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*

---

# REPLY BRIEF OF APPELLANT GARDA

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN 22 PM 4:49

---

CATHARINE MORISSET, WSBA # 29682
CLARENCE BELNAVIS, WSBA # 36681
ROCHELLE NELSON, WSBA # 48175
Fisher & Phillips LLP
1201 Third Avenue, Suite 2750
Seattle, Washington 98101
Tel. (206) 682-2308
Fax (206) 682-7908
*Attorneys for Appellant Garda CL Northwest, Inc.*

## TABLE OF CONTENTS

**I. INTRODUCTION AND SUMMARY OF REPLY .....1**

**II. ARGUMENT IN REPLY.....3**

A. Respondents' Brief Overgeneralizes Facts and Evidence, Imprecisely Cites the Record, and Mischaracterizes Cases.....3

B. Respondents Do Not Defeat F4A Preemption.....7

C. Washington Law Hardly Prohibits Employees from Collectively Bargaining Meal Period Waivers.....9

D. The CBA Waivers Create a Genuine Question of Fact as to Whether Respondents Waived their Meal Periods and Underscore that § 301 Preemption Applies.....12

E. Respondents' Claim for "Wages" for "On-Duty" Meal Period Inheres Solely in Their CBAs.....16

F. *Pellino* is Not a Silver Bullet; Respondents Misapply *Pellino* and Misconstrue the Evidence.....18

G. *Pellino* Does Not Mandate Class Certification.....21

H. No Evidence Shows Garda "Willfully" Withheld Meal Period "Wages."....21

I. Respondents Are Not Entitled to Prejudgment Interest in Addition to Compensatory Damages *or* Punitive Damages under Washington law.....23

J. Respondents' Lodestar Multiplier Argument is Inconsistent with *Fiore.* .....24

**III. CONCLUSION .....25**

## TABLE OF AUTHORITIES

**Cases**

*Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir. 2011) ..... 9

*Berg v. Hudesman*, 115 Wn.2d 657 (1990) ..... 13

*Blake v. Grant*, 65 Wn.2d 410 (1964) ..... 27

*Bowman v. Webster,* 44 Wn.2d 667, 670 (1954) ..... 14

*Brooklyn Sav. Bank v. o'Neil*, 324 U.S. 697 (1945) ..... 26

*Chelan Cty. Deputy Sheriffs' Ass'n v. Chelan Cty.*, 109 Wn. 2d 282 (1987) ..... 19

*Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120 (1992) ..... 17

*Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016) ..... 3

*Cowiche Canyon Conservancy v. Bosley,* 118 Wn. 2d 801 (1992) ..... 12

*Dilts v. Penske Logistics, LLC*, 769 F.3d 637, (9th Cir. 2014) ..... 3, 7, 8, 9

*Durand v. HIMC Corp.*, 151 Wn. App. 818 (2009) ..... 26

*Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879 (1955) ..... 27

*Iverson v. Snohomish County*, 117 Wn. App. 618 (2003). ..... 18

*Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665 (2014) ..... 26

*Metropolitan Life v. Mass.*, 471 U.S. 724 (1985) ..... 13

*Miller v. AT & T Network Sys.*, 850 F.2d 543 (9th Cir. 1988) ..... 13

*NW, Inc. v. Ginsberg*, - U.S. -, 134 S. Ct. 1422 (2014) ..... 3, 8

*Pellino v. Brink's Inc.*, 164 Wn. App. 668 (2011) ..... 6, 8, 10, 15, 19, 20, 21, 22, 23, 24

*Rayonier, Inc. v. Polson*, 400 F.2d 909 (9th Cir. 1968) ..... 27

*Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016) ..... 8

*State v. Evans*, 177 Wn. 2d 186, 193 (2013) ..... 10

*Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).....15

*Valles v. Ivy Hill Corp.*, 410 F.3d 1071 (9th Cir. 2005).....4, 17

*Ventoza v. Anderson*, 14 Wn. App. 882 (1976).....27

*White v. Salvation Army*, 118 Wn. App. 272 (2003).....19

*Wingert v. Yellow Freight Systems, Inc.*,
146 Wn. 2d 841 (2002).....11, 12, 18, 19

**Statutes**

28 U.S.C. §185.....2

49 U.S.C. § 14501.....3, 8

GR 14.1.....5

RCW 2.06.040.....5

RCW 49.12.187.....10, 11

RCW 49.46.090(1).....18

RCW 49.48.030.....18

RCW 49.52.070.....16, 18, 21, 23

WAC 296-126-092.....10, 11, 16, 17, 18

**Other Authorities**

Labor & Industries' Meal and Rest Period Guidance
E.S.C.6.....8, 9, 10, 11, 22

Washington Final Bill Report, May 12, 2003,
2003 Regular Session, Senate Bill 5995, WA F. B. Rep., 2003
Reg. Sess. S.B. 5995.....10

## I. INTRODUCTION AND SUMMARY OF REPLY

The trial court awarded Respondents significant "missed" meal and rest periods damages based on a meal period arrangement to which they expressly agreed, and for rest periods that they, in fact, testified they took. Despite having entered into agreements to waive meal periods – negotiated by their designated collective bargaining representatives and individually read, acknowledged, and signed – they claim they were deprived of the same. This result is not only fundamentally unjust, it is unsustainable under the law. No law or facts set forth in Respondents' Brief supports affirming the trial court's award.

