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NO. 68528-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CAROLINA BECERRA BECERRA, JULIO CESAR MARTINEZ MARTINEZ, MOISES SANTOS GONZALEZ, HERIBERTO VENTURA SATURNINO, ORLANDO VENTURA REYES, JOSE LUIS CORONADO, ALMA A. BECERRA, and ADELENE MENDOZA SOLORIO

Appellants/Plaintiffs,

v.

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

Respondents/Defendants.

Appeal from the Superior Court of Washington
For King County
(Cause No. 10-2-11852-7 SEA)

APPELLANTS' REPLY BRIEF

WILLIAM RUTZICK, WSBA #11533
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 622-8000
Counsel for Plaintiffs

DAVID N. MARK, WSBA #13908
LAW OFFICE OF DAVID N. MARK
810 Third Avenue, Suite 500
Seattle, WA 98104
Counsel for Plaintiffs
(206) 622-8000

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I. INTRODUCTION

Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 281 P.3d 289, 298 (2012), is important to this appeal for several reasons not acknowledged by either Fred Meyer Stores, Inc. ("Fred Meyer" or "FM" herein) or Expert Janitorial, LLC, dba Expert JMS ("Expert" herein).[1] First, the *Anfinson* Court explained that because the Washington Minimum Wage Act ("MWA") was adopted from the Fair Labor Standards Act ("FLSA") in 1959, the Legislature intended to adopt the federal construction of the FLSA as of 1959:

> The legislature's nearly verbatim adoption in the MWA of the FLSA language with respect to the definition of "employee" evidences legislative intent to adopt the federal standards in effect at the time.

174 Wn.2d at 298 (emphasis added). That means that the pre-1959 FLSA Supreme Court interpretation of joint employment in *Rutherford Food Corp. v. McComb*, 331 U.S 722 (1947) is particularly important.

Secondly, the *Anfinson* court explained that the MWA was "remedial legislation," that it should be "given a liberal construction," and that a liberal construction "is one that favors classification as an employee." *Id.* at 299. That is particularly relevant here because every defendant denied that it employed plaintiffs. Yet the trial court concluded

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[1] The FM brief at page 27 only cites *Anfinson* for the principle that:

> The MWA "is based on the Fair Labor Standards Act of 1938," and "when a state statute is 'taken substantially verbatim' from [a] federal statue, it carries the same construction as the federal law and the same interpretation as federal case law.

See also Expert Brief at page 17 (same).

that neither Fred Meyer nor Expert were plaintiffs' employers without even determining that anyone was plaintiffs' employer. That is not a liberal construction.

Finally, *Anfinson* relied on *Rutherford* as a controlling interpretation of how employee status was determined "at the time Washington adopted the MWA," *e.g.*, "'the determination of the relationship ... depend[s] ... upon the circumstances of the whole activity.' *Id.* at 730." 174 Wn.2d at 868-69. The Court relied on *Rutherford,* much as plaintiffs do in this appeal, because whether workers were employees or independent contractors is at issue in both *Anfinson* and this appeal.

Rutherford considered, as factors cutting against joint employment, the fact that Kaiser (the putative joint employer), did not hire or fire the "meat boners" who were its putative joint employees, and did not directly dictate their hours, pay them, or keep their employment records. 331 U.S. at 726, 730. *See also Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 70 (2d Cir. 2003) (discussing this aspect of *Rutherford*). The *Rutherford* court, nevertheless, concluded that Kaiser was a joint employer based on six additional factors discussed at 331 U.S. at 730 which plaintiffs also rely on. *See* Opening Brief, p. 6.

Rutherford and *Anfinson* thus reject the contentions of Fred Meyer (pp. 29-30) and Expert (p. 28) that the primary or exclusive factors in determining joint employment should be limited to the four factors

specifically identified in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). Those four factors include mostly factors not found determinative in *Rutherford* and omit most of the factors found determinative in *Rutherford*.[2] Pages 8-11 herein further discuss how the federal Courts of Appeal and the United States Department of Labor ("DOL") have interpreted the joint employment factors, particularly in light of *Rutherford.*

The summary judgment record regarding Fred Meyer in most respects is similar to or more favorable to plaintiffs than was the record in *Rutherford* and calls for the same result. Fred Meyer was similar to Kaiser in that both did not hire the plaintiffs, did not pay them, and did not keep their employment records. However, unlike the putative employer in *Rutherford*, Fred Meyer did control the hours plaintiffs left work because plaintiffs must obtain a Fred Meyer's manager's signature on a work order before leaving the store and managers required plaintiffs to do additional work before signing the work orders. *See* pp. 17-21 herein. Moreover, there is substantial, although disputed, evidence that a Fred Meyer manager was responsible for plaintiffs Alma Becerra and Julio Martinez

[2] Indeed, *Bonnette* itself rejects defendants' cramped interpretation of its holding since it reiterates the *Rutherford* holding quoted above. 704 F.2d at 1470. The Ninth Circuit also subsequently cited *Bonnette* for the proposition that "a court should consider all those factors which are 'relevant to [the] particular situation' in evaluating the 'economic reality' of an alleged joint employment relationship under the FLSA. *Bonnette*, 704 F.2d at 1470." *Torres-Lopez v. May,* 111 F.3d 633, 639 (9th Cir. 1997) (emphasis added.).

being fired. *See* pp. 19-20 herein. Both of these factors favor joint employment under all joint employment tests.

There is also substantial evidence that at least five of the six factors utilized in *Rutherford* at 730 favor joint employment as to Fred Meyer: (1) Fred Meyer's premises and equipment were used for the work (*see* CP 720, 726, 1052-56); (2) Fred Meyer managers kept in touch daily and directly with the plaintiffs and their work (*see* CP 51, 728, 1035, 1051-52); (3) the responsibility under the janitorial subcontracts passed from one subcontractor (All Janitorial) to another subcontractor (All American Janitorial (hereafter "All American")) without material change (*see* CP 1264-70, 1277-78, 137-93); (4) the janitors' work did not depend for success upon their initiative, judgment or foresight (*see* CP 2068, 1998, 193-98); (5) while only analogous to working on a production line,[3] plaintiffs' janitorial work was a specialty job that is an essential part of Fred Meyer's integrated store activities and is the same work done by Fred Meyer employees during the day to clean up spills and clean bathrooms (CP 703, 699-700, 711, 785, 827-28); and (6) All American did not have a business organization that could or did shift from one retailer to another in the relevant time period (CP 1275).

