

65372-5

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No. 65372-5-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK LITCHFIELD and a class of similarly situated individuals,

Petitioners,

v.

KPMG, LLP,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE STEVEN C. GONZALEZ

OPENING BRIEF OF PLAINTIFF CLASS PETITIONERS

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I. INTRODUCTION: PROCEDURAL POSTURE ON REVIEW

This case is before the Court on the parties' cross-motions for discretionary review of orders on summary judgment. The trial court certified and this Court accepted immediate appellate review under RAP 2.3(b)(4) of interrelated issues concerning what constitutes employment in a "bona fide professional capacity" for purposes of exemption from overtime regulation.

Plaintiff Mark Litchfield brought this action to obtain overtime pay under the Minimum Wage Act (RCW Ch. 49.46) for himself and a class of unlicensed (non-CPA) "audit associates" of defendant KPMG. Litchfield and the court-certified class initially filed a notice for discretionary review of a trial court order entered on March 1, 2010 denying their motion for partial summary judgment for overtime. After the notice was filed, the trial court granted reconsideration, and on April 22, 2010 substantially modified its prior order.

Under the trial court's April 22 order, Litchfield and the plaintiff class substantially, but not completely, prevailed on liability. Defendant KPMG thereafter filed its own notice of discretionary review from the trial court's April 22 order. The trial court certified

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the issues presented by both parties for discretionary review under RAP 2.3(b)(4). In accepting discretionary review, Commissioner Verellen declined to realign the parties. The plaintiff class petitioners as a consequence file this initial brief although they mostly believe the trial court ruled correctly. This procedural anomaly is addressed more fully in the assignments of error, presentation of issues, and argument below:

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its April 22, 2010 order to the extent it held that an audit associate need not study for and pass the CPA exam and be licensed as a Certified Public Accountant to be eligible for the professional exemption for auditors under the Minimum Wage Act. (CP 2349)

The trial court did not err in its April 22, 2010 order by holding that the professional educational requirement for individuals performing audit work to be exempt from overtime is at least a bachelor's degree and the subsequent on-the-job audit work-training experience of a minimum of 2,000 hours over a 12-month period required by RCW 18.04.105(1)(d) and WAC 4-25-710 and -730. (CP 2349)

2. The trial court erred in overruling plaintiffs' objections to defendant's legal arguments submitted in the form of "expert" declaration testimony concerning the significance of licensing to the professional exemption from overtime regulations. (CP 2349)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

The trial court certified and this court accepted two interrelated issues for immediate appellate review:

1. Only Certified Public Accountants may legally practice as auditors. In order to be licensed as a Certified Public Accountant, an individual must: (1) obtain a bachelor's degree with an accounting concentration, (2) have one year of on-the-job training and instruction, so that the assistant may obtain the competencies and abilities needed to perform audit work as a professional, (3) study for and pass the CPA exam, and (4) only when these three requirements are met, apply for and obtain a CPA license. WAC 4-25-710, -720 and -730. Are "audit associates" who are not licensed to practice as Certified Public Accountants and cannot legally practice as auditors nevertheless employed in a "bona fide professional capacity" and thus exempt from overtime laws? (The plaintiff class petitioners lost, and respondent KPMG

won, on this issue below. This issue is addressed in Arguments A-C, *infra.*)

2. Are the minimum educational requirement for employees performing audit work to be exempt from overtime laws as employed in a “bona fide professional capacity” *at least* the bachelor’s degree and subsequent on-the-job audit work-training experience for a minimum of 2,000 hours over a 12-month period required by RCW 18.04.105(1)(d) and WAC 4-25-710 and -730? (The plaintiff class petitioners won, and respondent KPMG lost, on this issue below. This issue is addressed in Argument D, *infra.*)

In addition to these substantive certified issues, the declarations the trial court considered in deciding what constitutes being employed in a “bona fide professional capacity” prejudicially affected its decision and raise the following issue:

3. Whether the trial court erred in considering and giving weight to declarations setting out “expert” opinion as to the proper application, interpretation and enforcement of overtime laws? (The trial court overruled plaintiff class petitioners’ objections to consideration of this evidence as improper legal argument. This issue is addressed in Argument E, *infra.*)

IV. STATEMENT OF FACTS

The trial court's orders on summary judgment were almost entirely based on respondent KPMG's own evidence. There is no dispute concerning the following material facts:

A. KPMG's Audit Associates Are Unlicensed Auditing Trainees.

Respondent KPMG LLP is a national accounting firm that provides accounting services throughout the United States. It has approximately 23,000 employees in 87 U.S. offices. (CP 1345-46 ¶¶6) KPMG's Seattle office has three separate practice areas: audit, tax and advisory. (CP 1346 ¶¶7) This case concerns only the audit department, and a certified class of its unlicensed audit associates.

