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NO. 74617-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

v.

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

Defendant/Appellant

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I. INTRODUCTION

Respondents/Plaintiffs are a class of 480 messengers and drivers ("Plaintiffs" or "class members") who were employed by Appellant Garda CL Northwest ("Garda" or "Defendant") in the State of Washington to pick up, transport, and deliver currency in armored trucks for Garda clients. Clerk's Papers ("CP") at 4, 3807. Plaintiffs allege that while working for Garda, they were not provided meal and rest breaks as required under the Washington Industrial Welfare Act, RCW 49.12, and Minimum Wage Act, RCW 49.46.

This case is nearly identical to *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011) (affirming judgment on rest and meal break claims for class of armored car messengers and drivers). Here, just as in *Pellino*, the employer required its employees to remain constantly vigilant in guarding the armored car and currency and forbade them to engage in any personal business while on their routes. *See, e.g.*, CP 2780-81. As a result, the employees did not get lawful meal or rest breaks. Here, Plaintiffs sued in 2009 and after years of litigation, including prior appeals, the trial court held a bench trial in 2015 and entered judgment for the Plaintiffs for over $9 million. CP 3977, 4200, 4209.

Garda's appeal presents a host of issues that were carefully considered and often reconsidered by the trial court, and each is without merit. The record is clear that Washington wage law is not preempted by federal laws; that the Plaintiffs could not and did not waive their right to lawful meal breaks through collective bargaining agreements; that there

was no material factual dispute to warrant a trial on liability; that class certification was well within the trial court's discretion and manifestly correct; that the trial court properly awarded double damages for the period following this Court's decision affirming the judgment in *Pellino*; and that the trial court properly applied its discretion in awarding attorney's fees under Washington wage laws. This Court should affirm in all respects and award additional fees on appeal.

II. STATEMENT OF THE CASE

A. Factual Background

1. Working Conditions of Garda Truck Crews.

Garda employs truck crew members in seven branch locations throughout the State of Washington, in Seattle, Tacoma, Mt. Vernon, Wenatchee, Yakima, Spokane, and Pasco. CP 2280. A typical Garda armored truck crew consists of a Driver and a Messenger. CP 2857-2858. The "Driver" is responsible for driving the armored truck to and from Garda client locations, various banks, and the Garda branch location. CP 2858. The "Messenger" carries currency and other valuables (referred to as "liability") between the armored truck and client premises. *Id.* While specific routes may vary, truck crews at all Washington Garda locations perform the same basic daily duties. Once the crew departs the Garda facility after pre-trip inspections, they begin picking up and dropping off liability for clients on their assigned route. CP 2859. Once they complete the assigned route, the crew returns to the Garda facility and deposits the liability into the vault. CP 2859.

Garda has uniform policies and procedures regarding meal and rest breaks for all its Washington branches.[1] Routes do not include any scheduled breaks. *See* CP 4288; Appellant's Appendix. Garda policy prohibits all personal activities and use of personal materials by crew members while on route. CP 2772-2773. Garda managers admitted that the crew members are forbidden to conduct personal business while on duty, CP 3337, 3351, 2986, 2924, and that personal items are prohibited on the truck according to Garda policy. CP 2927-28, 2948, 2986, 2962-2964.

Representative class members from all branches, rural and urban, have testified that they do not get true rest or meal breaks during which they can relax and exercise personal choice over their activities. Class members testified that there was insufficient time on the routes to do anything other than a quick run to the bathroom or to grab a sandwich or snack to eat in the truck while driving, and that any stops were almost always at locations the trucks were servicing en route. *See* CP 2854 (stopping to use the bathroom was "as fast as possible, a few minutes"); CP 2972-2974 ("we had to make time [to use the bathroom at a stop we serviced] because we weren't allowed specific time for that"); CP 2880-2882 (bathroom breaks were "just quick at the rest stop if you had to go" and folks would "run into like a gas station or after they picked up

[1] CP 2956-2959; *see also* CP 2977 ("basic rules and procedures [are] the same" in Seattle, Yakima, Pasco and Wenatchee branches); CP 2940 (policies and practices were the same in Seattle and Tacoma); CP 2376 (duties and expectations are the same on all routes).

McDonalds on the way out they would grab something"); CP 2885 ("You didn't have a lunch break. You couldn't stop anywhere. You ate what you had in your lunch bag"; "if you got something on the way out, it was quick, grab something, pay for it and you're out"). *See also* CP 2890, 2897, 2899 2902, 2852-53, 3143.[2]

Garda sets up its armored truck routes in a way that puts constant time pressure on driver/messengers to keep moving. Each Garda branch manager designs and modifies the routes that the driver/messengers work. CP 2872. They receive no training or guidance on how to do so.[3] Furthermore, managers conduct "route surveillance" every month, watching truck crews to make sure they do not violate the rules. CP 3342, 3344-3345; CP 4338-4340; CP 4371-4374. Managers also monitor the time crews spend on routes each day, and if a crew takes too long, the manager posts the times and confronts the employees. *See* CP 2946-2947.

2. Garda Requires Constant Vigilance By Truck Crews.

Regardless of the route, all Plaintiffs were required to remain "on duty" and vigilant to threats against the truck and its liability at all times. Garda's policy is clear:

> Each member of the armored crew must remain alert at all times for the success of our operations. Look alert and be alert. Don't take anything for granted.... Certainly, be alert from a security standpoint. Be suspicious of anyone or

[2] Many class members testified that they had to urinate in bottles while remaining on the truck due to time pressures. *See e.g.* CP 3129; CP 2933-2934 (peeing in bottles was a common occurrence); CP 2925 (manager acknowledges that he was aware that employees peed in bottles).

[3] CP 4360, 4362; CP 4393, 4410, 4411; CP 2872.

> anything you observe that looks unusual.... The criminal is always looking for opportunities to attack the armored crew who are doing their job in a lackadaisical and routine way...

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

> Q: So it's true, is it not, that Garda does not provide truck crews with work-free, vigilance-free rest breaks? Isn't that true?
>
> A: Yes.
>
> Q: And it's also true that Garda does not provide armored truck crews with vigilance-free, work-free rest breaks? That's true, isn't it?
>
> A: Yes.

CP 2966-2967.

Branch managers also acknowledged that each member of the armored truck crew must remain alert at all times for the success of Garda's operations, and there is never a time when crew members can completely relax and let their guards down. CP 2920-2921, 2966; CP 2344-2345; CP 2325-2327. Both managers and class members testified that crewmembers must be vigilant at all times, even while purchasing food, smoking, or using the restroom. CP 2923; CP 2883 (there is no place along the route that he could take a completely vigilant-free rest break); CP 2855 (had to be alert "all day" because even if using a customer's

bathroom along the route, "you're in uniform, you have a firearm, you're a potential hostage"); *see also* CP 2874-2875; CP 2984-2985; CP 2358.

