

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Dec 01, 2014, 4:38 pm  
BY RONALD R. CARPENTER  
CLERK

*bjh*  
RECEIVED BY E-MAIL

No. 90932-6

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

CERTIFICATION FROM  
THE UNITED STATES  
DISTRICT COURT FOR  
THE WESTERN DISTRICT  
OF WASHINGTON

---

ANA LOPEZ DEMETRIO and FRANCISCO EUGENIO PAZ,  
individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

---

**PLAINTIFFS ANA LOPEZ DEMETRIO AND FRANCISCO  
EUGENIO PAZ'S OPENING BRIEF ON CERTIFIED QUESTIONS**

---

Toby J. Marshall, WSBA #32726  
Marc C. Cote, WSBA #39824  
TERRELL MARSHALL  
DAUDT & WILLIE PLLC  
936 North 34th Street, Suite 300  
Seattle, Washington 98103  
Telephone: (206) 816-6603  
Facsimile: (206) 350-3528

Daniel G. Ford, WSBA #10903  
Sarah Leyrer, WSBA #38311  
COLUMBIA LEGAL SERVICES  
101 Yesler Way, Suite 300  
Seattle, Washington 98104  
Telephone: (206) 464-5936  
Facsimile: (206) 382-3386

*Attorneys for Plaintiffs-Petitioners*

 ORIGINAL

**TABLE OF CONTENTS**

	<b>Page No.</b>
I. INTRODUCTION .....	1
II. CERTIFIED QUESTIONS.....	2
III. STANDARD OF REVIEW .....	2
IV. STATEMENT OF THE CASE.....	2
A. Factual Background .....	2
B. Procedural Background.....	4
1. The class action settlement .....	5
2. The district court’s order certifying issues to this Court .....	6
V. ARGUMENT .....	7
A. Summary of Argument .....	7
B. Washington Employers Have an Obligation Under WAC 296-131-020(2) and the MWA to Separately Pay Piece-Rate Farm Workers for Rest Breaks.....	8
1. Washington has a comprehensive statutory and regulatory scheme that requires employers to provide paid rest breaks.....	8
2. The words “on the employer’s time” in WAC 296-131-020(2) mean that an employer must separately pay farm workers for rest break time. ....	11

3.	California case law interpreting analogous language supports the requirement that employers separately pay piece-rate workers for rest break time.....	15
4.	Separately paid rest breaks are necessary to give farm workers relief from difficult, physical work in the elements. ....	19
C.	The Rate of Pay for Rest Break Time Should Be Based on the Average Hourly Rate from Piece-Rate Earnings Each Week.....	21
D.	The Workers Are Entitled to Attorneys' Fees Under RCW 49.48.030 .....	26
VI.	CONCLUSION.....	29

TABLE OF AUTHORITIES

Page No.

STATE CASES

*Abels v. Snohomish Cnty. Pub. Util. Dist. No. 1*,  
69 Wn. App. 542, 849 P.2d 1258 (1993).....27, 28

*Bates v. City of Richland*,  
112 Wn. App. 919, P.3d 816 (2002).....26, 27

*Bluford v. Safeway Stores, Inc.*,  
216 Cal. App. 4th 864,  
157 Cal. Rptr. 3d 212 (Cal. Ct. App. 2013).....16, 17, 18

*Carlsen v. Global Client Solutions, LLC*,  
171 Wn.2d 486, 256 P.3d 321 (2011).....2

*Frias v. Asset Foreclosure Servs., Inc.*,  
\_\_\_ Wn.2d \_\_\_, 334 P.3d 529 (2014).....2

*Drinkwitz v. Alliant Techsystems, Inc.*,  
140 Wn.2d 291, 996 P.2d 582 (2000).....8

*Gray v. Suttell & Assocs.*,  
\_\_ Wn.2d \_\_\_, 344 P.3d 14 (2014).....28

*Hodge v. Dev. Servs. Of Am.*,  
65 Wn. App. 576, 828 P.2d 1175 (1992).....27

*In re Kim*,  
139 Wn.2d 681, 989 P.2d 512 (1999).....11, 15

*In re Parentage of L.B.*,  
155 Wn.2d 679, 122 P.3d 161 (2005).....15

*Int’l Ass’n of Fire Fighters Local 46 v. City of Everett*,  
146 Wn.2d 29, 42 P.3d 1265 (2002).....9, 26

*Manor v. Nestle Food Co.*,  
131 Wn.2d 439, 932 P.2d 628 (1997).....10

<i>Murphy v. Kenneth Cole Prods., Inc.</i> , 155 P.3d 284 (Cal. 2007) .....	20
<i>Pellino v. Brink's Inc.</i> , 164 Wn. App. 668, 267 P.3d 383 (2011) .....	<i>Passim</i>
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998) .....	8
<i>Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.</i> , 139 Wn. 2d 824, 991 P.2d 1126 (2000) .....	25
<i>Slaughter v. Snohomish Cnty. Fire Protection Dist. No. 20</i> , 50 Wn. App. 733, 750 P.2d 656 (1998) .....	11
<i>State v. Houck</i> , 32 Wn.2d 681, 203 P.2d 693 (1949) .....	11
<i>State v. Keller</i> , 98 Wn. App. 381, 990 P.2d 423 (1999) .....	11
<i>State v. Wall</i> , 46 Wn. App. 218, 729 P.2d 656 (1986) .....	11
<i>Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.</i> , 175 Wn. 2d 822, 287 P.3d 516 (2012) .....	<i>Passim</i>
<i>Whatcom Cnty v. City of Bellingham</i> , 128 Wn. 2d 537, 909 P.2d 1303 (1996) .....	11, 12
<i>Wingert v. Yellow Freight Sys., Inc.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002) .....	<i>Passim</i>