KPMG's audit department conducts financial audits of businesses and other organizations. (CP 162-63 ¶¶8; 1346 ¶¶9-10; 1371 ¶¶13-14, 1373 ¶¶21) KPMG conducts its audits using teams that normally include a partner, a senior manager or manager, a senior associate, and one or more audit associates. (CP 162-63 ¶¶8; 1377-78 ¶¶36; 1412 ¶¶15) During the time period covered by this case (2004 to the present), each year KPMG's audit department in Seattle had 15 to 17 partners, 30 to 34 managers, 50 senior

associates, and 50 to 55 unlicensed audit associates. (CP 1346 ¶18)

“Audit associate” is the entry-level position in KPMG’s audit practice. KPMG hires 25 to 30 new audit associates each year. (CP 1348 ¶18) “[B]efore they are hired, KPMG requires each of its Associates to have a college degree that satisfies the requirements of the Washington State Board of Accountancy to be licensed as a CPA.” (CP 1380 ¶46; *see also* 1348 ¶18) However, none of KPMG’s audit associates *are* licensed to be a Certified Public Accountant. Nor could they be, given the statutory requirements for licensure, which mandate at least one year of on-the-job “apprentice” training and studying for and passing the CPA exam before an individual is eligible to obtain a license to practice as a Certified Public Accountant. *See* Statement of Facts § B, *infra*.

The representative plaintiff Mark Litchfield worked for over a year for KPMG as an unlicensed audit associate. (CP 162 ¶4; 1250 ¶2) The audit associate job was Litchfield’s first full-time employment after his graduation from college with a bachelor of science degree with a concentration in accounting. When he started working for KPMG, Litchfield had no accounting or auditing

experience other than briefly working for KPMG as an intern the summer before his last year of college. (CP 161-62 ¶¶3, 5) Litchfield did not have a license to practice as a Certified Public Accountant when he worked as an audit associate for KPMG. (CP 162 ¶5; 1250 ¶2)

KPMG paid Litchfield an annual salary of \$41,000, which equates to \$19.71 per hour for the 2080 hours in a standard work year (52 weeks times 40 hours per week). But in addition to these 2080 hours of work, KPMG actually required Litchfield, and its other salaried audit associates, to work a minimum of 270 annual hours of overtime. (CP 162 ¶4, 175 ¶54; 1652, 1654) Thus, Litchfield's effective hourly pay was much less than his annual pay rate suggested. His hourly pay would have dropped to \$17.50 if he had worked the minimum of 270 hours of overtime. But since Litchfield worked more overtime than that, his effective hourly pay was lower than \$17.50. (CP 175-76 ¶¶54-56)

KPMG argued below that eligibility for overtime must be “determined individually, for each employee,” through a person-by-person, week-by-week, retrospective look at “the job duties actually performed by each unlicensed accountant, on an employee-by-

employee basis.” (CP 1722; *see also* CP 1720-21) However, KPMG uniformly treats *all* its unlicensed (non-CPA) audit associates as exempt from overtime from the moment they are hired. (CP 1553-54 ¶¶11, 13; 1349 ¶21; 1378 ¶37; 1413 ¶19) There was no evidence that any KPMG audit associate has received any overtime pay in recent years.

B. None of the Class of Audit Associates Had Satisfied All The Statutory Requirements To Become A Professional Auditor.

To obtain the CPA license needed to practice as an auditor, an individual must satisfy three requirements under the Accountancy Act (RCW Ch. 18.04) and the regulations implementing the Act (WAC Ch. 4-25). First, an individual must have a bachelor’s degree with an accounting concentration, or a higher academic degree in accounting. RCW 18.04.105(1)(b); WAC 4-25-710. KPMG expects all its first-year audit associates to have this college degree. (CP 1348 ¶18) Second, the individual must obtain one year (2,000 hours) of on-the-job training and experience working for a licensed firm, to acquire the competencies and abilities needed to be eligible to become licensed to practice. RCW 18.04.105(1)(d); WAC 4-25-730. Third, an individual must

pass all parts of the CPA examination, including the ethics exam. RCW 18.04.105(1)(c); WAC 4-25-720. Only after satisfying all three of these requirements can an individual apply for and obtain a license as a Certified Public Accountant.