The result should be the same as to Expert whose summary judgment should also be reversed. Expert argues at pages 17-20 that both

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[3] *See Torres-Lopez* at 643.

it and plaintiffs agree with Ninth Circuit law pursuant to which courts "consider all of those factors which are 'relevant to [the particular] situation' (*Moreau*, 356 F.3d at 947); *Torres-Lopez*, 111 F.3d at 638-39." (emphasis added) (Expert Brief, p. 17). The 12 factors are set out at pages 17-18 of Expert's Brief. The first 10 of those factors are similar to the *Rutherford* factors discussed above, and the last two *Torres-Lopez* factors (permanency and whether the work is integral) are also endorsed as relevant factors by the DOL in its 2001 Opinion Letter (2001 WL 1558966 at *2), discussed *infra*. Plaintiffs' approach is that this Court should utilize all relevant factors including, but not limited to, those 12.[4]

Based on the summary judgment record, the trier of fact could reasonably find that 9 of the 12 *Torres-Lopez* factors favor Expert being plaintiffs' joint employer: (1) evidence of Expert's indirect right to fire janitors is contained at CP 238; (2) evidence of Expert's role in supervising or controlling janitors' work is contained at CP 385-86; (3) the right to control payment to workers was conceded by Expert at CP 1981, *see also* CP 47; (4) evidence that the janitors' work was a specialty job on

[4] Expert's position is that this Court should consider the four *Bonnette* factors, but only "may consider the non-regulatory factors set forth first in *Torres-Lopez*" (Expert Brief, p. 18:7) or "could" consider them. *Id.*, p. 20:10. That is inconsistent with *Torres-Lopez* which holds at page 640 that "the non-regulatory factors play an important role in revealing the economic reality" of the alleged employment relationship (emphasis added). Furthermore, plaintiffs disagree with Expert's argument that there "is no material difference among the various descriptions of the FLSA economic reality test by the different federal circuits. All of them boil down to the same factors." *Id.*, p. 20, n. 3. However, to the extent this Court agrees with the Ninth Circuit's position that all relevant factors, including the eight non-regulatory *Torres-Lopez* factors should be considered, that issue is moot.

the production line (or, as articulated in *Torres-Lopez* at 643, it "constituted one small step in the sequence of steps" necessary to the alleged employer's business model) is essentially conceded by Expert at page 34 of its brief when it acknowledges that the janitors' work was "integral"; (5) evidence that All American did not have an organization that could or did shift as a unit from one work site to another is contained, *inter alia*, at CP 396; (6) evidence that the work was piecework and not work that required initiative, judgment or foresight, is factually conceded in part at pages 32-33 of Expert's brief; (7) whether the employee had an opportunity for profit or loss depending on the alleged employer's managerial skill is factually conceded by Expert at pages 32-33 of its brief; (8) evidence of the permanency in the working relationship is contained at CP 195-99; and (9) Expert conceded at page 34 of its brief that the janitorial work done by plaintiffs was "integral."

Plaintiffs also spent considerable time in their Opening Brief laying out evidence both (a) to demonstrate material disputed issues of fact with respect to many factors, *e.g.*, defendants' supervision and control of plaintiffs' work, their power directly or indirectly to fire plaintiffs, that contracts passing without material changes from subcontractor to subcontractor, and defendants' participation in the "Building One" model, and (b) to show that a number of factors that favor joint employment are undisputed by Fred Meyer, Expert or both. Defendants try to limit this evidence in three ways. First, both defendants object to much evidence

which the trial court considered even though defendants either did not object in the trial court or did not cross-appeal from the trial court orders considering such evidence. None of those objections are procedurally or substantively valid. *See* pp. 11-16 herein. Secondly, defendants either ignore or misconstrue disputed evidence as discussed at pages 17-29 herein. Finally, defendants argue that a number of undisputed factors are really irrelevant. Those arguments are refuted at pages 29-39 herein.

Plaintiffs are entitled to the evidence and reasonable inferences therefrom "being viewed in the light most favorable" to them. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). As such, there are material disputed issues of fact calling for summary judgment to be reversed since this Court should accept evidence including (a) the plaintiffs in their declarations, depositions and interrogatory answers; (b) the declarations of Robert Fazio and John Ezzo; (c) the deposition by Sergey Chaban but not his declaration; and (d) the deposition of William Suen, rather than the conflicting evidence presented by defendants and their employees.

II. ARGUMENT

A. This Court Should Utilize The Joint Employment Factors Adopted By The Supreme Court, The Second And Ninth Circuits, And The U.S. Department of Labor.

Both Fred Meyer and Expert's motions in the trial court relied

primarily on the four so-called "*Bonnette*" factors.[5] The trial court relied only on the *Bonnette* factors in granting Expert's motion (CP 1961) and largely did so in granting Fred Meyer's summary judgment. RP 9/2/11, p. 36.[6] For that reason, plaintiffs explained at pages 37-40 of their Opening Brief why Washington should follow such authorities as *Rutherford, Torres-Lopez, Zheng, Barfield v. New York City Health & Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008), *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir.1996), and DOL's 2001 opinion letter of the relevant joint employment factors under the FLSA, rather than adopt defendants' focus on the four *Bonnette* factors.[7]

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[5] Expert argued this at CP 1991, 1995-96, and 2037. Fred Meyer argued similarly at CP 2001 and 2108.

[6] Expert quotes a portion of the court's written ruling and claims at p. 20 of its Brief that plaintiffs' argument that the trial court relied only on the *Bonnette* factors in granting Expert's motion for summary judgment was "patently unfair" and "unsupported by the record." The only relevant part of the trial court's ruling of CP 2263 not quoted by Expert states:

> There is no genuine issue of material fact on the issue of whether Expert was Plaintiffs' joint employer, and the Defendant is entitled to judgment as a matter of law. Specifically, the Court concludes that Expert was not Plaintiffs' joint employer under the test set forth in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983) (emphasis added).

Given that the trial court's only reference of a test was the *Bonnette* test and it only discussed the four *Bonnette* factors, plaintiffs' position is not "patently unfair" and is supported by the record. Moreover, at RP 36-37 (9/2/11), the trial court acknowledged that it relied "more on the *Bonnette* factors than the *Torres-Lopez* factors."

[7] It is ironic that Fred Meyer at page 48 complains that plaintiffs ignore the "FLSA regulation on joint employment," since plaintiffs at page 24 of their opening brief quoted the 2001 DOL opinion letter that relies on that very regulation at *2. Given that the *Barfield* court used that opinion letter, it is Fred Meyer which should explain why this court should not pay attention to that opinion letter which lists the following as relevant factors:

> [2] the power, whether alone or jointly or directly or indirectly, to hire or fire or modify the employment conditions of the individual; [3] the degree of permanency and duration of the relationship; [4] the level of skill involved.

Defendants largely ignore plaintiffs' discussions of *Rutherford*[8] and completely fail to cite or distinguish *Barfield*, *Antenor*, or the DOL opinion. Defendants' failure to cite *Barfield* is particularly telling because *Barfield* rejects many of their arguments in a way that undercuts defendants' arguments. For example, at page 143, *Barfield* explains why the four factors discussed in *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984) (which correspond closely to the *Bonnette* factors) are useful when examining the degree of formal control over a worker, while the *Zheng* factors (largely drawn from *Rutherford*) should be used in assessing "whether an entity that lacked formal control nevertheless exercised functional control over a worker."

The *Bonnette/Carter* factors largely ignore functional control which was important in *Rutherford*, *Zheng* and *Barfield*, and which are important in this appeal. "Functional control" is relevant here because Fred Meyer and Expert set up a contractual framework that minimized their formal control over plaintiffs, while maximizing functional control as explained, *inter alia*, by Mr. Ezzo.

Barfield also discusses and supports DOL opinion letters and explained that "this Court" has "often relied on DOL opinion letters for their persuasive value." *Id.* at 149. The Second Circuit specifically relied upon the 1998 and 2001 DOL letters, which plaintiffs cite or discuss at

[8] For example, Fred Meyer, which mischaracterizes *Rutherford* as a "chicken boning" case, never analyzes the factors used in *Rutherford.*

pages 8-9 and 24 of their Opening Brief and which defendants conspicuously ignore.[9]

Fred Meyer "doubles down" on the four-factor "*Bonnette* test" and argues that "the overwhelming majority of federal courts use this FLSA test or equivalent." FM Brief, p. 30; *compare* Expert Brief, pp. 17-18 (courts have focused primarily on *Bonnette* factors). Fred Meyer's argument is refuted not only by the cases and authorities plaintiffs cited at pages 37-40 of their Opening Brief, including *Rutherford*, *Torres-Lopez*, and *Barfield*, but also by many of the cases Fred Meyer cites in its brief. For example, while *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation,* 683 F.3d 462, 470 (3d Cir. 2012) cites the "four *Bonnette* factors," it makes clear that those four factors "did not constitute an exhaustive list of all potentially relevant facts and should not be 'blindly applied.' *See Bonnette*, 704 F.2d at 1469-70." 683 F.3d at 469 (emphasis added).

