74617-1

74617-1

No. 94593-4

CASE NO. 74617-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER,
on their own behalves and on behalf of all persons similarly situated,

Plaintiffs/Respondents

v.

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

Defendant/Appellant

OPENING BRIEF OF APPELLANT GARDA

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

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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I. ASSIGNMENTS OF ERROR

1. This case was tried to the bench on damages issues only. Garda assigns error to the trial court's Findings of Fact Nos. 18-22, and its Conclusions of Law Nos. 1-2, 16-30.

2. The trial court erred when it concluded that the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("F4A"), failed to preempt Plaintiffs' claims even though the "vigilance-free" breaks would significantly impact Garda's routes and services, and prices.

3. The trial court erred when it denied Garda's Motion for Partial Summary Judgment, because the Labor Management Relations Act, 28 U.S.C. § 185(a) ("§ 301"), preempts any state law claims where resolution of those claims is substantially dependent on terms of a collective bargaining agreement (CBA), and the trial necessarily interpreted the parties' CBAs to decide Plaintiffs' meal period claims as Plaintiffs urged.

4. The trial court erred when it granted Plaintiffs' Motion for Summary Judgment on Liability regarding meal periods on the basis that the right to a meal period cannot be waived through collective bargaining, because it ignored the fundamental right that employees have to collectively bargain recognized by RCW 49.12.187 and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169.

5. The trial court erred as a matter of law when it concluded that the CBAs—and Plaintiffs' individual acknowledgments of them—must be ignored as evidence of Plaintiffs' intent to waive their meal periods and granted Plaintiffs summary judgment on liability.

6. The trial court erred when it granted Plaintiffs' Motion for Summary Judgment on Liability regarding rest periods because there are genuine issues of material fact showing Plaintiffs actually received their required rest periods.

7. The trial court erred when it certified the class, and failed to decertify the class, without properly engaging in an analysis of CR 23(b) factors, and without creating a record of its analysis.

8. The trial court erred by awarding Plaintiffs double damages under RCW 49.52.070 for meal period violations because (a) Garda already paid Plaintiffs for all time worked; (b) there was insufficient evidence to support the trial court's conclusion that Garda "willfully" withheld wages for missed meal periods; and (c) Plaintiffs "knowingly submitted" to meal period violations when they agreed to paid on-duty meal periods or waived them.

9. The trial court further erred when it awarded attorneys' fees related to Plaintiffs' meal period claims because Plaintiffs did not recover any unpaid wages for meal periods.

10. The trial court erred when it awarded both prejudgment interest and double damages under RCW 49.52.070, because both awards have the purpose of compensating employees for a wage payment delay and Plaintiffs are not entitled to such double recovery.

11. The trial court further erred when it applied a 1.5 lodestar multiplier to Plaintiffs' attorneys' fees award, relying upon the very same risk factors deemed insufficient in *Fiore v. PPG Indus. Inc.*, 169 Wn. App. 325 (2012).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the F4A preempted Plaintiffs' rest and meal period claims given that Washington's meal and rest period rules, as construed by Plaintiffs, significantly impact Garda's prices, routes and services. [De Novo]

2. Whether § 301 preempted Plaintiffs' meal period claims because (a) resolution of the claims substantially relied on the trial court's interpretation of the CBAs' "on-duty" meal period provisions, and (b) RCW 49.12.187 and the NLRA preserve employees' fundamental right to collectively bargain with their employer over wages and conditions of employment. [De Novo]

3. Whether there were material issues of fact to preclude summary judgment on meal period liability where the CBAs waived meal periods, Plaintiffs signed individual acknowledgments of the CBAs, meal periods are waivable under Washington law, and RCW 49.12.187 specifically states that nothing in Chapter 49.12 RCW "can be construed to interfere with, impede, or in any way

diminish the right of employees to bargain collectively with their employers . . . concerning wages or standards or conditions of employment." [De Novo]

4. Whether there were material issues of fact to preclude summary judgment on Plaintiffs' rest period claims when multiple class members testified they took breaks to use personal cell phones, eat, rest, take rest room breaks, and grab food during shifts. [De Novo]

5. Whether the trial court erred when it certified the class without weighing the necessary factors under CR 23(b) and failed again to do so when it denied the motion to decertify, particularly given the individualized factual determinations regarding waiver and rest periods. [Abuse of Discretion]

6. After the bench trial, whether the trial court improperly awarded double damages under RCW 49.52.070 based on Plaintiffs' meal period claims when they were already paid for all meal periods worked and the alleged missed meal period was a labor violation, not a wage violation. [De Novo]

7. Whether the trial court improperly awarded double damages under RCW 49.52.070 for missed meal period claims when (a) it lacked sufficient evidence to conclude that Garda "willfully" violated Washington's meal period requirements and (b) Plaintiffs "knowingly submitted" to meal period violations when they agreed to paid on-duty meal periods. [De Novo]

8. Whether the trial court improperly awarded both prejudgment interest and double damages under RCW 49.52.070, where both awards have the purpose of compensating employees for a wage payment delay and analogous federal case law instructs that employees are not entitled to such double recovery. [De Novo]

9. Whether the trial court abused its discretion by awarding a 1.5 lodestar multiplier to Plaintiffs' attorneys' fees, relying upon the very same risk factors the court deemed insufficient in *Fiore*, 169 Wn. App. at 325. [Abuse of Discretion]

III. STATEMENT OF THE CASE

A. CBAs Governed the Conditions of Plaintiffs' Employment as Armored Truck Drivers and Messengers.

Garda is an armored car carrier with seven Washington branches: Seattle, Mount Vernon, Tacoma, Yakima, Wenatchee, Spokane, and Pasco.[1] To deliver and transport currency or other valuables ("Liability"), it employs truck crews of two individuals: a driver, who drives the armored truck along its assigned route, and a messenger, who rides in the back of the truck and transports the Liability to the customer.[2] Each Garda facility is operated and supervised by a separate branch manager with the exception of the Wenatchee and Yakima branches, which share common management. Depending on the size of the branch, other supervisors such as assistant managers and route supervisors work with the branch managers to enforce Garda's workplace policies.[3]

The named plaintiffs (Hill, Wise, and Miller) are former Washington drivers and messengers representing the class of similar current and former employees working between February 11, 2006 and February 2015 ("Plaintiffs.")[4] Plaintiffs' employment was, at all relevant times, governed by the terms of the applicable Labor Agreement (CBA)

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[1]CP 313.
[2]CP 1405 (9:17-21), CP 1408 (8:7-20), and 1414 (11:22-12:1).
[3]CP 1741 (14:17-25).
[4]CP 3807-08, Findings of Fact Nos. 2, 9.

for their branch, as negotiated by each branch's own Drivers' Association.[5] Each branch's bargaining unit employees actively participated in negotiations, reviewed proposals, and ratified agreements.[6] Each CBA had its own ratification and expiration date.[7] Most class members also signed individual acknowledgments of their CBAs,[8] such as:

> I acknowledge that by signing this Agreement, I agree to its terms and conditions…I have signed this form freely and voluntarily.[9]

The CBAs also specified that employees follow its exclusive Grievance Procedure for complaints about any CBA term or labor condition.[10] Plaintiffs never filed any grievances related to breaks.

B. <u>Each CBA Contained Plaintiffs' Meal Period Waiver</u>.

The CBAs each provided that Plaintiffs would remain on-duty

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[5]CP 380-659, 1128-1176. The CBAs are: CP 383: "2004-2009 Mt. Vernon Labor Agreement"; CP 405: "2009-2012 Mt. Vernon Labor Agreement"; CP 426: "2006-2009 Pasco Labor Agreement"; CP 447: "2004-2008 Seattle Labor Agreement"; CP 470: "2008-2011 Seattle Labor Agreement"; CP 491: "2007 Spokane Rules"; CP 508: "2008-2011 Spokane Labor Agreement"; CP 529: "2005-2008 Tacoma Labor Agreement"; CP 556: "Tacoma 2009-2012 Labor Agreement"; CP 571: "2009 Wenatchee Labor Agreement"; CP 591: "2010 Wenatchee Labor Agreement"; CP 615: "2006-2009 Yakima Labor Agreement"; CP 636: "2010-2013 Yakima Labor Agreement"; CP 1128: "2013-2016 Mt. Vernon Labor Agreement"; CP 1154: "2010-2013 Pasco Labor Agreement." A summary table of key provisions is in the Appendix at Page a.

[6]CP 1001-02 (16-17); 1017 (38-39).

[7]*See* summary table in Appendix at Page a.

[8]CBA Acknowledgments at: CP 404, 424-25, 468, 488-89, 526-27, 549; 568-69, 614, 635, 659, 1153, 1176.

[9]CP 549.

[10]Found in either Article 4 or 5 of the CBA: CP 389-90, 411-12, 432-33, 453-54, 476-77, 514-515, 534-35, 556-57, 577-78, 599-600, 621-22, 644-645. Of all the CBAs that applied during the class-period, only the Spokane 2007 CBA "Work Rules" did not provide for a Grievance Procedure or contain individual acknowledgments. CP 491-507. The Spokane 2008-2011 Labor Agreement, however, provides both. CP 508-528.

through their meal period and receive compensation, or request an off-duty meal period from their supervisors. However, the precise language of these meal period waivers varied among CBAs.[11] Some CBAs expressly provided that the employees "waived" their right to a meal period.[12] Other CBAs did not contain the word "waive," but stated that the employees agreed to an "on-duty meal period" unless they requested an off-duty meal period.[13] Still other CBAs provided that "routes will be scheduled without a designated lunch break" and truck crews could request a "non-paid lunch break."[14]

Each relevant clause in the CBAs affirms that Plaintiffs chose to waive the meal period requirements that would otherwise exist in the absence of a waiver, i.e., those set forth in WAC 296-126-092. It is undisputed that no other writing contained the challenged meal period "policies." It is further undisputed that Garda compensated Plaintiffs for each and every of these "on-duty" meal periods as part of their regular pay.[15]

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[11]*See* summary table in Appendix at Page a.

