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NO. 94593-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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LAWRENCE HILL, ADAM WISE, and ROBERT MILLER, on behalf  
of themselves and all persons similarly situated

Plaintiffs/Cross-Petitioners,

v.

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

Defendant/Cross-Respondents

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PLAINTIFFS'/CROSS-PETITIONERS' SUPPLEMENTAL BRIEF

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ISSUES PRESENTED ON REVIEW ..... 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT ..... 4

    A. The trial court’s award of double damages on Plaintiffs’  
        missed meal breaks should be reinstated. .... 4

        1. Washington law explicitly prohibits waiver in a CBA ..... 6

        2. Even if CBAs could be considered, they do not support  
            waiver here..... 10

    B. Workers deprived of wages due are entitled to prejudgment  
        interest on those wages, regardless whether double damages  
        are awarded. .... 14

        1. *Ventoza* incorrectly held that prejudgment interest on  
            compensatory damages is not allowed when punitive  
            damages are sought. .... 15

        2. *Ventoza*’s holding is limited to timber trespass cases  
            where the interest arises from the punitive damages  
            statute itself. .... 16

        3. The Wage Rebate Act is a remedial statute that must be  
            liberally construed in favor of employees..... 17

        4. An award of both exemplary damages and prejudgment interest  
            does not constitute a double recovery..... 19

V. CONCLUSION..... 20

## TABLE OF AUTHORITIES

### Cases

<i>Blake v. Grant</i> , 65 Wn.2d 410, 397 P.2d 843 (1964) .....	15, 16
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007).....	18
<i>Brady v. Autozone Stores, Inc.</i> , 188 Wn.2d 576, 397 P.3d 120 (2017) ....	10
<i>Champagne v. Thurston County</i> , 163 Wn.2d 69, 178 P.3d 936 (2008).....	5, 12
<i>Dautel v. Heritage Home Center, Inc.</i> , 89 Wn. App. 148, 948 P.2d 397 (1997).....	18
<i>Dept. of Labor &amp; Ind. v. Overnite Transp. Co.</i> , 67 Wn. App. 24, 834 P.2d 638 (1992).....	5
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , Wn.2d 291, 996 P.2d 582 (2000).....	18, 19
<i>Evans v. Loveland Automotive Investments, Inc.</i> , 632 Fed. Appx. 496 (10th Cir. 2015).....	20
<i>Hill v. Garda CL Nw, Inc.</i> , 179 Wn.2d 47, 308 P.3d 635 (2013) .....	3
<i>Hill v. Garda CL Nw., Inc.</i> , 198 Wn. App. 326 (2017) .....	<i>passim</i>
<i>J.I. Case Co. v. N.L.R.B.</i> , 321 U.S. 332 (1944) .....	9
<i>Jones v. Best</i> , 134 Wn.2d 232, 950 P.2d 1 (1998) .....	10
<i>Kalmanovitz v. Standen</i> , 2016 WL 827145 (W.D. Wash. March 3, 2016) .....	15, 20
<i>Marshall v. Brunner</i> , 668 F.2d 748 (7th Cir. 1982).....	19
<i>Morgan v Kingen</i> , 141 Wn. App. 143, 169 P.3d 487 (2007), <i>aff'd</i> 166 Wn.2d 526 (2009).....	20
<i>Morgan v. Kingen</i> , 166 Wn.2d 526, 210 P.3d 995 (2009).....	18

