APPENDIX

APPENDIX A

SUPREME COURT OF WASHINGTON

No. 94593-4

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. a Washington Corporation,

Petitioner / Cross-Respondent.

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Attorneys and Law Firms

Clarence M. Belnavis, Catharine M. Morisset, Fisher & Phillips LLP, 1201 Third Avenue, Suite 2750, Seattle, WA 98101-3274, Rochelle Yvonne Nelson, Skellenger Bender PS, 1301 5th Avenue, Suite 3401, Seattle, WA 98101-2630, Alexander A. Wheatley, Attorney at Law, 111 SW 5th Avenue, Suite 4040, Portland, OR 97204-3643, for Petitioner.

Daniel Foster Johnson, Breskin Johnson & Townsend, PLLC, 1000 Second Avenue, Suite 3670, Seattle, WA 98104, Adam J. Berger, Schroeter Goldmark & Bender, 810 3rd Avenue, Suite 500, Seattle, WA 98104-1657, for Respondents.

Patrick Michael Madden, K&L Gates LLP, 925 4th Avenue, Suite 2900, Seattle, WA 98104-1158, for Amicus Curiae (King County).

Katherine Eileen Cameron, Fair Work Center, 5308 Martin Luther King Jr. Way S, Unit 10, Seattle, WA 98118-6307, Jeffrey Lowell Needle, Attorney at Law, 705 2nd Avenue, Suite 1050, Seattle, WA 98104-1759, for Amicus Curiae (Washington Employment Lawyers Association).

OPINION

GORDON McCLOUD, J.

Garda CL Northwest Inc. operates an armored transportation service and requires its drivers and messengers to remain constantly vigilant while working. Specifically, Garda requires those employees to maintain vigilance when they take lunch breaks while on the job. The Court of Appeals ruled that this constant vigilance policy deprived the employees of a meaningful meal period, as guaranteed under WAC 296-126-092. That court also ruled that this policy violated the Washington Minimum Wage Act (MWA), chapter 49.46 RCW.

Under Washington law, an employer who violates the MWA owes its employees double exemplary damages unless certain exceptions apply. RCW 49.52.050, .070. One exception is for wage claims over which the employer and employees have a "'bona fide'" or "'fairly debatable'" dispute, meaning a dispute that is both objectively and subjectively reasonable. *E.g., Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wash.2d 822, 834, 287 P.3d 516 (2012) (internal quotation marks omitted) (quoting *Morgan v. Kingen*, 166 Wash.2d 526, 534, 210 P.3d 995 (2009); *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 161, 961

P.2d 371 (1998)). The first question in this case is whether Garda carried its burden[1] of showing a fairly debatable dispute over whether the employees waived their state law right to meal periods in their collective bargaining agreements (CBAs). Answer & Cross-Pet. for Review at 18. The second question is whether the plaintiffs can recover both prejudgment interest under RCW 19.52.010 and double exemplary damages under RCW 49.52.070 for the same wage violation. *Id.* at 18-20.

We hold that Garda has failed to prove a bona fide dispute based on waiver. We also hold that aggrieved workers may recover both double exemplary damages under RCW 49.52.070 and prejudgment interest under RCW 19.52.010 for the same wage violation. We therefore reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL BACKGROUND

Garda operates an armored transportation service delivering currency and other valuables throughout Washington State. Typically, two Garda employees, a driver and a messenger, guard these valuables during transport. To ensure the safety of those employees and their cargo, Garda requires its drivers and messengers to remain vigilant at all times—even when they take rest breaks and meal periods.[2] Opening Br. of

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[1] *Wash. State Nurses Ass'n*, 175 Wash.2d at 834, 287 P.3d 516 ("The burden falls on the employer to show the bona fide dispute exception applies." (citing *Schilling*, 136 Wash.2d at 165, 961 P.2d 371)).

[2] Garda disputed whether all drivers and messengers really followed that policy. Clerk's Papers (CP) at 3172-3302 (containing logs of certain employees' social media access). The trial court resolved that dispute by ruling that some employees may have engaged in personal activities during their breaks, but the

Appellant Garda at 7 ("acknowledg[ing] that because of the nature of the work—transporting Liability [(valuables)] in an armored truck and carrying firearms—its crew must exercise some level of alertness at all times outside a Garda facility").

Plaintiffs Lawrence Hill, Adam Wise, and Robert Miller are former Garda drivers and messengers. They argue that Garda's policy of prohibiting drivers and messengers from taking vigilance-free rest breaks and meal periods violates WAC 296-126-092 (guaranteeing workers rest breaks and meal periods) and RCW 49.46.020 of the MWA (entitling employees to compensation for all hours worked). Clerk's Papers (CP) at 2753-61, 3304-08. They filed a lawsuit on behalf of themselves and a class of similarly situated Washington drivers and messengers for compensation for these missed rest breaks and meal periods. CP at 3-8. They requested compensatory damages under RCW 49.46.040, exemplary double damages under RCW 49.52.070, and prejudgment interest under RCW 19.52.010.

The trial court certified the plaintiff class (hereafter "Plaintiffs"). CP at 932-34. It then ruled that WAC 296-126-092 granted Plaintiffs the right to vigilance-free rest breaks and meal periods, CP at 3352-53, and that this was made especially clear by the 2011 decision in *Pellino v. Brink's Inc.*, 164 Wash. App. 668, 267 P.3d 383 (2011). CP at 3810-11. *Pellino* held that a similar constant vigilance policy used by one of Garda's competitors, Brink's Inc., violated WAC 296-126-092. *Pellino*, 164 Wash. App. at 694-96, 267 P.3d 383. It therefore granted summary judgment to the

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"[e]mployees were never relieved of the obligations to guard the truck and/or the liability and to maintain constant vigilance." CP at 3812.

Plaintiffs on the issue of liability. CP at 3352-54. A bench trial followed on the issue of damages and double damages.

The Plaintiffs sought double damages pursuant to RCW 49.52.050 and .070. Those statutes say that employers who intentionally underpay employees must pay exemplary double damages. Garda opposed double damages. Garda argued that there was a bona fide dispute over the workers' entitlement to vigilance-free rest breaks and meal periods for four reasons[3] and that such a dispute constitutes a defense to double damages under RCW 49.52.050 and .070. Garda also argued that even if there were no bona fide dispute, the workers knowingly submitted to the violation—another statutory defense to double damages. CP at 3447-48.

The trial court rejected Garda's arguments and granted the Plaintiffs prejudgment interest and double damages for their missed rest breaks and meal periods, starting two weeks from the date that *Pellino* was issued. CP at 3810, 3821. The trial court held that Garda did not have the requisite intent to deprive the workers of their rest breaks and meal periods earlier because prior to *Pellino* it was fairly debatable whether WAC 296-126-092 required vigilance-free rest breaks and meal periods. CP at 3811.

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[3] Garda argued it had a bona fide dispute based on (1) federal preemption under the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. § 14501(c)(1); (2) federal preemption under the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185(a); (3) individual waiver based on the acknowledgments that each employee signed, agreeing to be bound by the terms of their respective CBA; and (4) collective waiver based on the Plaintiffs' respective CBAs. CP at 3437, 3444, discussed *infra* at 212.

Garda appealed several issues concerning liability.[4] It also appealed the award of double damages but only as to the meal period violations (not the rest break violations). Lastly, Garda appealed the Plaintiffs' recovery of both prejudgment interest and double damages for the same violations.

The Court of Appeals affirmed the trial court's rulings on liability. *Hill v. Garda CL Nw., Inc.*, 198 Wash. App. 326, 343-59, 394 P.3d 390 (2017). But it reversed the trial court's award of double damages for meal period violations and reversed portions of the prejudgment interest award regarding rest break violations because the Plaintiffs also recovered double damages for those violations. *Id.* at 363-66, 394 P.3d 390. The Court of Appeals explained that Garda had established its statutory, bona fide dispute defense because the law was not that clear about whether meal periods could be waived in a CBA. *Id.* at 363, 394 P.3d 390. The Court of Appeals did not address whether Garda had established the bona fide dispute defense on the other issues Garda claimed were debatable: Federal Aviation Administration Authorization Act of 1994 (FAAAA) preemption, Labor Management Relations Act of 1947 (LMRA) preemption and individual waiver. *Id.* at 363-64, 394 P.3d 390. Nor did it address Garda's statutory defense that the workers willfully submitted to the violation. *Id.* at 364, 394 P.3d 390.

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[4] Garda appealed liability under WAC 296-126-092, raising questions regarding (1) the meaning of WAC 296-126-092 and whether it required vigilance-free rest breaks and meal periods, (2) the waivability of meal period rights by CB As, and (3) federal preemption under the FAAAA, the LMRA, and section 7 of the National Labor Relations Act of 1935, 29 U.S.C. § 157.

Garda petitioned this court for review and the Plaintiffs cross-petitioned. We denied Garda's petition but granted Plaintiffs' cross-petition on the issues of double damages and prejudgment interest. *Hill v. Garda CL Nw., Inc.*, 189 Wash.2d 1016, 403 P.3d 839 (2017).

ANALYSIS

I. Garda Failed To Carry Its Burden of Showing the Statutory Bona Fide Dispute Defense to Double Damages Based on Waiver

A. Under RCW 49.52.052 and .070, an Employer Is Liable for Double Damages for Wage Violations Unless It Carries the Burden of Showing That a Statutory Defense Applied

The trial court's decision that Garda violated WAC 296-126-092 and is liable to the Plaintiffs for wage violations under the MWA is not before this court. The question for us relates solely to Garda's liability for double exemplary damages under RCW 49.52.050 and .070.

Under those statutes, an employer who "pay[s] any employee a lower wage than the wage such employer is obligated to pay such employee" "shall be liable . . . to judgment for twice the amount of the wages unlawfully . . . withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees" if the employer withheld the wages (1) "[w]ilfully and [(2)] with intent to deprive the employee of any part of his or her wages" and (3) the employee did not "knowingly submit[ ] to such violations." RCW 49.52.050(2), .070.

The standard for proving willfulness is low—our cases hold that an employer's failure to pay will be

deemed willful unless it was a result of "'"carelessness or err[or]."'" *Wash. State Nurses Ass'n*, 175 Wash.2d at 834, 287 P.3d 516 (quoting *Morgan*, 166 Wash.2d at 534, 210 P.3d 995 (quoting *Schilling*, 136 Wash.2d at 160, 961 P.2d 371)); *see also* RCW 49.52.080 (presuming willfulness). But an employer defeats a showing of willful deprivation of wages if it shows there was a "bona fide" dispute about whether all or part of the wages were really due. *Schilling*, 136 Wash.2d at 161, 961 P.2d 371; *see also Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wash.2d 282, 301 n.11, 745 P.2d 1 (1987) (listing cases); *Morgan*, 166 Wash.2d at 534, 210 P.3d 995 (citing *Pope v. Univ. of Wash.*, 121 Wash.2d 479, 490, 852 P.2d 1055 (1993)).

Under our prior decisions, the burden is on the employer to show the existence of such a bona fide dispute. *Wash. State Nurses Ass'n*, 175 Wash.2d at 834, 287 P.3d 516 (citing *Schilling*, 136 Wash.2d at 165, 961 P.2d 371).

And under our prior decisions, a bona fide dispute has both an objective and a subjective component. The employer must have a "'genuine belief" in the dispute at the time of the wage violation. *See Chelan County*, 109 Wash.2d at 301, 745 P.2d 1 (quoting *Ebling v. Gove's Cove, Inc.*, 34 Wash. App. 495, 500, 663 P.2d 132 (1983)). That is the subjective component. In addition, that dispute must be objectively reasonable—that is, the issue must be "fairly debatable." *Schilling*, 136 Wash.2d at 161, 961 P.2d 371; *see Wash. State Nurses Ass'n*, 175 Wash.2d at 836, 287 P.3d 516 (examining reasonableness of the dispute over wages to determine whether the issue was fairly debatable for purposes of RCW 49.52.050(2)). That is the objective component.

Thus, despite the statute's focus on the employer's intent, our decisions state that whether an employer acts "[w]ilfully and with intent to deprive" within the meaning of RCW 49.52.050(2) is really a two-part test with an objective and subjective component. The subjective, genuine belief component is a question of fact that we generally review under the substantial evidence standard. *Schilling*, 136 Wash.2d at 167, 961 P.2d 371 (Alexander, J., dissenting) (citing *Pope*, 121 Wash.2d at 490, 852 P.2d 1055 (citing *Lillig v. Becton-Dickinson*, 105 Wash.2d 653, 660, 717 P.2d 1371 (1986))); *State v. O'Connell*, 83 Wash.2d 797, 839, 523 P.2d 872 (1974); *Chelan County*, 109 Wash.2d at 300-01, 745 P.2d 1. The objective, "fairly debatable" inquiry is a legal question about the reasonableness or frivolousness of an argument that we review de novo. *See In re Pers. Restraint of Caldellis*, 187 Wash.2d 127, 385 P.3d 135 (2016) (reviewing de novo lower court's dismissal of a personal restraint petition as frivolous under RAP 16.11(b)).

B. Garda Failed To Carry Its Burden of Showing the Statutory Bona Fide Dispute Defense to Double Damages Based on Collective Waiver

1. The Trial Court Rejected All Four Bona Fide Disputes Proposed by Garda

At trial, Garda argued that there was a bona fide dispute about whether the Plaintiffs were entitled to vigilance-free meal periods because it questioned

> (1) whether Plaintiffs' meal and rest break claims were preempted by the Federal Aviation Administration Authorization Act ("[FAAAA]"); (2) whether Plaintiffs' meal break claims were preempted by Section 301 of the Labor

> Management Relations Act ("LMRA"), . . . (3) whether Plaintiffs waived their meal break claims by individually signing acknowledgment forms stating that the employee individually agreed to the terms of the applicable Labor Agreements[, and (4)] whether the Labor Agreements are the type of "CBAs" [Department of Labor & Industries administrative policy] ES.C.6 § 15 is intend[ed] to address [(given that this court questioned the characterization of the plaintiffs' labor agreements as CBAs in *Hill v. Garda CL Nw., Inc.*, 179 Wash.2d 47, 50 n.1, 308 P.3d 635 (2013)].

CP at 3437, 3444. The trial court rejected Garda's claims of a bona fide dispute on all four grounds. CP at 3817-19. With regard to question 1, it found that Garda did not "'genuinely believe[ ]'" in the FAAAA preemption argument at the time of the wage violation. CP at 3811, 3819. This ruling on question 1 is a factual conclusion. With regard to questions 2 and 3, it rejected Garda's LMRA preemption and individual waiver arguments as objectively unreasonable. CP at 3817-19. The trial court ruled that Garda's LMRA preemption argument was "meritless" because the law was clear that the LMRA does not apply to claims based solely on state statutory and regulatory requirements. CP at 3818-19. As for Garda's argument that the Plaintiffs had individually waived their meal periods when they signed acknowledgements agreeing to be bound by the terms of their respective CBAs, the trial court ruled that that argument was unreasonable because the CBAs on which Garda's individual waiver arguments were predicated did not purport to waive the "'on-duty' meal breaks" that the Plaintiffs were seeking to enforce. CP at 3818. These rulings on

questions 2 and 3 are legal conclusions. Finally, the trial court did not provide a reason for rejecting Garda's fourth claim that the labor agreements signed by the workers were not the type of CBAs that are subject to provision 15 of the Department of Labor and Industries' Employment Standard ES.C.6 (2005), which bars waiver of meal period rights in CBAs. Because it made no factual finding on that point, we treat its decision on question 4 as a legal one, not a factual one.

2. The Court of Appeals Reversed Based on the Bona Fide Dispute Summarized at (4), Above: Whether a CBA Can Waive the State Law Right to Meal Breaks

The Court of Appeals reversed, finding that Garda did have a bona fide dispute about whether the Plaintiffs waived their state law meal break right in their CBAs—the dispute described as number 4, above. Specifically, that court held that it was fairly debatable whether the Plaintiffs had waived their meal period rights because "the state of the law was not clear" about whether meal period rights could be waived in a CBA, noting specifically that "Garda's interpretation of the Policy [(Employment Standard ES.C.6 (2005))] on this point was not unreasonable." *Hill*, 198 Wash. App. at 363, 394 P.3d 390. We reverse.

