wholly intrastate deliveries were a “practical continuity of movement” from out-of-state. Safeway therefore failed to establish that Plaintiffs are subject to the FMCA, and therefore failed to meet its burden to be able to claim the overtime exemption in RCW 49.46.130(2)(f). *See, e.g., Flowers v. Regency Transp., Inc.*, 535 F. Supp. 2d 765, 772 (S.D. Miss. 2008)

⁷ Moreover, were the court to examine the “character of the shipments [they were] charged with delivering, and the intent of the shippers as to the ultimate destination of the goods.” *Watkins*, 375 F.3d at 825 (citing *Klitzke* at 1469), they would find that when Safeway has goods shipped from out-of-state to its distribution center, the distribution center is the only designated destination, and so under *Watkins*, Plaintiffs would not be subject to the Federal Motor Carrier Act.

(denying employer's motion for summary judgment under the FLSA interstate driver exemption because "[d]efendants have not sustained that burden with the proof presented on the present motion").

Furthermore, the trial court's order denying Plaintiffs' motion for partial summary judgment was in error because even when taking all facts in the light most favorable to the Defendant, the Defendant has not established facts to meet their burden of proof. *See, e.g., Sedrick v. All Pro Logistics LLC*, 2009 WL 1607556 (N.D. Ill. June 8, 2009) (finding employer failed to carry its burden of show driver was covered by the FMCA for purposes of the FLSA exemption, granting summary judgment for the driver).

5. Plaintiffs Should Not Be Denied Their Overtime Claims Under The Washington Minimum Wage Act Because Of A Limited, Erroneous Stipulation As To A Matter Of Law.

In its motion for summary judgment, Defendant asserted that the FMCA coverage requirement was satisfied based on a limited, legally erroneous stipulation and two declarations. CP 1163 (Safeway's Motion For Summary Judgment In Relation To RCW 49.46.130(2)(f)). This stipulation said, simply, that Gasca, Radke, and Holcomb were "subject to the provisions of the Federal Motor Carrier Act...." CP 702 (Statement of Stipulated Facts).

In response, Plaintiffs brought to the trial court's attention the fact that the Plaintiff drivers *never* drove out-of-state and therefore should not be considered subject to the MWA interstate truck driver exemption. CP 1202-1205 (Plaintiff's Response to Defendant's Motion For Summary Judgment), CP 1223 and CP 1227-1310 (Declaration of Jennifer Woodward).

In reply, Defendant cited one case from Florida that followed *Jacksonville Paper's* holding that intrastate deliveries can sometimes be considered part of an interstate delivery, without any analysis other than a parenthetical that truly missed the *Jacksonville Paper* distinction. CP 1394 (Reply In Support Of Safeway's Motion For Summary Judgment) ("*Alvarado v. I.G.W.T. Delivery Sys.*, 410 F. Supp. 2d 1272, 1277 (S.D. Fla. 2006) (drivers traveling intra-state are covered by FMCA because they are completing interstate delivery of goods)"). Although Defendant reminded the trial court that "[the Legislature's] choice to make Section 2(f)'s exemption contingent on coverage under the FMCA must be given full effect," *Id.* CP 1394, Defendant then argued, "[o]f course, Plaintiffs also stipulated that they are subject to the FMCA. Thus, Plaintiffs admit that they are interstate drivers as used by the Legislature, and the FMCA requirement has been satisfied." *Id.*, CP 1394 (citation omitted).

Indeed, the lower court accepted the Defendant's argument, and noted:

[B]ecause of the parties' stipulation and because of the case law interpreting the application of FMCA that it appears very obvious to me that the members of the bargaining unit who are represented by the plaintiff are employed as truck and bus drivers who are subject to the FMCA. And I am ruling on that as a matter of law. Based on both the stipulation and on prior legal holdings.

RP 19.⁸

First, case law interpreting the FMCA, as demonstrated in Section 2, pp 15 to 22, compels the opposite conclusion: these drivers are *not* subject to the FMCA. Moreover, the argument that Plaintiffs are exempt from overtime because of this stipulation cannot stand, and cannot excuse Defendant from its "burden of establishing its exempt status." *Stahl, supra*, 148 Wn.2d at 881.