3. The Labor Agreements.

At each Garda facility in Washington, Garda requires employees to sign a "labor agreement." *See Hill v. Garda CL NW*, 179 Wn.2d 47, 50, 308 P.3d 635 (2013).[4] Although the labor agreements are ostensibly "negotiated" between Garda and the "employee associations" at each of Garda's branches, Garda's employee associations are not "unions" in the conventional sense. *Id.* Employees do not pay dues to the employee associations, and the associations have no resources. *Id.* The associations are not able to truly "negotiate" with the company and for the most part just have to accept whatever contract is offered. *Id.* at 51. The language of all the agreements at each branch is nearly identical. *See id.*

There are at least 17 Labor Agreements that were in use across the seven Garda branches during the nine-year class period. *See* Appellant's Opening Brief Appendix.[5] Three contain a provision that purports to waive meal periods. *See* Appellant's Appendix; CP 2609, 2613, 2617. These three agreements were executed after this lawsuit was filed and after the class had been certified, were in use for only a few years in

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

[5] At least two agreements are missing from the Appendix: One used in Seattle beginning in 2012 and another used in Tacoma beginning in 2013. *See, e.g,* CP 4230-59.

Garda's smallest branches, and were individually acknowledged by only 29 out of 480 class members. *See id.* The origin of the change to add these waiver provisions is unexplained and apparently unknown, even to Garda. 9/21/15 Report of Proceedings (RP) at 53 (the change was "handed down from the general counsel's office"), 66-68. There is no evidence that any individual employees were aware of the change.

All of the other Labor Agreements—covering a vast majority of the class—do not say the employees waive their meal breaks. Instead, some of those agreements provide for an "unscheduled" meal period, while the others provide for an "on duty" meal period.[6] *See* Appellant's Appendix. There is no evidence that any employee or association has ever negotiated with Garda about its meal and rest break policies or practices.

B. Procedural Background

This suit was filed in February 2009. Judgment was entered in *Pellino* in March 2010. The trial court in this case originally certified the class on July 23, 2010, and the class consists of all armored truck drivers/messengers who have been employed by Garda or its predecessor at any time during the nine-year period between February 11, 2006 and February 7, 2015. *See* CP 932.[7] In 2010, the trial court then granted

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

[7] Defendant filed a motion to decertify on April 2, 2015, which was denied on April 27, 2015. CP 2733. In that context, Plaintiffs gave notice that the class

Garda's motion to compel arbitration. *See Hill*, 179 Wn.2d at 52. On appeal, the Washington Supreme Court held that the arbitration provisions in Garda's Labor Agreements were unconscionable and unenforceable. *Id.* at 52, 57-58. On June 16, 2014, the United States Supreme Court denied certiorari. *Garda CL Northwest, Inc., v. Hill*, 134 S.Ct. 2821 (2014).

Following remand, Garda moved for summary judgment on several affirmative defenses, including preemption under Section 301 of Labor Management Relations Act of 1947, preemption under the Federal Aviation Administration Authorization Act ("F4A"), and waiver of meal breaks through Collective Bargaining Agreements. The trial court denied each of these defenses, some more than once. CP 1270, 2728, 2730, 2987. Garda moved to decertify the class, which the trial court also denied. CP 2733. Plaintiffs then moved for summary judgment on liability and on double damages. Garda conceded liability for its failure to provide meal periods in light of the trial court's dismissal of its preemption and waiver defenses. CP 2993 n.1. The trial court granted Plaintiffs' motion as to denial of rest breaks and denied it as to double damages. CP 3352.

A three-day bench trial on damages commenced on June 16, 2015, and continued on the issue of double damages on September 21 and 22, 2015. CP 3806. On October 23, 2015, the trial court entered findings of fact and conclusions of law, awarding $4,209,596.61 in back pay

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period would end on February 7, 2015, a date based on the availability of damages data. *See* CP 2247.

damages, $1,668,235.62 in double damages, and $2,350,255.63 in prejudgment interest. CP 3817, 3821-22. The court later allocated 30% of the damages award to class counsel for attorney's fees and costs and $10,000 each to the class representatives. CP 4187, 4194. The court also awarded statutory attorney's fees and costs to the class in the amounts of $1,127,734.50 and $60,112.49, respectively. CP 4194.[8]

The parties stipulated to a supplemental damages judgment in the amount of $81,564.26, to correct the original judgment. CP 4206, 4209.

Garda timely appealed.

III. ARGUMENT

A. The F4A Does Not Preempt State Meal and Rest Break Requirements.

Garda first contends the trial court erroneously dismissed its affirmative defense that Washington meal and rest break rules are preempted by the Federal Aviation Administration Authorization Act (FAAAA or "F4A"), 49 U.S.C. § 14501(c)(1). Garda failed to even raise this defense until October 2014, after the Ninth Circuit had firmly rejected it with respect to California's nearly identical meal and rest break rules. CP 1273; *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014) (state rest and meal break laws "plainly are not the sorts of laws" that Congress intended to preempt with the F4A). The trial court correctly dismissed this defense and should be affirmed.

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[8] The award of statutory fees and costs will be used to partially offset the common fund fee award. *See* CP 4202.

1. Preemption is Disfavored.

Garda's burden of proof, already significant in the context of preemption, is even higher with a state law that is within the state's traditional police powers, such as employee wage and hour regulations. *Dilts*, 769 F.3d at 643; *see also Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998) ("We commence with the assumption that state laws dealing with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to do so is clear and manifest."). "Preemption of employment standards within the traditional police power of the State should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252 (1994).

Furthermore, Washington courts apply "a strong presumption against finding preemption and state laws are not superseded by federal law unless it can be determined it is the clear and manifest purpose of Congress." *Department of Labor & Indus. v. Lanier Brugh*, 135 Wn. App. 808, 815-16, 147 P.3d 588 (2006) (citing *Washington State Physicians Ins. Exch. v. Fisons Corp.,* 122 Wn.2d 299, 327, 858 P.2d 1054 (1993)). "Preemption may be found only if federal law 'clearly evinces a congressional intent to preempt state law,' or there is such a 'direct and positive' conflict 'that the two acts cannot be reconciled or consistently stand together.'" *Department of Labor & Indus. v. Common Carriers, Inc.*, 111 Wn.2d 586, 588, 762 P.2d 348 (1988) (citations omitted) (Washington Minimum Wage Act (MWA) not preempted by federal Motor Carrier

Act); *see also Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 721 n.9, 153 P.3d 846 (2007) (Washington MWA not preempted by F4A because impact on prices, routes and service too indirect, remote and tenuous).

2. *Dilts* Established that State Meal and Rest Break Requirements Are Not Preempted By the F4A.

In *Dilts*, the Ninth Circuit held this was not even a close case: the F4A does not preempt state rest and meal break regulations. 769 F.3d at 647.[9] The court noted that in order for the F4A to preempt state law, the state law must be shown to have a "*significant* impact on carrier rates, routes, or services." *Id.* at 645 (emphasis in original) (quoting *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008)). To show such an impact, it is not enough that the state law may *affect* a carrier's routes or services. "The proper inquiry is whether the provision, whether directly or indirectly, *binds* the carrier to a *particular* price, route or service and thereby interferes with the competitive market forces within the industry." *Id.* at 646 (first emphasis in original) (quoting *American Trucking Ass'n v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011)). Accordingly, only laws that *mandate* the use of particular prices, routes, or services are preempted. *Id.*

The *Dilts* court also pointed out that, while laws that "operate at the point where carriers provide services to customers" are more likely to

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[9] California law generally requires a 30-minute meal break for every five hours worked and a paid 10-minute rest break for every four hours worked. *Dilts*, 769 F.3d at 640 (citing Cal. Lab. Code sec. 512 and Cal. Code Regs. tit. 8, sec. 11090). These are the same requirements imposed by Washington's rest and meal break regulation. *See* WAC 296-196-092.

be preempted, the F4A does not preempt laws that operate "one or more steps away" from the "moment" the carrier "offers its customer a service for a particular price." *Id.* (quoting *S.C. Johnson & Son v. Transp. Corp. of Am.*, 697 F.3d 544, 558 (7th Cir. 2012)).