<i>Pellino v. Brink's Inc.</i> , 164 Wn. App. 668, 267 P.3d 383 (2011).....	2
<i>Rayonier, Inc., v. Polson</i> , 400 F.2d 909 (9th Cir. 1968).....	15, 16
<i>Reilly v. Natwest Markets Group, Inc.</i> , 181 F.3d 253 (2d Cir. 1999).....	20
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998).....	4, 5, 20
<i>State v. Carter</i> , 18 Wn.2d 590, 140 P.2d 403 (1943) .....	4
<i>Stevens v. Brink's Home Sec., Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007).....	17
<i>TJ Landco, LLC v. Harley C. Douglass, Inc.</i> , 186 Wn. App. 249, 346 P.3d 777 (2015).....	17
<i>Walton v. United Consumers Club, Inc.</i> , 786 F.2d 303 (7th Cir. 1986) ...	19
<i>Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.</i> , 175 Wn.2d 822, 287 P.3d 516 (2012).....	5, 12, 13
<i>Watson v. Providence St. Peter Hosp.</i> , 2013 U.S. Dist. LEXIS 99980 (W.D. Wash. July 17, 2013) .....	8
<i>White v. Salvation Army</i> , 118 Wn. App. 272, 75 P.3d 990 (2003).....	12
<i>Wingert v. Yellow Freight Sys. Inc.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002).....	7, 8
<b>Statutes</b>	
29 U.S.C. §§201-219 .....	19
49.52.070.....	4
RCW 19.52.010 .....	14, 17
RCW 49.12.187 .....	8
RCW 49.52 .....	1
RCW 49.52.050 .....	4

RCW 64.12 .....	16
RCW 64.12.030 .....	16
<b>Other Authorities</b>	
Wash. Dept. Labor & Indust. Administrative Policy ES.C.6 .....	6
<b>Regulations</b>	
WAC 296-126-092.....	6, 7, 11

## I. INTRODUCTION

Petitioners are nearly 500 employees and former employees of the Defendant armored car company, Garda CL Northwest. The employees brought suit against Garda for systematically denying them meal and rest breaks in violation of Washington wage laws. After years of litigation, including a prior appeal to this Court, the trial court granted summary judgment to the Plaintiffs on liability, held a trial on damages, and entered judgment. Garda appealed, and although the Court of Appeals affirmed on most issues, it overturned the trial court's findings and conclusions concerning two parts of its damages award .

First, the Court of Appeals significantly narrowed the application of the Wage Rebate Act, RCW 49.52, by holding that an employer may avoid exemplary damages simply by asserting a legal defense, even if its factual and legal basis is not fairly debatable, so long as there is no other case that "squarely addressed" that defense in the same context before. Second, the court wrongly applied a rule from timber trespass cases to the Wage Rebate Act, holding for the first time that prejudgment interest on liquidated back pay damages cannot be recovered when exemplary damages are also awarded. This Court should reverse the Court of Appeals and reinstate the trial court's awards of double damages and prejudgment interest.

## II. ISSUES PRESENTED ON REVIEW

This Court granted discretionary review on the following issues:

(1) Whether an employer who knowingly deprives its employees of meal breaks can avoid double damages under RCW 49.52 by claiming the employees waived meal breaks in their collective bargaining agreements (CBAs), where the law clearly does not allow collective waiver and the CBAs clearly did not contain a waiver;

(2) Whether an award of double damages against an employer for willful withholding precludes the employees from recovering prejudgment interest on the compensatory portion of their back pay award.

## III. STATEMENT OF THE CASE

Plaintiffs Larry Hill, Adam Wise, and Robert Miller filed this lawsuit in February 2009, claiming they were denied rest and meal breaks while working as crew members on Garda's armored cars. CP 3807. At the time a similar case was already pending in the same court against armored car company Brink's. A trial was held and judgment was entered against Brink's in March 2010 and was affirmed on appeal. *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011).

The trial court certified a class in this case in July 2010, and then granted Garda's motion to compel arbitration. CP 3807. Plaintiffs appealed, this Court reversed, and the United States Supreme Court denied

certiorari. *Hill v. Garda CL NW*, 179 Wn.2d 47, 308 P.3d 635 (2013),  
*cert. denied, Garda CL Northwest, Inc., v. Hill*, 134 S.Ct. 2821 (2014).

After remand, Plaintiffs moved for summary judgment on liability. The evidence showed Garda required its employees to remain constantly vigilant in guarding the armored car and currency and forbade them to engage in any personal business while on their routes. *See, e.g.*, CP 2776-77, 2966-67, 2780-81. Garda conceded that it failed to provide meal periods. CP 2993 n.1. The trial court granted summary judgment to Plaintiffs on liability. CP 3352.