It is true that "[f]actual stipulations generally bind the parties and the court... When a case is submitted to the trial court on stipulated *facts*, neither party may argue on appeal that the facts were other than as stipulated." *Glen Park Associates, LLC v. Dept. of Revenue*, 119 Wn. App. 481, 487, 82 P.3d 664 (2003), *rev. denied*, 152 Wn.2d 1016 (emphasis added) (citing *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507,

⁸ All RP cites in this brief correspond to the Report of Proceedings from December 12, 2008, court reporter Pete S. Hunt.

517-18, 940 P.2d 252 (1997); *State ex rel. Carroll v. Gatter*, 43 Wn.2d 153, 155, 260 P.2d 360 (1953)).

However, whether these employees are subject to FMCA and the motor carrier exemption is a matter of law. See, e.g., *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (“[T]he determination of whether a particular statute applies to a factual situation is a conclusion of law.”) (citation omitted); *Mackey v. American Fashion Institute Corp.*, 60 Wn. App. 426, 429, 804 P.2d 642 (1991) (“The question of whether a statute applies to a factual situation is a question of law and fully reviewable on appeal.”) (citing *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983)); *Reich v. American Driver Service, Inc.*, 33 F.3d 1153, 1155 (9th Cir. 1994) (“Whether ADS’s drivers, fuelers, and utility workers were exempt from the maximum hours provisions of the FLSA is a question of law...”).

Stipulations as to matters of law are not binding. See *In Re Interest of J.F.*, 109 Wn. App. 718, 732, 37 P.3d 1227 (2001) (“We decline to accept the State's concession that the statutory exception of RCW 18.19.180(6) does not apply in this case. Erroneous concessions of law are not binding upon the court”) (citing *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988)); *Folsom v. County of Spokane*, 111 Wn.2d

256, 261-62, 759 P.2d 1196 (1988) (applying “the long-standing rule that stipulations of law are not binding”); *State v. Vangerpen*, 125 Wn.2d 782, 792, 888 P.2d 1177 (1995) (“A stipulation as to an issue of law is not binding on this court; it is the province of this court to decide the issues of law”) (citing *Folsom*), *supra*; *Rusan’s, Inc. v. State*, 78 Wn.2d 601, 606, 478 P.2d 724 (1970) (same).

Therefore, Safeway cannot rely on this stipulation to excuse its burden of establishing the applicability of the exemption.⁹

In any case, even if this stipulation were binding as to the legal question of the applicability of the FMCA, only three of Safeway’s employees are covered by this stipulation. CP 702 (Statement of Stipulated Facts). In no case could the stipulation compromise the rights

⁹ Additionally, estoppel and waiver arguments have been rejected as a defense to wage and hour claims since the earliest days of Washington’s regulation of the workplace and to the present day. See *Larsen v. Rice*, 100 Wash. 642, 650 (1918) (rejecting estoppel based on settlement defense raised by employer); *Cannon v. Miller*, 22 Wn.2d 227, 239, 155 P.2d 500 (1945), *overruled on other grounds*; *Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126, 1 P.3d 578 (2000) (rejecting an employer’s estoppel argument, ruling, “the fact that respondents accepted checks for lesser amounts would not of itself preclude them from collecting the balance lawfully owing to them...”); *Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn. App. 401, 414, 54 P.3d 687 (2002), affirmed, 151 Wn.2d 853, 93 P.3d 108 (2004), (rejecting employer’s argument that employees were estopped from pursuing their MWA overtime claim because their union had agreed to a lesser payment in a collective bargaining agreement, and signed agreements releasing any and all claims. The employees “did not, by reason of the settlement agreement and dismissal of their claims in [the lawsuit], give up such nonnegotiable substantive rights as are contained in the MWA; *such rights prevail regardless of any agreement to the contrary.*”) (emphasis added) (citations omitted); *Bostain, supra*, 159 Wn.2d at 723-24 (rejecting employer’s argument that employee was estopped from claiming back-overtime because he worked overtime without compensation for ten years).

of the other 120 or so Safeway employees who are represented in this action by Plaintiffs.

As to these other employees, in its Motion for Summary Judgment, Defendant simply asserted “the other Safeway drivers represented by Local 174 are truck drivers who are subject to the FMCA.” CP 1163 (Safeway’s Motion for Summary Judgment In Relation to RCW 49.46.130(2)(f) (citing Decl. of Robert McLauchlin Dated Nov. 13, 2008 ¶ 2) CP 950-951 and Declaration of Joel Leisy Dated Nov. 14, 2008, ¶ 2 CP 427)).

