No. 93564-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFCATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON IN

MICHAEL BRADY,

Plaintiff,

v.

AUTOZONE STORES, INC., and AUTOZONERS, INC.,

Defendants.

AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association ("WELA") is an organization of approximately 188 lawyers licensed to practice law in Washington. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA is a chapter of the National Employment Lawyers Association. WELA has appeared in numerous cases before this Court involving employee rights.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

State wage and hour laws "play a crucial role in protecting workers' rights and creating a level playing field for businesses."[1] "The mere existence of [these] laws," however, "does not automatically mean the standards they establish are followed."[2] Indeed, "[p]ervasive violation of both federal and state wage and hour laws across the United States is well documented."[3] This includes violation of state laws enacted to ensure minimum conditions of labor, such as rest and meal periods.

For example, a landmark survey published in 2009 revealed that 69 percent of employees who were legally entitled to a meal break experienced one or more meal break violations in the previous

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[1] Jacob Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators*, at 7 (2011), http://www.law.columbia.edu/sites/default/files/microsites/attorneys-general/files/Wage%20and%20Hour%20Report%20FINAL_0.pdf.

[2] *Id*. at 5.

[3] *Id.*

workweek.[4] These violations were prevalent in a variety of industries, such as restaurants and hotels, personal and repair services, apparel and textile manufacturing, food transportation, residential construction, security and building maintenance, and retail and drug stores.[5] Among cashiers and retail salespersons, meal break violations impacted more than 70 percent of eligible employees.[6]

The Washington legislature enacted the Industrial Welfare Act ("IWA"), chapter 49.12 RCW, to protect all workers in this state. The IWA is broad in scope and liberally construed so as to realize its remedial goals. Among other things, the statute prohibits employing any person under conditions of labor that fall below minimum standards established by the Department of Labor and Industries. These conditions include the rest and meal breaks to which employees are entitled under WAC 296-126-092. The purpose of the regulation is to ensure the health, safety, and welfare of employees.

This case presents two primary issues regarding the basic right of employees to rest and meal breaks. The first concerns the responsibility of employers under WAC 296-126-092. The United States District Court for the Western District of Washington concluded that "employers need only make meal breaks available to employees who choose to take those

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[4] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 22-23, 36-37 (2009), http://nelp.3cdn.net/e470538bfa5a7e7a46_2um6br7o3.pdf.

[5] *Id*. at 36-37.

[6] *Id*.

breaks." *Brady v. AutoZone Stores, Inc.*, No. C13-1862 RAJ, 2015 WL 5732550, at *3 (W.D. Wash. Sept. 30, 2015). This decision is erroneous. As the Supreme Court held in *Demetrio v. Sakuma Bros. Farms, Inc.*: "It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time." 183 Wn.2d 649, 658, 355 P.3d 258 (2015).

The standard that best guarantees the health, safety, and welfare of workers is set forth in *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), which this Court cited approvingly in *Demetrio*, 183 Wn.2d at 658. There the Court of Appeals held that "employers have a duty to provide meal periods and rest breaks and to ensure the breaks comply with the requirements of WAC 296-126-092." *Pellino*, 164 Wn. App. at 688. This "mandatory obligation" requires employers to see that employees actually receive the breaks to which they are entitled. *Id.* at 685-88, 699 (affirming trial court's conclusion that employers "have an affirmative obligation to make sure rest and meal periods are provided and taken" (emphasis added; internal marks omitted)). Employers "naturally desire to obtain as much labor as possible from their employees," and this proclivity creates pressures (both subtle and overt) that induce workers "to conform" to conditions "detrimental to their [own] health or strength." *Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 596, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379 (1937). Washington's longstanding policy of protecting workers demands that employers bear

the responsibility for promoting rest and meal breaks. If employers could simply leave it to employees to "choose" whether to take breaks, the goals of WAC 296-126-092 would be undermined.

The second issue before the Court concerns the burden placed on employees to prove violations of WAC 296-126-092. Like the vast majority of lawsuits challenging an employer's compliance with the rest and meal break law, Plaintiff Michael Brady brought this case as a proposed class action. The district court refused to certify the case for class treatment, however, based on the determination that employees must prove they were "deprived" of "a meaningful opportunity to take a meal break," and "[a]ny such showing will require substantial individualized fact finding because the court will need to inquire into the reasons for any missed breaks." *Brady*, 2015 WL 5732550, at *6. By requiring employees to demonstrate why they missed each break, the district court imposed a liability standard that makes it virtually impossible to utilize the class action device to enforce the fundamental right to rest and meal breaks.