The court held a bench trial on damages in June and September 2015 and entered judgment for the Plaintiffs in October 2015. CP 3808, 3977; *see also* CP 4200, 4209 (supplemental judgments). It awarded double damages for “willful” withholding beginning after the Court of Appeals’ decision in *Pellino*, pursuant to RCW 49.52.070. CP 3810, 3818 (“as of that time, no bona fide dispute existed over whether Garda’s policy and practice .... violated Washington law by depriving its employees of lawful rest and meal breaks.”). It also awarded prejudgment interest on the back pay award. CP 3821-22.

Garda appealed the judgment on multiple grounds, and the Court of Appeals affirmed in part in a published decision. *Hill v. Garda CL Nw., Inc.*, 198 Wn. App. 326 (2017). However, it overturned the trial court’s

award of double damages on Plaintiffs' meal break claim, concluding that Garda's "waiver" defense, though unavailing, was sufficient to create a bona fide dispute and defeat double damages. *Id.* at 352, 363. It also overturned the trial court's award of prejudgment interest on Plaintiffs' post-*Pellino* rest break damages award, holding that prejudgment interest cannot be awarded when double damages have been assessed. *Id.* at 365-66. This Court accepted review of the Court of Appeals' damages decisions.

#### IV. ARGUMENT

##### A. The trial court's award of double damages for Plaintiffs' missed meal breaks should be reinstated.

The Wage Rebate Act is part of a "comprehensive scheme" enacted by the Legislature to ensure that employees' wages are paid. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). Under the Act, an employer who "willfully" withholds wages due is guilty of a gross misdemeanor and liable for twice the amount of wages withheld. RCW 49.52.050(2) & 49.52.070. The purpose of this double damages provision is to "protect the wages of an employee against any diminution or deduction," and it must be "liberally construed" to advance this purpose. *Schilling*, 136 Wn.2d at 159 (quoting *State v. Carter*, 18 Wn.2d 590, 621, 140 P.2d 403 (1943)).

When an employer fails to pay wages due, its act is “willful” unless it was erroneous or there is a “bona fide dispute” about whether the wages were due. *Id.* at 160.<sup>1</sup> A bona fide dispute is one that is “fairly debatable.” *Id.* This is “a narrow exception to the statute providing for double damages.” *Dept. of Labor & Ind. v. Overnite Transp. Co.*, 67 Wn. App. 24, 36, 834 P.2d 638 (1992). A legal argument that has no merit “does not amount to a bona fide dispute which justifies invoking the narrow exception to the statute.” *Id.* It is the employer’s burden to show a bona fide dispute. *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 834, 287 P.3d 516 (2012).

Garda claims there was a bona fide dispute over Plaintiffs’ meal break claim based on its CBAs, which Garda says contained waivers of meal breaks. *See* Supp. Br. of Garda at 7. Garda’s waiver defense is not “fairly debatable,” either legally or factually. Legally, it is clear that to the extent employees may “waive” the right to a meal period, they can only do so individually, not through a collective bargaining agreement. Factually, Garda’s CBAs did not actually say that the employees “waived” the right to take meal breaks.

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<sup>1</sup> Garda never argued it deprived employees of meal periods in error. It presented another defense, “knowing submission,” but has not raised that here. *See Champagne v. Thurston County*, 163 Wn.2d 69, 81 n.10, 178 P.3d 936 (2008) (“no Washington court” has found knowing submission based on a CBA).

**1. Washington law explicitly prohibits waiver in a CBA.**

State law explicitly prohibits waiver of the right to meal breaks through a collective bargaining agreement. The only authority that meal breaks can *ever* be waived is the Department of Labor and Industries’ (“L&I”) Administrative Policy ES.C.6 (“Policy ES.C.6”).<sup>2</sup> But, as the Court of Appeals noted, that Policy emphasizes “an individual’s choice whether to waive meal periods.” *Hill*, 198 Wn. App. at 352. It states: “[I]f an employee wishes” to waive his or her meal period, “the employer may agree to it,” but the employee must be free to revoke the waiver “at any time.” Policy ES.C.6 ¶8 at 4.