3. We Reverse; Even If Washington Law Were Unclear about the Waivability of "On Duty" Meal Period Rights through CBAs, Garda Never Argued that the Plaintiffs Waived the "On Duty" Meal Period Right That the Plaintiffs Are Seeking To Enforce

There was no bona fide dispute about whether the Plaintiffs waived their right to a paid, *on duty* meal

period. Indeed, even Garda acknowledges that the Plaintiffs retained the right to a paid, on duty meal period. Instead, Garda argued that the Plaintiffs waived their right to *off duty* meal periods and that they received their *on duty* meal periods. *E.g.*, Garda's Reply to Answer & Cross Pet. for Review at 1-2 ("Garda argued below, as it has consistently throughout this litigation, that the Drivers intentionally and knowingly waived *off-duty* meal periods either in the agreements negotiated by the Drivers Associations or by individually signing the acknowledgments of the same. . . . Garda also argued that there was no wage violation because the Drivers were paid for such on-duty meal breaks." (emphasis added)).

Based on that argument, Garda concludes that because the Plaintiffs were paid for a full day, including the time during which they ate while working, they were given and paid for "on duty" meal periods as required by WAC 296-126-092. *E.g.*, Suppl. Br. of Pet'r/Cross Resp't Garda, f/k/a AT Systems Inc. at 3 ("Garda maintains that each relevant CBA clause confirmed showed [sic] that the Drivers agreed—and chose—to work [through] 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.").

But that's not what an "on duty" meal period, as contemplated by WAC 296-126-092, is. An "on duty" meal period is one during which the employee is relieved of all work duties—the employee need only remain "on the premises or at a prescribed work site in the interest of the employer." WAC 296-126-092(1).[5]

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[5] Regardless of whether it might have been debatable before the *Pellino* decision whether the meal periods the Plaintiffs

It is undisputed that Garda failed to provide the Plaintiffs with that type of work-free, "on duty" meal period. And it is precisely that type of work-free, "on duty" meal period on which the Plaintiffs base their claims in this case: the Plaintiffs explicitly claimed that they were deprived of such "on duty" meal periods.

Because there was no argument that the Plaintiffs waived "on duty" (as opposed to "off duty") meal periods in their CBAs, Garda's assertion of a bona fide dispute based on collective waiver was objectively unreasonable. We therefore reverse the Court of Appeals on the bona fide dispute question (4).[6]

Thus, even without focusing on the specific language of the Plaintiffs' CBAs, we hold that Garda failed to establish a bona fide dispute based on collective waiver because Garda never actually argued there was waiver of the particular type of rights the Plaintiffs sought to enforce here, that is, "on duty" meal periods.

4. The Plaintiffs' CBAs Support Their Undisputed Assertion That They Did Not Waive Their "On Duty" Meal Periods in Those Agreements

The specific language of the Plaintiffs' CBAs, however, provides further support for our conclusion that there was no bona fide dispute based on waiver.

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received qualified as an "on duty" meal period, that debate is not relevant here because the trial court awarded double damages starting after the *Pellino* decision.

[6] Given our limited resolution of this case, we do not address whether the Court of Appeals also erred in concluding that the law was unclear as to the waivability of meal period rights in CBAs.

As detailed below, each of the Plaintiffs' 18 CBAs contained one of three general meal period clauses, all reaffirming that the Plaintiffs had not waived "on duty" meal periods.

The first type of meal period clause stated that driving routes would be scheduled without a designated, prescheduled lunch break and explained that the employees would instead be provided a paid, on duty lunch break. Eight CBAs contained one of three variations of that clause:

> 1. Street and ATM (automated teller machines) routes will be scheduled without a designated lunch break; thus employees will not be docked for same. In the event a truck crew on a Street or ATM route wishes to schedule a nonpaid lunch break, they must notify their supervisor. (CP at 390 (2004-09 Mt. Vernon Labor Agreement), 454 (2004-08 Seattle Labor Agreement), 536 (2005-08 Tacoma Labor Agreement).)
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> 2. Street routes as well as ATM routes will be scheduled without a designated lunch break thus employees will not be docked for same. In the event a truck crew on a street or ATM route wishes to schedule a nonpaid lunch break, they must notify their supervisor. (CP at 497 (2007 Spokane Work Rules).)
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> 3. Street routes will be scheduled without a designated lunch break; thus employees will not be docked for same. In the event a truck crew on a street route wishes to schedule a nonpaid lunch break, they must notify their supervisor. (CP at 578 (2009 Wenatchee Labor Agreement), 622 (2006-09 Yakima

> Labor Agreement), 433 (2006-09 Pasco Labor Agreement),[7] 1513 (2006-09 Wenatchee labor agreement).)

The second type of meal period clause guaranteed the employees a paid on duty meal period and stated that if the employees wanted an unpaid off duty meal period instead, then the employees must make arrangements with their supervisor. Seven of the Plaintiffs' CBAs contained that clause:

> The Employees hereto agree to an on-duty meal period. Employees may have an off duty meal period if they make arrangements with their supervisor in advance of the need or provided the supervisor with a written request to renounce the on-duty meal period in exchange for an off-duty meal period.

CP at 413 (2009-12 Mt. Vernon Labor Agreement), 478 (2008-11 Seattle Labor Agreement), 516 (2008-11 Spokane Labor Agreement), 558 (2009-12 Tacoma Labor Agreement); 1140 (2013-16 Mt. Vernon Labor Agreement), 4239 (2013-16 Seattle Labor Agreement), 1669-70 (2011-14 Spokane Labor Agreement).

The third type of meal period clause purported to waive all meal period rights but then indicated that the employees still had a right to a paid, on duty meal period. Three of their CBAs contained that clause:

> The Employees hereto waive any meal period(s) to which they would be otherwise

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[7] The court's photocopy of the 2006-09 Pasco labor agreement is striated and therefore difficult to read, but the parties seem to agree that it contains language consistent with the 2009 Wenatchee and 2006-09 Yakima labor agreements. Opening Br. of Appellant Garda, App. at a; Pls.'/Cross-Pet'rs' Suppl. Br. at 11 n.6.

> entitled. Employees will be paid at their regular hourly rate to work through any such meal period(s). Notwithstanding this waiver, employees may eat meals within their vehicles while on route so long as they can do so in a safe manner. Employees may take an unpaid off-duty meal period if they make arrangements with their supervisor at least one day in advance of the need or provide their supervisor with a written request to renounce the on-duty meal period in exchange for an off-duty meal period.

CP at 1163 (2010-13 Pasco labor agreement), 601 (2010 Wenatchee Labor Agreement), 646 (2010-13 Yakima Labor Agreement).

Thus, none of the Plaintiffs' 18 CBAs actually waived their right to an on duty meal period, which is the right the Plaintiffs seek to enforce in this lawsuit.

Garda has therefore failed to carry its burden of showing a bona fide dispute on waiver.

5. The LMRA Does Not Bar This Court from Reading the Parties' CBAs, Nor Does It Preempt the Plaintiffs' State Law Claim

Garda argues that it is impermissible for this court to interpret the language of those agreements, despite the fact that Garda is the party that raised their language as a basis for its bona fide dispute defense. Garda claims that this court is barred from referring to that language because section 301 of the LMRA, 29 U.S.C. § 185(a), preempts the field of labor relations and bars state courts from resorting to the language of a CBA even when analyzing the enforceability of a state law created right. Opening Br. of Appellant Garda at 21-22.

Garda is incorrect. Because Garda raised the language and characterizes it as supporting its argument, this court has a duty to read that language and decide whether Garda is correct about that characterization. As the Ninth Circuit summarized of the holdings of the relevant United States Supreme Court decisions on this point,

> [I]n order for complete preemption to apply, "the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is *plainly based on state law,* § 301 pre-emption is not mandated simply because the defendant refers to the CBA in mounting a defense." [*Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001); *see also Gregory v. SCIE, LLC*, 317 F.3d 1050, 1052 (9th Cir. 2003); *Humble v. Boeing Co.*, 305 F.3d 1004, 1008 (9th Cir. 2002).]

Valles v. Ivy Hill Corp., 410 F.3d 1071, 1076 (9th Cir. 2005) (emphasis added). The Plaintiffs' claims in this case are "plainly based on state law." The fact that Garda "refers to the CBA in mounting a defense" does not turn it into an LMRA claim. Neither does reading the CBAs themselves.

Garda also argues that if we choose to spend too much time addressing the language of the CBAs that it raised, then the Plaintiffs' claim must be considered fully preempted. This reflects a misunderstanding of the reach of LMRA preemption. As the Court of Appeals said in its discussion of that issue, and in reliance on controlling United States Supreme Court law, "[S]ection 301 preemption does not apply to every dispute between an employer and a union employee. '[I]t would be inconsistent with congressional intent under [section 301] to pre-empt state rules that

proscribe conduct, or establish rights and obligations, *independent of a labor contract.*'" *Hill*, 198 Wash. App. at 349, 394 P.3d 390 (emphasis added) (second and third alterations in original) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)).

This holding remains good law, and the WAC on which the Plaintiffs rely is a state rule that prescribes rights "independent of a labor contract."

Garda argues one final aspect of LMRA preemption. It contends that "the Plaintiffs' claims stem from negotiable rights, which they have waived in their CBAs." *Id.* at 351, 394 P.3d 390. And Garda is correct that in the line of cases in which the United States Supreme Court "has sought to preserve state authority in areas involving minimum labor standards," *Valles*, 410 F.3d at 1076, that court has said that "[section] 301 [of the LMRA] cannot be read broadly to pre-empt *nonnegotiable rights* conferred on individual employees as a matter of state law." *Livadas v. Bradshaw*, 512 U.S. 107, 123, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994) (emphasis added). Garda relies on this premise to argue the converse, i.e., that the meal period protection at issue here was a *negotiable* right and, hence, the LMRA preempted the Plaintiffs' claims and the Plaintiffs lack the ability to make any argument that the CBA actually preserved their negotiable right.

But a CBA cannot waive the employees' right to the protection of even a *negotiable* state law right unless it does so in "clear and unmistakable language." As the Ninth Circuit recently explained, in a passage relying solely on controlling United States Supreme Court law:

> Finally, we have held that "§ 301 does not permit parties to waive, in a [CBA], nonnegotiable state rights" conferred on individual employees. *Balcorta* [*v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1111 (9th Cir. 2000)]. As the Supreme Court has repeatedly emphasized, "Congress is understood to have legislated against a backdrop of generally applicable [state] labor standards." *Livadas*, 512 U.S. at 123 n. 17, 114 S.Ct. 2068. Section 301 must not be construed to give employers and unions the power to displace state regulatory laws. *See Cramer*, 255 F.3d at 697; *Humble*, 305 F.3d at 1009; *Associated Builders & Contractors, Inc.* [v. *Local 302 Int'l Bhd. of Elec. Workers*], 109 F.3d [1353, 1357-58, *amended and superseded on reh'g*, 1997 WL 236296 (9th Cir. 1997)]. Where, however, under state law waiver of state rights may be permissible, "the CBA must include 'clear and unmistakable' language waiving the covered employee's state right 'for a court even to consider whether it could be given effect.'" *See Cramer*, 255 F.3d at 692 (quoting *Livadas*, 512 U.S. at 125, 114 S.Ct. 2068).

Valles, 410 F.3d at 1076 (footnote omitted). We agree.

Thus, even if Washington's state law meal period protection is considered collectively negotiable—a question we do not reach—the language in the Plaintiffs' CBAs on which Garda relies certainly did not waive that protection in clear and unmistakable language. As discussed above, the agreements did not waive the protection of true on duty meal periods at all. Instead, as Garda acknowledges, the CBAs retained the protection of true on duty meal periods. Thus, it was

unreasonable for Garda to claim a bona fide dispute based on waiver.[8]

C. Garda's "Knowing[ ] Submi[ssion]" Defense and Its Other Bona Fide Dispute Defenses Should Be Addressed on Remand

Given our limited grant of review, we remand to the Court of Appeals to address Garda's remaining statutory defenses to double damages, including whether there was a bona fide dispute based on FAAAA preemption and whether the Plaintiffs knowingly submitted to Garda's meal period violation. RAP 13.7(b); *Hill*, 198 Wash. App. at 364, 394 P.3d 390.

II. Workers May Recover Both Double Exemplary Damages under RCW 49.52.070 and Prejudgment Interest under RCW 19.52.010 for the Same Wage Violation

The trial judge awarded the Plaintiffs back wages from 2006 to 2015 for the vigilance-free meal periods and rest breaks of which they were deprived. CP at

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[8] Contrary to the dissent's concerns, our holding in this case does not disturb our rulings in *Champagne v. Thurston County*, 163 Wash.2d 69, 82, 178 P.3d 936 (2008), and *Washington State Nurses Ass'n.* Those cases state that "[g]enerally, 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.'" *Wash. State Nurses Ass'n*, 175 Wash.2d at 834, 287 P.3d 516 (quoting *Champagne*, 163 Wash.2d at 82, 178 P.3d 936). As detailed above, the CBAs in this case guaranteed the Plaintiffs an on-duty meal period, which the Court of Appeals held they did not receive. Thus, we do not address the Plaintiffs' fallback argument that even if the CBAs had waived their meal period rights under WAC 296-126-092, Garda could not rely on such waiver as a defense to double damages because the Department of Labor and Industries' Administrative Policy ES.C.6 (2005) bars waiver of meal period rights in CBAs.

3808, 3814-17. It also awarded double exemplary damages from 2011[9] to 2015. CP at 3821. Finally, it awarded prejudgment interest, but only on the back wages, not on the double exemplary damages. CP at 3822. Garda does not dispute the Plaintiffs' ability to recover prejudgment interest for the type of wage claims raised here. *See Stevens v. Brink's Home Sec., Inc.*, 162 Wash.2d 42, 50, 169 P.3d 473 (2007) (classifying judgments for back wages as liquidated and therefore eligible for prejudgment interest (citing *Hansen v. Rothaus*, 107 Wash.2d 468, 472, 730 P.2d 662 (1986))). Instead, Garda argues that the Plaintiffs cannot recover both prejudgment interest and double exemplary damages for the same wage violation; Garda argues that would constitute impermissible double recovery. The Court of Appeals agreed and reversed the portions of the trial court's prejudgment interest award granting double exemplary damages for the same wage violation. *Hill*, 198 Wash. App. at 364-66, 394 P.3d 390.

Whether an award of double exemplary damages under RCW 49.52.070 and an award of prejudgment interest result in an impermissible double recovery is a question of statutory interpretation that we review de novo. *Spivey v. City of Bellevue*, 187 Wash.2d 716, 726, 389 P.3d 504 (2017) (citing *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 807, 16 P.3d 583 (2001)).

To answer this question, we must consider whether the harms compensated by RCW 49.52.070, the double damages statute, and RCW 19.52.010, the prejudgment interest statute, overlap.

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[9] The year of the *Pellino* decision.

They do not. RCW 49.52.070 awards employees "twice the amount of the wages unlawfully rebated or withheld by way of *exemplary* damages" when the employer withholds such wages willfully and with intent to deprive. (Emphasis added.) "Exemplary damages" are synonymous with punitive damages. BLACK'S LAW DICTIONARY 692 (10th ed. 2014) (equating "exemplary damages" with "punitive damages"). Exemplary damages under RCW 49.52.070 are therefore designed to "punish and deter" an employer's blameworthy conduct, not to compensate the worker for harm caused by such conduct. *Morgan*, 141 Wash. App. at 161-62, 169 P.3d 487 (citing BLACK'S LAW DICTIONARY 418-19 (8th ed. 2004)).