Washington favors the aggregation of small claims in one lawsuit "for purposes of efficiency, deterrence, and access to justice," *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007), and break claims are invariably too small to justify individual legal action. This Court should announce a liability standard that facilitates the ability of employees to prosecute break claims in class actions. Specifically, the Court should declare that employees establish a prima facie case for rest

and meal break violations when they show they failed to receive the minimum breaks to which they were entitled within the time frames established by Washington law. It is unnecessary to ascertain why the employees failed to receive the breaks. The employer will be held liable for those violations unless it sufficiently disputes the employees' evidence. A contrary ruling would effectively foreclose the ability of employees to access the courts and enforce meal and rest break regulations through the class action procedure.

A third issue is also implicated in this case: the circumstances, if any, under which employees are allowed to waive their right to a meal break. Given the imbalance of power inherent in the employer-employee relationship, this Court should treat meal break waivers (to the extent they are enforceable at all) as an affirmative defense that is narrowly construed. The Court should require such waivers to be free and voluntary, obtained in advance, limited in duration, specific as to date, and documented. Without these restrictions, employers would be able to abuse waivers to escape liability when they fail to satisfy their duty to provide minimum meal breaks and ensure those breaks are received.

III. ARGUMENT

A. The Court should exercise its authority to reformulate the certified questions.

There are significant problems with the manner in which the district court formulated the certified questions. With respect to Question 1, "strict liability" is a tort standard that carries no meaning in

relation to wage and hour laws. With respect to Question 2, the district court's inquiry improperly assumes that an employer need only "permit the employee an opportunity to take a meaningful break . . . ." *Brady v. AutoZone Stores, Inc.*, No. 2:13-cv-01862-RAJ, 2016 WL 7733094, at *3 (W.D Wash. Sept. 9, 2016). This Court requires more: an employer "must affirmatively promote meaningful break time." *Demetrio*, 183 Wn.2d at 658.

For these reasons, the Court should exercise its inherent authority to reformulate the certified questions so as to better address the underlying issues. *See Travelers Cas. & Surety Co. v. Wash. Trust Bank*, 186 Wn.2d 921, 931, 383 P.3d 512 (2016). Those issues are: (1) the responsibility an employer bears to ensure compliance with WAC 296-126-092 and (2) the standard an employee must meet to prove liability.

B. Employers have an affirmative duty to provide rest and meal breaks to employees and to ensure those breaks comply with the requirements of WAC 296-126-092.

More than 40 years ago our legislature declared: "The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010. "'Conditions of labor' means and includes the conditions of rest and meal periods for employees" set forth in WAC 296-126-092. RCW 49.12.005(5). This regulation establishes basic minimum standards for rest and meal breaks to ensure the safety and welfare of Washington

workers. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002). Those standards are as follows:

> (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.
>
> (3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime 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 4 hours worked, scheduled rest periods are not required.

WAC 296-126-092.

As shown above, the regulation's operative language is identical for both rest and meal breaks: "[e]mployees shall be allowed" certain minimum breaks throughout the day, and "[n]o employee shall be required to work" more than a set number of consecutive hours without

such breaks. WAC 296-126-092(1)-(4). Periodic breaks "are critical to the health and effectiveness of employees." *Demetrio*, 183 Wn.2d at 658. Accordingly, this Court construes the provisions of WAC 296-126-092 "to further that recuperative purpose." *Id*.

The Court recently remarked on the responsibility of employers "to protect the effectiveness of rest breaks," holding: "It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time." *Id*. The Court's conclusion was informed by the Court of Appeals decision in *Pellino*. *See id*. There Division One held that "[t]he plain language of WAC 296-126-092 imposes a mandatory obligation on the employer." *Pellino*, 164 Wn. App. at 688. Specifically, "employers have a duty to provide meal periods and rest breaks to ensure the breaks comply with the requirements of WAC 296-126-092." *Id*.

To understand the meaning of this holding, it is important to look at the arguments put forth by the employer—arguments similar to those made by AutoZone in this case: (1) "that an employer does not have a duty to 'provide' meal and rest breaks but is only required to allow employees to take meal periods and rest breaks by not standing in the way of employees who choose to take a break"; and (2) "that an employer does not have a duty to ensure employees take meal and rest breaks under WAC 296-126-092." *Id*. at 687 (internal marks omitted). The Court of Appeals explicitly rejected these positions, stating: "the

employer must provide breaks that comply with the requirement of 'relief from work or exertion.'" *Id*. at 691 (quoting *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003)). In other words, the employer has a duty to ensure that its employees actually receive the minimum breaks to which they are entitled. *See id*. Because the employees "did not receive lawful meal periods and rest breaks," the Court of Appeals held the employer liable. *Id*. at 699.

