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THE SUPREME COURT OF WASHINGTON
Case No. 94593-4

Court of Appeals Case No. 74617-1

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

Respondents/Cross Petitioners

v.

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

Petitioner/Cross Respondent

**SUPPLEMENTAL BRIEF OF PETITIONER/CROSS
RESPONDENT GARDA CL NORTHWEST, INC.,
f/k/a AT SYSTEMS, INC.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii-iii

I. INTRODUCTION1

II. ISSUES ACCEPTED FOR REVIEW1

III. STATEMENT OF THE CASE2

A. The Drivers Agreed to Paid On-Duty Meal Periods in Their Collective Bargaining Agreements.....2

B. The Trial Court Improperly Awarded Both Prejudgment Interested and Punitive Damages.4

IV. ARGUMENT6

A. Garda Did Not Willfully Deprive Drivers of “Additional Wages” When it Paid Drivers for a Meal Period they Agreed to Waive.....6

 1. *Garda Paid the Drivers as Agreed in the CBA.*7

 2. *It Was Fairly Debatable Whether the CBA Waivers Were Enforceable.*.....8

 3. *No Prior Cases or L&Is Policy Prohibited Meal Period Waivers in Collective Bargaining Agreements.*.....8

B. The Drivers are Not Entitled to Double Recovery for their “Back Pay” Award.....15

V. CONCLUSION20

VI. APPENDIX.....a

TABLE OF AUTHORITIES

	Page(s)
State Cases	
<i>Ass'n of Wash. Bus. v. Wash. Dep't of Revenue</i> , 155 Wn. 2d 430, 447 (2005)	12
<i>Blake v. Grant</i> , 65 Wn. 2d 410 (1964)	19
<i>Bostain v. Food Exp., Inc.</i> , 159 Wn.2d 700, 723 (2007)	20
<i>Champagne v. Thurston Cty.</i> , 163 Wn. 2d 69 (2008).....	7,8
<i>Duncan v. Alaska USA Fed. Credit Union, Inc.</i> , 148 Wn. App. 52 (2008).....	8
<i>Hill v. Garda CL Nw., Inc.</i> , 198 Wn. App. 326, 366 (2017)	15
<i>JDFJ Corp. v. Int'l Raceway, Inc.</i> , 97 Wn.App. 1, 10 (1999).	19
<i>Jumamil v. Lakeside Casino, LLC</i> , 179 Wn. App. 665 (2014).....	17
<i>Moore v. Blue Frog Mobile, Inc.</i> , 153 Wn.App. 1, 8 (2009)	8
<i>Morgan v. Kingen</i> , 166 Wn.2d 526 (2009).....	16, 17
<i>Pellino v. Brink's, Inc.</i> , 164 Wn. App. 668 (2011).....	5, 9, 15
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn. 2d 152, 160 (1998)	6, 8, 17
<i>Stevens v. Brink's Home Sec., Inc.</i> , 162 Wn.2d 42, 50-51 (2007)	16
<i>Ventoza v. Anderson</i> , 14 Wn. App. 882 (1976).....	16, 17, 19

Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.,
175 Wn.2d 822 (2012).....6, 7, 8

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

Federal Cases

Brooklyn Sav. Bank v. O'Neil,
324 U.S. 697 (1945) 18, 19

Livadas v. Bradshaw, 512 U.S. 107, 120 (1994) 13

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

Miller v. AT & T Network Sys.,
850 F.2d 543 (9th Cir. 1988) 11

NLRB v. Lettie Lee, Inc.,
140 F.2d 243 (9th Cir. 1944) 11

Rayonier, Inc. v. Poison, 400 F.2d 909 (9th Cir. 1968) 16

San Diego Building Trades Council v. Garmon, 359 U.S.
236 (1959) 13

State Statutes

RCW 49.12.005 10

RCW 49.12.187 9, 10, 11, 13

RCW 49.52.050 17

RCW 49.52.070 1, 4, 5, 6, 15, 17, 18, 20

Federal Statutes

28 U.S.C. § 185 14

29 U.S.C. § 151 13

29 U.S.C. § 157 13, 17

29 U.S.C. § 206	18
29 U.S.C. § 216	18
49 U.S.C. § 14501	14
Regulations	
WAC 196-126-092	3, 9, 10, 12

I. INTRODUCTION

This appeal arises from a bench trial awarding damages for missed meal and rest periods to Plaintiffs, former Washington drivers and messengers representing a class of similar current and former employees (“Drivers”) working for armored car carrier Garda CL Northwest, Inc., f/k/a AT Systems, Inc. (“Garda”). This supplemental brief addresses the facts and law related to the two issues for which this Court granted review.

