

NO. A06-0178

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State of Minnesota  
**In Supreme Court**

Gary J. Milner, Toni Bjerke, Annette Barrett, individually on behalf  
of themselves and all others similarly situated,

*Respondents,*

v.

Farmers Insurance Exchange,

*Appellant.*

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

In its opening brief, Farmers demonstrated that the trial court's three post-verdict rulings were erroneous. The assessment of civil penalties and the imposition of an injunction were erroneous because these claims were never pleaded in the complaint and because there is no private right of action for this relief. The finding that Farmers had "violated" Minn. Stat. §§ 177.21-.35 by "misclassifying" its claims representatives was erroneous because it contravenes the jury's verdict and because misclassification is not an actionable violation of the statute. The award of attorney fees was erroneous because the plaintiffs were not prevailing parties and, assuming, *arguendo*, that they were prevailing parties, the award improperly failed to account for the limited results obtained by plaintiffs.

In their opposition, plaintiffs seriously misrepresent the trial court record. Part I of this reply brief addresses those misstatements. Part II addresses plaintiffs' argument that the trial court's finding of a violation of Minn. Stat. §§ 177.21-.35 is consistent with the jury's verdict that Farmers had not failed to pay any overtime. Part III of this reply brief addresses the right of plaintiffs to seek injunctive relief and civil penalties – remedies expressly reserved to the Commissioner of Labor and Industry – as well as the failure of plaintiffs to establish the prerequisites for injunctive relief. Part IV addresses the reasons why the trial court's award of attorneys' fees should be reversed. Finally, Part V addresses the companion issues, raised by plaintiffs in their cross-appeal, that Minn. Stat. § 177.27 gives plaintiffs the right to have civil penalties payable to themselves, not the

`state, and plaintiffs’ argument that they are entitled to a multiplier or “enhancement” of their attorneys’ fees.

## ARGUMENT

### I. **BECAUSE THE ONLY CLAIM RAISED BY THE COMPLAINT IS A VIOLATION OF MINN. STAT. § 177.25, THE JURY’S VERDICT RESOLVED ALL STATUTORY VIOLATION CLAIMS IN FAVOR OF FARMERS.**

#### A. **The Amended Complaint fails to allege a statutory violation for “misclassification.”**

Farmers’ principal brief pointed out at pp 14-18 that plaintiffs made only two claims for relief in the Amended Class Action Complaint. They are claims for alleged failure to pay straight time pay for hours worked in excess of the “regular work week” of 38.75 hours – a claim dismissed by the trial court and not appealed – and a claim for failure to pay for overtime hours worked required by Minn. Stat. § 177.25 – the claim that was tried. The Rules of Civil Procedure contemplate “notice pleading,” but require notice, not only of a violation of a rule of law giving rise to a claim for relief, but some factual context demonstrating actionable conduct. *See, Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (Docket No. 05-1126, May 21, 2007).

Plaintiffs’ Amended Complaint, the complaint on which the trial below was conducted, determines what was and was not pleaded. (A.16-30). In order to bolster their arguments on appeal, plaintiffs now attempt to retrospectively reinterpret their Amended Complaint to buttress the trial court’s decision. Plaintiffs’ use of hindsight to try and rewrite their Complaint for purposes of this appeal is unjustified.

Scrutinized carefully, the Complaint fails to demonstrate that plaintiffs sought relief for “misclassification” or record keeping violations. Plaintiffs vigorously assert (at pp. 26 and 27) that they pleaded the violations which formed the basis for the trial court’s ruling. But they never answer the obvious question, “Where in your Amended Complaint did you plead it?” The first claim for relief, is “FOR FAILURE TO PAY COMPENSATION” and prays for damages for unpaid wages. (A.23). The second claim for relief seeks a “Declaratory Judgment” because Farmers allegedly “has failed to pay overtime compensation.” (A.25). And the third claim for relief seeks an accounting of the “overtime compensation not paid . . . plus waiting time penalties [for terminated employees].” (A.26).

Plaintiffs’ Amended Complaint clearly and consistently alleges throughout that Farmers violated the Minnesota Fair Labors Standards Act (1) by failing to “pay the plaintiff Class the regular rate of hourly compensation for hours worked in excess of 38 3/4 hours to 48 hours per week;” and (2) by refusing to “pay overtime compensation.” (A.16, 21 at (b)(ii) and (iv), 24, 25 at (a) – (d), and 27). Nowhere did plaintiffs allege that Farmers’ alleged misclassification of the plaintiff class is a violation of the statute or that they were seeking civil penalties for that violation.