The excessive award directly flowed from the numerous errors that occurred throughout the litigation below. Case law was argued and applied imprecisely, evidence was overgeneralized, key issues of fact were disposed of as a matter of law, and established precedent was either ignored or contravened.

As Garda set forth in its Opening Brief, there are three fundamental errors that must be addressed. First, Respondents' claim for unpaid "wages" for missed "on-duty" meal periods is derived entirely from the terms of their collective bargaining agreements (CBAs); Respondents do not have any stand-alone right to a paid, on-duty meal period under Washington law; thus, their wage claim for missed "on-duty"

meal periods runs squarely into 28 U.S.C. § 185 (a)'s ("§301") preemptive force. Second, the trial court's conclusion that valid meal period waivers must be tossed aside just because they were collectively, rather than individually negotiated, is unprecedented, unsupported by the Washington statutes or regulations, and improper under state and federal law. Tellingly, Respondents failed to address how this conclusion—which is blatantly hostile to the process of collective bargaining itself—escapes long-established labor law principles.

The trial court also erringly accepted Respondents' overgeneralizations about what "all" the CBA's meant or they intended when they signed them. These factual issues underscore why individual not class, issues predominated. Third, the trial court created an unprecedented rule that a single written policy requiring employees to maintain some level of "alertness" *per se* violates rest period rules, irrespective of how that policy was in fact understood, enforced, followed, or implemented. This factually intensive issue should not have been summarily decided without a trial. Last, putting aside these errors in imposing liability, the trial court awarded double damages to which Respondents were not entitled and used a lodestar multiplier for reasons not sufficient under clear precedent.

## II. ARGUMENT IN REPLY

### A. Respondents' Brief Overgeneralizes Facts and Evidence, Imprecisely Cites the Record, and Mischaracterizes Cases.

Rather than face the law and the facts Garda explained head on, Respondents engage in their same trial tactics on appeal -- overgeneralizing facts and evidence and misinterpreting or imprecisely summarizing cases while misleadingly citing the record. For example:

- Respondents claim *Dilts* foreclosed an "as applied" preemption challenge under the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("F4A") to California meal and rest break law,[1] when in fact, the **same** footnote they cited **expressly** provides that the court declined to reach that issue.[2]

- Respondents cited *Ginsberg* and *Costello* for a general proposition that the F4A does not preempt state laws (like meal period rules) if the employer can lawfully avoid them, even though **neither** states this. Costello did not reach the issue[3] and *Ginsberg* held that state law is not preempted if the parties can contract around it.[4] Notably, the actual holding directly contradicts Respondents' continuing arguments that a contractual CBA waiver is unlawful.[5]

- Respondents claim their meal period claims have nothing to do with their CBAs, while blatantly ignoring their own allegations in their Complaint and repeatedly relying on their interpretation of the term "on duty" meal period in the CBAs to prove their claims.[6]

---

[1]Brief of Respondents, filed May 23, 2016 ("Response") at 13.
[2]*Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 648 n.2 (9th Cir. 2014) (*en banc*).
[3]*Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1057 (7th Cir. 2016) (declining to reach the second prong of the preemption analysis).
[4]*NW, Inc. v. Ginsberg*, - U.S. -, 134 S. Ct. 1422, 1433 (2014) (State's implied-covenant laws are not preempted if its law "permits an airline to contract around those rules.")
[5]Response at 14.
[6]Response at 16 (Plaintiffs are not challenging the labor agreements); 20 (the agreements provide for an on-duty meal period); and 21 n. 17 (Plaintiffs' complaint is that they were deprived of their "on-duty" meal periods).

- Respondents' new claim that the "associations are not able to truly 'negotiate' with the company and for the most part have to accept what is offered,"[7] contradicts the named plaintiffs' own testimony: employees at each branch actively participated in the CBA negotiation process, reviewed proposals, and ratified agreements.[8]

- Respondents now claim that their Labor Agreements are not collectively bargained agreements,[9] yet their sole basis to dismiss the CBA waivers is their assertion that Washington prohibits collective bargaining of the same.

- Respondents rely on *Valles v. Ivy Hill Corp.,* 410 F.3d 1071 (9th Cir. 2005) to argue its principles are "strictly applied" in Washington[10] and meal period waivers cannot be collectively bargained,[11] even though it is well-settled that California's meal period right is **un-waivable**, while Washington's meal periods **are waivable.**[12]

- Respondents baldly conclude that "all Plaintiffs were required to …remain vigilant to threats against the truck and liability at all times," with no citation to the record.[13]

- Respondents claim that Garda's various branches have uniform meal and rest break policies, but cite only testimony about Garda's employee handbook and operations rules -- neither of which contain any rest or meal break policies or procedures.[14]

- Respondents assert that Garda managers testified that personal activities or devices were prohibited in the trucks, even though the **very same** deposition excerpts reveal that Garda managers uniformly testified in the same breath that those policies did **not** reflect reality.[15]

---

[7]Response at 6.
[8]*See, e.g.* CP 1001-1002 (16:13-19:1); VRP 04/24/2015 at 70:11-16, 05/29/2015 at 133:3-19 (employee explaining that they all sat at the table and negotiated terms).
[9]Response at 6.
[10]Response at 16
[11]Response at 17-18.
[12]Response at 16, 18.
[13]Response at 4.
[14]Response at 3 n.1 (citing CP 2956-59).
[15]Response at 3. *See also e.g.*, CP 2924 ("I'd lie if I said that some didn't go get a Redbox or something); 2949 (having cell phones on the truck "[is] the norm"); 2962-64; 2986, 2948, 3351 ("They're not allowed to… But they do. They do [.]").