By contrast, prejudgment interest under RCW 19.52.010 is designed to repay the plaintiff for the "'use value'" of the money that the plaintiff never received. *Hansen*, 107 Wash.2d at 473, 730 P.2d 662 (quoting *Mall Tool Co. v. Far W. Equip. Co.*, 45 Wash.2d 158, 177, 273 P.2d 652 (1954)). "Prejudgment interest awards are based on the principle that a defendant 'who retains money which he ought to pay to another should be charged interest upon it.'" *Id.* (quoting *Prier v. Refrigeration Eng'g Co.*, 74 Wash.2d 25, 34, 442 P.2d 621 (1968)). The availability of prejudgment interest does not depend on the willful intent of the employer; instead, it depends on whether the claim is liquidated. *Id.* at 472, 730 P.2d 662. A claim is "liquidated" for purposes of triggering prejudgment interest "'where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.'" *Id.* (quoting *Prier*, 74 Wash.2d at 32, 442 P.2d 621). If a claim is liquidated, then Washington courts will treat the claim as if it were a loan made to the defendant and

compensate the plaintiff for the loss of use of that money.

Because the compensatory function of prejudgment interest and the punitive function of exemplary damages are different, there is no bar on awarding both for the same underlying wage violation.

Garda's reliance on federal cases applying the federal double liquidated damages provision of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 216(b), is unavailing. Although both the federal and state provisions entitle workers to double damages when their employer unlawfully withholds wages and both are silent as to the availability of prejudgment interest, the similarities between the two provisions end there.

The federal provision was enacted in 1938[10]—a year before Washington adopted our double damages provision.[11] The federal provision entitles the plaintiff to double damages "as *liquidated* damages" when the employer violates certain federal wage and hour laws. 29 U.S.C. § 216(b) (emphasis added).[12] By contrast,

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[10] 52 Stat. 1069 (1938).

[11] LAWS OF 1939, ch. 195, § 3.

[12] Section 216(b) provides in pertinent part:

> Any employer who violates the provisions of section 206 [(titled "Minimum wage")] or section 207 [(titled "Maximum hours")] 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*. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

RCW 49.52.070, which was enacted a year later, contains different language. It restricts the recovery of double damages to instances where the employer unlawfully collects or receives a rebate of wages or unlawfully withholds wages "[w]ilfully and with intent to deprive the employee of any part of his or her wages." RCW 49.52.070, .050(2). In those limited instances, RCW 49.52.070 authorizes double damages to be awarded "by way of *exemplary damages*."[13]

This distinction between double damages as "*exemplary* damages" under RCW 49.52.070 and double damages as "*liquidated* damages" under 29 U.S.C. § 216(b) is significant.

Unlike Washington's prejudgment interest law which uses "liquidated damages" to refer to readily calculable damages, the FLSA uses "liquidated damages" as an approximation for actual damages where

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29 U.S.C. § 216(b) (emphasis added). That language has remained the same since its enactment in 1938. *Compare* 29 U.S.C. § 216(b), *with* 52 Stat. 1069.

[13] RCW 49.52.070 provides:

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

(Emphasis added.) Like its federal counterpart, RCW 49.52.070 has remained substantially the same since its enactment in 1939. *Compare* RCW 49.52.070, *with* LAWS OF 1939, ch. 195, § 3.

the damages are "too obscure and difficult of proof" to calculate. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942); *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 709, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). Liquidated damages under the FLSA are therefore "compensation, not a penalty or punishment by the Government." *Overnight Motor*, 316 U.S. at 583, 62 S.Ct. 1216. For that reason, the United States Supreme Court has held that prejudgment interest is not available in addition to double damages under the FLSA since the double damages provision already compensates the employee for the delay in wages. *Brooklyn Sav. Bank*, 324 U.S. at 715, 65 S.Ct. 895. To hold otherwise, the Court explained, would "produce the undesirable result of allowing interest on interest." *Id.* (citing *Cherokee Nation v. United States*, 270 U.S. 476, 490, 46 S.Ct. 428, 70 L.Ed. 694 (1926)).

No such "interest on interest" problem results under RCW 49.52.070 because our state double damages statute is designed to "punish and deter" employers from unlawfully demanding a rebate in wages or unlawfully withholding wages willfully and with an intent to deprive. *Id.* Federal case law interpreting the FLSA is therefore not persuasive.

The Court of Appeals' reliance on *Ventoza v. Anderson*, 14 Wash. App. 882, 545 P.2d 1219 (1976)—a timber trespass case—is likewise misplaced. In *Ventoza*, a plaintiff landowner was harmed when the defendant cut 16 acres of trees belonging to the plaintiff without his permission. *Id.* at 886, 545 P.2d 1219. The trial court awarded the plaintiff treble damages under RCW 64.12.030 plus prejudgment interest. *Id.* at 897, 545 P.2d 1219. The *Ventoza* court reversed the prejudgment interest award. It held "that

when a plaintiff elects to seek recovery under the treble damage section, only three times the value of the trees wrongfully cut may be recovered, and interest may not be granted upon either the compensatory or the punitive portion of the award." *Id.* (citing *Rayonier, Inc. v. Polson*, 400 F.2d 909, 922 (9th Cir. 1968)). In reaching this rule, the *Ventoza* court relied primarily on the Ninth Circuit's *Rayonier* decision. The Ninth Circuit, in turn, relied primarily on this court's decision in *Blake v. Grant*, 65 Wash.2d 410, 413, 397 P.2d 843 (1964), and on the general rule that punitive remedies must be strictly construed and not extended by implication. *Rayonier*, 400 F.2d at 922. We find neither rule applicable in this nontimber wage context.

As the Ninth Circuit acknowledged, *Blake* "never held" that prejudgment interest is unavailable on the *compensatory* portion of a damages award. *Id.* *Blake* merely stated that "interest is generally disallowed on *punitive* damages." *Blake*, 65 Wash.2d at 413, 397 P.2d 843 (emphasis added) (citing 15 AM. JUR. *Damages* § 299 (1938)).[14] Indeed, several other jurisdictions expressly allow prejudgment interest on the compensatory portion of a damages award but deny it on the punitive portion of the award. *See*, *e.g., Matanuska Elec. Ass'n v. Weissler*, 723 P.2d 600, 610 (Alaska 1986) ("[P]rejudgment interest may be awarded on the compensatory portion but not on the punitive portion of the award." (citing *Andersen v. Edwards*, 625 P.2d 282, 289-90 (Alaska 1981))); *Salvi v. Suffolk County Sheriff's Dep't*, 67 Mass. App. Ct. 596, 608-09, 855 N.E.2d 777 (2006) (upholding award of prejudgment

[14] That referenced portion of section 299 states that "[i]nterest is not recoverable in statutory actions for double or treble damages." 15 AM. JUR. *Damages* § 299.

interest on back pay but not on punitive damages). Like these jurisdictions, the trial court in this case awarded prejudgment interest on only the compensatory portion of their damages award, not the punitive, double damages award. CP at 3821 (awarding "prejudgment interest . . . on the back pay owed"). The trial court did not award prejudgment interest on the exemplary double damages.

We hold that RCW 49.52.070 does not bar recovery of prejudgment interest on the compensatory portion of the Plaintiffs' damages award.

CONCLUSION

Garda failed to prove a bona fide dispute based on the purported waiver of Plaintiffs' state law right to on duty meal breaks in their CBAs. In addition, the Plaintiffs can recover both double exemplary damages under RCW 49.52.070 plus prejudgment interest under RCW 19.52.010 for the same wage violation. We therefore reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

WE CONCUR:

Madsen, J.
Stephens, J.
Wiggins, J.
González, J.
Yu, J.

JOHNSON, J. (concurring in part/dissenting in part)

While the majority correctly concludes that, in general, a plaintiff may recover both prejudgment interest under ROW 19.52.010 and double damages under ROW 49.52.070, on the facts of this case, Garda CL Northwest Inc. did not willfully withhold wages and thus double damages are inappropriate.

Garda and its employees entered a collective bargaining agreement (CBA) establishing working conditions justified by the nature of the employment: an armored truck service where employees are armed and transporting valuable cargo. Given the nature of their occupation, Garda employees must be alert and attentive the entire time they are at work.

The language in the CBAs is clear: "Employees hereto waive any meal period(s) to which they would otherwise be entitled" (Clerk's Papers (CP) at 601 (2010 Wenatchee Labor Agreement), 646 (2010-13 Yakima Labor Agreement)) and truck routes "will be scheduled without a designated lunch break" (CP at 390 (2004-09 Mt. Vernon Labor Agreement), 433 (2006-09 Pasco Labor Agreement), 497 (2007 Spokane Work Rules), 536 (2005-08 Tacoma Labor Agreement), 578 (2009 Wenatchee Labor Agreement), 622 (2006-09 Yakima Labor Agreement)). Even though Garda was ultimately held liable for unpaid wages, it was not unreasonable for Garda to perceive this language as a clear waiver of employees' meal periods and not merely an agreement to on-duty meal periods. Because liability for wages is not at issue, whether these words constituted actual waiver is not at issue. Instead, the focus is on Garda's state of mind and whether its actions were willful for purposes of double damages.

Even in the few CBAs stating, "Employees hereto agree to an on-duty meal period," that language cannot be read out of context. CP at 202 (2004-08 Seattle labor agreement), 558 (2009-12 Tacoma Labor Agreement). The employee handbook explicitly states that drivers must remain "alert at all times" while working. CP at 1791, 1792. Drivers also testified that constant alertness was part of the job. Even some of the CBAs recognize that the requirement of constant alertness dovetails with employees' breaks. CP at 601 (2010 Wenatchee Labor Agreement). Considering the CBAs, the employee handbook, and driver testimony, there should be no question that drivers understood the need for a constant state of vigilance when they agreed to work for Garda. Thus, it was not unreasonable for Garda to interpret this section of the CBA as an agreement to work through meal periods.

In holding that Garda willfully withheld wages, the majority fails to recognize our precedent in *Champagne v. Thurston County*, 163 Wash.2d 69, 82, 178 P.3d 936 (2008) and *Washington State Nurses Ass'n v. Sacred Heart Medical Center*, 175 Wash.2d 822, 834, 287 P.3d 516 (2012). "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." *Wash. State Nurses Ass'n*, 175 Wash.2d at 834, 287 P.3d 516 (quoting *Champagne*, 163 Wash.2d at 82, 178 P.3d 936). Here, Garda operated according to the CBAs signed by its employees—given the nature of the job, there were no scheduled meal breaks and employees needed to remain vigilant at all times while working. When there is an agreement and the employer pays wages based on that agreement, as Garda did here, such action negates a finding of willfulness. *Champagne*, 163 Wash.2d at 82, 178 P.3d 936.

Furthermore, the plaintiffs have presented no evidence of deception or bad faith surrounding the creation of the CBAs.

Until today, under certain circumstances, employers and employees could waive statutorily required rest and lunch breaks as long as an employment agreement existed that provides adequate compensation for forgoing what the statute otherwise required. *Iverson v. Snohomish County*, 117 Wash. App. 618, 622, 72 P.3d 772 (2003) (affirming summary judgment for the employer because the employee "failed to produce any evidence that the reality of his employment contradicts the collective bargaining agreement" stating that he would need to perform tasks during meal breaks). The majority's decision undermines the right of employees to bargain collectively with their employers. Under the majority's decision, CBAs arguably are no longer binding agreements, and neither employers nor employees will have any incentive to adhere to their terms.

That Garda followed the terms of the CBA is sufficient to negate a finding of willfulness; the Court of Appeals should be affirmed.

Fairhurst, C.J.
Owens, J.

APPENDIX B

COURT OF APPEALS OF WASHINGTON,
DIVISION 1

No. 74617-1-I

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

Respondents,

v.

GARDA CL NORTHWEST, INC., f/k/a AT Systems
Northwest, Inc., a Washington corporation,

Appellant.

Filed: March 27, 2017

Attorneys and Law Firms

Clarence M. Belnavis, Catharine M. Morisset, Fisher & Phillips LLP, 1201 Third Avenue, Suite 2750, Seattle, WA, 98101-3274, Alexander A. Wheatley, Attorney at Law, 111 S.W., 5th Ave., Ste. 4040, Portland, OR, 97204-3643, for Appellant.

Daniel Foster Johnson, Breskin Johnson & Townsend PLLC, 1000 Second Avenue, Suite 3670, Seattle, WA, 98104, Adam J. Berger, Martin S. Garfinkel, Schroeter Goldmark & Bender, 810 3rd Ave., Ste. 500, Seattle, WA, 98104-1657, for Respondents.

OPINION

Trickey, A.C.J.

In this class action case, the Plaintiffs, nearly 500 employees of Garda CL Northwest, Inc. (Garda), an armored vehicle company, successfully sued Garda for denying them meal periods and rest breaks guaranteed under Washington's Industrial Welfare Act, chapter 49.12 RCW, and Minimum Wage Act, chapter 49.46 RCW. The trial court awarded the Plaintiffs double damages, prejudgment interest, and attorney fees. Garda appeals the trial court's certification of the class, denial of its motions for summary judgment, grant of the Plaintiffs' partial summary judgment motion on liability, award of double damages, award of prejudgment interest, and use of a lodestar to multiply the Plaintiffs' attorney fee award.

Garda contends that the trial court abused its discretion by certifying the class without making a clear record of its reasons or considering the criteria of CR 23. We hold that the trial court's order was sufficient because it identified the common question that predominated and explained why a class action was superior to individual actions.

Garda argues that the trial court erred by concluding that neither the Federal Aviation Administration Authorization Act of 1994 (FAAAA) nor section 301 of the Labor Management Relations Act (LMRA) preempts the Plaintiffs' claims. We hold that the FAAAA does not preempt the Plaintiffs' claims because complying with Washington law would not have had a significant impact on Garda's operations if Garda had sought a variance. We also hold that section 301 of the LMRA does not preempt the Plaintiffs' claims because the Plaintiffs' rights are independent and non-negotia-

ble, and we do not have to interpret the Plaintiffs' various collective bargaining agreements (CBAs) with Garda in order to resolve the issue.

Garda maintains that the trial court erred by granting the Plaintiffs' summary judgment motion on Garda's liability for failing to provide meal periods and rest breaks. It argues that the Plaintiffs' waived their right to meal periods when they acknowledged their CBAs, which purported to contain waivers. Because the Plaintiffs could not waive their meal periods through a CBA, we hold that acknowledging their CBAs did not constitute a waiver. Garda argues further that questions of material fact remain whether the Plaintiffs were able to take rest breaks. We hold that Garda's own testimony and materials established that there was a policy against taking true breaks. Accordingly, we affirm summary judgment on Garda's liability.

Garda also argues that the court erred by awarding double damages for the missed meal periods because those are not wage violations and Garda's conduct was not willful. We hold that failing to provide meal breaks is a wage violation, but agree that Garda's conduct was not willful. Therefore, we reverse the award of double damages for the meal period violations.

Garda also argues that the court should not have awarded prejudgment interest for any damages for which it awarded double damages. Because prejudgment interest is not available when the plaintiff receives punitive damages, such as double damages, we reverse the award of prejudgment interest on the rest break damages.

Finally, Garda contends that the trial court abused its discretion by applying a 1.5 lodestar multiplier to the Plaintiffs' attorney fee award. This multiplier was

reasonable given the risks of the case and the fact that the Plaintiffs' attorneys took the case on a contingency basis. We affirm.

FACTS

Garda is an armored truck company that picks up, transports, and delivers currency and other valuables. Each truck has a two-person crew, consisting of a driver and a messenger. The truck routes vary in length and number of stops, with some requiring as long as 10 hours to complete.

Garda operates branches in seven cities in Washington: Seattle, Tacoma, Mount Vernon, Wenatchee, Yakima, Spokane, and Pasco. Company-wide policies, applicable to all Washington branches, include rules for ensuring the safety and security of the truck, the crew, and the valuables. The policies require Garda drivers and messengers to be alert at all times and prohibit Garda employees from bringing personal cell phones or reading materials on the trucks.

Most branches have their own managers. Each branch has its own drivers association, which negotiates CBAs on behalf of that branch's employees. A large percentage of Garda employees signed acknowledgments of their branches' CBAs.