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[9] *Barfield* additionally rejects Fred Meyer's argument that the *Rutherford/Zheng* factors are intended only to expose "shams" or "subterfuge" arrangements. FM Brief, pp. 31, 41, 46-47. At pages 145-46, *Barfield* explains that such an argument "misreads *Zheng*" which actually:

> [C]ontemplates arrangements under which the totality of circumstances demonstrate that workers formally employed by one entity operatively function as the joint employees of another entity, even if the arrangements were not purposely structured to avoid FLSA obligations. (Emphasis added.)

No case cited by Fred Meyer holds that the joint employment factors only apply in "sham" situations. Moreover, there is substantial evidence in this record that Fred Meyer went to its current model to save money, and that its other ostensible reasons did not really apply. *See, e.g.*, CP 1053. Finally, *Barfield* at 146 rejects defendant's argument that the existence of a "legitimate business concern" (the term used in *Barfield*) or "legitimate business objectives" (FM Brief, p. 41) calls for denying joint employment.

In *Schultz v. Capital Int'l. Sec., Inc.*, 466 F.3d 298, 306, n. 2 (4th Cir. 2006), cited by Fred Meyer at page 30, n. 9 of its brief, the Fourth Circuit only gave a lukewarm approval of the *Bonnette* factors stating that the *Bonnette* factors "may be useful" in "some cases." (Emphasis added.) Similarly, Fred Meyer cites *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012), which used an eight-factor test rather than the four *Bonnette* factors.[10]

B. Defendants' Evidentiary Objections Are Baseless And/Or Waived, But Plaintiffs' Motion To Strike Portions Of Expert's Brief Should Be Granted.

1. John Ezzo and Sergey Chaban.

Plaintiffs offered against Fred Meyer a declaration by John Ezzo. CP 1054-1182.[11] This declaration supplied historical opinion of the kind specifically approved in *Zheng*, 355 F.3d at 73-74, and applied at *Zheng v. Liberty Apparel Co. Inc.*, 556 F. Supp. 2d 284, 291-93 (S.D.N.Y. 2008). His declaration also provides important evidence concerning Fred Meyer's role in supervising and disciplining plaintiffs (CP 1057-58), as well as explaining that Fred Meyer supplied by far the greatest dollar amount of

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[10] Fred Meyer cited *Layton* for the proposition that "Federal Courts have rejected the argument that 'cases interpreting the AWPA can be used to interpret the FLSA.'" FM Brief, p. 28. Fred Meyer's argument is flawed for two reasons. First, *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999) is the only case plaintiffs cited that considered only the AWPA and did not also consider the FLSA. For example, *Torres-Lopez* and *Antenor* interpreted both laws. Secondly, DOL disagrees both with *Layton* and Fred Meyer because it cited *Charles* in its 2001 Opinion Letter discussed herein at *2, which interpreted joint employment factors under the FLSA.

[11] While portions of that declaration incorporated a declaration offered against Expert (CP 1066-85), which is in the record at CP 549-68, much of the Ezzo declaration offered against Fred Meyer was new. CP 1055-64.

materials and equipment for the plaintiffs' work (CP 1059). This evidence is directly relevant to joint employment factors this Court should consider pursuant to *Rutherford*, *Torres-Lopez*, *Zheng*, *Barfield*, and *Anfinson*.

Fred Meyer raised no objection to the trial court's consideration of the Ezzo declaration, and the trial court considered the declaration in deciding the summary judgment. CP 1966. Fred Meyer now argues that his declaration "alleges facts without foundation," and that "many, if not all of the Ezzo citations in plaintiffs' appeal brief are inadmissible as either hearsay, due to lack of foundation, or lack of relevance." FM Brief, p. 22. Fred Meyer, however, waived all of its objections to this declaration by not raising them to the trial court. As held in *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979), a case also involving an expert declaration:

> [T]he record before us, however, does not reveal any motion to strike the affidavit or any portion thereof prior to the trial court's action. Failure to make such a motion waives deficiency in the affidavit if any exists.[12]

Even had the objections not been waived, there would be no basis for this Court to exclude Mr. Ezzo's declaration against Fred Meyer whether this Court's review is for an abuse of discretion basis or

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[12] Cases to the same effect include *Mithoug v. Apollo Radio of Spokane,* 128 Wn.2d 460, 463, 909 P.2d 291 (1996); *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987) (where no objection or motion to strike is made prior to entry of summary judgment, a party is deemed to waive any deficiency in the affidavit); and *Armstrong v. Safeco Ins. Co.,* 50 Wn. App. 254, 257, 748 P.2d 666 (1988).

de novo.[13] Mr. Ezzo's declaration lays out ample foundation for his opinion under ER 702 and, pursuant to ER 703, his opinion may rely on hearsay.

Mr. Ezzo's declaration concerning Expert at CP 549-642 also contains crucial historical evidence against Expert as discussed at pages 16-18, 41, and 46 of plaintiffs' Opening Brief. Expert seeks at pages 35-36 of its Brief to have this Court "disregard" Mr. Ezzo's declaration, using almost identical language to what it used at CP 2038 when it unsuccessfully sought the same relief in the trial court. The trial court correctly rejected those arguments and considered Mr. Ezzo's declaration. CP 1961. However, as in *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052 (2011), Expert did not cross-appeal the trial court's order considering the Ezzo declaration. Expert thus failed to comply with RAP 2.4(a), and its objection should not be considered by this Court. *State v. Sims,* 171 Wn.2d 436, 442, 256 P.3d 285 (2011) and *Morgan*, 159 Wn. App. at 733.[14] Even assuming that this Court does review these objections, they are baseless.[15]

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[13] *Compare King County Fire Protection Districts No. 16, et al. v. Housing Authority King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Orion Corp. v. State*, 109 Wn.2d 621, 638, 747 P.2d 1062 (1987); and *American States Ins. Co. v. Rancho San Marcos Properties, LLC*, 123 Wn. App. 205, 214, 97 P.3d 775 (2004) (abuse of discretion) *with Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); and *Warner v. Regent Assisted Living,* 132 Wn. App. 126, 130 P.3d 865 (2006) (de novo).

[14] *Morgan* held at page 733:

> While IMO's briefing includes argument as to why the Wortman declaration should not be considered by this court, it acknowledges that it has not cross-appealed the trial court's ruling not to strike. Accordingly, we decline to review

Mr. Chaban's testimony at CP 240-41 that the amounts paid him by Expert were insufficient for him to pay plaintiffs properly under the MWA is relevant to whether plaintiffs were in fact economically dependent on Expert, and thus joint employees. *See Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 407 (7th Cir. 2007), *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983). While Expert challenges that testimony at page 40 of its Brief, it waived its argument (raised, but rejected in the trial court at CP 2257-59 and not cross-appealed) that Mr. Chaban's sworn deposition testimony should be disregarded because Expert was not present at his deposition taken in a case in which Expert was not even a party. Even if not waived, this argument makes no sense since CR 56 permits evidence in summary judgments to be presented by affidavits or declarations without the right to cross-examine. Sworn testimony similarly may not be properly disregarded for that reason.