- Respondents make the sweeping generalization that if crews take too long on their routes, then managers will post the times and confront the employees, but cite only a single piece of testimony in which one manager said that he resorted to this on a single occasion.[16]

- Respondents make the absolute statement, "there is never a time when crew members can completely relax and let their guards down," but their only support is managers' testimony that employees were expected to maintain a minimal level of "alertness" on their routes.[17]

- Respondents state that "[m]any employees testified that they had to urinate in bottles" when **not a single driver** testified to personally having that experience. Each testified only that they had heard of such rumored "horror stories" secondhand.[18]

- Respondents rely on an unpublished California District Court Order, which is both unpersuasive and violates RCW 2.06.040 and GR 14.1.[19]

- Respondents indiscriminately apply *Pellino*[20] to every aspect of this case, attempting to conceal that *Pellino* involved unchallenged facts on appeal, was resolved following a full trial on the evidence, and that *Pellino* did not involve any CBAs or waivers.

Respondents' mishandling of both the record and the case law resulted in a trial court decision that is legally unsustainable, and in many respects, self-contradictory. For example, the trial court concluded:

- Apparently accepting Respondents' argument that F4A preemption does not apply because drivers can just pull over to take a break, it still

---

[16]Response at 4 (citing CP 2946-47).

[17]Response at 6 (citing CP 2874-75 ("When I say alert, I mean make sure he's not sleeping ... I mean there's not a lot of security that can be done at 60 miles per hour."); CP 2984-85 (drivers should be alert because they are at risk for "bad guys" if they are sleeping or appear asleep); and CP 2358 (agreeing that drivers must be alert).

[18]Response at 4 n. 3 (citing CP 3129 ("I've heard stories [...] usually by word of mouth [...] again this is just secondhand."); CP 2933-34 ("I didn't want to do hearsay, but yeah"); CP 2925 (manager he has "heard" of it, but it should not be happening).

[19]Response at 14-15 (citing *Dunbar Armored, Inc. v. Rea*, 2004 U.S. Dist. LEXIS 31685, *18 (S.D. Cal. July 8, 2004)).

[20]*Pellino v. Brink's Inc.*, 164 Wn. App. 668 (2011).

awarded wages for missed rest periods because the so-called vigilance policy prevented any real breaks.[21]

- §301 preemption does not apply because it need not interpret any CBA, but then it did indeed interpret its term "on-duty" to establish meal period wage liability and to dismiss Garda's waiver defense and knowing submission defense to double damages.[22]

- The fact that only *some* CBAs contained the word "waiver," was sufficient to conclude that **none** of the CBAs provided for a waiver, even though some unequivocally did.[23] But on the other hand, the fact that *some* CBAs contained the term "on-duty" was sufficient to conclude that they **all** generally provided for "on-duty" meal periods.[24]

- The class members' claims could be adjudicated on class wide basis even though determining the validity of waivers requires an individual assessment as to each individual's intent,[25] and the waiver language was not identical for all class members in any case.

- There was no "bona fide dispute" for purpose of double damages because of the purported clarity of the law, and yet, this was a difficult "high risk" case warranting a 1.5 lodestar multiplier.[26]

The trial court's errors should be reversed.

---

[21]CP 2728 (order dismissing F4A defense); CP 3352 (order granting summary judgment as to rest and meal period liability); CP 3818 at ¶ 19 (there is no bona fide dispute that Garda's vigilance policy violates rest and meal period laws). *See also Cf.* CP 2759 with CP 2063 (Respondents argument). The trial court improperly dismissed F4A preemption without entering any findings or conclusions. CP 2728-29. Garda challenged this deficiency in its Opening Brief at 9.

[22]CP 3818-19 at ¶ 21 ("Plaintiffs' claims [did not] require substantial interpretation of the CBAs"); CP 3818 at ¶ 20 (interpreting the CBA's term "on-duty" under Wash. law).

[23]CP 3818, 3820 (dismissing waiver and knowing submission defenses entirely because the CBAs "generally did not" contain waivers.)

[24] CP 3818 at ¶ 20.

[25]CP 3818 at ¶ 20, CP 3820 at ¶ 25.

[26]CP 3818 at ¶ 19 (there was no bona fide dispute as to any issues of liability or defenses); CP 4192-93 at ¶ 23 (this was a "high-stakes" case involving unsettled law).

### B. Respondents Do Not Defeat F4A Preemption.

Respondents' opposition to F4A preemption is fundamentally flawed and contradictory. They now downplay their earlier arguments that there is no preemption because the drivers could pull over and take a break at any time,[27] yet stick to their argument that the drivers were never relieved of work because they were required to remain "vigilant" at all times.[28] Further, they rely on a case that found no preemption because, by contrast, the employer could allow "minor deviations from [] routes" that would provide breaks,[29] while steadfastly holding to their position that work-free, or "vigilance free" breaks were impossible. They rely on this same case analyzing preemption in the context of California's waivable rest period right, while glossing over the fact that Washington allows only meal period, **not** rest period, waivers.[30] They also claim that this case prevents any "as applied" challenge by "all motor carriers," when the case states the opposite.[31] They claim that there can be no F4A preemption if there is the potential to obtain a meal or rest period variance;[32] however, they only cite a case holding state law is not preempted if the parties can

---

[27]CP 2049:6.
[28]CP 2757:14-25.
[29]*Dilts*, 769 F.3d at 649 (emphasis added).
[30]California's meal and rest break laws allow employers to simply pay employees for any missed breaks, while this compliance option is not available in Washington. *See Pellino*, 164 Wn. App. at 686-87.
[31]*Cf.* Response at 13 *with* the actual language in *Dilts*, 769 F.3d at 648 n.2.
[32]Response at 14.

contract around it,[33] while firmly maintaining that their contractual CBA waivers were unlawful. Respondents simply cannot have it both ways.