Each CBA had one of the following provisions regarding meal breaks:

- "[R]outes will be scheduled without a designated lunch break."[1]

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[1] Clerk's Papers (CP) at 390 (2004-2009 Mount Vernon Labor Agreement): CP at 433 (2006-2009 Pasco Labor Agreement): CP at 454 (2004-2008 Seattle Labor Agreement): CP at 497 (2007 Spokane Rules); CP at 536 (2005-2008 Tacoma Labor Agree-

- "Employees hereto agree to an on-duty meal period."[2]
- "The Employees hereto waive any meal period(s) to which they would otherwise be entitled."[3]

Garda employees often go to the bathroom or buy food and beverages while on their routes, but do not take official meal breaks. Garda managers agree that, because of the dangerous nature of their work, all Garda employees must maintain some level of alertness during the entirety of their routes.

In February 2009, three Garda employees, Lawrence Hill, Adam Wise, and Robert Miller, sued Garda, alleging that Garda did not provide them with legally sufficient rest breaks or meal periods, in violation of the Washington Industrial Welfare Act, chapter 49.12 RCW, and the Minimum Wage Act, chapter 49.46 RCW. They moved for class certification, which the trial court granted in July 2010.

The class consists of nearly 500 current and former Garda employees (collectively, the Plaintiffs) who worked for Garda between February 11, 2006, and February 7, 2015. The court appointed Hill, Wise, and Miller as the named representatives of the class. Garda moved to compel arbitration under the terms of

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ment): CP at 578 (2006-2009 Wenatchee Labor Agreement): CP at 622 (2006-2009 Yakima Labor Agreement).

[2] CP at 413 (2009-2012 Mount Vernon Labor Agreement): CP at 1140 (2013-2016 Mount Vernon Labor Agreement); CP at 478 (2008-2011 Seattle Labor Agreement); CP at 516 (2008-2011 Spokane Labor Agreement); CP at 558 (2009-2012 Tacoma Labor Agreement).

[3] CP at 1163 (2010-2013 Pasco Labor Agreement); CP at 601 (2010-2013 Wenatchee Labor Agreement); CP at 646 (2010-2013 Yakima Labor Agreement).

the CBAs, but the Washington Supreme Court held that the arbitration procedures were unconscionable and remanded the case back to the trial court in September 2013.[4]

Garda moved for summary judgment on the ground that the Plaintiffs' claims were preempted by section 301 of the LMRA or, in the alternative, that the Plaintiffs had waived their right to meal breaks through their CBAs. The trial court denied Garda's motion.

In December 2014, Garda received permission to amend its answer to add the affirmative defense that the FAAAA preempted the Plaintiffs' claims. Garda moved for summary judgment on this preemption argument and the trial court denied it. Garda then moved unsuccessfully to decertify the class.

The Plaintiffs moved for partial summary judgment on the issues of liability and their entitlement to double damages. The trial court granted the motion as to liability but denied summary judgment on double damages.

In June 2015, the case proceeded to a bench trial on the issue of damages and, in September, to a trial on double damages. In October, the court found for the Plaintiffs, awarding $4,209,596.61 in back pay damages, $1,668,235.62 in double damages, and $2,350,255.63 in prejudgment interest. In December, the trial court awarded the Plaintiffs $1,127,734.50 in attorney fees, after applying a 1.5 lodestar multiplier.

Garda appeals.

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[4] *Hill v. Garda CL Nw., Inc.*, 179 Wash.2d 47, 50, 58, 308 P.3d 635 (2013).

ANALYSIS

Class Certification

Garda argues that the trial court erred by certifying the class and denying its motion to decertify the class. It contends that the trial court oversimplified the case and neglected to weigh individual questions against common questions. We disagree. The trial court's order certifying the class identified the overriding question for this case as whether Garda had provided legally-sufficient rest breaks and meal periods to all class members. The trial court did not abuse its discretion.

Civil Rule 23 governs class actions. Individuals "may sue or be sued" as representatives of a class if

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representatives will fairly and adequately protect the interests of the class.

CR 23(a).

Additionally, to maintain a class action, the court must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3).[5]

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[5] CR 23(b)(1) and (2) offer other bases for maintaining a class action that are not relevant to this appeal.

"This court reviews a trial court's decision to certify a class for [an] abuse of discretion." *Miller v. Farmer Bros. Co.*, 115 Wash.App. 815, 820, 64 P.3d 49 (2003). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Miller*, 115 Wash.App. at 820, 64 P.3d 49. "The court must articulate on the record each of the CR 23 factors for its decision on the certification issue." *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wash.App. 9, 19, 65 P.3d 1 (2003). We review class decisions "liberally" and will "err in favor of certifying a class." *Miller*, 115 Wash.App. at 820, 64 P.3d 49.

In *Miller*, the trial court certified the class but did not make any findings regarding whether joinder of the 29 individual plaintiffs would be impracticable. 115 Wash.App. at 821, 64 P.3d 49. The Court of Appeals reversed and remanded to the trial court for additional findings showing it had rigorously considered the CR 23 criteria. *Miller*, 115 Wash.App. at 821, 64 P.3d 49. By contrast, in *Eriks v. Denver*, the Supreme Court held that the trial court had not erred by certifying a class when it "specifically concluded there were common questions of fact and that 'the interests of justice would be impaired by requiring [class] members to proceed individually.'" 118 Wash.2d 451, 467, 824 P.2d 1207 (1992). The Supreme Court noted that the "judge also incorporated by reference the authorities and arguments cited in the investors' brief. Therefore, it [was] obvious the judge considered all of the criteria of CR 23." *Eriks*, 118 Wash.2d at 467, 824 P.2d 1207.

Here, the trial court granted class certification under CR 23(a) and CR 23(b)(3).[6] The court specifically found

> that common questions of law and fact will predominate over any individual questions. The single common and overriding issue presented is whether Drivers and Messengers are allowed legally sufficient rest or meal breaks and whether Drivers and Messengers are entitled to compensation for missed meal periods and rest breaks. The claims of individual class members are likely valued at a few thousand dollars each and adjudicating the claims presented on a class basis will be manageable; Class adjudication of common issues is therefore superior.[7]

Garda argues that these findings are not adequate to support the trial court's finding that common questions predominated and a class action would be superior to individual actions. But, by finding that a single issue was "overriding," the trial court signaled that it had considered the individual issues and determined that that this one was common to all putative class members and would predominate. By naming the specific issue, the court demonstrated that it had engaged in a critical examination of the issues. In addition, the court stated that it had "considered" the parties' motions, which thoroughly examined these issues.[8] We conclude that the trial court's findings

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[6] Garda does not appear to be challenging the trial court's findings related to CR 23(a).

[7] CP at 933.

[8] CP at 932

were sufficient to show that a question common to the Plaintiffs predominated.

Additionally, the trial court estimated the value of each individual's claim and concluded that the action would be manageable as a class action. These findings, together with the court's findings that there were likely hundreds of class members and that a common question predominated, are adequate to show the court's reasons for determining that a class action was superior to individual actions.

The record also supports the trial court's decision to certify the class. The FAAAA and section 301 preemption issues are legal questions that are common to the whole class and do not require analyzing the different CBAs.[9] And, while individual branch managers may have treated individual class members differently, the summary judgment motion on liability relied on Garda's state-wide policies and the concessions by Garda's corporate designee, which applied to all class members.

Garda also argues that the trial court did not make adequate findings in response to its motion to decertify the class. It is true that the trial court's order addressing that motion simply recited the documents it considered and then denied the motion. But Garda cites no authority for its position that the trial court must offer new findings to support a decision not to

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[9] Garda argues that common questions do not predominate because the Plaintiffs' claims rely on at least three different CBAs and the acts of individual Garda employees. As will be discussed in more detail below, we do not need to interpret the various CBAs to resolve the Plaintiffs' claims. Therefore, the differences in the CBAs do not make the Plaintiffs' claims less susceptible to class adjudication.

decertify. The trial court's original findings were adequate to support its decision to deny Garda's motion.

In short, the trial court did not abuse its discretion by certifying the class and declining to decertify the class.

Garda's Summary Judgment Motions on Preemption

Garda argues that the trial court should have granted its motions for summary judgment on the grounds that the FAAAA and section 301 of the LMRA preempt the Plaintiffs' claims. We disagree.

Summary judgment is proper if, viewing the facts in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wash.2d 471, 484, 258 P.3d 676 (2011); CR 56. We review summary judgment decisions de novo. *Dowler*, 172 Wash.2d at 484, 258 P.3d 676.

FAAAA Preemption

Garda argues that it was entitled to judgment as a matter of law because the FAAAA preempts the Plaintiffs' claims. Specifically, it argues that complying with Washington's meal and rest period requirements would have a significant impact on its prices, routes, and services. We hold that the FAAAA does not preempt the Plaintiffs' claims because, by obtaining a variance, Garda can comply with the meal and rest period rules without significantly impacting its operations.

Whether federal law preempts state law is a question of congressional intent. *Dep't of Labor &*

Indus, of State of Wash, v. Common Carriers. Inc., 111 Wash.2d 586, 588, 762 P.2d 348 (1988). Federal law preempts state law when Congress has explicitly said so, when federal regulation of a field is so comprehensive that there is no room for state action, or when there is an actual conflict between federal and state law. *Common Carriers*, 111 Wash.2d at 588, 762 P.2d 348. There is a strong presumption against federal preemption when a state acts within its historic police powers. *Common Carriers*, 111 Wash.2d at 588, 762 P.2d 348; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994).

Preemption is an affirmative defense; the proponent of the defense bears the burden of establishing it. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014). This court reviews preemption determinations de novo. *Robertson v. State Liquor Control Bd.*, 102 Wash.App. 848, 853, 10 P.3d 1079 (2000).

The FAAAA forbids states from enacting or enforcing any law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Congress passed the FAAAA in order to "eliminate non-uniform state regulations of motor carriers" and "'even the playing field' between air carriers and motor carriers." *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998) (quoting H.R. Conf. Rep. No. 103-677, at 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757, 1759).

Although "related to" expresses a broad preemptive purpose, there is no preemption "when a state statute's 'effect is no more than indirect, remote, and tenuous.'" *Robertson*, 102 Wash.App. at 854-55, 10 P.3d 1079 (quoting *Mendonca*, 152 F.3d at 1189). While the

FAAAA usually preempts laws that affect the way a carrier interacts with its customers, it often does not preempt laws that affect the way a carrier interacts with its workforce because they are "too tenuously connected to the carrier's relationship *with its customers.*" *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1054 (7th Cir. 2016). "[G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide." *Dilts*, 769 F.3d at 646.

In *Dilts*, the Ninth Circuit held that the FAAAA did not preempt California's meal and rest break laws. 769 F.3d at 647. California's meal and break laws require employers to provide a 30 minute meal break for employees who work more than five hours a day and a paid 10 minute rest period every four hours for employees who work at least three and one-half hours. *Dilts*, 769 F.3d at 641-42; Cal. Lab. Code § 512(a); Cal. Code Regs. Tit. 8, § 11090(12)(A). Under certain circumstances, employees may waive their meal breaks or agree to an on-duty meal break. *Dilts*, 769 F.3d at 641-42. If the employer fails to provide the required breaks, it must pay the employee "for an additional hour of work at the employee's regular rate." *Dilts*, 769 F.3d at 642.

The court held that the FAAAA did not preempt the claims of a class of delivery drivers and installers who asserted that their employers were not providing the required meal and rest breaks. *Dilts*, 769 F.3d at 640. It acknowledged that "motor carriers may have to take into account the meal and rest break requirements when allocating resources and scheduling routes," but

held that these "normal background rules" did not have a significant enough impact on prices, routes, or services to warrant preemption. *Dilts*, 769 F.3d at 647. It also held that modest increases in the cost of doing business, including having to hire more drivers or having drivers take longer to complete certain routes, were not the kind of impacts that Congress intended to preempt. *Dilts*, 769 F.3d at 648-49.

Here, the Plaintiffs base their claims on Washington's meal period and rest break laws, which closely resemble California's. Washington's specific rules are set out in Washington Administrative Code (WAC) 296-126-092:

> (1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.
>
> (2) No employee shall be required to work more than five consecutive hours without a meal period.
>
> . . . .
>
> (4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

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

The employees must be free from work duties, including the duty to be "'vigilant,'" during these breaks. *Pellino v. Brink's Inc.*, 164 Wash.App. 668, 685-86, 690, 267 P.3d 383 (2011).

Washington's meal period and rest break regulations are generally applicable background laws that govern how all employers interact with their employees. They do not single out motor carriers or explicitly attempt to regulate prices, routes/or services. Nevertheless, Garda argues that the FAAAA preempts Washington's regulations in this case because Garda cannot comply with the regulations without having to significantly change its prices, routes, and services.

Due to the dangerous nature of their work, Garda employees must "remain on alert for possible threats," "even when taking a break."[10] They "cannot merely pull off the road to a parking space or rest stop to take a rest break."[11] In order to provide completely vigilance-free breaks, Garda would have to dramatically change its routes to allow drivers to return to its secure facilities to take breaks every three hours. It would also have to stop services completely for rural routes that cannot be completed in three hours.

Garda is correct that such significant impacts on its routes would likely warrant a finding of preemption under the FAAAA. But implementing these changes

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[10] CP at 1376.

[11] CP at 1376.

is only one way that Garda could comply with Washington's meal and rest period regulations. Garda also has the option to apply for a variance from Washington's Department of Labor and Industries (Department).

Washington law provides that employers may receive a variance from meal and rest break rules if the employer can show "good cause." RCW 49.12.105. "'Good cause' means, but is not limited to, those situations where the employer can justify the variance and can prove that the variance does not have a harmful effect on the health, safety, and welfare of the employees involved." WAC 296-126-130(4). Garda's need for its employees to be alert at all times is based on ensuring the employees' personal safety and the safety of the valuables Garda employees transport. These bases would likely qualify as good cause under the WAC provisions.[12]

At least one armored car company, Loomis, has already received a variance under RCW 49.12.105 and accompanying state regulations.[13] Under the variance,

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[12] Garda argues that the state law regulation does not list "[a]voiding [FAAAA] preemption" as "good cause" for a variance. Br. of Appellant at 15 n.69 (citing WAC 296-126-130(4)). First, the regulation does not list any specific justifications. The entire definition of "good cause" is quoted above. Second, Garda could apply for a variance based on the significant impact of the meal period and rest break regulations on its opportunity to provide a safe working environment to its employees, not the potentially preemptive effect of the FAAAA.

[13] Garda moved to strike the Plaintiffs' designated clerk's papers containing this variance. A commissioner of this court denied that motion but invited Garda to address the argument in its reply brief. Garda did not. We assume that the declarations and exhibits contained in those pages are properly before this court.

Loomis must provide rest periods to its employees, during which the employees "shall be relieved of all job duties and responsibilities, with the exception that during rest periods they shall continue to (a) remain attentive and vigilant regarding their personal safety and their immediate surroundings, (b) remain on call to respond to emergency circumstances, (c) comply with all [rules related to carrying firearms], (d) wear any uniform required by Loomis, and (e) carry any communication device required by Loomis."[14] Garda has not sought a similar variance.[15] Garda does not address whether complying with Washington law would have less of an impact on its operations if it received a variance.

Garda's FAAAA preemption argument assumes that the Plaintiffs' are correct that the law entitles them to "completely 'vigilance free'" rest breaks.[16] It does not argue that it would be impossible to provide appropriate breaks under the same type of variance Loomis received. Since Garda could obtain a variance to satisfy its need for employee vigilance, this case is nearly indistinguishable from *Dilts*.

Garda argues that "[t]he preemptive effect of [FAAAA] surely cannot be avoided simply because an

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[14] CP at 4285.

[15] In its briefing below, Garda argued that a variance was not available because it "sought a variance as soon as it was suggested in the *Pellino* decision that armored car driver/ messengers needed to be provided with 'vigilance free' meal and rest breaks" but "was told at the time" by the Department that "a variance likely would not be granted because there was ongoing litigation on the issue." CP at 2697. But Garda did not actually apply for a variance. On appeal, Garda does not argue that it sought a variance.