[12]CP 1162: "The Employees hereto waive any meal period(s) to which they would otherwise be entitled...Employees may take an unpaid meal period if they make arrangements with their...or provide [] their supervisor with a written request to renounce the on-duty meal period[.]"

[13]CP 1140: "Employees hereto agree to an on-duty meal period. Employees may have an off duty meal period if they make arrangements with their supervisor...or provide[] their supervisors with a written request to renounce the on-duty meal period[.]"

[14]CP 454: "[R]outes will be scheduled without a designated lunch break thus employees will not be docked for the same. In the event a truck crew...wishes to schedule a non-paid lunch break, they must notify their supervisor."

[15]*See* CP 315:8-18.

C. The So-Called "Constant Vigilance" Policy.

In spite of clear CBA language confirming Plaintiffs' agreement to waive meal periods, Plaintiffs summarily dismissed their CBAs below by asserting that Washington law prohibits meal period waivers from being collectively bargained.[16] Plaintiffs instead focused on the purported "constant vigilance" policy, claiming it "necessarily means that they have been deprived of the requisite rest and meal breaks."[17]

Garda did acknowledge that because of the nature of the work – transporting Liability in an armored truck and carrying firearms – its crew must exercise some level of alertness at all times outside a Garda facility.[18] Yet Garda managers testified that Plaintiffs nevertheless received relief from active duty during breaks.[19] Further, because each Garda branch operated under its own work rules,[20] the extent to which individual branches enforced the written alertness policy, and the extent to which employees followed it, varied greatly.[21] Many class members testified they actually took periods of rest during their shifts to engage in

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[16] *See, e.g.*, CP 1184:8-1186:11.
[17] CP 2757:16-20.
[18] *See, e.g.*, CP 1791.
[19] CP 2966:1-5; CP 3116 (221:3-20).
[20] CP 1745 (60:15-20).
[21] *Cf.* CP 1991:12-25 (manager told him he could not take breaks) with CP 765 (he would often have rest periods of 35 minutes to an hour to "listen to music and relax"). *See also* CP 3114 (134:2-8) and CP 3116 (222:1-17) (manager did not enforce written policies).

personal activities.[22] These breaks ranged from 3-4 minutes for bathroom breaks, 5-10 minutes for smoke breaks, and 10-15 minutes to shop for food and snacks.[23] Numerous class members explained they were free of work obligations during those periods.[24] Others confirmed it was their "personal choice" as to how to use this break time.[25]

D. Procedural History

Plaintiffs filed their Complaint on February 10, 2009,[26] alleging they did not receive rest and meal periods because Garda's "written policy or rule" required crew members to remain "on-duty" during meal and rest breaks.[27] In its Answer, Garda denied Plaintiffs' claims, but also asserted 13 affirmative defenses, including that Plaintiffs agreed to arbitrate any disputes in the applicable CBAs, and that § 301 preempted their claims.[28]

After a stay of several months, Plaintiffs moved for class certification in March 2010,[29] which was granted. Yet the court also granted Garda's Motion to Compel Arbitration.[30] Plaintiffs appealed that

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[22] CP 744, 777-78, 819-20, 822-23, 834-35, 837-38, 1831, 1838, 1864, 1893, 1904, 1908, 1940, 1956-59, 1996-97, 2000-03, 2011-12, 3034, 3115-16, 3143-46, 3177-3302, 3116.
[23] *See, e.g.*, CP 776, 829, 831-32.
[24] CP 744, 768, 771, 744, 776-77, 780-782.
[25] CP 786, 817, 823.
[26] CP 3.
[27] CP 5, ¶ 17.
[28] CP 9.
[29] CP 15.
[30] CP 932.

order, and the Washington Supreme Court reversed.[31] On remand, the following dispositive motions were granted or denied as noted:

1. Without making any findings of fact or conclusions of law,[32] the trial court denied Garda's Motion for Partial Summary Judgment, which argued (1) § 301 preemption, (2) Plaintiffs' waived their right to off-duty meal breaks through the CBAs, and (3) Plaintiffs were not entitled to double damages under RCW 49.52.070.[33]

2. After Garda was granted leave to amend its Answer to assert that the F4A preempted Plaintiff's claims,[34] the trial court denied summary judgment on that issue.[35]

3. The trial court granted Plaintiffs' Motion for Clarification or Partial Summary Judgment seeking dismissal of Garda's waiver defense,[36] rejecting the defense as "a matter of law"[37] because meal period waivers could not be contained in CBAs.[38]

4. The trial court next denied Garda's motion to decertify the class,[39] without entering any findings of fact or conclusions of law.[40]

5. Relying on *Pellino v. Brink's, Inc.*, 164 Wn. App. 668 (2011) (decided during the pendency of the first appeal), Plaintiffs filed a motion for partial summary judgment on liability.[41] The trial court granted the motion as to base damages, but denied it as to double damages.[42]

The bench trial on damages took place June 16-18, 2015. During closing arguments, the trial court solicited argument from Plaintiffs' counsel regarding double damages for the class period measured after the

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[31] *Hill v. Garda CL NW, Inc.*, 179 Wn.2d 47 (2013).
[32] CP 1270.
[33] CP 972.
[34] CP 1273, 1366, 1369.
[35] CP 1556, 2728.
[36] CP 1556.
[37] CP 2730. The trial court clarified on May 7, 2015, that its waiver defense had been dismissed as a matter of law. CP 2987. *See also* CP 3811-12, Findings of Fact 20-21.
[38] *See* CP 3811-12, Findings of Fact Nos. 20-21.
[39] CP 1705.
[40] CP 2733.
[41] CP 2743.
[42] CP 3352.

2011 *Pellino* decision. During that exchange, the trial court stated it believed Plaintiffs had misunderstood its previous order denying their motion regarding double damages. The court stated it merely had not granted the motion because it did not believe that Plaintiffs were entitled to double damages for any period before *Pellino*.[43] Garda objected to any double damages award, particularly without a factual hearing.[44]

The court granted Garda's request, but limited witnesses to only those listed for the damages portion of the trial.[45] During oral argument, Plaintiffs argued that their CBA waivers were inadequate evidence of a "knowing submission" because the term "on-duty meal periods" did not mean Plaintiffs intended to waive duty-free meal periods. Plaintiffs urged that the 2011 *Pellino* decision supplied the meaning of the "on-duty" term contained in some CBAs, and ignored that other CBAs did not even use the term "on-duty," and that others still used the specific term "waive."[46]

The damages trial concluded September 22, 2015.[47] In its Findings of Fact and Conclusions of Law, the trial court concluded no bona fide dispute regarding liability existed after *Pellino*, and Plaintiffs did not

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[43]VRP 06/18/2015, 8:18-9:11.
[44]VRP 06/18/2015, 53:25-54:21; CP 3448.
[45]VRP 06/29/2015, 196:3-6.
[46]*See* VRP 9/22/2015, 6:9-13; 7:12-17 ("[T]heir contracts didn't even say they're waiving a meal break, so no employee could even say that an employee...had a voluntary volitional decision to not take a meal break[.]"); 16:6-21.
[47]*See* VRP 9/22/2015, 63.

"knowingly submit" to any meal period violation because waivers could not be collectively bargained as a matter of law. It also concluded that Garda must pay double damages under RCW 49.52.070 from November 20, 2011 (a couple of weeks following the issuance of the *Pellino* decision) through trial,[48] and it awarded prejudgment interest.[49]

The parties filed cross-motions in support of, and opposing, entry of judgment.[50] In its motion, Garda specifically challenged many of the court's Findings and Conclusions.[51] But on November 9, 2015, the trial court entered judgment for Plaintiffs, consistent with its prior Findings and Conclusions.[52] It awarded damages for unpaid wages, double damages, attorneys' fees (to be determined and entered later), and prejudgment interest in the amount of $8,228,087.86.[53]

Plaintiffs moved for separate entry of a supplemental judgment for attorneys' fees, requesting a lodestar estimate plus a 1.5 risk multiplier.[54] While Garda challenged the Plaintiff's motion on several grounds,[55] the trial court awarded the lodestar estimate, plus the multiplier, and granted

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[48]CP 3810-11, Findings of Fact Nos. 18, 20.
[49]CP 3821, Conclusions of Law Nos. 27, 29.
[50]CP 3826, 3963.
[51]CP 3963.
[52]CP 3977.
[53]The trial court entered supplemental judgment regarding attorney fees as well as second supplemental judgment in order to add damages for 13 class members. *See* Supp. Designation of Clerk's Papers, Dkt 314, 318, and 319. These CPs are not yet available.
[54]CP 3829.
[55]CP 3981.

fees in total amount of $1,127,734.50, plus $60,112.49 in litigation costs.[56] Garda filed this timely appeal.[57]

IV. ARGUMENT

Plaintiffs' claims should have been dismissed in their entirety as preempted by F4A because "vigilance free" break requirements substantially impact Garda's routes, prices, and services. Regarding meal periods, Plaintiffs' challenge to Garda's practice of paying them for "on-duty" periods is preempted by § 301 because it substantially depends on their own interpretation of that term in some CBAs. The trial court ignored fundamental labor law when it concluded that meal period waivers could not be collectively bargained and disregarded the CBA waivers for any purpose. Further, conflicting evidence created issues of fact regarding whether Plaintiffs individually waived their meal breaks and whether Plaintiffs actually took intermittent rest periods. These individualized factual issues also show that the trial court erred when it certified the class. Last, even if liability is affirmed, the trial court committed several legal errors in determining the damages and attorney fees award.