As for Respondents' claim of no "significant" impact of the meal or rest period rules on Garda's operations, they ignore that "logical," "indirect" interference is enough, and Garda need not demonstrate it with "empirical evidence."[34] The substantial impact of the regulation on Garda's routes, prices, and service[35] is unmistakable. If the Court accepts Respondents' argument that the so-called vigilance policy deprived them from any breaks as a matter of law, then the direct impact on routes and services is clear. As Garda explained in its Opening Brief, the logical and natural consequence of restricting the routes' distance to allow trucks to return to a safe location, or to allow for relief crews to arrive, is removal and editing of routes and services.[36] This meaningful interference with Garda's ability to select its starting points, destinations, and routes undoubtedly impacts its routes, prices, and services. Unlike *Dilts,* there is a direct impact on more than just prices, but on the routes and services themselves. F4A preempts Respondents' claims.

---

[33] *Ginsberg*, 134 S. Ct. at 1433.
[34] *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 437 (1st Cir. 2016).
[35] *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)).
[36] Opening Brief at 13-14.

### C. Washington Law Hardly Prohibits Employees from Collectively Bargaining Meal Period Waivers.

Respondents offer a tortured interpretation of Labor & Industries' Meal and Rest Period guidance E.S.C.6 ("Guidance") to support their conclusion that employees may only waive meal periods individually, but not through collective bargaining unless they are public sector or construction workers. Respondents' interpretation defies both logic and well-settled labor law principles.

It is black-letter law that meal periods are waivable under Washington law, if the employer and employee agree.[37] This is, indeed, the "floor" that Washington law sets: Employers must provide employees with an unpaid, off-duty meal period for every five hours worked or obtain a valid waiver.[38] Contrary to Respondents' overreaching, just because an employee must be able to revoke the waiver at any time does not mean that a waiver meeting this requirement cannot be included in a CBA. As was the case here, the CBAs' various meal period waivers expressly provided that drivers may revoke their waiver by requesting an off-duty meal period[39] or a "non-paid lunch break" at any time.[40] Including a meal

---

[37]*Pellino*, 164 Wn. App. at 697 (citing Guidance §§ 8, 9).

[38]Employees must also be allowed another meal break if they work three hours or more beyond their normal workday. Guidance § 5 ("When is a meal period required?").

[39]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 [.]"

period waiver in a CBA, especially when (1) there is no requirement that the meal period waiver even be in writing in the first place[41] and (2) the written waiver allows the employee to revoke his/her waiver at any time, hardly goes below the "floor" set by WAC 296-126-092 and the Guidance.

Respondents argue that RCW 49.12.187 would be rendered meaningless if private, non-construction trade employers could waive meal periods through CBAs. This is a gross overstatement. Notably absent from RCW 49.12.187 is any language even related to, let alone prohibiting, meal period waivers. RCW 49.12.187 simply states that public or construction employees may enter into CBAs "that specifically vary from or supersede . . . rules regarding appropriate rest and meal periods." The amendment explains exactly what the Legislature intended: by "superseding" meal and rest period rules, employees in the public or construction sector can collectively bargain **when** meal or rest periods will occur, as long as the agreement provides for them.[42]

---

[40]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."

[41]Guidance § 8 ("May an employee waive the meal period?").

[42]To extent RCW 49.12.187 is ambiguous, a review of the legislative history also shows that this interpretation is correct. *See generally State v. Evans*, 177 Wn. 2d 186, 193 (2013) (legislative history may be consulted if more than one interpretation of the plain language is reasonable and the statute is thus ambiguous) (internal citations omitted). The Final Bill Report for the construction trades amendment states it was passed in reaction to *Wingert*, which invalidated a CBA provision that allowed required a 15-minute rest period *after* two hours of overtime work, rather than a 10-minute break *during* the first 2 hours of an overtime assignment. *See* May 12, 2003, Washington Final Bill Report, 2003

Consistent with the statute, §§ 3 and 4 of the Guidance simply state that public or construction trade employers can negotiate CBAs that provide "meal and periods different from those under WAC 296-126-092." Meal period waivers are allowed under Washington law; Garda's CBAs did not impose meal (or rest) period requirements "different from" WAC 296-126-092. Instead, the CBAs' terms exactly track the language of Guidance § 8 providing for meal period waivers. Respondents' reading of the Guidance is strained and inconsistent with RCW 49.12.187.[43]

And finally, Respondents' efforts to put aside the importance of the fundamental right to collectively bargain waivable rights cannot stand. As a waivable right, meal periods are clearly negotiable.[44] Respondents offer no response other than dismissive rhetoric to address how their interpretation of the law—that meal period waivers can be individually, but not collectively, negotiated—can be squared with the requirement that a state's minimum labor standards must "neither encourage nor discourage

---

Regular Session, Senate Bill 5995, WA F. B. Rep., 2003 Reg. Sess. S.B. 5995 (discussing *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn. 2d 841 (2002)). In essence, this statute was passed to ensure that construction and public employers could use CBAs to contract for different rest and meal period timing than those required by regulation. Respondents' unsupported speculation that the purpose of the 2003 amendments aimed to bar otherwise valid meal period waivers in CBAs lacks any grounding in the legislative history.