> [G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide.

Id. The Seventh Circuit recently reiterated the distinction between laws that "affect the way a carrier interacts with its customers," which "fall squarely within the scope of FAAAA preemption," and those that "merely govern a carrier's relationship with its workforce," which are "often too tenuously connected to its relationship *with its consumers* to warrant preemption." *Costello v. Beavex, Inc.*, 810 F.3d 1045, 1054 (7th Cir. 2016) (emphasis in original).

Dilts is dispositive. Washington's meal and rest break requirements (like California's) are several steps removed from Garda's contracts with its clients in which it offers specific services at specific prices.[10] As in *Dilts*, the most that can be said of the obligation to provide

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[10] Garda attempts to evade *Dilts* by pointing to two cases from the First Circuit that involved much broader state laws. *See Schwann v. Fedex Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016); *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11 (1st Cir. 2014). In those cases, delivery companies that use independent contractors as couriers challenged a portion of Massachusetts' broad independent contractor law that forbids classifying workers as independent contractors if they perform services within the usual course of the defendants' business. That law was found preempted because it "expressly references" the

rest and meal breaks to drivers and messengers is that Garda must "factor [them] into their decisions" about prices, routes, and services. Garda cannot possibly show—and has not attempted to show—that providing breaks to its workers would "bind" it to "particular" prices, routes, or services. 769 F.3d at 647.

Garda attempts to circumvent *Dilts* by asserting that the court's conclusion was limited to the facts of that case. However, the clear language of the Ninth Circuit's opinion refutes this notion. First, the court explicitly stated that its holding applied "generally" to all "motor carriers," and was not limited to the facts presented by Penske, the defendant in that case, or the effect of California's rest and meal break rules "as applied" to Penske. *Dilts*, 769 F.3d at 648 n.2.

Second, the decision rests not on the particular facts of Penske's business or operations, but on the conclusion, which the court found to be obvious, that Congress did not intend the F4A to preempt these types of generally applicable industrial welfare laws:

> California's meal and rest break laws plainly are not the sorts of laws "related to" prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly. They are "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services." .... They are normal background rules for almost all employers doing business in the state of California.

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companies' services, and was "an anomaly" among state laws because of its breadth. *Schwann*, 813 F.3d at 437-38.

769 F.3d at 647 (internal citations omitted). The trial court in this case correctly followed *Dilts* in concluding that Washington's rest and meal break rules are not the types of laws that Congress intended the F4A to preempt.

3. Garda Failed to Show Substantial Impact.

Even if Washington's rest and meal break rules were the types of law the F4A could preempt, Garda failed to meet its burden of proving that compliance would necessarily significantly impact its prices, routes, or services. State law requirements are not preempted if the employer can lawfully avoid them. *See Costello*, 810 F.3d at 1057 (quoting *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1433 (2014)). Garda could have sought a variance from the Department of Labor and Industries (DLI) in order to allow it to deviate from normal meal and rest break requirements. *See* RCW 49.12.105; WAC 296-126-130.[11] The existence of this option precludes Garda from establishing preemption under the F4A; as long as it has a potential means of complying with state law that would not substantially impact its prices, routes, or services, its affirmative defense cannot be maintained. *See Costello*, 810 F.3d at 1057; *Dunbar Armored,*

[11] Garda considered but decided against seeking a variance regarding rest and meal breaks in mid-2010, about a year after this case was filed, and after the trial court issued a verdict in *Pellino*. *See* CP 4278. One of Garda's major competitors, Loomis Armored US, LLC, sought and obtained a variance from DLI in May 2012 which allows it to require its crew members to maintain vigilance with respect to personal and firearm safety during rest breaks, as long as they are relieved of the duty of guarding the armored car and its valuables. *See* CP 4281-4286 (Loomis Variance).

Inc. v. Rea, 2004 U.S. Dist. LEXIS 31685, *18 (S.D. Cal. July 8, 2004) (concluding that armored transport company could "comply with the Regulations [requiring meal and rest breaks] without altering its operations to the drastic extent projected" by seeking a variance from the state labor department). For this reason as well, the trial court properly rejected Garda's F4A preemption defense.

B. The NLRA Does Not Preempt Plaintiffs' Meal Break Claim.

Next, Garda contends that Section 301 of the National Labor Relations Act (NLRA) preempts Plaintiffs' claim for denial of meal breaks. It argues that its Labor Agreements contain language that waives employees' right to meal breaks, and that this in turn makes resolution of Plaintiffs' claim dependent on interpretation of those agreements and therefore subject to the exclusive jurisdiction of the National Labor Relations Board (NLRB). This contention is wrong for multiple reasons.[12]

First, Section 301 preempts only claims that are "founded directly on rights created by collective-bargaining agreements," or are "'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (*quoting Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)). As the Washington Supreme Court has explained, "section 301 should not preempt 'nonnegotiable *or* independent negotiable claims.'" *Hisle v. Todd Pacific Shipyards Corp.,* 151

[12] As explained in Section C below, the vast majority of Garda's Labor Agreements do not actually contain any language even purporting to waive meal breaks.

Wn.2d 853, 864, 93 P.3d 108 (2004) (emphasis in original) (quoting *Commodore v. Univ. Mechanical Contractors Inc.*, 120 Wn.2d 120, 131, 839 P.2d 314 (1992)); *see also Livadas v. Bradshaw*, 512 U.S. 107, 123-24 (1994) ("It is the legal character of a claim, as 'independent' of rights under the collective bargaining agreement … that decides whether a state law cause of action may go forward.").

Here, Plaintiffs never challenged the Labor Agreements, only Garda's practice of failing to provide lawful meal breaks to its employees in violation of state law. Garda's attempt to mount a defense with the Labor Agreements does not transform Plaintiffs' independent state law claim into one for breach of the CBAs. "If the claim is plainly based on state law, § 301 pre-emption is not mandated simply because the defendant refers to the CBA in mounting a defense." *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005) (holding California's state-established right to meal periods was nonnegotiable and could not be waived by meal period provisions in employer's negotiated CBA). These principles are strictly applied by the Washington courts. *See e.g., Hisle,* 151 Wn.2d at 864 ("there is a strong presumption against finding preemption").

Second, state law explicitly prohibits waiver of the right to meal breaks through a collective bargaining agreement. As Garda points out, the only authority that meal breaks can *ever* be waived is DLI's Administrative Policy ES.C.6 ("Policy ES.C.6"). *See* Addendum to Appellant's Brief at p. 4, ¶ 8. But the very same policy statement

unequivocally says that such waivers generally *cannot* be made through collective bargaining agreements. *Id.* at p. 5, ¶ 15:

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

See also RCW 49.12.187 (same).[13] Plainly, the legislature and the implementing agency chose to allow only public employees and construction trade unions to vary or supersede rest and meal break requirements by CBA. Thus, they cannot be waived or altered by a CBA in other private sector industries. *See also Watson v. Providence St. Peter Hosp.*, 2013 U.S. Dist. LEXIS 99980, *16 (W.D. Wash. July 17, 2013) ("Washington law sets the floor, not the ceiling, for meal breaks and rest periods and thus the CBA can grant more rights but not less."); *accord*

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[13] RCW 49.12.187 provides in pertinent part (emphasis added):

> [R]ules adopted under this chapter regarding appropriate rest and meal periods as applied to *employees in the construction trades* may be superseded by a collective bargaining agreement negotiated under the national labor relations act, 29 U.S.C. Sec. 151 et seq., if the terms of the collective bargaining agreement covering such employees specifically require rest and meal periods and prescribe requirements concerning those rest and meal periods. *Employees of public employers* may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.