[16] Br. of Appellant at 13.

employer might be able to obtain a variance."[17] Garda cites no authority for this position. If Washington law creates a problem for Garda, it is logical to look to Washington law for a solution before finding federal preemption.

Accordingly, we conclude that the FAAAA does not preempt applicable Washington regulations governing meal periods and rest breaks. The impact of having to schedule routes with adequate time for meal periods and rest breaks would have only an indirect and remote impact on Garda's prices, routes, and services. As in *Dilts*, these impacts are not significant enough to warrant preemption.

Garda attempts to distinguish *Dilts* on the ground that, unlike in Washington, employers in California may simply pay extra money to avoid following the rule. That is not a correct statement of California law and was not a basis for the court's decision in *Dilts*. In fact, in *Dilts*, the court pointed out that employers did *not* have that option: "[S]ection 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay. . . . The failure to provide required meal and rest breaks is what triggers a violation of section 226.7." 769 F.3d at 642 (alteration in original) (quoting *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal.4th 1244, 140 Cal.Rptr.3d 173, 274 P.3d 1160, 1168 (2012)).

In short, the trial court did not err by holding that the FAAAA did not preempt the Plaintiffs' claims.

Section 301 Preemption

Next, Garda argues that the trial court erred by holding that section 301 of the LMRA did not preempt

[17] Br. of Appellant at 15 n.69.

the Plaintiffs' claims because the claims are based on negotiable rights and require interpretation of the CBAs. The Plaintiffs respond that section 301 does not preempt their claims because they seek to enforce rights that exist independently from their CBAs. We agree with the Plaintiffs.

Through section 301 of the LMRA, Congress vested exclusive jurisdiction for violations of CBAs in the federal courts, in an attempt to establish "interpretive uniformity and predictability" in labor-contract disputes. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); 29 U.S.C. § 185(a). "Section 301 governs claims founded directly on rights created by [CBAs], and also claims 'substantially dependent on analysis of a [CBA].'" *Caterpillar*, 482 U.S. at 394, 107 S.Ct. 2425 (quoting *Int'l Bros, of Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987)).

But section 301 preemption does not apply to every dispute between an employer and a union employee. "[I]t would be inconsistent with congressional intent under [section 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis-Chalmers*, 471 U.S. at 212, 105 S.Ct. 1904. "If the claim is plainly based on state law, [section] 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense." *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) *(en banc)*.

Section 301 does not "preempt nonnegotiable *or* independent negotiable claims." *Commodore v. Univ. Mech. Contractors. Inc.*, 120 Wash.2d 120, 131, 839

P.2d 314 (1992). A state law claim is independent if it does not rely on a right created by a CBA. *Commodore*, 120 Wash.2d at 129, 839 P.2d 314. "A right is nonnegotiable if the state law does not permit it to be waived, alienated, or altered by private agreement." *Miller v. AT & T Network Sys.*, 850 F.2d 543, 546 (9th Cir. 1988). A state law right may be nonnegotiable for certain classes of employees, even if the state does not provide that right to all employees. *See Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1081 (9th Cir. 2005).

In *Miller*, the Ninth Circuit set out a three-part test for determining whether section 301 preempts a claim:

> In deciding whether a state law is preempted under section 301, therefore, a court must consider: (1) whether the CBA contains provisions that govern the actions giving rise to a state claim, and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract.

850 F.2d at 548 (footnote omitted). Section 301 preempts the state law claim "only if the answer to the first question is 'yes,' and the answer to either the second or third is 'no.'" *Miller*, 850 F.2d at 548.

For example, in *Ervin v. Columbia Distributing, Inc.*, section 301 did not preempt an employee's overtime claims, even though he was a party to a CBA with provisions governing overtime. 84 Wash.App. 882, 890, 930 P.2d 947 (1997). The court held that the overtime provisions were nonnegotiable rights and that it would need to examine the CBA only to

determine the plaintiff's "regular rate of pay." *Ervin*, 84 Wash.App. at 890-91, 930 P.2d 947.

Here, the Plaintiffs alleged in their complaint that Garda's "policy and practice under which Plaintiffs and the class do not receive meal and rest breaks violates [chapter] [RCW] and WAC 296-126-092."[18] Garda argues that the Plaintiffs' claims stem from negotiable rights, which they have waived in their CBAs. The Plaintiffs argue that Washington does not allow private employees in trades other than construction to waive their rights to a meal period in a CBA, so any alleged waivers in the CBAs are irrelevant to their claims.

Both parties argue that the Department's Administrative Policy No. ES.C.6 (the Policy), issued to interpret WAC 296-126-092, supports their position.[19] The Policy explains that individual employees may waive their meal periods:

> 8. May an employee waive the meal period?
>
> Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean that an employer may not require more than five

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[18] CP at 7. Garda does not argue on appeal that section 301 preempts the Plaintiffs' rest period claims, presumably because employees may never waive those rights. But it did argue to the trial court that section 301 preempted the Plaintiffs' rest period claims.

[19] The agency's interpretation of these statutes and regulations is entitled to deference. *See Pellino*, 164 Wash.App. at 688, 267 P.3d 383.

> consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.
>
> If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.
>
> If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect.[20]

Although the Policy allows a CBA covering public employees or employees in the construction trades to vary the rules regarding meal and rest periods, it does not extend that option to other CBAs:

> 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 [at] least equal to or more favorable than the provisions of these standards, with the exception of

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[20] Wash. Dep't of Labor & Indus., Administrative Policy ES.C.6, § 8, at 4 (rev. June 24, 2005); CP at 1037.

public employees and construction employees covered by a CBA.[21]

Garda contends that WAC 296-126-092's "minimum standard" allows employees to waive their meal periods. Therefore, the CBAs at issue here, which waive the meal periods for all employees, meet the "minimum standard." Thus, employees can waive their right to a meal period through a CBA.

We disagree. Garda's reading of the Policy is inconsistent with the emphasis the Policy places on an individual employee's choice whether to waive meal periods. An employee has the right to revoke a waiver at any time.[22] Waiving all employees' meal periods through a CBA would limit an individual employee's ability to revoke that waiver. Or, even if the CBA allowed employees to revoke that waiver, having the remainder of the workforce agree to a waiver could put pressure on individual employees not to revoke their waivers.[23]

The "minimum standard" is a 30-minute meal period. A waiver of that meal period is less than the standard. We hold that Washington does not allow most private employees to waive their right to a meal period through a CBA.

Therefore, the Plaintiffs' state right to meal periods is both independent and nonnegotiable, and there is no section 301 preemption. Washington law allows

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[21] Administrative Policy ES.C.6, § 15, at 5; CP at 1038.

[22] Administrative Policy ES.C.6, § 8, at 4; CP at 1037.

[23] This analysis applies to CBAs generally, and is not meant to address the specific CBAs between the parties in this case. Those CBAs do allow employees to "request" meal periods from their supervisors or "notify" their supervisors that they want meal periods. *See*, *e.g.*, CP at 390, 413, 433, 454, 478.

public and construction employees to waive this right, but the Plaintiffs here do not fall within those classes. We do not have to resolve the parties' disputes over the meaning of the meal period provisions in the CBAs in order to determine whether Garda provided the meal periods required under Washington law.

Garda argues that the Plaintiffs' interpretation of the regulation would violate the employees' right to collectively bargain under RCW 49.12.187 and implicate the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, preemption, because it would discourage collective bargaining.[24] As the Plaintiffs point out, Garda is raising these arguments for the first time on appeal. We decline to consider these arguments. *See* RAP 2.5(a).

Plaintiffs' Summary Judgment Motions on Liability

Garda argues that the trial court erred by granting the Plaintiffs' motions for summary judgment on liability because material questions of fact remained whether individual Plaintiffs waived their meal periods and received adequate rest breaks. The Plaintiffs argue that the trial court properly disregarded evidence of waiver related to the CBAs and that Garda's state-wide policies show that it did not provide adequate rest breaks. We agree with the Plaintiffs.

Meal Periods

Garda argues that the Plaintiffs' acknowledgments of their CBAs, which purported to waive their rights

[24] Specifically, Garda argues that *Garmon* preemption, named after *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), would bar the Plaintiffs' interpretation, Br. of Appellant at 19-20.

to meal breaks, creates a genuine dispute of material fact whether individual Plaintiffs waived those rights. Because the Plaintiffs cannot waive meal breaks through their CBAs, evidence that the Plaintiffs acknowledged the CBAs or understood that they would not receive meal breaks under the CBAs is not evidence that they voluntarily waived this right. We affirm.

"A waiver is the intentional and voluntary relinquishment of a known right." *Jones v. Best*, 134 Wash.2d 232, 241, 950 P.2d 1 (1998). Knowledge of the existence of the right may be "actual or constructive." *Bowman v. Webster*, 44 Wash.2d 667, 669, 269 P.2d 960 (1954). A waiver may be express or implied. *Jones*, 134 Wash.2d at 241, 950 P.2d 1. But an implied waiver must be based on "unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors." *Jones*, 134 Wash.2d at 241, 950 P.2d 1. The party asserting waiver bears the burden of proof. *Jones*, 134 Wash.2d at 241-42, 950 P.2d 1.

Here, Garda argues that there is a question of fact whether the Plaintiffs individually waived their right to meal periods under WAC 296-126-092(1) and (2). Garda notes that several CBAs contained waivers and that many class members signed acknowledgments of their CBAs.[25] Also, all three named Plaintiffs confirmed that they knew they had agreed to forego scheduled meal breaks through the CBAs.

A waiver in a CBA is not evidence of an individual plaintiff's choice. An individual worker may "vote against representation; but the majority rules." *J.I.*

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[25] "The Employees hereto waive any meal period(s) to which they would otherwise be entitled." CP at 1163, 601, 646.

Case Co. v. Nat'l Labor Relations Bd., 321 U.S. 332, 339, 64 S.Ct. 576, 88 L.Ed. 762 (1944). Likewise, in *Ervin*, the court held that an agreement with a plaintiff's union "*cannot* be viewed as an agreement with [the plaintiff] *individually*." 84 Wash.App. at 893, 930 P.2d 947 (first emphasis added).

We conclude that the trial court did not err by refusing to treat the waivers contained in the CBAs as evidence that individual Plaintiffs waived their rights. Garda offers no evidence of waiver independent of the CBAs and does not object to the trial court's decision to grant summary judgment on the subject of liability for meal periods on any other grounds. Therefore, the trial court did not err by granting summary judgment on this issue.

Rest Breaks

Garda argues that the trial court erred by granting summary judgment on the issue of liability for rest breaks on the basis that the written vigilance policy established that Plaintiffs did not receive lawful rest breaks as a matter of law. The Plaintiffs respond that summary judgment was proper because Garda's own policies and testimony show that it did not provide legally sufficient rest breaks. We agree with the Plaintiffs.

A motion for summary judgment requires the court to view all evidence in the light most favorable to the nonmoving party. *Dowler*, 172 Wash.2d at 484, 258 P.3d 676; CR 56. This means the court will not weigh evidence or resolve issues of credibility. *Barker v. Advanced Silicon Materials, LLC*, 131 Wash.App. 616, 624, 128 P.3d 633 (2006). But there is no genuine issue of material fact where reasonable people could draw only one conclusion. *White v. Salvation Army*, 118 Wash.App. 272, 284, 75 P.3d 990 (2003).

Here, the Plaintiffs contend that the rest breaks they received were inadequate because they were not given enough time and were not completely relieved of duties. Washington requires employers to provide "a rest period of not less than ten minutes, on the employer's time, for each four hours of working time . . . . Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each [four] hours worked, scheduled rest periods are not required." WAC 296-126-092(4), (5). The Department clarified that "[t]he term 'rest period' means to stop work duties, exertions, or activities for personal rest and relaxation."[26]

It is not enough for employers to allow employees to take breaks, rather "employers must affirmatively promote meaningful break time." *Demetrio v. Sakuma Bros. Farms. Inc.*, 183 Wash.2d 649, 658, 355 P.3d 258 (2015). If a workplace culture "encourages employees to skip breaks" it violates the regulation. *Demetrio*, 183 Wash.2d at 658, 355 P.3d 258. Courts must look at "the purposes rest breaks serve in light of how rest breaks were used (or not) by the employees in context." *Demetrio*, 183 Wash.2d at 658, 355 P.3d 258.

In *Pellino*, the court ruled that drivers and messengers of armored vehicles did not receive "true breaks" because of their employer's "'rules requiring constant guarding and vigilance.'" 164 Wash.App. at 687, 690-91, 267 P.3d 383. The rules required employees to always "'be alert'" and "'look alert,'" to "'continuously observe their surroundings,'" and be "'constantly suspicious.'" *Pellino*, 164 Wash.App. at 674-75, 267 P.3d 383. The security rules explicitly applied to employees' break periods. *Pellino*, 164 Wash.App. at 674, 267 P.3d

[26] Administrative Policy ES.C.6, § 10, at 4; CP at 1037.

383. The employer also did not give them sufficient time to take breaks. *Pellino*, 164 Wash.App. at 690-91, 94, 267 P.3d 383.

By contrast, in *White*, the court held that employees who were "on call" during their breaks still received adequate rest periods. 118 Wash.App. at 283-84, 75 P.3d 990. There, the employees were able to "eat, rest, make personal telephone calls, attend to personal business that would not take them away from the facility, and close the door to the office in order to make themselves unavailable." *White*, 118 Wash.App. at 283-84, 75 P.3d 990.

Here, Garda's corporate witness, designated under CR 30(b)(6), conceded that Garda could not provide vigilance-free breaks due to the nature of the job performed by its employees. Two Garda publications, in use at all Washington branches, explain Garda's vigilance requirement: Garda's "Employee Handbook For Driver/Messengers and Vault Employees" and its "Operations Book Of Rules." In the handbook's section on "Operations and Security," it instructs employees to "remain alert at all times for the success of [Garda's] operations. Look alert and be alert. Don't take anything for granted."[27] "Be alert at all times."[28] It warns crews not to "make route or schedule changes or deviate from their scheduled routes for any reason without current authorization from management."[29]

The handbook also prohibits employees from conducting personal business while on duty. Employees may not bring any reading materials with them in the

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[27] CP at 2776.

[28] CP at 2777.

[29] CP at 2777.

truck. The handbook also instructs employees that "[c]ell phone, pager, and two-way transmission devices are prohibited on all company armored vehicles or in company armored or money room/case processing facilities" without "specific supervisor approval for very limited use as to time and scope."[30] The "Operations Book Of Rules" has similar prohibitions.[31]

Garda's corporate witness stated that employees routinely broke these policies, but agreed that these policies remained in effect. Two Garda branch managers testified that they did not discipline their employees for having their cell phones or personal reading materials on the trucks. Those managers did not testify that they altered Garda's polices or authorized their employees to have personal items with them.

We hold that Garda violated the rest period regulations because its official policies do not promote opportunities for meaningful breaks. The Plaintiffs had to remain vigilant and were not free to conduct personal business. Although Garda's rules are not as extreme as those at issue in *Pellino*, Garda's requirement of vigilance is much more involved than simply being on call, as the employees were in *White*. Garda conceded in its briefing below "that it cannot provide breaks *completely free of any need* to exercise vigilance."[32] Moreover, Garda's state-wide policies strongly

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[30] CP at 3031. On the same page of the handbook, Garda authorizes employees to use their cell phones during breaks and meal periods, but the breaks at issue here would have had to occur while the employees were in their trucks, and the rules are clear that Garda employees may not bring their cell phones with them on the trucks.

[31] CP at 2772-73.

[32] CP at 2994.

restrict the Plaintiffs' ability to relax or take care of personal business during their breaks.

Garda argues that the trial court erred by weighing the written policies more strongly than other evidence. For example, Garda presented evidence that its managers did not always enforce the rules and that many employees violated the rules.[33] But, if employees may take meaningful breaks only by violating the company's official policies, Garda has still created a culture that discourages meaningful breaks.