The Policy also unequivocally says that meal periods *cannot* be altered, much less waived, through CBAs. *Id.*, ¶15 at 5:

**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 [sic] 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.

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<sup>2</sup> The distinction the Policy makes between meal and rest breaks—allowing limited waiver of meal breaks but not rest breaks—has no apparent basis in L&I’s meal and rest break *rule*, which describes both with the same mandatory language. *Compare* WAC 296-126-092(1) *and* WAC 296-126-092(4).

Garda admits this provision prohibits CBAs from providing “different” or “less favorable” meal periods, but contends it permits them to provide *no* meal period. Supp. Br. of Garda at 10. This absurd interpretation rests on the fallacy that the “minimum standard” referred to above allows employees to waive their meal breaks, so CBAs that waive meal breaks are not “less favorable” than the “standard.” *Id.* at 10-11. But the “standard” referenced is set forth in WAC 296-126-092, which mandates a 30-minute meal period and does not contain any option for waiver. *See Hill*, 198 Wn. App. at 352 (“The ‘minimum standard’ is a 30 minute meal period. A waiver of that meal period is less than the standard.”). Thus, Garda relies on the Policy to argue waiver of meal periods is an option, while ignoring the Policy’s express prohibition on waiver by CBA. This selective reading of the Policy cannot support a bona fide dispute.

The Policy makes an exception for CBAs in public and construction employment, and this exception proves the rule. As Garda admits, the exception “clarifies” 2003 amendments to the Industrial Welfare Act, Supp. Br. of Garda at 9, which were enacted in response to this Court’s decision in *Wingert v. Yellow Freight*. *Id.* at 11-12 n.31. *Wingert* held that collective bargaining agreements could only “enhance or exceed,” but not diminish, the “minimum standards” under the Act. *Wingert*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). The legislature enacted

RCW 49.12.187 as an exception to *Wingert* in order to allow public employers and employers in the construction trades to negotiate different meal and rest periods than required by the WAC.<sup>3</sup> See also L&I Admin. Policy ES.A.6.

Plainly, the Legislature and L&I chose to allow only public employees and construction trade unions to vary or supersede rest and meal break requirements by CBA. Thus, they cannot be waived or altered by a CBA in other private sector industries. See *Wingert*, 146 Wn.2d at 851-52; *Watson v. Providence St. Peter Hosp.*, 2013 U.S. Dist. LEXIS 99980, \*16 (W.D. Wash. July 17, 2013) (“Washington law sets the floor, not the ceiling, for meal breaks and rest periods and thus the CBA can grant more rights but not less.”).

Garda points out that many class members “signed individual acknowledgements of their CBAs,” suggesting this somehow constituted

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<sup>3</sup> RCW 49.12.187 provides in pertinent part (emphasis added):

[R]ules 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.

an individual waiver. Yet, even if the language of the CBAs expressly waived meal periods (which it does not, *see infra*), the acknowledgements offer no evidence of personal intent as to any particular provision in the CBAs. Individuals had no true choice in the matter because they were subject to the CBA provisions whether or not they signed. *See* CP 2656; CP 2675; CP 2664. That is the nature of a CBA. *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335-36 (1944) (after a CBA is executed, “[t]here is little left to individual agreement except the act of hiring”). If the class members wished to continue working for Garda they would be bound by the CBA and therefore an explicit acknowledgment of its terms does not establish an intentional, voluntary, individual waiver.