Valles, 410 F.3d at 1082 (holding California's right to meal periods was nonnegotiable and could not be waived by CBA).[14]

In a remarkable example of circular reasoning, Garda asserts that a CBA waiver does not result in a "less favorable" meal period than required by "the standard" because "the standard allows employees to waive meal periods." Appellant's Opening Brief at 19. This is clearly wrong. First, it would render most of RCW 49.12.187 mere surplusage, in violation of basic canons of statutory construction: there would be no need to make an exception for public and construction sector employees if all other workers could vary or supersede their meal periods through a CBA as well. Second, "the standard" that the DLI Policy expressly forbids using a CBA to vary is the standard set forth in WAC 292-126-092, which mandates a 30-minute meal break and does not contain any option for waiver. Policy ES.C.6 at ¶ 15. Third, the Policy requires that any meal period waiver be revocable by the employee at any time. Policy ES.C.6 at

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[14] Garda also advances a new argument, never raised before, that so-called *Garmon* preemption precludes application of the rule against CBA waivers. *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). This Court does not consider arguments raised for the first time on appeal. RAP 2.5(a); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001). In any event, the argument is meritless. *Garmon* protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA. The "critical inquiry" is "whether the controversy presented to the state court is identical with that which could be presented to the [NLRB]." *Wal-Mart Stores, Inc. v. UFCWU*, 190 Wn. App. 14, 22-23, 354 P.3d 31 (2015) (quoting *Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983)). The NLRA contains no provisions relating to meal periods or their waiver, and therefore *Garmon* does not apply.

¶ 8. A waiver in a CBA would stay in effect for the term of the CBA, contrary to the requirements of the Policy.

Therefore, because Plaintiffs' meal break claim arises solely from Washington law, not the Labor Agreements, and because the Agreements cannot support a waiver defense in any event, the trial court correctly concluded that there is no Section 301 preemption.

C. The Trial Court Properly Dismissed Garda's Waiver Defense.

Putting aside its NLRA preemption argument, and assuming that meal break rights can be waived in a CBA, Garda asks this Court to reverse the trial court's summary judgment dismissal of its waiver defense.[15] As explained above, Washington law is clear that the right to meal breaks cannot be waived in a CBA. This disposes of Garda's waiver defense as a matter of law, and the trial court's disposition should be affirmed.

Even if class members could have waived their meal breaks through the CBAs, Garda did not and could not meet its burden of proof to establish waiver. That burden is particularly high in this instance. Waiver requires "the intentional and voluntary relinquishment of a known right." *Pellino*, 164 Wn. App. at 696-97 (citing *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998)). It may be proven only by express agreement or "unequivocal acts or conduct," and cannot be "inferred from

[15] Garda attempts to have it both ways: to have Plaintiffs' claim preempted because the NLRB purportedly must interpret the Labor Agreements as CBAs; and to have the courts interpret the Labor Agreements as individual waivers of Plaintiffs' meal period rights.

doubtful or ambiguous factors." *Id.* at 697 (citations omitted). And, because wage regulations are remedial, exceptions are narrowly construed. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300-01, 996 P.2d 582 (2000). Finally, because the purported waiver is in a CBA, any such waiver would have to be "clear and unmistakable" "for a court even to consider whether it could be given effect." *Livadas*, 512 U.S. at 125.

As noted, the vast majority of Garda's Labor Agreements do not say the employees waive their meal breaks. *See supra* pp. 6-7. Instead, some of those agreements provide for an "unscheduled" meal period while others provide for an "on duty" meal period. *See* Appellant's Appendix. Under Washington law, neither can signify a waiver.

An "unscheduled" meal break is not the same as no meal break. *Pellino*, 164 Wn. App. at 691 ("while an employer does not have an obligation to schedule meal periods or rest breaks ..., the employer must provide breaks that comply with the requirement of 'relief from work or exertion'") (quoting *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003)). And an "on duty" meal period is still a meal period as well; it simply means that the employer may require the employee to remain on the employer's premises and be "on call" in case of emergency. *See* WAC 296-126-092(1); *Pellino,* 164 Wn. App. at 692-93. As this Court held in *Pellino,* even with "on duty" meal periods "the employee is entitled to a full 30 minutes of paid meal time ... without performing work duties on behalf of the employer." 164 Wn. App. at 689. Thus, as a matter of well-established law, an agreement that provides an "unscheduled" or

"on duty" meal break does not waive—much less unequivocally, clearly, and unmistakably waive—the meal break.[16]

Ignoring this fundamental problem in its waiver defense, Garda points out that "many class members individually acknowledged their CBAs," evidencing their "personal intent to waive" meal breaks.[17] Yet, even if the language of the CBAs expressly waived meal periods, the acknowledgements offer no evidence of personal intent. In fact, the individuals had no choice in the matter, they were subject to the CBA provisions whether they signed or not. *See* CP 2656; CP 2675; CP 2664. That is the nature of a CBA. *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335-36 (1944) (after a CBA is executed, "[t]here is little left to individual agreement except the act of hiring"). If the class members wished to continue working for Garda they would be bound by the CBA whether they signed it or not, so acknowledging its terms cannot establish a

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[16] Garda is wrong to claim that by pointing out the established meaning of the term "on duty," Plaintiffs seek to enforce the Labor Agreements. In fact, it is Garda that relies on this term from the Labor Agreements, and then seeks to avoid the established meaning of that term. Plaintiffs seek only to enforce their right to lawful meal and rest breaks mandated under Washington law; no interpretation of a collective bargaining agreement is required. *See Washington State Nurses Ass'n. v. Sacred Heart Med. Center,* 175 Wn.2d 822, 833, 287 P.3d 516 (2012) (dispute is whether missed rest breaks must be paid at overtime rates, "not the meaning of the CBA").

[17] Appellant's Opening Brief at 29. In a rhetorical sleight of hand, Garda qualifies its assertion to claim that the employees waived "off duty, unpaid meal periods." *Id.* As explained above, both on-duty and off-duty meal periods must consist of a complete cessation of exertion on behalf of the employer. Plaintiffs' complaint is not that they were denied off-duty meal periods (i.e., 30 minute, uninterrupted meal periods during which they could leave the prescribed work site), but that they were deprived of lawful, work-free, on-duty meal periods.

knowing, intentional, individual waiver.[18] Moreover, accepting Garda's argument would eviscerate the legislative and regulatory prohibition on waiver by CBA, and allow any employer to make an end-run around this prohibition and the strict limitations on the waiver option by the simple expedient of having individual employees sign an acknowledgement of their CBAs.