**WASHINGTON RULES, STATUTES AND REGULATIONS**

RAP 18.1 .....	28, 29
RCW 2.60.020 .....	28
RCW 49.12 .....	9

RCW 49.12.010 .....	19
RCW 49.12.185 .....	9
RCW 49.30.030 .....	9, 10
RCW 49.46.020 .....	24, 25
RCW 49.46.130 .....	24
RCW 49.48.030 .....	26, 27, 28, 29
WAC 296-126-001.....	9
WAC 269-126-092.....	<i>Passim</i>
WAC 269-131-020.....	<i>Passim</i>
WAC 296-131-110.....	13

**FEDERAL REGULATION**

29 C. F. R. § 785.18 .....	9, 14
----------------------------	-------

**OTHER AUTHORITIES**

<i>Agricultural Operations</i> , OCCUPATIONAL SAFETY & HEALTH ADMIN., <a href="https://www.osha.gov/dsg/topics/agriculturaloperations/">https://www.osha.gov/dsg/topics/agriculturaloperations/</a> (last visited November 21, 2014) .....	19, 20
Geraldine Warner, <i>Paying for Rest Time</i> , <i>Good Fruit Grower</i> , May 1, 2014, at 22, available at <a href="http://www.goodfruit.com/paying-for-rest-time/">http://www.goodfruit.com/paying-for-rest-time/</a> (last visited November 18, 2014).....	23
Michael I. Marsh & Dorothy A. Johnson, <i>A real heat shield for farmworkers</i> , L.A. TIMES, Aug. 2, 2008, available at <a href="http://articles.latimes.com/2008/aug/02/opinion/oe-marsh2">http://articles.latimes.com/2008/aug/02/opinion/oe-marsh2</a> (last visited November 17, 2014) .....	19

*Your Rights as a Worker in Washington State*, WASH. STATE DEP'T OF LABOR & INDUS., <http://www.lni.wa.gov/IPUB/700-074-909.pdf> (emphasis added) (last visited November 7, 2014)..... 13

Washington State Department of Labor and Industries Administrative Policy ES.C.6 ..... 7, 12, 13, 15, 18

Washington State Department of Labor and Industries Administrative Policy ES.A.8.1 ..... 25

*Workplace Safety & Health Topics, Heat Stress*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/topics/heatstress/> (last visited November 17, 2014)..... 19

## I. INTRODUCTION

Washington's long and proud history of being a pioneer in the protection of employee rights is not limited to particular industries or particular employees. Rather, Washington's employment laws must be liberally construed to protect all covered employees. Washington farm workers are entitled to rest breaks under an agricultural employment regulation that has language identical to a generally applicable rest break regulation. Washington courts have interpreted the generally applicable provision to require separate payment for rest breaks. The same requirement should apply to piece-rate farm workers. If piece-rate farm workers were not allowed the same rest break rights as other Washington workers, it would contravene Washington's long and proud history of protecting employee rights, would improperly exclude a historically marginalized group from important health and safety protections, and would discourage farm workers from taking necessary breaks from the physically demanding work they do in harsh outdoor conditions.

In response to the legal questions certified from the United States District Court for the Western District of Washington ("district court"), this Court should hold that (1) employers must separately pay piece-rate farm workers for rest breaks and (2) employers must calculate the pay for

such rest break time based on each worker's weekly average hourly rate from piecework, but no less than the minimum wage.

## II. CERTIFIED QUESTIONS

The district court certified the following questions to this Court:

1. Does a Washington agricultural employer have an obligation under WAC 296-131-020(2) and/or the Washington Minimum Wage Act to separately pay piece-rate workers for the rest breaks to which they are entitled?
2. If the answer is "yes," how must Washington agricultural employers calculate the rate of pay for the rest break time to which piece-rate workers are entitled?

Dkt. 44.

## III. STANDARD OF REVIEW

This Court reviews certified questions of law de novo. *Frias v. Asset Foreclosure Servs., Inc.*, \_\_\_ Wn.2d \_\_\_, 334 P.3d 529, 533 (2014) (citing *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011)). The Court considers the questions presented "in light of the record certified by the federal court." *Id.*

## IV. STATEMENT OF THE CASE

### A. Factual Background

Plaintiffs Ana Lopez Demetrio and Francisco Eugenio Paz and class members ("the workers") are migrant or seasonal farm workers who have worked for Sakuma Brothers Farms, Inc. ("Sakuma") under a piece-rate compensation system that pays them based on the amount of fruit they pick. Dkt. 19 at ¶¶ 3.1, 3.9, 3.22. Each summer, Sakuma hires migrant and seasonal workers, who predominantly speak indigenous Mexican

languages Triqui and Mixteco, to harvest fruit at fields in Skagit County. *See id.* at ¶ 3.18, 3.21. The workers pick strawberries, blueberries, blackberries, and raspberries during the seasonal harvest, and Sakuma pays them on a piece-rate basis—for example, a certain amount per pound or per box of fruit picked. *See id.* at ¶¶ 3.18, 3.22.

Because Sakuma pays its piece-rate employees only for the amount of fruit they pick, the company does not pay for time the workers spend in rest breaks (when, by definition, they are not picking fruit). Dkt. 33, Ex. A at 47:10-49:10. Indeed, if a piece-rate employee stops picking fruit to take a rest break, the employee stops earning money. *Id.* at 48:4-12. Likewise, Sakuma does not pay its piece-rate workers for missed rest breaks. *Id.* at 50:8-10.

For its *hourly* employees, however, Sakuma pays for rest break time at the employees' regular hourly rates. *Id.* at 47:18-21. In contrast to migrant or seasonal piece-rate workers like Ms. Lopez Demetrio and Mr. Eugenio Paz, hourly workers who work an eight-hour shift receive eight hours of pay even though they spend twenty minutes of that shift taking rest breaks. *Id.* at 47:10-48:15.