A. Plaintiffs' Claims are Preempted by F4A and Must Be Dismissed.

49 U.S.C. § 14501(c)(1) preempts Plaintiffs' claim that the law

[56]CP 4184; Supp. Designation of Clerks' Papers, Dkt No. 314, CP not yet available.
[57]CP 4159.

entitles them to completely "vigilance free" breaks. It provides:

> [A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to* a price, route, or service of any motor carrier . . . with respect to the transportation of property.

(Emphasis added). The phrase "related to" is "deliberately expansive" and "conspicuous for its breadth."[58] Thus, the F4A "embraces state laws 'having a connection with or reference to' carrier 'rates, routes or services,' whether directly or indirectly."[59] F4A preemption is a matter of law reviewed de novo.[60]

Plaintiffs urged a construction of Washington's rest and meal period rules that would significantly impact Garda's routes and services. Nearly all of Plaintiffs' routes take longer than 3 hours to complete.[61] Several individual customers are located more than 3 hours round trip from any Garda facility or other secured location.[62] If the law truly requires Garda to provide completely "vigilance free" rest breaks every 4 hours, but no later than the end of the 3rd hour,[63] Garda would have to change these routes, add routes, or build a new secure location where

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[58]*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992).
[59]*Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364, 370 (2008).
[60]*Robertson v. State Liquor Control Bd.*, 102 Wn. App. 848, 853 (2000).
[61]CP 1415 (18:10-20:11) (routes taking 8-10 hours to complete); CP 1409 (13:2-15:23) (Wenatchee routes); CP 1421-23 (20:24-26:15) (Pasco routes).
[62]CP 1409 (15:6-10 (stating that the longest route from Wenatchee facility ran from Wenatchee to Spokane, roughly 165 miles, and taking over 5 hours to complete); CP 1422 (22:20-22) (describing 130 mile route from Pasco to Lewiston); CP 1534 (16:11-19) (describing a route from to Spokane to Lewiston over 100 miles away).
[63]WAC 296-126-092(4).

crews could break, because the trucks could not drive to and from the customer location before a rest period is required. Staggering shifts would not lessen this impact, given the routes' geography and necessary length.[64]

With no place where a crew can stop safely along the way, and a desire to avoid increased operating costs, Garda might eliminate the longer routes, thus ceasing service to these customers altogether. And while it might be theoretically possible to allow trucks on shorter routes to return to a secure facility for breaks, it would severely alter the routes Garda offers, and impact the services it provides to its customers, by affecting the timing and procedures for pick-ups and deliveries. Such changes logically increase costs and thus prices. Changing routes to give a "vigilance free" meal period would cause similar substantial effects.[65]

To escape F4A preemption, Plaintiffs argued below that Washington's break rules had no impact on Garda's routes or services because they could simply "pull off the road and take a break."[66] But this argument squarely contradicts their substantive claim that "constant vigilance" means they were never "relieved of []work duty," and thus, they were always "deprived" of any meal or rest periods.[67] If Plaintiffs are correct about the law, then F4A preemption must apply.

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[64] CP 1376-1377.
[65] CP 1376. *See also* CP 1526 (82:13-16); CP 1431 (64:10-23).
[66] CP 2049:6.
[67] *See, e.g.*, CP 2757:14-25.

Dilts v. Penske Logistics, LLC[68] does not change this analysis. Plaintiffs argued below[69] that Garda lacked any valid basis to even raise F4A preemption as a matter of law because of this 2014 decision. Plaintiffs overstated *Dilts'* importance. Even putting aside the fact that it was decided nearly 3 years **after** Plaintiffs filed this lawsuit, *Dilts* hardly adopted a broad categorical rule that any and all state rest or meal period rules escape F4A preemption as a matter of law.[70] Indeed, "the Ninth Circuit recognized that generally applicable statutes, 'broad laws applying to hundreds of different industries,' could be preempted if they have a 'forbidden connection with prices, routes, and services.'"[71]

In other words, *Dilts* did not change the basic rule: the F4A broadly preempts any state law or regulation that "directly or indirectly, binds the carrier to a particular price, route, or service[.]"[72] Only those laws with a "tenuous, remote, or peripheral" connection are not preempted.[73] And a state law's "potential impact on carriers' prices, routes, and services need not be proven by empirical evidence; rather,

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[68]757 F.3d 1078, 1085, *amended by* 769 F.3d 637 (9th Cir. 2014) (*en banc*).
[69]Plaintiffs also argued below that there was no preemption because Garda could ask for a rest period variance. CP 2060-62. Yet a variance is by no means guaranteed. "Avoiding F4A preemption" is not among the reasons listed as "good cause." WAC 296-126-130(4). The preemptive effect of F4A surely cannot be avoided simply because an employer might be able to obtain a variance.
[70]*Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 20 (1st Cir. 2014).
[71]*Coakley*, 769 F.3d at 20 (quoting *Dilts*, 769 F.3d at 647).
[72]*Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011) (rev'd in part sub nom. -- U.S. --, 133 S. Ct. 2096 (2013)).
[73]*Rowe*, 552 U.S. at 371. *See also Robertson*, 102 Wn. App. at 853.

courts may look to the logical effect that a particular scheme has on the delivery of services."[74] Applying these rules, courts have found state laws on various subjects preempted where there is a logical, even indirect, effect on rates, routes, or services.[75] This same effect exists here.

Dilts did involve similar missed meal and rest period claims brought by appliance delivery truckers in California.[76] Unlike this case, however, *Dilts* concluded that their employer could allow "minor deviations from [] routes, such as pulling into a truck stop," or require "that a driver briefly pull on and off the road during the course of travel," such that it found no meaningful interference with the carrier's ability to select its starting points, destinations, and routes.[77] Here, however, as explained above, no such "minor deviations" would solve the "vigilance-free" dilemma that Plaintiffs say exists. Further, California's meal and rest

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[74]*Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 437 (1st Cir. 2016).
[75]*See e.g., Rowe*, 552 U.S. at 371-72 (holding Maine's Tobacco Delivery Law requiring tobacco shippers to use delivery services to verify recipients' identity, legal age, signature, and government-issued photo identification preempted); *Schwann*, 813 F.3d at 437 (finding both the Massachusetts Independent Contractor Statute and Wage Act, requiring "independent contractors" perform services outside the usual course of the employer's business preempted); *Nw, Inc. v. Ginsberg*, - U.S. -, 134 S. Ct. 1422, 1430-31 (2014) (reversing 9th Cir.'s finding of no preemption of common law claim for breach of the duty of good faith and fair dealing brought by airline customer whose frequent flyer program membership was revoked); *S.C. Johnson & Son, Inc. v. Trans. Corp. of America, Inc.*, 697 F.3d 544, 557 (7th Cir. 2012) (preemption applied to common law claims for fraudulent misrepresentation and conspiracy to commit fraud where employer's transportation director accepted bribes from motor carriers). *Cf. Robertson*, 102 Wn. App. at 858 (holding that Congress clearly did not intend to preempt state laws prohibiting the illegal "service" of transporting contraband cigarettes).
[76]*Dilts*, 769 F.3d at 640.
[77]*Dilts*, 769 F.3d at 649 (emphasis added).

break laws allow employers to simply pay employees for any missed breaks, while this compliance option is not available in Washington.[78] This underscores the key difference between *Dilts* and this case. Claiming their breaks must be "vigilance free," has a logical, substantial, and ultimately impermissible effect on Garda's routes, services, and prices. F4A thus preempts Plaintiffs claims.

B. Plaintiffs' Meal Period Claims Should Be Dismissed because They Are Preempted by § 301.

The trial court committed clear legal error when it accepted Plaintiffs' arguments that it must disregard their explicit meal period waivers just because they were contained in their CBAs[79] because 1) state law expressly permits employees to waive their right to meal periods, and 2) the right to bargain waiveable rights collectively is fundamental. Even if F4A preemption does not apply, Plaintiffs' meal period claims must still be dismissed because they are substantially dependent on their interpretation of the term "on-duty meal period" or the meal period waiver clauses in the relevant CBAs. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of the parties' agreement in a labor contract, that claim must either be treated as a § 301

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[78] *See Pellino*, 164 Wn. App. at 686-87.
[79] *See* CP 3352-53, 3811-12, Findings of Fact Nos. 19-22.

claim, or dismissed as preempted by federal labor-contract law."[80]

1. Employees' right to collectively bargain waivable rights is fundamental.

Washington's meal period requirements are a regulatory, not statutory, mandate. Both case law and Labor & Industries' ("L&I") Administrative Policy No. ES.C.6 ("Policy")[81] firmly establish that employees may waive WAC 296-126-092's meal period provisions if the employer also agrees.[82] In spite of this clarity, Plaintiffs urged below that this same Policy expressly allowing meal period waivers also forbids collectively bargaining them except for public or construction employers.[83] This is legally inaccurate.

The language Plaintiffs cited in the Policy simply clarifies the impact of 2003 amendments to the Industrial Welfare Act, Chapter 49.12 RCW (IWA).[84] Relevant here is: (1) the addition of public employer to IWA's definition of "employer," and (2) the concurrent addition of a specific carve out for public employers and construction trades from the meal period requirements.[85] The Policy clearly explains this means that public employees and construction employees can negotiate break

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[80] *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).
[81] Question No. 8 ("Employees may choose to waive the meal period requirements"); Copy in Appendix.
[82] *Pellino*, 164 Wn. App. at 697.
[83] CP 1190 and 3811, Finding of Fact No. 19.
[84] RCW 49.12.187 (*amended by* 2003 c 401 § 1, c 146 § 1). *See also* Policy, Nos. 3, 4.
[85] RCW 49.12.005(3)(b); RCW 49.12.187. *See also* Policy, No. 3.

requirements "less favorable" than WAC 196-126-092's "standards," while collective bargaining agreements for other industries must include meal and rest periods requirements "at least equal to or more favorable than" those provisions.[86] Despite Plaintiffs' protests, the CBAs here do not contain a "less favorable" meal period "less than" L&I's "standard"; the standard allows employees to waive meal periods, which is exactly what Plaintiffs did through their designated bargaining representatives. Nothing in the Policy prohibits waiving meal periods by collective bargaining.