Garda also suggests that class members' failure to request off-duty meal breaks supports a finding of intentional waiver. This is equivocal evidence at best, and insufficient as a matter of law. *Pellino*, 164 Wn. App. at 697. The testimony is uniform that class members did not request off-duty meal periods because such requests would have been inconsistent with the job requirements imposed by Garda and futile. *E.g.*, CP 2660. ("Why would I ask for a break I'm not allowed to take."); CP 2680 (requested an off-duty meal period "[i]n jok[ing] but not for real because we were never actually allowed to have that kind of time"); CP 2667 ("even though they're saying you could if you would request it, you're not going to get it anyway"); CP 2891 ("You just wouldn't get it. You have to get that route done and back to the banks in the afternoon. There was no

[18] In making its waiver argument, Garda misrepresents the named plaintiffs' testimony. Mr. Hill agreed only that "Garda, consistent with the [labor] agreement, schedule[d] routes without designated lunch breaks." CP 1027 (Tr. 76:21-23). While Mr. Wise testified the labor agreement allowed for employees to ask management for a non-paid lunch period, he also explained that he never did so because "We had no time. The managers were always hounding us to be done in time." CP 1015 (Tr. 32:25-13). Finally, while Mr. Miller understood that his lunch period would be "on the clock," (CP 1003, Tr. 24:15-18), he also specifically denied that he had "waived" his right to a lawful meal period. CP 1003 (Tr. 23:20-24:1).

time to do that."). Branch managers admitted that they would not even know how to provide an off-duty meal period if asked. *See, e.g.,* CP 2631-32, 2642-43. As important, failing to request an *off-duty* (30-minute, uninterrupted) meal period, does not signify waiver of work-free *on-duty* (on-call, in the workplace) meal period. The fact that no class member ever took the affirmative, but futile step, of requesting an off-duty meal period does not constitute the type of unequivocal conduct sufficient to create a question for trial on implied waiver.

D. The Trial Court Properly Granted Summary Judgment On Liability As To Rest Breaks.

In the course of arguing waiver and F4A preemption, Garda *insisted* that its driver/messengers do not and cannot take vigilance-free rest and meal breaks as required by Washington law. CP 1545-1546. After its legal defenses were dismissed, and in response to Plaintiffs' motion for partial summary judgment on liability, Garda conceded liability with respect to meal breaks, CP 2993 n.1, and the trial court also found liability regarding missed rest breaks. CP 3352. In its present appeal, Garda claims that class members received sufficient work-free rest breaks and that summary judgment was therefore improvidently granted. The record evidence fully supports the trial court's conclusion that as a matter of law and uncontested fact, Garda failed to provide its armored truck crews with lawful rest breaks.

1. Applicable Standards

In reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court and on the same record.

Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). On a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material fact. *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, Local 1001*, 77 Wn. App. 33, 40, 888 P.2d 1196 (1995). Once the moving party carries its initial burden, the burden shifts to the nonmoving party to "set forth specific facts evidencing a genuine issue of material fact for trial." *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 664 (1995). The motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Here, the trial court correctly determined that there was only one reasonable conclusion under the evidence before it and the controlling precedent of *Pellino v. Brinks*: that Garda had violated its mandatory duty to provide class members with lawful, work-free rest breaks under Washington law.

The Industrial Welfare Act provides that all employees shall be "protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010. DLI has enacted regulations to provide such protections, including rest break requirements. WAC 296-126-092. This regulation has "the full force and effect of law." *Wingert v. Yellow Freight Sys. Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002) (internal quotations omitted). Under it, employers may not require employees to work more than three hours without a rest break of at least 10 minutes. *Demetrio v. Sakuma Bros. Farms Inc.*, 183 Wn.2d 649, 657, 355 P.3d

(2015) (citing *Wingert*, 146 Wn.2d at 852). Employers have a "mandatory obligation" to provide paid rest breaks. *Id.* at 658 (quoting *Pellino*, 164 Wn. App. at 688).

> It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, ***employers must affirmatively promote meaningful break time***.

Id. (citing *Pellino* at 691) (emphasis added). "A workplace culture that encourages employees to skip breaks violates WAC 296-126-092." *Id.*

2. *Pellino* Resolved the Same Legal Issues on the Same Material Facts.

In *Pellino*, this Court found that Brink's had failed to provide lawful rest breaks to its armored car crews on two independent grounds. First, crews "were always 'engaged in active work duties'" because of the requirement to stay vigilant at all times. 164 Wn. App. at 680. Second, "[r]egardless of the requirement to … remain vigilant," Brink's failed to provide sufficient time to take breaks during the day. *Id.* Either of these grounds was sufficient by itself to establish a violation of Washington law. *Id.* at 690-91.

Garda attempts to distinguish this case from *Pellino*, observing that the facts in *Pellino* were established at trial and unchallenged on appeal. However, it ignores the fact that unlike *Pellino*, Garda's own CR 30(b)(6) witness *admitted* that the company failed to comply with its legal obligation to provide work-free, vigilance-free rest breaks. CP 2966-67. Also, Garda failed to identify any material factual differences between its

own break practices and those of Brink's. Indeed, the facts are materially identical:

- Both Brink's and Garda employed a driver and a messenger on each armored truck, and their primary duty was to guard the valuables on the trucks. (*Pellino*, 164 Wn. App. at 674, ¶ 8; CP 2857-58.)

- Brink's and Garda both required crew members to follow daily route sheets with specified times for pickups and deliveries. (*Pellino*, 164 Wn. App. at 673-74, ¶ 6; CP_1808 (Tr. 29:4-6).)

- Supervisors checked and monitored the progress of the crews throughout the day to ensure they remained on schedule. (*Pellino*, 164 Wn. App. at 678-79, ¶ 20; CP 2946-47.)

- Both companies required crew members to remain constantly vigilant against potential threat of attack while on duty. (*Pellino*, 164 Wn. App. at 674, ¶ 8; CP 2776.)

- Both prohibited crew members from bringing personal materials on the trucks, and prohibited them from engaging in any personal activities. (*Pellino*, 164 Wn. App. at 675, ¶ 9; CP 2772-73.)

- Vigilance was required even while crew members were using the bathroom or purchasing food. (*Pellino*, 164 Wn. App. at 677, ¶ 17; CP 2855, 2883, 2923.)

- The crew members were expected to "eat on the fly," not to stop for meals or rest. (*Pellino*, 164 Wn. App. at 678, ¶ 20; CP 2621, 2635, 2627-28.)

These are the material facts upon which Judge Trickey concluded, and this Court affirmed, that Brink's was liable for violating WAC 296-126-092, and they are the same undisputed facts established by Plaintiffs in this case. Accordingly, there was no genuine issue of material fact to warrant a trial in this matter, and summary judgment was proper.

3. Garda's Evidence Did Not Contradict the Undisputed Material Facts.

Garda offers three reasons this Court should reverse the trial court's judgment. First, it says its managers "instructed their crews to take breaks" and "exercised their discretion" to not enforce the vigilance requirement or the rule against personal items on the trucks. Opening Brief at 32. The only testimony Garda cites is testimony from two managers stating that they had not *disciplined* employees for buying food, smoking, or using a phone while on route (CP 3116, 3121), and a single manager saying he told new employees "they should take" breaks. CP 3113 (Tr. 61:6-23). This does not contradict the undisputed evidence that crew members were never allowed to completely let their guard down, and were bound by company policy to conduct no personal business or activity while on route. *See supra* pp. 3-4. And evidence that some employees break company rules to make personal calls or texts is not evidence that Garda meets its affirmative obligation to provide lawful rest breaks. At a minimum, Garda had a "culture that encourages employees to skip breaks," in violation of Washington law. *Demetrio*, 183 Wn.2d at 658.