[43]*See Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 815 (1992) (an administrative interpretation is not accorded deference if the agency's interpretation conflicts with the relevant statute).

[44]*Miller v. AT & T Network Sys.*, 850 F.2d 543, 546 (9th Cir. 1988) (emphasis added) (explaining that a state right is only "nonnegotiable" if state law "**does not permit it to be waived**, alienated, or altered by private agreement").

the collective-bargaining process [.]"[45] Their proffered interpretation of the Guidance violates this mandate.

### D. The CBA Waivers Create a Genuine Question of Fact as to Whether Respondents Waived their Meal Periods and Underscore that § 301 Preemption Applies.

Respondents fail to demonstrate how the meaning of their meal period waivers could be properly determined as a matter of law. Contract interpretation is a matter of ascertaining the parties' intent by evaluating the entire circumstance in which the contract was made and the reasonableness of the parties' competing interpretations.[46] Such an inquiry generally precludes resolution as a matter of law.[47] Here, genuine questions of fact remained as to the parties' intent when they agreed to either "routes [...] scheduled without a designated lunch break", "to an on-duty meal period", or to "waive any meal period(s) they would otherwise be entitled."[48] None of Respondents' arguments change the black letter law that whether waiver exists is a question of fact.[49]

Respondents first argue that these waivers were not effective

---

[45] *Metropolitan Life v. Mass.*, 471 U.S. 724, 755 (1985).
[46] *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990).
[47] *Berg*, 115 Wn.2d at 678.
[48] *See* CBA Table in the *Appendix* to Garda's Opening Brief. Note, Respondents state that two CBAs are "missing" from the table. Response at 6 n. 5 (citing CP 4230-59). They filed these missing documents with the trial court after Garda filed its brief. Respondents also identified only one of the two "missing" CBAs, the Seattle 2013 CBA.
[49] *Bowman v. Webster*, 44 Wn.2d 667, 670 (1954).

because the "vast majority"[50] do not contain the word "waive," and the terms "on-duty" or "unscheduled" do not signify a waiver under Washington law.[51] Not only does this underscore that issues of fact existed, but their argument also illustrates why §301 preemption applies. As explained by the United States Supreme Court, §301's very purpose is to prevent state courts from applying their state law to interpret CBAs:

> The possibility that **individual contract terms might have different meanings under state and federal law** would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.... [T]he process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. **Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.**[52]

Thus, Respondents' argument that the CBAs must necessarily have the same meaning of "on-duty" that the Washington State Court of Appeals used in its decision in *Pellino* —a case decided years *after* these agreements were executed—is directly controverted by federal law. It is wholly without logic to conclude as a matter of law that the parties

---

[50]Response at 15 n. 12.

[51]Respondents misquote the terms of the CBAs in their brief. The CBAs do **not** provide for "'unscheduled' meal periods," as they state. Response at 20. Those CBAs provide that the routes will be scheduled without a designated meal period. For contract interpretation, it is important to be exact in the actual stated terms. In this instance, the former sentence implies that the CBA provides for meal periods; the latter does not.

[52]*Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) (emphasis added).

intended the CBA terms to have a meaning from a case not yet decided. CBAs simply are not subject to the patchwork of state law interpretation. The technical meaning of "on-duty" under state law cannot supply the definitive meaning of that term in the CBAs.

Moreover, the CBA provisions do not even set forth an "on-call" or "on-duty" type of meal break arrangement that Respondents suggest. Each plainly provides that the employee agrees to work through the day (forego a designated break; remain on-duty; waive lunches) unless they request otherwise. It stands to reason that **had** the parties intended to agree to some "on-call" type arrangement, the parameters of that arrangement would be more apparent from the CBA's text: the provision would have outlined the expectations for the "on-duty" meal periods, which inferably would be different than regular on-duty time or a work-free, unpaid meal period. In any case, resolution of the meaning of the CBAs' terms is something that the trial court should have resolved as an issue of fact, rather than summarily disregard them for all purposes.

Respondents alternatively argue that the CBAs' waivers are invalid because they had no individual choice to refuse them. This assertion is both factually and legally incorrect. First, the CBAs uniformly provide that any individual desiring a meal period can request from a supervisor by

asking for one.[53] Thus, the individual's choice is built into the agreement. Second, this argument again runs into the same NLRA preemption issue discussed above: a waiver cannot be invalid simply because it is collectively, rather than individually, negotiated. Such a conclusion undermines the bargaining process itself.

Finally, Respondents boldly state that the drivers' testimony is "uniform" that they never requested meal periods because they did not believe they would have received one.[54] Yet the actual testimony was far from uniform. At least 15 employees declared that they understood they had a right to request one at any time but chose to work through the day.[55] These same employees signed individual acknowledgments confirming that they read and understood the CBAs' terms. Given that Washington law does not even require that meal period waivers be in writing, these two facts create an irrefutable question of fact as to whether Respondents voluntarily chose not to request a meal break (per their arrangement) or declined to ask because Garda actively discouraged meal breaks (an allegation Garda denies). This evidence precluded summary dismissal.