"[T]he underlying purpose for meal periods and rest periods—to stop work duties for rest and relaxation—is the same for both." *Id*. at 693 (quoting *White*, 118 Wn. App. at 283) (internal marks omitted). The *Pellino* decision is consistent with this goal and with the statute enabling the break regulation. The IWA makes it unlawful to employ any person under conditions of labor that fail to meet the minimum requirements for rest and meal periods. RCW 49.12.170. The term "'[e]mploy' means to engage, suffer or permit work." WAC 296-126-002(3). Thus, an employer who suffers or permits an employee to work more than five hours from the beginning of a shift without the receipt of a meal break violates the law. *See* RCW 49.12.170; WAC 296-126-092(1).

The holding of the district court, by contrast, is at odds with the intent of chapter 49.12 RCW and the principles enunciated in *Demetrio* and *Pellino*. Rather than obligate employers to see that their employees actually receive the meal breaks to which they are entitled, the district court determined "employers need only make meal breaks available to employees who choose to take those breaks." *Brady*, 2015 WL 5732550,

at *3. The court came to this conclusion by focusing on the outer boundaries of break violations, taking issue with what it characterized as a "hard-line approach" that makes employers liable "[when] an employee punches out five hours and one minute after the start of his shift." *Id*. But this is a problem of the employer's own making. Nothing requires an employer to schedule a lunch break at the fifth hour of a shift. Such an approach invites a violation. To avoid this, the employer need only schedule the lunch break 15 to 30 minutes before the deadline and ensure the break is received at that time. Moreover, a line must be drawn somewhere, and the regulation is unequivocal regarding the minimum conditions required for rest and meal breaks. *See* WAC 296-126-092(1) (meal periods must commence "no less than two hours nor more than five hours from the beginning of the shift").

The district court also expressed concern about a standard that "require[s] employers to police employees who fail to take a break." *Brady*, 2015 WL 5732550, at *3. The court apparently intended "police" to have a pejorative connotation, but the term's definition is quite appropriate. As a verb, "police" means to "[e]nforce regulations . . . in a particular area" or, similarly, to "[e]nforce the provisions of a law."[7] This is precisely what the *Pellino* court held is required of employers: "employers have a duty . . . to ensure th[at] breaks comply with the requirements of WAC 296-126-092." 164 Wn. App. at 688.

[7] Oxford Dictionary (US) (Oxford University Press 2017), https://en.oxforddictionaries.com/definition/us/police (internal marks omitted).

Lastly, the district court implied it is unduly burdensome for employers to manage the breaks of employees, but this suggestion has no merit. Employers closely monitor the work of their employees on a daily basis, ensuring among other things that employees are not paid for work they do not perform; that employees are on time but do not clock in early; that employees work their scheduled hours but not beyond; and that employees complete their assigned duties each shift. In fact, employers are required by law to supervise employee work hours:

> An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.

Wash. Dep't of Labor & Indus. ("DLI") Admin. Policy ES.C.2 at 1 (2008); *see also United Food & Commercial Workers Union Local 1001 v. Mut. Ben. Life Ins. Co.*, 84 Wn. App. 47, 54, 925 P.2d 212 (1996) (holding employer "cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation") (citation omitted), *abrogated on other grounds by Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000). In short, employers are engaged in the business of supervising their workforces for a variety

of reasons, and ensuring that employees actually receive minimum required breaks is but a small part of that administration.[8]

The IWA and its regulations are broad in scope and liberally construed so as to realize their remedial objectives. *See Pellino*, 164 Wn. App. at 684-65 (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)). In fact, "Washington has a 'long and proud history of being a pioneer in the protection of employee rights.'" *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)). More than eighty years ago, this Court acknowledged that employers and employees

> do not stand upon an equality, and . . . their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, if fairly exercised, would pronounce to be detrimental to their health or strength.

Parrish, 185 Wash. 596.

Periodic rest and meal periods are necessary for healthy and safe working conditions. Just as employers are obligated to ensure employees get paid no less than the minimum wage for all hours worked, so too are

[8] If an employer is able to demonstrate truly compelling reasons as to why it is unduly burdensome to comply with the basic requirements of WAC 296-126-092, the employer may apply to the director of the Department of Labor and Industries for a variance. *See* RCW 49.12.105.

employers obligated to ensure employees receive the minimum rest and meal breaks to which they are entitled. In light of the objectives of WAC 296-126-092 and the imbalance of power inherent in the employment relationship, employers are best suited to shoulder that responsibility.