Even assuming, *arguendo*, that misclassification was somehow pleaded, plaintiffs ignore the fact that a definition (of “employee”) cannot be “violated.” Plaintiffs cite *Martin v. Indiana-Michigan Power Co.*, 381 F.3d 574, 584 (6th Cir. 2004), an FLSA case, for the proposition that misclassification is a violation of that statute. *Martin* says no such thing. In *Martin* the Sixth Circuit held that the FLSA was violated because the

employee had not been paid overtime compensation – not because he had been misclassified. *Id.* at 584. The misclassification issue was addressed in light of the liquidated damages provision and Martin’s claim that the employer had not acted in good faith in classifying him. *Id.* at 584-85. There is no parallel claim of bad faith in this case.<sup>1</sup>

The distinction is this – the act of classifying an employee as exempt or non-exempt itself is not a violation of the statute – classification is simply a determination as to whether the individual is an “employee” *subject to* the statute and its minimum wage and overtime pay provisions. The trial court found that Farmers had violated § 177.23, subd. 7(6). But that section only *defines* who is covered by the Act. The statute imposes no sanction for mistakenly believing that an employee is not covered by the Act if there is no failure to pay the required minimum wage or overtime. Only where an employee subject to the Act is not paid the required compensation (as in *Martin*) is the statute violated.<sup>2</sup>

**B. Plaintiffs’ Amended Complaint never pleaded a right to the injunctive relief imposed by the trial court.**

Plaintiffs assert (at p. 49) that the Class Complaint sought injunctive and declaratory relief. While that is technically true, plaintiffs certainly did not ask for the

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<sup>1</sup> The FLSA contains a “good faith” defense which permits an employer who has failed to pay overtime to avoid liquidated damages. 29 U.S.C. § 259. The Minnesota statute has no comparable provision.

<sup>2</sup> Plaintiffs’ citations to Minn. R. 5200.0180 and 5200.0220 similarly fail to support their argument that misclassification of employees is a violation of the Act. Neither .0180 nor .0200 states, expressly or by implication, that misclassification is a violation of Chapter 177.

*kind* of injunctive and declaratory relief the trial court imposed. What the plaintiffs actually requested was an injunction restraining Farmers from requiring plaintiffs to work so many hours (A.27-28), and a declaration establishing the amount of past unpaid wages and overtime pay due to the Class. (A.25). The Complaint does not come close to seeking the relief obtained by the plaintiffs in their post-trial motions. Although the Complaint also asked for “all relief available under Minn. Stat. § 177.27” (A.30), it didn’t use the term “civil penalties,” much less put Farmers on notice that plaintiffs were seeking civil penalties or an injunction for misclassification or failing to keep records.

The lack of pleading on this issue involves a great deal more than mere lack of notice to Farmers. Here, the plaintiffs not only failed to plead, but also failed to prove the essential facts necessary to support injunctive relief: a present failure to pay overtime, a violation that will continue unless enjoined, irreparable harm, or even that anyone in the plaintiff class would be affected by an injunction. *Cherne Industrial, Inc. v. Grounds & Associates*, 278 N.W.2d 81, 92 (Minn. 1979) Indeed, as discussed below, Farmers had already reclassified many of its Minnesota claims representatives before trial. Another large group of property claims representatives was classified as nonexempt before the trial court ruled. *Infra* at IV.

**C. The Amended Complaint does not seek penalties for recordkeeping violations and no evidence of recordkeeping violations was presented at trial.**

Plaintiffs proclaim (at p. 31) that at the inception of their case, they pleaded a violation of Minn. Stat. § 177.30. Glaringly absent, however, is a citation to the record

for that statement. There is, in fact, no mention of a violation of § 177.30 anywhere in the Amended Complaint or in the original Complaint which commenced the action.

Again misstating the trial record, plaintiffs argue that the issue of failure to keep time records was tried by consent because Farmers admitted in discovery that it did not maintain time records for plaintiffs. But it is black letter law that consent to try an issue not raised by the pleadings cannot be inferred from the mere fact that evidence was received without objection which would have been pertinent to such an issue had it been raised, where the same evidence *was* pertinent to issues that were actually raised by the pleadings. *Briggs v. Kennedy Mayonnaise Products*, 297 N.W. 342, 346 (Minn. 1941). Plaintiffs' argument is also flawed because the discovery responses claimed to admit violations of § 177.30 were never offered or received as evidence at trial. Thus, that issue could not have been "tried" by consent.

Plaintiffs also assert that prior to trial Farmers stipulated to the number of pay periods at issue in the litigation and this constitutes consent with respect to the § 177.30 violation. But the stipulation as to the number of paydays in the class period was made not prior to trial, but just prior to submission of the case to the jury. It was an attempt to assist the jury to calculate damages. It is not clear how stipulating to the number of paydays in the class period was supposed to put Farmers on notice that plaintiffs were seeking relief for failure to maintain records. A violation of § 177.30 was never pleaded and nothing in the record up to the submission of the case to the jury put Farmers on notice that plaintiffs were seeking relief based on a violation of that section.

