STATE OF WISCONSIN, COURT OF APPEALS
DISTRICT IV

Steven J. Piper, Robert Bue, Scott R. Olson and Leslie T. Smith,
Plaintiffs,
Jonathon Kracht, Gary Benes and Charles Manley
Plaintiffs-Respondents,

v.
Jones Dairy Farm
Defendant-Appellant.

District: 4
Appeal No. 2018AP001681

Circuit Court Case No.
2010CV001210
Three-Judge Appeal

ON APPEAL FROM THE CIRCUIT COURT JEFFERSON COUNTY
THE HONORABLE WILLIAM F. HUE, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

Submitted this 31st day of October, 2018 by:

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I. STATEMENT OF THE ISSUES FOR REVIEW

1. Are the Plaintiffs' state law claims for compensation for donning and doffing activities subject to the Parties' historical negotiations and enforcement of their collective bargaining agreements, thus rendering those activities non-compensable?
    a. Circuit Court Answered: No.
2. Are the Plaintiffs' state law claims for compensation for donning and doffing activities subject to the doctrines of equitable estoppel, laches, waiver, and/or unjust enrichment, thus rendering those activities non-compensable?
    a. Circuit Court Answered: No.
3. Are the Plaintiffs' state law claims for compensation for donning and doffing activities subject to the doctrine of *de minimis non curat lex*, thus rendering those activities non-compensable?
    a. Circuit Court Answered: No.

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the duration of this case, its unique procedural history, and the legal issues involved, oral argument may provide helpful clarification to the Court.

This opinion should also be published pursuant to § 809.23(1) of the Wisconsin Statutes. This matter will resolve an important legal question: Whether Wisconsin employers and the unions representing their employees may

rely upon their collective bargaining agreements, negotiations, and past practices with respect to the compensability of on-site, clothes-changing activities under Wisconsin's wage and hour laws, as they can under the federal Fair Labor Standards Act. This opinion will also clarify the application of equitable defenses and the doctrine of *de minimis non curat lex* to brief periods of time spent engaged in on-site, clothes-changing activities that have for decades been rendered non-compensable by collective bargaining agreements. This opinion will also provide guidance to Wisconsin Circuit Courts and the Wisconsin Department of Workforce Development in their decision-making and analysis regarding these issues. Finally, the disposition of this case will impact employers, employees, and their unions throughout the State of Wisconsin.

III. STATEMENT OF THE CASE

This is an appeal from a judgment entered July 18, 2018, in the Circuit Court for Jefferson County by William F. Hue, Judge, who refused to grant summary judgment to Defendant-Appellant Jones Dairy Farm regarding the wage and hour claims of a group of its hourly employees, the Plaintiffs-Respondents, who were seeking compensation for time spent engaged in clothes-changing activities. The Circuit Court concluded that the employees' claims were not precluded by their own agreement, through collective bargaining, that the periods at issue would not be paid, nor by equitable defenses, nor by the doctrine of *de minimis non curat lex*. Following denial of summary judgment on August 10,

2016, the Parties entered into a stipulation regarding the remaining disputed issues, giving rise to this appeal.

A. FACTUAL BACKGROUND[1]

Defendant-Appellant Jones Dairy Farm ("Jones Dairy Farm" or the "Company") is a family-owned and operated business that for over 125 years has employed many hundreds of Jefferson County residents at its food production factory in Fort Atkinson (the "Plant"). R. 81, ¶ 1; P-App 005. For many decades, the hourly-paid employees in production, maintenance, sanitation, and shipping/receiving jobs have been represented by the United Food and Commercial Workers International Union, Local 538 (the "Union"). R. 81, ¶ 2; P-App 005. Joseph Jerzewski was the President and Business Manager of the Union from April 2004, until August 2006, and then again from August 2009, through 2012. R. 81, ¶ 9; P-App 006.

Plaintiffs-Respondents ("Plaintiffs" or the "employees"), through their Union, have negotiated and agreed to a long series of collective bargaining agreements with Jones Dairy Farm governing the wages, hours of work and, other terms and conditions of their employment. R. 81, ¶¶ 48-106; P-App 008-16. Those employees, however, sued the Company for more pay than they bargained

[1] These facts are derived from Defendant-Appellant's May 6, 2015 Motion for Summary Judgment. R. 81; P-App. 005-21. Because Plaintiffs-Respondents did not dispute any of the facts presented by Jones Dairy Farm in support of that Motion, they are deemed true and undisputed. *See, e.g.*, *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751 ("The court takes evidentiary facts in the record as true if not contradicted by opposing proof.").

for, agreed to, accepted, and retained. R. 1; R. 66; R. 71. More specifically, the employees sued for time spent engaged in pre-shift donning, post-shift doffing, and related walking. *Id.*

1. The donning and doffing activities are simple and quick.

The "donning" activities most employees undertake at the Plant consist of putting on safety shoes or shoe covers, slipping on a frock over their street clothes and fastening the snaps on the front of it, putting on a hairnet (and a beard net if they wear facial hair), inserting some earplugs, and placing a plastic bump cap on their head. R. 81, ¶ 20; P-App 007. By stipulation, the Parties agreed that the total time taken by an employee to complete these "donning" activities amounts to 2.561 minutes per work shift. R. 81, ¶ 21; P-App 008; R. 75, ¶ 1; P-App 001.

The "doffing" activities at the end of an employee's work day consist of taking off the safety shoes or covers, taking off the frock and tossing it into a hamper for cleaning by the Company, removing the ear plugs, pulling off the hair net, and taking off the bump cap. R. 81, ¶ 22; P-App 008. By stipulation, the Parties agreed that the total time taken by an employee to complete these "doffing" activities amounts to 1.74 minutes per work shift. R. 81, ¶ 23; P-App 008; R. 75, ¶ 1; P-App 001. The total donning and doffing time for most employees is 4.3 minutes per employee per work day. R. 81, ¶ 24; P-App 008; R. 75, ¶ 1; P-App 001.

Prior to November 2013, employees could and often did arrive at the Plant before their work shift and engage in personal activities like chatting, reading the

newspaper, and drinking coffee before their shift. R. 81, ¶ 47; P-App 012. Employees interspersed these personal activities with their donning activities prior to heading to their work stations in the Plant. *Id.* Similarly, employees would sometimes perform some or all of their doffing activities before or while engaging in their personal activities. *Id.* There was no requirement or even consistent practice in this regard. *Id.*

2. The employees agreed in 1985, and in successive rounds of collective bargaining ever since, that their donning and doffing activities were not compensable.

Prior to 1982, the employees' collective bargaining agreement with Jones Dairy Farm stated that each employee would receive a daily credit of 12 extra minutes of paid time for changing clothes. R. 81, ¶ 49; P-App 012. In the 1982 collective bargaining agreement, the Parties bargained over that provision and agreed to reduce the 12 minutes of pay credit to 6 minutes. R. 81, ¶¶ 51-52; P-App 013. In the next CBA (in 1985), the Parties bargained over that provision again, this time agreeing to eliminate it from the collective bargaining agreement altogether and thus eliminating any extra-pay provision for donning and doffing. R. 81, ¶ 54; P-App 013.

Subsequent rounds of labor negotiations consistently included express bargaining over this specific issue of extra pay for clothes-changing time. The Union made written proposals for extra donning and doffing pay in labor contract negotiations in 1994, 1997, 2000, 2004 and 2009, and each time the Parties bargained over that proposal as part of bargaining the Union's other economic

proposals intended to increase the employees' overall wages and benefits. R. 81, ¶¶ 59-92; P-App 014-16, 018. Each time the Union ultimately withdrew the donning and doffing pay proposal, but it had successfully used it as a bargaining chip because in each of these rounds of negotiations the Company agreed to increase each employees' base hourly wage rate. R. 81, ¶¶ 60-101; P-App 014-17, 019.

In the 1994 labor contract negotiations, the Union included in its bargaining proposals a request that the Company agree once again to pay employees for 12 minutes to change clothes. R. 81, ¶ 60; P-App 014. During negotiations, the Company ultimately did not agree to pay for clothes-changing time, and the Union withdrew its proposal. *Id.* During the course of those 1994 negotiations, however, the Union was successful in convincing the Company to increase the economic value of its compensation offer to employees. R. 81, ¶ 61; P-App. 014. Specifically, Jones Dairy Farm increased employee wages by $0.60/hour in the new 1994 collective bargaining. R. 81, ¶ 62; P-App. 014.

When the 1994 collective bargaining agreement expired in 1997, the Company and the Union again negotiated regarding compensation for clothes-changing time. R. 81, ¶ 63; P-App. 014. The Company would not agree to pay for this time, and ultimately the Union withdrew the proposal. *Id.* Again, however, the Union was successful in convincing the Company to increase the economic value of its compensation offered to the employees, this time by $0.90/hour for the new 1997 collective bargaining agreement. R. 81, ¶¶ 63-64; P-App. 014.

When the 1997 collective bargaining agreement expired in 2000, the Company and the Union reconvened to negotiate for, among other things, compensation for clothes-changing time. R. 81, ¶ 68; P-App. 015. Just as it had in 1994 and 1997, again in 2000, the Union included in its labor contract proposals its request that the Company pay 12 minutes of time for employees to change clothes. R. 81, ¶ 69; P-App. 015. Just as it had in 1994 and 1997, the Company did not agree to pay for clothes-changing time, and eventually the Union decided to withdraw its proposal. R. 81, ¶ 70; P-App. 015. Nonetheless, yet again in the give-and-take of bargaining, the Union convinced the Company to increase the economic value of its compensation offered to the employees, this time by $1.50/hour for the new 2000 collective bargaining agreement. R. 81, ¶¶ 71-72; P-App. 015.

When the 2000 collective bargaining agreement expired in 2004, the Company and the Union again reconvened for bargaining and again negotiated over clothes-changing time. R. 81, ¶ 75; P-App. 016. Approximately 20 face-to-face meetings between the Union and the Company occurred, during which the Union would withdraw economic proposals with the expectation that it was creating an incentive for the Company to make some positive movement in its economic offer. R. 81, ¶ 77; P-App. 016. As it had in 1994, 1997, and 2000, the Union again requested that the Company pay 12 minutes of time for employees to change clothes. R. 81, ¶ 78; P-App. 016. As it had in 1994, 1997, and 2000, the Company would not agree to pay extra for clothes-changing time, and eventually

the Union withdrew its proposal. R. 81, ¶¶ 78-79; P-App. 016. However, as in 1994, 1997 and 2000, the Union again was successful in the 2004 negotiations in persuading the Company to increase the economic value of its compensation offer to the employees, this time by $1.25/hour for the new 2004 collective bargaining agreement. R. 81, ¶ 80; P-App. 017.

Although during the 1994, 1997, 2000, and 2004 negotiations the Union never objected to the legality of not compensating for donning and doffing activities, and the Union accepted, if not encouraged, the overall increase in economic compensation, the employees serving as Union leaders believe as early as 2000, that they were entitled to compensation for donning and doffing activities. R. 81, ¶¶ 74-75; P-App. 016.

3. The employees asserted their belief that they were legally entitled to compensation for donning and doffing activities in 2006, but continued accepting collectively bargained benefits in lieu of that compensation.

In a letter to Jones Dairy Farm dated May 24, 2006, the Union asserted that the Company's current practice of not paying employees for clothes-changing and related walking time violated the law and "must be remedied immediately."[2] R. 81, ¶ 83; P-App. 017. The Union official who signed and sent the letter, President

[2] This correspondence was sent to Jones Dairy Farm barely six months after the United States Supreme Court unanimously held that employee walking time from the changing area to the place of poultry and meat production, following donning and doffing activities the employer had conceded to be compensable, was also compensable under the continuous workday rule applied to the federal Fair Labor Standards Act. *See IBP v. Alvarez*, 126 S.Ct. 514 (2005). The contents of the Union's May 24, 2006 correspondence, and the circumstances surrounding its creation – including the Supreme Court's pronouncement in *Alvarez* – confirm that the Union representing employees working at the Company believed in 2006, at the latest, they were being denied pay to which they may be entitled.

and Business Manager, Joseph Jerzewski, never followed up with the Company on this letter and has no knowledge if anyone else from the Union ever followed up. R. 81, ¶ 84; P-App. 017. Moreover, the Union has not filed any grievance with the Company regarding pay for clothes-changing or walking time, nor a wage claim with the State of Wisconsin Department of Workforce Development. R. 81, ¶¶ 86-87; P-App. 017.

In the 2009 bargaining, right before filing the lawsuit giving rise to this appeal in the Circuit Court, the Union expressly proposed that the Company pay employees an extra 12 minutes per day for donning and doffing activities. R. 81, ¶ 92; P-App. 018. The parties met for face-to-face bargaining on approximately 20 separate days over the course of months. R. 81, ¶ 98; P-App. 018. In declining the donning and doffing pay proposal, the Company reiterated to the Union bargaining committee that employees already were compensated for donning and doffing by virtue of employee-favorable rounding of paid time (in six-minute increments) on both the front and back end of every shift that applied to all employees. R. 81, ¶¶ 94-95; P-App. 018-19. In addition, the contract already included a generous personal time allowance built in to all the incentive plans (that applied to approximately 50% of the employee's work hours) that ensured that all non-production work activity of employees on incentive pay, including donning, doffing, and related walking, was accounted for in their pay plan. R. 81, ¶ 96; P-App. 019.

Although the Union ultimately withdrew its donning and doffing pay proposal in the 2009 negotiations, it was successful in extracting Jones Dairy Farm's agreement to a five-year labor contract with wage increases in each year of the contract, totaling $1.25 per hour. R. 81, ¶ 101; P-App. 019. This was especially effective bargaining by the Union because it obtained the Company's promise to give annual wage increases for the period during which the United States economy was mired in the Great Recession. Jones Dairy Farm would not have agreed to these wage increases if the Union had insisted on and prevailed in convincing the Company to pay an extra amount for donning and doffing activities. R. 81, ¶ 102; P-App. 020. The employees ratified the deal by vote at a Union meeting, and then received, accepted, and retained all of its benefits. R. 81, ¶¶ 103, 106; P-App. 020.

4. After accepting the benefits of the collective bargaining process for decades, the employees sued Jones Dairy Farm for compensation for the donning and doffing activities they agreed would be unpaid.

Jones Dairy Farm pays all of its hourly employees weekly. R. 81, ¶ 36; P-App. 010. Neither the Union, nor any employee has ever filed any claim with the Department of Workforce Development seeking wages for time spent donning or doffing, or walking to and from the places of donning and doffing. R. 81, ¶ 43; P-App. 011. The employees' Chief Union Steward, Steve Piper ("Chief Steward Piper"), confirmed with each and every paycheck he received from the Company that he was accurately paid for all hours worked. R. 81, ¶ 38; P-App. 011. In the

few instances Chief Steward Piper believed he was underpaid, he brought it to the Company's attention and it was resolved to his satisfaction. R. 81, ¶ 39; P-App. 011.

During the very first year of the 2009 collective bargaining agreement, however, Union President Jerzewski contacted Chief Union Steward Piper, and told him the Union needed four employees to act as named plaintiffs in a class action case against the Company seeking more wages for donning and doffing time. R. 81, ¶ 107; P-App. 020.

The Union's idea of suing Jones Dairy Farm for donning and doffing pay was at least four years old at that point because back in 2006, the Union President sent a letter to the Company threatening such a claim. R. 81, ¶¶ 82-83; P-App. 017. In fact, bargaining unit employees believed at least since 2004, that they were entitled to extra pay for donning and doffing time. R. 81, ¶ 74; P-App. 016. The Union discussed the potential lawsuit with the employees at a Union meeting, and Chief Steward Piper confirmed that the decision to file and prosecute the lawsuit was made by the Union President. R. 81, ¶ 108; P-App. 020. Chief Steward Piper—who was the Union's lead negotiator at both the 2009 and immediately prior 2004 labor negotiations—became the original lead plaintiff representative in this lawsuit (R. 81, ¶¶ 18-19; P-App. 007), which was filed on December 14, 2010, R. 1.

5. In 2013, Jones Dairy Farm began paying employees for time spent donning and doffing, but did not renege on its agreement to provide them the higher wages previously promised in lieu of payment for those activities.

Until November 25, 2013, paid work time was tracked by Jones Dairy Farm by supervisors' electronic entry into the Company's computer system of the start and stop times for the employees within their particular area of supervision. R. 81, ¶ 26; P-App. 009.

In November 2013, the Company implemented a new time clock-payroll system that calculated employees' paid work time to the minute and paid employees based on time clock entries made by the employees at the start and end of a work shift. R. 81, ¶ 44; P-App. 011. As part of the new system, the Company mandated that all employees clock in prior to beginning any donning activity and complete their doffing activity before clocking out and thus ending their paid time. R. 81, ¶ 45; P-App. 012. Accordingly, there is no dispute that the employees' claim for back pay covers the period up to, but not beyond, November 25, 2013. R. 81, ¶ 46; P-App. 012.