Plaintiffs' conclusion that Washington law forbids public or construction employees from collectively bargaining meal period waivers is flawed for two other key reasons. First, it violates employees' fundamental right to collectively bargain. There is no doubt that "[t]he right of collective bargaining is a fundamental right of employees."[87] RCW 49.12.187 further underscores this by clearly mandating that Chapter 49.12 RCW "shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively . . . concerning wages or standards or conditions of employment." Plaintiffs' proffered construction of the Policy violated this mandate.

Second, holding that Washington law prohibits collectively bargained meal period waivers implicates NLRA preemption. The NLRA

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[86] Policy, No. 15. *See also* Policy ES.A.6 No. 1 (A).
[87] *NLRB v. Lettie Lee, Inc.*, 140 F.2d 243, 248 (9th Cir. 1944).

purposefully protects the rights of employees to collectively bargain.[88] It is thus well-settled that it preempts any state law that either conflicts with its underlying goals and policies or stands "as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress.[89] Specifically, *Garmon*[90] prohibits any state regulation impinging on National Labor Relations Board's jurisdiction to regulate activities that are protected by its rules, including employees' Section 7 rights to organize and bargain collectively.[91] Further, while a state can set minimum labor standards, those standards must "neither encourage nor discourage the collective-bargaining process[.]"[92] The trial court's conclusion that the Policy means that employees can waive meal periods individually, but that employees' designated bargaining representatives lack authority to waive meal periods on their behalf, is hostile to the collective bargaining process itself. This construction violates RCW 49.12.187 and the NLRA. Instead, as a negotiable right, meal period waivers must be open to collective bargaining.

2. *Plaintiffs' meal period claims substantially depend on interpretation of various waiver language in the CBAs.*

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[88]*See generally* 29 U.S.C. § 151.
[89]*Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (internal quotation omitted).
[90]*San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).
[91]29 U.S.C. § 157; *Wal-Mart Stores, Inc. v. United Food & Comm. Workers Int'l Union*, 190 Wn. App. 14, 21 (2015).
[92]*Metropolitan Life v. Mass.*, 471 U.S. 724, 755 (1985).

Plaintiffs' challenge to the legality and meaning of their CBA break provisions are clearly preempted. Section 301 confers exclusive federal jurisdiction over suits alleging violations of "contracts between employers and labor organizations."[93] By enacting this, "Congress intended to have the federal courts create a body of federal common law to be used to adjudicate disputes arising out of labor contracts."[94] The "pre-emptive force of § 301 is so powerful" it displaces not only claims founded directly on CBA rights, but also claims "substantially dependent on analysis of a collective-bargaining agreement."[95] In other words, preemption applies if a CBA provision is "reasonably said to be related to resolution of the dispute,"[96] because "any such suit is purely a creature of federal law, [even though] state law would provide a cause of action in the absence of § 301."[97] Reviewing this issue of law de novo,[98] § 301 preempts Plaintiffs' meal period claims and they must be dismissed.

Plaintiffs' attempt below to recharacterize their claims as wholly independent from their CBAs do not save them from preemption. First, Plaintiffs cannot evade § 301's requirements just by stating their claims

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[93]29 U.S.C. § 185(a). Copy in Appendix.
[94]*Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1065 (9th Cir. 2000) (Firestone I), *aff'd*, 281 F.3d 801 (9th Cir. 2002) (*en banc*) (Firestone II).
[95]*Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987).
[96]*Firestone II*, 281 F.3d at 802.
[97]*Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983).
[98]*See Firestone II*, 281 F.3d at 802.

have nothing to do with their CBAs.[99] Instead, while a plaintiff is generally the master of his complaint, under the "artful pleading" and "complete preemption" doctrines, § 301 is so strong that it "completely preempts" state law claims arising under or substantially dependent on terms of a collective bargaining agreement no matter how they are pled.[100]

Here, Plaintiffs' Complaint specifically alleged:

- Garda has a "written policy or rule that armored truck employees shall take their meal breaks 'on duty.'"[101]
- Garda's written "policy . . . under which Plaintiffs and the class do not receive meal and rest breaks violates" Washington law.[102]
- It is a common issue of law and fact whether Garda's "policy providing its armored truck employees with only 'on-duty' meal breaks is consistent with Washington law."[103]

However, the CBAs are the only written "policy" describing "on duty" meal breaks or other challenged break rules. Challenging the lawfulness of a CBA term necessarily requires substantial interpretation of the CBA itself.[104] Where such dependence exists, § 301 preempts the claim.[105]

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[99]*See Lueck*, 471 U.S. at 211.
[100]*See Franchise Tax Bd.*, 463 U.S. at 24. *See also Atkins v. Praxair Inc.*, 182 Fed. Appx. 724, 727 (9th Cir. 2006).
[101]CP 5 at ¶ 17.
[102]CP 7 at ¶ 31.
[103]CP 6 at ¶ 28 (c).
[104]*Vera v. Saks & Co.*, 335 F.3d 109, 116 (2d Cir. 2003) (explaining that questions "relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law").
[105]*Levy v. Verizon Info. Servs., Inc.*, 498 F. Supp. 2d 586, 597 (E.D.N.Y. 2007) (unlawful wage deduction claims substantially depended on the interpretation of the CBA were preempted). *See also Medrano v. Excel Corp.*, 985 F.2d 230, 234 (5th Cir.1993) (finding

Plaintiffs will likely argue that § 301 cannot apply to their meal period claims because they are based on a "nonnegotiable" minimum labor standard.[106] This argument, however, misses the crucial point. While § 301 fails to preempt state law claims based solely on independent, *non-negotiable* state law rights,[107] a right is only "nonnegotiable" if state law "does not permit it to be *waived,* alienated, or altered by private agreement."[108] Thus, § 301 does preempt state law claims based on a *waivable* right if their resolution substantially depends on interpretation of the applicable CBA.[109] Because Washington law permits meal periods waivers, it is *not* a "nonnegotiable" right, and Plaintiffs "minimum labor standard" argument falls apart.

It is also clear that resolution of Plaintiffs' meal period claims was not, and cannot be, decided by simple reference to unambiguous CBA terms. While "not every claim which requires a court to refer to the language of a labor-management agreement is necessarily preempted," § 301 *does* apply if the court must "interpret" the CBA, rather than just

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that where plaintiff was "essentially challenging the very legality" of a provision of the CBA, "which [defendant] had faithfully applied," plaintiff's claim was, "without a doubt . . . substantially dependent upon the meaning of a term of the CBA" and thus preempted).

[106]*See e.g.* CP 1184:8.

[107]*Lueck*, 471 U.S. at 213.

[108]*Miller v. AT & T Network Sys.*, 850 F.2d 543, 546 (9th Cir. 1988) (emphasis added).

[109]*Firestone I*, 219 F.3d at 1064.

"refer" to it.[110] Indeed, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement" must be preempted.[111] These are the same questions presented in this case.

Firestone v. Southern California Gas Co., underscores the key difference between CBA interpretation and mere reference. There, employees sued for unpaid overtime under California law, which provides that employees are not entitled to any overtime pay if they are paid a "premium" for overtime work above the "regular rate" of pay in the contract. The plaintiff employees and the defendant employer disagreed about the meaning of pay provisions in the CBA and, thus, disagreed on whether plaintiffs had received a "premium" for overtime work. *Firestone* found that resolving that question required interpretation of the CBA, because "[t]he agreement would be enforced differently depending on which party's interpretation is accepted."[112] Thus, because "[r]esolution of plaintiffs' claim to overtime pay under state law [could not] be decided by mere reference to unambiguous terms" of the CBA, it was preempted.[113]

Here, the parties' disagreement as to the effect and meaning of

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[110]*Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108-09 (9th Cir. 2000) (internal quotation omitted).
[111]*Livadas*, 512 U.S. at 123 (internal quotation omitted.)
[112]*Firestone II*, 281 F.3d at 802.
[113] *Firestone II*, 281 F.3d at 802.

various CBA's meal period clauses[114] lies at the heart of this case. Specifically, at issue is whether the following language proved Plaintiffs agreed to waive their unpaid, off-duty meal periods:

- "The Employees hereto waive any meal period(s) to which they would be otherwise entitled [.]"[115]
- "The Employees hereto agree to an on-duty meal period."[116]
- "[R]outes will be scheduled without a designated lunch break thus employees will not be docked for same."[117]

Plaintiffs not only maintained that these clauses should be disregarded because they were in CBAs, but also argued that the term "on-duty" meant that they only agreed to be on-call during meal periods, rather than waive them altogether.[118] Garda maintains that these clauses show unequivocal waiver regardless of whether they expressly used that term or stated that employees' agreed to work during meals.[119] Resolution of the Plaintiffs' missed meal period claims necessarily requires determining what the parties intended these clauses to mean.

