

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

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4 MAIN and PHELPS, et. al., )

5 Plaintiffs, )

6 vs. ) No. 16-2-29685-8 SEA

7 QUICK & CLEAR, INC., et. al., )

8 Defendants. )

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10 VERBATIM REPORT OF PROCEEDINGS

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12 Heard before: The Honorable John P. Erlick

13 Date: September 1st, 2017

14 Time: 9:00 a.m.

15  
16 APPEARANCES:

17  
18 Scott C.G. Blankenship and Richard Goldsworthy,  
19 Attorneys at Law, on behalf of the Plaintiffs;

20 Adam G. Cuff and Patricia K. Buchanan, Attorneys  
21 at Law, on behalf of the Defendants.

22  
23 Reported and Transcribed by:

24 Michael P. Townsend

25 Official Court Reporter

## 1 P R O C E E D I N G S

2 THE COURT: Morning. Please be seated. On the  
3 record in the matter of Main and Phelps versus Quick  
4 and Clear, Inc. This is King County Cause No.  
5 16-2-29689-5 Seattle. This is plaintiff's motion for  
6 partial summary judgment. And if I could please have  
7 counsel identify themselves for the record, beginning  
8 on my right, with Mr. Blankenship, please.

9 MR. BLANKENSHIP: Scott Blankenship, here on  
10 behalf of the class.

11 MR. GOLDSWORTHY: Rick Goldsworthy on behalf of  
12 the class, as well.

13 MR. TAREN: Jordan Taren on behalf of the class.

14 THE COURT: Thank you, Counsel.

15 MS. BUCHANAN: Good morning, your Honor, Pat  
16 Buchanan on behalf of the defendant.

17 MR. CUFF: Your Honor, Adam Cuff, Patterson and  
18 Buchanan, on behalf of the defendants.

19 THE COURT: All right. Very good. Thank you.  
20 Okay. All right. And let's see, so this is  
21 plaintiff, Main and Phelps', motion for summary  
22 judgment on the following issues: First is  
23 plaintiff's entitlement to compensation for time  
24 spent driving the work trucks from homes to the first  
25 job site. Second, is time spent for cleaning and

1 maintaining equipment, including laundering towels  
2 for the jobs. Third is payment of non-discretionary  
3 bonus wages and calculating overtime pay. And last  
4 is the imposition of penalties under company policy  
5 for non-compliance with administrative company  
6 policies. We have about fifty minutes, that gives  
7 each side up to twenty-five minutes. We'll begin  
8 with plaintiffs. Counsel?

9 MR. BLANKENSHIP: Good morning, your Honor. This  
10 is an important case where we ask this court to grant  
11 summary judgment and assure that these technicians  
12 get paid the compensation they are due. Washington  
13 has a long and proud history of enforcing employee  
14 rights and wage laws, including having a minimum wage  
15 before the Federal Government. Because of this case  
16 and these two gentleman, Mr. Main and Mr. Phelps,  
17 more than a hundred employees received a substantial  
18 sum of money, but they didn't receive all that's due  
19 to them. The defendants do not get a free pass in  
20 Washington. Under RCW 49.52 and RCW 49.48, they are  
21 owed this compensation. And under 49.52, the conduct  
22 is willful. Significantly, as your Honor mentioned,  
23 these employees don't get paid for drive time.  
24 Defendants, undisputedly, only paid these technicians  
25 when they first arrived at a customer's house, and

1           they stopped paying them after they finished paper  
2           work as mandated in the cab of the company truck  
3           after finishing the last customer's house.  
4           Defendants don't pay these employees a nickel for  
5           their time spent mapping the addresses at home, they  
6           don't spend them a penny for washing the defendant's  
7           towels on their own time -- quote, on their own time,  
8           for admittedly -- for these essential tools of their  
9           job. They don't pay a dime to defendant, they don't  
10          pay a dime for plaintiff's basically delivering these  
11          essential tools which, if you look at the photographs  
12          we provided the Court, it's very clear that there is  
13          an innumerable amount of equipment that gets  
14          delivered to this truck. I would say this, your  
15          Honor, if any of these techs arrived in an Uber at  
16          the job site, they couldn't do their jobs. All of  
17          this equipment, all this delivery is essential, as  
18          the truck is integral. So it is clear from their  
19          policies that plaintiff doesn't get paid -- they  
20          don't get paid when their work day begins.  
21          Defendants dictate that they be available from 7:00  
22          a.m., it says, quote, 7:00 a.m. until you arrive  
23          after the workday -- arrive home after the workday.  
24          What defendants call a workday, unfortunately, does  
25          not translate into a paycheck under Washington law.

1           THE COURT: So are you saying the workday begins  
2 at seven or the workday begins when they leave their  
3 home to go to their first job site?

4           MR. BLANKENSHIP: I think the workday begins as  
5 soon as they basically start mapping the job, but  
6 they are -- I think they're -- I think that is going  
7 to be an issue for damages, but they are most  
8 certainly on duty when they are mapping their job for  
9 the first job site, and I think they're on duty when  
10 they're laundering the towels. So at this point, I  
11 don't know that we need to figure out whether or not  
12 that's 7:00 a.m. or 8:00 a.m. One thing that we do  
13 have in this case is the GPS data, so we can tell  
14 exactly when they left and exactly when they  
15 returned.

16           THE COURT: Well, the GPS -- that was my  
17 question, though. So if you're using GPS data,  
18 you're suggesting that it's the time that they would  
19 leave their house, because the GPS data will dictate  
20 when they leave their home.

21           MR. BLANKENSHIP: I think that's something we can  
22 figure out for damages, but at least that's -- yeah,  
23 where it should begin, I mean, when the time they  
24 leave their house, there is other -- because before  
25 they leave their house, they have to map the site.

1 And then on their way to the job site, they may get  
2 redirected. But what I'm saying is that under  
3 Brinks, they're on duty because the defendant  
4 controls the drive time and prevents the technician  
5 from using their company trucks for personal  
6 business, which is what the policy says.

7 THE COURT: Where is that in the policy?

8 MR. BLANKENSHIP: Let me hand up, your Honor, an  
9 exhibit that I think will get -- will answer some of  
10 those questions.

11 THE COURT: Is this the same as what you provided  
12 to the Court previously?

13 MR. BLANKENSHIP: No, this is an illustrative  
14 exhibit from Brinks, and we have --

15 MR. CUFF: Your Honor, can I object to that?  
16 Because the case is already cited in both of our  
17 briefs.

18 THE COURT: Well, it's just illustrative,  
19 Counsel, it's just to assist the Court. Weren't  
20 these factors modified under L&I administrative  
21 guidelines post-Brinks?

22 MR. BLANKENSHIP: I think that -- well, what the  
23 Court said with respect to the factors, and we can --  
24 I have got the factors here, is that they were  
25 applying it to meet the terms of Brinks.

1 THE COURT: The L&I administrative guidelines?

2 MR. BLANKENSHIP: Yes.

3 THE COURT: So shouldn't we go off of the L&I  
4 administrative guidelines?

5 MR. BLANKENSHIP: Well, I think the Supreme Court  
6 -- I think we could go either way. I think they both  
7 prove that the drive time was compensable.

8 THE COURT: Well, but if the Supreme Court comes  
9 down with Brinks, and then L&I post-Brinks modifies  
10 or adopts different guidelines, shouldn't we be  
11 guided by those guidelines?

12 MR. BLANKENSHIP: I think the guidelines are  
13 persuasive, and I think that the Supreme Court is  
14 authoritative, but I think under both tests, under  
15 the guidelines and under Brinks, basically, the drive  
16 time is compensable.