---

[53]*See* Appendix summarizing CBAs attached to Opening Brief.
[54]Response at 22.
[55]CP 770-839.

### E. Respondents' Claim for "Wages" for "On-Duty" Meal Period Inheres Solely in Their CBAs.

Respondents continue to argue that § 301 preemption does not apply because their claims are based on an independent state right, and only Garda's waiver defense mandates substantial interpretation of the CBA.[56] This is false. As pointed out in Garda's Opening Brief, Respondents' Complaint specifically alleged (and Respondents continue to argue on appeal) that Garda failed to provide them with the "on-duty" meal periods that the CBAs provided.[57] The CBAs provide the *sole* basis for Respondents' claim that Garda promised a work-free "on-duty" meal period which they did not receive, and are owed damages even though they were paid for this time.

Respondents also failed to show they have an independent claim under RCW 49.52.070 for withheld "wages" for their missed meal periods. Respondents undermine the Supreme Court's *Wingert* analysis[58] when they assert that any damages owed for meal period violations are "wages" simply because they are calculated using the same hourly rate, or

---

[56]Response at 15-20 (citing *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 131 (1992) and *Valles*, 410 F.3d at 1076 (involving California law).

[57]Response at 21 n.17 ("Plaintiffs' complaint is not that they were denied off-duty meal periods [...] but that they were deprived of lawful, work-free, on-duty meal periods.") *See also* Plaintiffs' Complaint at CP 0005. Also note, that only **six** of the 16 CBAs provide for an "on-duty" meal period. *See* Appendix and CP 4230.

[58]*Wingert*, 146 Wn.2d at 849 (holding that although violations of WAC 296-126-092 are generally pure labor violations, rest period violations are both wage and labor violations because employees have an unconditional, unwaiveable right to a paid rest break).

because they were recovered by "reason of employment." Their assertion also conflicts with this Court's decision in *Iverson,* which clearly explained that **no** authority stood for the proposition that the plaintiff, already paid wages for his lunch period, was owed additional wages because he performed some duties that period.[59] If RCW 49.52.070 provides damages for labor violations, as Respondents suggest, then *Wingert's* entire analysis distinguishing labor violations from wage violations for RCW 49.52.070 purposes is entirely superfluous.

Respondents alternatively allege that they were deprived of **wages** because they did not receive work-free, paid on-duty meal periods.[60] This argument is also unavailing. WAC 296-126-092 only requires that employees "shall be allowed" an unpaid 30 minute meal period. It does not require employers to offer an "on-duty" paid meal break option. A duty-free, "on-duty" paid lunch, not an unconditional, independent right. It also does not follow that L&I meant to transmute all meal period violations into a wage violation just by recognizing the option of a paid "on-duty" meal period.[61] A claim for withheld **wages** exists when the

---

[59]*Iverson v. Snohomish County*, 117 Wn. App. 618, 622 (2003).

[60]Response at 21 n. 17.

[61]The Court in *Pellino* awarded damages for the meal period violations without addressing its basis for its award. Garda agrees that *Wingert* may apply "with equal force to the requirement that on-duty employees 'shall be allowed' a total of 30 minutes for a meal period without engaging in work activities." *Pellino*, 164 Wn. App. at 690. However, *Wingert* patently *cannot* apply with equal force with respect to "wages" owed for **any and all** meal period violations because, unlike rest periods, the regulation does

employer provides an "on-duty" meal period, fails to relieve the employee of active duty, **and** fails to pay wages.[62]

With the exception of the CBAs, there is no evidence that the parties agreed to a work-free, "on-duty" meal period. Garda has consistently maintained that crews were expected to work their shifts *without* any work-free 30-minute meal period, unless they requested one from their supervisor, and would be paid for all time worked. Thus, if Respondents wished to recover damages on a theory that Garda breached its promise to provide Respondents with paid, "on-duty" meal breaks, they must do so by following the grievance procedure set out in the CBAs. Because Respondents have no independent claim that they were entitled to "on-duty" meal periods, they are not entitled to any damages for "wages" under RCW 49.52.070, or to attorneys' fees under RCW 49.48.030, 49.46.090(1), because they recovered only for a labor, not wage, violation.

### F. *Pellino* is Not a Silver Bullet; Respondents Misapply *Pellino* and Misconstrue the Evidence.

The thrust of Respondents' entire position is that *Pellino* controls

---

not guarantee the unconditional right a paid meal period. Plaintiffs' argument to the contrary ignores the general rule that meal periods are unpaid.

[62] *See generally Chelan Cty. Deputy Sheriffs' Ass'n v. Chelan Cty.*, 109 Wn. 2d 282 (1987); *White v. Salvation Army*, 118 Wn. App. 272, 278 (2003) (additional compensation not owed when and the workers were already paid for on-call meal period). *See also* Guidance § 7 ("As long as the employer pays the employees during an [on-duty] 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.:).

this case, such that no genuine factual dispute existed as to liability. Respondents' argument fails for two reasons. First, the rest period issue in *Pellino* was not decided as a matter of law. *Pellino* held the trial court's **unchallenged** findings of fact, namely that the employees were never relieved of active guard duty, was sufficient to support rest and meal period liability.[63] The *Pellino* court did *not* hold that a single written policy requiring alertness creates rest break liability *as a matter of law*—irrespective of how the policy is enforced, the level of "alertness" that is actually required, or whether employees did in fact receive a break. The Respondent's argument to this effect far exceeds *Pellino*'s actual holding. If this Court affirmed the trial court's summary judgment on this factually intensive issue, it would effectively create a new rule that a written policy *per se* violates rest break rules, regardless of any other facts. This would be unprecedented, illogical, and contrary to *Pellino*.