The referenced declarations do not contain any argument or factual basis to support Defendant’s assertion that these employees are covered by the FMCA. They are self-serving declarations of law, and do not contain any facts to support these assertions.¹⁰

As previously discussed, the coverage of the FMCA is determined by “the character of the shipments...and the intent of the shippers as to the ultimate destination of the goods.” *Watkins, supra*, 375 F.3d at 825. A mere assertion by the employer that its drivers are subject to the FMCA could not be sufficient or entitled to any weight, because “it is the

¹⁰ Mr. McLauchlin declared: “[a]t its distribution facilities, Safeway employs drivers, loaders and driver-loaders who are subject to the provisions of the Federal Motor Carrier Act...” Declaration of Robert McLauchlin Dated November 13, 2008 ¶ 2, CP 950-951 . Likewise, Mr. Leisy declared: “[t]he Safeway drivers represented by Local 174 are truck drivers who are subject to the Federal Motor Carrier Act.” Declaration of Joel Leisy Dated November 14, 2008 ¶ 2, CP 427.

province of this court to decide the issues of law.” *Vangerpen, supra*, 125 Wn.2d at 792.

Therefore, Defendants cannot rely on this limited stipulation regarding three employees to excuse their burden of establishing the applicability of RCW 49.46.130(2)(f) to its entire workforce.

C. EVEN IF PLAINTIFF EMPLOYEES WERE SUBJECT TO THE PROVISIONS OF THE FEDERAL MOTOR CARRIER ACT, RCW 49.46.130(2)(F) DOES NOT EXCUSE SAFEWAY’S FAILURE TO PAY THEM PROPER OVERTIME PAY, BECAUSE SAFEWAY’S COMPENSATION SYSTEM DOES NOT PROVIDE THE REASONABLE EQUIVALENT OF STATUTORY OVERTIME.

1. “Reasonably Equivalent” Under RCW 49.46.130(2)(f) Means Commensurate Pay to What The Drivers Would Have Received Under RCW 49.46.130(1).

Even if truck and bus drivers are subject to the provisions of the Federal Motor Carrier Act, they are not exempt from the MWA overtime requirements unless “the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.” RCW 49.46.130(2)(f).

Under RCW 49.46.130(2)(f), “a worker must be paid an amount equal to one and one-half times the hourly rate or be provided reasonably equivalent compensation. *Thus, the workers must receive overtime pay*

that is commensurate.” Bostain, supra, 159 Wn.2d at 715 (emphasis added). The trial court correctly found that this means “what the drivers are earning here should in fact be as good as or better...than what they would earn under the Washington Minimum Wage Act.” RP 22.

2. Defendant’s “Activity Based Compensation” System Does Not Provide The Reasonable Equivalent of Traditional Overtime.

When it granted Safeway’s motion for summary judgment and denied Plaintiffs’ motion, the trial court found that the “Activity Based Compensation” (“ABC”) system under which Plaintiffs were paid was reasonably equivalent to what the drivers would earn under the MWA. RP 24. This was in error because the evidence could not support such findings under the appropriate standards for summary judgment.

It is not disputed that Safeway’s ABC system pays drivers on a task basis, without regard for the actual hours worked by an employee. It is also not disputed that drivers receive premium pay without regard to whether the hours they work are or are not in excess forty per week. Specifically, when a driver completes more than forty “Standard Time” hour units in one week, the driver receives one and-one-half more pay per unit than they received for the first forty units they completed that week. The ABC system is a classic piece rate system with the units relabeled as time.

In such a system, the **“regular rate of pay is computed by adding together the total earnings for the workweek from piece rate and all other earnings (such as bonuses), and any sums that may be paid for other hours worked.”** CP 1093-1102 (L&I Employment Standards Administrative Police ES.A.8.1, p. 4). “This sum is divided by the total number of hours worked in that week to yield the pieceworker’s ‘regular rate’ for that week.” *Id.* See also WAC 296-128-550 (“the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week”); 29 CFR 778.312 (“Pay for task without regard to actual hours.”).

