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No. A10-~~049~~

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Eduardo Rios, Rodolfo Gutierrez, Evelia Mendoza, Jennifer Brickweg, Marsha Winter,  
Juan Guerra, Jr., Valeria Cabral, Margarita Ruiz, Todd E. Nord, Jeff Rudie, and John  
Patrick Kelly, Jr.,

Appellants/Cross-Respondents,

v.

Jennie-O Turkey Store, Inc., a Minnesota Corporation, West Central Turkeys, Inc. (a/k/a  
Pelican Turkeys, Inc.), and Heartland Foods Co.,

Respondents/Cross-Appellants.

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**RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL  
APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## INTRODUCTION

As noted in Jennie-O's opening brief, if this Court affirms the district court's summary judgment orders, as it should, it need not consider Jennie-O's related appeal. If the Court considers Jennie-O's related appeal, however, the district court's orders certifying a class, denying decertification, denying Jennie-O's Frye-Mack motion, and permitting Appellants to pursue a claim for punitive damages should be reversed.

The district court failed to adhere to the controlling authority in Whitaker v. 3M Co., 764 N.W.2d 631 (Minn. App. 2009), which makes clear that plaintiffs bear the burden to prove each and every element of Minn. R. Civ. P. 23 by a preponderance of the evidence. Thus, to certify a class, a district court must conduct a rigorous analysis, resolve evidentiary disputes pertaining to the elements of Rule 23, and make factual findings that the plaintiffs have carried their burden to prove each element of Rule 23.

Here, however, the district court held that it was required to accept Appellants' allegations as true, and was required to resolve doubts regarding the propriety of class certification in favor of class certification. Doing so was directly contrary to Whitaker's requirement that Appellants bear the burden of proof by a preponderance of the evidence. The district court also relied on Appellants' class *allegations* and so-called "common questions" as the basis to certify a class, rather than weighing all of the available evidence and making findings of fact that Appellants had carried their burden of proof. This was an abuse of discretion under Whitaker.

Whitaker makes clear that, as part of their burden, Appellants must "bridge the gap" between their individual claims and putative class claims by proving, by a

preponderance of the evidence, a common practice by Jennie-O in violation of the Minnesota Fair Labor Standards Act's ("MFLSA") overtime requirements, and by proving that the evidence (if any) supporting their own MFLSA overtime claims would prove such claims for other Jennie-O employees.

But the district court did not find that there was a common practice of unpaid MFLSA overtime at Jennie-O. It never considered any evidence concerning Jennie-O's compliance with the MFLSA's 48-hour overtime statute at all. Indeed, the district court did not even find that there was a common practice of unpaid donning and doffing at Jennie-O. Instead, the district court accepted Appellants' promise that their experts *could* produce evidence of unpaid donning and doffing in a proposed future analysis. In doing so, it failed to address the contrary evidence presented by Jennie-O's expert and fact witnesses and failed to make findings of fact on this issue. That was an abuse of discretion under Whitaker. And when Appellants' promises concerning their expert evidence later proved to be false – Appellants' experts both admitted that they had simply assumed the existence of unpaid donning and doffing time based on the instructions of Appellants' attorneys – the district court erred again by not correcting its first mistake and decertifying the class.

When the record as a whole is rigorously analyzed – including Appellants' experts' admissions that they made no effort to demonstrate *any* unpaid donning and doffing, much less unpaid MFLSA overtime on a class-wide basis, and the Appellants' own admissions that they have no evidence of any unpaid donning and doffing for themselves, much less other employees – Appellants cannot establish the Rule 23

requirements of commonality, typicality, predominance, manageability and superiority by a preponderance of the evidence.

Appellants' concession that "there can be no punitive damages without a substantive law violation" confirms that the district court's order permitting Appellants to pursue a claim for punitive damages was error. Appellants now agree that if the district court correctly granted summary judgment on their MFLSA overtime claim because they had no evidence of unpaid MFLSA overtime, then the district court's earlier punitive damages order must be reversed. Further, Appellants concede that the issue before the district court on their motion to amend to add a claim for punitive damages was whether Jennie-O deliberately disregarded its MFLSA overtime obligations, *i.e.*, the "substantive law" at issue. But the district court did not consider whether there was even *prima facie* evidence of a MFLSA overtime violation when it granted Appellants' motion, much less whether there was clear and convincing evidence that Jennie-O deliberately disregarded that law. Indeed, Appellants never presented such evidence, and the district court itself later realized that Appellants had *no* evidence of a MFLSA overtime violation and granted summary judgment. Jennie-O could not possibly have "deliberately disregarded" Appellants' MFLSA overtime rights by paying overtime in a manner the district court held to be correct as a matter of law.