Consequently, Farmers could not request jury instructions or a special verdict question on the issue.

Plaintiffs allege (at p. 9) that the trial court's April 5, 2005 Order rejected Farmers' "feigned contention" that plaintiffs "had not plead" a records keeping violation. There is absolutely no reference in the Order, at A. 49 or elsewhere, to Farmers' objection that the record keeping violation was not pleaded. The trial court simply ignored the objection. This Court should not do so.

**D. Farmers never stipulated to a bench trial for plaintiffs' post-trial claims for civil penalties or injunction.**

Plaintiffs assert (at p. 50) that Farmers stipulated that the trial court would decide civil penalties and injunction issues. In our principal brief (at p. 18, fn. 4), we pointed out that there is no evidence of any such stipulation in the record. Despite ridiculing Farmers' position (p. 50, fn. 4.), plaintiffs have failed to cite the Court to the record to support the claimed stipulation. No such stipulation exists.

**II. THE POST TRIAL RULINGS ERRONEOUSLY NULLIFY THE JURY'S FINDING THAT FARMERS DID NOT FAIL TO PAY ANY OVERTIME.**

**A. The jury verdict resolved Farmers' liability for violation of Minn. Stat. § 177.25 – the only claim pleaded – in favor of Farmers.**

At the heart of the trial court's post-verdict rulings is its conclusion that "(t)here is clear evidence in the case that Claims Representatives routinely worked in excess of 48 hours." (A. 49). This "conclusion of law" is impossible to reconcile with the jury's

verdict finding that plaintiffs were entitled to no compensation for overtime hours worked.

The plaintiffs' misguided interpretation of the special verdict is that "the jury found liability but no damages." That is not what the jury was asked to do and it is not what it did.

First, plaintiffs claim the jury found that Farmers violated the statute by classifying the claims representatives as exempt. The verdict does not say that. (A.36-38). The jury was asked to find facts. The specific facts regarding status as employees were whether the class members' primary duties were directly related to management functions or general business operations of the defendant and whether the class members regularly exercised discretion and independent judgment in the course of their duties. *Id.* The answers to these questions do not, by themselves, establish that Farmers was liable to the Class. To establish that Farmers was liable to the Class, the plaintiffs also had to prove that Farmers employed class members for more than 48 hours in a work week and failed to pay them for the time at one and one-half times their regular rate of pay. Minn. Stat. § 177.25, subd. 1. That is what they failed to prove. Plaintiffs assert (p. 30) that the jury could not decide what amount of back pay was appropriate. But the jury DID decide what amount of back pay was appropriate: zero. (A.36-38 at questions 3, 6, 9, and 12). The plaintiffs, having the burden of proof, failed to convince the jury that the class had worked overtime for which they were entitled to compensation.

Plaintiffs speculate that the jury must have determined that the damages were speculative and not capable of being computed on a class-wide basis. (p. 30). Neither

the trial court nor this Court should be called upon to speculate on how the jury arrived at its verdict. *Cf.* Minn. R. Evid. 606.

Plaintiffs assert at p. 29 that “[d]espite the jury’s assessment of damages,” the district court properly found that there was “clear evidence that claims representatives routinely worked in excess of 48 hours.” In short, plaintiffs concede that the trial judge simply disagreed with the jury. As noted above, the statutory violation is the failure to pay for overtime hours worked. If the jury found no money was due for overtime hours worked, it found that there was no violation. We acknowledge that there was evidence in the record which, if believed, would have supported a verdict that at least some claims representatives worked more than 48 hours in some work weeks, but the jury rejected that evidence. That is what juries do – weigh the evidence and make decisions. Plaintiffs have never claimed – in post-trial motions or on appeal – that the jury’s verdict was not supported by the evidence. As we demonstrated in our brief, absent an appropriate motion, the trial judge is not permitted to nullify the jury’s verdict.

Plaintiffs assert that because Farmers did not propose a special verdict question asking for a separate determination of the number of hours worked each week by class members, it somehow waived the right to a jury decision on that issue and the trial court was thus free to make a finding under Minn. R. Civ. P. 49.01. (p. 45). Rule 49.01 provides that a jury trial is waived on all issues that are omitted from instructions (and the verdict) without objection. But it was plaintiffs who had the burden of proving the number of hours worked as a component of damages. Their failure to ask for a separate verdict question on the number of hours worked and to object when none was given

means that they are bound by the jury's finding that there was no violation because there were no damages.