II. ISSUES ACCEPTED FOR REVIEW

1. Whether the Drivers were entitled to exemplary damages under RCW 49.52.070 for missed meal periods when there was a bona fide dispute as to whether the Drivers were entitled to additional pay for on-duty meal periods because the Drivers knowingly submitted to any labor violation when they intentionally waived off-duty meal periods or agreed to on-duty meal periods through their individually acknowledged collective bargaining agreements, and it was thus fairly debatable whether additional rest period pay was owed?

2. Whether the trial court improperly awarded both double damages and prejudgment interest when such exemplary damages compensate employees both for the harm due to a delayed wage payment and punish the employer, and Washington’s wage violations are silent regarding prejudgment interest?

III. STATEMENT OF THE CASE

A. The Drivers Agreed to Paid On-Duty Meal Periods in Their Collective Bargaining Agreements.

Garda is an armored car carrier that operated seven Washington branches at the time relevant to this appeal: Seattle, Mount Vernon, Tacoma, Yakima, Wenatchee, Spokane, and Pasco.¹ To deliver and transport currency or other valuables, 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 assists in transports if the valuables directly to the customer.²

Plaintiffs' employment was, at all relevant times, governed by the terms of the applicable Labor Agreement (CBA) for their branch, as negotiated by each branch's own Drivers' Association.³ Each branch's

¹CP 313.

²CP 1405 (9:17-21), CP 1408 (8:7-20), and 1414 (11:22-12:1).

³CP 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 of key provisions is in the Appendix at Page a.

bargaining unit employees actively participated in negotiations, reviewed proposals, and ratified agreements.⁴

The Drivers challenged Garda's written "policy" related to meal periods,⁵ but it is undisputed that no other writing contained the "on-duty" meal period "policy" the Drivers challenged in their Complaint. The CBAs each provided that the Drivers would remain on-duty through their meal period and receive compensation, or they could request an off-duty meal period from their supervisors. While the precise language of these meal period provisions varied,⁶ Garda maintains that each relevant CBA clause confirmed showed that the Drivers agreed – and chose - to work thorough meal periods and receive pay. In other words, they agreed to waive the unpaid off-duty meal period requirement contemplated by WAC 296-126-092 as allowed by Department of Labor & Industries (L&I)

⁴CP 1001-02 (16-17); 1017 (38-39).

⁵ CP 5 ¶ 17.

⁶*See e.g.*, CP 454 ("routes 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"); 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"); 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"). *See also* summary table in Appendix at Page a.

Administrative Policy No. ES.C.6.

Moreover, Garda did not rely just upon the agreements bargained by the Drivers' designated bargaining representatives. Most class members also signed **individual** acknowledgments of their CBAs. Specifically:

I have read and understand this Agreement. I acknowledge that by signing this Agreement, I agree to its terms and conditions . . . I have signed this form freely and voluntarily.⁷

It is undisputed that as Garda and the Drivers had agreed, Garda compensated the Drivers for each and every of these "on-duty" meal periods as part of their regular pay **and** counted this time as time worked for purposes of determining overtime.⁸ Nevertheless, the Drivers filed suit alleging they were entitled to off duty meal breaks and double damages "for the unpaid wages and/or denial of meal . . . breaks."⁹

B. The Trial Court Improperly Awarded Both Prejudgment Interested and Punitive Damages.

The trial court decision regarding the double damages under RCW 49.52.070 for missed meal periods and prejudgment interest as to both meal and rest periods are the most relevant to the issues accepted on review. In its September 2015 Findings of Fact and Conclusions of Law

⁷ CP 408, 424-25, 467-68, 488-89, 526-27, 549, 568, 614, 635, 659, 1153, 1176.