Appellants' assertion that Jennie-O waived its appeal of the district court's order denying its Frye-Mack motions – the only argument they present on that issue – is without merit. Jennie-O explained the failures of Appellants' expert testimony at length, including that the expert opinions were irrelevant, unreliable, and highly misleading

because they merely assumed the “fact” upon which they purported to opine. Appellants do not contest that on the central issue of class certification – whether alleged MFLSA overtime violations could be proved on a class basis – their experts abandoned their earlier promise to the district court to prove a common practice of unpaid donning and doffing and simply based their opinions on the instructions of Appellants’ attorneys that such proof could be assumed.

For these reasons, if this Court considers this related appeal, all orders appealed from should be reversed.

### ARGUMENT

**I. The district court abused its discretion by certifying, and then refusing to decertify, the MFLSA overtime class.**

**A. The Whitaker standard.**

Under Whitaker, plaintiffs bear the burden to prove each and every element of Rule 23 by a preponderance of the evidence. *See Whitaker*, 764 N.W.2d at 640 (“[P]arties moving for class certification under Minn. R. Civ. P. 23 must prove, by a preponderance of the evidence, that the certification requirements of the rule are met.”). For a district court to grant class certification, it must conduct a rigorous analysis, weigh the evidence relevant to the elements of Rule 23 (including, but not limited to, expert evidence), resolve factual disputes relevant to class certification requirements, and make factual findings that the plaintiffs have carried their burden of proof as to each element of Rule 23. *Id.* at 637-40.

In particular, Whitaker requires that a district court hold the plaintiffs to their burden to “bridge the gap” between their individual claims and putative class claims. *Id.*

at 639. A district court cannot find that plaintiffs have bridged the gap merely by stating “common questions.” *Id.* at 640. A district court also cannot rely on the plaintiffs’ allegations or merely accept the plaintiffs’ view of the evidence as true. *Id.* at 639. And, of course, because the plaintiffs bear the burden of proof to establish the elements of Rule 23, a district court cannot resolve doubts concerning the Rule 23 elements in the plaintiffs’ favor. *Id.* at 640.

Rather, plaintiffs can “bridge the gap” between individual and putative class claims only by demonstrating a common practice in violation of the substantive law at issue, *id.* at 639; *see also id.* at 638 (courts must analyze the Rule 23 requirements “with specific reference to the cause of action asserted in a particular case”); and by proving that the evidence (if any) supporting their own claims would prove such claims for other putative claimants, *see Serrano v. Cintas Corp.*, 2009 WL 910702, at \*7-8 (E.D. Mich. Mar. 31, 2009); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 479 (S.D. Ohio 2001); *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 77 (D.N.J. 1993).

**B. The district court did not apply the Whitaker standard.**

Contrary to Appellants’ argument, the district court (Leung, J.) did not require plaintiffs to bear the burden of proving each and every element of Rule 23 by a preponderance of the evidence, as Whitaker requires. Instead, the court held that it was required to “accept the substantive allegations of the plaintiff’s complaint as true” and “should resolve any doubt regarding the propriety of certification ‘in favor of allowing the class action.’” (A.104.) Simply accepting the Appellants’ class allegations as true is

not a “rigorous analysis” and demonstrates that the district court did not weigh the evidence and resolve factual disputes regarding the elements of Rule 23. See Whitaker, 764 N.W.2d at 639. Likewise, giving the benefit of the doubt regarding class certification to Appellants was directly contrary to Appellants’ burden to establish all elements of Rule 23 by a preponderance of the evidence. Id. at 640.

Even “examining the evidence and considering JOTS’ factual arguments,” App. Opp. Br. at 24, as Appellants contend the district court did, is not enough. Unless the court engages in a rigorous analysis that resolves evidentiary disputes concerning the class requirements and holds the plaintiffs to their burden to prove each and every element of Rule 23 by a preponderance of the evidence, a class cannot be certified. Id. at 639-40.