KPMG acknowledges that at least a year of on-the-job instruction and training is required under the Accountancy Act, so that the associate will have acquired the practical training, instruction and experience to obtain the competencies and abilities to become an auditor. (CP 1349-51 ¶¶22-30) In fact, KPMG provides its audit associates with the extensive on-the-job instruction and training necessary to teach associates how to conduct audits. (CP 1357 ¶¶53-56; 1580-82 ¶¶95-100) KPMG also provides “informal on-the-job training,” primarily by “Senior Associates” who “mentor and teach Associates on engagements.” (CP 1357 ¶¶55; 1370 ¶¶10; 1474 ¶¶8)

In addition to the required on-the-job training, an audit associate must also study for and pass all aspects of the CPA exam in order to be licensed to practice as an auditor. (CP 1352 ¶¶35-36; 1572 ¶¶74, 1576-77 ¶¶86) Only after passing the CPA exam and completing the one year of required on-the-job training is

an individual eligible to practice as a Certified Public Accountant. (CP 1572 ¶¶74, 1578, ¶¶89) Only once an individual receives a license to practice as a Certified Public Accountant can he or she act independently and practice as an auditor. (CP 1578 ¶¶89)

C. Procedural History Below.

Plaintiff Litchfield brought this action to obtain overtime pay under the Minimum Wage Act (RCW Ch. 49.46) for himself and a class of unlicensed (non-CPA) “audit associates” of defendant KPMG. The Superior Court certified the following class:

All individuals employed by KPMG in Washington in its audit department as “audit associates” who while working did not or do not have a license as a Certified Public Accountant. The class includes current employees and those employed within three years of filing suit.

(CP 1253 ¶¶14) There are about 200 class members. (CP 1251 ¶¶6)

KPMG claimed below that all audit associates are “full-fledged” professional auditors from day one of employment, based on an “individualized examination of job duties actually performed.” (CP 1723) The trial court in its April 22, 2010 order (CP 2347-49) granted partial summary judgment for Litchfield and the plaintiff class, rejecting KPMG’s argument. The trial court held that to be eligible for the “bona fide professional capacity” exemption based

on its “advanced” education requirement, an audit associate must not only have a bachelor’s degree, but also the one year of on-the-job training required under the Accountancy Act, RCW 18.04.105(1)(d). (CP 2349) However, the trial court rejected plaintiffs’ argument that an audit associate must actually pass the CPA exam and be licensed as a certified public accountant to be eligible for the professional exemption from overtime.

V. ARGUMENT

The trial court correctly rejected KPMG’s argument that all audit associates are “full-fledged” professional auditors from day one of employment, based on an “individualized examination of job duties actually performed.” (CP 1723) The trial court erred, however, by rejecting the bright-line licensing requirement for the professional exemption from overtime proposed by plaintiffs. Only by fulfilling *all* the requirements for licensing as a professional auditor should an employee be considered “employed in a bona fide professional capacity” and exempt from overtime regulations. At a minimum, an employee must fulfill the on-the-job audit work-training experience required before an individual can be licensed as an auditor before he or she could be considered “employed in a

bona fide professional capacity” and exempt from overtime regulations.

A. The Minimum Wage Act Exempts Only Bona Fide Professionals From Overtime Regulations.

“[N]o employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of [forty] hours . . . at a rate not less than one and one-half times the regular rate at which he is employed.” Minimum Wage Act (MWA), RCW 49.46.130(1). KPMG argues that its audit associates are “professionals” on their first day of work and therefore are always completely exempt from overtime as individuals “employed in *a bona fide . . . professional capacity*. . . as those terms are defined and delimited by rules of the director [of labor and industries].” RCW 49.46.130(2)(a); 49.46.010(5)(c) (emphasis added). The trial court correctly rejected KPMG’s argument that these employees are “professional” employees, on that first day of work. But it erred in concluding that audit employees who had not become licensed as Certified Public Accountants are exempt under the “bona fide professional capacity” exemption.