2. Testimony From Plaintiffs.

Fred Meyer introduced evidence from Marcos Flores that it had no

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the trial court's admission of this evidence, and consider the Wortman declaration as the trial court did. (Emphasis added.)

[15] For example, while Expert claims that Mr. Ezzo "makes no showing that other experts in the field reasonably rely on the information and materials he bases his opinion on as required by ER 703," that claim simply ignores CP 556, ¶53, which does just that. Further, while Expert claims that his declaration does not supply expert opinion to "assist the trier of fact to understand the evidence," the court could simply look to CP 566-68 for testimony that is both beyond what an ordinary trier of fact would know and helpful to the issue of whether Expert likely was part of a scheme that led to wage and hour violations.

involvement in firing plaintiffs,[16] but objects as hearsay to Alma Becerra's testimony at CP 1224 that she was told by Marcos Flores that she and plaintiff Martinez were fired because their store manager "didn't want us there anymore" because "we were late." FM Brief, pp. 15, 34, 34, n.12, and 42. That testimony is obviously relevant to the "power to fire" factor. Fred Meyer's hearsay objection misses the point because Ms. Becerra's testimony is admissible for a non-hearsay purpose – it provides evidence challenging the credibility of and impeaching Mr. Flores' statement offered by Fred Meyer because that statement is inconsistent with a prior statement from him to Ms. Becerra. That is not hearsay. *Powell v. Viking Ins. Co.,* 44 Wn. App. 495, 503, 722 P.2d 1343 (1986).[17] Moreover, defendant itself, at CP 772 and 775, submitted emails which contained admissions from Alma Becerra conveying the same information, *e.g.*, "apparently Marcos told her that Mark Scheid did not want them here anymore and that was the reason given for their termination." Admissions are not hearsay pursuant to ER 801 and, when received in evidence, may be used by any party. *See also* the discussion, *infra*, at page 18 concerning

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[16] Fred Meyer submitted the declaration of Marcos Flores who stated that Fred Meyer "never asked All Janitorial or All American to remove specific janitors from a store for performance reasons." CP 705. In response, plaintiffs submitted excerpts of Alma Becerra's deposition, which stated that she stopped working for Fred Meyer because Marcos Flores called her "about at 10:00 p.m. and he said the manager of the store didn't want us there anymore" because she and her co-worker "were late." CP 1224. Fred Meyer then submitted declarations from Mark Scheid and Maria McGuinness. CP 770-81 relating to this issue.

[17] *See* also *Fraser v. Beutel,* 56 Wn. App. 725, 738, 785 P.2d 470 (1990) and *Riley v. Andres,* 107 Wn. App. 391, 397-98, 27 P.3d 618 (2001).

Fred Meyer's objection to other testimony of plaintiffs.

3. Motion To Strike Portions Of Expert's Brief.

Plaintiffs move this Court to strike the portions of Expert's Brief that refer to or depend on the bankruptcy filing or pleadings involving Mr. Chaban in the Western District of Washington (page:line: 7:1-4, 15:9-17, 41:3-11, and 41:20-42:3). This evidence was neither called to the attention of nor considered by the trial court in connection with Expert's Motion For Summary Judgment, which is why there are no CP citations in its brief relating to it. It should be excluded pursuant to RAP 9.12 and such cases as *Nelson v. McGoldrick,* 127 Wn.2d 124, 141, 896 P.2d 1258 (1995).[18] The purpose of the challenged portions of Expert's Brief is to imply that Mr. Chaban has lots of money to cover the plaintiffs' claims so no harm would be done if Expert is not liable. That implication is untrue and unsupported by the evidence of the record. If the court does not strike the challenged portions of the brief, the court should then consider the portions of the same bankruptcy court's record contained at Docket Nos. 1, 2 and 25 in *In Re Chaban*, U.S. Bankr., W.D. Wash., No. 11-20593-TWD, as well as the Discharge of Debtor. Those documents demonstrate

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[18] In *Nelson,* 127 Wn.2d at 141, the court stated:

> The supplemental brief, which is barely over nine pages long, contains numerous factual assertions unsupported by the record, and evidence (including one and a half pages of deposition testimony) which was never submitted to nor considered by the trial court in deciding the summary judgment motion. We grant the motion to strike those portions of the brief containing the factual material about which McGoldrick appropriately complains.

the falsity of the implication, and show that Mr. Chaban was granted a "no asset" bankruptcy.

C. There Are Material Disputed Issues Of Fact Regarding Whether Fred Meyer Was A Joint Employer Under A Number Of Relevant Factors.[19]

1. Fred Meyer Controlled And Supervised Plaintiffs.

The following chart summarizes some of the material disputed issues relating to Fred Meyer's control or supervision of janitors:

FM's Evidence	Plaintiffs' ("P") Evidence
1. Ps' worked only when the FM store was closed to public – 9:00 pm – 7:00 am. (CP 721, 727)	1. "Impossible" to finish work by 7 am (CP 841) and often worked until 7:30-8 or later (CP 1032, 1035, 1051, 1039-40)
2. No FM managers in store from 11 pm – 7 am (CP 820, 998, 1007; *see* FM Brief, p. 38)	2. FM managers in store beginning at 5 a.m. (CP 705, 756, 841, 761, 904, 1003)
3. Janitors only speak Spanish and FM managers did not speak Spanish so no effective means of communication (CP 703-04, 759, 763, 785)	3. FM Managers could and did communicate with janitors regarding need for further work (CP 842, 861, 1035, 1039, 1052)
4. Contact between FM managers and plaintiffs was limited to signing work sheets (CP 842, 861, 722; *see* FM Brief, p. 39	4. FM Managers walked the store with janitors and had corrections made before signing off (CP 855, 885, 913, 1032, 1040, 1051)
5. Marcos Flores supervised janitors (CP 793, 795; *see* FM Brief, p. 39)	5. Janitors rarely communicated with Flores; who, after a time, rarely if ever supervised them (CP 704, 855, 910, 1040)

CP 696-1030 was the evidence that Fred Meyer submitted to the trial court. Its own evidence contradicts its factual assertions and arguments that it did not supervise or control plaintiffs. For example, Fred Meyer argues that "the janitors only interacted with Fred Meyer

[19] Fred Meyer and Expert both argue that "Joint Employment Is A Legal Question." Expert Brief, p. 16; FM Brief, p. 27 *citing Moreau* and *Bonnette*. That is misleading. Those and other cases agree that it is a legal question assuming the facts are undisputed. When facts are disputed, the trier of fact – whether the jury or the Judge – must first resolve the factual disputes. *Castillo*, 704 F.2d at 185; *Antenor*, 88 F.3d at 929. Moreover, *Anfinson v. FedEx Ground*, 159 Wn. App. 35, 72, 244 P.3d 32 (2010), holds that under Washington law, "[e]mployment status is a mixed question of fact and law."

employees after they had finished cleaning." This is contradicted, *inter alia*, by Alma Becerra's testimony, in direct response to Fred Meyer's questions at CP 841 that she communicated with Fred Meyer employees during the night. Fred Meyer also argues that "Appellants' conclusory assertions that Fred Meyer 'managers' who signed work orders supervised them did not create factual issues sufficient to preclude summary judgment. *Grimwood*, 110 Wn.2d at 360." FM Brief, p. 36. Fred Meyer fails to point out that it offered the same evidence it is criticizing and that the evidence consisted of unobjected deposition responses to defendants' questions.[20]