Nowhere in the district court’s opinion did the court state that it was applying the preponderance of the evidence standard. To the contrary, by expressly stating that it was accepting the plaintiffs’ allegations as true and resolving all doubts in plaintiffs’ favor, the court openly acknowledged that it was applying a very *different* standard. Moreover, the district court did not make findings of fact resolving the evidentiary disputes concerning the Rule 23 elements. Indeed, consistent with its incorrect view that it need not resolve any factual disputes, the district court did not mention, identify or address *any* of the evidence presented by Jennie-O showing that Appellants could not establish the elements of Rule 23. The district court did not mention, for example, the affidavit of Jennie-O’s expert, Dr. Jeffrey Fernandez, who opined, based on his review of the evidence and his personal inspection of Jennie-O plants, that treating Jennie-O production

employees as a class was not feasible given the extensive differences in donning and doffing and pay practices applicable to those employees. (A. 97-114; R.Supp.App. 24-30.) Nor did the district court mention the more than 30 affidavits Jennie-O presented from its supervisors – none of which was refuted by Appellants – explaining that their employees *were* paid for donning and doffing activities. (A. 97-114; R.App. 731-1051.) The district court’s failure to consider this evidence, much less resolve the evidentiary disputes and hold Appellants to their burden of proof, was an abuse of discretion. See Whitaker, 764 N.W.2d at 635 (applying an incorrect legal standard is an abuse of discretion).

In particular, the district court did not weigh, resolve and issue findings with respect to conflicting evidence and expert opinion on the issue of whether Jennie-O had a common practice of violating the MFLSA’s overtime requirements. Appellants did not provide, and the district court did not find, evidence of a common practice of unpaid overtime. (A. 97-114.) Appellants did not even present evidence of a common practice of unpaid donning and doffing time – just the promise that they could produce such evidence through expert opinion *in the future*. (A. 107, 111 & n.6.) The district court expressly relied on those *assertions* about what Appellants’ evidence would eventually show. (Id.) This further confirms that the court *did not* resolve factual disputes by determining that Appellants’ evidence addressing the Rule 23 requirements was more persuasive than Jennie-O’s, and did not hold Appellants to their burden to prove the elements of Rule 23 by a preponderance of the actual – not potential – evidence.

Because the district court (Bransford, J.) did not issue a memorandum opinion when it denied Jennie-O's motion for decertification (*after Whitaker* was decided), this Court also should reverse that order. Because it is an abuse of discretion for a district court to apply the incorrect legal rule, or rely upon an improper factor, or omit consideration of an important factor, or make an error of judgment in evaluating the proper factors, *see Whitaker*, 764 N.W.2d at 635-36, the district court's failure to provide this Court with a meaningful opportunity to review those issues also requires reversal.<sup>1</sup> *See, e.g., Edina Comm. Lutheran Church v. State of Minnesota*, 673 N.W.2d 517, 523 (Minn. App. 2004).

**C. Appellants cannot prove the elements of Rule 23 by a preponderance of the evidence.**

The district court's failure to comply with *Whitaker* requires reversal, and Appellants' failure to meet the criteria of Rule 23 shows that there is no need for a remand. Appellants did not prove the elements of Rule 23 by a preponderance of the evidence. Three facts make this apparent:

- (1) Notwithstanding Appellants' promises to the district court that their experts would prove the alleged fact of widespread unpaid donning and doffing,<sup>2</sup>

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<sup>1</sup> As noted in Jennie-O's prior brief, Jennie-O unified its pay practices with respect to donning and doffing for the first time in June 2007. The district court did not analyze the evidence relevant to the Rule 23 elements for either the pre-June 2007 or post-June 2007 time periods.

<sup>2</sup> Appellants reference the testimony of Tarald Kvålseth, noting that the district court relied on Kvålseth's testimony when it certified the class. App. Opp. Br. at 31. But Appellants abandoned the methodology Kvålseth had proposed and which the district court had cited (incorrectly under *Whitaker*) as a basis for class certification.

Appellants' experts admitted that they have no evidence of – indeed, made no attempt to identify or measure – alleged unpaid donning and doffing time for any employees, much less the entire putative class. See Resp. Br. at 51-52 (citing App. 2, 16; R.App. 542-47, 551, 556-57, 580-82, 593-95, 652, 655).

(2) Appellants themselves admitted they do not know whether they engaged in any unpaid donning and doffing. See Resp. Br. at 49-50 (citing R.App. 473, 475, 564-65, 569, 575-76, 681, 699-701, 708, 734).

(3) Jennie-O presented extensive evidence – *none of which Appellants ever rebutted*<sup>3</sup> – demonstrating that most Jennie-O production employees were paid