KPMG claims that whether audit associates are professional employees exempt from overtime must be divined solely from the language of the MWA,¹ without considering the Accountancy Act (RCW Ch. 18.04) and its regulations (WAC Ch. 4-25), which govern the minimum requirements for the professional practice of auditing. (CP 1727, 2323, 2344) But the employer has the burden to affirmatively establish that its employees are exempt from the Act's coverage. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000). In deciding whether the employer's claim of exemption is correct, "[e]xemptions from remedial legislation, such as the MWA and FLSA [federal Fair Labor Standards Act] are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz*, 140 Wn.2d at 301. KPMG's argument is contrary to the way remedial statutes such as the MWA are construed, and would make the application of the exemption ad hoc, arbitrary, and determined on an employee-by-employee, week-by-week basis.

¹ While arguing that only the MWA, and no other statutes, are relevant to what constitutes employment as a "bona fide . . . professional," KPMG bases its argument on legal opinion testimony. See Arg. § E, *infra*.

Instead, exemption decisions under the overtime regulations are properly made on a position-wide basis. *Berrocal v. Fernandez*, 155 Wn.2d 585, 597, ¶17, 121 P.3d 82 (2005) (“whether [an] exclusion [from the MWA] applies is a question of worker categorization.”). *Accord, Teamsters Local Union No. 117 v. Dept. of Corrections*, 145 Wn. App. 507, 513-14, ¶11, 187 P.3d 754, (2008); *Strain v. West Travel, Inc.*, 117 Wn. App. 251, 255, 70 P.3d 158 (2003), *rev. denied*, 150 Wn.2d 1029 (2004). As argued below, the determination whether the professional exemption from overtime applies must consider all the statutes, including the Accountancy Act, that define and control professionals within the industry at issue.

B. Under The “Plain Meaning Rule,” The Courts Must Look To The Accountancy Act To Determine Whether An Employee Is An Exempt Bona Fide Professional.

Under the “plain meaning rule,” our courts look at not only the legislative provision at issue but related statutes to determine legislative intent and the meaning of a statute. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, ¶6, 126 P.3d 802, *cert. denied*, 549 U.S. 988 (2006); *Cerrillo v. Esparza*, 158 Wn.2d 194, 202, ¶10, 142 P.3d 155 (2006). Where terms are not defined in the statute or

regulations, the courts look to other laws to determine the meaning of the provision in the law in question. *Snohomish Cty. Fire Prot. Dist. v. State Boundary Review Board*, 155 Wn.2d 70, 76, ¶8, 117 P.3d 348 (2005); accord, *Delyria v. State*, 165 Wn.2d 559, 566, ¶15, 199 P.3d 980 (2009) (the Court looked at multiple statutes addressing teacher pay to determine that the undefined statutory term “salary” in a particular statute meant “base salary”).

The “plain meaning rule” of construction applies to regulations as well as statutes. *Mader v. Health Care Authority*, 149 Wn.2d 458, 473, 70 P.3d 931 (2003) (“the plain meaning of a regulation may also be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.”) (internal quotations omitted). Thus, the Supreme Court in *Mader* reviewed the Health Care Authority’s (HCA) health care eligibility regulations in light of three statutes pertaining to part-time and career seasonal employees in order to determine that part-time community college instructors were covered by the HCA’s career seasonal health coverage regulation, rather than being excluded under the part-time

community college instructor regulation. *Mader*, 149 Wn.2d at 474-75.

The Department of Labor & Industries' (DLI) interpretative rule states that "professionals" are those who hold positions that "require knowledge of an advanced type," acquired by a "prolonged course of specialized intellectual instruction and study." WAC 296-128-530(1)(e). But the DLI regulations do not state what particular professions are "bona fide" professions, nor do the DLI regulations define the educational requirements of a "bona fide" professional within any particular profession, including auditing.

"Bona fide" means "truly; actually; without simulation or pretense." *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 679, 911 P.2d 1301 (1996), *quoting* Black's Law Dictionary 177 (1980). Here, the Court must look to the Accountancy Act, RCW 18.04.105(1), and the implementing regulations for the Act, WAC 4-25-710, -720 and -730, to determine the requirements for becoming a "bona fide" professional "auditor," because an individual cannot be an auditor in Washington until licensed to practice as an accountant: "No individual . . . not holding a license to practice . . . may hold himself . . . out to the public as

an “auditor. . . .” RCW 18.04.345(9). See *also* RCW 18.04.345(2) (prohibiting practice of public accounting (which expressly includes auditing) unless the individual has a CPA license). In interpreting the “bona fide professional capacity” exemption, the trial court in this case erred in failing to adopt the clear definition of professional auditor in the Accountancy Act and its regulations, which require that the professional be licensed as a Certified Public Accountant.