17 THE COURT: Okay.

18 MR. BLANKENSHIP: So if you look at this, this is  
19 a quote from the pertinent pages from Brinks. In  
20 Brinks, they talk about the technician's use of  
21 trucks, specifically mandating that they are for  
22 company business only. And then I have got what the  
23 handbook says, "Company vehicles are not provided for  
24 any type of personal use." And so that would be  
25 Exhibit F, employee handbook, at page 28. And then

1 the next factor that's identical is the company  
2 policy that also requires technicians to wear  
3 seatbelts, obey traffic laws, not park haphazardly.  
4 And you can see under the handbook here, quote, If  
5 you operate equipment improperly, carelessly,  
6 negligently and unsafely, you will be disciplined or  
7 even terminated. And under these administrative  
8 penalties they did, you could get penalized, get  
9 fined -- illegally, but you would you get fined.  
10 "Lock vehicle at all times." Same thing here,  
11 "Vehicle canopy should be locked to prevent theft."  
12 And then Brinks policy basically prohibits  
13 technicians from engaging in personal activities  
14 while driving Brinks trucks. And here, if you look  
15 at the arrow for that, from the Yellow Company,  
16 vehicles, quote, Are not provided for any type of  
17 personal use, unquote. Only specified drivers may  
18 drive the company vehicles. That's the handbook.  
19 That's the handbook that somebody signed last week  
20 when they became -- that's the 2016 handbook that's  
21 still in effect. And then if you look at,  
22 "Technicians receive job site assignment at home via  
23 via voice mail or handheld computer," same, same as  
24 here. It is the -- and you can see where I ask, "Is  
25 the practice to send somebody an email at the end of



1 the workday that tells them what the first job is of  
2 the workday, the location?" And that's, "Yes." The  
3 way they define workday is not -- is not in their  
4 policies and not how they pay people. We got that  
5 testimony quoted in the -- in the exhibits we handed  
6 you, your Honor. And basically, the workday is, like  
7 I said, where they say, "After you get home --" so  
8 the workday extends up to the point that they go  
9 home, according to their own policies. It says they  
10 must spend -- right here, it says, "They must spend  
11 time running down assignments and mapping the best  
12 route to reach their installation service locations  
13 before beginning their drive," same, you know. In  
14 Brinks, "Supervisor may direct technicians under the  
15 HDP while en route to and from their homes to assist  
16 with their jobs or answer service calls." Here, the  
17 policy mandates that they can be redirected. It  
18 says, quote, Technicians can be re-routed while  
19 driving to the first job site of the day. And they  
20 have to leave their phone on in case they get that.  
21 And the defendants self-serving, without a foundation  
22 declaration from Vandenbrink and the other ones, that  
23 basically says that they don't enforce these  
24 policies. If you read all of the data they do, it is  
25 qualified. The fact that you have to leave your

1 phone on, the fact that you can be redirected is the  
2 point.

3 THE COURT: So I want to address that. So how  
4 should the Court consider Mr. Vandenbrink's  
5 declaration to the extent that it is inconsistent  
6 with company handbook?

7 MS. BLANKENSHIP: I think if you look at the Hill  
8 v. Garda, the Supreme Court addressed the issue.  
9 Well, Brinks was based almost solely on the handbook,  
10 so that's a starting place. But in Hill v. Garda,  
11 you had exactly that happening at the Washington  
12 Supreme Court just recently when they were saying,  
13 "Well, we don't always enforce our handbook." And  
14 the Washington Supreme Court, in basically upholding  
15 the trial court's entry of the summary judgment said,  
16 you know, you can't get around your handbook by  
17 claiming you don't follow it. Indeed, you know, made  
18 the point that if you are dictating an employee to do  
19 something, they're not go to feel like they can do  
20 anything else. These handbooks that Mr. Vandenbrink  
21 testified were true and authentic and testified early  
22 in the day were conclusive and a guide and we quoted  
23 you that in our motion. And something that directs  
24 the employees what to do, that testimony, I think,  
25 trumps this kind self-serving declaration. The other

1           thing I would say about that declaration is if you  
2           just look at that, there is no foundation, it's just  
3           statements. Statements like, you know, "It only  
4           takes a few minutes to wash towels." He doesn't wash  
5           towels. It says that --

6           THE COURT: I do, Counsel.

7           MR. BLANKENSHIP: What's that? I do, as well.  
8           He doesn't wash the towels, those drivers do. I'm  
9           sure he washes towels, too, maybe, but I think you  
10          understand my point. So that declaration, along with  
11          the -- that declaration, if you -- when you look at  
12          it, and when I went through it, it is just a series  
13          of conclusions. And that declaration, I believe,  
14          lacks foundation and is inadmissible, so I think the  
15          Court can disregard it. But also, we have Rule 36  
16          admissions that the Supreme Court has said are  
17          conclusive and irrefutable. "Irrefutable" means that  
18          the point is established. Same with the answers to  
19          the complaint, those are also conclusive. So, you  
20          know, this wasn't a case where you even needed to get  
21          declarations from the drivers because we have a  
22          policy that the Supreme Court says has to be  
23          followed, we have a request for admissions that we  
24          outlined in the reply brief that basically are  
25          irrefutable, and he can't refute a request for

1 admission. He can't refute the answers that, again  
2 and again, basically incorporated the employee  
3 handbook.

4 THE COURT: So in terms of compensation, the  
5 employees are compensated while actually at the job  
6 site performing the work; is that correct?

7 MR. BLANKENSHIP: That's why it doesn't matter if  
8 they are in or out of their truck; not that it would  
9 matter, anyway. They are paid for when they are --  
10 you know, when they park their car and they go do the  
11 window washing. But what they do when they do window  
12 washing and the gutters is they use tools. And you  
13 would have to pay someone to deliver that equipment.

14 THE COURT: All right.

15 MR. BLANKENSHIP: And the equipment is a lot more  
16 extensive here than it was in Brinks, or like the ADT  
17 guys that come and put the little things up in the  
18 ceiling. I mean, this is very tool-intensive, they  
19 use the trucks to brace, there are multiple ladders.

20 THE COURT: So I understand that, but that wasn't  
21 actually going to be my question.

22 MR. BLANKENSHIP: Sorry, what's your question,  
23 your Honor?

24 THE COURT: So with respect to the maintaining  
25 and cleaning that's required by the employer, and you

1 are claiming it is off the clock, or for which they  
2 are not compensated?

3 MR. BLANKENSHIP: Yes.

4 THE COURT: Your position is it doesn't matter if  
5 it takes five minutes or twenty minutes, there is no  
6 de minimus exception, and even if there were, I forget  
7 which case it is where the employees were simply  
8 putting on some clothes, this would not be de minimus.

9 MR. BLANKENSHIP: It wouldn't be de minimus. And  
10 Alvarez is a Ninth Circuit case, it is going under  
11 different -- under FLSA. And just like we had a  
12 minimum wage before the FLSA, our laws are more  
13 stringent. And you simply just get paid for your  
14 work. I mean, you look at Madsen's dissent, and that,  
15 you know, underscores how, if somebody just works,  
16 you know, in the dissent in the Stevens case.

17 THE COURT: Okay. So tell me about -- my  
18 understanding is that plaintiffs are taking the  
19 position that they corrected the non-discretionary  
20 bonus wage in terms of overtime pay.

21 MR. CUFF: Defendants, your Honor.

22 THE COURT: I'm sorry, thank you, Counsel.  
23 Defendants have taken the position --

24 MR. BLANKENSHIP: Well, yeah, and our position is  
25 that it's not accurate, which is a damages issue, but

1 if it did happen, it was purely because of this  
2 lawsuit. I mean, to the point where Mr. -- I can  
3 hand you up that email, he basically has admitted in  
4 his testimony and in his email that he did it because  
5 of the lawsuit, and basically that ought to be  
6 established as just a matter of law, that this  
7 lawsuit -- that we should get liability on that part.  
8 But the other factor that needs to be considered is  
9 this drive time, which is also compensable, and needs  
10 to be factored.