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Appellants used two “time study” experts. The first, Kvålseth, opined that the proper way to perform time studies would be to determine time “standards” reflecting the reasonable amount of time for employees in certain “groupings” to don, doff, walk, and wash. (R.Supp.App. 14-16, 20.) Although Kvålseth also failed to identify any methodology to determine how much donning and doffing time, if any, actually was unpaid, Appellants represented to the district court that they intended to follow Kvålseth’s approach to establish time standards. (R.Supp.App. 5-6.) The district court relied on this assertion. (A.111 at n. 6 (“Plaintiffs’ expert, Dr. Tarald O. Kvålseth, concludes in his Affidavit that it would be feasible to devise a method to determine reasonable donning and doffing time standards using Defendants’ departmental groupings and time measurements obtained through further study.”).) Indeed, the district court had specifically ordered Plaintiffs to describe the “groupings” they intended to use. (R.Supp.App. 10-11.) But Appellants’ later expert, Robert Radwin, simply ignored their prior representations and made no effort to identify “groupings” of employees or determine time standards reflecting reasonable donning and doffing times. (R.App. 656-58, 666-67, 669, 673.) Appellants’ assertion that Kvålseth’s proposed methodology justified class certification, when their own subsequent expert rejected that methodology entirely, is baseless.

<sup>3</sup> Appellants’ argument that this evidence is contested is without merit. Appellants cited no record support for their argument, see App. Opp. Br. at 32 n. 12, and the record is clear that the named plaintiffs *could not* identify any unpaid donning and doffing activities. (R.App. 473, 475, 564-65, 569, 575-76, 681, 699-701, 708, 734.)

for donning and doffing.<sup>4</sup> See Resp. Br. at 46-49 (citations omitted).

These facts demonstrate that Appellants cannot “bridge the gap” between their own MFLSA overtime claims and those (if any) of other putative class members. See Whitaker, 764 N.W.2d at 639.

Appellants cannot carry their burden to prove commonality. Appellants’ failure to provide any common evidence of unpaid donning and doffing time for the putative class, combined with Jennie-O’s extensive and unrebutted evidence that most employees *were* paid for donning and doffing, preclude Appellants from proving the existence of a common practice of unpaid donning and doffing by a preponderance of the evidence, much less a common violation of the MFLSA’s overtime law for the entire putative class. See Whitaker, 764 N.W.2d at 639-40.

Nor can Appellants prove typicality. Not only are Appellants unable to establish unpaid donning or doffing or unpaid MFLSA overtime for themselves, but they also cannot prove MFLSA overtime claims for other putative class members, without relying on evidence – contrary to their own – from each putative claimant. See Sprague v. General Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998) (“The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.”); Elizabeth M. v. Montenez, 458 F.3d 779, 787 (8th Cir. 2006) (“The presence

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<sup>4</sup> Appellants’ attempt to distinguish Fox v. Tyson Foods, Inc., 2006 WL 6012784 (N.D. Ala. Nov. 15, 2006), is unavailing. Appellants note that “[i]n Tyson, the district court found, based on uncontroverted evidence, that employees in some plants were compensated for Donning and Doffing” and, thus, no class could be certified. App. Opp. Br. at 33 (emphasis in original). Equally here, Jennie-O’s evidence that most employees were paid for donning and doffing has never been rebutted by Appellants.

of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry.”); Liberty Lincoln, 149 F.R.D. at 77 (“[I]f proof of the representatives’ claims would not necessarily prove all the proposed class members’ claims, the representative’s claims are not typical of the proposed members’ claims.”); see also Bishop v. Petro-Chem. Transp., LLC, 582 F.Supp.2d 1290, 1308 (E.D. Cal. 2008) (“The representative’s claims [for alleged unpaid overtime] are not typical of the class members, because violations did not occur as to some class members.”); Oetinger v. First Residential Mortgage Network, Inc., 2009 WL 2162963, at \*5 (W.D. Ky. July 16, 2009) (denying plaintiffs’ motion for certification of overtime claims because “the highly individualized factual circumstances and defenses as to liability would preclude any class-wide resolution of the liability question”).

Indeed, in light of the named plaintiffs’ admissions and the failure of Appellants’ experts to prove alleged unpaid donning and doffing for the putative class, the evidence required to prove MFLSA liability – that (1) a claimant actually engaged in unpaid work; (2) he or she engaged in a particular amount of unpaid work; (3) the amount of the claimant’s unpaid work was more than *de minimis*; (4) the unpaid work caused the claimant to work more than 48 hours per workweek; and (5) the claimant was inadequately paid under Minnesota’s workweek rule, even though Jennie-O pays overtime after 40 hours in a workweek, rather than 48 hours – could only come from individual claimants in this case.

Appellants also cannot prove predominance because the *only* way that any putative claimant could prove unpaid donning and doffing, much less unpaid MFLSA

overtime, would be through an entirely individualized liability analysis. See Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228, 1235-36 (11th Cir. 2000) (“[S]erious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts.”); Southwestern Refining Corp. v. Bernal, 22 S.W.3d 425, 434 (Tex. 2000) (“If, after common issues are resolved, presenting and resolving individual issues is likely to be an overwhelming or unmanageable task for a single jury, then common issues do not predominate.”).

