

No. 33094-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FRANCIS M. WOODS et ux, Appellants

v.

MITCHELL BROS. TRUCK LINE, INC., Respondent

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COURT OF APPEALS
DIVISION II
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BRIEF OF RESPONDENT

David J. Sweeney,
Attorney for Respondent
Brownstein, Rask, Sweeney, Kerr,
Grim, DeSylvia & Hay, LLP
1200 S.W. Main St.
Portland, OR 97205
(503) 221-1772
WSBA #35419

pm 9-5-07

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I. INTRODUCTION

The issue decided by the superior court in this case was legal and limited: Can the overtime provisions of Washington's Minimum Wage Act ("MWA") be applied to interstate truck drivers who do not work more than 40 hours in a week within the state of Washington? The superior court held that it could not, and plaintiffs filed this appeal.

Shortly thereafter, plaintiffs moved to stay the appeal pending a decision by this court in a similar case, *Bostain v. Food Express, Inc.*, Case No. 33094-6-II, which motion was allowed. On May 17, 2005 this court decided *Bostain*, and held that the overtime provisions of the MWA do not apply to hours worked outside the state of Washington. *Bostain v. Food Express, Inc.*, 127 Wn. App. 499, 111 P.3d 906 (2005). Plaintiffs then filed their opening brief in this case,¹ and defendant filed a motion on the merits, based on this court's decision in *Bostain*.

In the meantime, the Washington Supreme Court accepted a petition for review in *Bostain*, and the present case was stayed again. On March 1, 2007 the Washington Supreme Court reversed in *Bostain*,

¹ Somewhat incredibly, although the same attorney represents the plaintiffs in both *Bostain* and the present case, plaintiffs in this case did not cite *Bostain* when they filed their opening brief some two and a half months after this court issued the *Bostain* decision.

Bostain v. Food Express, Inc., 159 Wn.2d 700, 153 P.3d 846 (2007), holding that the overtime provisions of the MWA apply to “Washington-based employees,” even if those employees do not work more than 40 hours in a week within the state of Washington. The employer in *Bostain* filed a petition for reconsideration, which was denied on June 20, 2007. Counsel for the employer in *Bostain* advises that the employer will be filing a petition for writ of *certiorari* with the United States Supreme Court.

Following the Washington Supreme Court’s decision in *Bostain*, defendant in this case withdrew its motion on the merits, and now submits this response brief.

II. RESPONSE TO ASSIGNMENT OF ERROR

Defendant does not disagree with plaintiffs’ statement of its assignment of error, except to note that the trial court’s determination that the overtime provisions of the MWA do not apply when the employee does not work more than 40 hours within the state of Washington is a question of law, not a question of fact.

The issues that remain to be resolved are:

A. Whether plaintiff Francis Woods is a “Washington-based employee” such that the overtime provisions of the MWA apply to him even though he never worked more than 40 hours in any one week within the state of Washington;

B. Whether the interpretation of the overtime provisions of the MWA to require payment of overtime to interstate truck drivers who do not work more than 40 hours per week within the state of Washington violates the Commerce Clause to the United States Constitution, U.S. Const., art. I, § 8, cl. 3; and

C. In the event that this court holds that the overtime provisions of the MWA do apply to plaintiff Francis Woods, what relief is available to plaintiffs.

III. RESPONSE TO STATEMENT OF THE CASE

Defendant does not disagree with plaintiffs’ statement of the case, but supplements it as follows:

A. The bulk of the hours driven by plaintiff Francis Woods were outside of the state of Washington (CP 18), and plaintiff Francis Woods

does not know whether he ever drove more than 40 hours in any one week within the state of Washington (CP17).

B. Since the time plaintiffs filed their opening brief, additional procedural events have occurred as described in the introduction section of this brief.

IV. RESPONSE TO PLAINTIFFS' ARGUMENT

A. The Overtime Provisions of the MWA do not Apply to Plaintiff Francis Woods because he is not a "Washington-Based Employee"

This case was argued and decided below on the narrow question of whether the overtime provisions of the MWA could ever be applied to an interstate truck driver who never drove more than 40 hours per week within the state of Washington. Defendant argued that the MWA did not, and could not, require an employer to pay overtime to an individual employed as an interstate truck driver when the employee never works more than 40 hours within the state of Washington. The Washington Supreme Court rejected that argument in *Bostain*.