11 THE COURT: Let's not -- I don't want to talk  
12 about drive time, I don't want to talk about towels  
13 or equipment, I want to talk about the  
14 non-discretionary bonus. It may be that the  
15 defendant may agree that there could be a finding of  
16 liability, that they are liable for that, and then  
17 the question is whether or not there are any damages  
18 owing. In other words, you can do your accounting,  
19 they can do their accounting, and then I don't know  
20 if I can resolve on summary judgment the willfulness  
21 under 49.52.

22 MR. BLANKENSHIP: I think you can. And if you  
23 look at this, we cited to you in our motion the Jim  
24 Ameal Lakeside -- I'll just call it Lakeside because  
25 it's a lot easier, that was a Washington Appeals

1 case, 179 Washington App. 665-685. And basically,  
2 the Court directly dealt with this idea of mootness.  
3 Relying on Schilling which, you know, the Court  
4 basically said that the fees and costs are -- you  
5 don't get complete relief without the fees and costs.

6 THE COURT: Oh, I understand. And you are  
7 talking about attorneys fees and cost?

8 MR. BLANKENSHIP: Yeah.

9 THE COURT: That's a separate issue. I'm talking  
10 about what I should be doing today in terms of what  
11 type of ruling I should be making with respect to  
12 that specific issue. In other words, if they  
13 acknowledge that overtime pay was associated with the  
14 non-discretionary bonus wages, and they agree to  
15 that, then, I could just make a determination that  
16 the defendant is liable for any and all compensation  
17 associated with that element of your claims,  
18 reserving for another day willfulness, which is  
19 double damages, and attorneys feast and costs. Now,  
20 it is likely you are going to get your attorney fees  
21 and costs, the question is, do you get your attorneys  
22 fees -- I'm not going to parse though out if you  
23 prevail either today, on these issues, or you prevail  
24 at trial on these issues, you're not going to prevail  
25 on the damages, obviously, today. So short of a

1 non-adjudicative resolution, you're not going to know  
2 what your fees are, anyway. So put that aside, other  
3 than saying that, perhaps, you are entitled to your  
4 fees and costs.

5 MR. BLANKENSHIP: Okay. Want me to respond to  
6 that, your Honor? I can.

7 THE COURT: You may.

8 MR. BLANKENSHIP: Basically, what we're asking  
9 you to do is make a finding that not paying was  
10 willful. And we've cited to you -- and willful under  
11 RCW 49.52. They claimed to have already paid double  
12 damages with respect to the bonus not being included  
13 in overtime, and they claim to have paid double  
14 damages with respect to the administrative penalty.  
15 What we are arguing with strong support from the  
16 Washington Supreme Court is that willful, according  
17 Schilling, means that a person knows what he is  
18 doing, intends to do what he is doing and is a free  
19 agent. And part of the reason that the Lakeside case  
20 is important is that what the Court held in finding  
21 individual liability, that if somebody knows about a  
22 policy, and this was the dealer support policy,  
23 resulted in basically these dealers being forced to  
24 gamble wages six hours a day and did not stop it,  
25 that was sufficient to hold somebody personally



1           liable for double damages and attorneys fees. What  
2           I'm saying is here, we have them admitting they  
3           violated the law, and I have got testimony that --  
4           admitting that when he got on the internet and  
5           Googled it, he basically was able to find quickly  
6           that he had violated the law and he paid it, but he  
7           knew all along that these dealers -- that these  
8           people were not being -- not dealers, that the  
9           drivers, the technicians, were not being paid for the  
10          bonus.

11           MR. CUFF: Your Honor, I need to object to that.

12           MR. BLANKENSHIP: And the willfulness in  
13          Schilling was a summary judgment issue.

14           THE COURT: Okay.

15           MR. BLANKENSHIP: And so --

16           THE COURT: Mr. Blankenship, I'll look at that,  
17          okay? The last issue is the penalties that were  
18          imposed, or the fines that were imposed? Um, the  
19          defendants also apparently concede that that is  
20          improper withholding of wages?

21           MR. BLANKENSHIP: Right.

22           THE COURT: That's the relief you are requesting  
23          today.

24           MR. BLANKENSHIP: And we cited to an email where  
25          he tells the drivers, "Yeah people have been

1 complaining about this for years, I should have done  
2 something with it sooner," so same thing, willful,  
3 volitional, --

4 THE COURT: What relief are you requesting this  
5 morning?

6 MR. BLANKENSHIP: A finding of willfulness.

7 THE COURT: Okay.

8 MR. BLANKENSHIP: And then we can figure out the  
9 extent of the payment as a damages issue. And in the  
10 TRA, the Flower versus TRA Industries case, which is  
11 127 Washington App., 13, on page 37, is very helpful  
12 here to the Court. And we didn't cite it exactly  
13 right in the reply brief. We cited it, but I want to  
14 make sure the Court understands that, you know, on  
15 page 6 of our reply brief, we have a quote that says,  
16 quote, The fact that the employer can drive a legal  
17 argument that the bonus was actually an expense,  
18 unquote, does not make it a bonafide dispute,  
19 unquote. So basically, the Court says simply raising  
20 an erroneous legal argument as a defense to liability  
21 does not qualify as a bonafide dispute, and therefore  
22 it is willful. And here, I don't even think -- all  
23 that the defendant said here is that, "I didn't know  
24 what the law was, and once I found out what it was, I  
25 paid it." And it is not like there is -- but it is

1 the same type of thing to -- you know, basically,  
2 what it is saying is ignorance of the law is no  
3 excuse. I mean, if this court didn't find  
4 willfulness for something like that, the message  
5 would be to discourage employees from doing what Mr.  
6 Vandenbrink and the company should have done, which  
7 is read the Google earlier, read the L&I web site and  
8 comply with the law.

9 THE COURT: Thank you, Counsel. All right. I'm  
10 going to hear from the defense. You are welcome to  
11 stay up here, if you like, Counsel, or you can go be  
12 seated.

13 MR. CUFF: Thank you, your Honor.

14 THE COURT: Counsel.

15 MR. CUFF: Before I go into my spiel, I want to  
16 answer some of your questions. You had some really  
17 good questions earlier for Mr. Blankenship.

18 THE COURT: So basically what -- I know he argued  
19 Brinks, I don't know whether I'd follow Brinks or I  
20 follow L&I.

21 MR. CUFF: L&I, your Honor.

22 THE COURT: But regardless, going through the  
23 factors, it appears, at least if I apply the  
24 handbook, that the factors are there. So I think we  
25 need to just go through and address each of the L&I

1 factors. So I'm looking at the administrative policy  
2 for the Department of Labor and Industries cited in  
3 Pierce versus Health Consultants. I actually don't  
4 know if either side cited Pierce versus Health  
5 Consultants, but it's a federal court applying  
6 Washington law.

7 MR. CUFF: We did, your Honor.

8 THE COURT: You did?

9 MR. CUFF: Yes, and we made a chart for you to  
10 show you that uses those standards.

11 MR. BLANKENSHIP: Could I get a copy of that so  
12 can I see it?

13 THE COURT: Yeah, that's actually in the  
14 briefing.

15 MR. BLANKENSHIP: Okay.

16 MR. CUFF: Using -- we've got our case here, we  
17 have the Stevens case here, and Pierce, that you just  
18 mentioned, is here.