Appellants also cannot prove manageability and superiority. The district court could not possibly manage a nominally “class” trial in which the only means for any putative claimant to prove liability (much less damages) would be through individualized proof that he or she worked unpaid overtime. See, e.g., Burkhart-Deal v. Citifinancial, Inc., 2010 WL 457122, at \*4 (W.D. Pa. Feb. 4, 2010) (“Where common proof is not available, thus requiring individualized ‘mini-trials,’ courts have found that the ‘staggering problems of logistics thus created’ make the case unmanageable as a class action.”) (quotation omitted). A nominally “class” trial also would not be superior to other forms of litigation, regardless of the amount of any potential recovery for any individual claimant, where the same individualized inquiries would have to be undertaken in either a “class” trial or individual trials. See Burrell v. Crown Cent. Petroleum, Inc., 197 F.R.D. 284, 291 (E.D. Tex. 2000) (superiority lacking when a court would be forced “to engage in a highly individualized inquiry into the specific circumstances of each plaintiff’s claims”).

**D. Appellants' arguments that class certification was proper are untenable.**

Notwithstanding their inability to actually “bridge the gap” between their individual claims and putative class claims, Appellants attempt to justify class certification with arguments that their MFLSA class was properly certified regardless of Whitaker. None of those arguments have merit.

**1. Appellants' arguments contrary to the Whitaker standard should be rejected.**

Appellants assert that the district court properly held that commonality was satisfied because they stated “common questions.” Indeed, the district court found commonality on that basis and held that it would not resolve factual disputes related to those questions, which go to the heart of whether this is truly a “class” case. (A. 108 (“The Court, therefore, finds that several questions of law and fact are common to the class, and that Plaintiffs have satisfied the commonality requirement of Rule 23.01(b)); A. 107 (postponing resolution of Jennie-O’s argument that commonality was absent because “Plaintiffs’ expert, Frank B. Martin, has indicated that [unpaid donning and doffing time] may be established using data derived from Defendants’ KRONOS system.”).) Appellants make the same argument to this Court. App. Opp. Br. at 24-26; id. at 27 (“The court correctly found here that commonality is satisfied based on the central issue – [the *question* of] whether JOTS violated the MFLSA by failing to pay overtime.”).

The Whitaker court expressly rejected the district court’s analysis and Appellants’ argument:

Respondents further urge this court to adopt the analysis of the federal district court in Hnot, that the determination of the *existence* of common questions can be separated from finding the *answer* to those questions. See 241 F.R.D. at 211. . . . This is precisely the standard that has been rejected by the federal courts of appeal.

764 N.W.2d at 640. Appellants should have been required to prove, by a preponderance of the evidence, that the *answers* to their so-called “common questions” involved a common practice by Jennie-O of not paying MFLSA overtime for donning and doffing activities. Id. at 639.

Appellants also misconstrue Whitaker’s commonality analysis as somehow limited to class discrimination claims. While the facts of that case led to the Whitaker Court’s use of the term “common discriminatory practice” to reflect the evidentiary showing required of the plaintiffs in Whitaker, the Court made clear that courts must analyze the requirements of Rule 23 “with specific reference to the cause of action asserted in a particular case.” Id. at 638. Thus, the fact that this case does not concern discrimination claims does not change Appellants’ burden under Rule 23, which requires them to demonstrate a “common practice” in violation of the substantive law at issue – here, a common practice in violation of the MFLSA’s overtime law – by a preponderance of the evidence. Id. at 639.

Appellants also misstate the requirements to establish “typicality” and “predominance.” The district court held that Appellants established typicality based on their *allegations* that Jennie-O failed to pay proper overtime for donning and doffing activities. (A. 104, 108.) It held that predominance was established because Appellants had articulated a “common legal grievance,” and asserted that their experts would

eventually prove the amount of unpaid donning and doffing and damages for putative class members. (A. 110-11.) Again, Appellants adopt the same arguments on appeal. App. Opp. Br. at 27-29.

After Whitaker, however, it is not enough for plaintiffs to assert “the same legal theory,” App. Opp. Br. at 27, or a “principal and unifying legal grievance,” id. at 29. Rather, Appellants must prove that they satisfy the requirements of Rule 23 by a preponderance of the *evidence*. See Whitaker, 764 N.W.2d at 638-40. In the context of typicality, this requires proof that the evidence (if any) that would prove their own allegations of unpaid overtime would also prove the claims of the other putative class members, without receiving such evidence from each one. See, e.g., Serrano, 2009 WL 910702, at \*7-8; Bacon, 205 F.R.D. at 479; Liberty Lincoln, 149 F.R.D. at 77.