Notwithstanding Jones Dairy Farm's agreement to start paying employees for time spent engaged in donning and doffing activities, the Company did not reduce the pay or benefits provided to those employees, which had been agreed to in collective bargaining as part of a total package that assumed no pay for donning and doffing. R. 81, ¶ 106; P-App. 020.

B. PROCEDURAL POSTURE

Plaintiffs filed a class action in Jefferson County Circuit Court on December 14, 2010. R. 1. On August 25, 2011, they moved for plant-wide class certification, to which Jones Dairy Farm objected. R. 9; R. 39. Following briefing and arguments, Plaintiffs dropped their request to certify a single class and proposed instead to certify four subclasses, to which Jones Dairy Farm stipulated. R. 70, 71, 73.

On March 3, 2015, the Parties filed their Stipulation Regarding the Amounts of Time Implicated in Plaintiffs' and Class Members' Claims. R. 75; P-App. 001-4.

On May 6, 2015, Jones Dairy Farm moved for summary judgment, arguing that the court can rely on the collective bargaining agreements and historical negotiations to find that the donning, doffing, and walking times at issue are non-compensable; that the equitable defenses of estoppel, waiver, laches, and unjust enrichment defeat Plaintiffs' claims; and that donning, doffing, and walking times are rendered non-compensable by the doctrine of *de minimis non curat lex*. R. 79-121. In support of its motion, Jones Dairy Farm submitted a statement of facts with citations to record evidence, which Plaintiffs never contested. R. 81; P-App. 005-21.

After the matter had been fully briefed by the Parties, and oral arguments heard, the Circuit Court issued an order denying Jones Dairy Farm's Motion for Summary Judgment on August 10, 2016. R. 155; P-App. 022-32; R. 242. The

Circuit Court ruled that under *United Food & Commercial Workers Union, Local 1473, et al. v. Hormel Foods Corp.*, 2016 WI 13, 367 Wis. 2d 131, 876 N.W.2d 99, and *Weissman v. Tyson Prepared Foods, Inc.*, 2013 WI App 109, 350 Wis. 2d 380, 838 N.W.2d 502, pre- and post-shift donning and doffing activities are "integral and indispensable" activities and thus compensable under § (DWD) 272.12(1)(a)1 of the Wisconsin Administrative Code. R. 155 at 1-2; P-App. 022-23.

The Circuit Court further held that because "there is no exception under Wisconsin law permitting collective bargaining to modify or eliminate compensation for such activity, the time is compensable and may not be waived through collective bargaining." R. 155 at 5-7; P-App. 026-28. More specifically, the Circuit Court determined that *Aguilar v. HUSCO Int'l*, 2015 WI 36, 361 Wis. 2d 597, 863 N.W.2d 556, was distinguishable because there is a risk to the health, safety, and welfare of workers if they do not engage in donning and doffing activities, and because there was not an underlying investigation by the Department of Workforce Development in this case as there had been in *Husco*. R. 155 at 7-8; P-App. 028-29.

The Circuit Court also rejected Jones Dairy Farm's assertion that the donning and doffing times were *de minimis*, concluding "$675/year is a figure significant to each individual employee." R. 155 at 10; P-App. 031.

Finally, the court rejected Jones Dairy Farm's assertion of equitable defenses because "where the legislature has outright banned contracts from

precluding access, this Court concludes that such a strong statement of broad public policy supporting access to courts may not be contravened by equitable doctrine application to any individual." R. 155 at 11; P-App. 032.

Jones Dairy Farm filed a petition for leave to appeal from a non-final order on August 24, 2016, which was acknowledged by this Court on August 29, 2016. R. 156. On September 28, 2016, this Court issued a summary order denying the petition. R. 157.

Following the denial of Jones Dairy Farm's petition, the Plaintiffs filed a Motion for Summary Judgment on March 3, 2017, seeking judgment as a matter of law that their donning, doffing, and walking time is compensable. R. 162. After Plaintiffs' Motion had been fully briefed, Judge Hue denied the motion (R. 251 at 21) and the Parties stipulated to the entry of final judgment in favor of Plaintiffs, reserving the issues of liquidated damages and attorneys' fees until after exhaustion of all appeals. R. 202. The Circuit Court entered the stipulated final judgment on August 21, 2017. R. 202.

On October 3, 2017, Jones Dairy Farm appealed. R. 203. On January 16, 2018, this Court, acting *sua sponte*, requested briefing on whether the Parties' August 21, 2017 stipulation was a final appealable order. R. 211. After considering the Parties' submissions, this Court dismissed the Company's appeal, ruling that the Circuit Court's order was not final. R. 212.

On March 9, 2018, Judge Hue notified the Parties that he would consider arguments on liquidated damages. R. 213. After that issue was resolved, the

Parties filed a stipulation to have final judgment entered on June 22, 2018. R. 235. On July 18, 2018, the Circuit Court entered final judgment resolving all issues. R. 236; P-App. 033-36. Jones Dairy Farm timely appealed on August 8, 2018. R. 237.

IV. ARGUMENT

A. STANDARD OF REVIEW

A motion for summary judgment carries with it the "explicit assertion that the movant is satisfied that the facts are undisputed and that on those facts he [or she] is entitled to judgment as a matter of law." *Powalka v. State Mut. Life Assurance Co.*, 53 Wis. 2d 513, 518, 192 N.W.2d 852, 854 (1972). Thus, the court of appeals review summary judgment *de novo*, using the same methodology as the circuit court. *Tews v. NHI, LLC*, 2010 WI 137 *American Family Mut. Ins. Co. v. Powell*, 169 Wis. 2d 605, 607, 486 N.W.2d 537 (Ct. App. 1992).

The Wisconsin Court of Appeals reviews a circuit court's findings of fact for clear error. Wis. Stat. § 805.17(2). Whether facts found by the circuit court fulfill a particular legal standard, however, is a question of law, which the Court reviews *de novo*. Wis. Stat. § 227.20(5); *see Boynton Cab Co. v. DILHR*, 96 Wis. 2d 396, 291 N.W. 2d 850 (1980).

B. SUMMARY OF ARGUMENT

The employees in this case sued their employer for unpaid wages allegedly owed them for time spent engaged in pre-shift donning and post-shift doffing activities taking them each day just over four minutes to complete. There is no

dispute that the employees agreed, in successive rounds of collective bargaining since 1985, that the time periods at issue are not compensable.

This Court held that donning and doffing activities similar to those at issue here are compensable because they are an integral part of a principal activity. *See Tyson*, 2013 WI App 109. This conclusion – that donning and doffing activities like those at issue here are compensable under Wisconsin law – was also reached by the Wisconsin Supreme Court. *See Hormel*, 2016 WI 13.

Since 1949, however, § 203(o) of the federal Fair Labor Standards Act (the "FLSA") has expressly permitted unions and employers to agree through collective bargaining that clothes-changing activities like those at issue here, even if otherwise compensable, can be rendered non-compensable by agreement of the parties. Although modeled after the FLSA, and borrowing heavily from its text, Wisconsin's wage and hour statutes and administrative code provisions do not feature the exact language of § 203(o).

What was not argued to this Court in *Tyson*, or to the Wisconsin Supreme Court in *Hormel*, is that the donning and doffing activities, even if compensable under Wisconsin law, were rendered non-compensable by the Parties' collective bargaining, notwithstanding the absence of language identical to § 203(o) in Wisconsin's wage and hour statutes or administrative code provisions. Although this issue was not raised by the parties in *Hormel*, four of the six Wisconsin Supreme Court Justices confirmed that compensation for the particular activities of donning and doffing work clothes can, in fact, be bargained away in a collective

bargaining agreement under Wisconsin law, just as it can be under the FLSA. *Hormel*, 2016 WI at 13, ¶ 113 n. 6 and ¶ 145 n. 3.

That has been Jones Dairy Farm's primary argument since this case was first filed in the Circuit Court in 2010, and remains so on appeal. Even assuming the donning and doffing activities at issue here are compensable under Wisconsin law, the employees have repeatedly agreed, for more than 30 years, not to be paid for that time, "which is permitted under state and federal law." *Id.* In multiple rounds of collective bargaining, the employees successfully negotiated for increased wage rates and other benefits in lieu of compensation for clothes-changing time, and they received and retained all of those negotiated benefits that the Company paid in reliance on the ratified contract.

In light of the foregoing, as outlined more fully below, the decision of the Circuit Court should be reversed, and summary judgment granted to Defendant-Appellant Jones Dairy Farm. Summary judgment should also be granted to Jones Dairy Farm because the Plaintiffs-Respondents are barred by equitable estoppel, laches, waiver, and/or unjust enrichment from recovery, and the time periods at issue are *de minimis*.

C. JONES DAIRY FARM'S EMPLOYEES COLLECTIVELY BARGAININED AWAY THEIR RIGHT TO PAYMENT FOR TIME SPENT DONNING AND DOFFING, WHICH THE WISCONSIN SUPREME COURT RECENTLY CONFIRMED IS PERMITTED BY STATE AND FEDERAL LAW

The Wisconsin Supreme Court's March 1, 2016 decision involving Hormel Foods Corporation confirms a legal principle requiring summary judgement in

favor of Jones Dairy Farm. Despite its splintered opinion, four of the six participating Justices confirm unequivocally that parties to a collective bargaining agreement can "bargain" away the rights of employees to be paid for donning and doffing activities under Wisconsin law, just as they can under the FLSA. Because there is no dispute that the Parties here have, through collective bargaining, agreed that donning and doffing activities are not compensable, this Court should reverse the Circuit Court's decision denying Defendant-Appellant's Motion for Summary Judgment.

In *Hormel*'s Concurring/Dissenting Opinion, Chief Justice Roggensack, joined by Justice Prosser, notes that pursuant to the terms of an earlier labor contract, Hormel compensated employees 12 minutes per day for donning and doffing tasks, but that in "subsequent contract negotiations, the Union bargained away this compensation provision." *Hormel*, 2016 WI 13, at ¶ 113. Then, the Chief Justice articulates the legal principle that compels summary judgment for Jones Dairy Farm:

> Hormel does not argue that no compensation is due because such compensation was *bargained away in a collective bargaining agreement, which is permitted under state and federal law*. See Aguilar v. Husco Int'l, Inc., 2015 WI 36, ¶ 24, 361 Wis. 2d 597, 863 N.W.2d 556; Wis. Admin. Code §274.05; see also Sandifer v. United States Steel Corp., 134 S. Ct. 870, 878-79 (2014).

Id. at ¶ 113 n.6 (emphasis supplied).

As legal authority for the proposition that employees can bargain away their right to pay under federal law, the Chief Justice cites to *Sandifer v. United States Steel Corporation*, a United States Supreme Court decision unanimously

affirming a decision from the Seventh Circuit Court of Appeals denying compensation to unionized employees for time spent donning and doffing certain items because those employees had collectively bargained away their right to pay, pursuant to 29 U.S.C. § 203(o).

In support of the proposition that employees can bargain away their right to pay for donning and doffing activities under state law, the Chief Justice cites to *Aguilar v. Husco, Int'l, Inc.*, a decision the Wisconsin Supreme Court had issued a year earlier, and a provision of Wisconsin's Administrative Code. In *Husco*, the Wisconsin Supreme Court refused to permit recovery to employees who had collectively bargained for unpaid meal periods that were twenty minutes in length, ten minutes shorter than the minimum length required for unpaid meals under Wisconsin law.

In reaching that conclusion in *Husco*, the Wisconsin Supreme Court invoked § (DWD) 274.05 of the Wisconsin Administrative Code, which states, in its entirety, as follows:

> Waiver or modification. Except as provided in s. DWD 274.08, where a collectively bargained agreement exists, the department may consider the written application of labor and management for a waiver or modification to the requirements of this chapter based upon practical difficulties or unnecessary hardship in complying therewith. If the department determines that in the circumstances existing compliance with this chapter is unjust or unreasonable and that granting such waiver or modification will not be dangerous or prejudicial to the life, health, safety or welfare of the employees, the department may grant such waiver or modification as may be appropriate to the case.

It was undisputed in *Husco* that the parties had agreed for decades to shortened meal periods through the collective bargaining process, that (DWD) 274.05

permits parties to a collective bargaining agreement to obtain a waiver for such a practice, and that no such waiver was obtained. *See Aguilar*, 2015 WI 36 at ¶ 9. In denying recovery to the employees, the Wisconsin Supreme Court agreed that the absence of a waiver was a technical violation that did not nullify the preclusive effect of the parties' collective bargaining agreement and related history. *See id.* at ¶¶ 35-38.

Even though *Husco* dealt with meal periods, while *Hormel* dealt with donning and doffing activities, and even though *Husco* included an investigation by the Department of Workforce Development, while *Hormel* was a direct action in Circuit Court, Chief Justice Roggensack, joined by Justice Prosser, plainly notes that the rationale in *Husco* would have equal application to the donning and doffing activities that had been rendered non-compensable through collective bargaining had that argument been raised. And they were not alone on that point.

In *Hormel*'s Dissenting Opinion, Justice Gabelman, joined by Justice Ziegler, adopts the same principle articulated by Chief Justice Roggensack and Justice Prosser. The Dissenting Justices state that "[t]he Wisconsin Administrative Code allows employees to bargain away rights they would otherwise have under the Code as long as the parties enter into a CBA agreement and apply for a waiver or otherwise meet the factors required for the waiver." *Id.* at ¶ 145, n. 3. The Dissenting Justices then expressly endorse the legal conclusion of the Concurring/Dissenting Opinion, and quote the Chief Justice:

> But, as the concurring/dissenting opinion points out, "Hormel does not argue that no compensation is due because compensation was bargained away in a collective bargaining agreement, which is permitted under state and federal law." Concurrence/Dissent, ¶ 113 n.6.

Id. at ¶145 n.3 (emphasis added).

The Lead Opinion, written by Justice Abrahamson and joined by Justice A. W. Bradley, says nothing that in any way contradicts or even questions the legal principle articulated by four Justices in the other two opinions—that compensation for donning and doffing tasks may be bargained away in a collective bargaining agreement, under both "state and federal law." In fact, despite writing some 37 pages, Justices Abrahamson and A. W. Bradley avoid the point entirely. Likely because it was not raised by the parties, the Lead Opinion Justices do not discuss the collective bargaining agreement and related history, and do not even cite to the Court's most recent, relevant decision—*Aguilar v. Husco Int'l, Inc.*, 2015 WI 36, 361 Wis. 2d 597, 863 N.W.2d 556.

Regardless of the silence of two Justices on the applicability of the Court's ruling in *Husco* to a donning and doffing pay claim, a four-Justice majority demonstrates that *Husco* controls in circumstances like those present here and requires deference to the collective bargaining process and the agreements thereby reached on the compensability of time spent engaged in clothes-changing activities.

This is not an instance in which local judges opine about the possible meaning and application of out-of-jurisdiction decisions. To the contrary, this is

commentary from four Justices regarding what they meant when joining the unanimous decision in *Husco* and how it should be applied to donning and doffing activities.

Furthermore, the comments in *Hormel* were not an afterthought. Rather, the Supreme Court's intent to consider the applicability of *Husco* to the donning and doffing claim in *Hormel* was signaled a year earlier. On February 10, 2015, the Wisconsin Supreme Court entered an Order accepting the certification of the direct appeal of *Hormel*, bypassing this Court. In that Order, the Wisconsin Supreme Court revealed its intent to wait to consider the donning and doffing claims in *Hormel* until after it decided the case involving *Husco*. The Court's February 10, 2015 Order stated:

> IT IS ORDERED that the certification shall be held in abeyance pending this Court's disposition of Case No. 2013AP265, Aguilar v. Husco Int'l, Inc. (oral argument heard February 3, 2015).

Thus, immediately upon accepting *Hormel* for direct review, the Wisconsin Supreme Court identified the overlapping nature of the dispositive legal issues presented in *Husco* and *Hormel*. In each case, employees sought additional pay under the Wisconsin wage law on an issue that was collectively bargained between their union and their employer; in each case, the employees argued that the state wage law must ignore a collectively bargained agreement that was negotiated for, and ratified by, the employees (who then received and retained all of the other benefits of that deal); and in each case, the parties failed to secure a waiver from the Wisconsin Department of Workforce Development to permit their deviation

from state wage and hour mandates. Thus, the Wisconsin Supreme Court decided to wait to consider the donning and doffing claim in *Hormel*, until it decided the lunch break claim in *Husco*.