⁸ See CP 315:8-18.

⁹ CP 6-7 ¶¶ 17-19, 28(e).

following the bench trial on damages,¹⁰ even though the Drivers had already been paid for their time worked during “missed” meal periods, the trial court awarded the Drivers “back pay” for both meal periods and rest periods.¹¹ The trial court concluded no bona fide dispute regarding missed meal or rest period liability existed after the decision in *Pellino v. Brink’s, Inc.*, 164 Wn. App. 668 (2011) (“*Pellino*”)¹² and the Drivers did not “knowingly submit” to any meal period violation because waivers could not be collectively bargained as a matter of law.¹³ The trial court thus 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,¹⁴ and it awarded prejudgment interest on the “back pay” portion of the award.¹⁵

¹⁰ See VRP 9/22/2015, 63.

¹¹ CP 3817 ¶ 15.

¹² The trial court had previously stated it did not believe that Drivers were entitled to double damages for any period before *Pellino*. VRP 06/18/2015, 8:18-9:11.

¹³ CP 3817-3821 ¶¶ 16-27.

¹⁴ CP 3818 ¶ 19.

¹⁵ CP 3821 ¶¶ 27-30.

IV. ARGUMENT

A. Garda Did Not Willfully Deprive Drivers of “Additional Wages” When it Paid Drivers for a Meal Period they Agreed to Waive.

Garda paid the Drivers their wages for on-duty meal periods and counted them as hours worked as the Drivers had agreed, so any award of double damages for unpaid “wages”¹⁶ related to meal periods is improper. RCW 49.52.070 authorizes employees to recover double damages only when their employers have “willfully” withheld their wages. A failure to pay owed wages is not willful when there is a bona fide dispute over whether the employer owes the wages.¹⁷ “Determining willfulness is a question of fact reviewed for substantial evidence.”¹⁸ The facts here conclusively show that Garda’s failure to pay “wages” for purportedly missed meal periods was not willful.

¹⁶Garda still maintains that because unlike rest periods, there is no definitive right to a paid meal period, the only source of this right was the CBAs, Drivers were paid their purportedly missed meal periods, and that time was counted as hours worked, the award related to missed meal period was not “wages” or “back pay.” See Garda’s Petition for Review at 16-17. However, the Court appears to have not accepted review on this point by denying Garda’s Petition so it is not addressed here.

¹⁷ *Schilling v. Radio Holdings, Inc.*, 136 Wn. 2d 152, 160 (1998).

¹⁸ *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 834 (2012) (requiring that the employer compensate missed rest breaks at the overtime rate but declining an award of double damages because the employer had paid the employees as spelled out in a CBA).

1. *Garda Paid the Drivers as Agreed in the CBA.*

Here, Garda did not willfully deprive Drivers of “additional wages” for on-duty meal periods because it relied on the Drivers’ collectively bargained (**and** individually acknowledged) meal period waivers/agreements to an “on duty” meal period, and paid them as agreed. Generally, an employer who follows the provisions of a CBA ‘with respect to overtime wages and compensatory time’ does not willfully deprive employees of wages or salary.”¹⁹ As in both *Washington State Nurses Ass’n* and *Champagne*, the Drivers have never alleged that Garda acted in bad faith. Without that, “the record lacks the requisite substantial evidence that gives rise to a finding of willful withholding.” *Washington State Nurses Ass’n*, 175 Wn. 2d at 835. Garda counted on the Drivers’ promises and paid them as agreed. For this reason alone, the award of double damages for meal periods should be reversed.

¹⁹ *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 835 (2012) (requiring that the employer compensate missed rest breaks at the overtime rate but declining an award of double damages because the employer had paid the employees as spelled out in a CBA). *See also Champagne v. Thurston County*, 163 Wn.2d 69, 82 (2008) (holding that the employer's compensation scheme, paying its employees additional pay at the end of the month subsequent to the month in which it is earned, violated Washington law, but declining to award double damages).