C. Under The Accountancy Act, An Audit Employee Is Not Employed In A “Bona Fide Professional Capacity” Unless Licensed As A Certified Public Accountant.

In order to be a professional auditor, an individual must have: (1) a bachelor’s degree with an accounting concentration; (2) work for a licensed firm for one year to obtain the required on-the-job training and experience; and (3) study for and pass all parts of the CPA exam. Only when the individual meets all these requirements is he or she eligible to obtain a license and practice as an auditor. RCW 18.04.105(1); WAC 4-25-710, -720 and -730. The trial court correctly understood that the educational requirements to practice auditing are part of what defines a “bona fide professional” auditor, but it erred in concluding that passing

the CPA exam and being licensed as a Certified Public Accountant are not part of the “professional” exemption requirements.

A “professional license” gives an individual a “nontransferable authorization to carry on an activity based on qualifications which include: (a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations.” *Brunson v. Pierce County*, 149 Wn. App. 855, 865, 205 P.3d 963 (2009), quoting RCW 18.118.020(8). Accountants cannot achieve professional status without meeting state licensing standards. *Chen Chi Wang v. U.S.*, 757 F.2d 1000, 1003 (9th Cir. 1985).

This licensing requirement is also reflected in other statutes governing accountants. For instance, RCW 18.04.345(7) provides that only licensed individuals may sign and be responsible for professional reports (such as those issued by auditors), and specifically prohibits unlicensed individuals from issuing such reports. Indeed, it is a crime for an unlicensed individual to practice as an auditor. RCW 18.04.370(1). See also *People v. Hill*, 66 Cal.App.3d 320, 323-24, 136 Cal.Rptr. 30, 31-32 (1977) (“It is unlawful for a person to represent himself to the public as an

accountant without first having been licensed as such under state law.”)

Under the Accountancy Act, an audit associate is not eligible to be an exempt professional until he or she has completed the prolonged course of specialized study and instruction specified by WAC 4-25-710, -720 and -730: (1) a bachelor’s degree with an accounting concentration, (2) one year of on-the-job training and instruction so that the assistant may obtain the competencies and abilities needed to perform audit work as a professional, (3) studying for and passing the CPA exam, and (4) when these first three requirements are met, applying for and obtaining a CPA license. (CP 1572 ¶74) The trial court erred in failing to hold that audit associates are not employed in a “bona fide professional capacity” and exempt from overtime regulations until they meet all the requirements to be licensed as Certified Public Accountants.

D. At a Minimum, Audit Associates Can Not Be Exempt From Overtime Regulations Until They Complete The Year Of On-The-Job Training Necessary To Apply For A CPA License.

Even if an audit associate need not be licensed as a Certified Public Accountant in order to be exempt from overtime regulations, the trial court properly rejected respondent KPMG’s

legal argument that whether audit associates are professional employees exempt from overtime must be divined solely from the MWA (“bona fide ... professional”), without considering the Accountancy Act (RCW 18.04) and its regulations (WAC Ch. 4-25). The trial court also properly rejected KPMG’s *factual* argument that exemptions from overtime must be “determined individually, for each employee,” through a person-by-person, week-by-week, retrospective look at “the job duties actually performed by each unlicensed accountant, on an employee-by-employee basis.” (CP 1722; *see also* CP 1720-21)²

Exemption decisions are properly made on a position-wide basis. *Berrocal*, 155 Wn.2d at 597, ¶17 (whether an exclusion from the MWA applies “is a question of worker categorization”). KPMG concedes that audit work is a very specialized form of professional work, and that it provides its audit associates with extensive training. (CP 1357, 1370, 1454-55) Under DLI WAC 296-128-530(1)(e), audit associates as a matter of law have not yet acquired the required “knowledge of an advanced type” required to be a

² Plaintiff class petitioners reserve the right to respond to KPMG’s challenges to the trial court’s rulings in the cross-respondents’ brief.

professional, but are instead still engaged in a “prolonged course of specialized intellectual instruction and study.”