While the collective bargaining argument was not raised or briefed in *Hormel*, it has been the fundamental premise of Jones Dairy Farm's position and asserted consistently throughout this case since it was filed in 2010. Like the historical collective bargaining agreements between the UFCW and Hormel, the Company's labor contracts with the UFCW prior to 1982, specifically required the Company to pay employees for 12 minutes of time spent on donning and doffing tasks each day. R. 81, ¶ 42; P-App. 011. In 1982, the Company and the Union bargained over that provision and agreed to reduce the 12-minutes-of-pay credit to 6 minutes. R. 81, ¶¶ 51-52; P-App. 013. In the next round of negotiations, for the 1985 collective bargaining agreement, the parties bargained over that provision again, this time agreeing to eliminate it from the collective bargaining agreement altogether and thus eliminate any extra pay for donning and doffing. R. 81, ¶ 54; P-App. 013.

But the collective bargaining over donning and doffing pay did not end in 1985. To the contrary, since then the topic of extra pay for donning and doffing time has repeatedly been raised in specific bargaining proposals by the Union, and expressly negotiated by the Parties. The undisputed facts confirm that the Union made written proposals for extra donning and doffing pay in labor negotiations in 1994, 1997, 2000, 2004 and 2009, and each time, the Parties bargained over that

proposal as part of bargaining to increase the employees' overall wages and benefits. R. 81, ¶¶ 59- 92; P-App 014-16, 018. In each of those negotiations, the Union ultimately withdrew the donning and doffing pay proposal. However, it had successfully used that pay proposal as a bargaining chip—in each of round of contract negotiations, Jones Dairy Farm agreed to increase the base hourly wage rate for each employee. R. 81, ¶¶ 60-101; P-App 014-17, 019. Collective bargaining on this issue worked to the employees' overall benefit, exactly as Congress intended.[3]

This happened explicitly in 2009, in the last round of collective bargaining before this lawsuit. R. 81, ¶¶ 92-102; P-App 018-20. Asbefore, the Union eventually dropped its proposal for extra pay for donning and doffing time, but only after persuading the Company to increase the value of wages and benefits. R. 81, ¶ 101; P-App. 015. Ultimately, the Union obtained Jones Dairy Farm's promise to increase all employees' base wages, in each year of the contract term. This was an especially fantastic result for employees, who ratified the contract by vote, given that the economy was sinking in the quicksand of the Great Recession.

[3] In enacting the National Labor Relations Act, Congress gave workers the choice of banding together through unions for mutual aid and support regarding working conditions, or go it alone. Once the choice is made, however, and a majority of employees in an appropriate bargaining unit have agreed to be unionized, that union becomes the "exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). Indeed, employers like Jones Dairy Farm are prohibited from dealing directly with individual employees who are represented by a union, even if their direct dealing would result in more favorable employment conditions for those employees. *See, e.g., J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944). In exchange for the privilege of bargaining exclusively on behalf of the employees they represent, unions must act "fairly, impartially, and in good faith" when doing so. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944).

Yet, when the ink had barely dried on their 2009 collective bargaining agreement with Company, the Union rallied the Chief Union Steward and a group of others to sue the Company seeking more pay for time spent on donning and doffing activities—the very activities they had just recently agreed, yet again, would not be compensated.

The Union's backdoor attempt to double-dip by suing Jones Dairy Farm for compensation it collectively bargained not to receive defies the Wisconsin Supreme Court's guidance in *Hormel*. A majority of four Justices state that any right to compensation for donning and doffing tasks may be collectively bargained away, as the employees have herein this case. Two Justices chose not to disagree with or even comment on that conclusion.

Furthermore, the collective bargaining of this very issue has been a concept embedded in wage and hour law for over six decades. Since 1949, it has been perfectly clear that employees can collectively bargain away their right to pay under federal law for donning and doffing activities. Congress mandated this when it enacted 29 U.S.C. § 203(o). *Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 878-79 (2014). Plaintiffs here sought no remedy under the federal wage law because they acknowledged they have bargained that away in exchange for other economic improvements and benefits that the employees ratified by majority vote, received, accepted, and retained. Yet they tried to double-dip by asserting wage claims exclusively under state law. This has been foreclosed by a majority of the Wisconsin Supreme Court Justices who conclude that collectively

bargaining away this particular type of claim for compensation "is permitted under state or federal law." *Hormel*, 2016 WI 13 at ¶ 113, n.6, ¶ 145, n.3.

In denying summary judgment to Jones Dairy Farm, Judge Hue concluded, unlike *Husco*, there was a risk to the health, welfare, and safety of the employees if they did not engage in donning and doffing activities. Even assuming that conclusion was correct, the issue is not whether the employees should or should not *engage* in donning and doffing, but rather, whether they should be paid for those activities. The same was true in *Husco*. The issue was not whether the employees should or should not be allowed to take twenty-minute meal periods, but rather, whether they should be paid for that time. In *Husco*, the Wisconsin Supreme Court held that the employees should not be paid for the meal periods, even without a waiver from the Department of Workforce Development, because the conditions for waiver were clearly present.

As in *Husco*, the conditions for granting a waiver are clearly present here. Implicit in the Wisconsin Supreme Court's unanimous decision in *Husco* was the belief that decreasing a meal period by 10 minutes—from 30, down to 20—was not detrimental to employee health, welfare, or safety. Here, the amount of unpaid time at issue is merely 4.3 minutes, less than half of the time found to be of no consequence to employee health, welfare, or safety in *Husco*. The fact that the duly authorized representative of the employees agreed to make these time periods non-compensable for more than 30 years, further supports the fact that this is not detrimental to the Company's employees. After all, the Union owes its members a

duty of fair representation in contract negotiations. *See Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991).

Additional support for the conclusion that unpaid donning and doffing time is not detrimental to the health, welfare, and safety of employees is found in the fact that the FLSA has permitted these time periods, regardless of their duration, to be rendered non-compensable by collective bargaining since 1949. Because the declared policy of the FLSA is to eliminate "labor conditions detrimental to the . . . health, efficiency, and general well-being of workers," 29 U.S.C. § 202, it is clear donning and doffing without pay pursuant to a collective bargaining agreement, which is permitted in the very next section of the FLSA, 29 U.S.C. § 203(o), is not detrimental to workers.

In 2014, in affirming a federal district court's decision to deny compensation to employees for donning and doffing activities they had collectively bargained away, Judge Posner aptly summarized the dynamic in such cases as follows:

> We end this longish opinion with a reminder that the cause of amicable labor-management relations is impaired by reading broadly statutes and regulations that remove wage and hour issues from the scope of collective bargaining. That is what motivated Congress to amend the Fair Labor Standards Act in 1947 to add (among other provisions) what is now section 203(o), stating in 29 U.S.C. § 251 that "Congress finds that the Fair Labor Standards Act of 1938 . . . has been interpreted judicially in disregard of long established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers." Employer and union in this case have agreed not to count the tiny donning/doffing times as compensated work. Doubtless the union required compensation for that concession to the employer. The plaintiffs in this case are trying to upend the deal struck by their own union.

Mitchell v. JCG Industries, Inc., 745 F.3d 837, 846 (7th Cir. 2014).

This Court should heed the plain and clear dictate of the majority of the Wisconsin Supreme Court Justices, reverse the Circuit Court, and grant summary judgment to Jones Dairy Farm. There are no disputes as to any fact material to this point, and those undisputed facts confirm that the Union in this case bargained away any claim for compensation for time spent on donning and doffing activities, "under state or federal law." *Hormel*, 2016 WI 13 at ¶ 113 n.6, ¶ 145 n.3.

D. THE FACTS AND CIRCUMSTANCES OF THIS CASE, INCLUDING THE ACTIONS OF THE EMPLOYEES, PRECLUDE THEIR RECOVERY FOR EQUITABLE REASONS.

The claims asserted in this case are the ultimate "gotcha." The employees selected the Union to be their "exclusive representative." 29 U.S.C. § 159(a). The Union bargained a deal with Jones Dairy Farm, which the employees ratified and the benefits of which they enjoyed, all dutifully paid by the Company as agreed. The Company made its agreement to provide increased compensation, including increased wage rates, in the specific context of knowing that the Parties all agreed there would be no extra pay for any time spent donning and doffing. This was not an "implied" or "unspoken" understanding; it was one specifically negotiated with the Union in 1994, 1997, 2000, 2004 and 2009. It also was not a bargain struck by unsophisticated parties, without regard for legal precedent; it was an agreement reached between an employer (represented by counsel) and its employees (represented by their Union), in full compliance with the 60 years of precedent that followed enactment of 29 U.S.C. § 203(o) in 1949.

Yet now the employees, orchestrated by their Union, try to double-dip by seeking to backdoor a claim for more pay on this very issue that was expressly negotiated and settled as part of an overall compensation package. No Wisconsin state court has rejected the defense that it was collectively bargained away.[4]

Before Judge Hue, Jones Dairy Farm asserted the equitable defenses of estoppel, laches, unjust enrichment, and waiver. Relying on § 109.03(5) of the Wisconsin Statutes, Judge Hue summarily rejected all these four equitable defenses, opining that "where the legislature has outright banned contracts from precluding access, this Court concludes such a strong statement of broad public policy supporting access to courts may not be contravened by equitable doctrine application to any individual." R. 155 at 11; P-App. 032. Judge Hue fundamentally misunderstood the Company's argument.

First, and as explained above, the legislature has not "banned contracts" regarding compensation for donning, doffing, and walking time. The Supreme Court said so in *Hormel*, 2016 WI 13, ¶ 113 n. 6, ¶ 145, n. 3.

Second, and perhaps more importantly, Judge Hue's decision failed to properly analyze the statutory scheme on which he relied. Section 109.03 of the Wisconsin Statutes, which is entitled "[w]hen wages payable; pay orders," governs

[4] The only case Jones Dairy Farm is aware of where a court approved a Wisconsin wage law claim regarding time excluded from paid time under a collective bargaining agreement is *Spoerle v. Kraft Foods Global, Inc.*, 626 F. Supp. 2d 913 (W. D. Wis. 2009), *aff'd* 614 F.3d 427 (7th Cir. 2010). *Spoerle*, however, addressed only the narrow question of whether federal law preempts Wisconsin law on the issue of payment for donning and doffing time under a collective bargaining agreement. *Id.* at 918-21. The employer in *Spoerle* did not raise any of the equitable defenses raised by the Company here.

the frequency of wage payments. Subsection (5), which was cited by Judge Hue, provides employees a private right to enforce those pay frequency requirements. That is the "section" from which employers are generally prohibited from securing exemption by contract or other means. Wis. Stat. § 109.03(5).

But even that prohibition actually advances Jones Dairy Farm's position because it expressly excludes a number of scenarios, set forth in Section 109.03(1), including employees who are covered by a valid collective bargaining agreement. Wis. Stat. § 109.03(1)(a). In sum, the Parties here are not disputing the frequency of payments, but rather whether payments are owed at all; therefore, sub. (5) does not apply. Even assuming it did apply, it actually supports the Company's argument that collective bargaining can modify Wisconsin's wage and hour laws in certain respects.

Finally, Judge Hue misunderstood that Jones Dairy Farm was not disputing the employees' basic right to access the courts, but rather was disputing the fairness and equity of their underlying claim. A plaintiff's right to bring a claim against a defendant does not insulate the claim from defendant's valid equitable defenses. If that were false, then no defendant could ever assert equitable defenses. There was no reason Judge Hue could not consider Jones Dairy Farm's equitable defenses. On review, this Court should reverse the Circuit Court and grant Summary Judgment to Jones Dairy Farm.

1. Employees are estopped from asserting a claim for more pay for donning and doffing time following their agreement to a contract with no extra pay for donning and doffing.

The employees' attempt to retain the benefits of their collective bargaining agreements while also directly undermining a premise of those agreements is the exact kind of action the doctrine of equitable estoppel seeks to curb. The employees' receipt of these wage benefits, to Jones Dairy Farm's detriment, equitably estops them from seeking pay for the donning and doffing time. "The elements of equitable estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." *Milas v. Labor Ass'n of Wis., Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). "When the facts and reasonable inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established." *Id.* at 8, 571 N.W.2d at 659.

Here, it is undisputed that the employees engaged in at least two "actions" Jones Dairy Farm detrimentally relied upon during each round of collective bargaining since at least 1994: (1) they dropped their bargaining proposal for extra pay for donning and doffing time, and (2) they ratified the resulting collective bargaining agreements that contained other economic improvements, such as higher wages, agreed to by the Company. Those actions induced Jones Dairy Farm to provide class members with higher hourly wage rates than the Company would have provided had they demanded payment for donning and

doffing time. In other words, had the employees demanded to be paid for this time, the Company could have and would have calculated the costs of paying donning and doffing time and adjusted wage rates downward accordingly in order to make the change revenue-neutral. The employees cannot logically provide and benefit from a concession during contract negotiations (i.e., dropping their proposal for extra pay for donning and doffing time), and then claim that Jones Dairy Farm did not rely on that concession in reaching the agreement the Parties reached. Finally, the increased wage costs borne by Jones Dairy Farm constitute a detriment to the Company.

Consequently, the employees are equitably estopped from seeking extra compensation for donning and doffing time when they previously and explicitly withdrew their proposal for such extra pay.

2. Laches bars the employees' claims because of their delay in asserting the claims.

The employees' unreasonable delay in bringing this litigation has prejudiced Jones Dairy Farm; consequently, the doctrine of laches bars their belated claims in this litigation. To successfully assert a laches defense, a party must show "(1) unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit; and (3) prejudice to the party asserting the defense in the event the action is maintained." *State v. Prihoda*, 2000 WI 123, ¶ 37, 239 Wis. 2d 244, 618 N.W.2d 857, *approved in State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29,

290 Wis. 2d 352, 714 N.W.2d 900. The first element relates to the conduct of the party bringing suit, and the latter two elements "apply to the party asserting laches." *Coleman*, 2006 WI 49, ¶ 28.

The employees' inaction, and the resulting prejudice to Jones Dairy Farm, satisfies each element of the laches test. Here, the employees were aware of both the facts underlying their claim and the legal theory supporting their claim no later than May 2006, when their Union sent a letter to Jones Dairy Farm demanding pay for donning and doffing time. Despite this knowledge, the employees did not assert the claims in this case until December 2010, more than four and a half years later. What did they do during the interim? The Union actually negotiated a new collective bargaining agreement with Jones Dairy Farm, wherein the employees agreed to forego any request for additional donning and doffing pay, and convinced Jones Dairy Farm to give wage increases to those employees throughout a five-year contract during one of the darkest times in American economic history.

Second, Jones Dairy Farm was unaware that the employees would assert the claims in this suit. After the May 2006 letter, the Union never again discussed the issue with Jones Dairy Farm, filed any grievance, or filed any wage claim. Moreover, the Union agreed at the 2009 contract negotiations that there need not be any additional pay for donning and doffing time. In light of these actions (and inactions), Jones Dairy Farm had no reason to suspect its employees would adjust

their course by 180 degrees the very next year, and assert the claims at issue in this lawsuit, thus seeking to double-dip on the labor contract deal.

Finally, the employees' delay in bringing this claim has prejudiced Jones Dairy Farm. As noted, in the 2009 collective bargaining negotiations, the Company provided its employees with a higher wage rate than the Company would have provided had the employees clung to their initial demand for extra pay for donning and doffing time or suggested they intended to file this lawsuit. By delaying the filing of this lawsuit, and any suggestion they would so file, the employees managed to string the Company along to the point of extracting five years of wage increases that they otherwise would not have received. Consequently, because the employees unreasonably delayed filing this action, to the detriment of the Company, laches bars their claims.

3. The employees waived any claim for pay for donning and doffing time.

In addition, the employees waived their claims in this litigation by repeatedly agreeing that there would be no extra pay for donning and doffing time, and by accepting payment tendered by Jones Dairy Farm as the full measure of the wages due to them for their work for the Company.

"A waiver is the intentional relinquishment of a known right. . . . [I]t must be shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his rights or of the facts on which they depended." *Bade v. Badger Mut. Ins. Co.*,

31 Wis. 2d 38, 46, 142 N.W.2d 218 (1966) (internal quotation marks omitted). The ordinary rule is that an employee waives his right to contest his wage payments if he accepts them without objection, knowing the employer considers them to be full payment, and continues in his employment." *N. Crossarm, Inc. v. Chem. Specialties, Inc.*, 332 F. Supp. 2d 1181, 1191 (W.D. Wis. 2004) (citing *Davies v. J.D. Wilson Co.*, 1 Wis. 2d 443, 467, 85 N.W.2d 459(1957)). In *Davies*, the employee defeated the employer's waiver claim only by protesting the wages he received that he claimed were less than he was due. 1 Wis. 2d at 472.

Here, there was no such protest, despite the employees' apprehension of their potential claims. The Union has bargained for extra pay for donning and doffing time since at least 1994. At least one employee believed Jones Dairy Farm owed additional donning and doffing pay as early as 2004. Moreover, in 2006, the Union sent the Company a letter demanding more pay to employees for donning and doffing time notwithstanding the collective bargaining agreement. Despite this knowledge, which is imputed to the Company's employees by the Union they selected to be their exclusive bargaining representative, no employee took any action to protest the Company's alleged failure to pay employees for this time:

- No employee ever filed a grievance challenging Jones Dairy Farm's pay practices for donning and doffing time.
- No employee ever filed a wage claim with the Department of Workforce Development seeking pay for donning and doffing time.

