NO. 89534-1

SUPREME COURT OF THE STATE OF WASHINGTON

CAROLINA BECERRA BECERRA, JULIO CESAR MARTINEZ MARTINEZ, ORLANDO VENTURA REYES, ALMA A. BECERRA, and ADELENE MENDOZA SOLORIO,

Respondents,

v.

EXPERT JANITORIAL, LLC, dba Expert JMS, and FRED MEYER STORES, INC.,

Petitioners.

RESPONDENTS' ANSWER TO MEMORANDUM OF AMICI CURIAE

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I. INTRODUCTION

Plaintiffs and the Amici agree on much of what the Court of Appeals did in its decision below[1], to wit:

- Recognized that "joint employment" under the Washington Minimum Wage Act ("MWA") is an issue of first impression.
- Adopted the Fair Labor Standards Act ("FLSA") "economic reality" test as the proper basis for deciding the issue, much like this Court did in *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012), on the analogous issue of MWA employee versus independent contractor status.
- Obtained guidance from the "seminal United States Supreme Court case" of *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), which it analyzed it in light of *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997), *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004), *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), and *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71 (2d Cir. 2003).

The Court of Appeals also followed the FLSA, with support from *Anfinson*, for the propositions that joint employment status is a question of law, while "the existence and degree of each factor is a question of fact." 309 P.3d at 716. Neither the parties nor Amici dispute any of the above principles.

The Court of Appeals reversed the trial court because its analysis was (a) too limited to the *Bonnette* factors and (b) misapplied several factors, as is discussed *infra*. The Amici ask this Court to accept review for two purposes. One is to "clarify which [economic reality] test applies," *i.e.*, create a definite list of factors, and the other is to "explain how the various factors of the appropriate test may be correctly applied"

[1] *Becerra v. Expert Janitorial, LLC*, -- Wn. App. --, 309 P.3d 711 (2013).

presumably herein and to cases generally. *See* Amici Mem., p. 7. As to a definitive list, the United States Supreme Court, the Circuit Courts of Appeal, the United States Department of Labor and the *Amici* all agree that there is no one exclusive list of factors. 309 P.3d at 715; *Amici* Mem., p. 6 ("the factors comprising the various versions of the economic reality test are not exclusive"). As to an explanation of the factors, as is discussed *infra*, the Court of Appeals gave substantial guidance on many factors to the trial court herein and future trial courts.

The Court of Appeals decision is judicious, *i.e.*, carefully sets forth largely undisputed principles for determining joint employment status and leaves it to the trial court to apply those factors, albeit with needed guidance as to the breadth of factors and insight as to application of specific factors. The opinion has not created confusion for Washington businesses, almost all of whom are subject to the same 9th Circuit authority relied upon by the Court of Appeals.[2] It will not "drive business costs in Washington higher" except to the extent that some putative joint employers may take greater care in selecting contractors where they have an ongoing, full-time-plus and close relationship with the contractor's employees, as herein. That is consistent with the MWA.[3] Contrary to the Amici's arguments, the present case is best suited for remand.

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[2] Ironically, Fred Meyer criticizes the Court of Appeals for relying too much on 9th Circuit opinions. Fred Meyer Pet., p. 12, n.3.

[3] As is discussed in plaintiffs' earlier briefing, Fred Meyer was already attuned to the joint employment issue. It obtained Expert Janitorial's promises (a) that the janitorial work would be done in compliance with the FLSA and (b) Fred Meyer be indemnified. Presumably, that somewhat increased Fred Meyer's subcontracting expense. It is also

II. ARGUMENT

A. The Court Of Appeals Followed This Court's Analysis In *Anfinson.*

The Court of Appeals relied on this Court's holding in *Anfinson* that the "MWA is based on the Fair Labor Standards Act of 1938," when it looked to the federal courts application of the FLSA to determine what constitutes joint employment under the MWA. 309 P.3d at 714. This Court in *Anfinson* also (a) recognized that "federal courts have established competing lists of nonexclusive factors that are relevant to the determination," and (b) did not either adopt or call for an exclusive list of factors. 174 Wn.2d at 869. The Court of Appeals did the same thing in this case for similar reasons. 309 P.3d at 716. This Court also agreed with the decision of the Court of Appeals in *Anfinson* to leave to the trial court some flexibility in determining factors. *See* 174 Wn.2d at 858, n. 1. The Court of Appeals in this case did the same. *Id.* at 720-21.