In Rule 30(b)(6) deposition testimony, Sakuma admitted that (1) while its *hourly* workers are separately paid for rest breaks, its *piece-rate* workers are *not* separately paid for rest breaks because they earn only “piece pay”; (2) when its piece-rate workers are not picking they are not earning pay because they receive pay based only on the amount of fruit

they pick; and (3) Sakuma has never compensated a piece-rate worker with additional pay for a missed rest break. *Id.* at 47:10-50:10.

**B. Procedural Background**

In October 2013, the workers filed a Class Action Complaint in the district court, claiming that Sakuma had engaged in a systematic course of unlawful conduct with respect to its migrant and seasonal employees who perform piece-rate fruit harvest work. Dkt. 19 at ¶ 1.1. The lawsuit alleged that Sakuma failed to comply with Washington and federal law in several ways, including failure to pay for all hours worked, failure to pay minimum wage, failure to provide paid rest periods, failure to pay for missed rest periods, failure to provide accurate statements of hours worked, failure to keep accurate records of hours worked, and failure to comply with agreed-upon working arrangements. *Id.* at ¶¶ 1.1, 3.5-3.8, 3.13-3.16, 5.2-5.7.

The lawsuit alleged that Sakuma’s conduct violated Washington wage and hour laws—including the agricultural worker rest break regulation, WAC 296-131-020(2), and Minimum Wage Act (“MWA”)—as well as the federal Migrant and Seasonal Agricultural Worker Protection Act. *Id.* at ¶¶ 1.1, 6.2-13.5.

1. The class action settlement

The parties engaged in extensive discovery, including multiple depositions, over several months until they reached an agreement to settle the class-wide damages claims in May 2014. Dkt. 27. The settlement agreement requires Sakuma to pay a total of \$850,000 and to provide injunctive relief by changing certain wage and hour practices. *Id.* The agreement provides for a release for alleged violations occurring through December 31, 2013. *Id.* at ¶ 19.

The parties were unable resolve one issue: whether, *going forward*, Sakuma must separately pay its piece-rate workers for rest breaks under WAC 296-131-020(2) or the MWA. *Id.* at ¶¶ 19-20, 24. The settlement agreement explicitly states that it does not resolve, and that the workers do not release, claims for declaratory relief on the rest break pay issue on a going-forward basis. *Id.* at ¶¶ 19-20, 24. The workers reserved the right to propose that this Court resolve the issue of separate pay for pieceworker rest breaks as a certified question of law. *Id.* at ¶ 20.

In July 2014 the district court gave preliminary approval of the settlement, including certification of the settlement class, and in November 2014 the district court granted Plaintiffs' motion for final approval of the settlement. Dkts. 31, 48. The Court's preliminary and final approval orders reserve the workers' claims for declaratory relief on

the issue of whether Sakuma must separately pay piece-rate workers for rest breaks under WAC 296-131-020(2) or the MWA. Dkt. 31 at ¶ 14; Dkt. 48 at ¶¶ 13, 15.

2. The district court's order certifying issues to this Court

In October 2014, the district court granted the workers' motion to certify the following legal questions to this Court: (1) Does a Washington agricultural employer have an obligation under WAC 296-131-020(2) and/or the Washington Minimum Wage Act to separately pay piece-rate workers for the rest breaks to which they are entitled? (2) If the answer is "yes," how must Washington agricultural employers calculate the rate of pay for the rest break time to which piece-rate workers are entitled? Dkts. 42, 44.

The district court concluded that "[t]he workplace conditions of agricultural workers have significant policy implications for workers, employers, and the state of Washington"; that "[p]iece-rate workers are often more vulnerable to grueling demands"; and that "a decision on whether or not they are entitled to paid breaks, or payment for missed breaks, will have far-reaching effects in terms of both workplace conditions and fair wages." Dkt. 42 at 4. "Because no Washington appellate authority has addressed these questions and they have significant implications for the lives of thousands of workers and employers," the

district court certified the questions to this Court. *Id.* at 5; *see also* Dkt. 44.

## V. ARGUMENT

### A. Summary of Argument

This Court has held that rest breaks are “hours worked” that must be paid. *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn. 2d 822, 831-32, 287 P.3d 516 (2012). Washington’s agricultural worker rest break regulation states, “[e]very employee shall be allowed a rest period of at least ten minutes, *on the employer’s time*, in each four-hour period of employment.” WAC 296-131-020(2) (emphasis added). No appellate court has interpreted this regulation. But Washington courts have determined that under the analogous non-agricultural worker rest break regulation, WAC 296-126-092(4), the term “on the employer’s time” means “the employer is responsible for paying the employee for the time spent on a rest period.” *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 689, 267 P.3d 383 (2011) (quoting Wash. Dep’t of Labor & Indus. (“L&I”) Admin. Policy ES.C.6. § 10). The same rule should apply for piece-rate farm workers who are protected under the same regulatory language.

A requirement that employers pay piece-rate farm workers for rest break time is supported by the plain language of the rule at issue, the analogous rule for non-agricultural workers, Washington case law,

relevant L&I publications, case law from other jurisdictions, and sound public policy. Excluding farm workers from wage and hour protections that benefit other Washington employees would be contrary to legislative and regulatory intent and Washington case law. It would also be unfair to the low-wage workers who toil under harsh conditions to pick the fruit and vegetables we eat.

For these reasons, this Court should answer the first certified question in the affirmative and, as to the second question, should require that Washington employers separately pay piece-rate farm workers for rest break time based on the workers' weekly average hourly rate from piecework, but no less than minimum wage.

**B. Washington Employers Have an Obligation Under WAC 296-131-020(2) and the MWA to Separately Pay Piece-Rate Farm Workers for Rest Breaks.**

1. Washington has a comprehensive statutory and regulatory scheme that requires employers to provide paid rest breaks.

Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). The state legislature has “evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive statutory scheme to ensure payment of wages.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). Thus, courts must liberally construe Washington’s remedial

wage statutes and regulations in favor of employees to protect employee rights. *Pellino*, 164 Wn. App. at 684-85 (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)). This mandate of liberal construction applies to the rest break regulations, which are intended to protect employee health, safety, and welfare. *See id.* at 684-90 (liberally construing rest break requirements of WAC 296-126-092).