Therefore, Safeway is not entitled to any “overtime” credit for the premium it pays to the drivers after they complete more than 40 “Standard Time” hour units in one week. This is because this premium pay is not actually overtime, as that term is used in the MWA, as it is not tied to the actual hours worked over forty in one week, but to the completion of “Standard Time” unit “hours”. Pursuant to both the regulation and DLI guidance, this premium pay, then, is factored into the “regular rate of pay” and cannot be used to satisfy the overtime requirement in a piece rate system. CP 1093-1102 (DLI ES.A.8.1, p. 4). Only premium pay that is

paid for **hours** worked in excess of forty in one week may be used to satisfy the MWA's overtime requirement in a piece rate system. *Id.*

For this reason, the compensation received by the drivers cannot be the reasonably equivalent of traditional overtime because when determining what they would have received in a traditional overtime system, their regular rate of pay must include the premium pay. After their regular rate of pay is determined, they must then receive one and-one-half times that rate for each *hour* (not unit) they worked over forty in one week. Of course, none of the drivers have received this overtime premium at all, because they were not paid an overtime rate for hours worked over forty.

Alternatively, even accepting Safeway's methodology – which directly conflicts with DLI guidance and federal regulations – a significant percentage of the drivers consistently earn less than what they would have received in a traditional overtime system. To support its argument that the ABC system paid Plaintiffs “reasonably equivalent” to overtime, Defendant provided a hard copy summary of its payroll records purporting to cover a 26-week period from July 3, 2005, through December 31, 2005. An assessment of this data revealed that Defendant's drivers earned less under the ABC system than they would have earned in a traditional overtime system. CP 1423-1425 (Plaintiffs' Motion for

Reconsideration). For example, 17.1 percent of the Safeway drivers during the 26-week period covered by the data earned less than they would have earned under traditional overtime. CP 1424 (Plaintiffs' Motion for Reconsideration), CP 1427-1429 (Declaration of David Helfer in Support of Motion for Reconsideration). These drivers represented a significant minority of Safeway's drivers, and as a group they earned \$37,500 less, for an average underpayment of approximately \$2,000 each. The individual underpayment during this period ranged from \$5,609 to \$211. CP 1424 (Plaintiffs' Motion for Reconsideration), CP 1429 (Declaration of David Helfer in Support of Motion for Reconsideration).

The trial court erred in granting Defendants motion for summary judgment because taking all facts in the light most favorable to Plaintiffs, this could not possibly be "reasonably equivalent." Even accepting (as the trial court did) Safeway's methodology to calculate what the drivers would have earned had they been paid traditional overtime, a significant minority of the drivers are still paid less.¹¹ Thus, the ABC system clearly did not

¹¹ Thus, the trial court declined to include as part of the calculation of a drivers' "regular rate of pay" premium pay provided by Safeway for "Standard Time" units worked in excess of forty in any given week. See discussion at pages 6-7, above and L&I Employment Standards Administrative Policy ("ES.A") 8.1, p. 4., ¶ 17. CP 705 (Declaration of Iglitzin., Ex. C). The conclusion cited above, that 17.1 percent of the Safeway drivers during the 26-week period covered by the data earned less than they would have earned under traditional overtime, CP 1424, CP 1427-1429, shows that drivers earned substantially less than they would have earned under traditional overtime even if Safeway is given "credit" for its payment of "premium pay" to "more efficient"

provide “reasonably equivalent...that is, commensurate” compensation compared to traditional overtime, and it was in error for the trial court to grant Safeway’s motion for summary judgment on this issue.

Viewing the facts in the light most favorable to Safeway, moreover, even under their calculations the drivers’ compensation is still not reasonably equivalent to what they would have earned under a traditional overtime system. Thus, it was error for the trail court to deny Plaintiffs’ motion for summary judgment.

At the very least, if the disagreement about the extent to which the ABC system provided the “reasonable equivalent” of traditional overtime to a genuine dispute of material facts, granting summary judgment on the issue was in error. However, Plaintiffs maintain that Safeway has not maintained their burden of proving the ABC system was “reasonably equivalent” even in the light most favorable to Defendant, which is why Plaintiffs’ motion for summary judgment should have been granted.

3. The Trial Court Erred In Allocating The Burden Of Proof On This Issue To Plaintiffs.

The trial court improperly placed the burden upon Plaintiffs to establish that the ABC system was *not* reasonably equivalent to statutory overtime:

drivers, i.e., drivers who completed more than a certain number of “Standard Time” units (called “hours,” but not a unit of time) in a given workweek.