Fred Meyer also argues that the janitors testified that "they rarely had to correct mistakes. CP 867, 905, 914." FM Brief, p. 11. Those three citations exclusively or primarily relate to having to correct problems after the plaintiffs had left the Fred Meyer store. As plaintiffs testimony repeatedly makes clear, that was only because Fred Meyer managers inspected their work and required it to be correct before the plaintiffs

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[20] *See* CP 841 (Alma Becerra), CP 885 (Ventura-Reyes), and CP 910 (Solorio). Presumably, defendants (who asked these questions, did not move to strike the answers, and then offered them in the trial court) must have considered them relevant and admissible evidence. Moreover, RAP 9.12 precludes objections on appeal since none were made at trial. Even some of its own managers contradicted Fred Meyer's position about control, *e.g.*, Mr. Fazio at CP 1051-52. Fred Meyer argues that his "declaration does not substantively disagree with the other 13 store directors' declarations." FM Brief, p. 17, n. 6. That would be true only if Fred Meyer agrees that all of the 13 directors do not substantively disagree with his testimony at CP 1051-52.

could leave. *See* CP 914 (Solorio), CP 885-886 (Martinez), CP 1032 (Alma Becerra), and CP 1039-40 (Ventura-Reyes).[21]

Fred Meyer's legal arguments regarding its control over plaintiffs are also unpersuasive. Relying on *Zheng*, *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683 (D. Md. 2010), and *Moreau v. Air France,* 356 F.3d 942 (9th Cir. 2004), Fred Meyer attempts to persuade this Court that if a company calls supervision of workers "quality control" or "supervision with respect to contractual warranties," then supervision is irrelevant to joint employment. FM Brief, pp. 37-38.

That is inconsistent with the language and required broad interpretation of the MWA. *See Anfinson* and *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010).[22] Furthermore, in all of the cases relied upon by Fred Meyer, the supervision under contractual warranties was

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[21] Fred Meyer also argues that "only two janitors' submitted declarations and neither raise a material factual dispute." FM Brief, p. 22. However, Fred Meyer itself submitted excerpts from each of the five appellant's depositions and plaintiffs submitted additional deposition excerpts so there was no need pursuant to CR 56 for the remaining three plaintiffs to submit declarations. As to their not raising material factual disputes, that would be true only if Fred Meyer agrees that it is undisputed that (a) janitors such as Alma Becerra "could not go home until our Fred Meyer managers inspected our work, we made any corrections and they signed us out," (CP 1032), and (b) Mr. Ventura-Reyes "was supervised by my Fred Meyer managers. Each morning my cousin and I could not leave until a Fred Meyer manager inspected our work and signed us out" and that "Marcos Flores did not inspect or supervise my work." CP 1039-40.

[22] If Fred Meyer were correct, then Fred Meyer or any other company, instead of hiring its own employees and paying them in compliance with the MWA, could routinely contract with an undercapitalized company that could not or does not comply with the MWA, impose detailed warranties relating to the work, do all of the supervising itself with little, if any, supervision by the contracting company and yet have no risk of being called an employer of the workers. That would enable such companies to eviscerate the MWA and the FLSA by setting up such contractual arrangements. However, as explained in *Narayan*, 616 F.3d at 897, "statutes enacted to confer special benefits on workers are 'designed to defeat rather than implement contractual arrangements.'"

accomplished only by communicating with the contractor not with the individual workers. That distinguishes Fred Meyer's control from the "control" in those cases. In *Moreau*, Air France monitored contractor's performance regularly, but only communicated once a month about those problems and communicated with the contractor, not the workers. 356 F.3d at 949. The same was true in *Jacobson*, where Comcast only reviewed the technician's performance once a month, although it collected data in real time. 740 F. Supp. 2d at 687. As explained in *Lemus v. Timberland Apartments*, LLC, 2011 WL 7069078 (D. Or. 2011) at *13: "Comcast only used the data to determine who should be deauthorized, not to micro-manage technician's daily activities."

Those facts are very different then this case in which Fred Meyer managers reviewed the janitors' work every day and would not let them leave until unsatisfactory work was corrected.[23] Fred Meyer's direct daily contact with the janitors, reviewing their work, and telling them what to change before they can leave, is similar instead to the supervision in *Rutherford*, *Torres-Lopez*, *Antenor*, *Lemus*, *Flores v. Albertson's, Inc.*, 2003 WL 24216269 (C.D. Cal. Dec. 9, 2003), and *Tumulty v. FedEx*

[23] Fred Meyer's quotation to *Zheng* at page 37 of its Brief regarding supervision based on "contractual warranties" also is misleading because *Zheng* explains the language Fred Meyer quotes by citing *Moreau* where "supervision of workers not indicative of joint employment where principal merely gave 'specific instructions to a service provider' concerning performance under a service contract." *Id.* at 75 (emphasis added). That would be analogous if Fred Meyer merely periodically contacted Expert, but is very different from the facts here in which there is daily detailed contact directly between Fred Meyer and the janitors.

Ground Packages, 2005 U.S. Dist. LEXIS 26215 (W.D. Wash. March 7, 2005).[24]

2. There Is Disputed Material Evidence As To Whether Fred Meyer Had The Power Directly Or Indirectly To Fire Plaintiffs.

While Marcos Flores signed a declaration that Fred Meyer never asked that All Janitorial fire anyone for performance reasons (CP 705), he told Alma Becerra the opposite according to her deposition, *i.e.*, he told her that she and her brother-in-law were fired because the Fred Meyer store manager didn't want them there anymore. CP 1224. She also told that to Fred Meyer employee Maria McGuinness, who confirmed her statement in a declaration Fred Meyer submitted and has not objected to. CP 772, 775. After hearing this testimony, the jury could believe either Mr. Flores or Ms. Becerra who (unlike Mr. Flores and Mr. Scheid, who were involved with Fred Meyer when they gave their declaration), had no

[24] In *Flores v. Albertson*, 2003 WL 24216269 (C.D. Cal. Dec. 9, 2003) at *3, as in this case, "day to day supervision over the janitorial employees came principally from the initial Supermarket defendants." Fred Meyer attempts to distinguish *Flores* from this case by arguing that, unlike *Flores* where the janitors were working when customers and supervisors were in the store, here the customers and managers were not in the store until 7:00 a.m. when the janitors had stopped working. FM Brief, p. 38. However, the evidence shows that managers came in beginning at 5:00 a.m. and the janitors kept working one or two hours after the store opened at 7:00 a.m. Thus, there were routinely several hours of overlap between plaintiffs and managers and/or customers. In *Tumulty*, Judge Peckman analyzed a joint employment claim against FedEx. The District Court concluded that FedEx exercised "significant control over the drivers' daily routine" even though the drivers "reported primarily to the contractors." *Id.* at *19-11. The facts supporting that finding were that managers held weekly meetings with the drivers and checked to see if they delivered their packages. The managers would also periodically assign extra work. Those facts are similar to the facts in this case.

reason to lie to Ms. McGuinness in 2008 just after she was fired. That is a material disputed issue of fact.