Rest breaks are “hours worked” that must be paid. *Sacred Heart*, 175 Wn.2d at 831; *see also* 29 C.F.R. § 785.18 (“[Rest breaks] must be counted as hours worked.”). Existing Washington case law on rest break requirements addresses WAC 296-126-092(4), a regulation adopted under the authority of the Industrial Welfare Act (“IWA”), RCW 49.12. But farm workers are not covered by the IWA. *See* RCW 49.12.185; WAC 296-126-001(2)(c). Instead, farm worker rest break requirements are found in WAC 296-131-020, a regulation adopted under the authority of former RCW 49.30.030. That statute, which was enacted in 1989, established an Advisory Committee on Agricultural Labor and provided in pertinent part:

Based upon the recommendations of the advisory committee and considerations as to the nature of agricultural employment and usual crop cultural and harvest requirements, the director [of L&I] shall adopt rules under chapter 34.05 RCW which only address the

following: . . . (2) The provision of rest and meal periods for agricultural employees, taking into account naturally occurring work breaks where possible. The initial rules shall be adopted no later than July 1, 1990.

RCW 49.30.030, Laws of 1989, ch. 380, § 85.

L&I adopted the agricultural rest break rule in 1990, as required by the authorizing statute. *See* WAC 296-131-020. The legislature then repealed RCW 49.30.030 in 1993 because the work of the Advisory Committee on Agricultural Labor was done. *See* Laws of 1993, ch. 142, § 1 (“An ACT relating to terminating defunct boards, commissions, and committees . . .”).

“[P]roperly promulgated, substantive agency regulations have the force and effect of law.” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002) (quoting *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445, 932 P.2d 628 (1997)). The agricultural rest break regulation states, “[e]very employee shall be allowed a rest period of at least ten minutes, *on the employer’s time*, in each four-hour period of employment.” WAC 296-131-020(2) (emphasis added). This language is essentially identical to the language of the analogous, non-agricultural rest break regulation: “Employees shall be allowed a rest period of not less than ten minutes, *on the employer’s time*, for each four hours of working time.” WAC 296-126-092(4) (emphasis added).

2. The words “on the employer’s time” in WAC 296-131-020(2) mean that an employer must separately pay farm workers for rest break time.

When the same words are used in related statutes or regulations, courts must presume that the legislature or agency intended the words to have the same meaning. *See State v. Keller*, 98 Wn. App. 381, 383-84, 990 P.2d 423 (1999), *aff’d*, *State v. Keller*, 143 Wn.2d 267, 282-83, 19 P.3d 1030 (2001); *Slaughter v. Snohomish Cnty. Fire Prot. Dist. No. 20*, 50 Wn. App. 733, 738, 750 P.2d 656 (1988) (noting that in determining the meaning of a term in a statute, a court may look to a definition of the term set forth in another statute that deals with the same subject matter); *State v. Wall*, 46 Wn. App. 218, 222, 729 P.2d 656 (1986) (holding that interpretation of a phrase used in the Sentencing Reform Act should be used to construe the same language from the juvenile statute). Indeed, regulations *in pari materia* (“upon the same subject”) “must be construed together” and “all acts relating to the same subject matter or having the same purpose should be read in connection therewith as together constituting one law.” *In re Kim*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999) (quoting *State v. Houck*, 32 Wn.2d 681, 684-85, 203 P.2d 693 (1949)). Furthermore, “[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *See Whatcom Cnty v. City of Bellingham*,

128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

The term “on the employer’s time” under WAC 296-126-092(4) means “the employer is responsible for paying the employee for the time spent on a rest period.” *Pellino*, 164 Wn. App. at 689 (quoting L&I Admin. Policy ES.C.6. § 10). Because the same words used in related regulations must be interpreted to have the same meaning, this Court must presume “on the employer’s time” has the same meaning in WAC 296-131-020(2): that employers must separately pay piece-rate farm workers for the time spent on a rest period. Allowing rest breaks for piece-rate farm workers to go unpaid would render the phrase “on the employer’s time” in WAC 296-131-020(2) meaningless. *See Whatcom Cnty.*, 128 Wn.2d at 546.

This Court has held that under WAC 296-126-092(4), non-agricultural workers are entitled to a *separately paid* ten-minute rest break for every four hours of work, and if such workers are denied a rest break, they are entitled to recover an additional ten minutes of pay. *Wingert*, 146 Wn.2d at 848-51. Interpreting the same language as in WAC 296-131-020(2), this Court reasoned in *Wingert* that depriving a worker of required rest breaks effectively forces the worker to perform an additional ten minutes of uncompensated labor. *See id.* at 849. Thus, the Court recognized an implied cause of action for wages lost through the

deprivation of rest breaks. *Id.* There is no valid reason to exclude farm workers who are compensated on a piece-rate basis from this essential labor protection.

Further, L&I publications support the conclusion that paid rest breaks are required for piece-rate farm workers. For example, L&I has determined that “on the employer’s time” means “the employer is responsible for paying the employee for the time spent on a rest period.” Wash. L&I Admin. Policy ES.C.6 § 10. In addition, L&I requires employers to post notice that agricultural workers are entitled to “a 10-minute *paid* rest break within each four-hour period of work.” *Your Rights as a Worker in Washington State*, WASH. STATE DEP’T OF LABOR AND INDUS., <http://www.lni.wa.gov/IPUB/700-074-909.pdf> (emphasis added) (last visited November 7, 2014); WAC 296-131-110(2).

Here, Sakuma does not pay its piece-rate workers for rest break time. Dkt. 33, Ex. A at 48:4-9. The workers are paid based only on the amount of fruit they pick, so they are not paid for time spent in rest breaks—when, by definition, they are not picking fruit. *Id.* at 48:10-22.