- The Union negotiated another collective bargaining agreement in 2009 that did not provide any extra donning and doffing pay, long after becoming aware of what it claimed was the alleged illegality of Jones Dairy Farm's pay practices.

And all along, employees continued to cash their paychecks, week after week, without any complaint, protest, or reservation. Employees and their Union, of course, knew Jones Dairy Farm considered the wage payments provided to fully compensate them for all services rendered; after all, those payments complied fully with their collective bargaining agreements, which they negotiated to set forth their wages, benefits, terms, and conditions of employment. In light of the intentional failure to protest their receipt of wages, "knowing that the employer considers them to be full payment," employees have waived any right to payment for donning and doffing time.

4. Employees would be unjustly enriched by an award of damages.

Finally, to allow the judgment in favor of the employees to stand in this case would unjustly enrich them at the expense of Jones Dairy Farm, which agreed to pay them higher wage rates with the understanding that there would be no additional pay for donning and doffing time.

Unjust enrichment occurs when (1) one party confers a benefit on another party, (2) the recipient is aware of the benefit, and (3) the recipient accepts or retains the benefit "under circumstances making it inequitable for the [recipient] to retain the benefit." *Watts v. Watts*, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987); *see also Sands v. Menard*, 2017 WI 110, ¶51, 379 Wis. 2d 1, 904 N.W.2d 789

("[A] plaintiff "must demonstrate that the benefits she conferred to [defendant] are not offset by the benefits she derived from him."). "Unjust enrichment is grounded upon the moral principle that a party who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust." *Abbott v. Marker*, 2006 WI App 174, ¶ 20, 295 Wis. 2d 636, N.W.2d 162 (citing *Management Comp. Servs. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 188, 557 N.W.2d 67 (1996)).

Here, Jones Dairy Farm conferred a benefit on its employees, in the form of higher wage rates in each successive collective bargaining agreement. The employees, through their ratification of each collective bargaining agreement and their receipt – without complaint, protest, or reservation – of their paychecks, were aware of the benefits conferred on them. And given that the higher wages were only given to the class members based on the mutual agreement that there would be no additional pay for donning and doffing time, it would be wildly inequitable to allow the class members to retain the higher wages and then renege on that portion of the bargain that made the higher wage rates possible in the first place.

E. EVEN THOUGH THE PARTIES AGREED TO THE TIME PERIODS AT ISSUE IN THIS CASE TO EXPEDITE RESOLUTION OF THEIR DISPUTE, THE DOCTRINE OF *DE MINIMIS NON CURAT LEX* NONETHELESS PRECLUDES EMPLOYEES FROM RECOVERY.

The 4.3 minutes of donning and doffing time at issue in this case is also not compensable because it is *de minimis*. The *Hormel* decision did not foreclose this argument. The Lead Opinion "[a]ssum[ed], without deciding, that the *de minimis*

doctrine applies to claims arising under Wis. Admin. Code § (DWD) 272.12," the time at issue in *Hormel* was not *de minimis* because it was not a "trifle." *Hormel*, 2016 WI 13, at ¶ 105. Curiously, the Lead Opinion arrived at that conclusion by noting that in the aggregate the average donning and doffing time amounted to over $500 in wages per year. *See id.*

The Dissent highlighted that the Court's Lead Opinion both failed to determine if the *de minimis* doctrine applies in Wisconsin, and did not explain what test or approach it used to reach its conclusion. *Id.* at ¶ 181. The Dissent also noted the Lead Opinion's misapplication of law, specifically noting in this regard the focus on an aggregate of annual pay at issue leads to disparate treatment under the law because that type of analysis will favor employees who are paid higher wages. *Id.* at ¶ 187 n.26. Instead, the focus of the *de minimis* doctrine needs to be on the daily amount of time at issue and whether it is too burdensome to capture and record accurately, not the annual amount of wages implicated. *Id.* at ¶¶ 126-129. However, the dissenters did not ultimately reach a conclusion on whether the time spent donning and doffing is *de minimis*; they instead decided they did not need to consider that question because they held in the first instance that the donning and doffing at issue was not compensable.

It is apparent, however, that had the dissenters needed to reach and decide the issue, they would have concluded that the 5.7 minutes of donning and doffing time per day at issue in *Hormel* would have been *de minimis* and therefore not compensable. *See id. at* ¶ 187 n.24 (quoting what the Dissent called the "critical"

language from the seminal case of *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984): "Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable," and noting "*Lindow* itself stand for the proposition that the 7 to 8 minutes employees spent on activities qualified as *de minimis*").

The Concurring/Dissenting Opinion did, however, reach a conclusion of sorts. The Chief Justice adopted the test of *Lindow* and concluded that, but for the parties' stipulation regarding the donning and doffing time at issue, "all donning and doffing would be precluded by the *de minimis* rule." *Id*. at ¶ 132.[5]

It is not clear where these three opinions leave the state of the *de minimis* doctrine, or how it should apply in this case. To avoid the expensive process of using expert witnesses to litigate the number of minutes at issue, the Parties here instead reached a stipulation reflecting an agreeable estimate of the daily time spent donning and doffing for most of the employees on most days. The stipulation was logical, at least to Jones Dairy Farm, precisely because of the difficulty of accurately measuring and recording the time employees spent on donning and doffing each and every day. The donning and doffing time is variable and unpredictable because the employees do those tasks at different speeds and intersperse throughout them any number of personal activities that are not compensable. These interspersed personal activities could include primping,

[5] The UFCW and Hormel stipulated that the total average time per day an employee requires to don and doff the required clothes and gear at the beginning and end of the workday was 5.7 minutes. *Hormel*, 2016 WI 13, at ¶ 114.

chit-chatting, reading the newspaper, sipping coffee, using the restroom, texting or surfing the internet on their smart phone, etc. The Parties stipulated that the donning and doffing activities at issue in this case take 4.3 minutes per day – about 25% less than the 5.7 minutes at issue in Hormel, and over 57% less than the time that "most courts" have found to be *de minimis* according to the seminal *Lindow* case.

The Justices joining in the Concurring/Dissenting Opinion conclude that all donning and doffing is *de minimis*, but refrained from applying the doctrine because the Parties had stipulated to the amount of time at issue. While Jones Dairy Farm and the employees also stipulated to an amount of time at issue, perhaps the Concurring/Dissenting Justices will view this differently because the stipulation here arose not from the fact that the activities at issue were measurable as in *Hormel*, but instead because of the opposite—certainly at least Jones Dairy Farm, and maybe the employees too, concluded it would be extremely difficult, burdensome and costly to attempt to measure accurately employees' actual donning and doffing times each and every day during the relevant damages period. Plus, the stipulated amount of time at issue here is even smaller than that in *Hormel*. Surely the Concurring/Dissenting Opinion cannot be read to mean that the mere existence of a stipulation precludes application of *de minimis* doctrine, even if the stipulated amount of time at issue is miniscule.

Moreover, even if the Concurring/Dissenting Justices would decline to apply the *de minimis* doctrine in this case because of the Parties' stipulation, that

stipulation does not apply to one of the four certified subclasses. The Parties' stipulation makes clear it does not apply to the subclass of persons employed in the Shipping/Receiving Department, where there is virtually no time spent donning or doffing because those employees are not required to wear most of the clothing and gear worn by the production employees. R. 75 at ¶ 3; P-App. 001.[6] In the absence of any stipulation, and virtually no donning or doffing activities required of the employees in the Shipping/Receiving Department, the Concurring/Dissenting Justices would find that their very short donning and doffing time is *de minimis* and not compensable.

Similarly, perhaps either of the two Justices on the Lead Opinion will treat the 4.3 minutes per day in this case differently than they treated the 5.7 minutes per day at issue in *Hormel*. It is also not clear precisely what Justices Ziegler, R. G. Bradley, Kelly, and Dallet will do if required to rule on the *de minimis* issue, but the Dissenting Opinion suggests 4.3 minutes per day is *de minimis* and therefore not compensable.

Therefore, Jones Dairy Farm asks this Court to reverse the Circuit Court and grant it summary judgment on the ground that the 4.3 minutes of donning and doffing time at issue for most of the subclasses is *de minimis* and therefore not compensable. At the very least, summary judgment should be granted dismissing the claims of the Shipping/Receiving Department subclass because there is no

[6] The only items donned and doffed by Shipping/Receiving Department employees are protective shoes or shoe covers and a bump cap, which only take a combined total of 1.7 minutes to don and doff each day. R. 235, ¶ 3.b.ii; R. 75, ¶ 3; P-App. 001.

stipulation in place governing their donning/doffing time, and that time is extremely short.

V. CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be reversed, and summary judgment granted to Defendant-Appellant.

Submitted this 31st day of October, 2018 by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b)(c) for a brief and appendix produced with proportional font.

The length of this brief is 10,960 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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MAILING CERTIFICATION
CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on October 31, 2018, this brief and appendix was given to a third-party carrier, Breakaway Couriers, for delivery to the Clerk of Court of Appeals. I further certify that the brief or appendix was correctly addressed.

Dated this 31st day of October, 2018.

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STATE OF WISCONSIN
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DISTRICT IV

Steven J. Piper, Robert Bue, Scott R. Olson and Leslie T. Smith,
Plaintiffs,

Case No. 2018AP1681

Jonathan Kracht, Gary Benes and Charles Manley,
Plaintiffs-Respondents,

v.

Jones Dairy Farm
Defendant-Appellant.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR JEFFERSON COUNTY, CASE NO. 10CV1210
THE HONORABLE JUDGE WILLIAM F. HUE

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STATEMENT OF ISSUES

1. Whether Jones Dairy Farm's ("JDF's") refusal to pay otherwise compensable wages in the average amount of $675 per employee per year for five years and in the aggregate amount to all class members in an amount greater than $765,000 for daily donning, doffing and traveling to assigned work stations was excused as a "trifle" or by the doctrine of *de minimis non curat lex*.

Answered by the Trial Court: No.

2. Whether the collective bargaining agent for the Employee Class can, and did, waive the rights of 227 employees to receive straight time and overtime compensation for hours worked donning and duffing Personal Protective Equipment ("PPE") and walking daily to and from the employees' assigned work station.

Answered by the Trial Court: No.

3. Whether the Employee Class' entitlement to unpaid wages is barred by the equitable doctrines of equitable estoppel, waiver, unjust enrichment or laches.

Answered by the Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Wisconsin Supreme Court, Wisconsin Court of Appeals, and Wisconsin federal Courts, in a series of cases, have addressed the nearly identical issues surrounding compensating employees for time spent donning and doffing PPE in the food industry, involving the life, health, safety or welfare of workers, as well as the public. As the circuit court found, these opinions decided that, only in limited circumstances, not applicable here, can an employer evade the Wisconsin Legislature's clear prohibition against contracts to not pay wages owed to employees for work performed. This case is controlled by established law, despite JDF's effort to cobble together an argument to the contrary by selectively picking language in footnotes from concurring and dissenting opinions in a Wisconsin Supreme Court opinion that neither considered nor analyzed whether a Union can waive an employee's right to receive compensation for donning, doffing and traveling to the employee's assigned work station. The Employee Class disagrees that either oral argument or publication is necessary to affirm the well-reasoned decision of Jefferson County Circuit Judge Hue, which was based on controlling Wisconsin appellate authority.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a wage and hour case under Wisconsin law involving claims by 227 current and former employees of Jones Dairy Farm ("JDF"), who were not paid wages owed for donning and doffing Personal Protective Equipment ("PPE") and for walking to and from the employees' job stations. Aggregate unliquidated unpaid wages for each class member is approximately $3,400 and, for the class, exceeds $765,000.

JDF contends that it should be permitted to evade its statutory obligation to pay wages it owes to its employees: based upon the parties' alleged past bargaining history; because the $765,000 owed to employees was a "trifle" or *de minimis*; or because certain general equitable doctrines should preclude employees from recovering wages owed to them. The trial court rejected each of these arguments in denying JDF's motion for summary judgment. The parties thereafter stipulated to the resolution of all remaining disputed facts and to entry of judgment in favor of the Employee Class.

The parties stipulated to certification of four sub-classes (hereinafter "Employee Class"). The parties also stipulated to the precise amount of time it took workers to don and doff PPE and to walk to and from their respective work areas. Based upon the stipulation of the parties, the court entered a stipulated judgment.

JDF has appealed the denial of its motion for summary judgment and judgment in favor of the Employee Class.

While JDF raised multiple issues and defenses before the trial court, many of these issues were resolved based upon controlling case law or the stipulation of the parties for the entry of final judgment and are not part of this appeal. For example, JDF claimed that class members chose whether to don and doff on paid time, were covered by an incentive program that allegedly included pay for donning and doffing and that employees were paid based upon claimed rounding of hours. These theories are not part of the appeal. JDF raised federal preemption as a defense. This too is not part of the present appeal. Oddly, JDF alleged as an affirmative defense that the donning and doffing was for the principal benefit of the employee. Not surprisingly, JDF is not pursuing this defense on appeal.

JDF also alleged that the donning and doffing was not a principal work activity and was a non-compensable preliminary or postliminary activity. JDF raises none of these defenses in the present appeal. Finally, based upon stipulations by the parties, there is no challenge to the amount of time that it took employees to don and doff PPE or walk to and from their workstations.

II. PROCEDURAL STATUS

Employee Class members filed their complaint in this action on December 13, 2010 alleging violations of Wisconsin wage and hour law. In August 2014, the parties stipulated to class certification of four sub-classes. On September 29, 2014, Plaintiffs filed their Second Amended Complaint.

In March 2015, the parties stipulated as to the time required by employees for donning and doffing as well as walking to and from their work stations. JDF moved for summary judgment in May 2015 and, by order dated August 10, 2016, Jefferson County Circuit Court Judge Hue denied JDF's summary judgment motion. JDF petitioned the court of appeals for an appeal of a non-final order, which the court of appeals denied on September 26, 2016.

In June 2018, the parties stipulated to entry of a final judgment in favor of the Employee Class. The circuit court entered final judgment on July 18, 2018.

III. DISPOSITION IN TRIAL COURT

By Memorandum Decision dated August 10, 2016, Jefferson County Circuit Court Judge Hue denied JDF's motion for summary judgment on the issue of liability. The parties subsequently reached a stipulated resolution of the case in favor of the Employee Class. The parties stipulated to the amount of time spent donning, doffing and walking to assigned workstations and the methodology for calculating damages owed to the 227 Employee Class members. The parties reached an agreement on the statutory penalty to be included in the judgment. The stipulated judgment provided that the parties had reached an agreement on the remaining disputed issues of fact and that the court could enter judgment on behalf of the Employee Class. On July 18, 2018, Judge Hue entered the stipulated judgment and on August 29, 2018, JDF appealed the stipulated judgment on the sole question of whether the circuit court erred in denying its motion for summary judgment.

IV. STATEMENT OF FACTS

There are 227 members of the Employee Class. (R. 71, ¶ 7.) Class members claim that they were not compensated for time spent donning and doffing PPE and walking to and from their work stations. (R. 71.) Class members could not clock in at the start of their shift until they had changed their clothes and walked to their workstation and were required to clock out prior to walking back to the locker room and changing out of their PPE. (R. 71, ¶¶ 20-22.) Class members, depending on the sub-class they were in, were required to wear the following PPE: footwear with steel covered toes, a frock, a hairnet, earplugs, bump caps, aprons, armguards and gloves. (R. 71, ¶ 18.)

The wearing of PPE was to protect the life, health, safety and welfare of the employee. JDF required employees to wear PPE. (R. 71, ¶ 19.) Employees could not take PPE home with them and change at home either prior to the start of a shift or at the conclusion of a shift. JDF required employees to wear PPE to comply with applicable laws and regulations. (R. 71, ¶ 19.) Approximately three months after the Wisconsin court of appeals decision in *Weissman v. Tyson Prepared Foods, Inc.*, 2013 WI App 109, 350 Wis. 2d 380, 838 N.W.2d 502, JDF again began paying employees for donning and doffing PPE and walking to and from the employees' workstations. The Employee Class filed its complaint in this action on December 13, 2010 seeking recovery of unpaid compensation based upon JDF's failure to pay for donning and doffing of PPE and time spent by employees walking to and from their workstations. (R. 71.)

The parties reached a stipulation as to the amount of time employees spent donning and doffing PPE and walking to and from their respective workstations. (JDF-App., pp. 001-004.) The parties agreed that the donning activity took 2.561 minutes per workday to perform and the doffing activity took 1.74 minutes per workday to perform. (*Id*.) The parties also agreed to walking distances as well as total minutes, to the hundredth of a minute, spent donning, doffing and walking to and from the various departments excluding, the shipping and receiving department, which ranged from 4.7 to 7.8 minutes[1] (*Id.*; JDF-App., p. 030.) The average amount of damages per Class member is $3,375.00 ($675 times five years). (JDF-App., p. 030.) Total unliquidated wage damages are approximately $766,125.00 (227 class members times $3,375.00). Liquidated damages total approximately $861,900.00 (unliquidated damages times stipulated liquidated damages of .125) (JDF-App., p. 035, ¶ 4.)