Most of all I have to say that on this record it seems to me that the burden is on the plaintiffs to bring forward evidence to show the Court that there is an ongoing issue not only with the application of the ABC system to the drivers as a group...but also to show that there is some particular problem with regard to individual drivers or a sub-set of the drivers. And I do not think that the plaintiffs have come close to meeting that burden.

RP 23.

Under Washington law the burden is on the employer to establish an employee is exempt from overtime, not the employee's burden. *See Stahl, supra; Clawson, supra.* It was in error to place that burden upon Plaintiffs. And, as this was a reference to the burden of proof on Safeway's motion for summary judgment, this was error because it is "[t]he moving party [who] bears the burden of demonstrating there is no genuine dispute as to any material fact." *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 111 P. 3d 866 (2005) (citing *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998)).

D. EVEN IF PLAINTIFF EMPLOYEES ARE SUBJECT TO THE FMCA, DEFENDANT'S COMPENSATION SCHEME DOES NOT FALL WITHIN RCW 49.46.130(2)(F) BECAUSE THE DEPARTMENT OF LABOR AND INDUSTRIES DID NOT APPROVE OF THE SCHEME.

Even if the Plaintiff drivers were covered by the FMCA and the ABC system arguably did provide pay "reasonably equivalent" to traditional overtime, Safeway could not properly claim the RCW

49.46.130(3)(f) exemption over the period covered by this lawsuit because Safeway did not obtain approval of its ABC system from DLI.

DLI has the authority to supervise, administer, and enforce all laws pertaining to employment, including wage and hour laws. *Schneider, et al. v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 717, 66 P.3d 640 (2003); *See also* RCW 43.22.270. Pursuant to that authority, DLI has adopted rules related to this truck driver exemption which state, in pertinent part:

The compensation system under which a truck or bus driver subject to the provisions of the Federal Motor Carrier Act is paid shall include overtime pay at least reasonably equivalent to that required by RCW 49.46.130 for working in excess of forty hours a week. To meet this requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime. **An employer shall substantiate any deviation from payment on an hourly basis to the satisfaction of the department** by using the following formula or an alternative formula that, at a minimum, compensates hours worked in excess of forty hours per week at an overtime rate of pay and distributes the projected overtime pay over the average number of hours projected to be worked.

WAC 296-128-012(1)(a) (emphasis added). CP 1118-1120 (Iglitzin Dec., Ex. G).

In other words, to enjoy the benefit of the exemption, an employer must first seek and obtain the approval of the DLI. DLI has previously explained that WAC 296-128-012(2) means that:

[I]f an employer of a truck or bus driver under the Motor Carrier Act does not have an **approved** reasonably equivalent plan, then the bus or truck driver who works in excess of 40 hours per week is entitled to time and one half of the rate under which most of the employee's hours were worked.

July 19, 2004 Letter from DLI re: WAC 296-128-012(2), CP 1091 (attached to Iglitzin Dec. as Ex. B), (emphasis added).

It is undisputed that Defendant neither sought, nor obtained, the approval of DLI for its ABC system. CP 1136-1139 (Plaintiffs' Motion for Partial Summary Judgment). Absent that approval, Defendant is simply not entitled to the exemption contained in RCW 49.46.130(2)(f). The trial court was therefore in error to allow Defendants to claim the RCW 49.46.130(2)(f) exemption.

E. BECAUSE DEFENDANTS SHOULD NOT HAVE PREVAILED ON SUMMARY JUDGMENT THE TRIAL COURT WAS IN ERROR TO GRANT THEM COSTS.

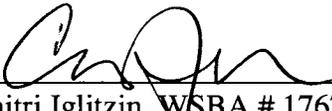
Civil Rule 54(d) provides in pertinent part that “[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney’s fees – should be allowed to the prevailing party.” CR 54(d)(1). Additionally, RCW 4.84.080 provides, “When allowed to either party, costs to be called the attorney fee, shall be as follows: (1) In all actions where judgment is rendered, two hundred dollars.” RCW 4.84.080. Because summary judgment should not have been granted for Defendants,

the trial court was in error to award Defendants these costs and fees, and this Court should reverse that decision.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the rulings of the trial court referenced herein be reversed.

Respectfully submitted this 6th day of July, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2009, I caused the original and one copy of the foregoing Brief of Appellant to be delivered via legal messenger to:

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