19 THE COURT: Right.

20 MR. CUFF: This chart shows you in one quick  
21 glance that all these cases, even though they are  
22 similar to Stevens, --

23 THE COURT: Right.

24 MR. CUFF: -- and are closer to Stevens, they  
25 still granted summary judgment for the employer.

1 THE COURT: Correct.

2 MR. CUFF: Like our case.

3 THE COURT: Sorry, the employer?

4 MR. CUFF: These cases went the way of the  
5 employer. Basically with those L&I standards, I  
6 think --

7 THE COURT: Stevens didn't go for the employer.

8 MR. CUFF: Right. All these three cases, your  
9 Honor. In the --

10 THE COURT: Oh, Pierce, Kerr and Jensen.

11 MR. CUFF: Yes, your Honor.

12 THE COURT: Oh.

13 MR. CUFF: So what happened, essentially, is that  
14 Stevens gave out a really harsh ruling, L&I softened  
15 it, and using that guidance, the cases went in favor  
16 of the employer. Our case isn't like Stevens, these  
17 cases were more like Stevens, and still they got  
18 summary judgment for the employer. We're not even  
19 asking for summary judgment here, we are just  
20 explaining that the facts and the genuine issues of  
21 material fact bar summary judgment.

22 THE COURT: Okay. So I did read Pierce Jensen  
23 and Stevens, I don't know if I read Kerr. So let's  
24 go through this because you are making certain  
25 contentions here, so here is what I'm wrestling with:

1           You have got, for example, you take personal use and  
2           passengers, okay. Mr. Vandenbrink says, "Hey, they  
3           use these vehicles all the time for their personal  
4           use, they pick people up, they use it for doing work  
5           for friends and family."

6           MR. CUFF: That's right.

7           THE COURT: That's actually proscribed under the  
8           company policy.

9           MR. CUFF: That's right, your Honor. It's a  
10          20-year-old handbook, he got it from somebody, he put  
11          it in place, he is a small businessman, he was  
12          unsophisticated, he focused on training and teaching  
13          his employees over the last couple decades, and then  
14          his handbook just got -- kept getting repeated. It  
15          isn't way things are done. He tells -- he has weekly  
16          meetings, he tells people how it's done. And those  
17          are not just conclusory statements, he does wash  
18          towels, he does all these things with his employees.  
19          It's being called hearsay, but he has been there for  
20          twenty years working with his employees and training  
21          them. He does know how long they take to do the  
22          things they do.

23          THE COURT: But the policy, the handbook is  
24          pretty onerous. It basically says, "If you don't  
25          comply with this, you could be fined, you can lose

1           your job," and that was the issue of Garda versus  
2           Hill, I think it is.

3           MR. CUFF:  And our case is different, your Honor,  
4           because in our case, the reality was a daily  
5           commitment to telling people how it was.  "You can  
6           use the vehicle for personal use, you can get  
7           groceries on the way home, you can give someone  
8           a ride, you can do your neighbors windows."

9           THE COURT:  Other than Mr. Vandenbrink, what's  
10          the evidence there?

11          MR. CUFF:  Oh, we have declarations from the  
12          technicians and their briefing, two technicians who  
13          have chimed in on two or three of the issues,  
14          explaining that -- it's right ere.  That there is  
15          very little time taken in the morning with  
16          communication, much less than what they are saying.  
17          That they were allowed to use the vehicles  
18          personally, and that they didn't spend hardly any  
19          time washing towels, and they're all in the briefing.  
20          Got numerous declarations from employees.

21          THE COURT:  But how do I get around Garda?

22          MR. CUFF:  That's exactly what I wanted to just  
23          tell you.  They are different cases, different from  
24          our case.  In that case, the policy -- both sides  
25          acknowledge that there was a policy, but one side,

1 the defense claimed it wasn't enforced. And our case  
2 is different. In our case, Brett Vandenbrink has  
3 testified under oath in his dep and his declaration  
4 that they didn't -- that that wasn't the policy, that  
5 wasn't the reality of how he did business. Yes, it  
6 was in place, and he understands that, but it was  
7 just something he didn't pay attention to. The  
8 reality of the practice and procedure, the daily  
9 basis, was as he sets forth in his declaration, not  
10 in the handbook.

11 THE COURT: But again, in Garda, it is very  
12 similar. In other words Garda says, "Hey, forget  
13 policy, that's not the reality. The reality is that  
14 we never enforce the policy. The employees routinely  
15 broke the policy, we didn't discipline employees for  
16 breaching a policy." And the Court said, you know,  
17 "You're kind of putting employees between a rock and  
18 a hard place. You have got this handbook that says  
19 follow these rules or you are subject to discipline,  
20 and now you come in and say, you know, you weren't  
21 really subject to discipline."

22 MR. CUFF: There is a critical difference here,  
23 your Honor. In our case, the employees -- there is  
24 not testimony or information that the employees knew  
25 the policies in detail and objected to them or got



1 violated for breaking them. What they knew was the  
2 daily practice and procedure that was coming from  
3 Brett and his managers in training.

4 THE COURT: Well, I mean, how is that different?  
5 I mean, you had employees, apparently, in Garda who  
6 were violating the policy, routinely violating the  
7 policy, just like you have got employees here  
8 apparently -- I don't know how routine it is, but  
9 according -- I mean, I don't even know what personal  
10 knowledge Mr. Vandenbrink has about personal use. I  
11 suppose there might be some GPS records.

12 MR. CUFF: He has knowledge of it from people  
13 asking for permission and him giving it to do those  
14 various things, and it is in his declaration and his  
15 deposition.

16 THE COURT: If they were asking for permission,  
17 then, that would be an exception to the policy.

18 MR. CUFF: But it would -- that's not the only  
19 instance of it, because the technicians themselves  
20 have put in their declarations that they used  
21 vehicles for personal use. I'm just saying that the  
22 way that Brett knows about it is from being asked.

23 THE COURT: Well, the policy is pretty explicit.  
24 I mean, if I look at all the factors set out in  
25 Pierce, and I look at the L&I administrative

1 guidelines, and I look at Brinks, the handbook,  
2 pretty much step-by-step, determines that these are  
3 company vehicles to be used exclusively for company  
4 purposes, and that the time, the drive time between  
5 the home and the first job site and the last job site  
6 and home, would constitute work on prescribed work  
7 places, in a prescribed work place.

8 MR. CUFF: Your Honor, the handbook and the  
9 issues surrounding the handbook are issues of fact,  
10 there needs to be a trial so that Vandenbrink and  
11 other managers can explain the reality of how things  
12 were done, that this is an ancient document, it was  
13 an ignored document, that the reality for the  
14 employees, on a daily basis, was what's in the  
15 deposition and declaration of Vandenbrink of how  
16 things could be done.

17 THE COURT: Well, Garda is an old -- what,  
18 six-month-old case or something, if that?

19 MR. CUFF: So, your Honor, Garda shouldn't apply  
20 to the last three years and before the filing.

21 THE COURT: Well, Garda doesn't change the law.  
22 Garda interprets the law, it doesn't change the law.  
23 It's not like it is overruling prior law.

24 MR. CUFF: Your Honor, in the Pierce case, unless  
25 you need to --

1           THE COURT: I just want to look at this. It was  
2 a summary judgment posture. So the holding -- part  
3 of the holding in Garda was that, "We hold that Garda  
4 violated the rest period regulation because its  
5 official policies do not promote opportunities for  
6 meaningful breaks." There was lots of evidence  
7 there, controverting evidence, at summary judgment  
8 that, in fact, they take breaks. Some of the  
9 employees read magazines, some of them were not fully  
10 vigilant, some of them made personal phone calls, and  
11 --

12           MR. CUFF: If I may, your Honor?

13           THE COURT: Yes.

14           MR. CUFF: That case shouldn't control here.  
15 Handbooks are used for different things in different  
16 cases. In other cases, handbooks are used for  
17 whether or not they contain specific promises or  
18 specific treatment, and there are different standards  
19 applied. That case is about rest breaks and whether  
20 or not the handbook controls there. And this is a  
21 different kind of a case, and that case shouldn't  
22 apply to make the handbook control in this case.