Nonetheless, Sakuma has suggested that the second sentence of WAC 296-131-020(2) absolves it from separately paying for the time spent in rest breaks. This position is misplaced. The second sentence of the regulation provides: “*For purposes of computing the minimum wage*

on a piecework basis, the time allotted an employee for rest periods shall be included in the number of hours for which the minimum wage must be paid.” WAC 296-131-020(2) (emphasis added). This sentence concerns the hours that must be counted to determine weekly minimum wage compliance for piece-rate farm workers—not whether separate payment is required for rest breaks. The issue before the Court is *whether* piece-rate farm workers are entitled to *separate pay* for rest break time. The issue is not *how to compute minimum wage* for piece-rate farm workers. Thus, the second sentence of WAC 296-131-020(2) is not relevant to the inquiry.

Furthermore, rest periods “may not be offset by time spent working.” *Sacred Heart*, 175 Wn.2d at 832; *see also* 29 C.F.R. § 785.18 (“Compensable time of rest periods may not be offset against other working time . . .”). Instead of separately paying for rest breaks, Sakuma offsets rest period time with piece-rate pay received for picking work. Dkt. 33, Ex. A at 48:4-12. But piece-rate pay is earned only during picking time, not rest break time, and piece-rate pay earned during picking time may not be used as an offset for rest break time. *See Sacred Heart*, 175 Wn.2d at 832; 29 C.F.R. § 785.18. Indeed, Sakuma effectively deducts earnings from each worker’s piece-rate compensation to pay for rest break time. Under this Court’s ruling in *Sacred Heart*, this is unlawful. Rest breaks cannot be compensated by pay earned when

working.

Interpreting “on the employer’s time” in WAC 296-131-020(2) to mean that employers must separately pay piece-rate farm workers for rest break time is the only result consistent with the meaning of “on the employer’s time” that Washington courts and L&I have already adopted. *See Pellino*, 164 Wn. App. at 689 (quoting L&I Admin. Policy ES.C.6. § 10). And because WAC 296-131-020(2) and WAC 296-126-092(4) relate to the same subject matter and have the same purpose, they “must be construed together.” *In re Kim*, 139 Wn.2d at 592. Washington courts have already construed WAC 296-126-092(4) to require separate payment for rest breaks. *Wingert*, 146 Wn.2d at 848-51; *Pellino*, 164 Wn. App. at 689. There is no reason to construe the same language in WAC 296-131-020(2) differently.

3. California case law interpreting analogous language supports the requirement that employers separately pay piece-rate workers for rest break time.

On issues of first impression in Washington, this Court may look at cases from other jurisdictions for guidance. *In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161 (2005). This case presents an issue of first impression under WAC 296-131-020(2). Although there is little case law from other states regarding whether piece-rate farm workers are entitled to

separate pay for rest break time, recent case law interpreting a similar regulation in California is instructive.

In *Bluford v. Safeway Stores, Inc.*, the California Court of Appeal held that piece-rate workers must receive separate compensation for rest break time under a regulation that—like Washington law—defines rest breaks as “hours worked.” 216 Cal. App. 4th 864, 157 Cal. Rptr. 3d 212, 218-19 (Cal. Ct. App. 2013). There, a truck driver (Mr. Bluford) who was paid on a piecework basis brought a class action against Safeway because the company did not pay drivers for rest break time. *Id.* at 217-18. Mr. Bluford asserted that the “compensation system, based on miles driven and the performance of specific tasks, did not account for rest periods or provide an ability to be paid for them.” *Id.* Under California Industrial Welfare Commission wage orders parallel to WAC 296-131-020(2), employers are required to provide ten-minute rest breaks for every four hours worked and rest breaks must “be counted as hours worked.” *Id.* at 218 (quoting Cal. Code. Regs., tit. 8, §§ 11070, subd. 12; 11090, subd. 12).<sup>1</sup>

---

<sup>1</sup> The California Industrial Welfare Commission “Agricultural Occupations” wage order similarly states “[a]uthorized rest period time shall be counted, as hours worked for which there shall be no deduction from wages.” Cal. Code. Regs., tit. 8, §§ 11140, subd. 12.

Mr. Bluford, like the workers here, argued that his employer “was required to compensate drivers separately for their rest periods, and that it did not because its compensation system, based on miles driven and specific tasks performed, did not include rest periods as an item that would be reported by drivers and compensated.” *Id.* Safeway, like Sakuma here, argued that “pay for rest periods is considered part of the overall piece-rate compensation.” *Id.*

The court rejected Safeway’s argument, holding that “rest periods must be separately compensated in a piece-rate system.” *Id.* The court stated that “a piece-rate compensation formula that does not compensate for rest periods does not comply” with California law. *Id.* at 219. Because there was “no dispute that Safeway’s activity based compensation system did not separately compensate drivers for their rest periods,” the court concluded that Safeway’s liability could be determined by law and fact common to all members of the class. *Id.* In so concluding, the court rejected Safeway’s assertion that “the system’s mileage rates and the activity rates were designed to include payment for expected rest periods.” *Id.*

Finally, the *Bluford* court rejected the employer’s assertion that its holding would “severely disrupt piece-rate pay systems throughout the state” because there was “no evidence that its compensation system will

collapse by complying with controlling law and having to include one additional element—rest periods—that must be separately paid at an hourly rate.” *Id.* at 219-20.

The same reasoning applies here. Under Washington law, as in California, rest breaks are “hours worked” and must be paid. *Sacred Heart*, 175 Wn. 2d at 826; Wash. L&I Admin. Policy ES.C.6. § 10. Like in *Bluford*, there is no dispute that Sakuma’s piece-rate compensation system does “not separately compensate [workers] for their rest periods.” 157 Cal. Rptr. 3d at 219; Dkt. 33, Ex. A at 48:4-12. Furthermore, “pay for rest periods” cannot be properly “considered part of the overall piece-rate compensation” when no pay is applied to rest break time. *Id.* at 218-19. Finally, requiring separate payment for the time spent in rest periods will not “severely disrupt piece-rate pay systems,” and “[t]here is no evidence that [Sakuma’s] compensation system will collapse by complying with controlling law and having to include one additional element — rest periods — that must be separately paid at an hourly rate.” *Id.* at 219-20.