Plaintiffs attempt to distinguish damages -- the amount of money which will fairly and adequately compensate plaintiffs -- from the number of hours worked each week. Plaintiffs claim (at pp. 29-30) these issues are completely independent and that the damages failed because the jury was not persuaded by the expert testimony and statistical evidence introduced, while they did find ample evidence supporting a finding that claims representatives worked more than 48 hours per week. Again, there is no citation to the record to support this statement. Only two class members actually testified, Gary Milner and James Oliver (deceased). While there was testimony by plaintiffs' expert witness about out-of-court survey responses in which some survey respondents claimed huge overtime hours, there was no *admissible* testimony that anyone else worked over 48 hours in a week. The jury was free to discredit this exaggerated testimony and obviously did so. Plaintiffs' Rule 49 argument is undercut by the evidence.

**III. MINN. STAT. § 177.27 DOES NOT GIVE PRIVATE PLAINTIFFS – OR THE TRIAL COURT – THE RIGHT TO STAND IN THE SHOES OF THE COMMISSIONER OF LABOR AND INDUSTRY.**

**A. The trial court's award of civil penalties and an injunction is unsupported by the plain language of the statute and unsupported by competent legislative history.**

The meaning of the "In addition..." sentence in Minn. Stat. § 177.27, Subd. 8 is at the heart of plaintiffs' claim for civil penalties and an injunction:

An employer who pays an employee less than the wages and overtime compensation to which the employee is entitled under sections 177.21 to 177.35 is liable to the employee for the full amount of the wages, gratuities,

and overtime compensation, less any amount the employer is able to establish was actually paid to the employee and for an additional equal amount as liquidated damages. *In addition, in an action under this subdivision the employee may seek damages and other appropriate relief provided by subdivision 7 and otherwise provided by law.* An agreement between the employee and the employer to work for less than the applicable wage is not a defense to the action.

(Emphasis supplied). Plaintiffs accuse Farmers of selectively reading Minn. Stat. § 177.27, subd. 8. But they persistently ignore the “in addition ...” and “otherwise provided by law” language which is also part of the statute.

Plaintiffs attempt (at p. 14) to provide an explanatory rewording of the italicized sentence. Standing the plain meaning of the words on their heads, plaintiffs argue that “in addition” really means, “alternatively” or even “notwithstanding the foregoing.” Not only is this rewording not supported by any record citation or legal authority, it is incorrect and defies logic. If, as plaintiffs argue (at p. 10), the second sentence were intended simply to “denote the alternative remedies a private plaintiff can plead,” subdivision 7 evidences that the legislature would have listed all available remedies. *See* Minn. Stat § 177.27, subdivision 7 (listing each action the Commissioner of Labor may take upon finding a violation of the statute).

The plain meaning of the paragraph is far more straightforward. The sentence beginning, “In addition . . .” has two plain requirements. First, it applies only to “[a]n employer who pays an employee less than [required by the minimum wage or overtime provisions of the statute].” The sentence only applies if there is first a finding – under the prior sentence – that the employer “is liable to the employee” for failure to pay the

required wages. Here, the jury found no failure to pay in the first instance. Without a finding of liability the second sentence simply cannot come into play.

Second, the sentence does not say that in addition to the remedies provided by subd. 7, the employee can seek other remedies provided by law. It says that the employee can get remedies provided by subdivision 7 *and* otherwise provided by law. Civil penalties are not otherwise provided by law in district court actions. It is clear that the legislature intended only the Commissioner to have those enforcement powers.

Plaintiffs assert (at p. 17) that the 1996 amendments “mandated imposition of civil penalties for employers who violated the Act.” This is legally incorrect. The Commissioner may award civil penalties only when the Commissioner finds a willful or repeated violation. Here, even if plaintiffs could seek civil penalties, they would be required under the statute to plead and prove a repeated or willful violation. Minn. Stat. § 177.27, subd. 7. The jury did not find *any* violation for failure to pay overtime compensation, let alone a repeated or willful violation.

Plaintiffs assert (at p. 13) that the Commissioner’s power to issue a cease and desist order prohibiting the employer from engaging in violative practices is equivalent to an injunction. However, a cease and desist order triggers a right to an administrative hearing, not an injunction. *See* Minn. Stat. § 177.27, subd. 4. Even then, the Commissioner’s order is not an injunction. The Commissioner must bring an action in district court to get an order enforcing his cease and desist order. *See* Minn. Stat. § 177.27, subd. 5. There is no indication anywhere in section 177.27 that the Commissioner’s orders are self-enforcing as an injunction order would be.