23           THE COURT: And it doesn't control here why?

24           MR. CUFF: That case is about rest breaks, and  
25 this cases is about commute time.

1           THE COURT: That's kind of a distinction without  
2 a difference, isn't it? I mean, you missed the point  
3 of the holding of Garda, it is not, "This about rest  
4 breaks and the next case is about some other  
5 position," the point is that the handbook is the  
6 official policy that the employees are mandated to  
7 follow.

8           MR. CUFF: Understand. But in the case of  
9 specific, promises of the specific treatment, the  
10 handbook is not even given the status of a contract.  
11 Here, you're saying that the handbook should be given  
12 the status of, essentially, a contract between the  
13 employees and employer, controlling over the  
14 employer.

15           THE COURT: Well, it was enforced. I mean, they  
16 were fined for violations of provisions in the  
17 handbook; correct? That was the basis of the fines  
18 imposed against the employees; correct? There was no  
19 other contract.

20           MR. CUFF: Yes, your Honor, they weren't fines,  
21 they were just adjustments down from what their  
22 potential pay was. I understand.

23           THE COURT: It was a fine.

24           MR. CUFF: Thank you, your Honor. But those were  
25 very different and very specific provisions of the

1 handbook, not related to the trucks and driving.

2 THE COURT: But on the one hand, you are telling  
3 me, "This is an antiquated handbook, we didn't use  
4 it, we didn't follow it, the employees weren't aware  
5 of it." And on the other hand, you're saying the  
6 basis of the fine, or if you call it wage adjustment,  
7 was the handbook. Of course it's a contract. If  
8 it's not a contract, it wasn't enforceable. Just  
9 give me one moment, Counsel.

10 MR. CUFF: Yes, your Honor.

11 THE COURT: Okay. In the Pierce case, there  
12 wasn't a handbook, was there?

13 MR. CUFF: I don't remember, your Honor.

14 THE COURT: I don't believe so. So basically,  
15 Judge Zilly was looking at it factually.

16 MR. CUFF: Your Honor, there would have been a  
17 handbook, it wasn't necessarily at issue.

18 THE COURT: I don't see any reference to  
19 "handbook."

20 MR. CUFF: Your Honor, the Brinks case is  
21 supposed to capture a pretty narrow slice of  
22 employees, and our case isn't like that. It's not an  
23 equipment truck full of equipment for installation of  
24 security systems, sensitive equipment, it's just  
25 window washing.

1           THE COURT: So I'm looking at the Pierce  
2 description of Brinks, which they're distinguishing,  
3 "In contrast, technician employed by Brinks reviewed  
4 as being on duty for three reasons. First, the use  
5 of their company vehicles was strictly controlled."  
6 We have that in the handbook here. They could carry  
7 non-Brinks employees as passengers and could not use  
8 the trucks for personal errands. That's the status  
9 here in the handbook. "Second, the technicians  
10 received their daily assignments before leaving home  
11 and were required to spend time at home identifying  
12 the appropriate routes to the various job sites  
13 before beginning their initials drives." That's true  
14 here. "Third, while en route to and from their  
15 homes, the Brinks employees were required to remain  
16 available and could be redirected to assist with  
17 other service calls." That's also true here.

18           MR. CUFF: Actually, if I may -- or I'll wait.

19           THE COURT: Go ahead.

20           MR. CUFF: Actually, your Honor, the redirection  
21 realistically only occurred with the four lead  
22 technicians. While it might have possibly occurred  
23 with another employee, if anyone, it was these four  
24 lead technicians who might get redirected. That was  
25 point of it, redirected to help with another job or

1 train. So, if anything, there isn't liability in  
2 general, there are questions of fact. But if  
3 anything, it's these four lead technicians who had  
4 redirection and it doesn't apply to the others.

5 THE COURT: Doesn't the handbook say they are  
6 subject to redirection. Did your request for  
7 admission say they were subject to redirection?

8 MR. CUFF: Yes, your Honor, being subject to  
9 redirection doesn't mean they actually spend any time  
10 getting redirected, so --

11 THE COURT: So neither does this, it says, "And  
12 could be redirected," it doesn't say, "Or  
13 redirected," it says, "Could be redirected."

14 MR. CUFF: I understand, your Honor, but if I'm  
15 on my way to work, it's possible for my boss to call  
16 me and ask me to go, instead of work, to go somewhere  
17 else, but I don't get paid for that in my commute.

18 THE COURT: I assume you're salaried, Counsel?

19 MR. CUFF: Yes, your Honor, but with any  
20 employee.

21 THE COURT: They were also at prescribed work  
22 place when they were in their Brinks trucks because  
23 they carried the tools and equipment necessary for  
24 servicing, which we have here. The technician  
25 reported to the office only once each week to refill

1 supplies, I understand that --

2 MR. BLANKENSHIP: Once a month.

3 THE COURT: They were supposed to refill for a  
4 full month here. They were required to complete all  
5 paper work either at the customer's home or in the  
6 Brinks truck. I think the paper work was to be done  
7 in the truck.

8 MR. CUFF: No, your Honor.

9 THE COURT: Well, it says you have to complete  
10 the paper work between the time you complete your  
11 last job and before you return home. So I suppose  
12 they could go to a Starbucks.

13 MR. BLANKENSHIP: There is an RFA that goes right  
14 to that. It says, "Company vehicles --"

15 THE COURT: Counsel.

16 MR. BLANKENSHIP: Okay.

17 THE COURT: It's time.

18 MR. CUFF: Thank you, your Honor. I can actually  
19 address that RFA. From memory, the answer -- it was  
20 a poorly-worded question, and the answer was  
21 acknowledging that it can happen, not that it must  
22 happen, or that it always happens. It says something  
23 like do they or can they fill their --

24 THE COURT: Where else did they do their paper  
25 work?



1           MR. CUFF: In the customer's home, or on the  
2 customer's property, or on the way somewhere, in  
3 between jobs. They don't have to do it off-duty time,  
4 and they don't have to do it in their trucks. Brinks  
5 did require that, and here it is not.

6           THE COURT: Well, Brinks says it was in  
7 customer's home or in their truck.

8           MR. CUFF: Right, they were mandated, two places  
9 and only two places. We don't know that.

10          THE COURT: And the technicians were responsible  
11 for keeping the vehicles clean, organized, safe and  
12 serviced, which is exactly what we have here in the  
13 handbook. So what Judge Zilly found in the trial  
14 level -- remember, the other cases are appellate, and  
15 they're Washington. Judge Zilly, a federal judge,  
16 applying what he -- I assume Washington law.

17          MR. CUFF: Yes, your Honor.

18          THE COURT: In the Pierce case, he says, "We have  
19 got one element here. What we have, is we have the  
20 --"

21          MR. BLANKENSHIP: Persona; use.

22          THE COURT: Personal use proscription. The other  
23 three elements are not met. He found that,  
24 factually, that the plaintiff failed to carry their  
25 burden at summary judgment and he wasn't dealing with

1 a handbook. So what he did was, and he gets to do  
2 what he want, he's a federal judge, but he said, you  
3 know, "There is just not enough evidence here for the  
4 plaintiff to carry their burden of proof." He wasn't  
5 dealing with a handbook, he did a factual inquiry,  
6 and he granted defense summary judgment. I think he  
7 was correct in applying the L&I standards, and I  
8 think I should also look at the L&I standards,  
9 although I think they're fairly consistent with  
10 Brinks. And under Garda, I don't think I can ignore  
11 the mandates of the handbook. And if I look at the  
12 handbook, it appears as though all elements of the  
13 L&I administrative guidelines here show that these  
14 were on-duty employees who were working at a  
15 prescribed work site, which was their truck.

16 MR. CUFF: Your Honor, actually, in their reply,  
17 they brought out evidence that they could have  
18 brought out in their opening brief that we could have  
19 responded to, so it deprived us an ability to  
20 respond. They have pictures of the company trucks.  
21 We also have pictures that I would like to show you,  
22 if I may.