Garda also claims class members testified that they sometimes "took breaks during which they were fully relieved of all work duties." *Id.* However, Garda relies principally on declarations it had submitted nearly five years before the court's summary judgment decision, in July 2010, in opposition to class certification. *See* CP 768, 771, 777-78, 780-82, 786, 819-20, 822-23, 834-23, 831-32, 834-35, 837-38. Garda did not cite these declarations or call them to the trial court's attention when it opposed

Plaintiffs' motion for partial summary judgment on liability, and therefore the trial court did not consider them and neither can this Court. *See Colwell v. Holy Family Hospital*, 104 Wn. App. 606, 613, 15 P.3d 210 (2001) (Court of Appeals would not consider declarations filed in connection with another motion that were not cited nor called to the attention of the trial court with respect to the hospital's summary judgment motion).[19] In any event, these declarations do not address at all Garda's constant vigilance policy and do not show that class members were at any time relieved from their work responsibility to remain on guard at all times.

Moreover, there is no dispute that the class members in *Pellino* also were allowed to use the bathroom, buy food or snacks, and eat, drink and smoke while working. *Pellino*, 164 Wn. App. at 677. Here, just as there, those activities were always rushed and restricted, did not relieve the employees of "active guard duty" and exertion, and provided "no opportunity for personal relaxation, activities or choice." *Id.* at 680.[20]

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[19] RAP 9.12 provides that when reviewing summary judgment decisions, "the appellate court will consider only evidence and issues called to the attention of the trial court." *See also Green v. Normandy Park Riviera Section Comm'y Club Inc.,* 137 Wn. App. 665, 678, 151 P.3d 1038 (2007) ("[I]t is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court.") (citing *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.,* 121 Wn.2d 152, 163, 849 P.2d 1201 (1993)).

[20] Garda's suggestion that instances in which the messenger was seated in the back of the truck between stops served as a rest break ignores the conditions in which they occur: the messenger sits bouncing around buckled into a single seat in a loud, moving metal box, with no air conditioning, no personal materials, and barely a window. *See* CP 1535 (Tr. 34:17-36:12); CP 1813 (Tr. 96:10-13); CP 1951 (Tr. 59:10-17).

Plaintiffs were required to remain vigilant at all times, whether delivering valuables, riding in the truck between stops, or running to the bathroom. Garda presented absolutely no evidence that class members were permitted to let down their guard at any time during their workday.

Finally, Garda claims the crews were not rushed, because managers "built additional time into the routes to ensure crews had time to take proper breaks." Opening Brief at 33. The testimony is that route plans sometimes included a "buffer" to cover "all variables" including construction, traffic "and everything else." CP 3102 (Tr. 87:19-88:8). This is not evidence that the crews were not rushed. Moreover, Brink's made the same claim, and this Court agreed with the trial court that it was both insufficient and irrelevant because of the requirement to remain vigilant. *Pellino*, 164 Wn. App. at 679.

The evidence did not raise a genuine issue of material fact, and the trial court properly granted partial summary judgment on Garda's failure to provide lawful rest breaks to the Plaintiffs.

E. The Trial Court Did Not Err In Certifying The Class.

Garda challenges the trial court's decision to certify the class, and later to deny decertification. This Court reviews these decisions for "manifest abuse of discretion." *Pellino*, 164 Wn. App. at 682. The trial court should be upheld so long as it considered the criteria for class certification and its decision is "based on tenable grounds and is not manifestly unreasonable." *Id.* Garda contends the Plaintiffs' claims were "wholly ill-suited for class-wide adjudication," ignoring the fact that the

same claims were certified and resolved on a class-wide basis in *Pellino* and that decision was upheld by this Court. *Id.*

Class actions are favored in Washington as an effective means of adjudicating numerous, similar claims. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002). A class action "avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and also frees the defendant from the harassment of identical future litigation." *Sitton v. State Farm*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003) (citation and internal quotation omitted); *see also Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) ("state policy favor[s] aggregation of small claims for purposes of efficiency, deterrence, and access to justice"). Any doubts should be resolved in favor of maintaining certification. *Sitton*, 116 Wn. App. at 250.

Motions to decertify should not be granted without a showing of changed circumstances.

> In the absence of materially changed or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, courts should not condone a series of rearguments on the class issues by either the proponent or the opponent of class, in the guise of motions to reconsider the class ruling.

A. Conte & H. Newberg, *Newberg on Class Actions* § 7:47, p.159 (4th ed. 2002).

The trial court thoroughly considered all of the arguments for and against class certification, on the papers and at oral argument. *See* CP 2246. It correctly held that the overriding question was whether Garda

provided Plaintiffs "legally sufficient rest and meal breaks." CP 933. Plaintiffs showed that Garda's policies requiring constant vigilance and forbidding possession of personal items or conducting personal business while on route prevented them from taking work-free rest and meal breaks. Under *Pellino* and the underlying Washington law, these facts would establish liability, and they are common to all members of the class.

In support of its appeal of the certification decision, Garda merely refers in scattershot fashion to "the individualized determinations discussed in this brief." Opening Brief at 35.[21] Garda's list of examples center around (1) the language of the CBA's meal period provisions which it contends waived meal breaks, (2) the class members' understanding of the right to take an "off-duty" meal break, and (3) whether class members "actually received rest breaks." *Id.* at 35-36.

With respect to the CBA language, it is undisputed that there were only three different versions, and each would be interpreted in the same way for each person bound by it. Even if the CBAs were relevant, and even if each version would be subject to a different interpretation, that is not sufficient variation to undermine class certification.[22] Moreover,

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[21] To the extent Garda suggests that class certification requires absolute uniformity among class members, it is wrong. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 874-75 (2012) (plaintiffs may rely on "evidence that is true for most, but not all, members of the class").

[22] As discussed above, Plaintiffs contend none of the CBAs had any impact on their claims, in part because minimum rest and meal breaks requirements are non-negotiable in a CBA to begin with. In any event, that question is the same for all class members.

individual understandings of the contracts are irrelevant, particularly with a Labor Agreement, which is a contract between the company and the union, not the individual employee. *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 342 P.2d 612 (2005) (contract interpretation is based on "the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties"). *See also J.I. Case Co.*, 321 U.S. at 335-36 (after CBA is executed "[t]here is little left to individual agreement except the act of hiring"). Garda admits that no employee had any choice whether to be bound by the Labor Agreements and all were bound whether they signed them or not. CP 2328; CP 2377-2379.

Similarly, Garda did not show there were any individual differences regarding the purported right to take an "off-duty" meal break; it is undisputed that no class member ever did so, and the trial court correctly found that there was no realistic possibility of doing so. CP 4326-27; CP 3119 (Tr. 156:13-21); CP 3820 ¶ 26. As this Court made clear in *Pellino*, employers have a "mandatory obligation" not simply to allow employees to take meal periods but to "ensure the breaks comply with the requirements of WAC 296-126-092." 169 Wn. App. at 688.

Likewise, Garda still has not shown the presence of material individualized differences with respect to whether class members actually received lawful rest breaks. Plaintiffs did not dispute that class members occasionally purchased food and drinks, used the bathroom, and/or smoked while on route. Plaintiffs' theory, which was adopted by the

courts in *Pellino*, was that these brief activities performed while on guard and on duty did not qualify as lawful rest breaks. That issue was a common, not individualized one, and was underpinned by common, company-wide policies requiring constant alertness and prohibiting personal items and errands. CP 2772-73, 2776. The trial court's class certification decisions were correct, and well within its broad discretion.