C. Employees establish a prima facie case for break violations when they show by a preponderance of the evidence that they failed to receive the breaks to which they were entitled.

This Court recognizes that "[c]lass actions serve an important function in our system of justice." *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982). Class actions "establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits." *Id*. Indeed, when claims are small but numerous, "a class-based remedy is the only effective method to vindicate the public's rights." *Scott*, 160 Wn.2d at 852. Class actions also "improve access to the courts." *Darling*, 96 Wn.2d at 706. Finally, class actions "strongly deter future similar wrongful conduct, which benefits the community as a whole." *Id*. For these reasons, Washington favors the use of the class action device. *Scott*, 160 Wn.2d at 851; *see also Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 835-37, 161 P.3d 1016 (2007) (holding "class suits are an important tool" for enforcing small claims).

In keeping with this policy, Washington courts routinely allow cases involving rest and meal break violations to proceed as class actions. *See, e.g.*, *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d at 652; *Hill v.*

Garda CL Northwest, Inc., 179 Wn.2d 47, 51, 308 P.3d 635 (2013); *Pellino*, 164 Wn. App. at 675; *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 529-530, 128 P.3d 128 (2006). The federal district court, however, concluded that such cases rarely (if ever) qualify for class action treatment:

> Because AutoZone was required only to ensure that its employees received a meaningful opportunity to take a meal break, Brady and the putative classes can prevail only if they demonstrate that they were deprived of such an opportunity. Any such showing will require substantial individualized fact finding because the court will need to inquire into the reasons for any missed breaks.

Brady, 2015 WL 5732550, at *6 (emphasis added). In other words, the court denied certification on the ground that AutoZone's liability turns not on whether employees failed to receive their minimum required breaks but on the nebulous question of why any such breaks were missed—an individualized question that precludes class treatment. The court's decision effectively prevents more than 1,600 employees from having their break claims adjudicated.[9]

If adopted, the district court's liability standard would render WAC 296-126-092 largely unenforceable by depriving employees of their ability to pursue break claims through the class action procedure. Under

[9] AutoZone's own time records indicate 150,444 instances of meal break violations impacting 1,679 employees. *See* Appellants' Opening Br. at 8. This works out to an average of 90 meal break violations per employee. Under the district court's test, it would be exceedingly difficult for even one employee to establish why he or she failed to receive each of those meal breaks.

the civil rules in both state and federal court, a plaintiff may seek damages on behalf of a class only where common questions predominate over individual ones, the claims are manageable, and the class action device is found to be superior to other methods of adjudication. *See* CR 23(b)(3); Fed. R. Civ. P. 23(b)(3).

The liability standard imposed by the district court makes it virtually impossible to satisfy these requirements because of what the district court referred to as "the individuality component and unique fact scenarios associated with each potential violation of the meal break statute." *Brady*, 2016 WL 7733094, at *1. This Court should adopt a standard that, contrary to the district court decision, facilitates the ability of employees to pursue rest and meal break claims through the class action procedure. Specifically, the Court should declare that employees establish a prima facie case for rest and meal break violations when they prove they failed to receive the breaks to which they were entitled within the time frames required. Unless the employer offers sufficient evidence to show the employees actually did receive proper breaks, or that the employees executed enforceable waivers, the employer will be liable.

D. To the extent employees are allowed to waive their right to meal breaks, such waivers are an affirmative defense and should be strictly construed.

As demonstrated above, the operative language of the rest and meal break provisions in WAC 296-126-092 is identical, the purpose behind these breaks is the same, and employers have a duty to ensure

that both rest and meal breaks are actually received. Despite this, AutoZone argues the responsibility and liability standards for meal breaks differ from those for rest breaks because employees are free to waive meal breaks. Mr. Brady, on the other hand, argues that waiver is an affirmative defense and must be strictly construed before an employer can escape liability. The Court should adopt Mr. Brady's position.[10]