Further, Garda offered more than sufficient evidence to dispute Respondents' allegation that they were discouraged from taking breaks and required to maintain unrelenting vigilance in the same manner as *Pellino*. In *Pellino*, the Court held that the trial court's **unchallenged** findings of fact—its findings that Brink's managers discouraged breaks,

---

[63] *See Pellino*, 164 Wn. App. at 678 (concluding that ample credible evidence supported the trial court's finding that Brinks' employees were never afforded any moment of relief because of the nature of their routes, the employees' testimony, and the company's strict prohibition on personal devices).

class members were required to engage in active vigilance even on breaks, and were *never* permitted to enjoy personal activities while on duty—was sufficient to support a finding of rest period liability. [64] In contrast here, the record is replete with testimony from managers who verbally encouraged crews to take breaks[65] and provided sufficient time to take breaks,[66] and with testimony from crew members that they enjoyed stretches of time where they used cell phones, read magazines and newspapers, ate meals, slept, enjoyed smoke breaks – during which they clearly were not actively "vigilant."[67] Crews were relieved of active duty when they were resting and engaging in personal activities.

The evidence also shows that Garda's "alertness" policy bears very little semblance to the constant vigilance policy in *Pellino*. As Garda's 30(b)(6) witness explained, "When I say alert, I mean make sure he's not sleeping."[68] Crews are expected to be alert in the sense that they are aware of their surroundings, not because they are expected to maintain active

---

[64] 164 Wn. App. at 686.

[65] *See e.g.* CP 3103, CP 3113, and CP 3120 (all three managers testifying that they told their crews to take rest breaks while on the routes).

[66] *See* CP 3102, CP 3114, and CP 3119 (all three testifying that the routes are set up to allow time for breaks).

[67] CP 2011 (employees streamed music, texted, and accessed social media while on routes); CP 2002-03 (while on-duty would comment and post to Facebook, use Instagram, and his cell phone); CP 1831 (coworker made 25-30 personal calls in a single day while on a route); CP 1904 (coworker brought newspaper with him for the route); CP 1959 (named plaintiff, Adam Wise, admitting he occasionally brought reading materials onboard and it was "possible" he would read those materials during his routes).

[68] CP 2325-27 (crew members cannot sleep while on route, but they do have a reduced responsibility to be alert while riding in the back of the truck).

guard over the truck and Liability, but because they are more susceptible to attack if they appear asleep.[69] This "alertness" policy, as Garda's training materials and Garda managers explained, is a safety policy, not a job duty. It was **far** from "undisputed" below that Garda's alertness policy required drivers to maintain constant active vigilance. The evidence should have been weighed by the trier of fact to determine if the drivers were truly deprived of meaningful rest breaks.

### G. *Pellino* Does Not Mandate Class Certification.

Respondents' varied rest break testimony, combined with the CBAs' varied meal period waiver terms, also should have precluded class certification. When presented with these same facts on Garda's decertification motion, the trial court abused its discretion by failing to conduct any CR 23 analysis and by ignoring key factual differences to fit each individual's claim into a *Pellino*-seized box. Patently unlike *Pellino*, however, this case involved a written meal period waiver requiring the interpretation of three different CBAs' versions and how each individual understood them.[70] Such key factual differences warranted decertification.

### H. No Evidence Shows Garda "Willfully" Withheld Meal Period "Wages."

Respondents fail to identify any substantial evidence to support the

---

[69] CP 2344-45 (explaining the purpose of maintaining some level of alertness is for safety; if you are asleep or appear asleep then you more vulnerable to attack).
[70] *Cf Pellino*, 164 Wn. App. at 697.

trial court's finding that Garda "willfully" withheld meal period wages to support an award of double damages under RCW 49.52.070, simply implying it was patently obvious they were warranted. It was not. Garda relied in good faith on the CBAs and Respondents' individually signed acknowledgments of them and had little reason to suspect that their (revocable) meal period waivers would be invalidated simply because they were collectively negotiated. For the reasons set forth above, it cannot be correct that "Washington law clearly forbids waiver of the right to meal breaks through CBAs," just based on Guidance § 15 and an unpublished federal district court decision.[71] The Guidance itself is not law, the Guidance **does not** prohibit CBA waivers of negotiable rights in any case, and Respondents' strained interpretation to this effect violates the NLRA. Any one of these bases establishes grounds for Garda's reasonable and bona fide belief in the effectiveness of its waivers.

The same signed acknowledgements are also evidence, at a minimum, that Respondents knowingly submitted to the meal period arrangements. Respondents argue that there can be no knowing submission while Respondents actively challenged the meal period waivers in litigation.[72] However, even assuming the waivers cannot

---

[71] Response at 25 citing the trial court's order at CP 3818 ¶ 20 (in which the trial court in turn cites the Guidance § 15 and an unpublished federal district court decision).
[72] Response at 36 n. 25.

evidence Respondents' knowing submission, the validity of these CBA waivers has been disputed for years; Respondents were plainly aware that Garda relied on their CBA waivers which allowed them to request a meal period at any time. And yet, even after Respondents alleged that they desired fully-relieved meal breaks, **none** requested an off-duty meal period per the terms of the CBA.[73] Respondents should not be allowed a windfall by way of double damages for choosing to ignore their written agreements and allow their potential for damages to accumulate.