2. *It Was Fairly Debatable Whether the CBA Waivers Were Enforceable.*

Instead of claiming – or demonstrating – bad faith, the Drivers have consistently maintained that it was crystal clear under Washington law that meal period waivers could not be collectively bargained, and thus, their waivers or agreements to an “on duty” meal period – even if individually acknowledged – must be ignored for any purpose. But as in *Washington State Nurses Ass'n, Champagne*, and several other cases, Washington courts have held that double damages are not appropriate if the effectiveness of the meal period waivers was “fairly debatable.”²⁰ Whether the employer’s subjective belief is “fairly debatable” in an objective standard, and it does not matter if the employer’s view is ultimately erroneous.²¹ Garda’s position that it correctly relied on the CBA’s was “fairly debatable.”

3. *No Prior Cases or L&I's Policy Prohibited Meal Period Waivers in Collective Bargaining Agreements.*

Both case law and L&I’s Administrative Policy No. ES.C.6

²⁰ *Wash. State Nurses Ass'n*, 175 Wn.2d at, 836; *Champagne*, 163 Wn.2d at 82. See also *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 80 (2008) (fairly debatable if more wages were owed under compensation Plan).

²¹ *Moore v. Blue Frog Mobile, Inc.*, 153 Wn.App. 1, 8 (2009) (citing *Schilling*, 136 Wn.2d at 161).

(“Policy”)²² firmly establish that employees may waive WAC 296-126-092’s meal period provisions if the employer also agrees.²³ 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.²⁴ In spite of this clarity, the Drivers urged below that this same Policy, expressly allowing meal period waivers, also unambiguously forbids collectively bargaining them except for public or construction employers.²⁵ Garda has consistently maintained that the Drivers’ construction of the Policy was far from the only reasonable reading of it, and in fact, is inconsistent with long established labor law principles.

The Policy simply clarifies the impact of 2003 amendments to the Industrial Welfare Act, Chapter 49.12 RCW (IWA).²⁶ 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

²²Question No. 8 (“Employees may choose to waive the meal period requirements”); Copy in Appendix.

²³*Pellino*, 164 Wn. App. at 697.

²⁴Employees must also be allowed another meal break if they work three hours or more beyond their normal workday. Policy § 5 (“When is a meal period required?”).

²⁵CP 1190 and 3811, Finding of Fact No. 19.

²⁶RCW 49.12.187 (*amended by 2003 c 401 § 1, c 146 § 1*). *See also* Policy, Nos. 3, 4.

employers and construction trades from the meal period requirements.²⁷ The Policy clearly explains this means that public employees and construction employees can negotiate break requirements “less favorable” than WAC 196-126-092’s “standards,” while CBAs for other industries must include meal and rest periods requirements “at least equal to or more favorable than” those provisions.²⁸ The answer to Question 4 of the Policy clearly addresses whether construction trades can have meal periods “different” those in WAC 196-126-092. Here, however, the CBAs never contained a “less favorable” meal period “less than” or “different” than L&I’s “standard”; the standard allows employees to waive meal periods with the option to revoke that waiver at any time, which is exactly what Drivers agreed to through their designated bargaining representatives. Nothing in the Policy prohibits a revocable waiver of off-duty meal periods in a CBA.

The Drivers’ insistence that there was no debate that Washington law clearly forbade the relevant CBA provisions, is flawed for three other reasons. First, it ignores that off-duty meal periods are a negotiable right,

²⁷RCW 49.12.005(3)(b); RCW 49.12.187. *See also* Policy, No. 3.

²⁸ Policy, No. 15. *See also* Policy ES.A.6 No. 1 (A).

because Washington law allows them to be waived,²⁹ and “the right of collective bargaining is a fundamental right of employees.”³⁰ Consistent with that principle, RCW 49.12.187 specifically mandates that Chapter 49.12 RCW,

[S]hall 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.

Garda’s construction of the Policy is true to this mandate. RCW 49.12.187 states that public employees and employees in construction trades “may enter into collective bargaining contracts . . . that specifically vary from or supersede . . . rules regarding appropriate rest and meal periods.” Notably absent from RCW 49.12.187 is any language related to waivers. The amendment explains exactly what 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 CBA provides for them.³¹ Private employers, on the other hand, must

²⁹*Lueck*, 471 U.S. at 213. See also *Miller v. AT & T Network Sys.*, 850 F.2d 543, 546 (9th Cir. 1988) (emphasis added) (“a right is only “nonnegotiable” only if state law “does not permit it to be waived, alienated, or altered by private agreement”).