The trial court rejected Garda’s waiver defense on the merits *three times* (CP 1270, 2731, 2987), and held that it did not support a “bona fide dispute” because “Washington law clearly forbids waiver of the right to meal breaks through a CBA, except for public and construction industry employees.” CP 3818 (citations omitted). The Court of Appeals agreed on the merits, but reversed on bona fide dispute, concluding that “the state of the law was not clear.” *Hill*, 198 Wn. App. at 352, 363. It pointed out that there was no case that “squarely addressed” the issue, apparently concluding that the clear language in the Policy and the clear implication from the 2003 amendment were not enough. It should be. While an

administrative policy statement is not binding authority, here, it is that same authority that permits employees to waive meal periods in the first place, and also forbids them to do so through a collective bargaining agreement.<sup>4</sup> There is no lack of clarity, and no need for prior judicial confirmation of what the Policy clearly provides.

If an employer can avoid double damages whenever it can articulate a defense, no matter how weak, then exemplary damages will be unavailable in all but exceptional circumstances, directly contrary to the Legislature's policy goals and the mandate of liberal construction. The Court of Appeals' decision should be reversed.

**2. Even if CBAs could be considered, they do not support waiver here.**

Garda's waiver defense is not "fairly debatable" on the facts either. Waiver requires "the intentional and voluntary relinquishment of a known right." *Pellino*, 164 Wn. App. at 696-97 (citing *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998)). It may be proven only by express agreement or "unequivocal acts or conduct," and cannot be "inferred from doubtful or ambiguous factors." *Id.* at 697 (citations omitted). And, because the purported waiver here is in a CBA, it would have to be "clear

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<sup>4</sup> Moreover, this Court has repeatedly confirmed that L&I's Policy interpreting its own rest and meal break regulation is entitled to great deference. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 581, 397 P.3d 120 (2017).

and unmistakable” “for a court even to consider whether it could be given effect.” *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994).

Garda relies solely on its CBAs to establish waiver. Garda contends the CBAs support a bona fide dispute because it “counted on” them in not providing meal breaks to its crews. Supp. Br. of Garda at 7.<sup>5</sup> However, Garda admits throughout its briefing that the CBAs called for “on-duty meal periods.” Supp. Br. of Garda at 2, 4, 8.<sup>6</sup> And an “on duty” meal period is still a meal period, not a waiver; it simply means that the employer may require the employee to remain on the employer’s premises and be “on call” in case of emergency. *See* WAC 296-126-092(1); *Pellino*, 164 Wn. App. at 692-93. Even during an “on duty” meal period

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<sup>5</sup> In fact, there is no evidence of reliance; Garda’s own witnesses did not know what the rest and meal break provisions in the CBAs meant. CP 2627; CP 2642-43. Similarly, the Superior Court specifically found after trial that the supposed option of an off-duty meal period under the CBAs was illusory. CP 3820.

<sup>6</sup> Most of the 17 labor agreements used during the nine-year class period provide for an “on duty” meal period or for an “unscheduled” meal period. *See* Garda’s Appendix; CP 4230-59 (two additional agreements used in Seattle beginning in 2012 and Tacoma beginning in 2013). Only three contain a provision that purports to “waive” meal periods. *See* CP 2609, 2613, 2617. These three agreements were executed after this lawsuit was filed and the class had been certified, were in use for only a few years in Garda’s smallest branches, and were individually acknowledged by only 29 out of 480 class members (i.e., 6% of the class). *See id.* The origin of the change to add these waiver provisions is unexplained and apparently unknown, even to Garda. 9/21/15 Report of Proceedings at 53 (the change was “handed down from the general counsel’s office”), 66-68. There is no evidence that any individual employees were aware of the change, or that any employee or association has ever negotiated with Garda about its meal and rest break policies or practices.

“the employee is entitled to a full 30 minutes of paid meal time ... without performing work duties on behalf of the employer.” 164 Wn. App. at 689.<sup>7</sup>

Thus, as a matter of well-established law, an agreement that provides for an “on duty” meal period does not waive—much less unequivocally, clearly, and unmistakably waive—the meal period. Garda’s argument that merely following the CBA provisions is enough to avoid double damages fails, because Garda violated its own CBAs by failing to provide *any* meal periods, including on-duty meal periods. *See* Supp. Br. of Garda at 7.<sup>8</sup>

Garda insists that whether there is a bona fide dispute is a question of fact. Yet, unlike the trial court, the Court of Appeals declined to even inquire into the facts. *See Hill*, 198 Wn. App. at 364 (“We do not take the further step, taken by the trial court, to determine whether the purported

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<sup>7</sup> Similarly, an “unscheduled” meal break is still a meal break. *Pellino*, 164 Wn. App. at 691 (“while an employer does not have an obligation to schedule meal periods or rest breaks ... the employer must provide breaks that comply with the requirement of ‘relief from work or exertion’”) (quoting *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003)).