**B. The affidavits of the bill's author and legislative witness testimony about earlier drafts of the 1996 amendments to Chapter 177 are not competent evidence of legislative intent.**

It is well-settled in Minnesota that “a lone legislator is not competent to testify about the intent of a statute, even if she or he authored it.” *In the Matter of Welfare of D.L.*, 486 N.W.2d 375, 381 (Minn. 1992); *see also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 48:12, *Reports of committees, commissions, and other sources not connected with the legislature – Views of draftsmen* (6th ed.) (“In this country as in England, the views of draftsmen are not generally considered appropriate grounds upon which to base interpretation. For example, a lone legislator is not competent to testify about the intent of a statute, even if he or she authored it. There is not necessarily a correlation between the understanding and intent of a draftsman and the understanding and intent of the legislature.”).

Yet, plaintiffs’ entire legislative history argument is based on affidavits and testimony of the author and two assistant attorneys general about the purpose of the 1996 amendments to Chapter 177. This is legally inappropriate.

Plaintiffs rely (at p. 16) on a November 11, 2004 affidavit of Representative Robert Leighton (SA19-22), the author of the 1996 amendments to Minn. Stat. Chapter 177, to support their interpretation of the statute. In addition, plaintiffs cite Representative Leighton’s February 5, 1996 testimony before the House Committee on Labor Management Relations to bolster their interpretation of the 1996 amendments. Neither the affidavit nor the testimony is admissible as to what the statute means. *Matter of Welfare of D.L.*, 486 N.W.2d at 381.

Plaintiffs also cite testimony from Scott Strand, Deputy Counsel at the Attorney General's Office, and Assistant Attorney General Nancy Leppink to support their legislative history argument. Although plaintiffs insinuate (at p. 16) that the Attorney General's office was involved in the drafting of the 1996 amendments, there is nothing in the record to show that the Attorney General's Office or either of these testifying individuals was involved in drafting the amendments at issue. The Department of Labor and Industry took no position on the bill. (SA031).

Moreover, there is no evidence that the testimony plaintiffs rely on was intended to influence the committee's understanding of the bill as adopted. In fact, while the cited testimony was given on February 5 and 9, 1996, the bill was not passed until March 21, 1996. During the interim, significant changes were made to what ultimately became the current version of § 177.27. *See* Remarks of Rep. Goodno March 8, 1996, Exh. B to Affidavit of Martha Kobberdahl, 11/12/2004 (Docket No. 121) at p. 2. (SA038).

For all of these reasons, plaintiffs' legislative history argument carries no weight and should be disregarded.

**C. Punitive damages are an alternative to civil penalties in an appropriate case under Chapter 177.**

Plaintiffs argue (at p. 22) that punitive damages are not available under Chapter 177 because they have their basis in contract. This is a startlingly novel proposition, unsupported by citation to any authority. Plaintiffs' assertion (at p. 22) that the legislature did not intend punitive damages to be an available remedy contradicts Assistant Attorney General Nancy Leppink's testimony which plaintiffs quote with

approval on the preceding page. There is nothing in the statute or case law suggesting that damages in a wage/hour case are “contractual” in nature. Whatever a wage claim may have been at common law, it is clearly a statutory remedy under Chapter 177, and no case law holds otherwise.

**IV. THE TRIAL COURT’S ORDER AWARDING ATTORNEYS’ FEES TO THE PLAINTIFFS SHOULD BE REVERSED AND REMANDED BECAUSE THE TRIAL COURT FAILED TO APPLY THE *ANDERSON V. HUNTER, KEITH* STANDARDS.**

As argued in Farmers’ principal brief (at pp. 29-38), assuming that the plaintiffs are entitled to any award of their attorneys fees as the prevailing parties, the present award should be reversed and remanded with instructions to follow Rule 119, Minn. Gen. R. Pract. and the methodology set out in *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 630 (Minn. 1988). The plaintiffs failed to comply with Rule 119 and the trial court failed to make findings that the attorneys’ fees were considered and awarded under the standards adopted by the Court in the *Hunter, Keith* case.

In response, plaintiffs cite *Gully v. Gully*, 599 N.W.2d, 814, 825 (Minn. 1999), claiming that the trial court can waive compliance with Rule 119, Minn. Gen. R. Pract. and the fact question of the reasonableness of attorneys’ fees should be determined on the evidence submitted, the facts disclosed by the record of the proceedings and the court’s own knowledge of the case. *Gully* is completely inapposite. In that case, a protracted and bitterly contested post-decree child support dispute, the successful party sought \$2,500 in fees and was awarded \$1,500 with minimal documentation. *Id.* at pp. 825-26. That case was decided under Minn. Stat. § 518.14 which prescribes a special set of

criteria for reviewing attorneys' fee requests in marriage dissolution cases. Moreover, the court's resolution of the fee dispute in that case reflects the practical need to avoid escalating every routine child support case into World War III on the issue of attorneys' fees.