23 THE COURT: You can show me, of course.

24 MR. CUFF: Of the --

25 THE COURT: It wasn't -- it's not a part of the

1 record?

2 MR. CUFF: It is not yet, your Honor. I have a  
3 copy for defense counsel.

4 MR. BLANKENSHIP: Can I just respond to that in  
5 just a minute, if I --

6 THE COURT: Well, of course, you get a reply. It  
7 is noon, so I don't know how we're going to proceed,  
8 because I need to give the lower bench a break, we've  
9 got a full calendar this afternoon.

10 MR. CUFF: One minute, your Honor?

11 THE CLERK: Yeah, go ahead. Why don't you give  
12 that to the clerk, if you would. All right.

13 MR. CUFF: These are pictures of the  
14 representative plaintiff, Todd Phelps, who is in the  
15 room here today, and --

16 MR. BLANKENSHIP: Can I get a copy of that,  
17 please?

18 THE COURT: I'm going to -- yeah, I'm going to  
19 hand these down in a minute.

20 MR. CUFF: All right. We've got it here, your  
21 Honor. This is his personal vehicle. He's got a  
22 company where he is directly competing in violation  
23 of the non-compete with the defendant, and he is  
24 showing these photos with his personal vehicle with  
25 -- and doing a job for another client with his other

1 company.

2 MR. BLANKENSHIP: Your Honor, I'm just going to  
3 object to bringing this stuff up. It has nothing to  
4 do with this, first of all, and it has zero to do  
5 with the case.

6 THE COURT: Is this the company truck?

7 MR. CUFF: No, your Honor, that's the whole  
8 point. This is his personal vehicle.

9 THE COURT: I thought said you were going to show  
10 me a picture of the company truck.

11 MR. BLANKENSHIP: No, he didn't.

12 MR. CUFF: No, your Honor, Scott Blankenship, in  
13 his briefing, in his reply and his argument --

14 THE COURT: What's the relevance?

15 MR. CUFF: Your Honor, the relevance is that they  
16 are trying to say this was a mobile office and that  
17 they were required to use companies trucks, they had  
18 to use them, and my point is that they didn't have to  
19 use them. He's saying that they couldn't use an  
20 Uber, well, they could use their personal vehicles.  
21 So these trucks were provided as a benefit so they  
22 don't have to use their personal vehicles, and so  
23 they are not a mobile office, they are not a  
24 prescribed work place. And so there is an issue of  
25 fact and there shouldn't summary judgment.

1           THE COURT: My understanding of the company  
2           vehicle is, for company business, you use a company  
3           vehicle. You keep company equipment in the company  
4           vehicle. And you -- the company vehicles has to be  
5           marked a certain way, it has to be maintained a  
6           certain way. I mean, this is a side issue which  
7           isn't before the Court. I suppose, in theory, that  
8           Brinks drivers could have driven around their  
9           personal vehicles with the equipment; the equipment  
10          not significant for Brinks, more significant for  
11          Quick and Clear. Okay. We haven't addressed all the  
12          issues, I haven't given Mr. Blankenship an  
13          opportunity to reply, I haven't really let Mr. Cuff  
14          complete his opposition. Can we get this done in  
15          fifteen minutes?

16          MR. BLANKENSHIP: I could, your Honor. He's had  
17          lot more than --

18          THE COURT: I know, but there is a reason for  
19          that.

20          MR. CUFF: Yes, your Honor.

21          THE COURT: So --

22          MR. BLANKENSHIP: I could get it done ten minutes  
23          easily.

24          THE COURT: All right. So let me ask you this,  
25          Mr. Cuff: Page 25 of the handbook.

1 MR. CUFF: Yes, your Honor.

2 THE COURT: It says, "Field technicians are  
3 expected to email the daily report upon completion of  
4 their last job and before driving home." And then,  
5 "Email daily reports should include," et cetera, et  
6 cetera, et cetera.

7 MR. CUFF: Yes, your Honor.

8 THE COURT: Where would that get completed? If  
9 it's going to be completed after the last job and  
10 before you drive home, where would that get complete?

11 MR. CUFF: Where the employee wants, your Honor.  
12 Whether that's outside the customer's home, or in the  
13 vehicle, or in the customer's home.

14 THE COURT: Okay. Well, it's after the last job,  
15 so if you're done with the last job, you're going to,  
16 you know, --

17 MR. CUFF: Well, maybe the word "after" can be  
18 interpreted a little more broadly there, whereupon,  
19 or at the time of the end of the last job, you know,  
20 when someone delivers furniture, I just did it, and  
21 they sat in my house and they called their boss and  
22 they talked and they wrote stuff down and billed me.

23 THE COURT: For your job, but this is for the  
24 entire day. This is for information the entire day.

25 MR. CUFF: I understand, your Honor. But after a

1 holding moving job, the moving guy stands in my  
2 apartment, fills out the paper work, talks to me,  
3 talks to his boss, bills me, and then goes. And it  
4 all happens inside the customer's home, not required  
5 to be --

6 THE COURT: So it's in customers home, is it  
7 compensated time?

8 MR. CUFF: Yes, your Honor, because it's part of  
9 the last job.

10 THE COURT: Okay. If it's after the job is  
11 completed, and they go up to their truck, and they  
12 finish the paper work, is it compensated time?

13 MR. CUFF: Yes, your Honor.

14 THE COURT: It is?

15 MR. CUFF: Yes, it's because they only don't  
16 count their time after they leave on the road, during  
17 the commute.

18 THE COURT: So if they are in the customer's  
19 driveway, it's compensable?

20 MR. CUFF: Yes, your Honor.

21 THE COURT: They drive around the corner, and  
22 they stop around the corner, and they fill in the  
23 paper work, is it compensable?

24 MR. CUFF: Yes, your Honor.

25 THE COURT: When does it stop being compensated?

1           MR. CUFF:  When they stop doing that and they  
2 drive home.

3           THE COURT:  When they stop?

4           MR. CUFF:  When they stop doing their reporting  
5 and they drive home.

6           THE COURT:  Your position on maintaining the  
7 equipment and laundering the towels is what?

8           MR. CUFF:  Thanks, your Honor.  Just before I go  
9 to that, let me add one little point.  If you're  
10 inclined to consider the commute time in the morning  
11 as compensable, it doesn't mean that it's compensable  
12 in the evening.  And on the issue of towels, towels  
13 are like, when we all use to work at a place like  
14 McDonald's or Safeway.  You go home, throw your  
15 uniform in the laundry and take it out later and  
16 nobody pays you for it.  These towels could be used  
17 dirty, they could be used multiple times.  These  
18 towels are, as the briefing has set out, a de minimus  
19 amount of time.  He's going to tell you that's not --  
20 that that's federal law, but it's not disallowed in  
21 Washington.  So we do argue that this is de minimus.

22           THE COURT:  Are these thrown in a washer?

23           MR. CUFF:  Yes, your Honor.

24           THE COURT:  And then put into the dryer?

25           MR. CUFF:  Yes.  You can wash them with other



1 things, you can -- there is no special -- unlike  
2 these other cases, there is no special detergents.  
3 And window watching only twenty percent of the work,  
4 generally, so that's what uses the towels.

5 THE COURT: So it might --

6 MR. CUFF: The towels aren't always used. Go  
7 ahead.

8 THE COURT: So it might be ten minutes?

9 MR. CUFF: Actually, we have declarations and it  
10 varies, but yes, very, very little time.

11 THE COURT: What does "very little time" mean?  
12 Little time, five minutes?

13 MR. CUFF: Understand, your Honor. We are  
14 talking about not every day, even, not at all. It  
15 could be once a week, or however, once a month or  
16 something like that. We're talking about towels  
17 where they pick up a whole bunch of towels when they  
18 go in, and then they can use them for a long time.  
19 Sometimes using -- you don't have to have a clean  
20 towel to dry a window, they can be reused many, many  
21 times.