### I. Respondents Are Not Entitled to Prejudgment Interest in Addition to Compensatory Damages *or* Punitive Damages under Washington law.

The trial court unlawfully double-compensated Respondents when it awarded both interest and double damages under RCW 49.52.070 as the statute, in part, is already designed to compensate the employee for the delay in any wage payment.[74] Under guiding FLSA precedent, the trial court erred by compensating Respondents twice for the same harm.[75] Respondents refute this well-established principle by improperly relying on the unpublished portion of *Durand v. HMC Corp.*, 151 Wn. App. 818 (2009).[76] Such a violation of court rules[77] cannot save them.

---

[73] Respondents concede that employees did not request meal periods. Response at 22.
[74] *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665 (2014).
[75] *Brooklyn Sav. Bank v. o'Neil*, 324 U.S. 697, 715 (1945).
[76] Response at 37.
[77] RCW 2.06.040 and GR 14.1

More importantly, if, as Respondents allege, the sole purpose of RCW 49.52.070 were to punish and deter the employer, the trial court's award is invalid under Washington's long line of cases instructing that prejudgment interest is generally disallowed when the party seeks recourse under a punitive statute.[78] Courts have consistently held that statutes allowing exemplary damages that are penal in character must be strictly construed, and an award cannot be expanded by implication to provide for additional remedies beyond those provided for in the statute.[79] Thus, because RCW 49.52.070 does not specifically mention prejudgment interest, the trial court lacked authority to expand the statute to add prejudgment interest as an additional remedy.

### J. Respondents' Lodestar Multiplier Argument is Inconsistent with *Fiore.*

In response to Garda's challenge to the award of a lodestar multiplier, Respondents still fail to cite a **single** justification for their 1.5 lodestar multiplier that was not already articulated, and held insufficient, in *Fiore. PPG Industries, Inc.*[80] *Fiore* instructs that there must be some

---

[78] *Ventoza v. Anderson*, 14 Wn. App. 882, 897-98 (1976); *Blake v. Grant*, 65 Wn.2d 410 (1964); *Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879 (1955).

[79] *In Rayonier, Inc. v. Polson*, 400 F.2d 909 (9th Cir. 1968) (when recovery is sought under the punitive treble damage statute, which has no provision for interest, the statute cannot be extended by implication to provide for interest upon any portion of the award).

[80] 169 Wn. App. 325 (2012); The Respondents also include a red herring argument that the lodestar multiplier should stand because Garda refused to provide its own total in attorneys' fees. This argument is not only irrelevant, it misstates the law. A party opposing a requested lodestar has no obligation to share how much it spends on legal fees

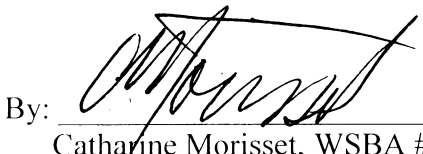
other risk factor associated with the difficulty of litigating other than the contingency-fee arrangement. The lodestar already accounts for the required additional time and effort on part of counsel for a class-action. The trial court provided no other justification for why this case was a "high risk" case, and as such, the trial court's award should be reversed.

## III. CONCLUSION

For these reasons, and for the reasons stated in Garda's Opening Brief, the trial court's errors should be reversed, and the judgment dismissed in its entirety or remanded to trial for a full and proper adjudication on the merits.

Respectfully submitted this 22nd day of June, 2016

FISHER & PHILLIPS LLP



By: _____
Catharine Morisset, WSBA # 29682
Clarence Belnavis, WSBA # 36681
Rochelle Nelson, WSBA # 48175
*Attorneys for Appellant Garda*

---

*unless* they make a specific challenge to unnecessary or excessive charges. *See Fiore*, 169 Wn. App at 355. Garda made **no** such challenge in its opposition to Plaintiffs' request for fees.

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing by the method(s) indicated below on:

Daniel F. Johnson
Breskin Johnson & Townsend PLLC
1000 Second Avenue Suite 3670
Seattle, WA 98104
Tel. (206) 652-8660
Fax (206) 652-8290
djohnson@bjtlegal.com
**Attorney for Respondents**

Adam Berger
Martin Garfinkel
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104
Tel. (206) 622-8000
Fax (206) 682-2305
berger@sgb-law.com
garfinkel@sgb-law.com
**Attorneys for Respondents**

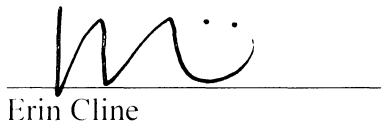
☐ **US Mail**: by mailing a full, true, and correct copy in a sealed envelope with postage prepaid thereon, addressed as above stated, which is the last-known office address of the attorney, and depositing it with the United States Postal Service at Portland, Oregon, on the date set forth below.

☐ **Email**: by emailing to the attorney at the email address as above stated, which is the last known email address for the attorney's office, on the date set forth below.

☒ **Hand-Delivery:** by causing a full, true and correct copy thereof to be hand-delivered to the attorney at either the attorney's last-known office address as above stated, on the date set forth below, or at another location where the attorney is known to be, on the date set forth below.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN 22 PM 4:49

DATED: June 22, 2016.



Erin Cline