F. The Trial Court Properly Awarded Double Damages For Willful Violations For The Period After This Court Affirmed *Pellino*.

The trial court awarded double damages to the class for the back pay damages accrued during the period following this Court's decision in *Pellino* (*i.e.,* between November 20, 2011 to February 7, 2015). CP 3810. It found that as of November 20, 2011, Garda knew or should have known its break policies violated Washington law, and that its violation was therefore "willful" under RCW 49.52.050 and warranted exemplary damages under RCW 49.52.070. CP 3811, 3817. Garda challenges the doubling of Plaintiffs' meal break damages only, on three grounds, all of which are baseless, and this Court should affirm.

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

First, Garda claims that because it paid Plaintiffs during their missed meal breaks, the damages owed are not "wages" and are therefore outside the scope of the exemplary damages statute. It did not make this argument below and cites no authority for it now.

The term "wages" is defined very broadly under Washington law and encompasses any "compensation due to an employee by reason of

employment." *See* RCW 49.46.010. Clearly, class members here have recovered compensation due to them by reason of their employment by Garda as measured by the hourly wage rates at which they were employed. *See* 6/16/15 RP at 22-23 (explaining damages calculations using hourly rates).

Moreover, Garda's theory directly contradicts *Wingert*, 146 Wn.2d at 849 (employees who miss paid rest breaks are entitled to "wages" as a remedy) as well as *Pellino,* 146 Wn. App. at 690 ("*Wingert* applies with equal force" to on-duty meal breaks). For pay purposes, a paid "on-duty" meal period is the equivalent of a paid rest break; and, a missed "on duty" meal period triggers a back pay obligation by the employer in the same way as a missed rest break. Accordingly, because Washington law requires employers to pay employees for such missed break time, these employees are thus receiving "compensation … by reason of employment," *i.e.,* "wages."

2. There Was No Bona Fide Dispute After *Pellino*.

Second, Garda claims there was a "bona fide dispute" about its duty to provide work-free meal breaks to the Plaintiffs, even after this Court's decision in *Pellino*, because it relied on the language in its Labor Agreements, "believing the waivers meant it met its meal period obligations." Opening Brief at 41.

A bona fide dispute is one that is "fairly debatable." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998). Legal arguments that are contrary to well-established law are not sufficient to

give rise to a bona fide dispute that would avoid liability under RCW 49.52.070. *Department of Labor & Industries v. Overnite Transp. Co.*, 67 Wn. App. 24, 34, 834 P.2d 638 (1992). The trial court found that "[t]he law was clear that meal breaks could not be waived in a Collective Bargaining Agreement (CBA) outside of public employment and construction trades," so there was no *bona fide* dispute that Garda had an obligation to provide work-free meal and rest breaks after *Pellino*, regardless of the terms of its CBAs. CP 3811, 3818 (citing DLI Admin. Policy ES.C.6, § 15; RCW 49.12.187).[23] Garda claims "[t]his legal conclusion was clearly erroneous," but fails to explain how or why.[24] It did not and has not established the existence of a bona fide dispute.

3. Plaintiffs Did Not "Knowingly Submit" to Deprivation of an On-Duty Meal Period.

Finally, Garda claims Plaintiffs "knowingly submitted" to its meal period violations and therefore are not entitled to double damages under RCW 49.52.070.[25] Again, Garda relied solely on the provisions of its

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[23] The trial court also noted that with few exceptions the CBAs provided for on-duty meal breaks, "which are still meal breaks requiring complete relief from active work under Washington law." CP 3818.

[24] Garda again invokes the employees' supposed right to request an off-duty meal period as support for its defense of waiver. Opening Brief at 41. As the trial court found, Garda did not show this was a realistic option, or that class members saw it as a realistic choice that could be construed as evidence of voluntary waiver. CP 3812.

[25] Notably, the period for which the court awarded double damages—from November 2011 to February 2015—falls entirely after this lawsuit was filed and the class certified, so Garda is advancing the illogical contention that Plaintiffs "knowingly submitted" to its meal break practices while simultaneously challenging them in court.

CBAs before the trial court. *See* CP 3820.[26] The court found no evidence that any class member had "deliberately and intentionally" given up any right to take a meal break because they "had no legitimate choice about foregoing their meal periods." CP 3820 (citing *Chelius v. Questar Microsystems Inc.*, 107 Wn. App. 678, 682, 27 P.3d 681 (2001)). Garda does not show otherwise.

Individual class members had no choice in the language of Garda's meal period rules written in its CBAs, and often did not even know what these agreements provided. *See* CP 2647, 2656, 2664, 2672, 2675. Garda *management* scarcely knew what these provisions said or meant. *See, e.g.*, CP 2631-32, 2642-43. They cannot possibly establish individual, intentional, knowing submission by the employees who were subject to them. As the trial court held: "Knowing submission must be explicit, not implied." CP 3820 (citing *Chelius*, 107 Wn. App. at 683 (rejecting employer's assertion of "constructive" agreement to defer wages)). Garda failed to establish its "knowing submission" defense to double damages, and this Court should affirm.

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[26] Garda contends the trial court rejected its knowing submission defense because meal periods cannot be waived in a CBA. Opening Brief at 42. While Plaintiffs argued that, as a legal matter, an employee cannot knowingly submit to a wage violation through means that are not cognizable as a waiver, the court did not reach that argument. *See* CP 3485 (citing *Durand v. HMC Corp.*, 151 Wn. App. 818, 836-37, 214 P.3d 189 (2009) (identifying "knowing submission" defense with "waiver" defense)).

G. Double Damages Are Not A Substitute For Pre-Judgment Interest.

Garda contends that an award of both prejudgment interest and exemplary damages under RCW 49.52.070 would constitute a "double recovery" to the Plaintiffs because both serve to compensate for the delay in payment. Garda cites no Washington law, and ignores cases that reached a contrary result. *See Durand v. HMC Corp.*, 151 Wn. App. 818, 214 P.3d 189 (2009) (awarding both prejudgment interest and double damages for willful violations of Washington's wage laws).

Instead, Garda relies solely on federal cases addressing liquidated damages under the federal Fair Labor Standards Act ("FLSA"). While it is true that federal decisions addressing the FLSA are persuasive authority when interpreting similar provisions of Washington wage law, Garda omits the corollary rule that where the laws differ, state courts will not follow federal authority. *Drinkwitz*, 140 Wn.2d at 298. Here, the laws differ. Liquidated damages under the FLSA serve the same purpose as prejudgment interest. *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982) ("liquidated damages are compensatory, not punitive … to compensate employees for … not receiving their lawful wage at the time it was due"). By contrast, exemplary damages under RCW 49.52.070 do not serve the same purpose as prejudgment interest.

> [T]he damages [under RCW 49.52.070] are exemplary damages, not merely compensatory. As exemplary damages, they are intended to punish and deter blameworthy conduct.

Morgan v. Kingen, 141 Wn. App. 143, 161-62, 169 P.3d 487 (2007) *aff'd*, 166 Wn.2d 526, 210 P.3d 995 (2009) (citing Black's Law Dictionary 418–

19 (8th ed. 2004)); *see also* Black's Law Dictionary (10th ed. 2014) (defining "exemplary damages" as a synonym of "punitive damages").

Thus, exemplary damages under RCW 49.52.070 serve a different purpose than liquidated damages under the FLSA, and a different purpose than pre-judgment interest.[27] The trial court properly awarded both.