22 THE COURT: I'm sure the customer would be very  
23 impressed when the worker comes out with a bag of  
24 dirty towels and starts cleaning their windows.

25 MR. BLANKENSHIP: And there is the emails that we

1 gave you where people get in trouble for not having  
2 clean towels, and the towels have to -- they have to  
3 use fabric softener, et cetera, et cetera.

4 THE COURT: Please, please, okay. All right.  
5 Did your client pay -- already pay double damages, or  
6 claim to have paid double damages for the  
7 non-discretionary bonuses?

8 MR. CUFF: Yes, your Honor.

9 THE COURT: Okay.

10 MR. CUFF: And for the administrative  
11 adjustments.

12 THE COURT: Okay. All right.

13 MR. CUFF: And they just argued that they  
14 shouldn't have to pay fees because the whole point of  
15 making the payment is, under 49.48.030, to cut off  
16 attorneys fees. Otherwise, counsel and three  
17 attorneys can continue to argue about something  
18 that's been already paid with double time all the way  
19 through trial that's not needed and then claim fees.

20 THE COURT: Well, it should definitely be cut off  
21 if it's -- well, it depends, if it has been fully  
22 compensated and plaintiffs still go to trial and they  
23 don't prevail on that issue that it wasn't fully  
24 compensated, then, the fees are cut off.

25 MR. BLANKENSHIP: Not -- I can answer that, I can

1 direct -- I can tell you the case that absolutely  
2 says that's not the case.

3 THE COURT: No, I mean, you shouldn't probably  
4 get your fees at trial if you don't prevail, you get  
5 your fees through the payment.

6 MR. BLANKENSHIP: Not according to the General v.  
7 -- you know, that case. Basically the same thing  
8 happened, actually, they agreed to a settlement with  
9 one of the parties, that was the guy that got brought  
10 out, and all the fees were awarded under 49.52  
11 because it was found to be willful, and the exact  
12 same situation as here, so that case stands for the  
13 opposite proposition.

14 THE COURT: All right.

15 MR. CUFF: That's the point, your Honor, that  
16 there is not a finding of willfulness here, that's  
17 why he wants there to be one.

18 MR. BLANKENSHIP: Your Honor, can I address some  
19 of these issues?

20 THE COURT: You have got five minutes, Counsel.

21 MR. BLANKENSHIP: Okay. So the first thing I  
22 want to address, your Honor, is they don't -- they  
23 have to -- we have the burden, but they have to  
24 basically dispute it with genuine evidence. They  
25 can't be sham declarations. And if you look at,

1           like, these declarations, they are what the Ninth  
2           Circuit calls "happy camper declarations." None of  
3           these people here even opted out. So they got this  
4           after the time that we filed our motion for cert and  
5           you gave them more time get declarations, this is  
6           what they got. And they basically are Exhibit A to  
7           show that there is uncompensated time. I mean, like,  
8           the first one I'm looking at says, "For the last  
9           three months, I've spent an average of 45 minutes  
10          each day driving from my residence to my first job  
11          for total of 1,800 minutes." I mean, it goes on and  
12          on. "Last month, I spent average day driving to my  
13          last job 1,800 minutes." That's all time that they  
14          didn't get compensated for. "For the last three  
15          months, I spent a total of 60 minutes putting towels  
16          in the laundry and leaving them in the driver and  
17          putting them in for a total of 60 minutes." These  
18          are all evidence --

19                 MR. CUFF: Over the three months.

20                 MR. BLANKENSHIP: But whatever, it's still 60  
21          minutes of work for free. I mean, then, there is  
22          nothing in these declarations that say anything about  
23          meetings, going to meetings, they just say, "For the  
24          last three months, I used my company vehicle for  
25          personal use such a buying groceries on the way home

1 or moving furniture, as permitted by the company."  
2 So somebody, on the way home, bought six pack of  
3 beer. They couldn't put in the car, according to  
4 their policies, but let's say they bought --

5 THE COURT: It's non-alcoholic beer.

6 MR. BLANKENSHIP: Non-alcoholic beer. We can see  
7 that from the GPS. I mean, I think that the -- but  
8 it's all about control. These are not -- they don't  
9 support the arguments of counsel, just like those  
10 photographs that were shown, that I would  
11 characterize as a cheap shot. The declaration of  
12 Brett Vandenbrink, he doesn't have foundation, just  
13 -- foundation means, "I was standing in the corner  
14 when I saw the light turn green." You know, not,  
15 "The light was red."

16 THE COURT: Counsel, I know what foundation is.

17 MR. BLANKENSHIP: I know you now about foundation  
18 way more than I do, your Honor. The other thing that  
19 Hill did not have was a request for admissions. And  
20 we have got powerful requests for admissions, that --  
21 it's the same thing. They didn't have in -- they  
22 didn't have in Stevens, they didn't have in Brinks,  
23 they didn't have in Pierce. And in the Pierce v.  
24 Heath case, basically it was a sharp distinction  
25 between the use of the vehicle, the company vehicle

1 just delivered people and was not integral, which is  
2 a key thing, is the truck interval. "Use of the  
3 company vehicle was optional." That's on page 2 of  
4 the opinion. "No tools necessary for the job  
5 connected to the truck." Zilly said, "Heath trucks  
6 had no unique or special features. These trucks, in  
7 this case, carry ladders, brace the workers. There  
8 were no towels or anything like that, there were no  
9 advertisements on the vehicles in Pierce.  
10 Substantial difference in control. Crew members were  
11 only required to be available for calls during the  
12 time they were actually being paid. They could turn  
13 their phone off, big difference in control.

14 THE COURT: Counsel, we have a court reporter  
15 here, and he is excellent --

16 MR. BLANKENSHIP: Am I going too fast for you?  
17 I'll slow down.

18 THE COURT: You are barely -- you're almost going  
19 too fast for me, so --

20 MR. BLANKENSHIP: I'm worried about the time, I'm  
21 sorry, I can slow it down. Substantial difference in  
22 control. Crew members were only required to be  
23 available for calls during the time they were  
24 actually being paid. They could decline an  
25 assignment, they weren't required to be available.

1           The after hours were strictly voluntary, could shut  
2           off the phones with not being paid. They got their  
3           assignment at a central location while on the clock,  
4           as opposed to at home. They were not required to  
5           clean tools or equipment at home, they basically --  
6           all they had to do was plug something in at the end  
7           of the day, so it's very different as to the  
8           prescribed work place. And I agree with your Honor  
9           that if you look at the -- if you go through the case  
10          and look at what Judge Zilly said, it said, in  
11          contrast that, you know, basically, he goes through  
12          the factors and you would say the same on all the  
13          factors the way he applies Brinks, same with Kerr,  
14          same with Jensen. And they don't matter, they're not  
15          -- they are unreported cases. Okay. So with respect  
16          to Hill, it's not true what counsel said in Hill.  
17          The defendants offered declarations. There was  
18          plenty of evidence from the defendant and the  
19          policies trumped. It was like this case. There was  
20          no testimony from class members, like this case, in  
21          Hill v. Garda. It is a distinction without a  
22          difference if it's basically dealing with breaks  
23          versus dealing with working off the clock. I mean,  
24          you can't, on the one hand, make somebody still sign  
25          a policy that's been revised, it says, "Revised

1           2016," and then say it's 20-years-old. And so we  
2           have got these irrefutable admissions, CR-36  
3           admissions. We also have, your Honor, answers to the  
4           complaint. Defendant's pleadings admit that it  
5           applies, when instead of denying the policy, the  
6           answer repeatedly that, "The handbook speaks for  
7           itself." And those are conclusive admissions. They  
8           don't deny the fact, they just say, "It speaks for  
9           themselves." Take a look at the request for  
10          admissions. Counsel didn't even sign the request for  
11          admissions, which is odd. Mr. Vandenbrink did.