JDF has proffered no collective bargaining agreement between the parties post 1985 which includes a provision that employees agreed to waive recovery of unpaid wages for donning and doffing and walking to and from workstations. JDF has proffered no proposal signed off on by both JDF and the Union where employees agreed to waive recovery of unpaid wages for donning and doffing and walking to and from workstations. JDF and the union never requested from the Wisconsin

[1] Under the parties Stipulation Regarding the Amount of time Implicated in Plaintiffs' and Class Members' Claims, the maximum time spent per day is 8.63 minutes, comprised of 4.3 minutes donning and doffing and 4.33 minutes of compensable walking time.

Department of Workforce Development a waiver of JDF's obligation to pay employees for donning and doffing PPE and walking to and from workstations.

STANDARD OF REVIEW

The Wisconsin Court of Appeals reviews summary judgment *de novo*, using the same methodology as the circuit court. *Am. Family Mut. Ins. Co. v. Powell*, 169 Wis. 2d 605, 607, 486 N.W.2d 537 (Ct. App. 1992). The Wisconsin Court of Appeals reviews a circuit court's findings of fact for clear error. Wis. Stat. § 805.17(2). The Wisconsin Court of Appeals reviews a circuit court's determination of applicability of equitable defenses for abuse of discretion. *Schauer v. Diocese of Green Bay*, 2004 WI App 180, ¶ 16, 276 Wis. 2d 141, 687 N.W.2d 766; *Sharpley v. Sharpley*, 2002 WI App 201, ¶ 13, 257 Wis. 2d 152, 653 N.W.2d 124.

SUMMARY OF ARGUMENT

In this donning and doffing case, a class of 227 employees at JDF seek compensation for time spent donning and doffing PPE and walking to and from the employees' assigned workstations daily. The parties stipulated that the amount of time spent donning, doffing and walking varied from 4.7 to 7.8 minutes. The parties also stipulated to a final judgment in favor of the Employee Class, including the resolution of all remaining disputed facts, in favor of the judgment, following denial of JDF's motion for summary judgment.

The Wisconsin Supreme Court and Court of Appeals, in the *Hormel* and *Tyson* cases, resolved most of the donning and doffing issues applicable to this case. Those courts concluded that donning and doffing clothing or PPE was integral and indispensable to sanitation and employee safety in the employees' principal work activities and that such time was therefore compensable. The Wisconsin Supreme Court, in *Hormel*, determined that 5.7 minutes spent donning and doffing daily was not a "trifle" and not *de minimis*, and that it was appropriate to aggregate unpaid time in analyzing whether the unpaid wages were a trifle or *de minimis*. *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 2016 WI 13, 367 Wis. 2d. 131, 876 N.W.2d 99; *Weismann v. Tyson Prepared Foods, Inc.*, 2013 WI App 109, 350 Wis. 2d 380, 838 N.W.2d 502.

In the present case, workers were required by JDF and federal regulations to wear specific clothing for sanitation and employee safety reasons. JDF nevertheless attempts to avoid paying these 227 employees based upon three arguments, all of

which were rejected by the Jefferson County Circuit Court and should similarly be rejected on appeal.

First, JDF claims that such unpaid wages are barred by the doctrine of *de minimis non curat lex*. Time spent donning, doffing and walking by Employee Class members range from 4.7 to 7.8 minutes daily, occurred each and every work day, and totaled over 40 hours of unpaid wages each year. The amount of lost wages per worker was $3,375.00 and the aggregate amount for the Employee Class was more than $765,000.00. In *Hormel*, the Wisconsin Supreme Court ruled that 5.7 minutes per day which equated to approximately $500.00 of unpaid compensation annually was not a "trifle" and not barred by the *de minimis* doctrine. In *Hormel*, as well as this case, the parties had stipulated to the amount of time spent donning and doffing so there was no difficulty calculating the amount of time. The *de minimis* issue in this case is controlled by the *Hormel* decision.

Second, JDF claims that the 227 member Employee Class, through their Union, bargained away their right to be compensated for donning, doffing and walking time. Despite no supporting evidence, JDF repeatedly claims, in its opening brief, that the Employee Class explicitly agreed that they were not owed compensation for donning, doffing and walking. This argument fails for multiple reasons. Under Wisconsin law, employees must be paid for all hours worked. Under Wisconsin law, employers cannot contract with their employees to avoid payment of wages.

JDF contends that, under a provision in DWD chapter 274 of the Wisconsin Administrative Code, a Union and employer, in certain limited circumstances, can seek a waiver of wage payment obligations and that this Court should use this provision to excuse JDF's failure to pay compensable wages owed to workers. This argument fails for multiple reasons. First, DWD chapter 274 applies to wages owed under that chapter. In the present case, wages are owed pursuant to DWD chapter 272. Second, DWD § 274.05 requires a "written application of labor and management for a waiver or modification to the requirements of this Chapter…". It is undisputed that there was no such written application for a waiver by the Union and JDF.

Third, there must, in fact, be an agreement by the parties to waive payment of wages – here for donning, doffing and walking. In the *Husco* case, the Wisconsin Supreme Court found such an agreement to treat meal breaks of 20 minutes as uncompensated time, despite language in DWD chapter 274 to the contrary, based upon express language in the parties' Collective Bargaining Agreement ("CBA"). Here, there is no such language in the parties' CBA that the employees agreed that they were not to be compensated for otherwise compensable time spent donning, doffing and walking. JDF's argument that such an "agreement" existed is based upon the Union's withdrawal of bargaining proposals. Obviously, bargaining proposals can be withdrawn for any number of reasons. Rather than indicating any agreement, withdrawal of a proposal demonstrates a failure to agree.

Fourth, the reason for seeking a waiver of the requirement to pay otherwise compensable wages must be due to "practical difficulties or unnecessary hardship in complying with a requirement." Clearly, no such difficulty or hardship exists here since the parties are able to calculate time spent donning, doffing and walking to the hundredth of a minute and, at times, even to the thousandths of a minute. Finally, a waiver cannot be granted if it might be "dangerous or prejudicial to the life, health, safety or welfare of the employees…". The Supreme Court in *Hormel* and the Court of Appeals in *Tyson* have already ruled in analogous cases that the PPE required by an employer, and also by applicable federal law, is in part for safety of employees and, in part, for safety of the public. Accordingly, even if DWD chapter 274 applied to the present case, no waiver of JDF's obligation to pay for donning, doffing and walking time would be permissible.

JDF suggests that, if the waiver issue reached the Wisconsin Supreme Court, it may conclude that a Union can collectively bargain away an employee's right to be compensated for donning, doffing and walking. For the reasons noted above, a DWD chapter 274 waiver is not available under the facts of this case. Additionally, absent a DWD section 274.05 waiver, no other basis in Wisconsin law exists to permit a union to waive employees' rights to payment of unpaid compensable wages. Finally, JDF's speculation as to what the Wisconsin Supreme Court might do on the waiver issue is premised on footnotes in concurring and dissenting opinions, on an issue that was not before the Supreme Court, was not briefed to the Supreme Court and was in no way analyzed by the Supreme Court.

JDF's third and final argument for attempting to avoid payment of wages due to the Employee Class members is based on principles of equity. JDF argues that, because the Union allegedly agreed that no compensation was owed for donning, doffing and walking, employees are barred by equity from recovering unpaid wages. JDF's premise that any such express agreement existed is belied by the facts of this case. Additionally, it is ironic that JDF would claim equity should bar the Employee Class members from recovering wages owed to them while JDF, for more than two decades before this case was even commenced, failed to pay wages of approximately $3.5 million to employees for donning, doffing and walking. Finally, under the applicable abuse of discretion standard, the circuit court did not abuse its discretion in rejecting JDF's equitable defenses.

ARGUMENT

I. JDF'S OBLIGATION TO PAY COMPENSABLE TIME FOR DONNING, DOFFING AND WALKING IS NOT BARRED BY THE DE MINIMIS DOCTRINE AND THE AMOUNT OWED IS NOT A TRIFLE.

The Wisconsin Supreme Court's decision in *Hormel* controls the outcome of this case. *United Food & Commercial Workers Union Local 1473 v. Hormel Foods Corp.*, 2016 WI 13, 367 Wis. 2d. 131, 876 N.W.2d 99. Following *Hormel*, it is clear the Employee Class members' time spent donning and doffing and the associated walking time is compensable. The parties have stipulated to a time range from 4.7 to 7.8 minutes, depending on the amount of compensable walking time involved. (JDF-App. 001-004.) As in *Hormel*, this time is not a "trifle" and damages are readily ascertainable. Accordingly, the *de minimis* doctrine is inapplicable in this case.

Finding the time donning and doffing integral and indispensable to the employees' principal activities in producing food products, *Hormel* turned to the applicability of the doctrine of *de minimis non curat lex* (the law does not concern itself with trifles). *Hormel's* Lead Opinion explains that because the time donning and doffing the required clothing and equipment is not a "trifle," the justices do not need to address the applicability of the *de minimis* doctrine to claims under Wis. Admin. Code DWD § 272.12. *Hormel*, 2016 WI 13, ¶ 105. The Lead Opinion notes the *de minimis* doctrine is an established feature of the Federal Fair Labor Standards Act, but no Wisconsin cases, statutes, or regulations have applied the doctrine. *Id.*

¶ 99. In the end, the *Hormel* Court's Lead Opinion does not need to address the applicability of the federally recognized *de minimis* doctrine under Wisconsin law because there is no question that the donning and doffing time at issue in the case is not a "trifle," and therefore, not subject to the doctrine. *Id.* ¶ 105.

Hormel and the Union stipulated to the donning and doffing period in question as 5.7 minutes per day, which equals 28.5 minutes per week, and approximately 24 hours per year. *Id.* ¶ 104. Multiplying this figure by the employees' average hourly rate of $22/hour, the court was able to estimate the amount at issue as $500 per year for each employee. *Id.* ¶¶ 102, 105. *Hormel* holds this amount is significant and not a "trifle." *Id.* ¶ 105.

In the instant case, Plaintiffs and JDF have similarly stipulated to amounts ranging from 4.7 to 7.8 minutes. (JDF-App. 001-004.) This results in an average amount of nearly $675 per year or $3,375.00 for each employee. (JDF-App. 030.) As in *Hormel*, this amount is not a "trifle" to each employee. The translation of time spent donning and doffing each day to annual dollars, as calculated in *Hormel*, provides a practical and meaningful illustration of why this time is not a "trifle."

JDF claims the Lead Opinion in *Hormel* misapplies the *de minimis* doctrine. JDF takes issue with the Lead Opinion's calculation of what the aggregate time spent donning and doffing equates to in aggregate annual pay. JDF contends that the focus should be on the amount of daily time spent donning and doffing and not on aggregate amounts.

At the outset, *Hormel's* Lead Opinion clearly recognizes the daily time aspect of the analysis, noting the time spent donning and doffing is 5.7 minutes per day. *Hormel*, 2016 WI 13, ¶ 104. Further, the amount of daily time spent is not the only factor considered in the *de minimis* analysis. While, as JDF points out, *Lindow v. United States* observes, "[m]ost courts have found daily periods of approximately 10 minutes *de minimis*…," JDF overplays the support *Lindow* lends to its position. *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984). The 10-minute time period referenced in *Lindow* is not a hard and fast rule. *Lindow* does not stand for the proposition that 7 to 8 minutes is unquestionably *de minimis*, as suggested by JDF and the *Hormel* Dissent. *Hormel*, 2016 WI 13, ¶ 187, n.24 (citing *Lindow*, 738 F.2d at 1063-64.) *Lindow* explicitly acknowledges "[t[here is no precise amount of time that may be denied compensation as *de minimis*. No rigid rule can be applied with mathematical certainty." *Lindow*, 738 F.2d at 1062 *(citing Frank v. Wilson & Co.*, 172 F.2d 712, 716 (7th Cir. 1949); *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336, 341 (D.N.J. 1962)).

Under *Lindow*, a *de minimis* determination actually looks at multiple factors, including (1) the amount of daily time spent on the additional work, (2) the administrative difficulty in recording that additional time, (3) the aggregate amount of compensable time, and (4) the regularity of the additional work. *Lindow*, 738 F.2d at 1063. This test is echoed by *Spoerle v. Kraft Foods Global, Inc.*, which held, "when providing compensation for a task imposes no additional burden on the employer, there is no justification for denying the employee compensation for that

task, regardless how fast the task was performed." *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 868-69 (W.D. Wis. 2007).

Under *Lindow's* fourth factor, courts, including the Wisconsin Supreme Court in *Hormel*, look at the regularity of the additional work. In the present case, there is no question that Employee Class members were required by JDF to don and doff PPE and to walk to their job stations each and every day that they worked. This was not a sporadic occurrence but rather a daily requirement.

Lindow's third factor directs courts to examine the aggregate amount of compensable time. *Lindow*, 738 F.2d at 1063. This is exactly what the Wisconsin Supreme Court did in *Hormel*, when it concluded the $500.00 aggregate amount of compensable time per employee that Hormel failed to pay its employees was not a trifle. In the present case, the $675.00 per class member per year amount is more than a third greater than the amount in *Hormel*, which the Wisconsin Supreme Court found was not a "trifle". *Lindow* also observed that "moreover, courts in other contexts have applied the *de minimis* rule in relation to the total sum or claim involved in the litigation." *Id*. at 1063. This indicates that it is appropriate to aggregate, not only an individual class member's claims but all class member claims in determining whether the uncompensated amounts are *de minimis*. Here that amount is in excess of $765,000.00. There is no question that such a significant amount is neither a "trifle" nor a *de minimis* amount.

Thus, the Lead Opinion's review of the aggregate amounts in *Hormel*, in addition to the daily time amounts, is appropriate under the *Lindow* factors.

Similarly, in the instant case, the trial court properly notes that the donning and doffing at issue equaled an aggregate of $675 per year for each employee. (JDF-App. 030.)

JDF also claims the Lead Opinion in *Hormel* misapplies the *de minimis* doctrine by failing to focus on how burdensome it would be to capture the time at issue. *See Lindow*, 738 F.2d at 1063. Clearly, *Hormel* considers this factor, as it references the stipulation in determining the amounts at issue are readily ascertainable. The trial court similarly did so in the instant case. *Hormel's* Lead Opinion states that because of the stipulation, the "court need not be a 'time-study professional' to determine the time spent donning and doffing the clothing and equipment." *Hormel*, 2016 WI 13, ¶ 104. The Concurring Opinion joins in finding the amounts at issue readily ascertainable given the stipulation in place. *Id.* ¶ 109. The times are readily ascertainable in *Hormel*, as they are in the instant case.

As set forth above, *Lindow* turns on the administrative difficulty in recording the time. *Lindow*, 738 F.2d. at 1064. *Lindow* ultimately holds "[a]lthough plaintiffs' aggregate claims may be substantial we conclude that their claim is *de minimis* because of the administrative difficulty of recording the time and the irregularity of the additional pre-shift work." *Id*. The existence of the stipulation in this case distinguishes it from *Lindow.* There is no administrative difficulty in recording the additional time at issue in this case. Not only was the amount of time easily calculable for purposes of the stipulation in this case, the parties, in fact, were able

to calculate the amount involved to the hundredth and even the thousandth of a minute. Under the *Lindow* factors, the time at issue in this case is not *de minimis*.

JDF subsequently seeks to explain away the stipulation in this case. JDF claims the parties stipulated under different circumstances in *Hormel* than in the instant case. JDF gives a lengthy explanation for the parties' stipulation (e.g., avoid the expense of an expert witness, etc.). However, *Hormel* does not analyze the reasons behind the stipulation. It simply states that the donning and doffing times have been determined, and therefore, the *de minimis* rule does not preclude this time. *Hormel*, 2016 WI 13, ¶¶ 104, 132. Contrary to JDF's assertion, the stipulated times in this case are, in fact, greater than in *Hormel*, when taking into account the compensable walking time involved. (JDF-App. 001-004.)

The claims of the Shipping/Receiving Department subclass are not subject to dismissal merely because there is no stipulation in place governing the donning/doffing time. As noted in *Lindow*, "[t]here is no precise amount of time that may be denied compensation as *de minimis*." *Lindow*, 738 F.3d at 1062. "Rather, common sense must be applied to the facts of each case." *Id.* Although JDF declined to stipulate to the amount, it acknowledges that it takes the Shipping/Receiving Department employees 1.7 minutes to don and doff protective shoes or shoe covers and a bump cap each day. (App. Br. at p. 48; JDF-App. 001.) "[W]hen providing compensation for a task imposes no additional burden on the employer, there is no justification for denying the employee compensation for that task, regardless how fast the task was performed." *Spoerle*, 527 F. Supp. 2d at 869.