Garda also does not contradict its own representative's concession that Garda did not provide vigilance-free breaks. Therefore, the court did not have to weigh evidence when it determined that Garda deprived the Plaintiffs of meaningful breaks. The trial court did not err by granting the Plaintiffs' motion for summary judgment on rest periods.

On appeal, Garda also relies on its employees' declarations that they had adequate rest breaks, during which they were able to "stop [their] work duties" and make "personal choices about how [they] spend [their] time."[34] We do not consider these declarations because Garda did not call them to the trial court's attention for this motion.[35] They were filed nearly five years earlier to support Garda's opposition

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[33] Individual class members testified they took breaks for smoking, using the restroom, getting food, and sending text messages via their personal cell phones. Cell phone records and social media records confirm that many class members used their cell phones while on the trucks.

[34] CP at 768; *see also* CP at 771, 774, 777, 780, 783, 786, 817, 820, 823, 826, 829, 832, 835, 838.

[35] CP at 2989-3008.

to the Plaintiffs' motion to certify the class.[36] Because the appellate court engages in the same inquiry as the trial court, it "'will consider only evidence and issues called to the attention of the trial court.'" *Mithoug v. Apollo Radio of Spokane*, 128 Wash.2d 460, 462, 909 P.2d 291 (1996) (emphasis omitted) (internal quotations marks omitted) (quoting RAP 9.12).

Double Damages

The trial court awarded the Plaintiffs double damages under RCW 49.52.070. Garda argues that the trial court erred because it awarded double damages for Garda's failure to provide meal periods, which is a labor violation, not a wage violation.[37] Garda also argues that its actions were not willful and that the Plaintiffs knowingly submitted to Garda's meal period arrangement.

RCW 49.52.070 authorizes employees to recover double damages when their employers have willfully withheld their wages:

> Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees:

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[36] Garda filed its opposition to the Plaintiffs' motion for class certification in July 2010. Garda filed its opposition to the Plaintiffs' motion for partial summary judgment in May 2015.

[37] Garda does not challenge the trial court's award of double damages for its violation of the rest break requirements.

> PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

We hold that violating the meal period requirement is a wage violation, but that Garda did not willfully violate the requirement.

Wage Violations

First, Garda argues that, because the Plaintiffs were paid for all the time they worked, a failure to provide them with meal periods is not a wage violation. The Plaintiffs argue that Washington treats a failure to provide meal periods as withholding wages. We agree with the Plaintiffs.

Any employer who "[w]illfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract" has committed a wage violation under RCW 49.52.050(2). The statute does not define "wage," but "another related wage statute, the Minimum Wage Act, chapter 49.46 RCW, broadly defines 'wage' as 'compensation due to an employee by reason of employment.'" *LaCoursiere v. Camwest Dev., Inc.*, 181 Wash.2d 734, 742, 339 P.3d 963 (2014) (quoting RCW 49.46.010(7)). This court construes the statute liberally in order to "protect employee wages and assure payment." *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998).

In *Wingert v. Yellow Freight Systems, Inc.*, the court held that an employer's failure to provide its employees with rest periods was a wage violation. 104 Wash.App. 583, 588, 13 P.3d 677 (2000). There, an

employer failed to provide its employees with sufficient rest periods when they worked overtime. *Wingert*, 104 Wash.App. at 586, 588, 13 P.3d 677. The court held that the employees could recover payment for the breaks they should have received, even though the employer paid its workers for every minute they worked. *Wingert*, 104 Wash.App. at 588-90, 13 P.3d 677.

The court rejected the employer's argument that "failure to allow rest periods results in lost rest time, not lost wages." *Wingert*, 104 Wash.App. at 589, 13 P.3d 677. It held that a contrary holding would leave the "employees with no remedy for their employer's violation of WAC 296-126-092(4)" and would "unjustly enrich[ ]" the employer, who would have received extra work from its employees. *Wingert*, 104 Wash.App. at 590-91, 13 P.3d 677.

Here, Garda's failure to provide meal breaks violated WAC 296-126-092(1) and (2). Unlike rest breaks, which must always be on the employer's time, not all meal periods are paid. WAC 296-126-092(1), (4). Garda argues that, because the law does not guarantee a paid meal period, the failure to provide a meal period is a labor violation, not a wage violation. It claims that the court made this distinction in *Iverson v. Snohomish County*, 117 Wash.App. 618, 623, 72 P.3d 772 (2003). But, there, the court did not award damages because it concluded that the plaintiff did not prove his employer had violated WAC 296-126-092. *Iverson*, 117 Wash.App. at 623, 72 P.3d 772. The court did not address what remedy would have been appropriate if there had been a violation.

We hold that treating violations of meal period requirements as wage violations is consistent with *Wingert*. The Plaintiffs here were paid for every minute they worked, but they were deprived of

opportunities to rest. If this court does not treat this as a wage violation, it is unclear what recourse the Plaintiffs would have.[38] Moreover, Garda undoubtedly benefitted from the lack of meal periods. For example, Garda's crews would be able to finish routes more quickly. For those reasons, and given that the court must construe the statute liberally, we conclude that Garda's failure to provide meal periods is a wage violation.

Willfulness

Garda argues that, if its conduct amounts to a wage violation, it was not willful because there was a bona fide dispute over whether it was obligated to provide the Plaintiffs with meal periods. We agree.

A failure to pay owed wages is not willful when there is a bona fide dispute over whether the employer owes the wages. *Schilling*, 136 Wash.2d at 160, 961 P.2d 371. The employer bears the burden of showing that a bona fide dispute exists. *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wash.2d 822, 834, 287 P.3d 516 (2012). "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." *Sacred Heart*, 175 Wash.2d at 835, 287 P.3d 516 (quoting *Champagne v. Thurston County*, 163 Wash.2d 69, 82, 178 P.3d 936 (2008)).

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[38] Garda acknowledges that, in *Pellino*, the court awarded the employees "the equivalent of 30-minutes of pay as damages for the meal period violation." Br. of Appellant at 39, n.175; *see Pellino*, 164 Wash.App. at 689, 699, 267 P.3d 383. Garda characterizes this as damages for a labor violation. The appellate decision in Pellino does not specify what compensation the employees received or how the court characterized the violation.

"Determining willfulness is a question of fact reviewed for substantial evidence." *Backman v. Nw. Publ'g Ctr.*, 147 Wash.App. 791, 796, 197 P.3d 1187 (2008). "Substantial evidence is a sufficient quantum of evidence to persuade a fair-minded person of the truth of the declared premise." *Chelius v. Questar Microsystems, Inc.*, 107 Wash.App. 678, 682, 27 P.3d 681 (2001).

Here, the trial court awarded double damages for the period between November 20, 2011, and February 7, 2015. Garda assigns error to the trial court's findings of fact on whether Garda's withholding was willful. The trial court held that, after the appellate decision in *Pellino*, "Garda knew or should have known that requiring constant alertness by its armored truck crews and failure to provide sufficient time for breaks violated the Washington Industrial Welfare Act and its implementing regulations."[39]

The court also found that Garda's affirmative defenses did not create bona fide disputes:

> Garda's affirmative defenses to double damages did not create a "bona fide dispute" over its liability for failing to provide lawful breaks after *Pellino*. Garda did not show that it considered and "genuinely believed" in the FAAAA defense to [P]laintiffs' claims prior to fall 2014. By that time the law was clear that the FAAAA did not preempt state meal and rest break rules. The law was clear that meal breaks could not be waived in a Collective Bargaining Agreement (CBA) outside of public employment and construction trades, and

[39] CP at 3811.

> the law was clear that statutory wage claims were not preempted by the LMRA.[40]

We conclude that Garda's waiver-related affirmative defenses are unavailing, but the law is not as clear on these issues as the trial court suggested. We review the legal conclusions in this finding of fact de novo. *See Willener v. Sweeting*, 107 Wash.2d 388, 394, 730 P.2d 45 (1986).

Garda has clearly relied throughout on the purported meal period waivers in the CBAs. The trial court concluded that the law was clear that private employees outside the construction trades could not waive their meal periods through a CBA. While we agree that the Plaintiffs cannot waive their meal periods via a CBA, the state of the law was not clear. No case cited by either party squarely addressed the issue. Garda's interpretation of the Policy on this point was not unreasonable. We conclude that there was a bona fide dispute as to whether the Plaintiffs could waive their meal periods through the CBAs, and, therefore, that Garda did not willfully withhold wages for meal periods.

We do not take the further step, taken by the trial court, to determine whether the purported waivers were actually waivers. The trial court concluded that the CBAs "did not generally waive meal breaks but instead provided for 'on-duty' meal breaks, which are still meal breaks requiring complete relief from active work under Washington law."[41] We do not attempt to determine whether the CBAs contained waivers.

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[40] CP at 3811.

[41] CP at 3818.

Garda's reliance on the purported waivers is sufficient to show its withholding was not willful.

Because we conclude that a bona fide dispute existed about the requirement to provide meal periods, we do not need to determine whether Garda's FAAAA defense created a bona fide dispute or whether the Plaintiffs knowingly submitted to Garda's practice.

Prejudgment Interest

Garda contends that the trial court erred by awarding both double damages and prejudgment interest because both compensate the Plaintiffs for harm due to a delayed payment. The Plaintiffs argue that the purposes of the awards are different enough to support both. We agree with Garda.

Courts consider judgments for back wages to be liquidated and thus will award prejudgment interest for back wages. *Stevens v. Brink's Home Sec., Inc.*, 162 Wash.2d 42, 50-51, 169 P.3d 473 (2007). But courts will not allow prejudgment interest when the plaintiff seeks damages under a punitive statute. *Ventoza v. Anderson*, 14 Wash.App. 882, 897, 545 P.2d 1219 (1976). If a plaintiff sues under a punitive statute, the court will not grant interest on "either the compensatory or the punitive portion of the award." *Ventoza*, 14 Wash.App. at 897, 545 P.2d 1219.

Washington's wage violation statutes are silent on the issue of prejudgment interest. Title 49 RCW. But case law shows that double damages are punitive in nature. *Morgan v. Kingen*, 141 Wash.App. 143, 161-62, 169 P.3d 487 (2007) (holding that damages under the statute are "intended to punish and deter blameworthy conduct"), *aff'd*, 166 Wash.2d 526, 210 P.3d 995 (2009). Thus, under *Ventoza*, an award of prejudgment

interest is inappropriate when the court awards double damages.[42]

It does not appear that any published Washington cases have examined whether plaintiffs can recover both double damages and prejudgment interest under Washington's wage laws. Garda says prejudgment interest should not be available, relying on the fact that plaintiffs who recover under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219, may not recover prejudgment interest. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). But the Plaintiffs point out that the FLSA, although similarly allowing double damages, is distinguishable because it does not require a finding of willfulness. *See Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1103 (3d Cir. 1995) (holding that both double damages and prejudgment interest *are* appropriate under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and distinguishing the FLSA on the basis that it does not have a willfulness component). We conclude that, on this issue, cases

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[42] Arguably, under *Ventoza*, an award of prejudgment interest is inappropriate when a plaintiff seeks, an award of double damages under the statute, regardless of whether the court in fact awards double damages. But, since *Ventoza*, our Supreme Court has allowed prejudgment interest for an award based on failure to pay wages when a party unsuccessfully sought double damages for that same award. *Bostain v. Food Exp., Inc.*, 159 Wash.2d 700, 723, 153 P.3d 846 (2007). Moreover, Garda does not appear to be arguing that the Plaintiffs may not recover any prejudgment interest because they sought double damages. For example, when arguing that the trial court allowed the Plaintiffs a "double recovery" by awarding them prejudgment interest "on top of punitive damages," Garda said, "If no double damages are awarded, then prejudgment interest is appropriate only on any award that is affirmed." Br. of Appellant at 3, 45.

interpreting the FLSA and other federal labor and employment laws do not shed much light. Accordingly, we rely on this court's opinion in *Ventoza*. Although the underlying cause of action in that case related to trespass to timber, rather than employment, the court's holding that "[i]nterest is generally disallowed when recourse upon a punitive statute is sought" was not limited to timber claims. *Ventoza*, 14 Wash.App. at 897, 545 P.2d 1219.

We conclude that the trial court erred by awarding prejudgment interest when the Plaintiffs had recovered double damages under RCW 49.52.070.

Attorney Fees at Trial

The trial court awarded attorney fees at trial pursuant to Washington's wage laws, RCW 49.46.090, RCW 49.48.030, and RCW 49.52.070.[43] The trial court also applied a 1.5 lodestar multiplier to the Plaintiffs' attorney fee award.

Garda argues that the trial court abused its discretion by granting the Plaintiffs' request for a lodestar multiplier because the case was insufficiently risky to warrant one. We hold that the contingent nature of the case and the uncertain chance of success, as determined at the outset of litigation, justify the multiplier. The trial court did not err.

Trial courts use the lodestar method to calculate the proper attorney fee award in wage violation cases.

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[43] Garda again argues that the Plaintiffs are not entitled to attorney fees under these statutes for the meal period violations because they are not wage violations. As discussed earlier in this opinion, the meal period violations are wage violations. Accordingly, the Plaintiffs may recover attorney fees incurred pursuing their meal period claims.

Fiore v. PPG Indus., Inc., 169 Wash.App. 325, 351, 279 P.3d 972 (2012). To determine the lodestar, the court multiplies the number of hours reasonably spent on the case by a reasonable hourly rate. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 593-94, 675 P.2d 193 (1983). The court will sometimes adjust the lodestar to reflect factors that are not taken into account when calculating the lodestar, such as the contingent nature of the work or the skill of the legal representation. *Bowers*, 100 Wash.2d at 593-94, 675 P.2d 193. These adjustments are called multipliers. *See Bowers*, 100 Wash.2d at 583, 675 P.2d 193.

To determine whether the prevailing party deserves a multiplier based on the contingent nature of the work, the court "must assess the likelihood of success at the outset of litigation." *Bowers*, 100 Wash.2d at 598, 675 P.2d 193. Contingent-fee multipliers are only appropriate when attorneys are working on a contingency fee basis, because otherwise the attorneys will be entitled to fees regardless of the outcome of the litigation. *Bowers*, 100 Wash.2d at 598-99, 675 P.2d 193.

The Court of Appeals, Division One, reversed the grant of a multiplier on an attorney fee award in *Fiore* after it determined that the trial court had relied on an irrelevant factor. 169 Wash.App. at 330-31, 279 P.3d 972. There, the plaintiff sought a trial de novo after an unfavorable arbitration decision. *Fiore*, 169 Wash.App. at 332, 279 P.3d 972. By statute, a party who seeks a trial de novo after mandatory arbitration and does not improve their position has to pay the opposing party's reasonable attorney fees. *Fiore*, 169 Wash.App. at 356 n.1, 279 P.3d 972 (quoting MAR 7.3). The plaintiff prevailed at the trial de novo, and the trial court awarded a multiplier based on the contingent nature of the plaintiff's attorney fees, the

fact that the opposing party had hired very skilled attorneys from firms across the country, and the risk that the plaintiff might have had to pay the opposing party's attorney fees. *Fiore*, 169 Wash.App. at 356, 279 P.3d 972.

The Court of Appeals reversed the multiplier. *Fiore*, 169 Wash.App. at 357, 279 P.3d 972. It held the case was "a straightforward wage and hour case" and not high risk because it "did not require the pursuit of risky trial strategies or present novel problems of proof." *Fiore*, 169 Wash.App. at 357, 279 P.3d 972. It also held that, even though the attorneys' payment was on a contingency basis, it was the "'least risky'" type of contingent fee cases because liability and damages were resolved on summary judgment, the plaintiff sought damages under a statute that provided for attorney fees, and the defendant was "a large, solvent corporation." *Fiore*, 169 Wash.App. at 358 n.20, 279 P.3d 972. It concluded that the lodestar already reflected the difficult nature of the case because it was based on how many hours the attorneys would have to work. *Fiore*, 169 Wash.App. at 357-58, 279 P.3d 972.