The fact that audit associates are still undergoing specialized instruction in audit work is underscored by the rules governing auditors. Both the Generally Accepted Auditing Standards (“GAAS”) and American Institute of Certified Public Accountants (“AICPA”) rules of professional conduct, which govern auditors under WAC 4-25-622(1) and -631, require the auditor to properly instruct and supervise “assistants.” AICPA, AU Section 311 ¶31; AICPA, AU Section 311.30 (adopted into Washington law under WAC 4-25-622(1) and -631(1)); AICPA, AU Section 210.03.

The trial court properly rejected respondent KPMG’s argument that it need only hire individuals who meet the first requirement for licensure – a bachelor’s degree with an accounting concentration – for these individuals to immediately be full-fledged exempt professionals, assuming they are doing exempt professional audit work on a week-by-week basis. While KPMG concedes that a professional is one who possesses “knowledge of an advanced type” that is “acquired by a prolonged course of specialized intellectual instruction and study,” rather than a “general

academic education,” it attacks every assertion as to what that “prolonged course of study” is. (KPMG Motion for Disc. Rev. at 9-13)

KPMG asserts *no* position whatsoever on what constitutes a “professional” education, arguing only *negatively*. For example, KPMG argues that “nothing in the governing regulation remotely suggests that holding a CPA license — *or satisfying some or most or any* of the [educational] requirements to apply for a CPA license — is necessary” to meet the professional exemption. (KPMG Motion for Disc. Rev. at 9-13) (emphasis added). And, it says, “if they ‘actually perform [accounting] work,’ they are exempt, regardless of whether they have any education at all. (KPMG Motion for Disc. Rev. at 9-13) KPMG’s amorphous argument for what the professional exemption does *not* require is directly contrary to WAC 296-128-530. The trial court properly looked to the Accountancy Act to recognize the specialized instruction required for “professional” auditors.

E. The Trial Court Erred In Considering And Giving Weight To Legal Arguments In The Form Of “Expert” Testimony On The Significance Of Licensing.

The trial court’s only apparent source for the view that “bona fide professional” status as an auditor does not require studying for and passing the CPA exam and obtaining the CPA license required by statute for the practice of auditing was legal argument, in the form of supposed “expert” witness testimony. In particular, Tammy McCutchen, a D.C. lawyer, submitted a 20-page brief in the form of a “declaration” espousing her interpretation of the federal overtime regulations under the Fair Labor Standards Act (FLSA). (CP 1741-1961)

McCutchen is a lawyer from Washington D.C. who previously worked for the Bush administration to change federal regulations to make it easier for employers to deny overtime to white collar workers. (CP 2078; 1744, ¶¶ 16-18) Washington State rejected those same changes. (CP 1995) Although McCutchen is now an employment defense lawyer for a large employment defense firm in Washington D.C. (CP 1743 ¶ 10; CP 2077), she held herself out to the court as an independent “expert” on “applying, interpreting, and enforcing the Fair Labor Standards Act

(‘FLSA’) and related federal regulations.” (CP 1742 ¶2). She testifies for employers. (CP 1746, ¶20)

McCutchen’s declaration contains *no facts* pertaining to this action, as required by CR 56(e) to be considered on summary judgment. *Stenger v. State*, 104 Wn. App. 393, 408, 16 P.3d 655, *rev. denied*, 144 Wn.2d 1006 (2001). Instead, McCutchen’s declaration is a 20-page legal brief regarding federal regulations and how they supposedly apply in this action under Washington law. McCutchen’s declaration is submitted to support KPMG’s legal position that audit associates are professional employees exempt from overtime from the moment they are hired. (CP 1746-1754, ¶¶21-41)

McCutchen thus opines, for example, that “under [federal] regulations nearly identical to those in Washington . . . unlicensed accountants can qualify for the professional exemption.” (CP 1742, ¶3) (See *also* CP 1742, ¶¶3-7 (“summary” of legal opinions); CP 1746-60 ¶¶21-60. (legal opinions).) She explicitly expresses her opinion of the meaning of the “professional exemption” under Washington law and the federal law, supporting her opinion testimony with citations to federal regulations, the Washington

Administrative Code and DLI's policy statements, former federal regulations, and legislative history of the federal statute, all of which she attaches as pages of "exhibits" to her declaration. (CP 1762-1969)

The trial court erred in considering McCutchen's "expert" opinion on the law, over plaintiff class petitioner's objection. (CP 2055-67) This court "review[s] de novo a trial court's decision on the admissibility of evidence in a summary judgment proceeding." *State v. Lee*, 144 Wn. App. 462, 466, ¶11, 182 P.3d 1008 (2008), *rev. denied*, 165 Wn.2d 1017 (2009), *citing Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). "This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party . . . [and] with the requirement that the appellate court conduct the same inquiry as the trial court." *Folsom*, 135 Wn.2d at 663 (quotations and citations omitted). The trial court erred because a determination of the law is for the court, not a fact subject to testimony. Indeed, under Washington law, testimony about law is allowed only as to the law of foreign countries. CR 44.1(c). Any other testimony about the law is strictly prohibited.