**2. Appellants’ “evidence” cannot carry their burden of proof.**

Alternatively, Appellants assert, in conclusory fashion, that they can carry their burden to prove the elements of Rule 23 based on Jennie-O “documents, admissions, and policies” allegedly showing that employees were denied full payment for donning and doffing. App. Opp. Br. at 29. Yet nowhere do Appellants explain how those “documents” or “policies” establish a common practice of unpaid MFLSA overtime for all Jennie-O employees, or satisfy any other element of Rule 23, by a preponderance of the evidence.

In fact, the documents relied upon by Appellants do not support such a conclusion. As Jennie-O described in its opening brief, Resp. Br. at 59-61 & n.16, Appellants misrepresent the documents upon which they rely, which, when taken as a whole, do not

suggest a common practice of unpaid MFLSA overtime across Jennie-O's multiple plants and departments.<sup>5</sup> Even as mischaracterized by Appellants, the documents do not identify employees who engaged in alleged unpaid donning and doffing, much less in particular amounts; or that such time was more than *de minimis* and resulted in workweeks over 48 hours; or that Jennie-O failed to pay overtime as required by the MFLSA. Such evidence – crucial to Appellants' ability to establish the elements of Rule 23 “with specific reference to the cause of action asserted in [this] particular case,” Whitaker, 764 N.W.2d at 638 – cannot be gleaned from those documents, and is absent from the record as a whole, as demonstrated by the now undisputed fact that neither Appellants, nor their hired experts, could identify any unpaid donning and doffing time for themselves, much less a putative class. When the absence of such evidence is contrasted with the extensive evidence from Jennie-O showing that most employees *were* paid for donning and doffing by their supervisors (and that all employees were paid every penny of overtime compensation owed) it is clear that Appellants cannot establish the requirements of Rule 23.

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<sup>5</sup> Appellants subsequently focus on three documents. App. Opp. Br. at 31. The first two, a “Pay Practice Consolidation” memo (A. 130-31) and “Time Keeping Practices” memo (A. 132) make no suggestion that any donning and doffing time was unpaid; they simply reflect proposals to unify the then-different pay practices under which supervisors were already paying for donning and doffing. See Resp. Br. at 59-60 n.16 (citing R.App. 741-991, 1025-1051). The third, a single undated and unattributed table purporting to identify certain activities as having “payment” or “no payment,” was uniformly described as inaccurate by persons with knowledge of Jennie-O's pay practices related to donning and doffing, see Resp. Br. at 59-60 n.16 (citing R.App. 480-82, 716-18), and the district court did not rely on, and made no findings with respect to, that document. Regardless, such a document, in the context of the entire record before this Court, cannot carry Appellants' burden to prove all of the elements

Appellants also attempt to argue that Jennie-O had a “no-policy policy” which harmed the putative class. App. Opp. Br. at 32 (citing Frank v. Gold’n Plump Poultry, Inc., 2007 WL 2780504 (D. Minn. Sept. 24, 2007)). Appellants’ reliance on Frank, which was decided two years before Whitaker, is misplaced because that federal district court’s analysis is not the applicable law. Again, after Whitaker, Appellants bear the burden to establish all elements of Rule 23 by a preponderance of the evidence. This includes, but is not limited to, a requirement that Appellants prove commonality by showing that the preponderance of the evidence in the record demonstrates that Jennie-O had a common practice of not paying proper MFLSA overtime. See Whitaker, 764 N.W.2d at 639. Since Appellants cannot establish that an alleged “no-policy policy” resulted in a common practice of non-payment of MFLSA overtime, they have failed to meet their burden under Whitaker and Rule 23. Moreover, the unrefuted evidence shows that supervisors here *did* pay for donning and doffing, see Resp. Br. at 46-49 (citations omitted), thus precluding a common “injury” like that suggested by the Frank court, and precluding a finding of commonality.

**II. The district court improperly permitted Appellants to add a claim for punitive damages.**

**A. The district court erred in granting Appellants’ motion because there was no evidence that Jennie-O violated the MFLSA overtime statute.**

Appellants’ acknowledgment that “there can be no punitive damages without a substantive law violation” is significant. Because the district court correctly held that Appellants had no evidence of unpaid overtime under Minn. Stat. § 177.25 and Minn.

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of Rule 23 by a preponderance of the evidence.

Rule 5200.0170, summary judgment was properly granted. Appellants now concede that if this Court affirms summary judgment on the overtime claim, as it should, then the district court's earlier punitive damages order must be reversed – regardless of this Court's decision on the other claims dismissed on summary judgment.