The court also held that the risk of paying the opposing party's attorney fees after a trial de novo reflected a legislative preference for discouraging appeals from arbitration decisions. *Fiore*, 169 Wash.App. at 358, 279 P.3d 972. Applying a multiplier based on the risk of having to pay the opposing party's fees might actually encourage parties who lost at arbitration to seek a trial de novo, the opposite of the legislature's intent. *Fiore*, 169 Wash.App. at 358, 279 P.3d 972. Accordingly, the court held it was not a valid basis for an award of attorney fees. *Fiore*, 169 Wash.App. at 358, 279 P.3d 972.

An appellate court reviews a trial court's decision to award a multiplier for an abuse of discretion. *Bowers*, 100 Wash.2d at 599, 675 P.2d 193. A trial court abuses its discretion when it takes irrelevant factors into account in making a lodestar adjustment. *Chuong Van Pham v. Seattle City Light*, 159 Wash.2d 527, 543, 151 P.3d 976 (2007).

Here, the trial court found that a 1.5 multiplier was appropriate because the Plaintiffs' attorneys were working on a contingency basis and the case presented a high level of risk. This is the type of risk contemplated in both *Bowers* and *Pham* and distinguishable from *Fiore*. First, the trial court here relied exclusively on the risk that the Plaintiffs' attorneys undertook. It did not consider the skill of opposing counsel or irrelevant factors like the plaintiff's risk in a trial de novo. Second, this was not a straightforward case. It presented novel issues about the character of legally-sufficient rest breaks, not merely whether breaks were provided. Finally, success was very risky at the *outset* of litigation, because neither *Dilts* nor *Pellino* had been decided. The trial court did not abuse its discretion.

Garda relies on *Morgan v. Kingen* for its argument that the court's lodestar multiplier was unreasonable. 166 Wash.2d 526, 539-40, 210 P.3d 995 (2009), *as corrected* (Nov. 9, 2009). That case is distinguishable. There, the Supreme Court held that a trial court had not abused its discretion by denying successful plaintiffs a multiplier. *Morgan*, 166 Wash.2d at 539-40, 210 P.3d 995. For reasons similar to those considered by the Court of Appeals in *Fiore*, the trial court determined that the risk did not warrant a multiplier. *Morgan*, 166 Wash.2d at 539, 210 P.3d 995. The Supreme Court held that the trial court had clearly considered the risk at the outset of litigation and had

not abused its discretion. *Morgan*, 166 Wash.2d at 540, 210 P.3d 995. But a determination that the trial court did not abuse its discretion when it denied a request for a multiplier is not equal to a determination that the trial court would have abused its discretion if it had granted the request. *Morgan* is not controlling.

In sum, the trial court did not abuse its discretion by applying a multiplier based on the specific risks presented at the outset of this case.

Attorney Fees on Appeal

The Plaintiffs request attorney fees on appeal pursuant to RCW 49.48.030, RCW 49.52.070, and RCW 49.46.090(1). These statutes provide for an award of attorney fees for employees who successfully recover wages owed to them. The Plaintiffs have prevailed on this appeal and, therefore, are entitled to attorney fees on the same basis for which they received attorney fees below.

CONCLUSION

We affirm the trial court's class certification and summary judgment decisions, but reverse its award of double damages on meal period violations. We also reverse the award of prejudgment interest on the rest break damages, but not on the meal period violations. We remand for a new calculation of damages.

WE CONCUR:

Spearman, J.
Schindler, J.

APPENDIX C

SUPERIOR COURT OF WASHINGTON,
KING COUNTY

No. 09-2-07360-1 SEA

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

Plaintiffs,

v.

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

Defendant.

November 9, 2015

Julie Spector, Judge

JUDGMENT

Daniel F. Johnson, WSBA No. 27848, Breskin Johnson Townsend, PLLC, 1000 Second Avenue, Suite 3670, Seattle, WA 98104, Tel: 206-652-8660, Fax: 206-652-8290, djohnson@bjtlegal.com, for plaintiffs.

Adam J. Berger, WSBA No. 20714, Martin S. Garfinkel, WSBA No. 20787, Schroeter Goldmark & Bender, 810 Third Avenue, Suite 500, Seattle, WA 98104, Tel: 206-622-8000, Fax: 206-682-2305, berger@sgb-law.com, garfinkel@sgblaw.com, for plaintiffs.

Clerk's Action Required

JUDGMENT SUMMARY

1. Judgment creditors: LAWRENCE HILL, ADAM WISE, ROBERT MILLER, and members of the class;

2. Judgment debtor: GARDA CL NORTHWEST, INC.

3. Total judgment, comprised of the amounts set forth in paragraphs 4-6 below: $ 8,406,620.89

4. Total aggregate back pay damages for plaintiffs and members of the class: $ 4,209,596.61

5. Total aggregate prejudgment interest for plaintiffs and members of the class through November 6, 2015: $ 2,528,788.66

6. Total double damages for plaintiffs and members of the class pursuant to RCW 49.52.070: $ 1,668,235.62

7. Total attorneys' fees and costs for Plaintiffs and members of the class: $ To be determined[1]

8. Judgment amount shall bear interest at 12% per annum after entry.

9. Attorneys for Judgment Creditors: Daniel F. Johnson

Breskin Johnson Townsend, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Adam Berger
Martin S. Garfinkel
Schroeter Goldmark & Bender
810 Third Avenue, #500
Seattle, WA 98104

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[1] Plaintiffs will submit their petition for fees and costs after entry of judgment. The Court will enter a supplemental judgment setting forth attorneys' fees and costs for Plaintiffs and members of the class.

This matter was tried to the Court without a jury from June 16-18, 2015 and September 21-22, 2015, before the Hon. Julie Spector. Plaintiffs Lawrence Hill, Adam Wise, and Robert Miller and the class they represent, were represented by Daniel F. Johnson of Breskin Johnson Townsend, PLLC, and Adam Berger of Schroeter Goldmark & Bender. Defendant was represented by Clarence Belnavis and Alex Wheatley of Fisher & Phillips LP.

The parties presented evidence, testimony and briefing on legal issues. On October 23, 2015 the Court entered written Findings of Fact and Conclusions of Law. A copy of the Court's written Findings of Fact and Conclusions of Law is attached to this Judgment as Exhibit A.

Consistent with the Court's Findings of Fact and Conclusions of Law, the Court enters final judgment in this matter as follows:

1. The total judgment in favor of the class members and against Defendant is the amount of $8,406,620.89. This judgment is comprised of the amounts set forth in paragraphs 2, 3, and 4 below.

2. Plaintiffs and the class members are awarded back pay damages against Defendant in the total aggregate amount of $4,209,596.61.

3. Plaintiffs and the class members are awarded prejudgment interest against Defendant in the total aggregate amount of $2,528,788.66.

4. Plaintiffs and the class members are awarded double damages against Defendant pursuant to RCW 49.52.070 in the total aggregate amount of $1,668,235.62.

5. Plaintiffs and the class members shall be awarded attorneys' fees and costs against the Defendant in a total aggregate amount to be determined subsequent to entry of judgment. The award of attorneys' fees and costs may include a percentage of the Judgment amount set forth herein. The court will enter a supplemental judgment awarding the attorneys' fees and costs, which will also set forth the allocation of net back pay and interest damages among the individual class members.

6. Plaintiffs and the class members will receive 12% interest on the amounts set forth in paragraphs 2 and 4 of this judgment from the date of its entry until said judgment is satisfied.

DATED this *9* day of *Nov.*, 2015.

<<signature>>

HON. JULIE SPECTOR
King County Superior Court

Presented By:

s/Daniel F. Johnson
Daniel F. Johnson, WSBA No. 27848
Breskin Johnson Townsend, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Tel: 206-652-8660
Fax: 206-652-8290
djohnson@bjtlegal.com

Attorneys for Plaintiffs

s/Adam J. Berger
Adam J. Berger, WSBA No. 20714

s/Martin S. Garfinkel
Martin S. Garfinkel, WSBA No. 20787
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104
Tel: 206-622-8000
Fax: 206-682-2305
berger@sgb-law.com
garfinkel@sgb-law.com

Attorneys for Plaintiffs

APPENDIX D

SUPERIOR COURT OF WASHINGTON,
KING COUNTY

No. 09-2-07360-1 SEA

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

Plaintiffs,

v.

GARDA CL NORTHWEST, INC., f/k/a at Systems, Inc.
a Washington Corporation,

Defendant.

October 23, 2015

Julie Spector, Judge

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Daniel F. Johnson, WSBA No. 27848, Breskin Johnson Townsend, PLLC, 1000 Second Avenue, Suite 3670, Seattle, WA 98104, Tel: (206) 652-8660, Fax: (206) 652-8290, djohnson@bjtlegal.com; Adam M. Berger, WSBA No. 20714, Schroeter, Goldmark & Bender, 810 Second Avenue, Suite 500, Seattle, WA 98104, Tel: (206) 622-8000, Fax: (206) 682-2305, berger@sgb-law.com, for plaintiffs.

By order dated June 1, 2015, this Court granted summary judgment on liability to plaintiffs. The issue of damages was tried to the Court, without a jury, on June 16-18, 2015. The Court held over trial and the issue of double damages was tried to the Court on September 21-22, 2015.

To the extent the following Findings of Fact contain legal conclusions, those shall be deemed Conclusions of Law, and to the extent the following Conclusions of Law contain factual findings, those shall be deemed Findings of Fact.

I. FINDINGS OF FACT

A. Background

1. This case was filed on February 11, 2009. Plaintiffs Larry Hill, Adam Wise, and Robert Miller claimed, on behalf of themselves and the class members, that they and the class members were denied lawful rest and meal breaks under Washington law.

2. This case was certified as a class action pursuant to CR 23(a) and CR 23(b)(3) on July 23, 2010. The class was defined as "all people who have been employed by Garda CL Northwest or its predecessor to work on armored trucks in the State of Washington and who, at any time between February 11, 2006 and the present, were denied meal and/or rest breaks."

3. Following notice to the class, 29 putative class members opted out.[1] After the opt-outs, 277 class members remained.

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[1] The employees who opted out are James W. Anderson, David M. Burrow, Ryan Franck, Michael Gayken, Rudi J. Greer, Dustin Hagemann, Joshua J. Higgins, Franklin Johnson, Rudy L. Krager, Robert F. Larson, Jason R. Milam, Robert Patty, Daniel B. Pells, Roberto Pineda, Keith Pryor, Keith Rector, Allen K.

4. On September 24, 2015, the Court granted Garda's motion to compel arbitration, and ordered class arbitration.

5. The parties appealed, and the Washington Supreme Court, at 179 Wn.2d 47, 308 P.3d 635 (2013), held that the arbitration provisions in Garda's Labor Agreements were unconscionable and unenforceable. On June 16, 2014, the United States Supreme Court denied certiorari.

6. On remand, a second notice was sent to additional class members. None opted out and thereafter there were 480 class members.

7. On motions for summary judgment, the Court dismissed three affirmative defenses: waiver (with respect to meal breaks), preemption by the Labor Management Relations Act (LMRA), and preemption by the Federal Aviation Administration Amendments Act (FAAAA). On plaintiffs' motion, the Court granted summary judgment on liability.

8. Trial on damages took place June 16-18, 2015, and continued on the issue of double damages September 21-22, 2015.

9. At trial the Plaintiffs sought damages for all class members from February 6, 2006, to February 7, 2015 and double damages from November 20, 2011 to February 7, 2015.

Reser, Many Rim, David Sandberg, Scott A. Scott, Lenny S. Sensui, Kyle L. Shelley, Joshua D. Simonson, Melissa Trowbridge, David Turgeon, John S. Ueda, Dale Visser, Daniel Vondrachek, and Benjamin R. Wright.

B. Findings of Fact Regarding Damages

10. Plaintiff presented the testimony of Dr. Jeffrey Munson, a database and data management expert, regarding calculation of damages from electronic payroll and timekeeping detail data produced by Garda.

11. Garda produced two sets of data which Dr. Munson used to calculate damages. For the period from February 2006 through May 2010 (Period 1), Garda produced only biweekly payroll data, which specify how many regular and overtime hours an employee worked over a two-week pay period and the employee's regular rate of pay. *See* Exh. 12. The biweekly payroll data do not allow precise calculation of missed rest and meal breaks and consequent damages because they do not contain information on the number of hours worked on any particular day.[2]

12. For the period from June 2010 through February 7, 2015 (Period 2), Garda produced daily timekeeping data, as well as biweekly payroll data. These data allow a precise calculation of missed rest and meal breaks during the later period.[3] *See* Exhs. 1-11.

13. Dr. Munson applied the following assumptions to calculate the number of rest break minutes due to class members for Period 2, when daily timekeeping

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[2] Thus, for example, an employee working 40 hours in a week may have worked five eight-hour shifts (missing five meal periods), four ten-hour shifts (missing four meal periods), or three 10.5 hour shifts and one 8.5 hour shift (missing seven meal periods). In addition, the biweekly payroll data do not specify how many hours were worked in each week of the two-week period.

[3] The daily timekeeping data were missing for 12 class members who worked during Period 2, so only payroll data were available for them. For those class members, Dr. Munson calculated damages following the same assumptions used for Period 1.

data were available: if the daily total hours worked were greater than or equal to four hours but less than eight hours, 10 minutes of break time; if the duration was greater than or equal to eight hours but less than 12 hours, 20 minutes of break time; and if the duration was greater than or equal to 12 hours, 30 minutes of break time.

14. Similarly, Dr. Munson applied the following assumptions to calculate the number of meal period minutes due to class members for Period 2: if the daily total hours worked was greater than five hours but less than or equal to 10 hours, 30 minutes of meal time; if the duration was greater than 10 hours but equal to or less than 15 hours, 60 minutes of meal time; and if the duration was greater than 15 hours, 90 minutes of meal time.

15. For Period 1, when no daily timekeeping data and only payroll data were available, Dr. Munson employed the assumptions described above to estimate missed meal and rest breaks and additional assumptions regarding the division of biweekly hours worked among work weeks and days. For example, Dr. Munson generally allocated the total hours in a biweekly pay period evenly between the two weeks, unless a comparison of regular and overtime hours suggested a more reasonable distribution.[4] He also assumed a

[4] For example, if the payroll data showed that an employee worked 80 regular hours and ten overtime hours in a biweekly pay period, Dr. Munson's calculations assume that the employee worked 45 hours (40 regular plus five overtime hours) in each week. However, if the payroll data showed that an employee worked 75 regular hours and ten overtime hours in a pay period, the calculations assumed that the employee worked 35 hours in one week and 50 hours (40 regular plus ten overtime hours) in the other. In the latter example, the employee did not work enough regular hours to reach the 40 hour threshold for overtime

typical 9.5 hour day in dividing the weekly hours into days of work, and calculated missed rest and meal breaks on that basis.

16. For the months of June and July, 2010, Dr. Munson calculated damages from both biweekly payroll and daily timekeeping data. This allowed a comparison between the damages calculated based on assumptions about the biweekly payroll data and damages calculated with full information from the daily timekeeping data. The two methods yielded very similar results, with the payroll-based calculations only 1.7% higher than the timekeeping-based calculations. This supports the conclusion that Dr. Munson's assumptions and estimates for Period 1 damages are reasonable.

17. The Court finds Dr. Munson's methodology to be reasonable and appropriate and his calculations to be reasonable and sound.

C. Findings of Fact Regarding Double Damages

18. Dr. Munson also calculated double damages for the period between November 20, 2011 and February 7, 2015. The beginning of this period is approximately two weeks after the Washington Court of Appeals issued its decision in *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), holding that one of Garda's armored car industry competitors failed to provide lawful rest breaks and meal periods to its armored car messengers and drivers both because the messengers and drivers were required to maintain constant vigilance while on their routes, and thus were required to engage in unremitting work throughout

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hours in both weeks of the pay period, so it is reasonable to assume that all of the overtime hours were worked in the one week where the employee did reach 40 regular hours.

any breaks, and because the armored truck crews were not provided sufficient time to take lawful breaks. As of the date of the *Pellino* decision, Garda knew or should have known that requiring constant alertness by its armored truck crews and failure to provide sufficient time for breaks violated the Washington Industrial Welfare Act and its implementing regulations.