12           THE COURT: Counsel, we are at our time.

13           MR. BLANKENSHIP: Okay.

14           THE COURT: Thank you.

15           MR. BLANKENSHIP: Thank you, your Honor.

16           THE COURT: All right. If you would like to be  
17          seated, I'll make my ruling. This matter is before  
18          the Court on plaintiff's motion for partial summary  
19          judgment on four issues. The Court will address each  
20          issue independently. The first issue is whether the  
21          class plaintiffs are entitled to compensation for  
22          time spent driving company vehicles from their homes  
23          to the first job site and from the last job site back  
24          home. The Court is guided by Stevens vs. Brinks Home  
25          Security, 162 Washington Second, 42; Department of



1 Labor and Industries Administrative Policy, and  
2 Pierce versus Heath Consultants, 2011 West Law  
3 256-0254, a Western District of Washington case  
4 applying Washington law. The Court relies  
5 principally upon the Department of Labor and  
6 Industries factors.

7 The factors, as set forth in those administrative  
8 guidelines, are guidelines. They don't dictate, but  
9 they do guide the Court, and all factors should be  
10 combined together and weighed in combination with one  
11 another. The mere presence or absence of any single  
12 factor is not determinative. The first factor is the  
13 extent to which the employee is free to make personal  
14 stops and engage in personal activities during the  
15 drive time between home and the first or last job  
16 site of the day, and whether the vehicle may be used  
17 only for company business. The company handbook here  
18 expressly provides that vehicles are to be used for  
19 company business only and not be used for personal  
20 purposes. The Court acknowledges Mr. Vandenbrink's  
21 controverting declaration and testimony, and the  
22 question is whether that create as genuine issue of  
23 material fact. This court determines that it does  
24 not. The Court considers Hill versus Garda CL  
25 Northwest, 198 Wash. App. 326, 2017, a Division I

1 case. The fact that a policy may not have been  
2 enforced, or the fact that employee routinely broke  
3 those policies was acknowledged by Division I as not  
4 providing controverting evidence to overcome or  
5 defeat an official company policy. Essentially, what  
6 the defendant would do here is place the employees in  
7 a Hobson's Choice, which is to comply with company  
8 policy, which would essentially submit them to  
9 performing off-the-clock work or breach company  
10 policy, which could subject them to fines or, as  
11 noted by defense counsel, wage adjustments.

12 Therefore, the Court gives great weight to the  
13 handbook, which is which essentially operated as a  
14 contract because that was the handbook provided to  
15 the employees, signed by the employees, and enforced  
16 by the employer on specific provisions regarding  
17 safety and other requirements. The extent to which  
18 the employee is required to respond to a work-related  
19 call and to be redirected while on route, that was  
20 admitted in RFA No. 12. No. 3, whether the employee  
21 is required to maintain contract with the employer,  
22 that's in the handbook, page 24. The extent to which  
23 employees received assignments at home and must spend  
24 time writing down the assignments and mapping the  
25 route to reach the first job site before beginning

1 the drive, handbook page 24. Therefore, the elements  
2 of on duty are met under the Department of Labor and  
3 Industries' guidelines.

4 The next issue the Court must determine is  
5 whether the vehicles constitute a prescribed work  
6 place to determine whether or not these were hours  
7 worked. Those non-exclusive list of factors are as  
8 follows: Whether the nature of the business requires  
9 the employee to drive a particular vehicle provided  
10 by the employer to carry necessary, non-personal  
11 tools and equipment to the work site, that is  
12 mandated by the handbook at page 27. This argument  
13 here that the employees could have used their own  
14 vehicles, there was an attempt to show some  
15 photographs. The Court, to substantiate that, that's  
16 actually not part of the record and it doesn't matter  
17 because the handbook says, "Use our company vehicles  
18 for company business and for carrying company tools  
19 and instruments." The extent to which the company  
20 provided vehicles serves as a location where the  
21 employer authorizes or requires the employee to keep  
22 business, to complete business required paper work,  
23 or load materials or equipment. Handbook, page 25;  
24 request for admission No. 18. The extent to which  
25 the employer requires the employee to assure the

1 vehicle is kept clean, organized, safe and serviced.  
2 Handbook, page 29.

3 For those reasons, pursuant to Department of  
4 Labor and Industries' guidelines, Hill versus Garda  
5 Northwest and Brinks Stevens versus Brinks Home  
6 Security, the Court finds that there are no genuine  
7 issues of material fact. Plaintiff has carried its  
8 burden to show undisputed facts, that all elements as  
9 prescribed by administrative guidelines and case law  
10 establish that the employees were on duty during the  
11 time that they left their home for the first job site  
12 and returned home from the last job site. Summary  
13 judgment is granted.

14 With regard to paying class plaintiffs and  
15 members for cleaning and maintaining equipment, this  
16 is undisputedly off-the-clock work. It may be  
17 de minimus, it may be five minutes a week, which is  
18 twenty minutes a month, but it's time. The trier of  
19 fact can determine how much time it took to wash  
20 towels and clean the other equipment, but was  
21 mandated by the employer, it's compensable time.  
22 Summary judgment is granted.

23 With regard to the other two issues, the Court  
24 grants summary judgment to the extent that the  
25 employer has acknowledged that non-discretionary

1 bonus wages are required to be used to calculate  
2 overtime pay. And to the extent that the defendant  
3 withheld wages under the administrative compliance  
4 policies as sanctions. The Court would also make a  
5 finding of willfulness and reserves on the issue of  
6 attorneys fees and costs. With respect to the drive  
7 time, the Court finds that pursuant to Flower versus  
8 TRA Industries, 127 Washington App., 13, the  
9 determination of willfulness means that the failure  
10 to pay was volitional, or that the employer knows  
11 what he is doing and tends to do what he is doing and  
12 is a free agent. The determination here was not to  
13 pay the employees for off-the-clock work -- excuse  
14 me, for duty time, for the drive time. It was a  
15 volitional non-payment, and under 49.48, 49.52, it  
16 would be determination of willful subject to double  
17 damages and award of attorneys fees and costs. Mr.  
18 Blankenship, do you have any questions?

19 MR. BLANKENSHIP: No, your Honor.

20 THE COURT: Mr. Cuff?

21 MR. CUFF: Yes, your Honor. I understand your  
22 ruling on the towel issue, but you mentioned other  
23 equipment.

24 THE COURT: Yes.

25 MR. CUFF: The other equipment was washed during

1 the day or compensated.

2 THE COURT: Okay.

3 MR. CUFF: So only the towels are at issue, as I  
4 understand it.

5 THE COURT: Counsel?

6 MR. BLANKENSHIP: There is just no evidence of  
7 that in the record other than the conclusory  
8 statements by Mr. Vandenbrink. There is no  
9 foundation. It's a damages issue.

10 THE COURT: Well, it's a damages issue to the  
11 extent that the burden will be on the plaintiff to  
12 show what equipment was maintained or cleaned and was  
13 not compensated. Whether it was -- I don't know when  
14 they cleaned these items. I know that the towels  
15 were claimed to be cleaned at home, off the clock.  
16 And if the other items were cleaned at home, off the  
17 clock, it's compensable. If they were cleaned during  
18 the day and it was compensated time, then, it's not.

19 MR. BLANKENSHIP: Thank you, your Honor.

20 THE COURT: But the fact of cleaning them is  
21 compensable time. And if it hasn't been compensated,  
22 it should be compensated. All right. Mr.  
23 Blankenship, I'm going to charge you with preparing  
24 an appropriate order.

25 MR. BLANKENSHIP: We'll do that, your Honor.