Even if this Court were to reverse the district court's summary judgment order with respect to the overtime claim, however, it would remain that the district court held that Jennie-O correctly interpreted Minnesota law. There is no basis to hold that Jennie-O "deliberately disregarded" Appellants' MFLSA overtime rights by interpreting its legal obligations in a manner held to be proper, as a matter of law, by the district court, even if that determination were later reversed by an appellate court. See, e.g., Safeco Insurance Company of America v. Burr, 551 U.S. 47, 70 (2007).

**B. The district court erred by not considering the "substantive law" in granting Appellants' motion to amend to add a claim for punitive damages.**

Appellants' acknowledgement that "there can be no punitive damages without a substantive law violation" also is significant because in granting Appellants' motion to amend, the district court never considered whether there was evidence of a violation of the MFLSA overtime statute, much less clear and convincing evidence that Jennie-O had deliberately disregarded that law. In its punitive damages order (A. 71), the district court did not consider whether Appellants had successfully shown even *prima facie* evidence of a violation of the MFLSA; instead the district court appeared to assume that any failure to pay for donning and doffing time was evidence of a violation of the MFLSA overtime statute.

In order to succeed in amending their complaint to add a claim for punitive damages, Appellants had to present clear and convincing evidence that Jennie-O “deliberately disregarded” their MFLSA overtime rights, that is, that Jennie-O failed to pay proper MFLSA overtime compensation to Appellants, and that Jennie-O did so deliberately. To establish even the first requirement, Appellants needed to demonstrate clear and convincing evidence that (1) they engaged in *unpaid* but compensable work; (2) they engaged in particular amounts of unpaid work; (3) the amount of unpaid work was more than *de minimis*; (4) the alleged unpaid work caused the employee to work more than 48 hours per workweek; and (5) the employee was inadequately paid under Minnesota’s workweek rule, notwithstanding Jennie-O’s practice of paying overtime after 40 hours in a workweek, rather than 48 hours. But because Appellants did not offer, and the district court did not find, clear and convincing evidence in support of the elements of Appellants’ *prima facie* overtime claim, the district court necessarily erred in granting Appellants’ motion to amend.

**C. Appellants identify no evidence that Jennie-O deliberately disregarded their MFLSA overtime rights.**

Having conceded their burden to present clear and convincing evidence<sup>6</sup> that Jennie-O deliberately disregarded their MFLSA overtime rights, Appellants also do not dispute that none of the evidence they presented addressed that substantive law. As explained in Jennie-O’s opening brief, the documents that Appellants continue to advance

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<sup>6</sup> Appellants’ burden was to present clear and convincing evidence of a deliberate violation of the MFLSA, not evidence that “could be viewed as clear and convincing.” See McKenzie v. Northern States Power Co., 440 N.W.2d 183, 184

as the foundation for their overtime claim reflect Jennie-O's efforts to comply with the *federal FLSA*, not the *Minnesota FLSA's* overtime requirements. See Resp. Br. at 60.

None of those documents address Minnesota's 48-hour overtime statute at all.

Appellants do not dispute that fact. In the district court, Appellants made no attempt to connect the documents they presented to any alleged violation of the MFLSA overtime statute, and they make no attempt to do so in their briefing to this Court.

By contrast, the record demonstrated that Jennie-O did comply with its MFLSA overtime obligations because (1) it is undisputed that Jennie-O paid overtime compensation after 40 hours in any workweek, rather than after 48 hours as the MFLSA required; and (2) Appellants presented no evidence that any Jennie-O employee was not paid appropriate overtime compensation when Minn. Rule 5200.0170's workweek rule is applied. See Resp. Br. at 29-34. Again, Appellants do not dispute those facts in this Court. Because Appellants' evidence failed to address Jennie-O's compliance with the MFLSA overtime requirements, the district court had no basis to grant Appellants' motion to amend. See Minn. Stat. § 549.20; State Farm v. Campbell, 538 U.S. 408, 422-23 (2003) (punitive damages can only be awarded "for the conduct that harmed the plaintiff").