<sup>8</sup> Even so, neither *Champagne* nor *Sacred Heart* hold that merely following a CBA defeats double damages. *Sacred Heart* found a bona fide dispute about the rate at which back pay should have been calculated for missed rest breaks because the employer had paid what an arbitrator had awarded. 175 Wn.2d at 835. In *Champagne*, the Court *rejected* the notion that following a CBA “singularly negates a finding” of willfulness under RCW 49.52. 163 Wn.2d at 82 n. 11. The case was about the timing, not the amount, of overtime payments, and because there was no underpayment and the CBA set the time for payment, the Court found no “willful withholding.” *Id.* at 82. Nor does either case stand for the proposition, incorrectly urged by Garda, that a showing of “bad faith” is required for double damages under RCW 49.52.070.

waivers were actually waivers. Garda's reliance on the purported waivers is sufficient to show its withholding was not willful." It simply assumed the factual basis for Garda's defense existed. If this approach were correct, a litigant's mere *articulation* of a basis for violating Washington's wage laws, no matter how unsupported, would be sufficient to create a "bona fide dispute" and escape the legislature's edict that employers who willfully withhold wages are liable for exemplary damages. It would reward tenacious lawyering rather than good-faith efforts at compliance.

Finally, Garda claims that a rule forbidding waiver of meal periods in CBAs "implicates preemption" under the National Labor Relations Act. Supp. Brief of Garda at 13. But it did not raise this or any other preemption argument as grounds for a bona fide dispute in the Court of Appeals, and only barely mentions them in this Court.<sup>9</sup> "Washington courts have consistently and repeatedly rejected the idea that reference to a CBA extinguishes a claim based on a state law." *Sacred Heart*, 175 Wn.2d at 833. And, as Garda admits, the NLRA does not preempt minimum employment standards set by the state. There is no bona fide

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<sup>9</sup> Indeed, Garda did not assert collective bargaining rights as a defense of its CBA waivers in the trial court, and the Court of Appeals declined to consider those arguments for the first time on appeal. *Hill*, 198 Wn. App. at 353 & n.24. Garda also fails to explain how its other preemption arguments relate to the alleged CBA waivers; instead, its reference to those arguments in its supplemental brief seems an attempt to inject issues on which this Court has denied review.

dispute that Plaintiffs could not and did not waive their right to meal periods in the CBAs.

**B. Workers deprived of wages due are entitled to prejudgment interest on those wages, even when double damages are awarded.**

The trial court awarded prejudgment interest on the back wages due for the class period of February 11, 2006 through February 7, 2015. Plaintiffs did not seek, and the trial court did not award, interest on the exemplary damages awarded. CP 3821, 3423. The Court of Appeals overturned the award of prejudgment interest on the portion of the back pay award that was doubled pursuant to RCW 49.52. The court relied on *Ventoza v. Anderson*, 12 Wn. App. 883, 897, 545 P.2d 1219 (1976), a timber trespass case, to hold that a plaintiff may never recover both double damages and prejudgment interest. *Hill*, 198 Wn.App. at 366.

The court erred for several reasons. First, *Ventoza*'s holding that prejudgment interest may not be awarded at all in any case involving a claim for punitive damages is overbroad and incorrect. Second, even if *Ventoza* were correctly decided, it does not apply here because the prejudgment interest owed arises from RCW 19.52.010, and not the statute that authorizes exemplary damages, RCW 49.52. Third, the timber trespass cases are, in any event, inapplicable to a wage because that would conflict with the remedial purposes and liberal construction of our state's

wage protection statutes. Finally, Garda is wrong that prejudgment interest and exemplary damages serve the same purpose, so awarding both does not result in a “double recovery.”