H. The Court Properly Exercised Its Discretion In The Fee Award.

Garda asks the Court to overturn the trial court's attorney's fee award in two respects. First, it urges the Court to segregate fees incurred prosecuting Plaintiffs' meal break claims, based on the argument already discussed above that compensation for missed on-duty meal breaks is not "wages" and therefore not within the scope of the fee-shifting provisions in the wage statutes. *See supra* section F.1. As explained above and observed by the trial court, this argument is frivolous. CP 4190.[28]

Garda also challenges the trial court's decision to award a risk multiplier. "In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion." *Pham v. Seattle*

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[27] *See also Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1102 (3d Cir. 1995) (distinguishing the treatment of liquidated damages under the FLSA and awarding both pre-judgment interest and liquidated damages for willful violation of the ADEA); *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253, 265 (2d Cir. 1999) (awarding both prejudgment interest and liquidated damages under New York Labor Law where these "are not functional equivalents" because "liquidated damages under the Labor Law 'constitute a penalty' to deter an employer's willful withholding of wages due").

[28] The argument is not only substantively baseless but procedurally wrong as well: Washington courts do not segregate fees for different claims if they all "involve a common core of facts or are based on related legal theories." *Brand v. Dept. of Labor & Indus.*, 139 Wn.2d 659, 672-73, 989 P.2d 1111 (1999).

City Light, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Garda contends the trial court abused its discretion by basing its award of a multiplier on (1) the contingent nature of success and (2) the novelty of the issues in the case. Opening Brief at 47 (citing CP 4193).

First, the contingent nature of a case is the fundamental basis upon which the Washington courts have awarded a multiplier. "The contingency adjustment is based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services, unless they can receive a premium for taking that risk." *Pham*, 159 Wn.2d at 541 (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983)). Indeed, "the contingency adjustment is designed *solely* to compensate for the possibility . . . that the litigation would be unsuccessful and that no fee would be obtained." *Bowers*, 100 Wn.2d at 598-99 (quoting *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (emphasis added)). And, there is no dispute that Garda paid its own counsel a similar or greater amount over the past seven years than Plaintiffs' lodestar, regardless whether they won or lost.[29] The purpose of providing wronged employees with a right to recover attorney's fees if successful is "to provide incentives for aggrieved

[29] Plaintiffs repeatedly requested information about defense counsel's billing in order to compare and respond to Garda's objections to their fee petition, but were refused. CP 4190-91. Therefore, it can only be assumed that their hours were similar or greater to those of Plaintiffs' counsel. *See Fiore*, 169 Wn. App. at 354. Garda did disclose its counsel's current hourly rates, which are *higher* than the rates the trial court approved and used in calculating Plaintiffs' lodestar. *See* CP 3999, 4192.

employees to assert their statutory rights." *Int'l Ass'n of Fire Fighters Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (quoting *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994)). Without a contingency adjustment, there would be no monetary incentive to represent employees on a contingent basis.

Garda contends that contingency alone is not enough to warrant a contingency adjustment, relying solely on this Court's decision in *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 279 P.3d 972 (2012). *Fiore* did not so hold. It simply found that the reasons given by the trial court for its addition of a risk multiplier were not sufficient. *Id.* at 355 ("Because the extensive, time-consuming nature of the litigation was encompassed within the lodestar amount, and because the policies cited by the trial court as justification for the multiplier do not support such an award, the trial court erred").[30] The Court did go on to note that under *Pham*, '"the high risk nature of a case' may justify the award of a risk multiplier," but it did not hold that this is the *only* valid basis for such an award. *Id.* at 356 (quoting *Pham*, 159 Wn.2d at 543).

Regardless, the trial court here *did* find that this was a high-risk case. It explained that this was "a high-stakes class action," that there was

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[30] The "policies cited by the trial court" referred to the provision in the Mandatory Arbitration Rules (MARs) that the losing party in a trial *de novo* must pay the winner's attorney's fees. *See Fiore*, 169 Wn. App. at 358. The trial court had relied on the plaintiff's exposure under that rule as a basis for awarding a risk multiplier, which this Court held was error. "By utilizing a multiplier, the trial court actually *incentivized* that which the legislature seeks to *discourage*—appeals from arbitration decisions." *Id.*

"no authority on work-free meal and rest breaks for armored car personnel" at the time the case was filed, and there were "several affirmative defenses available to Garda." CP 4193 ¶ 22.[31] Garda acknowledges only one of these bases, the fact that no similar case had been decided, which it dismisses by pointing out that *Pellino* was decided while this case was pending. Opening Brief at 47. However, it is well-settled that risk must be assessed "at the outset of the litigation." *Pham*, 159 Wn.2d at 542 (quoting *Bowers*, 100 Wn.2d at 598). This case began a year before *Pellino* even went to trial. *See* CP 3847.

The primary concern when considering the award of any kind of multiplier is that it must be justified by some factor that has not already been incorporated into the lodestar. *See Bowers*, 100 Wn.2d at 599 (quoted in *Pham*, 159 Wn.2d at 542); *Fiore*, 169 Wn. App. at 357 ("the litigation was made complicated only by the amount of time and skill that it required—a consideration already accounted for in the lodestar amount."). But the high-stakes risk that this case presented for Plaintiffs' counsel was not accounted for in the lodestar.

In fact, Plaintiffs' lodestar was significantly *reduced* when the trial court reduced class counsel's proposed rates.[32] As previously noted, the

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[31] Class actions are qualitatively different in terms of risk than individual actions such as *Fiore*. Because the stakes are usually higher for the defendant—both monetarily and in terms of impact on its business practices—they are almost always hard-fought, and require a longer time commitment and more financial investment by the plaintiffs' counsel.

[32] Class counsel proposed rates ranging from $300 per hour to $500 per hour and the court used rates ranging from $250 per hour to $425 per hour. *See* CP 3839,

rates the court used to calculate class counsel's lodestar were lower than defense counsel's current rates, even though defense counsel practice primarily in Portland, a smaller and lower-cost legal market than Seattle. *Supra* note 29. As this Court noted in *Fiore*, where, as here, the defense counsel makes "no attempt to compare the hours they expended in defending the case," the court can "only assume" those hours are similar to the plaintiff's. 169 Wn. App. at 354. With that assumption, and the fact that the rates used in the lodestar calculation were *lower* than defense counsel's rates, the Court can be assured that the lodestar contained no compensation whatsoever for the risk that Plaintiffs' counsel took in prosecuting their case.

The trial court's decision to award a multiplier was based on appropriate considerations and is not manifestly in error, and should therefore be affirmed.

I. Plaintiffs Should be Awarded Fees on Appeal.

Plaintiffs request an award of fees for their counsel's work on appeal, under RCW 49.48.030, 49.52.070, and RCW 49.46.090(1). *See Fiore*, 169 Wn. App. at 358-59.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs ask that the Court affirm the judgment of the trial court.

3850, 4192. The reasons for the court's reduction in rates are not clear, though it is possible the court was engaging in some blending of current and historic rates given the long duration of the litigation. The $761,000 lodestar awarded would have been $905,100 at the proposed rates.

Dated this 23rd day of May, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on May 23, 2016, I caused the foregoing to be filed via legal messenger with:

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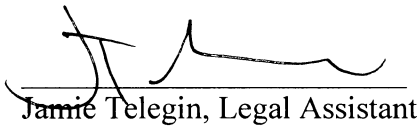
I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.



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