Further, Plaintiffs' arguments below, the trial court's summary judgment orders, and its final order bolster the conclusion that Plaintiffs claims are substantially dependent on their interpretation of the CBAs. For

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[114]CP 390, 413, 433, 454, 478, 497, 536, 516, 558, 578, 601, 646, 622, 1140, 1162. *See* also summary table in Appendix at Page a.
[115]CP 1162.
[116]CP 1140.
[117]CP 433.
[118]*See, e.g.*, CP 1566.
[119]*See, e.g.*, CP 390.

example, the trial court clearly interpreted the term "on duty meal period" and the other meal period clauses to reach its (erroneous) final decision. As it found:

- "The CBAs generally provided, on paper, for . . . the option of an off-duty or on-duty meal break; they did not contain statements that employees agreed not to take any breaks."[120]
- "Three CBAs . . . stated that employees waived meal breaks, but Garda failed to show . . . these employees knowingly and voluntarily chose not to do so."[121]
- "Garda's CBA's generally did not contain waivers."[122]

This last conclusion was the most egregious because it ignored the unambiguous "[e]mployees . . . waive any meal period" clause in some CBAs.[123] Its conclusions also show it accepted Plaintiffs' argument that it must, as a matter of law, assign the term "on duty meal period" the same meaning from *Pellino*,[124] even though § 301 clearly preempts application of state law to interpret a CBA term.[125] It is also problematic the trial court used *Pellino* to interpret the CBAs "on-duty" term, and then applied it class-wide, even though where not all of the CBAs contained this phrase and *Pellino* was affirmed on appeal years **after** the parties ratified most of

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[120]CP 3811, Finding of Fact No. 20.
[121]CP 3811-12, Finding of Fact No. 21.
[122]CP 3820, Conclusion of Law No. 25.
[123]CP 1162.
[124]*See, e.g.*, CP 3818, Conclusion of Law No. 20.
[125]*Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

the CBAs.[126] It was error for the trial court to assign the phrase "on duty meal period" a legal meaning from a case that had not even been decided at the time the CBAs were negotiated and ratified.

Because the meaning of the various CBAs' terms is key to determine Plaintiffs' claims, this case falls squarely within *Firestone*, and clearly differs from other cases rejecting § 301 preemption when the state law claims could be decided without interpretation of the CBA.[127] Plaintiffs' meal period claims are "inextricably intertwined" with the meaning of CBA terms and are thus preempted.[128]

3. Plaintiffs failed to use the CBAs' grievance procedures, and their meal period claims are thus time-barred.

As soon as Plaintiffs' meal period claims are properly characterized as § 301 claims, they must be dismissed. Plaintiffs admittedly failed to utilize the grievance procedure,[129] and there is no doubt more than 6 months has passed since Plaintiffs filed this case, let alone when the claims arose. Their meal period claims must be dismissed as untimely and for their failure to exhaust their grievance procedures.[130]

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[126]Of all the CBAs, only the 2013-2016 Pasco CBA was executed after 2011, and this CBA explicitly states: "Employees hereto waive any meal period(s)." CP 1162, 1174.
[127]*Huntley v. Frito-Lay, Inc.*, 96 Wn. App. 398 (1999) (overtime pay claim based on outside sales exemption not preempted where court did not need to interpret the CBA to analyze plaintiff's status); *Ervin v. Columbia Dist., Inc.*, 84 Wn. App. 882 (1997) (overtime claim not preempted because court could use paystubs instead of the CBA).
[128]*See Lueck*, 471 U.S. at 213; *Firestone*, 281 F.3d at 802.
[129]CP 1003 (21:2-22), 1014 (17:6-18:23), 1025 (61:25-63:3).
[130]*DelCostello v. Int'l Bd. of Teamsters*, 462 U.S. 151, 155 and 163 (1983).

C. Disputed Issues of Material Fact Showing Plaintiffs Intended to Waive Meal Periods Precluded Summary Judgment.

Waiver is an equitable doctrine that defeats a legal right where the facts show that the party relinquished a known right, or conduct shows the party relinquished known rights.[131] As explained above, the trial court erred in concluding, as a matter of law, that the CBA waivers were meaningless because they were collectively bargained.[132] It compounded its error by relying on this conclusion to grant Plaintiffs' summary judgment to dismiss Garda's waiver defense as a matter of law,[133] and also by concluding that CBAs could not "serve as evidence" that class members intended to waive meal periods.[134] Instead, whether there has been a waiver is a question of fact.[135] The facts here, viewed in Garda's favor as the non-moving party de novo, show disputed material facts to determine if class members voluntarily waived their meal periods.[136]

First, the CBAs themselves create issues of fact whether Plaintiffs intended to waive their meal periods. Waiver is a "voluntary act which implies a choice . . . to forgo some advantage" and "may result from an express agreement or be inferred from circumstances indicating an intent

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[131] *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954).
[132] CP 3811-12, Findings of Fact Nos. 19-22.
[133] CP 2731, 2987.
[134] CP 3820, Conclusion of Law No. 25.
[135] *Bowman*, 44 Wn.2d at 670.
[136] *Lybbert v. Grant County*, 141 Wn.2d 29, 34 (2000).

to waive."[137] To ignore express waivers just because (as Plaintiffs maintain) Washington law says waivers cannot be collectively bargained broadly overreaches. The trial court compounded its error when it glossed over the fact that some of the class members' CBAs contained a clear, unambiguous meal period waiver.[138] Instead, the parties disagreed about the meaning of the meal period language (which varied among the CBAs), and thus whether it showed an intent to waive them.[139]

Even if it were correct that their unions had no authority to agree to meal period waivers on their behalf, many class members individually acknowledged their CBAs.[140] These individually executed acknowledgments evidence each employee's personal intent to waive off-duty, unpaid meal periods. Several class members also testified that they understood that they had agreed, through their CBA, to forgo off-duty unpaid meal breaks and be paid for on-duty meal periods.[141] And they confirmed that they knew they had the right to request an off-duty unpaid

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[137] *Bowman,* 44 Wn.2d at 669.

[138] CP 1162: "The Employees hereto waive any meal period(s) to which they would otherwise be entitled [.]" *See also* CP 3811-12, Finding of Fact 21 ("Three CBAs, signed or acknowledged in writing by only 29 of the class members stated employees waived meal breaks." *But see* CP 3818, Conclusion of Law No. 25 ("Garda's CBAs generally did not contain waivers, so they cannot serve as evidence [.]")

[139] *Compare* CP 1162, 3015, 3020, and 3027 (CBAs). *See also* CP 2076-78.

[140] CP 404, 424-25, 468, 488-89, 526-27, 549, 568-69, 614, 635, 659.

[141] CP 1001-02 (16:13-19:1, 23:14-24:18) 1015, 1017 (32:1-7, 37:22-38:12) 1027 (76:21-23).

meal break at any time,[142] as Washington law requires.[143] Given that Washington law does not even require waivers to be in writing,[144] it makes little sense that the trial court ignored this evidence.

The trial court's wholesale dismissal of anything related to the CBAs was error. Waiver is a question of fact, requiring the trier of fact to examine if the entire circumstances infer an intent to waive. The employees' conduct, coupled with the CBAs and individual acknowledgments, reveals the intent to waive any off-duty meal period. Summary judgment was inappropriate.

D. Material Facts Showing Plaintiffs Actually Received Rest Periods Also Precluded Summary Judgment.

The trial court again erred when it concluded that the mere existence of the so-called "vigilance policy" established that Plaintiffs did not receive a lawful rest periods *as a matter of law*. Generally, whether employees receive adequate rest breaks is a question of fact.[145] Reviewing the trial court's order granting Plaintiffs summary judgment de novo, this Court must consider the facts and the inferences from them in the light most favorable to Garda, but also refrain from weighing evidence or

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[142]CP 1003-04 (24:19-25:7), 1015 (32:1-7), 1027 (76:13-19).
[143]Policy, No. 8: "if at some later date the employee wishes to receive a meal period, any agreement would be no longer in effect."
[144]Policy, No. 8.
[145]*See Pellino*, 164 Wn. App. at 690.

witness credibility.[146] Applying the correct test shows that summary judgment was inappropriate.

Washington employers must provide employees with a rest period of at least ten minutes for every four hours worked.[147] Case law explains that legally sufficient rest periods require that employees be relieved of all work duties and exertion, and be afforded an opportunity for personal relaxation while on the employer's time.[148] But requiring employees to remain on site during meal and rest periods remains consistent with this requirement, so long as the employees are free from the mental and physical exertions of their work.[149] Accordingly, employers can require employees to remain on premises to respond to contingencies without violating rest period rules.

Further, employers can also provide rest periods in less than full 10-minute increments, so long as these intermittent rest periods add up to 10 minutes for every 4 hours of work.[150] An "intermittent rest period" means "intervals of short duration in which the employees are allowed to relax and

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[146]*FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 688 (2012); *see also American Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667 (2012) (a trial court does not weigh the evidence or assess witness credibility on a motion for summary judgment); *Riley v. Andres*, 107 Wn. App. 391, 398 (2001) (the nonmoving party should have the opportunity to expose the moving party's credibility and demeanor while testifying at trial); *Balise v. Underwood*, 62 Wn.2d 195 (1963) (the trial cannot resolve genuine issue of credibility, such as is raised by contradicting or impeaching evidence).
[147]WAC 296-126-092.
[148]*White v. Salvation Army*, 118 Wn. App. 272 (2003).
[149]*White*, 118 Wn. App. at 283.
[150]*White*, 118 Wn. App. at 282.

rest, or for brief personal inactivity from work or exertion."[151]

In this case, the trial court concluded that Garda violated Washington's rest break requirements as a matter of law, even though Plaintiffs and Garda offered competing evidence showing employees received breaks. Genuine questions of fact remained as to the degree to which branch managers exercised their discretion to enforce the "vigilance policy" and provided breaks, and whether employees *in fact* took rest breaks during which they were fully relieved from all "mental and physical exertion." This included branch managers' testimony that they instructed their crews to take breaks, and allowed crew members to bring magazines, cell phones, and iPods on their routes for personal use.[152] Garda also offered crew members' declarations stating they took rest breaks during which they were fully relieved of all work duties.[153] One crew member even testified that he would relax in the back of the truck for 20 minutes *to an hour* between stops.[154] Class members gave other testimony admitting that they took breaks for personal activities such as:

- Stretches of time where they could use their cell phones, read magazines and newspapers, eat meals, conduct personal business, listen to music, and enjoy smoke breaks. [155]

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[151] *White*, 118 Wn. App. at 283 (citing L&I Administrative Policy ES.C.6 ¶ 12).
[152] CP 3113 (61:6-23), CP 3116 (222:9-17), CP 3121 (18:16-184:17).
[153] CP 767-787, 816-839, 2011, 1997, 1893, 2002-03, 1831, 1838, 1904, and 1864.
[154] CP 771 ¶¶ 4, 7.
[155] CP 744, 777-778, 1831, 1838, 1864, 1893, 1904, 1908, 1940, 1956-57, 1997, 2002-03, 2011, 3115-16, 3143.