Bostain did not, however, hold that in all circumstances an employee of a Washington employer is entitled to overtime whenever he works more than 40 hours per week. Instead, *Bostain* held that "[i]n

relevant part, the MWA regulates only employers who are doing business in Washington and who have hired Washington-based employees.”

Bostain, 159 Wn. 2d at 719, 153 P.3d at 855 (emphasis added).² It follows that if the employee in question is not a “Washington-based employee,” the overtime provisions of the MWA do not apply.

In the present case, plaintiff Francis Woods is not a “Washington-based employee” because he is an Oregon resident. He is, therefore, an “Oregon-based employee, not a “Washington-based employee.” Since plaintiff Woods is not a “Washington-based employee,” the overtime provisions of the MWA simply do not apply, and plaintiff Francis Woods is not entitled to overtime wages.

B. Interpreting the Overtime Provisions of the MWA to Require Payment of Overtime to Interstate Truck Drivers who do not Drive More than 40 Hours per Week within the State of Washington Violates the Commerce Clause of the United States Constitution

1. Defendant argued below that the MWA should be interpreted to not apply to interstate truck drivers who do not drive more than 40 hours per week within the state of Washington (CP 16, 26). *See generally*

² The *Bostain* court made numerous other references to the overtime provisions of the MWA applying only to “Washington-based employees” or “Washington employees.” *Id.* at 711, 712, 712-13, 720, 721, 153 P.3d at 851, 852, 855, 856.

Washington State Republican Party v. Washington State Public Disclosure Commission, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000) (“[w]here possible, statutes should be construed so as to avoid unconstitutionality”); *Bostain*, 159 Wn.2d at 733, 153 P.3d at 862 (“this court must always seek to construe statutes in a manner that avoids constitutional problems”) (J.M. JOHNSON, J., dissenting).

In general terms, a state statute violates the Commerce Clause of the United States Constitution if the burden that it imposes on interstate commerce is “clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As explained by the *Bostain* dissent:

[i]nterpreting RCW 49.46.130(1) to apply to all hours worked by an employee when those hours are worked outside of Washington means that the MWA will inevitably burden the extraterritorial activities of interstate truck drivers and their employers. For example, a truck driver could work for 15 hours in Washington, 15 hours in Oregon, and 15 hours in California in a single week. Application of RCW 49.46.130(1) in the manner advocated by the majority would require his employer to track and pay overtime related to the driver’s hours worked in Oregon and California as well as Washington. Should this driver’s employer wish to avoid paying overtime under the MWA, he might move his operations to another state or at least limit the driver’s “on duty” hours while the driver engaged in work outside of Washington. Additionally, this employer would be faced with the unenviable task of researching and resolving any conflicts between the overtime laws of Washington, Oregon, and California. In sum, under the majority’s

interpretation, RCW 49.46.130(1) will unquestionably burden the interstate activities of the trucking industry.

A statute will fail under the *Pike* balancing test and thus violate the Commerce Clause if the burden it imposes on interstate commerce is “clearly excessive in relation to the putative local benefits.” 397 U.S. at 142. As noted above, the public purpose of the MWA is focused on promoting employment and compensating employees within the state of Washington. Thus, the burden on interstate commerce that will result from the majority’s interpretation of RCW 49.46.130(1) is largely unrelated to the promotion of the public interests underlying the MWA. Because giving extraterritorial effect to RCW 49.46.130(1) will not actually further the legitimate public interests behind the MWA, the burden the majority imposes is excessive. See *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982).

Bostain, 159 Wn.2d at 733-34, 153 P.3d at 863 (J.M. JOHNSON, J., dissenting) (footnotes omitted).³

Defendant agrees with this analysis, and believes that the MWA should be interpreted to avoid violating the Commerce Clause.⁴

³ The difference between the majority opinion and the dissenting opinion in *Bostain* turned on the application of the *Pike* balancing test. The majority held that “any impact of the MWA on interstate commerce does not rise to the level of an impermissible burden, given the importance of the legitimate local public interest at stake.” *Bostain*, 159 Wn.2d at 721, 153 P.3d at 856.