³⁰*NLRB v. Lettie Lee, Inc.*, 140 F.2d 243, 248 (9th Cir. 1944).

³¹To extent RCW 49.12.187 is ambiguous, a review of the legislative history also shows that this interpretation is correct. See generally *Evans*, 177 Wn. 2d at 193 (legislative history may be consulted if more than one interpretation of the plain language is reasonable and the statute is thus

offer a 30-minute meal break every 5 hours, or obtain an outright waiver, and provide a 10-minute paid break for every 4 hours worked; they cannot use CBAs to deviate from those requirements. Indeed, keeping in mind that the Guidance is merely an agency interpretation,³² Policy §§ 3 and 4 consistently state that public employers and construction trade employers can negotiate CBA 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 period requirements “different from” WAC 296-126-092. Instead, the CBAs’ terms exactly track the language of the Policy § 8 allowing meal period waivers.

Second, concluding that Washington law clearly prohibited

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 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.

³²*Ass'n of Wash. Bus. v. Wash. Dep't of Revenue*, 155 Wn. 2d 430, 447 (2005) (“[I]nterpretive rules are not binding on the public... the public may be sanctioned and punished, not by authority of the rule, but by authority of the statute.”);

collectively bargained meal period waivers similarly implicates preemption under the National Labor Relations Act (the “NLRA”), which purposefully protects the rights of employees to collectively bargain.³³ It is thus well-settled that the NLRA 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.³⁴ Specifically, *Garmon*³⁵ 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.³⁶ Further, while a state can set minimum labor standards, those standards must “neither encourage nor discourage the collective-bargaining process[.]”³⁷ The 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 and violates RCW 49.12.187’s mandate. For yet another reason,

³³See generally 29 U.S.C. § 151.

³⁴*Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (internal quotation omitted).

³⁵*San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

³⁶29 U.S.C. § 157; *Wal-Mart Stores, Inc. v. United Food & Comm. Workers Int’l Union*, 190 Wn. App. 14, 21 (2015).

³⁷*Metropolitan Life v. Mass.*, 471 U.S. 724, 755 (1985).

Garda's reliance on the CBAs was objectively reasonable.

Next, Garda raised two key preemption arguments below that show there was a "bona fide dispute" that the CBAs not only controlled the Drivers' claims, but also ultimately meant they could not prevail – § 301³⁸ of the Labor Management Relations Act and the Federal Aviation Administration Authorization Act.³⁹ Preemption under both of these doctrines was fully briefed to the Court of Appeals and in Garda's Petition for Review, and are incorporated here to further demonstrate why the effect of the CBAs' provisions was "fairly debatable."⁴⁰

Finally, even if it were correct that Washington law could prioritize an employee's individual choice over collective bargaining rights, most of the Drivers signed **individual** acknowledgements of their CBAs, and each CBA meal period provision provided that Drivers agreed to waive meal periods and allowed for individual drivers to request off duty meal periods at any time. Washington law does not even require that meal period waivers be in writing,⁴¹ yet they were. Whether the Drivers were entitled to unpaid, off-duty meal periods or additional meal period

³⁸ 28 U.S.C. § 185.

³⁹ 49 U.S.C. § 14501(c) (1).

⁴⁰ See Garda's Opening Brief (Div. I) at 12-27 and Garda's Petition for Review at 10-16.

⁴¹ Policy, No. 8.

pay was clearly “fairly debatable.”⁴²

B. The Drivers are Not Entitled to Double Recovery for their “Back Pay” Award.

Even though the Drivers had already been paid their wages for work performed during their on-duty meal periods, the trial court concluded that Garda had committed a “wage” violation and awarded the Drivers “back pay” that included pay for missed meal periods.⁴³ The trial court then doubled (for the post-*Pellino* period)⁴⁴ the “back pay” awarded for both missed rest and meal periods **and** awarded prejudgment interest for that “back pay.” The Court of Appeals reversed, correctly holding that an award of prejudgment interest is not proper on the “wage” portion of the award when the Drivers had already recovered double damages under RCW 49.52.070. This Court should reach the same result.