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[10] There is strong authority for the position that employees are prohibited from ever waiving their right to minimum meal breaks—an issue this Court has never addressed. To bolster this state's policy of protecting workers, the Washington legislature created a "comprehensive" set of laws that grant employees "nonnegotiable, substantive rights regarding minimum standards for working conditions, wages, and the payment of wages." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998); *see also Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 419-20, 54 P.3d 687 (2002). The IWA and WAC 296-126-092 are two examples of such laws. With the exception of public and construction employees, the IWA prohibits workers from collectively bargaining for rest and meal periods that are less protective than WAC 296-126-092. *See* RCW 49.12.187; *see also* DLI Admin. Policy ES.C.6 at 5 (2005). And more generally, the Court of Appeals has stated that "the remedial nature" of chapter 49.12 RCW "evidences the Legislature's intention that employees should not be able to waive its minimum health and welfare standard." *Wingert v. Yellow Freight Sys., Inc.*, 104 Wn. App. 583, 596, 13 P.3d 677 (2000) (emphasis added), *aff'd* 146 Wn2d 841, 852, 50 P.3d 256 (2002).

Here the district court and the parties simply assume employees may waive their right to minimum meal breaks. This is unsurprising given that the Department of Labor and Industries has concluded such waivers are allowed. *See* DLI Admin. Policy ES.C.6 at 4. But the Department's position is contrary to the letter and spirit of the IWA. *See* RCW 49.12.187; *see also Wingert*, 104 Wn. App. at 596. The Department's position is also internally inconsistent, as the agency has determined that "[e]mployees may not waive their right to a rest period" even though the operative language for both rest and meal breaks is identical. DLI Admin. Policy ES.C.6 at 4 (emphasis added). For these reasons, the Department's position on meal break waivers carries no weight. *Bostain*, 159 Wn.2d at 716-17 ("deference to an agency's interpretation is never appropriate when the agency's interpretation conflicts with a statutory mandate").

WELA recognizes that the issue of whether employees are allowed to waive their basic right to a meal break is not directly before the Court in this case. Nevertheless, it is important the Court take care to avoid any pronouncements that may cause lower courts to interpret the Court's decision as explicitly or implicitly resolving the issue.

"A waiver is the intentional and voluntary relinquishment of a known right." *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). "The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver." *Id*., 134 Wn.2d at 241-42; *see also Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976) (waiver is affirmative defense and must be pleaded (citing CR 8(c)). Generally, "there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors." *Jones*, 134 Wn.2d at 241.

Two important considerations play into the determination of how waivers, to the extent they are allowed at all, should be treated in the context of meal breaks. The first consideration is the inherent imbalance of power that exists in the employer-employee relationship. *See Parrish*, 185 Wash. 596. Workplace pressures are generally omnipresent and will often lead employees to accept conditions against their own best interest. Moreover, employees may say their acceptance was volitional even though they felt compelled to act.[11]

The second consideration is the rule that exemptions from remedial laws like WAC 296-126-092 "are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz*, 140 Wn.2d at 301. The undeniable purpose of chapter 49.12 RCW and WAC 296-126-092 is

[11] Of the 303 written "waivers" AutoZone produced in discovery, 291 (or 96 percent) were obtained after Mr. Brady filed his case. Appellant's Reply Br. at 10, n.6.

to protect the basic health, safety, and welfare of employees. "Under the IWA, all employees shall be 'protected from conditions of labor which have a pernicious effect on their health.'" *Pellino*, 164 Wn. App. at 685 (quoting RCW 49.12.010)). Waivers must not become the exception that swallows this rule.

In light of these considerations, the Court should hold that if meal break waivers are allowed, those waivers must be free and voluntary, obtained in advance, limited in duration, specific as to date, and documented. The Court should also hold that such waivers do not diminish the general obligation of employers to provide meal breaks and ensure that those breaks are received. Finally, the Court should make clear that waivers do not create individualized issues because employees are not required to disprove the existence of waivers as part of their case-in-chief. If allowed, waivers will only serve to reduce the overall scope of an employer's liability through a fairly straightforward process of identifying specific breaks that were explicitly and voluntarily waived.

IV. CONCLUSION

It is imperative that this Court continue to protect the basic and fundamental rights of Washington workers. For the reasons set forth above, WELA respectfully asks the Court to make clear that employers have an affirmative obligation to provide rest and meal breaks and to ensure those breaks comply with the requirements of WAC 296-126-092. The Court should adopt a liability standard that allows rest and meal

break claims to be prosecuted as class actions. Finally, the Court should hold that to the extent meal break waivers are allowed (a question for another day), such waivers are an affirmative defense, must be strictly construed, and go only to the scope of an employer's liability.

RESPECTFULLY SUBMITTED AND DATED this 27th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on January 27, 2017, the above and foregoing Amicus Curiae Brief of Washington Employment Lawyers Association was filed with the Washington Supreme Court and copies were served to the following counsel of record by email, per agreement:

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