The damages for this subclass are similarly ascertainable. Common sense dictates that the Shipping/Receiving Department employees' time should be compensable, along with the other subclasses. *See Lindow*, 738 F.3d at 1062.

II. EMPLOYEE CLASS' RIGHT TO PAYMENT FOR HOURS WORKED SPENT DONNING AND DOFFING CANNOT BE BARGAINED AWAY UNDER WISCONSIN LAW. THERE IS NO BASIS FOR WAIVER OR MODIFICATION OF DWD'S REGULATION REQUIRING PAYMENT FOR SUCH HOURS WORKED.

The case is governed by the statutory mandate prohibiting employers from contracting to extinguish employees' rights guaranteed to them under Wisconsin's wage law. The statute is clear that:

> …no employer may by special contract with employees or by any other means secure exemption from this section.

Wis. Stat. § 109.03(5).

The rights guaranteed to employees under §109.03(5) include the right to be paid for compensable work, as defined by the regulations promulgated by the Department of Workforce Development under Wis. Stats. § 103.02. *See German v. Wis. Dep't of Transp.*, 223 Wis. 2d 525, 541-542, 589 N.W.2d 651 (Ct. App. 1998)(concluding chapter 109 is a mechanism for the enforcement of claims arising under Chapter 103, including those arising under regulations promulgated by DWD in furtherance of § 103.02). The question of whether donning and doffing is compensable "hours of work" is part-and-parcel of any claim for wages due under Chapter 109. *German*, 223 Wis. 2d at 539, n.5.

The Circuit Court correctly concluded that the Wisconsin Supreme Court in *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 2016 WI 13, 367 Wis. 2d 131, 876 N.W.2d 99, through its adoption of the relevant analysis by the Court of Appeals in *Weismann v. Tyson Prepared Foods, Inc.*, 2013 WI App 109, 350 Wis. 2d 380, 838 N.W.2d 502, has resolved the legal dispute that donning and doffing activities within the food preparation industry are compensable preliminary and postliminary activities under Wis. Admin. Code DWD § 272.12(2)(e). JDF-App. 024. Finding that the JDF case presents essentially the same fact situation as presented in the *Hormel* and *Tyson Foods* cases, the circuit court reached the same conclusions and results in this case under clear case precedent. JDF-App. 024-026.

On appeal, JDF does not dispute the circuit court's findings and conclusions concerning the compensability of Employee Class' donning and doffing activities under Wisconsin law. Instead, JDF seeks to render these activities non-compensable based on its CBA with the employees' union, the United Food and Commercial Workers International Union, Local 568. JDF's reliance on its CBA is flawed for the following reasons.

First, Wisconsin law lacks any exception for excluding donning and doffing from compensable hours worked, by contract, under a collective bargaining agreement. Unlike the federal FLSA, which expressly excludes from "hours worked" time spent in changing clothes at the beginning or end of each workday under the express terms of a bona fide collective bargaining agreement (*see* 29

U.S.C. § 203(o)), there is no equivalent exception under Wisconsin law. *See Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 428 (7th Cir. 2010). Wisconsin's mandate under § 109.03(5), precludes such contracting for an exemption from Wisconsin's requirements under Wis. Stat. § 103.02 and Wis. Admin. Code DWD § 272.12 to be paid for hours worked. Contrary to JDF's argument, the Wisconsin Supreme Court's decision in *Hormel* does not hold otherwise. Consequently, even if there were an agreement between JDF and the Union under the terms of their CBA (and there is no evidence of such an agreement), Wisconsin law does not allow parties to a collective bargaining agreement to bargain away employees' right to be paid for donning and doffing.

Second, the sole basis for obtaining a waiver or modification of Wisconsin wage law requirements pursuant to a CBA is Wis. Admin. Code DWD § 274.05, which does not apply in the instant case. The express language of § 274.05 restricts its application to waiver or modification of requirements of chapter 274 of the Code, not the requirements of chapter 272 that apply to donning and doffing. Even assuming § 274.05 could be applied outside chapter 274, the conditions for obtaining such a waiver or modification are not met in the instant case. There is no agreement in the CBA to exclude donning and doffing from hours worked. There is no written application by labor and management for a waiver or modification of the requirement to be paid for donning and doffing based on "practical difficulties or unnecessary hardship" in complying with the payment regulations, and indeed, there are no such practical difficulties or unnecessary hardship. Moreover, even if

there were such an agreement in the CBA and written application to the DWD, there is no determination by the DWD that under the circumstances granting such a waiver or modification is appropriate to the case. The decisions of the Wisconsin courts in *Hormel* and *Tyson Foods* preclude any determination that a "waiver or modification will not be dangerous or prejudicial to the life, health, safety or welfare of the employees", as further required under DWD § 274.05.

A. Wisconsin Law Does Not Permit Bargaining Away Employee Class' Right To Compensation for Donning and Doffing.

Wisconsin law does not allow agreements in CBAs to strip employees of rights to payment for hours worked guaranteed to them under Wisconsin's wage laws. The Seventh Circuit Court of Appeals decision in *Spoerle v. Kraft Foods, Inc.*, 614 F.3d 427, 430 (7th Cir. 2010) addressed this issue in rejecting Kraft Foods' argument that the FLSA's § 203(o) should preempt more generous state law governing donning and doffing.

In *Kraft Foods*, hourly employees of the plant in Madison, Wisconsin, were members of a FLSA collective action and state class action seeking payment for time spent donning and doffing safety and sanitation clothing. *Spoerle v. Kraft Foods Global, Inc.*, 626 F. Supp. 2d 913, 914 (W.D. Wis. 2009). Kraft Foods relied on its CBA representing an agreement not to be paid for donning and doffing and argued that § 203(o) preempted Wisconsin's law governing payment for those activities. The district court rejected Kraft Foods' preemption argument and granted

summary judgment in favor of the employees under state law. *Id.* at 921. Kraft Foods appealed.

The Seventh Circuit affirmed, concluding that the FLSA's § 203(o) does not preempt Wisconsin law, which lacks any equivalent exemption. *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d at 428, 430. In reaching its conclusion, the court rejected Kraft Foods' argument that Wisconsin was somehow meddling with collective bargaining if it could not rely on the agreement in the CBA. *Id.* at 429-430. The court recognized that "nothing in the Wisconsin statutes gives a state court, or other state official, any role in interpreting or enforcing a collective bargaining agreement. What Wisconsin requires is that the collective bargaining agreement be *ignored*, to the extent that it sets lower wages or hours than state law specifies." *Id.* (emphasis in the original). The court offered the following example to illustrate:

> Suppose the CBA set a wage of $8 per hour, higher than the current federal minimum wage of $7.25, while Wisconsin law set a minimum wage of $8.25. (Wisconsin's actual minimum wage is $7.25, but some states, including Illinois, use $8.25.) No one would contend that the employer could pay the workers $7.25 an hour, even though that is allowed by federal law if labor and management agree (this is the same sense that excluding donning and doffing time is allowed by § 203(o)). Which rate would prevail: $8 from the CBA or $8.25 from state law? According to § 218(a), the employer must pay $8.25 an hour; state law supersedes the collective bargaining agreement. And if this is so about the wage per hour, it is equally true about the number of hours.

Id. at 430.

The court went on to explain "[n]othing that labor and management put in a collective bargaining agreement exempts them from state laws of general application". *Id.*

> If a CBA were to say: "the workers will receive the minimum wage under FLSA, and not one cent more no matter what state law provides," that would be ineffectual. So too would an agreement along the lines of: "Because our base hourly rate is more than 150% of the minimum wage, we need not pay overtime rates under state law." States can set substantive rules that determine the effective net wage, even when a CBA plays a role (as it does when a law requires overtime pay at some multiple of the base pay set in a collective bargaining agreement). Every state's overtime-compensation rule could affect collective bargaining-- knowing that state law requires pay at time-and-a-half, labor and management might agree to a lower base rate per hour--but that effect would not prevent application of the state's wage-and-hour statutes.

Id.

The court recognized that management and labor acting jointly, through a CBA, have no more power to override state substantive law than they have when acting individually. States remain free to enforce laws that disregard CBAs altogether, which is what Wisconsin does when determining which donning and doffing time is compensable. *Id.* The appellate court concluded that the district court did not err in concluding that the plaintiffs were entitled to be paid for all time donning and doffing required by state law. *Id.*

Here, JDF is making essentially the same argument as Kraft Foods, i.e., that the Employee Class bargained away their right to payment for donning and doffing under state law. Even accepting JDF's faulty premise that the CBA represents an agreement not to be compensated for donning and doffing, *Kraft Foods* directs that

the CBA must be ignored if it sets lower compensable hours than state law specifies. The circumstances of this case are no different than if the parties bargained a provision setting a maximum workweek of 44 hours into their CBA. Such a provision would have to be ignored because it conflicts with the state law providing employees with a right to payment of overtime after 40 hours in a workweek. Indeed, this is exactly what Wis. Stat. § 109.03(5) says when it states that an employer may not, by contract, secure an exemption from Wisconsin's wage and hour law.

B. The Wisconsin Supreme Court's Decision in *Hormel Foods* Does Not Support a Right to Bargain Away Payment for Donning and Doffing.

JDF bases its primary argument in this case on two footnotes of the *Hormel Foods* decision, one from the concurring/dissenting opinion and another from the dissenting opinion, commenting on an issue that was not even before the Court. The dicta in *Hormel Foods* does not confirm nor support JDF's position that Employee Class' right to payment for donning and doffing in this case was somehow bargained away.

In the *Hormel Foods* case, the Wisconsin Supreme Court decided that: 1) DWD § 272.12 required Hormel Foods to compensate its employees for donning and doffing clothing and equipment that brought it into compliance with federal food and safety regulations and was integral to sanitation and safety in the employees' principal activities, namely food production; and 2) the required donning and doffing did not fall within the doctrine of *de minimis non curat lex.*

United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp., 2016 WI 13, ¶ 106, 367 Wis. 2d 131, 876 N.W.2d 99. The CBA between the Hormel employees and their union did not speak to the compensability of time spent donning and doffing and Hormel did not argue to the Court that no compensation was due because such compensation was bargained away. *Hormel*, 2016 WI 13, ¶ 77, ¶ 113 n.6, ¶ 145, n.3. The footnotes in the concurring and dissenting opinions making passing reference to "bargaining away" rights to compensation under state law should not be the basis for development of a rule of law on an issue that was neither argued nor briefed to the Court.

JDF's attempt to transform the two footnotes into a bargaining right under state law commensurate with rights under § 203(o) of the federal law, flies in the face of the fact that there is no equivalent exemption under Wisconsin law. Furthermore, the footnotes themselves tie any right to deviate from Wisconsin wage law to DWD § 274.05 and the Wisconsin Supreme Court's decision in *Aguilar v. Husco Int'l, Inc.*, 2015 WI 36, 361 Wis. 2d 597, 863 N.W.2d 556, neither of which support a general right to bargain away rights under state law or apply to the facts and circumstances of this case.

C. There Is No Basis for Waiver or Modification of The Requirement to Be Paid for Donning and Doffing Under DWD § 274.05 or *Husco*.

Wisconsin Administrative Code DWD § 274.05 states:

> **Waiver or modification.** Except as provided in s. DWD 274.08, where a collectively bargained agreement exists, the department may consider the written application of labor and management for a waiver or modification to the requirements of this chapter based upon the

> practical difficulties or unnecessary hardship in complying therewith. If the department determines that in the circumstances existing compliance with this chapter is unjust or unreasonable and that granting such waiver or modification will not be dangerous or prejudicial to the life, health, safety or welfare of the employees, the department may grant such waiver or modification as may be appropriate to the case.

1. DWD § 274.05 is limited to waiver or modification of requirements under Chapter 274.

Courts rely on the same rules of construction in interpreting regulations as in construing statutes. *See Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 45, 311 Wis. 2d 579, 754 N.W.2d 95. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.* ¶ 46 (*quoting State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967). Applying these well-established principles of construction to the DWD's regulation forecloses application of its waiver or modification language to the requirement for payment for donning and doffing at issue in this case.

By its express terms, DWD § 274.05 is limited to waiver or modification of "the requirements of *this chapter*", i.e., chapter 274. Wis. Admin. Code DWD § 274.05 (emphasis added). JDF seeks a waiver or modification of requirements that arise under an entirely different chapter of the Code, chapter 272, more specifically § 272.12(2)(e), governing preparatory and concluding activities.

Neither JDF, nor the concurring/dissenting justices in *Hormel*, cite to a single case where § 274.05 was applied outside Chapter 274, because there are none. JDF cannot rely on DWD § 274.05 to waive or modify its obligations under § 272.12(2)(e) because the plain language of the regulatory provision dictates that is applies only to waiver or modification of requirements under Chapter 274. This Court cannot disregard the express limitation included in DWD § 274.05.

JDF's reliance on *Husco* is similarly misplaced and does nothing to support its argument that state law allows for collectively-bargained exemptions to requirements for pay under chapter 272. The decision in *Husco* presented a unique set of facts not present in this case. As noted, the most obvious reason that *Husco* fails to support JDF's position is that the issue in that case was meal periods, under § 274.02 of chapter 274, rather than chapter 272, as is the instant case. *Husco* is good as far as it goes, but it does not go beyond supporting waiver or modification of requirements under chapter 274. *Husco* also involved an express provision included in the CBA, whereby labor and management agreed to an unpaid meal period of 20 minutes. *Husco Int'l Inc.*, 2015 WI 36, ¶ 1. There is no CBA provision governing donning and doffing in this case. Perhaps most importantly, the holding in *Husco* is limited to deciding whether the DWD's decision not to collect back wages for the shortened meal period was reasonable under the agency's interpretation of its own regulation under the facts of the case. There is no such DWD determination in this case.

Without any support in the statutes, regulations or case law, JDF seeks to extend § 274.05 and *Husco* to a donning and doffing claim. This court must reject JDF's argument to make such an extension.

> 2. Assuming, *arguendo*, that § 274.05 could be applied to requirements outside chapter 274, the requirements for a waiver or modification are not satisfied in this case.

There is no dispute that the first prerequisite for waiver or modification has not been met; there was no written application made by the Union and JDF for a waiver or modification of the requirement to pay for donning and doffing. Such an application, if it were filed, would need to be based upon the "practical difficulties or unnecessary hardship" in complying with regulatory requirements. Again, looking past the fact that it is a requirement under chapter 272 that JDF seeks to waive, there is no evidence of practical difficulties or unnecessary hardship, as evidenced by the fact that JDF can measure to the tenth of a second the amount of time employees spend donning and doffing each day.

Even if this Court were to look past the lack of any application, there is no determination from the DWD from which to seek guidance as to whether the factors required to approve a waiver or modification of DWD § 272.12 are satisfied in this case. This is one of the critical differences recognized by the circuit court in rejecting JDF's argument that DWD § 274.05 and the holdings in *Husco* permit the parties to modify compensability requirements for donning and doffing through collective bargaining. Indeed, it is an important distinction and one that forecloses

JDF from obtaining the waiver it seeks in this case. As the circuit court emphasized, the court in *Husco* had the benefit of an investigation, analysis and conclusion by the DWD, which is totally absent from this case. DWD § 274.05 authorizes the Department, the agency responsible for enforcing Wisconsin's wage provisions, to make a determination of whether its code provisions may be waived or modified. The *Husco* court relied on the Department's determination, recognizing that the exemption available under § 274.05 "may be granted in the Department's discretion" and the regulation's purpose is served "where the Department has made such a determination." *Husco*, 2015 WI 36, ¶ 37 (emphasis added). The court's decision makes clear that the determination under § 274.05 is not left to the parties to a collective bargaining agreement, as would be the case if JDF's argument for wholesale deference to the collective bargaining process were accepted. Even if the CBA between JDF and the Union did contain an agreement regarding compensability of donning and doffing, JDF cannot use it to circumvent the requirement under § 274.05 for a determination by the DWD.