Generally speaking, judgments for back wages are considered liquidated, and thus, courts have awarded prejudgment interest on back

⁴²*Hill v. Garda CL Nw., Inc.*, 198 Wn. App. 326, 366 (2017).

⁴³ See generally CP 3809 ¶ 13 and 3817 ¶ 15.

⁴⁴ The trial court’s determination Garda had a “bona fide” dispute until *Pellino* was decided is problematic for other reasons. Namely, there was no CBA at issue in *Pellino*, and it had nothing to do with the enforceability of meal period waivers in CBAs or agreements by the employees to take an “on-duty” meal period. Its implied decision that *Pellino* definitely decided this issue is not supported by the case itself.

pay owed.⁴⁵ And while trial courts have awarded both double damages and prejudgment interest in an unpaid wage cases,⁴⁶ no published case has affirmed the same with any discussion of the legal basis of such an award. Washington's wage violation statutes authorizing double damages do not also authorize awards of prejudgment interest. Washington cases have held that an award of both punitive damages and pre-judgment interest is not appropriate when the plaintiff obtains damages under a punitive statute. In *Ventoza v. Anderson*, 14 Wn.App. 882, 897 (1976), the court specifically concluded that "[i]nterest is generally disallowed when recourse upon a punitive statute is sought." In other words, if a plaintiff sues under a punitive statute, which contains no provision for interest, the court will not grant interest on "either the compensatory or the punitive portion of the award."⁴⁷ Although *Ventoza* was a timber trespass case, rather than employment case, the court's conclusion that "[i]nterest is

⁴⁵ *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 50-51 (2007).

⁴⁶ *See Morgan v. Kingen*, 141 Wn.App. 143, 150 (2007).

⁴⁷ *Ventoza*, 14 Wn.App. at 897 (discussing *Rayonier, Inc. v. Poison*, 400 F.2d 909 (9th Cir. 1968) (emphasis added). In *Rayonier*, the court held that 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.

generally disallowed when recourse upon a punitive statute is sought” was a general holding not limited to the statute at issue.⁴⁸

This conclusion should equally apply to RCW 49.52.070 “double wages” awards. The statute makes no provision for prejudgment interest, and it expressly specifies the amount recoverable to compensate for a willful delay in payment (under RCW 49.52.050(2)): “any employer . . . shall be liable. . .to judgement for twice the amount of wages unlawfully rebated or withheld by way of exemplary damages[.]” The Minimum Wage Act’s purpose of exemplary damages is “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.”⁴⁹ Our courts have long recognized that double damages under RCW 49.52.070 are “exemplary damages,” whose purpose is to “punish and deter” employers from blameworthy conduct.⁵⁰ Here, allowing the Drivers to recover both prejudgment interest and double damages for missed rest periods, in the

⁴⁸ *Ventoza*, 14 Wn.App. at 897.

⁴⁹ *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 687 (2014).

⁵⁰ *Morgan*, 141 Wn.App. at 161-62 (holding that these exemplary damages under the statute are “intended to punish and deter blameworthy conduct”), *aff’d*, 166 Wn.2d 526 (2009) (citations omitted). *See also Schilling v. Radio Holdings, Inc.*, 136 Wn. 2d 152, 157 (1998) (examining the propriety of the “punitive award,” or the doubling of the wages owed.)

absence of a statute requiring otherwise, affords them disfavored double recovery. Such a recovery is even more unwarranted for the missed meal period claims, where the Drivers already received wages for the work performed during “meal periods.”