In sum, this Court should follow the sound analysis of the California Court of Appeal in *Bluford* and find that under WAC 296-131-020(2) and the MWA, agricultural employers must separately compensate piece-rate farm workers for rest break time.

4. Separately paid rest breaks are necessary to give farm workers relief from difficult, physical work in the elements.

The basic purpose of WAC 296-131-020(2) and WAC 296-126-092(4) is the same: to ensure paid rest breaks are received for “the protection of employees’ safety, health, and welfare.” *Wingert*, 146 Wn.2d at 847. Paid rest breaks provide employees relief from work or exertion. *See Pellino*, 164 Wn. App. at 692. Indeed, requiring separate payment for rest breaks “is consistent with the purpose [of rest break laws] to protect employees ‘from conditions of labor which have a pernicious effect on their health.’” *Wingert*, 146 Wn.2d at 850 (quoting RCW 49.12.010); *see also Sacred Heart*, 175 Wn.2d at 832 (noting that “employee health” is an important consideration in interpreting Washington rest break laws).

There is no valid reason to exclude farm workers—a historically marginalized group—from the workplace health and safety rights that other Washington employees enjoy. In fact, the harsh outdoor conditions under which farm workers labor make separate payment for rest breaks crucial for workers’ safety and health. *See Workplace Safety & Health Topics, Heat Stress*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/topics/heatstress/> (last visited November 17, 2014) (emphasizing need for rest breaks for workers exposed to extreme heat, like farm workers); Michael I. Marsh & Dorothy A. Johnson, *A real*

*heat shield for farmworkers*, L.A. TIMES, Aug. 2, 2008, available at <http://articles.latimes.com/2008/aug/02/opinion/oe-marsh2> (last visited November 17, 2014) (discussing dozens of farm worker deaths from heat stroke and noting importance of rest breaks to avoid such deaths); *Agricultural Operations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dsg/topics/agriculturaloperations/> (last visited November 21, 2014) (stating that in 2011 the injury rate for agricultural workers was 40% higher than the rate for all workers). The need for rest breaks is essential for farm workers because they must perform difficult, physical work—such as repeatedly bending over or working on their hands and knees—in the elements. See *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 296 (Cal. 2007) (“Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor.”). As Judge Pechman noted in the order certifying questions to this Court, “[p]iece-rate workers are often more vulnerable to grueling demands, and a decision on whether or not they are entitled to paid breaks, or payment for missed breaks, will have far-reaching effects in terms of both workplace conditions and fair wages.” Dkt. 42 at 4.

Allowing Sakuma to claim that payment for rest breaks is subsumed in piece rates would not promote the worker-protection policy

goals of rest break regulations. *Cf. Pellino*, 164 Wn. App. at 684-90 (liberally construing Washington rest break requirements to protect employee health, safety, and welfare). Separately paid rest breaks create incentives for both workers and growers to ensure workers rest.

On the one hand, farm workers have little or no incentive to take rest breaks if they receive no pay for the break time. Rest breaks without separate payment are time pickers are required to be at work but are not making money and are not working toward production standards. Without separate pay for rest breaks, piece-rate workers feel pressure to forgo breaks to continue earning wages and to meet employer-set production standards. On the other hand, employers have no incentive to provide rest breaks if there are no consequences for not providing them. Employers who are focused primarily on harvest production may perceive rest breaks as cutting into the time workers can be harvesting.

To ensure basic workplace standards of health and safety for Washington farm workers, this Court should hold that piece-rate farm workers are entitled to separate pay for rest breaks, just like other Washington workers.

**C. The Rate of Pay for Rest Break Time Should Be Based on the Average Hourly Rate from Piece-Rate Earnings Each Week.**

If this Court holds that employers are obligated to separately pay for farm worker rest breaks, the Court must determine the proper rate of

pay for rest break time. To effectuate the plain language of WAC 296-131-020(2)—that rest breaks be “on the employer’s time”—this Court should hold that pay for rest breaks must be calculated based on a worker’s average hourly earnings from piecework each week.

As previously discussed, WAC 296-131-020(2) and WAC 296-126-092(4) are closely related and have the same purpose. To give meaning to the agricultural rest break rule, both regulations should be analyzed together. *See In re Kim*, 139 Wn.2d at 592. Indeed, the nearly identical language of the two rest break regulations makes it appropriate to apply case law interpreting the non-agricultural rest break provision when construing the agricultural rest break provision.

This Court has interpreted the non-agricultural rest break provision as establishing both conditions of labor and rules for wage payment. *Wingert*, 146 Wn.2d at 849-50. And this Court has held that when employees work through their rest breaks, “both the missed opportunity to rest and the additional labor [workers] provide constitute ‘hours worked.’” *Sacred Heart*, 175 Wn. 2d at 826.

Although WAC 296-131-020(2) explicitly states that rest breaks must be “on the employer’s time”—that is, separately paid—the regulation is silent as to how much employers must pay farm workers for rest break time. Sakuma’s hourly-paid farm workers receive their regular hourly rate

for rest break time. *See* Dkt. 33, Ex. A at 47:18-21 (Sakuma’s Rule 30(b)(6) testimony admitting that its hourly workers are “paid at their regular hourly rate for the 20 minutes of rest breaks” each day). For example, an employee who is paid \$15 per hour also receives \$15 per hour for all required rest break time.