Another critical difference, of even more significance, is that, under the circumstances of this case, granting a waiver or modification will negatively impact the life, health, safety and welfare of the employees, directly contrary to the requirements for waiver under § 274.05 and in contrast to the circumstances surrounding meal breaks addressed in *Husco*. Under established Wisconsin precedent, there is a direct relationship that exists between donning and doffing and the life, health, safety and welfare of employees, a relationship that the DWD found

lacking in the meal break issue decided in *Husco*. The Wisconsin court of appeals in *Tyson Foods* found that donning and doffing clothes and equipment was indispensable to the safety of the employees and the food they help produce. *Weissman v. Tyson Prepared Foods, Inc.*, 2013 WI App 109, ¶¶ 31, 37, 350 Wis. 2d 380, 838 N.W.2d 502. The Wisconsin Supreme Court in *Hormel* found the same direct relationship. *Hormel*, 2016 WI 13 ¶ 56 (the purpose served by the clothing and equipment requirements is the safety of the employees and the safety of the food they produce); ¶ 62 (putting on and taking off the required clothing and equipment at the beginning and end of the day cannot be eliminated without degrading the sanitation of the food or the safety of the employees); ¶ 63 (the employees are compelled by the nature of their jobs in food production to change clothing and wear equipment to ensure food and employee safety). In both cases, the courts found the employees were compelled by the nature of their jobs in food production to change clothing and wear equipment to ensure not only food safety but also employee safety. Both *Tyson Foods* and *Hormel* were food industry cases, identical to the case here involving JDF. As noted by the circuit court, the holdings in those cases have decided that the DWD's regulation governing compensability of donning and doffing is necessary to the life, health, safety and welfare of employees, and compel such a finding in the instant case.

III. THE EMPLOYEE CLASS' CLAIMS FOR UNPAID WAGES ARE NOT BARRED BY EQUITABLE CONSIDERATIONS.

A. JDF's Attempted Resort to Equity is Contrary to Established Law.

JDF attempts to dress up its failed collective bargaining argument in the clothing of general equitable principles. JDF begins with the incorrect premise that the Union and JDF reached an explicit agreement that employees would not be paid for all donning, doffing and walking time. From this false premise, JDF argues that: (1) employees are equitably estopped from pursuing a claim for unpaid wages: (2) employees waived any right to pursue a claim for unpaid wages; and (3) employees would be unjustly enriched if allowed to recover unpaid wages. Even though the Employee Class promptly brought legal action following the 2009 contract negotiations and seeks unpaid wages only going back two years from the filing of this action, JDF attempts to bar such claims based upon the doctrine of laches.

It is within the sound discretion of the circuit court to determine whether principles of equity should be applied. *Schauer v. Diocese of Green Bay*, 2004 WI App 180, ¶ 16, 276 Wis. 2d 141, 687 N.W.2d 766; *Sharpley v. Sharpley*, 2002 WI App 201, ¶ 13, 257 Wis. 2d 152, 653 N.W.2d 124. The party asserting an equitable defense bears the burden of proof to establish all elements of that defense. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 14, n.10, 290 Wis. 2d 352, 714 N.W.2d 900.

For many of the reasons discussed in Argument Section II *supra*, this Court should reject JDF's invocation of equitable principles. First, Wisconsin's statutory

law expressly prohibits contracts between an employer and its employees that permit the employer to avoid its obligation to pay wages owed to employees. This prohibition furthers an important public policy that employees be compensated for work they performed for the benefit of the employer. There is no question that an employer could not contract with its employees to pay them less than minimum wage or less than time and time-and-a-half for hours worked in excess of 40 in a workweek.

Permitting an employer, typically with superior bargaining power over that of its employees, to contract to not pay wages owed to employees would allow employers to flaunt the will of the Wisconsin Legislature. More than 70 years ago, the United States Supreme Court in *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945), prohibited employers from using prospective waivers to avoid the employers' wage and hour obligations. This is exactly what JDF attempts to do in this case. Wisconsin courts have recognized that a party cannot use equitable principles to avoid public policy obligations set forth in statutory provisions. *Anchor Point Condo Owners Ass'n v. Fish Tale Props, LLC*, 2008 WI App 133, ¶ 20, 313 Wis. 2d 592, 758 N.W.2d 144; *Deputy v. Lehman Bros., Inc.*, 374 F. Supp.2d 695, 710 (E.D. Wis. 2005).

Even if JDF could ignore clear statutory language and important Wisconsin public policy, it's equity argument is premised on the mistaken assertion that employees and JDF agreed that employees would not be compensated for donning, doffing or walking time. This alleged "agreement" is based upon the fact that,

during contract negotiations over the years, the Union withdrew proposals seeking payment for donning, doffing and walking time. JDF speculates that the only reason the proposals were withdrawn is because the Union must have agreed that JDF was not obligated to pay for donning, doffing and walking time. There is no evidentiary support for this alleged connection. JDF has not presented any language in any collective bargaining agreement between the Union and employer indicating any such agreement. JDF has not provided any proposal by the Union or company that was signed off on by both parties where the Union forfeited pay for employees for donning, doffing and walking in exchange for some other benefit. JDF has not provided any written agreement between the company and a single employee where the employee agreed that JDF did not have to compensate him or her for donning, doffing or walking time.

JDF claims that it would not have agreed to the same hourly pay increase if it also paid for donning, doffing and walking time. At most, JDF's contention would be that it unilaterally believed that the parties had reached an agreement, which does not establish any such agreement. JDF's equitable doctrine theories are premised on an alleged agreement between the Union and JDF that no compensation was owed to employees for donning, doffing and walking time. Because no such agreement exists, JDF's resort to equity fails.

A fundamental principle of equity is that the party seeking equity must come with clean hands. *Marthinson v. Brooks Equipment, Inc.*, 36 Wis. 2d 209, 223, 152 N.W.2d 849 (1967). Here, JDF shirked its responsibility to pay its employees for

time spent donning, doffing and walking to work stations for twenty plus years to the tune of more than $3.5 million. In 2006, shortly after the United States Supreme Court in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), the Union notified JDF of its obligation to pay for donning, doffing and walking time and requested that it immediately begin doing so. JDF ignored this communication. In 2013, JDF finally acknowledged its obligation to pay for these activities and began doing so without any change to the existing CBA. JDF understood its legal obligation to compensate its employees for donning, doffing and walking time. JDF refused to pay its employees for the five-year period for 2008 through 2013 for donning, doffing and walking time. Instead, it retained the more than $765,000.00 owed to its employees for this time period as well as more than $3.5 million owed to its employees for these activities for the period 1985 through 2008 (227 x 23 years x $675). JDF cannot engage in such wrongful conduct and then ask the Court to apply principles of equity to excuse its violation of Wisconsin law.

The Jefferson County Circuit Court, in its exercise of sound discretion, found that the claims of the Employee Class were not barred by principles of equity. The circuit court did not abuse its discretion in so finding and its decision should be affirmed.

B. Equitable Estoppel is Not Applicable to The Present Case.

JDF's equitable estoppel argument is based on the incorrect premise that its employees, through the collective bargaining process, agreed that they were owed no compensation for donning, doffing and walking. The elements for equitable

estoppel are: (1) action or non-action; (2) by one against whom estoppel is asserted; (3) which induces reasonable reliance by another party; and (4) which is to the third party's detriment. *Wosinski v. Advance Cast Stone Co.*, 2017 WI App 51, ¶ 40, 377 Wis. 2d 596, 901 N.W.2d 797. Even if the elements of equitable estoppel are established, whether to apply the doctrine is within the sound discretion of the circuit court. *Id*. ¶ 39. Proof of estoppel must be established by clear, satisfactory and convincing evidence and may not rest of mere inference or conjecture. *Id*. ¶ 39; *Somers USA, LLC v. State Dep't. of Transp.*, 2015 WI App. 33, ¶ 13, 361 Wis. 2d 807, 864 N.W.2d 114. Equitable estoppel should not be applied to avoid the effect of statutory obligations. *Anchor Point Condo Owner's Ass'n v. Fish Tale Props., LLC*, 2008 WI App 133, ¶ 20, 313 Wis. 2d 592, 758 N.W.2d 144.

As to the first element, JDF claims that the alleged wrongful conduct by the Union was withdrawing a bargaining proposal and ratifying the collective bargaining agreement. Part of every negotiation between parties involves making proposals and withdrawing proposals. There is nothing improper about doing so. Similarly, there is nothing improper about the Union members ratifying the collective bargaining agreement. There is nothing in the 2009 CBA that indicated that Union members were forfeiting their right to receive pay that JDF wrongfully withheld under state law.

Reasonable reliance is an essential element of equitable estoppel. *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶ 42, 374 Wis. 2d 513, 893 N.W.2d 212. There is no basis for JDF to allege that it reasonably relied on either the Union's

withdrawal of a proposal or the ratification of the CBA by Union members. There is no evidence proffered by JDF that the mere withdrawal of one party's proposal or ratification of a CBA that did not include reference to the withdrawn proposal meant that the parties had reached an express agreement as to that withdrawn proposal. Throughout the parties long history of bargaining, there were many hundreds or even thousands of proposals proffered by one party and then withdrawn during the course of bargaining for any number of reasons.

JDF cannot, as a matter of law, established by clear and convincing evidence that it reasonably relied on the Union's withdrawal of a donning and doffing proposal or ratification of a CBA to establish that the parties reached an agreement that employees forfeited their right to receive compensation for donning, doffing and walking time. Nor can JDF meet its burden of demonstrating that the circuit court abused its discretion in rejecting JDF's equitable estoppel defense.

C. Waiver is Not Applicable to The Present Case.

Similar to JDF's equitable estoppel argument, JDF claims that Employee Class members waived their right to recover unpaid wages for time spent donning, doffing and walking because the Union allegedly agreed that no wages were owed for these activities. JDF's equitable waiver argument is essentially identical to its statutory waiver argument discussed in Section II above and the Court should reject the equitable waiver argument for the reasons discussed above.

The equitable doctrine of wavier requires a voluntary and intentional relinquishment of a known right – here the statutory right to be paid for hours

worked. *Muluaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis. 2d 760, 768, 235 N.W.2d 460 (1975). With the waiver of statutory rights, as here, a party must also show a clear and specific renunciation of the right. *Id*. Courts have discretion to determine whether a finding of waiver is appropriate. *Sharpley v. Sharpley*, 2002 WI App 201, ¶ 13, 257 Wis. 2d 152, 653 N.W.2d 124.

JDF cannot meet the high showing necessary to establish a clear and specific intentional relinquishment of the right of employees to be paid for donning, doffing and walking time. JDF claims 227 employees clearly, specifically, voluntarily and intentionally gave up their statutory and regulatory right to be paid for compensable time spent donning, doffing and walking when the Union withdrew a proposal to include that employees be paid a certain number of minutes for these activities. As noted above, no CBA provision or even a proposal signed off by both parties indicating such an agreement has been proffered by JDF. Instead, it relies on speculation as to the meaning of the withdrawal of a bargaining proposal. Such speculation does not satisfy the clarity and specificity necessary to establish PDF's burden to prove a waiver.

JDF's final waiver argument is that 227 employees waived their right to make a claim for unpaid wages because they accepted their paycheck with less than what they were entitled to receive. JDF's argument would turn state and federal wage and hour law on its head. JDF contends that, unless an employee objects at the time her or she receives the paycheck, that employee loses the right to do so. Wisconsin law requires an employer to pay employees for all hours worked.

Wisconsin law provides an employee with a cause of action to recover unpaid wages, provided a suit is commenced within two years of when wages were to be paid. Wisconsin law does not require an employee to object at the time of payment of their shorted wages or to refuse to accept a paycheck that is incorrect.

If the doctrine of waiver could be used as suggested by JDF, employers would be free to flaunt the Wisconsin Legislature's determination as to the law of the state by not paying employees all wages earned with the hope that the employee would not promptly object to the underpayment. JDF's attempt to use equity to obtain such an inequitable result should not be permitted.

D. Unjust Enrichment is Not Applicable to The Present Case.

JDF's unjust enrichment argument is premised on the same inaccuracies as its previous arguments – because Employee Class members allegedly agreed to not be compensated for donning, doffing and walking time, they would be unjustly enriched if permitted to retain their wages.

In what is a bizarre attempt to use equity, JDF claims that that it, rather than the 227 employees who were not paid for time they worked to the tune of aggregate savings to JDF in the amount of over $765,000.00, is the victim in this scenario. JDF acknowledges that employees were owed wages for donning, doffing and walking and began paying for this time in late 2013. JDF's unjust enrichment defense is particularly offensive given that it was JDF who was unjustly enriched for more than twenty years in the amount of over $3.5 million that should have been paid to its employees for time spent donning, doffing and walking.

JDF's contention that its employees retained a benefit that they were not entitled to and that equity should step in an reward JDF, who refused to pay employees what they were owed for more than two decades, is unsupportable in law or equity. JDF cannot establish the critical element in an unjust enrichment claim – the employees retained the pay that they had owed "under circumstances making it inequitable for the [recipient] to retain the benefit." *Watts v. Watts*, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987). This Court should affirm the circuit court's exercise of its discretion rejecting JDF's unjust enrichment theory.

E. Laches is Not Applicable to The Present Case.

JDF's final equity argument is that class claims should be barred by the doctrine of laches. The elements for the defense of laches are: (1) unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert their right on which the basis is sued; and (3) prejudice to the parties asserting the defense in the event the action is maintained. *Smart v. Dane Cty. Bd. of Adjustments*, 177 Wis. 2d 445, 458, 501 N.W.2d 782 (1993). The doctrine of laches must be decided on the particular circumstances of each case. *Pugnier v. Ramharter*, 275 Wis. 70, 76, 81 N.W.2d 38 (1957). The burden of proof on all elements rests on the person asserting the laches defense. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 14, n.10, 290 Wis. 2d 352, 714 N.W.2d 900.

JDF has not satisfied either the elements or the policy behind the laches defense. There was no unreasonable delay in Employee Class members asserting

their rights. In 2009, as a part of the collective bargaining process, the Union made a proposal that employees be paid for donning and doffing time. When the parties did not agree, the Union withdrew the proposal. One year later, JDF employees commenced the present action to recover wages owed. The fact that litigation has lasted nearly eight years, due in part to stays agreed to by all parties, in no way suggests any delay by Employee Class members. Although JDF did not pay wages lawfully owed to its employees beginning in 1985, the Employee Class is only seeking wages beginning two years prior to the date of the commencement of this action. Not surprisingly, JDF has cited no Wisconsin case in which the court barred a timely wage claim based on the doctrine of laches.

JDF argues that employee class members were aware of the United States Supreme Court case in *IBP v. Alvarez,* in 2006 but delayed taking any action until suit was filed in 2010. It is undisputed that in 2006, the Union communicated to JDF that, based upon the *Alvarez* decision, JDF owed wages to its employees for donning, doffing and walking. JDF ignored this communication. In 2009, the next time the Union and JDF met to bargain the next contract, the Union proffered a proposal that Union members be paid for donning, doffing and walking time. When the parties were unable to reach an agreement on the matter, the Union withdrew the proposal and shortly thereafter, employees pursued wage claims in a judicial action.

JDF also cannot satisfy its burden of proof on the second element of laches – that JDF lacked knowledge that the employees would assert their right to

compensation for unpaid work time. It is undisputed that in 2006, JDF was informed that it owed wages to its employees for donning, doffing and walking time and it chose to ignore the request. The issue again was raised in 2009 during contract bargaining and, when there was no agreement, the Union withdraw its proposal. JDF was well aware that prior to the 2010 filings, its employees were asserting a right to be paid for time spent donning, doffing and walking.

JDF also cannot satisfy the final element of the laches defense, prejudice. This lawsuit seeks unpaid wages going back two years from the date of filing. There is no allegation that any witness with relevant information cannot be located. There is no allegation that any documents have been lost or destroyed. In fact, federal and state law require that employers retain timekeeping and payroll records for more than two years. Once this lawsuit was commenced, the parties were obligated to preserve relevant records. Accordingly, if any relevant records were lost or destroyed after the commencement of the litigation, any "prejudice" would be attributable to JDF.

JDF cannot meet its burden to establish the laches defense.

CONCLUSION

On the basis of the argument and authorities set forth above and the record in this case, the Wisconsin Court of Appeals should affirm the circuit court's decision denying JDF's motion for summary judgment and affirm judgment for the Employee Class as stipulated by the parties and entered by the Jefferson County circuit court.

Dated this 30th day of November, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief, including the statement of the case, the argument, and the conclusion and excluding other content, is 10,803 words.

The text of the electronic copy of this brief is identical to the text of the paper copy.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 30th day of November, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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STATE OF WISCONSIN, COURT OF APPEALS
DISTRICT IV

Steven J. Piper, Robert Bue, Scott R. Olson and Leslie T. Smith,
Plaintiffs,
Jonathon Kracht, Gary Benes and Charles Manley
Plaintiffs-Respondents,

v.
Jones Dairy Farm
Defendant-Appellant.

District: 4
Appeal No. 2018AP001681

Circuit Court Case No.
2010CV001210
Three-Judge Appeal

ON APPEAL FROM THE CIRCUIT COURT JEFFERSON COUNTY
THE HONORABLE WILLIAM F. HUE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

Submitted this 17th day of December, 2018 by:

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I. PLAINTIFFS DID NOT, AND COULD NOT, DISPUTE THAT DONNING AND DOFFING TIME IS NOT COMPENSABLE BY VIRTUE OF THEIR COLLECTIVE BARGAINING RELATIONSHIP AND HISTORY WITH JONES DAIRY FARM.