- Time to surf the internet, post on Facebook, or text a girlfriend using personal devices.[156]
- Time to relax between stops sufficient to close their eyes for 20 minutes and "take a break."[157]
- Being allowed to bring newspapers, magazines, personal cell phones, and iPods by the local branch manager, even though Garda's written prohibited them.[158]
- Stopping at McDonald's or Starbucks or other establishments to purchase soda, food, or personal items, which often necessitated parking the truck and entering the establishment to order and wait in line.[159]

Crew members also testified to taking 3-5 minutes for smoke breaks, 5-10 minute for foods stops and shopping, and 20 minutes or more to rest and relax between stops.[160] These breaks, intermittently spread across shifts, meet the "intermittent rest periods" compliance option. Garda further rebutted Plaintiffs' testimony that the class members were rushed to complete routes with branch managers' testimony to the contrary; they explained they built additional time into the routes to ensure that crews had time to take proper breaks.[161] All this evidence, viewed in Garda's favor, shows that crews regularly took breaks fully relieved of any active alertness.

Plaintiffs' argument that the so-called "constant vigilance" policy

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[156]CP 1959, 2003, 2011-2012, 3034, 3144-45, 3177-3302. Records confirmed that class members Jones, McNees, Hull, Olivias, Milich, Taylor, and Watkins, all used personal devices to make calls and social media posts during their routes. CP 3172-3302.
[157]CP 3116:3-20 (discussing Ellensburg and Yakima route).
[158]CP 3116:1-11.
[159]CP 744, 777-78, 819-20, 822-23, 834-35, 837-38, 1862, 1893-94, 1996, 2000, 3146.
[160]*See, e.g.*, CP 776 ¶ 5, 829 ¶ 7, CP 831-32 ¶ 5.
[161]CP 3102 (88:2-8), CP 3114 (134:2-8), CP 3119 (156:3-10).

ends any factual inquiry misconstrues *Pellino*. First, it is critical that the trial court in *Pellino* did not make any liability determination *as a matter of law*, unlike the lower court here. In *Pellino*, the trial court found that the plaintiffs did not receive adequate breaks under Washington law *after* it considered all the facts presented at a 14-day bench trial on the merits,[162] in which the trial court considered other relevant facts. *Pellino* hardly held that the existence of a written vigilance policy, regardless of any other facts, *per se* violates meal and rest period rules. Instead, Garda's alertness policy was just one fact among the many pieces of evidence presented at summary judgment.

Second, as noted above, Garda disputed most of the Plaintiffs' factual allegations regarding these rest periods. Here, the trial court ignored class members' own testimony showing they received breaks. The trial court also improperly assigned weight to one piece of evidence (the written policy) in direct contravention of the well-established standard.[163] The disputed material facts showing that Plaintiffs actually received breaks should have precluded summary judgment. This Court should remand this issue for trial.

E. The Trial Court Abused its Discretion when it Failed to Engage in the Requisite Analysis of CR 23 Factors Before Certifying the Class.

The trial court abused its discretion when it certified (and failed to

[162] *Pellino*, 164 Wn. App at 676.
[163] *FDIC*, 171 Wn. App. at 688.

decertify) a class of claims wholly ill-suited for class-wide adjudication. While courts generally review decisions certifying a class liberally, the rule "does not contemplate automatic affirmance whenever a trial court certifies a class."[164] A class certification will be reversed where, as here, the trial court made its decision "without appropriate consideration and articulate reference to the criteria of CR 23."[165]

For a class to be certified, plaintiffs must satisfy all of CR 23(a)'s requirements (numerosity, commonality, typicality, and adequacy)[166] and also a requirement of CR 23(b). The trial court must conduct a "rigorous analysis" of the CR 23 requirements to determine whether a class action is appropriate in a particular case.[167]

Here, rather than conduct a rigorous analysis, the trial court ignored the individualized determinations discussed in this brief, e.g., the meaning of each different CBAs' meal period language, if employees understood that they were entitled to take an off-duty meal period if they requested one (and that they voluntarily chose to work through the day without a designated break),[168] that some CBAs specifically used the term "waive", if putative class members actually received rest breaks; and if

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[164]*Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820 (2003) (citation omitted).
[165]*Miller*, 115 Wn. App. at 820.
[166]*Miller*, 115 Wn. App. at 820.
[167]*Oda v. State*, 111 Wn. App. 79, 93 (2008) (quotation omitted).
[168]CP 767-87, 816-39.

individual class members "knowingly and voluntarily" waived any right to a meal period or intended to do so. There is no evidence, however, that the trial court even considered the differences among the various CBAs, the differing facts, or the impracticality of making these individualized determinations on a class-wide basis (let alone whether individualized proof would be required to resolve an allegedly common issue), or if the resolution of a common legal issue (such as CBAs' meaning and the enforceability of CBA waivers) required specific factual and legal determinations different for each class member. The need for such individualized proof to resolve allegedly common issues where resolution depends upon highly specific factual and legal determinations different for each class member, weighs against class certification.[169]

Rather than weigh these individualized issues, the lower court instead relied on a grossly oversimplified characterization of this case, broadly concluding that **"[t]he *single* common and overriding issue presented** is whether Drivers and Messengers are entitled to compensation for missed meal periods and rest breaks."[170] By concluding that this case involved only a single, common issue, the trial court engaged in only half of the CR 23(b)(3) analysis, neglecting to weigh any of the individual questions presented against the common ones. The trial court

[169]*Miller*, 115 Wn. App. at 824 (citations omitted).
[170]CP 933:17-21 (emphasis added).

further abused its discretion when it denied the Defendant's Motion for Class Decertification without making any record indicating it considered the necessary factors or weighed the benefits of a class-action suit against alternative means.[171] Accordingly, the trial court lacked adequate findings to show a tenable basis to support its conclusion that common questions predominated over individual ones, or that class adjudication was superior. This Court should reverse.

F. Plaintiffs Were Not Entitled to Double Damages under RCW 49.52.070.

The trial court improperly awarded Plaintiffs double damages for "unpaid wages" related to meal periods under RCW 49.52.050 and 49.52.070. RCW 49.52.070 provides that if an employer violates any of the provisions of RCW 49.52.050 (1) and (2), it must pay "twice the amount of the ***wages unlawfully . . . withheld***" only if: (1) the employer "willfully" deprives the employee of wages and (2) the employee did not knowingly submit to any such deprivation.

1. Plaintiffs received wages for all meal periods worked, so there was no wage violation under RCW 49.52.070.

It is undisputed that Garda paid Plaintiffs wages in the ordinary course for each purportedly missed meal period. Thus, RCW 49.52.070 does not support a double damage award for unlawfully withheld "wages."

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[171] CP 2733.

Garda's purported failure to provide Plaintiffs off-duty meal periods constitutes a *labor* violation only; there is no *wage* violation where employees have already received all wages owed for all time worked.

Wingert v. Yellow Freight Sys., Inc., 146 Wn. 2d. 841 (2002) helps illustrate this difference. *Wingert* explained that although meal and rest period requirements are defined as a "condition of labor," a rest period violation constitutes *both* a condition of labor violation and a Chapter 49.52 RCW wage violation.[172] This is because WAC 296-126-092 not only provides that rest periods cannot be waived, but also that they "shall be taken on the employer's time." Thus, employers have a mandatory obligation to pay employees their wages during rest periods. Logically, when employees miss rest periods, they are owed an additional 10 minutes of wages because they have, in effect, provided an additional 10 minutes of labor rather than receiving 10 minutes of paid rest.[173]

However, unlike rest periods, WAC 296-126-092 provides that meal periods are generally *unpaid*; the law does not guarantee the right to a *paid* meal period. Accordingly, if an employee is deprived of a 30 minute off-duty meal period, the employer has violated the labor conditions set out in WAC 196-126-092 (in the absence of a waiver).[174]

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[172] *Wingert*, 146 Wn.2d at 849 (citing RCW 49.12.005(5)).
[173] *Wingert*, 146 Wn.2d at 849 (citation omitted).
[174] WAC 296-126-092(1).

Applying *Wingert's* logic, if an employee performs work during this missed meal period he/she must receive 30 minutes of wages for the work performed during that period; if the employer fails to pay the employee for this work, it is both a labor *and* wage violation. However, where, like here, the employee has already received wages for work performed during the "missed" meal period, the employer has committed only a labor violation because it has already paid the employee's wages for the extra work. The employee is entitled to damages for this labor violation,[175] but these are not unpaid wages owed for work performed without pay.