⁴ Defendant realizes that the Washington Supreme Court rejected this argument in *Bostain*, and that this court is bound by that decision. However, in light of the fact that the employer in *Bostain* intends to file a petition for writ of *certiorari* with the United States Supreme Court, defendant raises this issue in this brief in order to preserve the argument in the event that the United States Supreme Court accepts the petition for

2. In the superior court, plaintiffs moved the strike defendant's Commerce Clause argument on the grounds that "unconstitutionality" was not expressly pleaded by defendant in its answer (CP 19). Defendant responded by arguing that it was not required to raise this argument by affirmative defense because defendant was not contending that the MWA is unconstitutional in all situations, but rather that it should be interpreted in a way to avoid rendering it unconstitutional as applied (CP 23). Defendant also argued that if the court disagreed, and believed that defendant should raise the defense affirmatively, it should not grant plaintiffs' motion to strike, but rather allow defendant to move to amend to specifically assert this affirmative defense (*Id*). Defendant pointed out that plaintiffs could hardly object to such amendment given that they had devoted 25 pages of briefing to that issue (*Id*). At oral argument, the superior court took the motion to strike under advisement and, in light of its ultimate ruling, plaintiffs' motion to strike was rendered moot.

To the extent that this court is concerned with the issue of whether defendant's Commerce Clause argument has been adequately raised, defendant submits that the appropriate course of action is to remand the

certiorari in *Bostain* and rules that the overtime provisions of the MWA cannot be applied in these circumstances.

matter to the superior court for consideration of plaintiffs' motion to strike and defendant's request for leave to amend.

C. In the Event that this Court Reverses the Decision of the Superior Court, it Should Remand the Case to the Superior Court for Consideration of the Relief Available to Plaintiffs

The remaining issue is what relief the plaintiffs are entitled to recover in the event that this court reverses the decision of the superior court. The relief sought by the plaintiffs in the superior court included unpaid overtime, interest, double damages⁵ and attorney's fees. Given its disposition, the superior court did not rule on the relief plaintiffs were entitled to if they prevailed on the merits. Accordingly, in the event that this court reverses the judgment of the superior court, it should remand this matter to that court for its determination of the relief to which plaintiffs are entitled.

V. CONCLUSION

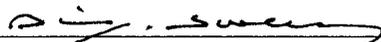
This court should affirm the decision of the superior court because the overtime provisions of the MWA apply only to "Washington-based employees," and plaintiff Francis Woods, an Oregon resident, is not a

⁵ In their March 23, 2007 Appellants' Response to Opinion by the Supreme Court in Bostain v. Food Express filed in this court, plaintiffs concede that their claim for double damages is foreclosed by *Bostain*.

“Washington-based employee.” The court should also affirm the decision of the superior court because interpreting the MWA to apply to interstate truck drivers who do not drive more than 40 hours per week within the state of Washington violates the Commerce Clause of the United States Constitution. Finally, in the event that this court reverses the judgment of the superior court, it should remand this case to that court for consideration of the relief to which plaintiffs are entitled.

DATED this 5th day of September, 2007.

BROWNSTEIN, RASK, SWEENEY,
KERR, GRIM, DESYLVIA & HAY, LLP

By: 
DAVID J. SWEENEY, WSBA #35419
Of Attorneys for Respondents

COURT OF APPEALS

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DECLARATION OF SERVICE

I hereby certify that on the 5th day of September, 2007, I served
one copy of the Brief of Respondent on:

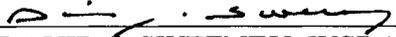
James F. Gray
Law Offices of James F. Gray
2712 Washington Street
Vancouver, WA 98660

Attorney for Appellants

by causing to be mailed to said attorney a true copy thereof. I further
certify that said copy was contained in a sealed envelope with postage

thereon prepaid, addressed as above stated, the last known address of said attorney, and deposited in the post office at Portland, Oregon, on the 5th day of September, 2007.

BROWNSTEIN, RASK, SWEENEY,
KERR, GRIM, DESYLVIA & HAY, LLP

By: 
DAVID J. SWEENEY, WSBA #35419
Of Attorneys for Respondents