A. PLAINTIFFS NEVER DISPUTED JONES DAIRY FARM'S FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, FORFEITING THESE ARGUMENTS ON APPEAL.

Jones' May 6, 2015 Statement of Facts in Support of Defendant's Motion for Summary Judgment, R. 81; P-App. 005-21, upon which this appeal is predicated, is true and undisputed as a matter of law, and Plaintiffs' failure to oppose it solidifies this. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751 ("The court takes evidentiary facts in the record as true if not contradicted by opposing proof."). Moreover, Plaintiffs' "failure to object constitutes a forfeiture of the right on appellate review." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. Therefore, the only evidence shows that the Union agreed and used consistently non-compensability as an effective bargaining to secure favorable economic terms.

It is undisputed that the Union made written proposals for donning and doffing pay in negotiations in 1994, 1997, 2000, 2004 and 2009, and ultimately withdrew those proposals, successfully using them as a bargaining chip to secure Jones' agreement to increase each employees' base hourly wage rate, every year. R. 81, ¶¶ 52-101; P-App 014-019. Jones then paid, and the employees retained, all the compensation to which they were entitled pursuant to the terms of each CBA. R. 81, ¶¶ 62, 67, 72, 81, 101, 106; P-App 10-20.

If Plaintiffs disputed any of the foregoing facts, they should have submitted supporting documents while Defendant's Motion for Summary Judgment was pending. *Schroeder, Gedlen, Riester & Moerke v. Schoessow*, 103 Wis. 2d 380, 385, 309 N.W.2d 10 (Wis. App. 1981). Because Plaintiffs did not do so, the facts are true and undisputed and all arguments in contravention of those facts are forfeited.

B. EXPRESS LANGUAGE EXCLUDING COMPENSATION FOR DONNING AND DOFFING TIME IS UNNECESSARY AND WOULD BE UNUSUAL.

Contrary to Plaintiffs' argument, an absence of explicit language disclaiming compensability does not equate to a lack of agreement. (Pls.' Br. at 10.) Indeed, courts routinely determine that the absence of explicit language signals employees' acquiescence to non-compensability. *See, e.g.*, *Marshall v. Amsted Rail Co., Inc.*, 817 F. Supp. 2d 1066, 1077 (S.D. Ill. 2011) ("[A] prolonged period of acquiescence can convert a custom or practice into an implied term of a labor agreement."); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 479-80 (5th Cir. 2001) (per curiam); *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 674 (2d Cir. 1994). This is no surprise because CBAs typically document the rights and privileges the parties have actually agreed upon; they do not recite the universe of benefits and rights the parties are not obligated to provide.

Moreover, courts have held that even where there is not a longstanding pattern of negotiating over the non-compensability of donning and doffing time, as there is here, where a contract is silent on the matter, unions necessarily understand that the time is non-compensable. *See, e.g.*, *Arcadi*, 38 F.3d at 675 (explaining where, for a four-year period, the CBA was silent on non-compensability for donning and doffing time, the union

necessarily "underst[ood] that changing time was not compensable under its agreement"); *Williams v. W.R. Grace & Co.*, 247 F. Supp. 433, 435 (E.D. Tenn. 1965) (four-year history of exempting clothes changing from compensation established custom and practice). Here, every time the Union and employees requested extra pay for donning and doffing time, they acknowledged when they withdrew their proposal that, at least for the remainder of that contract, the time would be non-compensable.

II. NOTWITHSTANDING PLAINTIFFS' SELECTIVE QUOTATIONS, WISCONSIN LAW PERMITS COLLECTIVE BARGAINING REGARDING THE COMPENSABILITY OF TIME SPENT DONNING AND DOFFING.

Although Plaintiffs argue that the Lead Opinion in *Hormel* controls the outcome of this case, they fail to acknowledge that "a majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court." *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (citation omitted). "[I]t is deemed the doctrine of the case . . . when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum, but is a judicial act of the court which it will thereafter recognize as a binding decision." *Chase v. American Cartage Co.*, 176 Wis. 235, 186 N.W. 598, 599 (Wis. 1922). In *Hormel*, a majority stated that compensation for donning and doffing may be collectively bargained away, as the employees have done here. 367 Wis.2d 131, ¶ 113 n.6 (Roggensack, C.J., concurring & dissenting in part); *id.*, ¶ 145, n. 3 (Gableman, J., dissenting). Accordingly, the Court recognized that the collective bargaining exception to donning and doffing time exists. That doctrine must be applied here.

A. SECTION 109.03(5) IS INAPPLICABLE TO PLAINTIFFS' CLAIMS FOR DONNING AND DOFFING PAY.

Disregarding the precedential effect of the separate writings in *Hormel*, Plaintiffs focus instead on extraneous arguments. Plaintiffs would have the court ignore plain language and selectively quote only the second half of the first sentence of Wis. Stat. § 109.03(5) for the proposition that employees cannot waive their right to pay for donning and doffing by contract with their employer. (Pls' Br. at 19.) However, reviewing the whole statute confirms that Plaintiffs are incorrect. By its terms, Section 109.03(5) is limited to the rights provided in that "section" – i.e., 109.03 – and therefore is not applicable to Wis. Admin. Code Chapter DWD 272. Section 109.03 deals with timeliness of pay, not the compensability of activities. As such, Section 109.03 is inapplicable to these claims.

Additionally, Section 109.03(5) specifically excludes "[e]mployees covered under a valid collective bargaining agreement." Wis. Stat. § 109.03(5) ("Except as provided in sub. (1) . . . ."); Wis. Stat. § 109.03(1)(a). Contrary to Plaintiffs' invitation, the "court is not at liberty to disregard the plain, clear words of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58 ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Full consideration of Section 109.03(5) confirms it does not preclude agreements between employers and unions regarding the non-compensability of donning and doffing time.

B. SECTION (DWD) 274.05 APPLIES TO THE COMPENSABILITY OF TIME SPENT DONNING AND DOFFING.

Conversely, Plaintiffs impermissibly limit the scope and significance of Section DWD 274.05. Contrary to Plaintiffs' assertions, Section DWD 274.05 applies to Chapter DWD 272 generally, and to time spent donning and doffing in particular, as four justices

indicated in *Hormel*. Section DWD 274.05 states "waiver or modification" is available from the requirements of this "chapter" – i.e., DWD 274. Even a cursory review of Chapter DWD 274 confirms it is not simply about the meal periods at issue in *Husco*, as Plaintiffs suggest.

In addition to meal periods addressed by Section DWD 274.02(3), Section DWD 274.03 also requires overtime payment for hours worked beyond 40 per week. Chapter DWD 274 defines "hours worked" by incorporating the very provisions at issue here: "The provisions of s. DWD 272.12 apply to the interpretation of hours worked under this chapter." Wis. Admin. Code § DWD 274.045. Considered together, this demonstrates that in Wisconsin, just like in every other state, unions have the authority to bargain over compensation for donning and doffing, as they have for decades under 29 U.S.C. § 203(o).

If Section DWD 274.05 did not extend to Chapter DWD 272, the employees in *Husco* could still have recovered for their shortened meal periods because Section DWD 272.12(2)(c) also defines hours worked to include breaks less than thirty minutes in length. The fact that they could not recover confirms that Section DWD 274.05 necessarily extends to Section DWD 272.12. As important, the Wisconsin Supreme Court overtly signaled Section DWD 274.05 allows parties to bargain away donning and doffing compensation, even if otherwise compensable pursuant to Section DWD 272.12. *Hormel*, 367 Wis. 2d 131, ¶ 113 n.6 (Roggensack, C.J., concurring & dissenting in part); *id.*, ¶ 145, n. 3 (Gableman, J., dissenting).

C. THE CONDITIONS FOR WAIVER ARE AS PRESENT HERE, AS THEY WERE IN *HUSCO*.

Contrary to Plaintiffs' assertion, a written application for waiver or modification of the compensability of time spent donning and doffing is not a prerequisite. (Pls.' Br. at 29.) As confirmed in *Husco*, the failure to obtain a waiver is merely a "technical violation," not warranting a back pay award. *Aguilar v. Husco Int'l, Inc.*, 2015 WI 36, ¶¶ 35, 863 N.W.2d 556, 361 Wis.2d 597.

Plaintiffs' argument conflates the circumstances justifying parties requesting a waiver with the circumstances justifying the recognition and application of a waiver. The first sentence of Section DWD 274.05 permits parties to a CBA to apply to DWD for a waiver or modification "based upon practical difficulties or unnecessary hardship in complying therewith." Seizing upon that language, Plaintiffs assert that there are no practical difficulties for Jones to comply with the requirement to pay for time spent donning and doffing. (Pls.' Br. at 29.) Even assuming *arguendo* that there is no difficulty, unnecessary hardship plagues the Company's compliance because it negotiated (and dutifully paid) financial terms and conditions predicated on the agreement that donning and doffing would be non-compensable. The Company bargained and fulfilled its labor contract in good faith, yet its Union later orchestrated this lawsuit to seek recovery for more pay than it bargained and the employees agreed to receive. This is a hardship for a local family business.

More importantly, a formal request is not required for a waiver or modification to be recognized and applied. While the first sentence of Section DWD 274.05 outlines why

parties might request a waiver, the second sentence outlines the two requirements for a waiver to be recognized and applied to a set of facts: (1) compliance with the requirement at issue is unjust or unreasonable, and (2) the waiver or modification is not prejudicial to the life, health, safety or welfare of the employees. Wis. Admin. Code § DWD 274.05.

Plaintiffs argue that a determination from DWD regarding these two conditions is a prerequisite to finding a waiver. However, contrary to Plaintiffs' constricted reading, Section DWD 274.05 does not state if, *and only if*, DWD makes a determination will a waiver be granted. The fact that Section DWD 274.05 presents DWD as one option for determining the presence of a waiver does not necessarily preclude other options. And, to be clear, this does not mean Jones and other employers can rely on their CBAs to deny wages without any recourse for their employees. Indeed, employees can always bring lawsuits to challenge whether the conditions for granting a waiver are present, as they have here. The Court will now determine whether the conditions for granting a waiver are present, even if DWD did not have an opportunity to do so.

Bypassing DWD is not uncommon in the enforcement of Wisconsin's wage and hour laws. In fact, it is expressly endorsed. Wis. Stat. § 109.11(2). Wage claims can be initiated with DWD or the circuit court. Plaintiffs skipped DWD and filed this case directly in court, despite thereby reducing by half the liquidated damages that could be recovered for the class. Had Plaintiffs filed with DWD, DWD could have addressed the waiver issue before this case reached a court. As demonstrated by the courts' decision in *Husco*, where the parties did not obtain a waiver under Section DWD 274.05 and the court proceeded as

though they had, the parties here may also receive a determination from this Court regarding that same issue.

In *Husco*, the issue was whether taking a 20-minute unpaid meal period, which was 10 minutes shorter than Wisconsin law requires, was "prejudicial." The Court confirmed it was not. Here, the issue is whether donning and doffing without pay, which the parties stipulated takes 4.3 minutes each day, is prejudicial. It is not. Not only is the time less than half of that at issue in *Husco*, the non-compensability of time spent donning and doffing is also expressly endorsed by Section 203(o) of the Fair Labor Standards Act, the primary purpose of which is to eliminate "labor conditions detrimental to the . . . health . . . and general well-being of workers," 29 U.S.C. § 202, and something to which the Union has agreed to for decades.

III. PLAINTIFFS REST THEIR COUNTER-ARGUMENTS TO JONES' EQUITABLE DEFENSES ON FACTS NOT SUPPORTED BY THE RECORD.

Plaintiffs argue that for years they diligently pursued their alleged right to donning and doffing pay and that Jones "shirked its responsibility to pay its employees." (Pls.' Br. at 34.) This statement, and all of Plaintiffs' arguments concerning the Company's equitable defenses, grossly misconstrue the facts. As stated in the Company's unopposed Statement of Facts, for years Plaintiffs asked for donning and doffing pay and instead, through bargaining, received increased economic advantages. Plaintiffs claim that no agreement was reached, that Jones knew what it was doing was illegal, and that they alerted the Company time and again of their right to donning and doffing pay. These

recharacterizations of the facts are subterfuge to distract from the obvious: Plaintiffs now want a better deal.

Indeed, one cannot reasonably characterize the Plaintiffs' decades-long failure to make any claim against Jones as "diligent." It was not until a letter in 2006 that Plaintiffs in any material way stated they claimed any right to pay for donning and doffing time, yet Plaintiffs never followed up on this letter. (Pls.' Br. at 35.) R. 81, ¶ 84; P-App. 017. Moreover, the Union has not filed any grievance with the Company regarding pay for clothes-changing time, nor a wage claim with DWD. R. 81, ¶¶ 86-87; P-App. 017.

The next bargaining session in 2009 followed the Union's well-established bargaining strategy: the Union expressly proposed that the Company give extra pay for donning and doffing, and ultimately withdrew that proposal in exchange for increased economic advantages. R. 81, ¶ 92; P-App. 018. Additionally, the Union ensured the incentive plans for all non-production work activity, including donning, doffing, and related walking, was accounted for in their pay plan. R. 81, ¶ 96, 101; P-App. 019.

Plaintiffs also submit that they were no match against Jones' superior bargaining power. (Pls.' Br. at 33.) It is difficult to imagine more evenly matched bargaining powers than those between Plaintiffs and Jones. For many decades, the hourly-paid employees working for Jones have been represented by the Union. R. 81, ¶ 2; P-App 005. Plaintiffs' powerful Union consistently secured for them favorable economic terms. To argue otherwise is to ignore the undisputed facts and collective bargaining realities.

Moreover, if Plaintiffs were truly dissatisfied with the Company's position to not compensate for donning and doffing time, mechanisms are in place to secure a more

favorable proposal. Under the National Labor Relations Act, Plaintiffs could have stood their ground and withheld their labor. Their failure to do so, their ratification of the negotiated agreement, and the implementation of wage increases in each contract secured in 1994, 1997, 2000, 2004, and 2009, demonstrates Plaintiffs were well-satisfied with the results of bargaining.

Jones entered into these CBAs in good faith, relying on and complying with them for decades. Thus, equitable estoppel, laches, waiver and unjust enrichment bar Plaintiffs' attempt to force Jones to pay the very benefit Plaintiffs agreed they would not receive.

IV. PLAINTIFFS' ARGUMENT THAT THE LEAD OPINION IN *HORMEL* CONTROLS THIS COURT'S DECISION IS FUNDAMENTALLY FLAWED.

Plaintiffs overstate the precedential effect of the Lead Opinion in *Hormel* on the *de minimis* doctrine and in so doing, inappropriately depend on the aggregated dollar amount at issue, rather than the time involved to which they stipulated. (Pls.' Br. at 13-17.) Focusing the analysis on the dollar amount is incorrect because it inevitably favors employees who are paid higher wages, resulting in unequal treatment under the law. *Hormel*, 367 Wis. 2d 131, ¶ 187 n.26 (Gableman, J., dissenting). To avoid this, the focus of a *de minimis* analysis must be on the time actually at issue.

More problematic, is that *Hormel* did not establish precedent concerning the *de minimis* doctrine as a majority of Justices did not reach the same conclusion. The Lead Opinion "[a]ssum[ed], without deciding" that the time at issue was not a "trifle." *Id.*, ¶ 105 (lead opinion). The Concurrence/Dissent adopted the test from *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984), holding the time at issue was *de minimis*, but for the parties'

stipulation, which was entered because the time at issue was easy to record. *Id.*, ¶ 132 (Roggensack, J., dissenting). And the Dissent never reached the issue, although if it had, it stated the time was *de minimis*, relying in part on the refrain from *Lindow*, 738 F.2d at 1062: "Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable." *Id.*, ¶¶ 181, 187 n.24 (Gableman, J., dissenting).

The Concurrence/Dissent and the Dissent were correct when they stated the time at issue in *Hormel* is *de minimis*. Similar logic should apply here and Jones would support adopting the factor test from *Lindow*. Here, the donning and doffing time is 25% less than that in *Hormel*, and well below the *Lindow* 10-minute marker. The administrative difficulty of recording this time was considerable, which is why the Parties stipulated. Finally, while donning and doffing occurred regularly, that is outweighed by "the uncertainty of how often employees performed the tasks and of how long a period was required for their performance." *Lindow*, 738 F.2d at 1063. Accordingly, any donning and doffing time here was *de minimis* as a matter of law.

V. CONCLUSION.

For the foregoing reasons, the judgment of the Circuit Court should be reversed, and summary judgment granted to Defendant-Appellant.

Submitted this 17th day of December, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c)2 for a reply brief produced with proportional font.

The length of this brief is 2,981 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of December, 2018.

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MAILING CERTIFICATION
CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on December 17, 2018, this reply brief was given to a third-party carrier, Breakaway Couriers, for delivery to the Clerk of Court of Appeals. I further certify that the reply brief was correctly addressed.

Dated this 17th day of December, 2018.

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