This Court explored this distinction in *Iverson v. Snohomish County*, 117 Wn. App. 618 (2003).[176] There, the plaintiff argued he was deprived of a meal period because he was required to remain "on-call" during his meal break, and he sought an additional 30 minutes of wages, on top of the wages his employer already paid. *Iverson* rejected this, noting that the plaintiff cited "no authority which would require additional compensation for duties during he is required to perform during his lunch period[,]" and explaining that nothing in *Wingert* supported his argument that he should get paid more wages than he already earned.[177]

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[175]*See e.g. Pellino*, 164 Wn. App. at 699 (awarding the equivalent of 30-minutes of pay as damages for the meal period violation).
[176]*Iverson*, 177 Wn. App. at 618.
[177]*Iverson*, 177 Wn. App. at 623.

Neither *Frese* nor *Pellino* changed this rationale. In *Frese*,[178] this Court simply held that *Iverson* did not bar employees who claimed they were forced to perform active duties during a paid, agreed "on-call" meal periods from proceeding with their missed break and breach of contract claims. The Court did not distinguish between a wage violation, a labor violation, or even their breach of contract claim. *Pellino* similarly did not make any distinction between wage and labor violations, merely awarding damages for the meal period violations without explaining how it characterized them.[179] Here, it would be erroneous to characterize the meal period damages as "wages" under RCW 49.52.070 when the employees were already fully compensated for all meal periods worked.

2. There was a bona fide dispute as to whether the Plaintiffs were entitled to additional pay for on-duty meal periods.

Even if the Court holds that Garda failed to pay meal period "wages," double damages are still unwarranted. The nonpayment of wages must be "willful," that is, the result of a "knowing and intentional action."[180] But courts "will not find willful intent to deprive the employee of wages if the employer has a bona fide dispute as to the obligation to pay."[181] Examples of bona fide disputes include disagreements over the

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[178] *Frese v. Snohomish Cty.*, 129 Wn. App. 659, 661 (2005).
[179] *See Pellino*, 164 Wn. App at 699.
[180] *Wingert*, 146 Wn.2d at 849.
[181] *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 834 (2012).

meaning of contract language[182] or obligations in a CBA.[183]

Here, there was a bona fide dispute whether Garda owed Plaintiffs additional meal period wages. The terms of the various CBAs demonstrated Plaintiffs' intent to waive off-duty unpaid meal periods, and class members' individual acknowledgements further demonstrated their intent. Plaintiffs' own testimony also confirms that they understood they had waived a right to off-duty meal periods, but could request unpaid off-duty meal periods at any time.[184] Garda relied on these agreements, believing the waivers meant it met its meal period obligations.

The trial court failed to even analyze these facts. Instead, it summarily dismissed them by concluding no bona fide dispute existed regarding their meals period claims *as a matter of law* because "Washington law clearly forbids waiver of rights to meal breaks through a CBA."[185] This legal conclusion was erroneous.[186] Rather than show a lack of a bona fide dispute, the evidence the trial court failed to consider overwhelmingly showed it was "fairly debatable" whether Garda needed

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[182]*O'Brien v. iloop Mobile, Inc.*, 189 Wn. App. 1040 2015 WL 5010599 *8 (2015). (meaning of "then current salary" in contract); *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 79 (2008) (fairly debatable whether the employer owed additional commissions under the compensation plan).
[183]*Wash. State Nurses Ass'n* 175 Wn.2d at 835 (employer paid straight time for missed rest periods according to CBA; no willfulness); *Champagne v. Thurston Cty.*, 163 Wn. 2d 69, 82 (2008) (employer's pay practice complied with CBA; no willfulness).
[184]See Part C, above.
[185]CP 3818, Conclusion of Law No. 20.
[186]See Part B and C, above.

to pay Plaintiffs additional compensation for waived, "non-designated," or "on-duty meal periods" (depending on the meaning of each CBAs meal period clause).[187] Garda did not "willfully" deprive Plaintiffs of meal period compensation.

3. Plaintiffs "knowingly submitted" to meal period violations when they agreed to paid, on-duty meal periods.

Even if an employer "willfully" deprives employees of unpaid wages, the employees still may not recover double damages if they "knowingly submit" to the wage withholdings. In other words, an employee may not recover double damages if the employee "deliberately and intentionally deferred to [the employer] the decision of whether [the employee] would ever be paid."[188] Once again, the trial court's erroneous legal conclusion that meal period waivers could not be collectively bargained led to its abrupt rejection of yet another of Garda's arguments: that double damages were inappropriate because Plaintiffs had "knowingly submitted" to the meal period violations through their CBAs.

Again, Garda maintains the CBAs showed that class members, through their designated representatives, 1) specifically waived meal

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[187] *Duncan*, 148 Wn. App. at 79 (holding that double damages were inappropriate because it was fairly debatable whether the employer owed the plaintiff additional commissions under the applicable compensation plan). *See also Wash. State Nurses Ass'n*, 175 Wn.2d at 835 (double damages were inappropriate because employer complied with the CBA and earlier arbitration award requiring only straight time pay for missed rest periods).
[188] *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 682-83 (2001).

periods, 2) agreed to no designated lunch break, or 3) expressly agreed to remain on-duty and alert during meal periods. Plaintiffs' individually-signed acknowledgment forms agreeing to the CBAs' terms underscores their personal agreement. The trial court's finding[189] that these agreements were not voluntarily negotiated just because the relevant clauses were collectively bargained suggests that the union had no authority to negotiate on the class members' behalf. This flies in the face of established labor law, and it was clear error.[190]

Instead, the above facts place this case squarely within others holding that an employee "knowingly submits" when the employee has entered some type of agreement relinquishing the claim to the wages in question.[191] Plaintiffs knowingly submitted to any meal period violations when they individually signed acknowledgments agreeing to the CBAs' terms. For yet another reason, the Court should reverse the award of double damages related to purported meal period violations.

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[189]CP 3811-12, Findings of Fact Nos. 20-21.

[190]A labor organization designated as the exclusive bargaining representative is the voice of employees when negotiating with the employer regarding terms and conditions of employment. *See* 29 U.S.C. § 159 (a); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (national labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.")

[191]*See, e.g.*, *LaCoursiere v. CamWest Development, Inc.*, 172 Wn. App. 142 (2012) (where employee voluntarily entered into LLC agreements that collected rebates in violation of RCW 49.52.050, the employee knowingly submitted to the wage violation).

G. Plaintiffs are not Entitled to an Award of Both Prejudgment Interest and Double Damages because Both Compensate for the Harm Due to a Delayed Wage Payment.

It was error to award both prejudgment interest and double damages as this allowed double recovery for a delayed "wage" payment. Cases applying the Fair Labor Standards Act's ("FLSA") similar double damages provision[192] have routinely held that plaintiffs may not recover both double damages and prejudgment interest because such an award would constitute double recovery.[193] Because the purpose of the FLSA's liquidated damages provision is compensatory—to provide compensation for delay in payment of sums—it is inconsistent with the FLSA's intent to also grant interest on those sums to compensate for the payment delay.[194]

Washington law should reach a similar conclusion. The MWA's purpose of exemplary damages is similar to the FLSA's: "to ensure that the employee realizes the full amount of his or her wages, ***and*** that the employer does not evade his or her obligation to pay wages by a device calculated to effect a rebate of part of them."[195] Like the FLSA, RCW

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[192] 29 U.S.C. § 216 (b): "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

[193] *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715 (1945) (recovery of liquidated damages and prejudgment interest is "double compensation for damages arising from delay in the payment of the basic minimum wages"); *see also Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1102 (3d Cir. 1995).

[194] *Brooklyn Sav. Bank*, 324 U.S. at 715.

[195] *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 687 (2014).

49.52.070 already specifies the amount recoverable to compensate for the delay in payment. RCW 49.52.070 also involves both a compensatory *and* punitive component. If the purpose of these damages is punitive, Washington cases firmly establish that prejudgment interest is not available on top of punitive damages.[196] It is inconsistent with the RCW 49.52.070's intent to award both double damages and interest on all claims. To the extent any award of double damages stands, prejudgment interest should not be allowed. If no double damages are awarded, then prejudgment interest is appropriate only on any award that is affirmed.

H. The Law Does Not Support the Amount of the Trial Court's Attorney's Fees Award.

1. Washington statutes authorize fee-shifting for wage violations, not labor violations.

For the same reasons set forth above explaining why the trial court incorrectly doubled damages for meal period violations, it also lacked any statutory basis for awarding attorneys' fees on the alleged meal period violations. The trial court cited RCW 49.48.030, 49.46.090(1), and 49.52.070, as its basis for awarding fees, but all three statutes provide for attorney fee-shifting only in disputes involving *wage* violations. Plaintiffs were already paid for all work performed during meal periods. Because the meal period violations were labor violations, not wage violations, the

[196] *Ventoza v. Anderson*, 14 Wn. App. 882, 897-98 (1976) ("Interest is generally disallowed when recourse upon a punitive statute is sought").

trial court had no basis to award attorney fees tied to Plaintiffs' meal period claims.