Judges are required to decide what the law means based on briefs and arguments of counsel, not on testimony by “expert” witnesses. *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (“Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony.”) (emphasis in original); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 549 (1992) (“the meaning of a statute’s terms is a question of law; the question is not one amenable to resolution based upon . . . testimony.”); *Hyatt v. Sellen Const. Co., Inc.*, 40 Wn. App. 893, 898-99, 700 P.2d 1164 (1985) (witness could not offer “expert” opinion on the meaning of DLI safety regulations and how they applied to the facts of the case); *Stenger*, 104 Wn. App. at 408-09 (trial court properly refused to consider testimony from attorney expert on requirements of disability law and how that law applied to the facts of the plaintiff’s claim of disability discrimination). *Accord, Bell v. State*, 147 Wn.2d 166, 179-80, 52 P.3d 503 (2002) (trial court erred in allowing testimony by parole board members about standard of proof required in parole board hearing; [o]pinion testimony on legal

issues is not admissible.”); *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992) (because proffered “expert” testimony pertained to an issue of law for the court to decide, trial court properly refused to consider expert witness testimony on whether attorney’s actions created a conflict of interest under the professional rules for lawyers).

There is also a very strong policy reason for not allowing testimony, such as McCutchen’s, about the law of Washington and the United States. Instead of the law being determined by the Court based on briefs and arguments of counsel, both sides would have a strong incentive to hire as “experts” former government officials to testify that regulations and policies of their former agency mean whatever the side who hired them says they mean. The determination of the law then becomes another battle of dueling “experts,” instead of the Court determining for itself the meaning of the text. Leaving aside how unseemly this process would be, the Court’s rules about page limits for briefs would become meaningless; each side could submit lengthy, repetitive “testimony” that reads just like a brief (as McCutchen’s does) on the meaning of the law, rendering page limits meaningless. *U.S. v.*

Mazzone, 782 F.2d 757, 765 (7th Cir.), *cert. denied*, 479 U.S. 838 (1986) (page limits violated by putting materials that belong in the brief in a separate document that was called something else).

McCutchen apparently believed that she can testify about the meaning of the FLSA and the MWA because she was in charge of writing the changes to DOL's overtime rules. (CP 1745-46, ¶¶16-18) But the fact that she believed she has personal knowledge about the drafting of the new FLSA regulations because she helped draft them does not give her the authority to testify about their meaning. *City of Spokane v. State*, 198 Wash. 682, 685, 89 P.2d 826 (1939).

In *City of Spokane*, the State sought to prove the meaning of the law and legislative intent with depositions of the Governor, the chairman of the Senate and House Committees, and the Speaker of the House, explaining "what they, respectively, thought the act meant at the time when each exercised his appropriate function with regard to it." *City of Spokane*, 198 Wash. at 685. The State also submitted affidavits of the 33 senators and 68 representatives who voted on the legislation at issue, explaining in identical words

the meaning of the law and the legislative intent. *City of Spokane*, 198 Wash. at 685-86.

The Supreme Court held that the trial court correctly refused to consider this evidence because “it is perfectly clear, both upon reason and authority, that legislative intent in passing the statute cannot be shown or proven in such manner.” *City of Spokane*, 198 Wash. at 687. Similarly here, the fact that McCutchen claims to have personal knowledge about the new DOL regulations does not allow her to testify about their meaning or intent.

Moreover, in addition to being inadmissible legal opinions masquerading as expert testimony, McCutchen’s arguments that licensing to practice as a professional are irrelevant to the Department of Labor (DOL) are wrong – or at the very least, seriously misleading. For example, McCutchen categorically states that DOL “never considers” state licensing requirements:

The [Wage and Hour Division] interprets and enforces the FLSA and *never considers any state laws in determining compliance with the FLSA*. Satisfying requirements under the Washington Accountancy Act, or any other state licensing law, *has never been a requirement for the professional exemption under the federal regulations*.