**1. *Ventoza* incorrectly held that prejudgment interest on compensatory damages is not allowed when punitive damages are sought.**

As a threshold matter, it appears that *Ventoza* was wrongly decided. It held that “interest is generally disallowed when recourse upon a punitive statute is sought” thus barring prejudgment interest on both compensatory and exemplary portions of the damage award. *Ventoza*, 14 Wn. App. at 897. However, it relied principally on *Blake v. Grant*, 65 Wn.2d 410, 397 P.2d 843 (1964), where this Court held only that “interest is generally disallowed *on punitive damages*,” not that interest should not apply to the compensatory damages awarded on the same claim. *Id.* at 845 (emphasis added).<sup>10</sup> *Ventoza*’s broad holding that a plaintiff who sues for punitive damages is barred from recovering prejudgment interest even as to compensatory damages is not supported by *Blake*.

Our federal court recently rejected *Ventoza* in a Wage Rebate Act case on just this basis. In *Kalmanovitz v. Standen*, 2016 WL 827145 at \*4 (W.D. Wash. March 3, 2016), the court awarded *both* prejudgment interest

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<sup>10</sup> *Ventoza* also relied another timber trespass case, *Rayonier, Inc., v. Polson*, 400 F.2d 909, 922 (9th Cir. 1968), which misinterpreted *Blake* in the same way.

on wrongfully withheld wages as well as exemplary damages. Judge Lasnik pointed out that *Ventoza* “failed to acknowledge or appreciate” the distinction between an interest award on the compensatory portion, as compared to the punitive portion, of a damage award, and “instead latch[ed] onto the broad statement ‘[i]nterest is generally disallowed on punitive claims.’” *Id.* Judge Lasnik also found that the *Blake* Court would have (had it been presented) overturned only that portion of interest that was “awarded on the punitive damage award.” *Id.*

**2. *Ventoza*’s holding is limited to cases where there is no independent statutory basis for prejudgment interest.**

Even if *Ventoza* were correctly decided, its holding is limited to situations where there is no independent statutory basis for an award of prejudgment interest. In *Ventoza*, the court held that because the timber trespass statute, RCW 64.12, “is penal in character, it must be strictly construed.” 14 Wn. App. at 897. Further, the timber trespass law does not provide for prejudgment interest, *see* RCW 64.12.030; rather it provides “a statutory measure of damages [and] by bringing the action *under the statute*, plaintiffs have declared for double or treble value of the trees as their measure of damages, instead of single value with interest.” *Id.* (citing *Rayonier*, 400 F.2d at 922) (emphasis added).

*Ventoza*’s holding does not apply here because the willful withholding of wages, unlike timber trespass, gives rise to a

“forebearance” on which prejudgment interest is *required* under RCW 19.52.010(1). “When a party breaches an obligation to pay a liquidated sum, a new forbearance is created...[and] [t]he creation of the new forbearance triggers the application of the prejudgment interest statute.” *TJ Landco, LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 256, 346 P.3d 777 (2015). There is no dispute here that the damages for unpaid back wages are liquidated. 198 Wn. App. at 364; *see also Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 50-51, 169 P.3d 473 (2007) (holding that wage claims are generally liquidated in nature); Supp. Br. of Garda at 15-16.

Here, the Court of Appeals was under the misapprehension that, as in *Ventoza*, there is no independent statutory basis for the award of prejudgment interest. 198 Wn. App. at 410 (“the wage violation statutes are silent on the issue of prejudgment interest”). However, RCW 19.52.010(1) provides the statutory basis and, as discussed below, such interest is mandatory in wage violation cases.