In this case, by contrast, literally millions of dollars in fees were at issue and the parties submitted detailed information on the reasonableness of rates, hours and the results obtained. Nothing in the *Gully* case or the other cases cited by plaintiffs suggests that *Hunter, Keith* has been overruled or superseded as to fee awards in class action employment disputes.

Plaintiffs complain (at p. 56) that the trial court permitted Farmers "many rounds of briefing" opposing the fee petition. What plaintiffs fail to point out is that the necessity for multiple submissions arose because plaintiffs' initial fee application did not contain any itemization of work done and hours charged for particular tasks and otherwise grossly failed to comply with Rule 119, Minn. Gen. R. Pract. After plaintiffs finally turned over their time records, Farmers had to re-brief its objections based on the time records.

Plaintiffs now argue, after the fact, that the court of appeals was wrong to compare the results obtained in the MDL case – almost \$4 million for the Minnesota class – with the results in this case. Plaintiffs again use subsequent events to bolster their arguments on appeal. Whatever the ultimate result in the MDL case – it is, after all, still pending – the fact remains that the jury in this case awarded the plaintiff class nothing. Plaintiffs' only "award" (if you can call it that) was the award of civil penalties which, if they are

available, must be paid to the State of Minnesota. Although plaintiffs argue (at p. 68) that the injunction should be valued by the future overtime earnings of Minnesota claims representatives who were reclassified as nonexempt, Farmers reclassified all of their PIP claims representatives as nonexempt and began paying overtime in June 2001, before this suit was filed. (Tr., Oct. 18, 2004 at 111). Farmers classified auto physical damage claims representatives as nonexempt – nationwide – in July, 2004, before this case went to trial. (Tr., Oct. 6, 2004 at 22-24). Property claims representatives were reclassified as nonexempt – nationwide – in February, 2005, before the decision in this case. (Humerickhouse Aff. ¶2, filed May 27, 2005, Docket No. 144). Only liability claims representatives in Minnesota were reclassified as a result of this case. Plaintiffs' success was minimal compared to their claims by any standard.

**V. THE COURT OF APPEALS CORRECTLY RULED THAT CIVIL PENALTIES CANNOT BE PAID TO PLAINTIFFS AND THAT NO FEE ENHANCEMENT IS APPROPRIATE.**

**A. In the absence of any contrary statutory direction, civil penalties under Minn. Stat. § 177.27 should be paid to the State of Minnesota.**

Prior to the 1996 amendments to Minn. Stat. § 177.27, that section governed only the powers and duties of the Commissioner of Labor and Industry. *See*, Minn. Stat. § 177.27 (1992). (The current version of Minn. Stat. § 177.27, which has not been amended since 1996, is at A.1 to A.15). Although the Commissioner had investigatory and enforcement powers and could enforce orders through Administrative Procedures Act contested case proceedings or in district court, there was no civil penalty provision. *Id.* A separate section allowed employees to recover unpaid wages, liquidated damages and

attorneys' fees in a civil action. Minn. Stat. § 177.33 (1992). In Minn. Laws 1996, Ch. 386, the legislature extensively revised § 177.27. It added subd. 7, greatly expanding the Commissioner's enforcement powers, and for the first time gave the Commissioner the ability to impose civil penalties for willful or repeated violations of the statute. *Id.*, see sect. 3 *supra*. At the same time, it repealed Minn. Stat. § 176.33, the employee remedy provision, and folded it into the Commissioner's Powers and Duties section as § 177.27, subd. 8.

If the legislature had stopped there – giving the Commissioner additional enforcement powers in subd. 7 – its intent would be beyond dispute. The civil penalties available under that subdivision could be sought only by the Commissioner and would go to the State, as do civil penalties assessed by other state enforcement agencies. But the legislature also moved former § 177.33 into § 177.27 as subdivision 8 and added the sentence disputed in this case: “In addition, in an action under this subdivision, the employee may seek damages and other appropriate relief provided by subdivision 7 and otherwise provided by law.” Plaintiffs claim that this language was intended to give a prevailing employee a right to be paid civil penalties, as well as every other remedy available to the Commissioner. As summarized *ante*, the more logical reading is that this language permits only relief *additional* to unpaid wages and liquidated damages awarded under the preceding sentence, and only when it is “other appropriate relief” and “otherwise provided by law.” Minn. Stat. § 177.27, subd. 8.