(CP 1754 ¶40) (emphasis added) But contrary to McCutchen's statement, DOL has issued formal opinions refusing to hold unlicensed paralegals to be exempt employees, in part because they are not licensed to practice law. DOL issued a formal opinion in 2005 (while McCutchen was working there) that paralegals are not exempt administrative employees because they are not licensed to practice as lawyers, they must be supervised by lawyers, and thus cannot act independently under only general supervision:

[M]ost jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons. Under the American Bar Association's Code of Professional Responsibility, a delegation of legal tasks to a lay person is proper only if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work produced. *The implication of such strictures is that the paralegal employees you describe would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption.*

December 16, 2005 FLSA 2005-54, 2005 WL 3638473 (emphasis added). *Accord* February 19, 1998 FLSA opinion letter, 1998 WL 852701 (DOL Wage-Hour).

McCutchen's "testimony" was the sole support for KPMG's argument that a license to practice as a professional is irrelevant to whether an employee is a professional exempt from overtime. The trial court apparently relied on McCutchen's testimony. The trial court erred in not sustaining the plaintiff class' objection to McCutchen's legal opinions, offered in the guise of expert testimony.³

F. Petitioners Reserve Their Claim For Fees Under The Minimum Wage Act.

As this court recently recognized, any argument for fees under RCW 49.46.090(1) or RCW 49.48.030 before final resolution

³ Although it apparently did not adversely affect that trial court's decision, the trial court also erred in rejecting plaintiff's objections to the declarations of Richard Ervin, an employee of DLI, and Richard Sweeney, an employee of the Washington Accountancy Board. Both Ervin and Sweeney offered their personal opinions about the meaning of agency regulations and policy statements. This is not proper testimony and should not have been considered. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 717 n.7, 153 P.3d 846, cert. denied, 552 U.S. 1040 (2007); *City of Sunnyside v. Fernandez*, 59 Wn. App. 578, 581, 799 P.2d 753 (1990). Moreover, Ervin admitted that DLI "has not considered or been asked to consider the requirements of the Washington Accountancy Act in analyzing whether an employee qualifies for an exemption." (CP 1915, ¶16) Thus, there is no agency interpretation for the Court to consider. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 184, 828 P.2d 549 (1992); *City of Sunnyside*, 59 Wn. App. at 581; Similarly, Sweeney acknowledged that the Accountancy Board has never considered the overtime law in connection with its rules. (CP 2046, ¶17) To the extent KPMG relied and continues to rely on their "expert" opinion, plaintiff class petitioners preserve their objection to consideration of these "expert" declarations.

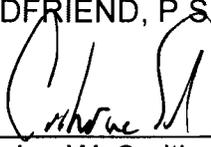
Package Systems, Inc., 63518-2 (December 20, 2010). Plaintiff class petitioners preserve their claim for fees, including fees on review, until final resolution of the action on remand. RAP 18.1.

VI. CONCLUSION

The trial court improperly applied the law by rejecting the bright-line license requirement proposed by plaintiffs for the professional exemption from overtime. The trial court did not err in determining that, at a minimum, audit associates cannot be exempt from overtime regulations until they complete at least a year of on-the-job training with a licensed auditor, required as a condition to obtain a CPA license to practice as an auditor. The Court should reverse and rule as a matter of law that unlicensed audit associates are not employed in a “bona fide professional capacity” and thus exempt from overtime regulations.

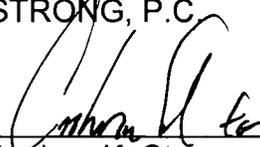
Dated this 30th day of December, 2010.

EDWARDS, SIEH, SMITH
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Attorneys for Appellant

DECLARATION OF SERVICE

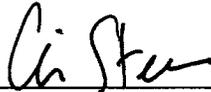
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 30, 2010, I arranged for service of the foregoing Opening Brief of Plaintiff Class Petitioners, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-File
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DATED at Seattle, Washington this 30th day of December, 2010.



Carrie Steen

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December 30, 2010

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Re: Litchfield, et al. v. KPMG, LLP, Cause No. 65372-5-I

Dear Clerk:

Enclosed for filing is the original and one copy of the Opening Brief of Plaintiff Class Petitioners in the above-referenced matter. Please copy receive the corresponding face page and return it to this office in the enclosed self-addressed stamped envelope.

Thank you for your courtesy.

Very truly yours,



Carrie Steen
Legal Assistant

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Enclosures

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