Citing *Lepkowski v. Telatron Mktg. Group, Inc.*, 766 F. Supp. 2d 572, 578 (W.D. Pa. 2011) and *Enterprise*, 683 F.3d at 470, Fred Meyer's only legal argument on this factor is that recommendations that a worker be fired standing alone, do not "amount to control over that worker's hiring and firing." FM Brief, pp. 34-35. Fred Meyer's reliance on *Lepkowski* and *Enterprise* is misplaced because the evidence here shows much more than "recommendations." For example, when an employee is "trespassed" by Fred Meyer, "the vender [*e.g.*, All Janitorial] is informed that this individual is not to be placed in a Fred Meyer store again." CP 772. That is an instruction, not a recommendation.[25] These facts are completely distinguishable from the facts in *Enterprise* where the record did "not support the plaintiffs' claims that Enterprise Holdings, Inc.'s recommendations were anything more than recommendations" [683 F.3d at 471] or from the facts in *Lepkowski* where there also was only a "recommendation." The facts here are more similar to *Baystate*

[25] Moreover, CP 1395-96 shows that Expert in 2008 communicated with All Janitorial about "thefts" by janitors at Fred Meyer, and told All Janitorial's owner "[d]o whatever you have to do but get this stopped!" In response, Mr. Chaban agreed that:

> I will also create a black list of people that are non hirable to make sure these people never come back to FM stores or any other in my company for that matter. (Emphasis added.)

Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 676 (1st Cir. 1998) and *Lemus*.[26]

3. Fred Meyer Had The Power To Determine Plaintiffs' Rate Of Payment.

Fred Meyer argues that it "did not determine the janitors' method or rate of payment." FM Brief, p. 39 (giving a number of CP cites). However, Fred Meyer is answering too narrow a question. The correct question is whether Fred Meyer had the right or power to determine plaintiffs' rate of pay. That can be seen in *Torrez-Lopez*, 111 F.3d at 640-44, where the Ninth Circuit explained that the joint employment factors focus on the ability to prevent labor law violations and does not depend on whether the putative joint employer actually used its power to prevent such violations. Indeed, if a putative joint employer uses its authority to prevent wage and hour violations, there typically would be no need for a lawsuit. Fred Meyer has no response to such evidence as (a) the email

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[26] In *Baystate* the court explained that:

> Baystate exercised indirect supervisory oversight of the workers through its communications with client companies regarding unsatisfactory performance, occasionally taking workers off the site in the middle of a job. Thus, Baystate retained the authority to intervene if problems arose with a worker's job performance. (Emphasis added.)

The Findings and Recommendation in *Lemus* at page 19 explained that:

> Unlike *Moreau* and *Gonzalez*, where the putative joint employers had absolutely no power to hire or fire plaintiffs, here Polygon retained both a limited right to fire JC Builders' employees for specific violations of Polygon policy and a more general right to remove JC Builders' employees from the job site for safety concerns, a sanction somewhat equivalent to firing here where Polygon's jobs constituted the vast majority of JC Builders' work. Thus, this factor weighs in favor of finding a joint employment relationship.

from Scott Jones at CP 1407-08 requiring confirmation about janitors' overtime pay from the janitorial management companies, (b) Mr. Chaban's testimony at CP 1251 that he would have treated individuals as employees if required and able to do so, and (c) Mr. Ezzo's testimony at CP 1058 and 1082-83 that Fred Meyer had such right and power under its contract. This is a disputed issue of material fact.

4. There Is Disputed Material Evidence As To Whether The Janitors' Work Was Integral To Fred Meyer's Business.

Fred Meyer at page 42 argues that even though the janitors' work was "important" or even "essential," it was not "integral" and claims that "[a]ppellants confuse 'necessary' . . . with 'integral.'" If plaintiffs are confused, then both the Third Circuit and the District Court in Oregon are equally confused since both courts equated "integral" with "necessary" in the wage and hour context. *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985) and *Lemus*, both of which were cited at page 32 of plaintiffs' Opening Brief. Significantly, Fred Meyer cites no cases to support its "confusion" argument.

Factually, Fred Meyer cites portions of the record to the effect that the janitors do not clean any of the "critical" sales areas such as the "grocery shelves." FM Brief, p. 43. Presumably, Fred Meyer's argument is that it uses its employees to clean the portions of the store that are "integral," but uses janitors such as plaintiffs to clean the rest. However, the trier of fact could reasonably find that the floor area upon which the

"grocery" shelves rest which plaintiffs clean are as integral as the shelves which Fred Meyer's employees clean. Similarly, the trier of fact could find that the bathrooms which the janitors clean at night are as integral as the same bathrooms cleaned by Fred Meyer employees during the day.

D. There Are Material Disputed Issues Of Fact Regarding Joint Employment Factors Involving Plaintiffs And Expert.

Expert's assertion that "no material facts were disputed" in this case (Expert Brief, p. 16) ignores or misconstrues numerous disputes of facts relating to relevant factors including the following:

1. **Indirect Right To Fire Janitors** - Susan Vermeer's statement that Expert had "no role" in "firing" janitors (CP 71) is disputed, *inter alia*, by (a) her admission that as to janitors caught stealing, Expert tells the service provider "that the janitor can no longer work on the Fred Meyer contract" (*id.),* and (b) Sergey Chaban's testimony at CP 238 that Susan Vermeer communicated to him that there should be personnel changes among the janitors. He testified that such communications took place if something was stolen, the janitor didn't show up, or a janitor just did a "bad job continuously." *Id.* He also testified that the communication from Susan Vermeer was "stronger than a suggestion" and that it was his "typical" practice in such a situation to "let them [the janitors] go." Giving plaintiffs, as non-moving parties, the benefit of the evidence and inferences, Expert both had at least the indirect power to fire

and exercised such power. That directly disputes the facts Expert relies on at pages 21-23 in claiming Expert "played no role" in firing.

2. **Control Of The Janitors' Work** - Susan Vermeer's statement that "Expert had no role in supervising the janitors or directing their work" (CP 71-72) is disputed by the testimony of Mr. Suen, who reported to Susan Vermeer (CP 385) and who testified that on a "typical day" he would start at 7:00 am, "go into a Fred Meyer Store," and his responsibility was "to make sure the janitors had completed the scope of work", and had been "signed off by the MOD." CP 385-86.[27] That is a material disputed issue of fact regarding Expert's control of the janitors.[28]

Expert also refers to its contract with Fred Meyer and with its service providers as if the contracts set forth undisputable facts. Expert's Brief, pp. 3, 4. That is incorrect. For example, while the Fred Meyer contract required that work be done by 7:00 a.m. (CP 50), there is substantial evidence that the janitors worked well past 7:00 a.m. CP 386.

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[27] While Expert tries to distinguish Mr. Suen's involvement from that of the manager in *Torres-Lopez* who was in the field "daily" (Expert Brief, p. 24), Mr. Suen was in the Fred Meyer stores "daily" although he was in each particular store only once a week. Mr. Suen's testimony was in the record against Expert, but was not part of the record in the Fred Meyer summary judgment. Plaintiffs' comments at CP 2077, quoted by Expert at page 24, were made based on the record in the Fred Meyer motion.

[28] Expert's reliance on *Moreau* and *Jacobson* at pages 25-26 of its brief is unpersuasive for the reasons set forth at page 19 herein. The same is true for Expert's reliance on *Zhao v. Bebe*, 247 F. Supp. 2d 1154 (C.D. Cal. 2003). In *Zhao*, it was the subcontractor Apex who was "primarily responsible for the day to day management of the workers." *Id.* at 1160. In this case, the record presents evidence from which the trier of fact can conclude that it was Fred Meyer and (according to Mr. Suen) Expert who had that day-to-day control rather than the subcontractors.