B. The Court of Appeals Gave Guidance on How to Apply Many Joint Employment Factors

The Court of Appeals gave considerable guidance to the trial court regarding specific factors, much as this Court did in *Anfinson.* For example, the Court of Appeals (309 P.3d at 724-26) lists at least eight "relevant joint employment factors with regard to defendant Expert," relying on non-exclusive factors utilized by various federal appellate

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one of many factors evidencing that Fred Meyer and Expert has more than a causal connection with these janitors who worked 7 nights and 60 hours a week without minimum wages or overtime pay.

courts. In the following table, plaintiffs list the factors the Court of Appeals found relevant to Expert, as well as citing FLSA authority.[4]

Factor	P.3d Cite	Cases That Refer To That Factor
1 Maintain employment records	724	-*Torrez-Lopez*, at 642 -*Moreau*, at 950 -*Layton*, at 1176
2 Determine the janitors' rate and method of payment	724	-*Torrez-Lopez*, at 642 -*Moreau*, at 950 -*Barfield*, at 145
3 "Expert concedes the existence of several factors, one of which is that the janitors' work was an integral part of its janitorial business"	724	-*Antenor*, at 937 -*Barfield*, at 145 -*Zheng*, at 72 -*Reyes*, at 408 -*Layton*, at 1176 -*Torrez-Lopez*, at 640 -*Moreau*, at 952 -DOL Opinion Letter
4 Expert also acknowledged that the janitors' work "required little initiative, judgment, or foresight"	724	*Rutherford*, at 730 *Torrez-Lopez*, at 644 -*Reyes*, at 408
5 The janitors had "little opportunity for profit or loss"	724	-*Rutherford*, at 730 -*Torrez-Lopez*, at 644 -*Moreau*, at 952
6 There is a genuine issue of material fact whether Expert had the power to fire or alter the employment conditions of All Janitorial and All American workers	724	-*Torres-Lopez*, at 642 -*Antenor*, at 935 -*Hodgson*, at 237 -DOL opinion letter
7 There was a genuine issue of material fact whether the janitors' employment was "permanent"	725	-*Torres-Lopez*, at 644 -*Moreau*, at 952 -DOL opinion letter

[4] *Rutherford Food Corp. v. McComb*, 331 U.S 722 (1947); *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004); *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996); *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973); *Torrez-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003); *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008); *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403 (7th Cir. 2007); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983); and DOL Opinion Letter, 2001 WL 1558966 (May 11, 2001).

8 The Expert contract passed "from one subcontractor to another without material changes" when All American Janitorial replaced All Janitorial	725	-*Rutherford*, at 730 -*Torres-Lopez*, at 644 -*Zheng*, at 72 -*Reyes*, at 408 -*Barfield*, at 145

Similarly, the Court of Appeals (309 P.3d at 721-24) identified relevant joint employer factors as to Fred Meyer as follows:

1 Indirect supervision and control of plaintiffs' work	721	-*Rutherford*, at 730 -*Torres-Lopez*, at 642 -*Layton*, at 1176 -*Reyes*, at 408 -*Antenor*, at 934 -*Moreau*, at 951
2 Control of plaintiffs' employment conditions	721	-*Rutherford*, at 730 -*Torres-Lopez*, at 642 -*Layton*, at 1176 -*Reyes*, at 408 -*Antenor*, at 935 -*Hodgson*, at 237 -DOL opinion letter
3 Plaintiffs' use of Fred Meyers premises and equipment	721	-*Rutherford*, at 730 -*Hodgson*, at 237 -*Torres-Lopez*, at 644 -*Reyes*, at 408 -*Barfield*, at 145 -*Antenor*, at 936-37 -*Moreau*, at 951 -DOL opinion letter
4 Permanence of plaintiffs' work	722	-*Moreau*, at 952 -DOL opinion letter
5 Degree of initiative judgment or foresight required by work	722	-*Rutherford*, at 730 -*Torres-Lopez*, at 644 -*Reyes*, at 408 -DOL opinion letter
6 Evidence that Fred Meyer's activities were subterfuge or sham to avoid MWA obligations	724	-*Castillo*, at 192 -*Barfield*, at 146 -*Zheng*, at 73-74 -*Reyes*, at 408-09