2. *A contingency-fee basis alone is insufficient to justify a 1.5 lodestar multiplier under Fiore.*

Although a multiplier award is discretionary, an award should be reversed on appeal if the trial court manifestly abused its discretion by awarding an unjustified risk multiplier.[197] The trial court abused its discretion when it awarded a lodestar multiplier supported by the same conclusions found insufficient in *Fiore*.[198] Cases involving the straight-forward litigation of issues do not warrant a risk multiplier.[199]

As this Court held in *Fiore*, the fact that a plaintiff's attorney accepts the case on a contingency-fee is insufficient to support a lodestar multiplier without more.[200] In *Fiore,* this Court reversed the application of a 1.25 multiplier because the trial court's two essential justifications for the lodestar application - the contingency basis and the plaintiff's potential liability for the defendant's own fees - were insufficient by themselves to justify the multiplier.[201] The Court found no factors otherwise justifying

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[197]*Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 540 (2007).
[198]*Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 357-58 (2012).
[199]*See, e.g.*, *Morgan v. Kingen,* 166 Wn.2d 526 (2009) (upholding the denial of a lodestar multiplier in an wage-claim class action hourly rates used to establish the lodestar figure sufficiently compensated for the quality of the work performed).
[200]*Fiore*, 169 Wn. App. at 357-58.
[201]*Fiore*, 169 Wn. App. at 356. *See also Martinez v. City of Tacoma*, 81 Wn. App. 228, 241 (1996) (court abused discretion by placing undue emphasis on contingent fee agreement when determining reasonable attorney's fees under RCW 49.60.030(2)).

the multiplier, such as "a high risk litigation strategy" or "novel problems of proof, and it reversed the award.[202]

Here, the trial court relied on the very same factors that *Fiore* found insufficient to justify the multiplier, namely, that "1) counsel would not have been compensated unless the plaintiff [sic] prevailed; and 2) because at the outset of the litigation no similar case had ever been decided and there was a real risk that plaintiffs would not prevail."[203] That "no similar case had ever been decided" hardly shows that the wage and hour issues in this case were particularly novel, underscored by the fact that *Pellino* was decided during the pendency of this case. 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, and does not justify a multiplier.[204] Because the trial court failed to make any findings to explain how this particular litigation was so excessively risky to warrant such a large upward adjustment of the Plaintiffs' fees, this Court should reverse the exceptional fee multiplier.[205]

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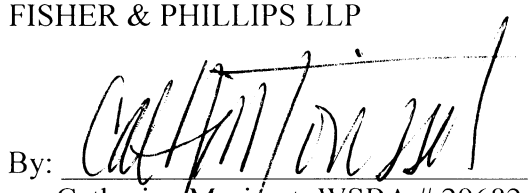
[202]*Fiore*, 169 Wn. App. at 357.
[203]CP 4193, ¶ 23.
[204]*Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593 (1983) (the lodestar is determined by multiplying a reasonable hourly rate by the hours reasonably expended).
[205]*Fiore*, 169 Wn. App. at 357 (contrasting its case to *Chuong Van Pham*, 124 Wn. App. at 722, where a lodestar multiplier was warranted "because clients were unable to explain their own claims, [and] their attorney pursued a 'high risk'' litigation strategy of proving the case through cross-examination and testimony of the adverse parties.")

V. CONCLUSION

In sum, Garda requests that this Court dismiss all of Plaintiffs' claims as preempted by F4A. Alternatively, Garda requests that this Court dismiss all of Plaintiffs' meal period claims as preempted by § 301. If this Court fails to conclude preemption applies, Garda requests that the Court reverse summary judgment on liability for both meal and rest periods, vacate the trial court's judgment awarding double damages under RCW 49.52.070 related to meal periods, vacate the trial court's judgment awarding both double damages and prejudgment interest, reverse the attorneys' fees award as related to meal period claims, and reverse the lodestar multiplier. Garda last requests that this Court remand this matter for further proceedings consistent with its opinion.

Respectfully submitted this 21st day of April, 2016

FISHER & PHILLIPS LLP



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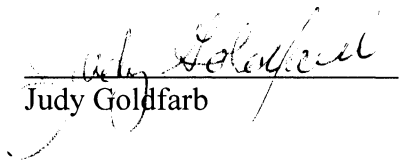

Judy Goldfarb

VI. APPENDIX

CBA	Meal Period Waiver	Employee's Right To Revoke Waiver	Date Executed
2004-2009 Mt Vernon Labor Agreement CP 383-402	"[R]outes will be scheduled without a designated lunch break[.]" CP 390.	"In the event a truck crew. . .wishes to schedule a non-paid lunch break, they must notify their supervisor."	6/1/04
2009-2012 Mt. Vernon Labor Agreement CP 405-422	"Employees hereto agree to an on-duty meal period." CP 413.	"Employees may have an off duty meal period if they make arrangements with their supervisor…or provide[] their supervisors with a written request to renounce the on-duty meal period[.]" *Id.*	3/31/09
2013-2016 Mount Vernon CBA CP 1128 - 1152	"The Employees hereto agree to an on-duty meal period." CP 1140.	"Employees may have an off duty meal period if they make arrangements with their supervisor…or provide[] their supervisors with a written request to renounce the on-duty meal period[.]" *Id.*	9/10/13
2006-2009 Pasco Labor Agreement CP 426-444	"[R]outes will be scheduled without a designated lunch break[.]" CP 433.	"In the event a truck crew on a Street or ATM route wishes to schedule a non-paid lunch break, they must notify their supervisor." *Id.*	8/ xx/06 (date illegible)
2010-2013 Pasco Labor Agreement CP 1154	"The Employees hereto waive any meal period(s) to which they would be otherwise entitled [.]" CP 1162.	"Employees may take an unpaid off-duty meal period if they make arrangements with their supervisor. . .or provide[] their supervisor with a written request to renounce the on-duty meal period [.]" *Id.*	5/1/10
2004-2008 Seattle Labor Agreement CP 447-465	"[R]outes will be scheduled without a designated lunch break." CP 454.	"In the event a truck crew. . .wishes to schedule a non-paid lunch break, they must notify their supervisor."	4/1/04 CP 465
2008-2011 Seattle Labor Agreement CP 470-487	"The Employees hereto agree to an on-duty meal period." CP 478.	"Employees may have an off duty meal period if they make arrangements with their supervisor in advance . . . or provide[] the supervisor with a written request to renounce the on-duty meal period[.]"	9/29/08

2007 Spokane Rules CP 491-	"[R]outes will be scheduled without a designated lunch break." CP 497.	"In the event a truck crew. . .wishes to schedule a non-paid lunch break, they must notify their supervisor."	7/07
2008-2011 Spokane Labor Agreement CP 508-525	"The Employees hereto agree to an on-duty meal period." CP 516.	"Employees may have an off duty meal period if they make arrangements with their supervisors in advance . . . or provide[] the supervisor with a written request to renounce the on-duty meal period [.]"	6/1/08
2005-2008 Tacoma Labor Agreement CP 529-47	"[R]outes will be scheduled without a designated lunch break." CP 536.	"In the event a truck crew. . .wishes to schedule a non-paid lunch break, they must notify their supervisor."	5/1/05
2009-2012 Tacoma Labor Agreement CP 550-67	"The Employees hereto agree to an on-duty meal period." *Id.* at 8, CP 558.	"Employees may have an off duty meal period if they make arrangements with their supervisors in advance . . . or provide[] the supervisor with a written request to renounce the on-duty meal period [.]"	11/19/08
2009 Wenatchee Labor Agreement CP 571-89	"[R]outes will be scheduled without a designated lunch break." CP 578.	"In the event a truck crew. . .wishes to schedule a non-paid lunch break, they must notify their supervisor."	9/1/06
2010 Wenatchee Labor Agreement CP 591-612	"The Employees hereto waive any meal period(s) to which they would otherwise be entitled." CP 601.	"Employees may take an unpaid off-duty meal period in exchange for an on-duty meal period.	4/20/10
2006-2009 Yakima Labor Agreement CP 615	"[R]outes will be scheduled without a designated lunch break." CP 622.	"In the event a truck crew. . .wishes to schedule a non-paid lunch break, they must notify their supervisor."	10/19/06
2010-2013 Yakima Labor Agreement CP 636-57	"The Employees hereto waive any meal period(s) to which they would otherwise be entitled." CP 646.	"Employees may take an unpaid off-duty meal period in exchange for an on-duty meal period."	5/1/01

Federal Statutes (in relevant part)

29 U.S.C. § 185

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

49 U.S.C. § 14501

(c) Motor Carriers of Property.—
(1) General rule —

Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

Washington Statutes and Regulations

RCW 49.12.187
Collective bargaining rights not affected.

This chapter shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing concerning wages or standards or conditions of employment. However, rules 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.

RCW 49.52.050 (in relevant part)
Rebates of wages—False records—Penalty.

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

. . .

Shall be guilty of a misdemeanor.

RCW 49.52.070
Civil liability for double damages.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

WAC 296-126-092
Meal periods—Rest periods.

(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

(3) Employees working three or more hours longer than a normal work day

shall be allowed at least one thirty-minute meal period prior to or during the overtime period.

(4) 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. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.

WAC 296-126-130 (in relevant part)
Variance.

(1) An employer may seek a variance from the rules under this chapter by submitting a written application to the director[.]

. . .

(3) After reviewing the application, the director shall grant the variance if the director determines that there is good cause for the variance from the rules under this chapter.

(4) "Good cause" means, but is not limited to, those situations where the employer can justify the variance and can prove that the variance does not have a harmful effect on the health, safety, and welfare of the employees involved[.]

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**MEAL AND REST PERIODS FOR NONAGRICULTURAL WORKERS AGE 18 AND OVER**	**NUMBER:**	**ES.C.6**
		REPLACES:	**ES-026**
CHAPTER:	**RCW 49.12** **WAC 296-126-092**	**ISSUED:** **REVISED:**	**1/2/2002** **6/24/2005**

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: **Minor employees** (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.

2. Are both private and public employees covered by these meal and rest period regulations?

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include "the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation". Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. *See Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements.*

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered 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, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

5. When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.

- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.

- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).

- The second 30-minute meal period must be given within five hours from the end of the first meal period and for each five hours worked thereafter.

6. When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

7. When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing

the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean than an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

11. When must rest periods be scheduled?

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

12. What are intermittent rest periods?

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.

An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

13. How do rest periods apply when employees are required to remain on call during their rest breaks?

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

14. May an employer obtain a variance from required meal and rest periods?

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. *See ES.C.9, Variances.*

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 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 Administrative Policy ES.A.6 and/or ES.C.1.*