Piece-rate farm workers should also be paid for rest break time at a rate equivalent to the average hourly rate earned from the piecework they perform. Applying an average hourly rate to rest break time for farm workers provides a logical, efficient, and fair process for employers and employees. *See* Geraldine Warner, *Paying for Rest Time*, GOOD FRUIT GROWER, May 1, 2014, at 22, *available at* <http://www.goodfruit.com/paying-for-rest-time/> (last visited Nov. 18, 2014) (“The approach of paying a piece-rate equivalent for rest periods helps employers drive the message that increased productivity is a win for both employees and management.”).

This is easily accomplished by converting the piece-rate earnings for the week to an average hourly rate and then using that rate to pay for rest break time. As with hourly-paid workers, this approach ensures that the rest break compensation a piece-rate worker receives is based on the worker’s actual hourly wage rate.

To convert piece-rate earnings into an average hourly rate, employers can simply divide a worker's piecework pay each week by the number of hours that worker was engaged in piecework during the week. For example, if a Sakuma farm worker spent 38 hours in a week picking fruit and earned piece-rate pay of \$380 for that week, the worker's average hourly rate would be \$10. The employer would then pay \$10 per hour for all rest break time to which the worker was entitled that week (or, \$1.67 for each ten-minute rest break).

This is easy to do from an administrative standpoint. Washington piece-rate employers already have a duty to run a calculation to determine whether each worker's average hourly wage for piecework time is at least the minimum wage "per hour." *See* RCW 49.46.020. Indeed, Sakuma already runs a similar calculation for minimum wage compliance. Dkt. 33, Ex. A at 48:16-25. Based on the average hourly wage rate that they must calculate for piece-rate workers to ensure minimum wage compliance for piecework hours, employers have the information to readily calculate the amount of rest break compensation due—they can simply multiply the average hourly rate by the compensable rest break time.<sup>2</sup>

---

<sup>2</sup> Determining a regular hourly rate for piece-rate employees is not a novel concept. For weekly overtime pay calculations, *non-agricultural*

Paying piece-rate workers at anything less than the hourly average of their piece-rate earnings would create a disincentive for workers to take breaks. If Sakuma's workers can earn more money by continuing to pick fruit, they will be discouraged from taking necessary rest breaks for health and safety. Thus, the most reasonable interpretation of "on the employer's time" is that employers must pay piece-rate workers for rest break time based on an hourly average rate of pay, just as they do with hourly workers.

The only exception to paying for rest break time based on a piece-rate worker's average hourly rate should occur when that rate is less than Washington's minimum wage rate. The MWA "sets the floor below which the agreed rate cannot fall without violating the statute." *Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.*, 139 Wn. 2d 824, 834, 991 P.2d 1126 (2000); RCW 49.46.020(4). Therefore, piece-rate farm workers who do not produce enough pieces at the prescribed rate to average minimum wage earnings for all piecework time in a week should be compensated for their rest break time at no less than the minimum wage. *See* RCW

---

employers must calculate the "regular rate of pay" for each employee "paid on a piece rate basis" by "dividing the total weekly earnings by the total number of hours worked in the same week." Wash. L&I Admin. Policy ES.A.8.1 at 3. Agricultural workers are not entitled to overtime compensation, RCW 49.46.130(2)(g), but their employers must perform similar "regular rate" calculations for minimum wage compliance. RCW 49.46.020.

49.46.020 (requiring minimum wage “per hour” for all hours worked); *Sacred Heart*, 175 Wn.2d at 831 (holding that rest break time constitutes “hours worked” under MWA). For example, if a Sakuma farm worker spends 38 hours in a week picking fruit, resulting in piece-rate earnings of \$300 for that week, the average hourly rate for the piecework time would be \$7.89. Because that rate is less than the current Washington minimum wage of \$9.32 per hour, the worker should receive no less than \$9.32 per hour for all rest break time that week (or, \$1.55 for each ten-minute rest break).<sup>3</sup>

For these reasons, this Court should hold that piece-rate farm workers must be paid for their rest breaks based on their average hourly rate from piecework each week, but no less than minimum wage. This payment method ensures that rest breaks are “on the employer’s time” and provides piece-rate workers the necessary incentive to take rest breaks.

**D. The Workers Are Entitled to Attorneys’ Fees Under RCW 49.48.030**

RCW 49.48.030 provides for the award of attorneys’ fees “[i]n any action in which any person is successful in recovering judgment for wages or salary owed.” This remedial statute “must be construed liberally in

---

<sup>3</sup> In this situation, Sakuma would need to supplement the piece-rate pay to ensure the employee receives at least minimum wage for the piecework hours as well.

favor of the employee.” *Bates v. City of Richland*, 112 Wn. App. 919, 939, 51 P.3d 816 (2002) (citing *Int’l Ass’n of Fire Fighters*, 146 Wn.2d at 34). Cases interpreting RCW 49.48.030 “demonstrate that awards for attorney fees under RCW 49.48.030 are not limited to judgments for wages or salary earned for work performed, but, rather, that attorney fees are recoverable under RCW 49.48.030 whenever a judgment is obtained for any type of compensation due by reason of employment.” *Id.* at 940.

Washington courts have held that a court may award attorneys’ fees under RCW 49.48.030 if there is a judicial order requiring payment of any type of compensation due by reason of employment, including future wages. *See Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 583, 828 P.2d 1175 (1992) (rejecting employer’s argument that “since [employee]’s claim was for loss of future wages, rather than for wages already earned, she was not entitled to attorneys’ fees under RCW 49.48”); *Bates*, 112 Wn. App. at 940 (holding that order regarding the proper calculation of pensions is a “judgment . . . for ‘wages’ as the term is used in RCW 49.48.030” and granting request for attorneys’ fees). Indeed, an award of attorneys’ fees under RCW 49.48.030 is appropriate even where employees “are not recovering a money judgment, but are establishing their rights to receive payment” by reason of employment. *Abels v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 69 Wn. App. 542, 557-58, 849

P.2d 1258 (1993) (holding that because case in which workers established a right to vacation payout *upon retirement* “involve[d] the payment of compensation for employment,” it fell “within the broad definition of ‘compensation due to an employee by reason of employment’” and warranted payment of attorneys’ fees).