19. Garda's affirmative defenses to double damages did not create a "bona fide dispute" over its liability for failing to provide lawful breaks after *Pellino*. Garda did not show that it considered and "genuinely believed" in the FAAAA defense to plaintiffs' claims prior to fall 2014. By that time the law was clear that the FAAAA did not preempt state meal and rest break rules. The law was clear that meal breaks could not be waived in a Collective Bargaining Agreement (CBA) outside of public employment and construction trades, and the law was clear that statutory wage claims were not preempted by the LMRA.

20. Plaintiffs did not "knowingly submit" to Garda's unlawful meal and rest break policies after *Pellino*. Garda failed to show that plaintiffs knowingly and voluntarily waived an existing right to take lawful rest and meal breaks. Garda's CBAs generally provided, on paper, for regular rest breaks and the option of an off-duty or on-duty meal break; they did not contain statements that employees agreed not to take any breaks.

21. Three CBAs, signed or acknowledged in writing by only 29 of the class members, stated that employees waived meal breaks. Garda failed to show that these employees could have taken meal breaks or that they knowingly and voluntarily chose not to do so. The CBAs were not negotiable by individual employees

and they applied to all employees whether they read, acknowledged, and signed them or not.

22. Garda did not show that class members actually had the option to take an off-duty meal break or that they knowingly and voluntarily chose not to do so. Employees were never relieved of the obligations to guard the truck and/or the liability and to maintain constant vigilance. Class members testified that they did not believe they could take off-duty meal breaks and Garda managers admitted they did not know how they would have provided actual off-duty meal breaks if they had been asked to do so.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter.

A. General Legal Framework

2. If an employer fails to provide rest breaks to its employees, it must pay for the missed break time. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 850, 50 P.3d 256 (2002). The same principle applies to missed meal breaks, even if paid. *See Pellino v. Brink's Inc.*, 164 Wn. App. 668, 690-91, 267 P.3d 383 (2011). In both cases, the employer is getting more work time from its employees than the law allows and must pay additional compensation for that time. *Wingert* at 849. Where, as here, the fact of injury has been established, Plaintiff does not need to establish the amount of damages owed with certainty. *Pugh v. Evergreen Hospital Medical Center*, 177 Wn. App. 363, 368 (2013) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)); *Pellino*, 164 Wn. App. at 698 ("Damages need not be proven with mathematical certainty, but must be supported by evidence that

provides a reasonable basis for estimating the loss and does not amount to mere speculation or conjecture.").

3. Plaintiffs' burden is only to provide sufficient evidence from which the finder of fact can make a reasonable approximation of the amount of damages owed. *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 713, 257 P.2d 784 (1953).

4. The Court also concludes that it is appropriate in this case to adopt the burden shifting approach set forth in *Mt. Clemens* with respect to proof of the amount of damages. As explained in *Mt. Clemens*, 328 U.S. at 687-88:

> [W]e hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

The Court went on to say, at 688:

> [E]ven where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-work activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor

> is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages . . . . It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of damages.

5. To the extent there was not a completely accurate record of the hours worked by class members on the trucks each day, the risk of error is better placed on Garda than on the Plaintiff employees. The same principles that support burden-shifting under the federal Fair Labor Standards Act ("FLSA") are also present in this case, including: 1) the remedial nature of the Industrial Welfare Act; 2) the principle that where the fact of damage is certain, the wrongdoer should provide compensation; 3) the similarity in statutory schemes between Washington law and the FLSA, particularly the employer's duty under Washington wage laws (at RCW 49.46.070), as well as the FLSA (at 29 U.S.C. § 211), to keep accurate and complete records of the hours worked each day and the wages paid; and 4) the fact that the employer "is in the position to know and to produce the most probative facts concerning the nature and amount of work performed." *Mt. Clemens* at 688.

B. Dr. Munson's Calculations Are Reasonable.

6. Plaintiff's evidence regarding the amount of damages came through the testimony of Dr. Munson. The Court concludes that Dr. Munson's overall methodology for calculating damages was sound and reasonable, reflected the requirements of Washington law, and generally resulted in reasonable calculation of the damages due to the class members.

7. In particular, the determination of missed rest and meal break time in Dr. Munson's calculations are consistent with WAC 296-126-092 and *Wingert, supra.* His use of the daily timekeeping data during Period 2 is reasonable because it yields the most accurate information possible about the class members' work hours and entitlement to breaks. His use of biweekly payroll data along with assumptions about the work hours of class members during Period 1 is reasonable because it was the best information available for that period and the assumptions were reasonable under the law and on the evidence.

8. As in *Pellino*, Dr. Munson's assumptions and calculations based on the biweekly payroll data and daily timekeeping data meet the legal standard for proving damages, and the Court concludes that Plaintiffs have met their burden in this case.

9. Garda attempted to call into question Dr. Munson's calculations, principally by challenging his use of a "typical" work day of 9.5 hours in allocating weekly work hours and calculating damages for Period 1. However, Garda did not present enough evidence to cast doubt on Dr. Munson's assumptions or methodology. Indeed, much of Garda's evidence confirmed that the assumptions and methodology were reasonable. Garda manager testimony confirmed, for example, that 9.5 hours was a reasonably accurate figure for a typical or average workday. The reasonableness of this assumption also is confirmed by the average shift length reflected in a number of the daily timekeeping spreadsheets for Period 2 and by the close correlation between the damage calculations under the Period 1 and Period 2 methodologies for the overlap period of June and July 2010. Garda's evidence does not

overcome the Court's conclusions that the calculations were reasonably accurate and reliable.

10. Garda also suggested Dr. Munson's calculations were faulty because he did not take into account "guaranteed time" or "idle time." These terms refer to the fact that Garda generally guaranteed full-time truck crew members that they would be paid for 40 hours per week, even if they worked less. Garda did not show the frequency with which class members worked less than 40 hours per week and received pay for guaranteed time.

11. Garda did not show that any guaranteed time was included in Dr. Munson's calculations for Period 2. During Period 2, Garda's data showed guaranteed time separately from hours worked, and Dr. Munson excluded those hours from his calculations.

12. During Period 1, Garda did not record guaranteed time. If a class member worked less than 40 hours, only his daily time card would show the actual hours he worked. His manager would then record "40 hours" on the payroll sheet that was used to calculate pay. There would be no way to determine whether and when guaranteed time was provided and included in hours worked during Period 1 except by comparing each time card with its corresponding payroll sheet. That would be extremely difficult or impossible. Garda did not even show that these documents existed, and did not offer any evidence whether or how much guaranteed time may have been included in the damages calculations.

13. Garda produced the data that Dr. Munson relied upon. If it had better data, it could have and should have produced it. Under these circumstances, it is appropriate to apply *Mt. Clemens* burden shifting

principles to the Defendant. The Court concludes that Garda did not come forward with sufficient "evidence of the precise amount of work performed" or sufficient "evidence to negative" the reasonableness of Dr. Munson's calculations. *See Mt. Clemens*, 328 U.S. at 687-88.

14. It appeared during trial that the damages originally calculated by Dr. Munson for certain class members were mistaken, either because the class members had opted out of the case in 2010 and were mistakenly included in the calculations, or because, in the case of two class members, they appeared as two different people, with slightly different names in the Period 1 payroll and Period 2 timekeeping data.[5] However, during redirect examination and after the first hearing concluded, Dr. Munson was able to provide reasonable adjustments to his damage calculations for these individuals. *See* Declaration of Jeffrey Munson, PhD., dated June 24, 2015 (hereafter "Munson Dec"). The Court concludes that the adjustments testified to by Dr. Munson are reasonable and adequately address the errors that were identified during trial.

15. After his corrections, Dr. Munson calculates total backpay owed to the class members as $4,209,596.61. Munson Dec. ¶ 6. The Court finds this amount of damages to be reasonable, and hereby awards that amount to the class as backpay damages.

C. Plaintiffs Are Entitled To Double Damages

16. Plaintiffs claim double damages for "willful" withholding of wages pursuant to RCW 49.52.050(2)

[5] Hubie Meadows and Hubie Meadows III are apparently the same person, and Duane Wilks and Duane Wilks, Jr., are apparently the same person.

and RCW 49.52.070. RCW 49.52.050 provides, in relevant part:

> Any employer or officer . . . who. . . (2) Wilfully [sic] and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract . . .
>
> Shall be guilty of a misdemeanor.

17. Under RCW 49.52.070, the civil penalty for such violations makes the employer liable for "twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees."

18. Under these statutory provisions, "[a]n employer's nonpayment of wages is willful and made with intent 'when it is the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.'" *Wingert*, 146 Wn.2d at 849.

19. The Court of Appeals' decision in *Pellino* affirming Judge Trickey's verdict for the plaintiff driver/messengers against Brink's was issued November 7, 2011. The Court concludes that, as of that time, no bona fide dispute existed over whether Garda's policy and practice, requiring its driver/messengers to continuously act as a guard and maintain constant vigilance, violated Washington law by depriving its employees of lawful rest and meal breaks.

20. Garda claims that even after *Pellino* there remained a bona fide dispute over whether its waiver defense to meal break violations relieved it of liability on that claim. However, Garda's waiver defense was based solely on language in Collective Bargaining

Agreements (CBAs) that did not generally waive meal breaks but instead provided for "on-duty" meal breaks, which are still meal breaks requiring complete relief from active work under Washington law. *See* Exhs. 119-125. Furthermore, Washington law clearly forbids waiver of the right to meal breaks through a CBA, except for public and construction industry employees. Wash. Dept. Labor & Indus. Admin. Policy ES.C.6, § 15; RCW 49.12.187; *Watson v. Providence St. Peter Hosp.*, 2013 U.S. Dist. LEXIS 99980 *16 (W.D. Wash. July 17, 2013). Thus, Garda's waiver defense was not "fairly debatable" and did not create a bona fide dispute over its liability for failing to provide lawful meal breaks.

21. Garda also claims that, even after *Pellino*, its preemption defenses created a bona fide dispute over its liability. Its defense that Washington meal and rest break rules are preempted by the federal Labor Management Relations Act (LMRA) is meritless. Plaintiffs' claims were based solely on Washington statutory and regulatory requirements, not on Garda's CBAs. Nor did the application of Washington law to Plaintiffs' claims require substantial interpretation of the CBAs. Garda raised the CBAs in defense, and as noted above, that defense was not meritorious. Legal arguments that are contrary to well-established law are not sufficient to give rise to a bona fide dispute that would avoid liability under RCW 49.52.070. *Department of Labor & Industries v. Overnite Transp. Co.*, 67 Wn. App. 24, 34 (1992).

22. Garda's argument that Washington law was preempted by the Federal Aviation Administration Amendments Act (FAAAA) was not even raised until December 2, 2014, nearly six years after the suit was filed, three years after *Pellino* was decided, and three

months before the end of the class period in the case. Defenses that are not considered and "genuinely believed" to be defenses at the time do not create a "bona fide dispute" between the parties over the wages at issue. Garda did not establish that, notwithstanding its delay in raising the defense, it had a "genuine belief that despite *Pellino*, the Plaintiffs' claims in this case were preempted by the FAAAA. And by the time Garda did raise the FAAAA in this case, the law was settled that it does not preempt state meal and rest break laws. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647(2014).

23. Garda also argued that class members "knowingly submitted" to meal break violations (but not rest break violations) by acknowledging and accepting the CBAs which, it contended, contained waivers of the right to a meal break.

24. "Knowing submission" is an affirmative defense to double damages under RCW 49.52.070. For an employer to prove "knowing submission" it must demonstrate that the employees "deliberately and intentionally deferred to [the employer's] decision to whether they would ever be paid." *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 682 (2001). There is no evidence of any such deliberate or intentional action on the part of the class members. This defense, which must be construed narrowly, includes a component of choice, because otherwise the exception would swallow the rule. Any employee who is forced to work off the clock or continues to work without pay would obviously "know" that, but it would destroy the purpose and liberal application of the rule to deny double damages in those instances. Here, because it is undisputed that all class members were required to be vigilant at all times and therefore were continuously

"working," the employees had no legitimate choice about foregoing their meal periods.

25. As noted above, Garda's CBAs generally did not contain waivers of the right to a meal break, so they cannot serve as evidence that class members knowingly submitted to the denial of that right. Garda failed to present any other evidence of knowing submission.

26. Nor is a finding of knowing submission supported by the provision in the CBAs giving employees, on paper, the right to request off-duty meal breaks and the failure of employees to do so. Garda did not show that the option of taking an off-duty meal break was realistic, and the weight of the evidence showed it was not. Knowing submission must be explicit, not implied. *See Chelius*, 107 Wn. App. at 683. Furthermore, failure to request an off-duty meal break, even if voluntary, does not constitute a knowing submission to the denial of a lawful, work-free, on-duty meal break.

27. Therefore, the Court grants Plaintiff's request for double damages under RCW 49.52. Dr. Munson calculated the amount of backpay due to the class members beginning November 20, 2011, as $1,668,235.62. Munson Dec. ¶ 9. The Court finds this amount to be reasonable and awards this amount to the class as double damages.

D. Plaintiffs Are Entitled To Prejudgment Interest

28. Washington courts regard judgments for back wages as liquidated and award prejudgment interest. *See, e.g., Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007); *Mothers Work, Inc. v. McConnell*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006); *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 948 P.2d 397 (1997), *rev. denied*, 135 Wn.2d

1003, 959 P.2d 126 (1998); *Curtis v. Security Bank of Washington*, 69 Wn. App. 12, 847 P.2d 507, *rev. denied*, 121 Wn.2d 1031, 856 P.2d 383 (1993). A claim is liquidated when the evidence "furnished data that . . . made it possible to compute the amount with exactness." *Mothers Work, Inc., supra*, at 536. This is true even if the number of unpaid hours are determined on an average or approximate basis, or when a damages expert is used to assist the trier of fact in determining the amount of back wages owed. *Stevens v. Brink's, supra*; *Mothers Work, Inc., supra.* Here, the damages were readily ascertainable based on pay rates, hours worked, and other objective data in the record and the Court's findings regarding the calculation of the number of rest and meal break minutes for which compensation is owed.

29. Accordingly, the Court concludes that prejudgment interest is due on the back pay owed here at a rate of 12% simple per annum, or one percent per month. *Stevens*, 162 Wn.2d at 42.

30. Dr. Munson calculated prejudgment interest at 12% simple per annum through June 30, 2015, as $2,350,255.63. Munson Dec. ¶ 6. Garda has not challenged this calculation, and the Court awards this amount to the class as prejudgment interest. The Court will award additional prejudgment interest at the time of entry of judgment, at 12% simple per annum, to the date of the judgment, upon request with appropriate support.

IT IS SO ORDERED.

DATED: *10/23/2015*

<<signature>>

Hon. Julie Spector

Presented by:

By: *s/ Daniel F. Johnson*
BRESKIN JOHNSON TOWNSEND, PLLC
Daniel F. Johnson, WSBA No. 27848
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Tel: (206) 652-8660
Fax: (206) 652-8290
djohnson@bjtlegal.com

SCHROETER, GOLDMARK & BENDER
Adam M. Berger, WSBA No. 20714
810 Second Avenue, Suite 500
Seattle, WA 98104
Tel: (206) 622-8000
Fax: (206) 682-2305
berger@sgb-law.com

Attorneys for Plaintiffs

APPENDIX E

THE SUPREME COURT OF WASHINGTON

No. 94593-4
Court of Appeals No. 74617-1-I
King County No. 09-2-07360-1 SEA

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., a Washington Corporation,

Petitioner / Cross-Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court considered the Petitioner/Cross-Respondent "GARDA CL NORTHWEST, INC.'S MOTION FOR RECONSIDERATION" and the "RESPONDENTS/ CROSS-PETITIONERS' ANSWER TO MOTION FOR RECONSIDERATION";

Now, therefore, it is hereby

ORDERED:

That the motion for reconsideration is denied.

DATED at Olympia, Washington this 20th day of November, 2018.

For the Court

/s/ Fairhurst
CHIEF JUSTICE