The Minnesota legislature, like Congress, “... does not hide elephants in mouseholes.” See, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). When

the legislature intends that a statutory penalty is to be paid to an aggrieved employee, it is perfectly capable of expressing that intention. Minn. Laws 1996, Ch. 386 – the *same* session law which amended § 177.27 – provided additional employee remedies for violation of various provisions of Minn. Stat. Ch. 181:

A person may bring a civil action seeking redress for violations of sections 181.02, 181.03, 181.031, 181.032, 181.08, 181.09, 181.10, 181.101, 181.11, 181.12, 181.13, 181.14, 181.145, and 181.15 directly to district court. An employer who is found to have violated the above sections is liable to the aggrieved party for the civil penalties or damages provided for in the section violated.

*Id.* sec. 12. If the legislature had intended to create new law allowing private plaintiffs to seek civil penalties under Chapter 177 for the first time, it would have said so in unmistakable language. The fact that the legislation *expressly* grants aggrieved employees the right to recover civil penalties for violations of Chapter 181, but *expressly* grants only the Commissioner the right to recover civil penalties under Chapter 177, inescapably leads to the inference that civil penalties under Ch. 177 are payable only to the state.

Minnesota courts have long recognized that statutory civil penalties do not inure to the benefit of plaintiffs in lawsuits; they are instead tools of public enforcement. *See Hoffman D.D.S. v. Delta Dental Plan of Minnesota*, 517 F.Supp. 564, 573 (D. Minn. 1981) (holding that an individual plaintiff does not have standing to recover the civil penalty provided for in Minn. Stat. § 325D.56 because it is a tool for public enforcement only); *State by Humphrey v. Alpine Air Products*, 500 N.W.2d 788, 792 (Minn. 1993) (“The civil penalty also furthers a legitimate purpose other than punishment: it lowers

the incentive to engage in consumer fraud and thus aids the state in enforcement of the statute.”). Individual plaintiffs simply do not have standing to seek civil penalties in civil lawsuits. *See also* Minn. Stat. § 8.31 (providing that a person may act as a “private attorney general” for specific violations of specific consumer protection statutes, but does *not* allow them to recover civil penalties as damages).

Plaintiffs cite *Milw. Police Assn v. Hegerty*, 693 N.W.2d 738, 747 (Wis. 2005) (at pp. 38-39) for the proposition that “it makes no sense to have one legislative wage payment scheme, meant to protect the right of employees, permit private litigants to recover civil penalties, but to have another, possibly more expansive, compensation and wage payment scheme preclude payment to the same party in interest, i.e., the employee.” The Wisconsin Supreme Court case cited does not support that proposition. The case states, in a footnote, that because of the statutory language courts have discretion *not to award civil penalties or expenses to employees in wage cases*. The Wisconsin statute at issue awards successful employees a “penalty” of up to 100% of wages due and unpaid. Wis. Stat. § 109.11(2). Although the Wisconsin statute calls the payments “civil penalties,” they look much like the liquidated damages required by Minn. Stat. § 177.27 and permitted by 29 U.S.C § 216(b). This is simply a case where one state’s statutes require or permit payment of “penalties” to the employee and another state’s statutes do not.

Because no language of Minn. Stat. § 177.27 indicates that civil penalties for violations of Chapter 177 are to be paid to the employees – when the same legislature

clearly made penalties under Chapter 181 payable to employees – this Court should affirm the court of appeals on this issue.

**B. Because the plaintiffs failed to show an extraordinary degree of success, they are limited to their lodestar attorneys' fees.**

Plaintiffs argue in their appeal that the court of appeals departed from the appropriate standard of review in reversing the trial court's award of an enhancement to the plaintiffs' lodestar attorneys' fee claim. Plaintiffs claim that the award of attorneys' fees under statutes providing for an award of reasonable attorneys' fees can be reviewed only for abuse of discretion, and that the court of appeals violated that standard of review in this case.

The trial court completely failed to explain why it was awarding the plaintiffs' counsel a \$629,000 bonus on their attorneys' fees (a 1.5X multiplier of their lodestar attorneys' fees of \$1,258,179). (A-63-67). Instead, it relied on a 1997 Louisiana federal trial court case suggesting that lodestar multipliers "typically" range from 1.0 to 4.0. (*Id.* A.65).

Contrary to the trial court's assertion that multipliers are "typical," there is in fact a strong presumption that the *unenhanced* lodestar amount is the reasonable statutory fee. By statute, prevailing plaintiffs' counsel are only entitled to their "reasonable . . . attorney fees." *See* Minn. Stat. §177.27. Only exceptional circumstances warrant an upward adjustment to a lodestar figure. The United States Supreme Court strictly limited the use of upward adjustments in class actions with statutory attorneys' fee awards. *Blum v. Stenson*, 465 U.S. 886, 898 (1984) (citing *Hensley v. Eckerhart*, 461 U.S. 424, (1983)).