The Court of Appeals' decision gives the trial court substantial guidance.

C. Amici's Brief Misreads The Court of Appeals' Opinion As Well As FLSA Authority

According to Amici, the Court of Appeals' decision was "opaque," leaving the trial court and business community without any guidance. Amici Brief, p. 5 (it "didn't say"). To the contrary, in the subsequent portions of the opinion entitled "Status of Fred Meyer" and "Status of Expert", the Court repeatedly discussed the relevance of specific factors. For example, the court held with respect to Expert that "there are genuine issues of material fact with respect to a number of the relevant joint employment factors." 309 P.3d at 724. The above tables go through the Court of Appeals' analysis of those factors in some detail.

Amici's view of the extent of guidance on these matters is equally myopic. For example, the Amici (a) assert that "federal courts have given extensive guidance on which factors are and are not relevant to determine joint employment," and (b) argue that "by failing to decide which relevant factors apply and what relevant weight should be given them, the Court in reality adopted none of them." Mem. at 6.

(a) Defendant's first statement ignores the wide variation in the listed factors among the various federal circuits. The Amici's members doing business in different federal circuits are faced with different factors. Using, for example, circuit court cases cited by Amici, a company facing an FLSA joint employment claim in Pennsylvania would use the *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation,*

683 F.3d 462 (3d Cir. 2012) four-factor test, while the same company doing business in Florida would use the eight-factor *Layton* or *Antenor* test which adds factors not contained in the *Enterprise* test such as "ownership of the facilities where the work occurred." *Id.* at 1180. The same company in New York would use a four-factor test or a six-factor test or both depending on the nature of the claim. *See Zheng* and *Barfield, supra.*

Amici's analysis also ignores how factors evolve within individual circuits. In *Barfield,* Second Circuit explained that "the 'economic reality' of a particular employment situation" may require a "different set[] of relevant factors." *Id.* at 141-42.[5]

(b) *Layton* also illustrates why it is impossible to determine in the abstract "what relative weight should be given among" the various factors. There, the factor of "relative investment in equipment and facilities" did "not aid our joint-employment inquiry" because "both Skyland and DHL made significant investments in facilities and equipment." *Id.* at 1181. That factor would have been of more significance had only the putative

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[5] *Barfield* goes on to explain at page 143:

> Our more recent holding in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, reiterates the necessary flexibility of the economic realities test. In *Zheng*, we considered whether an entity that lacked formal control over workers – as defined by the four *Carter* factors – could nevertheless be considered their employer based on its exercise of functional control. .... Relying on language drawn from *Rutherford Food Corp. v. McComb*, 331 U.S. at 724-25, 67 S.Ct. 1473, *Zheng* set forth a six-factor test "pertinent" to identifying the "economic realities" of the employment relationship "in these circumstances," 355 F.3d at 72.

joint employer made significant investments in facilities and equipment. *Zheng*, 355 F.3d at 70, cited *Rutherford* for the proposition that "in certain circumstances, an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them."

D. Review Should Not Be Granted for the Purpose of Deciding Whether "a Dispute as to Some Individual Factors" Is Outweighed by "the Balance of Factors as a Whole.