3. **Were The Subcontractors Businesses That Could Or Did Shift From One Customer To Another** - Expert's claim at page 31 that plaintiffs were part "of a business that could shift as a unit from one customer to another" is disputed by evidence that All American had no income from anyone other than Expert in the first part of 2010 (CP 396), when plaintiff Reyes was working for it. Under those circumstances, All American could not shift as a unit from Fred Meyer to other customers since it had no other paying customers.

4. **Easy Transfer From One Subcontractor To Another** - Mr. Reyes testified that the transfer from when he was working at All Janitorial to when he was working at All American just "changed suddenly" and that no one talked with him about it. CP 229. That disputes Expert's argument at page 30 of its Brief that the transfer from All Janitorial to All American was not analogous to the transfer in *Rutherford*. Moreover, Expert's reliance on and quotation from *Zheng* at page 30 of its brief is misplaced since the *Zheng* quote presupposes that there is a "direct employer." All American was not a direct employer of anyone in early 2010. CP 405, 443-48. Under plaintiffs' evidence, this factor discussed by Expert at pages 29-30 of its Brief, favors Expert being a joint employer particularly because Expert concedes that the All Janitorial contract was not materially different from the All American contract. *Id.*, p. 29.

5. **Permanency Of Work** - Expert's claim at page 33 of its Brief that the length of time plaintiffs worked under the Expert contract with Fred Meyer "varied widely from plaintiff to plaintiff, ranging from just nine weeks to 18 months" is disputed by the very record Expert cites.[29] Furthermore, all of the four plaintiffs left involuntarily and so otherwise would have chosen to have continued to work as janitors at Fred Meyer indefinitely. That is permanent employment which is defined by BLACK'S LAW DICTIONARY (7th Ed.), at page 545, as:

> **Permanent employment.** Work that, under a contract, is to continue indefinitely until either party wishes to terminate it for some legitimate reason.

This is a disputed issue of fact directly relevant to the "permanency" factor of *Torres-Lopez*, which is discussed by Expert at page 33 of its Brief. Under plaintiffs' evidence, this factor favors joint employment.

6. **Right To Control Payment To Workers** - Expert conceded in the trial court when filing its motion for summary judgment that its agreement with Fred Meyer "requires" that the janitorial work at Fred Meyer stores "complies with all applicable laws and regulations" including "the FLSA." CP 1981. *See also* CP 47. Plaintiffs accepted that concession, while at the same time conceding that Expert did not in fact

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[29] According to CP 195-199, the four plaintiffs who are appealing the judgment in Expert's favor worked the following amount of time: Caroline Becerra, 315 days in 11 months; Julio Martinez, 323 days in 11 months and subsequently 14 days in one month; Orlando Reyes, 157 days in six months and later 430 days in 15 months; Alma Becerra, 157 days in six months and later 430 days in 15 months. None of them only worked 9 weeks and the least time worked by any of the four plaintiffs was 323 days in 11 months.

use that right of control regarding payment. CP 2028. Under *Torres-Lopez* at 640-44, and contrary to Expert's argument at page 27, the right to control wage payment is relevant to joint employment.[30]

7. Mr. Chaban's sworn statement on April 1, 2011 at CP 96 that "[t]o the best of my recollection, I never spoke with Ms. Vermeer about All Janitorial's janitors working seven days a week" is inconsistent with his sworn statement five months earlier agreeing that he talked with Ms. Vermeer about "janitors working seven days a week." CP 249.

8. While Expert "ISP" contract required subcontractors such as All Janitorial to be the janitors' sole employer, All Janitorial did not treat them as employees and Expert Manager Susan Vermeer knew that to be the case according to Mr. Chaban. CP 245.[31]

E. Many Factors Undisputed Or Conceded By Fred Meyer Or Expert Are Relevant To And Favor Joint Employment.

Fred Meyer does not dispute that while working at All Janitorial and All American, the plaintiffs worked on Fred Meyer premises and did so exclusively (CP 268, 720, 1193, 1201, 1214, 1228, 1234), and the responsibility could pass from one subcontractor to another without material changes. *See* FM Brief, p.45. Both Fred Meyer and Expert do not dispute that (a) the plaintiffs' work was low skill (CP 1192, 1998,

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[30] Also, contrary to footnote 4 in Expert's brief, the trial court's conclusion that plaintiffs did not have an independent right to force Expert to exercise its control and thus was not a third-party beneficiary, does not mean that Expert did not have the right to control, which is a relevant factor in the separate "joint employment" claim.

[31] Both paragraphs 7 and 8 herein are relevant to the factors discussed at pages 36-39 herein.

2028, 1210-11, 1222, 1233,), and (b) plaintiffs had no opportunity for profit based on managerial skill. Expert also concedes that the plaintiffs were integral to Expert (CP 1999). As discussed in plaintiffs' Opening Brief, these factors were among the factors utilized repeatedly in *Rutherford* and/or by the Second Circuit in *Zheng*, the Ninth Circuit in *Torres-Lopez*, and the Eleventh Circuit in *Antenor*. Defendants' attempts to avoid or minimize the effect of these factors should fail as explained below.

1. Plaintiffs Worked On Fred Meyer Premises, Using Mostly Fred Meyer Materials.

Fred Meyer concedes on pages 44-45 of its brief that it is "undisputed" that plaintiffs "performed their work on Fred Meyer premises." It argues, however, that doing work on its premises does not favor joint employment because (a) that is only a "proxy for actual evidence about control," and (b) there is no such evidence of actual control. Its first argument is refuted by *Rutherford. Rutherford* included plaintiffs' work on Kaiser's premises as <u>one</u> factor favoring joint employment and included <u>as a separate factor</u> Kaiser's control of the work, *i.e.*, the managing official of the plant "kept close touch" on the operation. 331 U.S. at 730. Thus, contrary to Fred Meyer's argument, *Rutherford* held that working on a putative employer's premises is not simply a proxy for control. The Ninth Circuit, citing both Fourth and Fifth Circuit cases, explained that the significance of working on the premises is

not simply control, but is that the owner of the worksite "will likely be able to prevent labor law violations even if it delegates hiring and supervisory responsibilities to labor contractors." *Torres-Lopez*, 111 F.3d at 640.[32] Moreover, at CP 1056-57 and 1059, Mr. Ezzo explained that Fred Meyer supplied the considerable majority of the chemicals and equipment the janitors used in terms of dollar value.

2. Plaintiffs' Work Was Only In Connection With Fred Meyer Activities.

It is undisputed that plaintiffs only cleaned Fred Meyer stores. CP 1031-32, 1039, 1191, 1201, 1231. That factor was relevant in *Rutherford* and has been repeatedly used in circuit court decisions including *Zheng*[33] and *Antenor*, 88 F.3d at 927 (putative employees worked only for grower). Fred Meyer argues that this Court should disregard this factor because Fred Meyer had no control over the workers' "schedules." *Id.* at 46. Again, Fred Meyer is wrong factually because its managers did affect the workers' schedules by keeping them at work until plaintiffs had completed their work to the managers' satisfaction. It is

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[32] Fred Meyer's argument (b) that there was no evidence of actual control misstates the facts here because, as discussed above, there is substantial evidence that Fred Meyer managers reviewed the plaintiffs' work on a daily basis and made them redo it if the managers were not satisfied. *See* CP 1032. Those activities kept plaintiffs working later than they otherwise would have and thus "played a role in setting their schedules." *Zheng* at 75 discussing *Rutherford.*

[33] As also explained in *Zheng*, "the *Rutherford* court considered whether the purported joint employees worked exclusively or predominantly for the putative joint employer." 355 F.3d at 75.

wrong legally because there is no authority to ignore a factor other than control because there is allegedly no control.