Once this Court “has decided to rule on a certified question pursuant to RCW 2.60.020, the ruling is not advisory but resolves actual issues pending in the federal proceeding . . . .” *Gray v. Suttell & Assocs.*, \_\_\_ Wn.2d \_\_\_, 334 P.3d 14, 18 (2014). The workers’ request that Sakuma separately pay for rest breaks is a request for compensation by reason of employment. The workers seek to establish “their rights to receive payment” for rest breaks. *See Abels*, 69 Wn. App. at 557-58. If this Court issues an opinion that requires agricultural employers to separately pay piece-rate workers for rest breaks, the Court will be establishing the workers’ rights to receive payment from Sakuma.

Therefore, if the Court answers that employers must separately pay piece-rate farm workers for rest breaks, the workers here are entitled to attorneys’ fees under RCW 49.48.030. *See id.* The workers respectfully request that the Court award them reasonable attorneys’ fees incurred on these certified questions, pursuant to RCW 49.48.030 and RAP 18.1(a), in

an amount to be determined upon filing of an affidavit of fees and expenses. *See* RAP 18.1.

## **VI. CONCLUSION**

To ensure farm workers receive the same rest break protections as other Washington employees who are subject to a regulation with essentially identical language, this Court should conclude that (1) employers have an obligation under WAC 296-131-020(2) and the MWA to separately pay piece-rate farm workers for the rest breaks to which they are entitled; and (2) employers must calculate the rate of pay for the rest break time to which piece-rate farm workers are entitled based on the average hourly rate from piecework each week, but not less than minimum wage. The workers also respectfully request an award of attorneys' fees pursuant to RCW 49.48.030, in an amount to be determined upon filing of an affidavit of fees and expenses. *See* RAP 18.1.

RESPECTFULLY SUBMITTED AND DATED this 1st day of  
December, 2014.

TERRELL MARSHALL DAUDT  
& WILLIE PLLC

By: /s/ Marc C. Cote, WSBA #39824

Toby J. Marshall, WSBA #32726

Email: tmarshall@tmdwlaw.com

Marc C. Cote, WSBA #39824

Email: mcote@tmdwlaw.com

936 North 34th Street, Suite 400

Seattle, Washington 98103

Telephone: (206) 816-6603

Facsimile: (206) 350-3528

COLUMBIA LEGAL SERVICES

By: /s/ Daniel G. Ford, WSBA #10903

Daniel G. Ford, WSBA #10903

Email: dan.ford@columbialegal.org

Sarah Leyrer, WSBA #38311

Email: sarah.leyrer@columbialegal.org

101 Yesler Way, Suite 300

Seattle, Washington 98104

Telephone: (206) 464-5936

Facsimile: (206) 382-3386

*Attorneys for Petitioners*

**CERTIFICATE OF SERVICE**

I certify that on December 1, 2014, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Adam S. Belzberg, WSBA #41022  
Email: adam.belzberg@stoel.com  
STOEL RIVES LLP  
600 University Street, Suite 3400  
Seattle, Washington 98101  
Telephone: (206) 386-7516  
Facsimile: (206) 386-7500

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Service, per parties' agreement

*Attorney for Respondents*

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

DATED this 1st day of December, 2014.

TERRELL MARSHALL DAUDT  
& WILLIE PLLC

By: /s/ Marc C. Cote, WSBA #39824

Marc C. Cote, WSBA #39824  
Email: mcote@tmdwlaw.com  
936 North 34th Street, Suite 400  
Seattle, Washington 98103  
Telephone: (206) 816-6603  
Facsimile: (206) 350-3528

*Attorneys for Petitioners*

## OFFICE RECEPTIONIST, CLERK

---

**To:** Holly Rota  
**Cc:** adam.belzberg@stoel.com; Marc Cote; dan.ford@columbialegal.org;  
sarah.leyrer@columbialegal.org  
**Subject:** RE: Documents to be filed with the Supreme Court (Demetrio, et al v. Sakuma Brothers Farms, Inc., Case No. 90932-6)

Received 12-1-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Holly Rota [mailto:HRota@tmdwlaw.com]  
**Sent:** Monday, December 01, 2014 4:19 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** adam.belzberg@stoel.com; Marc Cote; dan.ford@columbialegal.org; sarah.leyrer@columbialegal.org  
**Subject:** Documents to be filed with the Supreme Court (Demetrio, et al v. Sakuma Brothers Farms, Inc., Case No. 90932-6)

Attached please find Plaintiffs Ana Lopez Demetrio and Francisco Eugenio Paz's Opening Brief on Certified Questions, to be filed in *Demetrio, et al v. Sakuma Brothers Farms, Inc.*, Supreme Court Case No. 90932-6.

Filed on behalf of:

Toby J. Marshall, WSBA #32726  
[tmarshall@tmdwlaw.com](mailto:tmarshall@tmdwlaw.com)  
Marc C. Cote, WSBA #39824  
[mcote@tmdwlaw.com](mailto:mcote@tmdwlaw.com)  
936 N. 34th Street, Suite 300, Seattle, Washington 98103  
Telephone: (206) 816-6603

Daniel G. Ford, WSBA #10903  
[dan.ford@columbialegal.org](mailto:dan.ford@columbialegal.org)  
Sarah Leyrer, WSBA #38311  
[sarah.leyrer@columbialegal.org](mailto:sarah.leyrer@columbialegal.org)  
100 Yesler Way, Suite 300, Seattle, Washington 98104  
Telephone: (206) 464-5936

Holly Rota

Legal Secretary

**TERRELL MARSHALL DAUDT & WILLIE PLLC**

936 N. 34th Street, Suite 300

Seattle, Washington 98103-8869

Telephone: (206) 816-6608

Facsimile: (206) 350-3528

[www.tmdwlaw.com](http://www.tmdwlaw.com)