The Amici request the Court accept review to decide whether "a dispute as to some individual factors preclude a grant of summary judgment when the balance of factors as a whole militates against a finding of joint employment." Mem. at 4. However, the importance of a dispute as to "some individual factors" depends on the totality of the circumstances. The Amici's formulation of the issue assumes the disputed individual factors are outweighed by a "balance of factors as a whole", *i.e.*, that a court has fully analyzed and weighed all relevant factors. That of course is also a fact-specific determination. Here, the trial court too narrowly focused on *Bonnette* factors, failed to consider the importance of Fred Meyer's daily janitor inspection/sign-out and in other ways did not do a full analysis and weighing of factors. The judicial process is better served by a remand.

E. The Present Case Is Not Garden-Variety Outsourcing; The Court of Appeals Did Not Adopt a Unique Test that Makes It "Impossible to Explain" Joint Employment.

The Amici argue that "while perhaps unintended" the Court of Appeals' decision could create MWA joint employment status for "even garden variety outsourcing or contracting." Mem. at 7. It concludes that "it is impossible to explain" to Washington companies the circumstances under which they may be exposed to joint employment liability. Neither statement is accurate. The Amici fail to explain what they mean by garden variety outsourcing or contracting. Here, Fred Meyer determined minutiae of the cleaning schedule and tasks, decided on and purchased all supplies and chemicals, retained the right to control payment of overtime, provided daily in-store inspections of the janitors' work – the only detailed and only on-site supervision, decided when the janitors were free to leave the store each workday and provided the only work-quality information on which to review janitor performance.

Expert Janitorial adopted a business model which relied on labor suppliers – like All Janitorial and All Janitorial – to supply the bodies to perform its principal service – cleaning. Fred Meyer and Expert operated in a national business environment where they knew that retail store janitor cost savings were widely being achieved by exploitation of immigrant workers, which included misclassification of janitorial workers and non-payment of minimum wages and overtime. They each had notice of widespread violations by All Janitorial and All American Janitorial.

Neither Fred Meyer nor Expert expected or wanted anything from All Janitorial and All American Janitorial other than cheap labor and use of a waxer/scrubber machine. This is not garden variety contracting and goes to the core of MWA concerns.

The Amici seem to be seeking a definite set of factors that if followed will be an inoculation against joint employment status. Wisely, whatever the facts, neither *Rutherford*, in 1947, nor any subsequent decision has done that. Nor would doing so be desirable to accomplish the remedial purposes of the FLSA and MWA. A definite set of factors unmoored to the facts could be used to structure relationships to appear to avoid a joint employment relationship, while exploiting economically dependent immigrant and other workers. The MWA would be better served by encouraging entities such as Fred Meyers who take workers into their stores for full-time-plus employment to exercise their power to promote MWA compliance. There is no need to accept review of the Court of Appeal's decision which simply extended FLSA "economic reality" analysis to this MWA joint employer issue.

III. CONCLUSION

Respondents respectfully request that the petitions for review be denied.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

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IN THE SUPREME COURT
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CAROLINA BECERRA BECERRA, JULIO CESAR MARTINEZ MARTINEZ, ORLANDO VENTURA REYES, ALMA A. BECERRA, and ADELENE MENDOZA SOLORIO, Respondents, v. EXPERT JANITORIAL, LLC, dba Expert JMS, and FRED MEYER STORES, INC., Petitioners.	NO. 89534-1 AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
County of King)

I, Nona Farley, being first duly sworn upon oath, declare and state:

1. I am an employee of Schroeter, Goldmark & Bender, over the age of 18, not a party to this action, and competent to make the following statements.

2. On January 10, 2014, I filed the Respondents' Answer To Memorandum of Amici Curiae and this Affidavit of Service via email to supreme@courts.wa.gov and served copies of Respondents' Answer To

Memorandum of Amici Curiae and this Affidavit of Service via legal messenger on the attorneys of record for Petitioners at the following address:

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SUBSCRIBED AND SWORN TO BEFORE ME this 10th day of January, 2014.

RHONDA L. JONES
Notary Public in and for the state of Washington, residing at Silverdale.
My Commission Expires: 07/11/17

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Attached please find Respondents' Answer To Memorandum of Amici Curiae and Affidavit of Service for filing today in Becerra v. Expert Janitorial, et al., Division I, Cause # 89534-1.

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