**3. The Wage Rebate Act is a remedial statute that must be liberally construed in favor of employees.**

Regardless what the timber trespass cases have held, it is erroneous to apply their holdings to a wage collection case. This Court has observed often that Washington has a “long and proud history of being a pioneer in the protection of employee rights,” and favors a liberal interpretation of

the wage protection statutes in order to ensure that employees receive full payment of wages due. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, Wn.2d 291, 307, 996 P.2d 582 (2000)); *see also Brady*, 188 Wn.2d at 583-84, *citing Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 656-59, 355 P.3d 258 (2015) (lauding cases interpreting WAC 296-126-092 to enhance worker protections). Indeed, this Court has held that “the payment of wages holds a *preferential* statutory position....” *Morgan v. Kingen*, 166 Wn.2d 526, 538, 210 P.3d 995 (2009) (emphasis added).

The decision of the Court of Appeals to overturn the award of prejudgment interest contradicts this well-established rule of construction. This is particularly true because “Washington law has historically treated prejudgment interest *as a matter of right* when a claim is liquidated.” *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 154, 948 P.2d 397 (1997) (emphasis added). There is no case law that provides any support for depriving an employee of the “right” to prejudgment interest on an award of back pay. Indeed, it would make no sense under either the statutory scheme or Washington’s strong public policy ensuring full and prompt payment of wages to permit the worst employer offenders (*i.e.*, those who “willfully” withhold wages under RCW 49.52) to evade their

responsibility for making employees whole by paying prejudgment interest on back wages.

**4. An award of both exemplary damages and prejudgment interest does not constitute a double recovery.**

Garda contends an award of prejudgment interest on unpaid wages that are doubled for willful withholding would give Plaintiffs a “double recovery.” Yet, Garda admits that the two forms of relief serve distinct purposes: prejudgment interest compensates employees for the delay in payment while exemplary damages serve to punish and deter wrongful conduct. *See* Supp. Br. of Garda at 16-17. Garda’s attempt to invoke federal case law under the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. §§201-219, is unavailing. As recognized by the Court of Appeals here (198 Wn. App. at 365), federal case law is inapplicable when there are “[s]ignificant differences between state and federal statutes.”

*Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d at 312. .

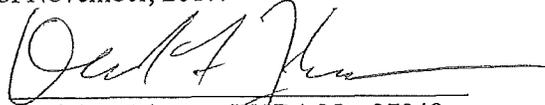
That is the case here because FLSA liquidated damages “are compensatory, not punitive in nature.” *E.g.*, *Marshall v. Brunner*, 668 F.2d 748, 753 (7th Cir. 1982). Under the FLSA, “[d]ouble damages are the norm,” *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986), and are intended to compensate employees for the delay in payment of wages, *Marshall*, 668 F.2d at 753.

In contrast, exemplary damages under RCW 49.52 require a showing of willfulness and are intended to “punish and deter blameworthy conduct.” *Morgan v Kingen*, 141 Wn. App. 143, 161-62, 169 P.3d 487 (2007), *aff’d* 166 Wn.2d 526 (2009); *see also Schilling*, 136 Wn.2d at 157 (double damages are “civil penalties”). Prejudgment interest under state law serves a different purpose, namely to compensate workers for the delay in receipt of their wages. Because of these differences, employees in a wage case are entitled to both remedies, and an award of both does not constitute a double recovery. *E.g.*, *Kalmanovitz, supra*; *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 265 (2d Cir. 1999) (awarding both prejudgment interest and liquidated damages under state labor law where the latter “constitute a penalty” to deter employer misconduct); *Evans v. Loveland Automotive Investments, Inc.*, 632 Fed. Appx. 496, 498-99 (10th Cir. 2015) (awarding both FLSA liquidated damages and state law exemplary damages; reviewing similar cases). The FLSA case law does not support Garda’s position; prejudgment interest and exemplary damages serve distinct purposes under state law and are not cumulative.

## V. CONCLUSION

The Court of Appeals significantly narrowed the remedies available to employees in cases of wrongful withholding of wages, and this Court should reverse.

Dated this 27<sup>th</sup> day of November, 2017.



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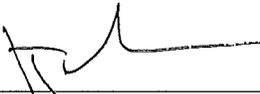
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