Cases under the Fair Labor Standards Act’s (the “FLSA”) similar liquidated damages provision⁵¹ bolster this conclusion. Like RCW 49.52.070, the FLSA also specifies the amount recoverable to compensate for an intentional delay in payment. Courts examining the FLSA have routinely held that plaintiffs may not recover both double damages and prejudgment interest because such an award would constitute double recovery.⁵² This is because the purpose of the FLSA’s liquidated damages provision is compensatory, i.e., to provide compensation for delay in payment of sums, and it is inconsistent with the FLSA’s intent to also

⁵¹29 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.” While the term “willful” is not specified in §206, the FLSA does allow an employer found liable for past wages to **avoid** liability for liquidated damages by proving a reasonable, good-faith belief that it was not violating the FLSA. 29 U.S.C. § 206.

⁵²See *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”).

grant interest on those sums to compensate for the payment delay.⁵³ The same rationale applies under WA law.

The Drivers summarily dismiss *Ventoza* by arguing that its holding is consistent with *Blake v. Grant*, 65 Wn. 2d 410 (1964). This overreaches. *Blake* held only that there was sufficient evidence of “willfulness” to support the treble damages award.⁵⁴ In dicta, it discussed whether the trial court properly awarded interest on the punitive portion of the award (the specific assignment of error) and commented that “interest is generally disallowed on punitive damages,” but it did “not decide the question.”⁵⁵ *Ventoza*, however, **did** decide that prejudgment interest was improper on both the compensatory **and** punitive damages portion of an award when a plaintiff obtains exemplary damages under a punitive statute. It also has not been overruled, and thus remains good law.⁵⁶

It was error for the trial court to award both prejudgment interest and double damages, allowing double recovery for “back pay” awarded because of a labor violation. It is inconsistent with the MWA’s intent to provide double recovery by awarding both double damages and interest for “back pay” willfully withheld. To the extent any double damages

⁵³ *Brooklyn Sav. Bank*, 324 U.S. at 715.

⁵⁴ *Blake*, 65 Wn. 2d at 412.

⁵⁵ *Blake*, 65 Wn. 2d at 412.

⁵⁶ See e.g., *JDFJ Corp. v. Int’l Raceway, Inc.*, 97 Wn.App. 1, 10 (1999).

award stands, prejudgment interest should not be allowed. If no double damages are awarded, then prejudgment interest for unpaid “wages” is appropriate.⁵⁷

V. CONCLUSION

For the reasons stated above, Garda requests that this Court reverse the trial court’s award of “double damages” under RCW 49.52.070 regarding meal periods and the award of prejudgment interest as to the rest period portion of the “back pay” award, as double damages were already awarded. Should this Court affirm the double damages as to meal period claims, Garda asks that the award of any prejudgment interest on the entire award be vacated.

Respectfully submitted this 22nd day of November, 2017

FISHER & PHILLIPS LLP

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Attorneys for Petitioner/Cross

Respondent Garda

⁵⁷ *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 723 (2007).

CERTIFICATE OF SERVICE

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

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- 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.

DATED: November 22, 2017.



Jazmine Matautia

VI. APPENDIX

CBA	Meal Period Waiver	Employee's Right To Revoke	Signed
2004-2009 Mt Vernon 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." <i>Id.</i>	6/1/04
2009-2012 Mt. Vernon 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[.]" <i>Id.</i>	3/31/09
2013-2016 Mt Vernon 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[.]" <i>Id.</i>	9/10/13
2006-2009 Pasco 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." <i>Id.</i>	8/ xx/06 (date illegible)
2010-2013 Pasco 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 [.]" <i>Id.</i>	5/1/10
2004-2008 Seattle 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." <i>Id.</i>	4/1/04 CP 465
2008-2011 Seattle 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[.]" <i>Id.</i>	9/29/08

2007 Spokane 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." <i>Id.</i>	7/07
2008-2011 Spokane 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 [.]" <i>Id.</i>	6/1/08
2005-2008 Tacoma 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." <i>Id.</i>	5/1/05
2009-2012 Tacoma CP 550-67	"The Employees hereto agree to an on-duty meal period." <i>Id.</i> 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 [.]" <i>Id.</i>	11/19/08
2009 Wenatchee 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." <i>Id.</i>	9/1/06
2010 Wenatchee 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. <i>Id.</i>	4/20/10
2006-2009 Yakima 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." <i>Id.</i>	10/19/06
2010-2013 Yakima 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." <i>Id.</i>	5/1/01

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