In *Blum*, plaintiffs' counsel sued under a statute allowing for reasonable fees for prevailing plaintiffs. 465 U.S. at 897. The lower court determined a lodestar amount for the reasonable fees generated by plaintiffs' counsel, and then applied a 1.5 multiplier. *Id.* at 898. The Supreme Court reversed the award and eliminated the multiplier noting that enhancement is the rare exception:

[W]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of *exceptional success* an enhancement award may be justified.

*Id.* at 901 (citing *Hensley*)(emphasis added).

An "exceptional case" requires more than simply prevailing on some claims. Whatever complexity and novelty inhered in the issues presented here, as in *Blum*, were already fully reflected in the hours presented by plaintiffs' counsel:

The "quality of representation," however, generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional."

*Id.* at 899. Plaintiffs here offered no evidence whatsoever that the quality of service rendered was superior to what should reasonably be expected in light of the rates charged, nor that their success was "exceptional." The U. S. Supreme Court has continued to reject enhanced attorneys' fee awards, *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986), and *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992) (rejecting enhancement for contingency of recovery under fee-shifting statutes).

On page 3 (¶14) of its Fee Order (A.69), the trial court posited that a multiplier was appropriate here because counsel's efforts conferred a benefit upon "not only the Class, but also for all future FIE claims representatives in the State of Minnesota."<sup>3</sup> There is nothing in the record or the trial court's Memorandum which suggests that the benefit warrants a windfall for plaintiffs' counsel. In *Blum*, the Supreme Court rejected the lower court's mere assertion that the outcome was of "great benefit to a large class of needy people." *Id.* That mere assertion is not enough to warrant an upward adjustment. And merely being deemed the "prevailing party," does not impede a downward departure. *Id.* (citing *Hensley* at 461 U.S. 434-36).

The "results obtained" do not provide an independent basis for an upward multiplier. *Id.* Instead, the outcome of the litigation is one factor in the reasonableness determination of the original lodestar amount (*before* a multiplier is considered). *Id.* In *Hensley*, the Court noted that in cases where one party is entitled to fees because it is a "prevailing" party, the "results obtained" factor becomes important for an upward *or* downward departure. 461 U.S. at 434. Thus, even if a party is deemed "prevailing," a downward adjustment is warranted where a plaintiff achieves only partial success, even if some limited benefit has been conferred upon the class.

The district court applied the law incorrectly in its attorneys' fees determination. This is not a discretionary standard, it is a *de novo* standard. The district court relied on the legal determination of a multiplier for "common fund" cases, which simply does not

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<sup>3</sup> The trial court was wrong. Most Minnesota claims representatives were already reclassified as nonexempt before the trial court ruled. See Section IV, *supra*.

apply to adjudicated claims with statutory fee provisions. Applying the proper standard to these facts, applying a multiplier was legal error and must be reversed. By failing to articulate its reasons for applying a multiplier, the trial court failed to follow this Court's direction in *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d at 629-630. Its failure to articulate why, in the face of very limited success, the plaintiffs were entitled to the extraordinary award of a 1.5X multiplier is an error of law which the court of appeals properly corrected.

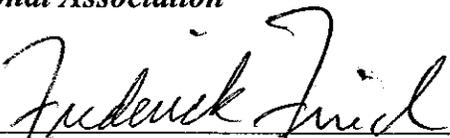
*Hunter, Keith* requires that trial courts (1) assess the reasonableness of hours and hourly rates; (2) reject fees charged for claims on which the prevailing party did not prevail, and, importantly; (3) assess the overall success of counsel for the prevailing party in setting the fee. If the Court affirms the courts below on the award of a lodestar attorneys' fee, it should reject the plaintiffs' plea for an enhanced lodestar fee because it is unwarranted by this Court's prior precedents given the limited success obtained by the plaintiffs.

## CONCLUSION

Based on the arguments in Appellant's initial brief and in this brief, Appellant respectfully requests that the judgment of the trial court be reversed and the case be remanded to the trial court with instructions to enter a judgment of dismissal. If this Court affirms any part of the judgment, the case should be remanded with instructions to reduce the award of attorneys' fees to an amount reflecting a reasonable hourly rate, a reasonable number of hours and a reasonable downward adjustment to reflect the limited results obtained.

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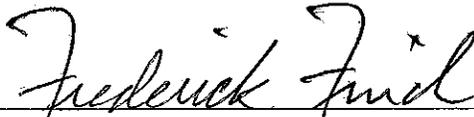
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**CERTIFICATION**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.1, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6835 words. This brief was prepared using Microsoft Word 2003 word processing software.

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