**III. Jennie-O did not waive its appeal of the district court's orders denying its Frye-Mack motions.**

Rather than address the merits of Jennie-O's argument that the district court erred by not excluding their expert testimony, Appellants contend that Jennie-O waived its

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(Minn. App. 1989).

appeal. To the contrary, Jennie-O explained the shortcomings of Appellants' expert testimony at length. See Resp. Brief at 51-52. For example, although Appellants presented the opinions of their time study expert, Robert Radwin, as proof of alleged unpaid donning and doffing time (A. 107, R.App. 249), Radwin made no effort to identify or measure unpaid donning and doffing time. (App. 2; R.App. 593-95.) Indeed, contrary to Appellants' new suggestion, Radwin never considered any evidence concerning Jennie-O's "policies and practice" before reaching his conclusions. (R.App. 676 ("I did not depend on [Jennie-O documents] in conducting my study specifically and I did not depend on that material in the opinions and conclusions of my report."); R.App. 581-82.). Instead, following the instructions of Appellants' attorneys, Radwin merely *assumed* that all donning and doffing was unpaid. (R.App. 580-82, 652, 655.) Notably, Appellants do not contest that the foundation for Radwin's opinions was their attorneys' view of the evidence.

Similarly, although Appellants presented the opinions of their statistician, Frank Martin, as evidence of class membership and damages for the putative MFLSA overtime class (A.107, 111), Martin also made no effort to determine whether any donning and doffing time was unpaid. (App. 16, R.App. 542-47, 556-57.) He also did not consider any evidence of Jennie-O's "policies and practice" in reaching his conclusions. Rather, like Radwin, he simply *assumed* that all donning and doffing was unpaid, at the instruction of Appellants' attorneys. (R.App. 546-47, 551.) Again, Appellants do not dispute that Martin did not have a scientifically reliable methodology, or a reliable evidentiary foundation, for his opinions.

Appellants' experts' unstudied adoption of their attorneys' instruction to simply assume that Jennie-O did not pay for any donning and doffing rendered their opinions irrelevant to the issues for which the experts were presented, i.e., to "determine the number of uncompensated 'hours worked'," and prove class membership and damages. See Minn. R. Evid. 402. That counsel persuaded an expert to assume an alleged fact – here the allegation of unpaid donning and doffing that was the foundation for all of the experts' opinions – does not make that fact more or less probable for purposes of Minn. R. Evid. 401.

Appellants' experts' opinions also were unreliable and, given the purpose for which they were offered, highly misleading. See Minn. R. Evid. 403, 702; State v. Roman Nose, 649 N.W.2d 815, 818 (Minn. 2000); Goeb v. Tharaldson, 615 N.W.2d 800, 814-15 (Minn. 2000); Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 155 (Minn. 1982); see also State v. Smith, 1996 WL 146416 at \*2-\*3 (Minn. App. Apr. 2, 1996) ("To be admissible, expert opinion testimony must be based upon the expert's personal knowledge or personal observations.... An opinion lacking adequate factual foundation is merely based on conjecture and speculation and has no evidentiary value."); Welch v. Eli Lilly & Co., 2009 WL 700199 at \*10 (S.D. Ind. March 16, 2009) ("[The evidence establishes] spoonfeeding of ... conclusions to [the expert] by Plaintiffs' counsel that is both troubling and substantial. ... This [is] unacceptable."). The district court erred by not excluding those opinions.

**CONCLUSION**

For the reasons set forth above and in Respondent's/Cross-Appellant's Principal and Response Brief, if the district court's order dismissing Appellants' overtime claim is reversed, the district court's orders certifying an overtime class and permitting a claim for punitive damages should be reversed. If any of the district court's summary judgment orders are reversed, the district court's order denying Jennie-O's motion to strike the testimony of Appellants' experts should be reversed.

Dated: September 7, 2010

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By \_\_\_\_\_



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**No. A10-049**

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Eduardo Rios, Rodolfo Gutierrez, Evelia Mendoza, Jennifer Brickweg, Marsha Winter,  
Juan Guerra, Jr., Valeria Cabral, Margarita Ruiz, Todd E. Nord, Jeff Rudie, and John  
Patrick Kelly, Jr.,

Appellants/Cross-Respondents,

v.

Jennie-O Turkey Store, Inc., a Minnesota Corporation, West Central Turkeys, Inc. (a/k/a  
Pelican Turkeys, Inc.), and Heartland Foods Co.,

Respondents/Cross-Appellants.

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**CERTIFICATE OF COMPLIANCE WITH MINNESOTA RULE OF CIVIL  
APPELLATE PROCEDURE 131.01, SUBD. 5(D)(7)**

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The undersigned hereby certifies, pursuant to Minnesota Rule of Civil Appellate Procedure 131.01, Subd. 5(d)(7), that this brief (exclusive of the table of contents, the table of authorities, any addendum, and any certificates of counsel) contains 6,196 words, as ascertained by using the word count feature of the Microsoft Office Word 2003 word-processing software used to prepare the brief, and conforms to the typeface and type style requirements of the rules by being in 13-point Times New Roman format.

Dated: September 7, 2010

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