3. No Opportunity for Profit Or Loss And Low Skill Work Are Two Commonly Used Factors To Determine Joint Employment And Both Factors Support Plaintiffs.

While defendants concede the facts underlying those two factors, both defendants' dispute the importance for joint employment purposes that plaintiffs' work was low skilled and that they did not have an opportunity for profit or loss. FM Brief, p. 46, n. 16; Expert Brief, pp. 32-33.[34] Defendants are wrong for two separate reasons. First, their argument is inconsistent with *Rutherford,* and was also correctly rejected in *Torres-Lopez.* In *Rutherford*, which was a joint employment case, the last factor relied upon by the court at page 330 was that:

> While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. (Emphasis added.)

The court looked to an employee versus independent contractor factor in determining joint employment. The Ninth Circuit made the same point when the *Torres-Lopez* court at 111 F.3d at 641, rejected the *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) analysis.[35]

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[34] Citing *Zheng*, *Layton* and *Aimable v. Long & Scott Farms*, 20 F.3d at 443-44, defendants argue that these factors merely tend to show that plaintiffs were somebody's employee, not Expert and Fred Meyer's employees.

[35] The *Torres-Lopez* court there explained that:

> The issue is not whether a farmworker is *more* dependent upon the farm labor contractor or the grower. Rather, the inquiry must focus on the economic reality

Secondly, defendants' reliance on *Zheng, Layton* and *Aimable* is also misplaced because in each of those cases it was either undisputed or had already been determined that the putative employee was already someone else's employee, *e.g.*, "it had been determined that the farmworkers were employees of the contractor." *Layton*, 686 F.3d at 1176. In the present case, however, it has never been determined that the plaintiffs were anyone's employee and there are disputed facts on that issue.[36] Therefore, the factual predicate for the analysis in *Zheng*, *Layton* and *Aimable* does not apply even assuming those cases are correct given their facts. The facts in this appeal are very similar to the facts in both *Flores* and *Tumulty*. In *Flores*, a case also involving joint employment of janitors at supermarkets, the District Court held:

> .... The Janitorial services performed by the plaintiff class was piecework, requiring little skill, and there is no

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of the particular relationship between the farmworker and the alleged joint employer.

[36] All Janitorial and All American Janitorial denied in their answers that they were plaintiffs' employers. CP 476, 1472. Both Marcos Flores (CP 65) and Sergey Chaban (CP 1244) testified that All Janitorial's workers agreed to be independent contractors rather than employees. The trial court was never asked to rule that plaintiffs were employees of either subcontractor. Moreover, Fred Meyer admits to this Court that "the record is clear" that plaintiffs "contracted with All Janitorial and All American as independent contractors." FM Brief, p. 9. Expert also admits that the record shows that "All Janitorial classified its janitors as independent contractors" rather than employees. Expert Brief, p. 9.

Fred Meyer asked the trial court to assume that the plaintiffs were employed by the subcontractors All Janitorial or All American. CP 2048. Defendants are again asking this Court to make the same assumption without proof. *See* FM Brief (page:line) 10:3, 13:1, 24:14, 28, last line; Expert Brief, 1:4, 12:10. Plaintiffs objected to that assumption. CP 2085. Thus, there is no basis to Fred Meyer's contention that plaintiffs cannot raise this issue here because it was not raised in the trial court.

evidence of opportunity for profit or loss depending on the employee's managerial skills. (Emphasis added.)

In *Tumulty* at *17, the District Court analyzed the same factors as follows:

> .... While the deliveries by the Drivers are not as "piecework" as the cucumber picking in *Torres*, they are considerably more routine than the work done by the master chefs in *Moreau*. The only initiative and foresight exercised in the delivery process was by the contractors, who had to determine how many truck drivers they would need to efficiently service their route. This factor supports a "joint employer" relationship. (Emphasis added.)

See also Itzep v. Target Corp., 543 F. Supp. 2d 646 (W.D. Tex. 2008), which Fred Meyer refers to as a "sham" situation even though the *Itzep* court never does. The facts in *Itzep* are similar to the facts here in a number of ways.

4. Responsibility Could Pass From One Subcontractor To Another Without Material Change.

The facts here are similar to *Torres-Lopez* where explained at 643:

> Second, there were no "material changes," *id.*, in the terms of the oral contracts between Bear Creek Farms and farm labor contractors such as Ag-Labor. The contracts were standard for the industry and involved little negotiation.[37]

While Fred Meyer at page 45 quotes *Zheng*, that opinion favors plaintiffs since what *Zheng* actually held just before the portion quoted by Fred Meyer at the bottom of page 45 is:

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[37] In *Tumulty* at page pp. *13-14, the District Court similarly held:

> The primary question under this factor is whether the labor contract is "standard for the industry," *Torres*, 111 F.3d at 643, or "negotiated and quite specific," *Moreau*, 343 F.3d at 1189. Here the former is the case.

> Under Rutherford, therefore, this factor weighs in favor of a determination of joint employment when employees are tied to an entity such as the slaughterhouse rather than to an ostensible direct employer such as the boning supervisor. In such circumstances, it is difficult not to draw the inference that a subterfuge arrangement exists.

Id. at 74 (emphasis added). These were the facts here since every All American worker at Fred Meyer on January 16, 2010 had worked at Fred Meyer on January 15, 2010 for All Janitorial.[38]

5. The Undisputed Factor That Plaintiffs Work Was Integral To Expert Is Entitled To Considerable Weight.

Expert at page 34 concedes that the "janitorial work done by plaintiffs was an integral part of performing its contract with Fred Meyer." Expert's subsequent effort to minimize the significance of that factor ignores the holding of *Zheng* (which Expert cited for other purposes four times in the preceding four pages of its brief):

> [I]n determining the weight and degree of [that factor] ..., we believe that both industry custom and historical practice should be consulted. .... [H]istorical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws. *Id.* at 73-74 (emphasis added).

Such historical evidence is supplied in this case, *inter alia*, by Mr. Ezzo, who explains that during the last 15 years large portions of the janitorial industry have utilized a model that takes advantage of the influx

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[38] Contrary to Fred Meyer's argument at page 44, this factor refers to "contractors" not to "individual janitors" such as plaintiffs.

of large numbers of foreign born, unskilled workers to provide janitorial services without receiving appropriate overtime and minimum wage pay. CP 555-60, 567-68. He also opines that there is considerable evidence that puts Expert within that model. *See* CP 566-67. His opinions are also supplemented by evidence (discussed *infra* at subsection F) of the additional relevant factors that Expert did not pay enough to its subcontractors for them to comply with the MWA and Expert's knowledge of numerous MWA violations among its subcontractors. It is also supplemented by CP 193-98 which shows such violations for all four plaintiffs. Expert provides no evidence contradicting this evidence.

F. Expert's Inadequate Payments To Its Subcontractor And Knowledge Of Alleged Wage And Hour Violations Are Relevant To Show Joint Employment.

Plaintiffs raised in the trial court the relevance of evidence both that Expert's payments to All Janitorial were too low to permit All Janitorial to comply with the MWA and evidence of Expert's knowledge of MWA violations by its subcontractors. CP 2027. Plaintiffs cited cases from within both the Fifth and Ninth Circuits to support their argument. *Bureerong v. Uvawas,* 922 F. Supp. 1450, 1468 (C.D. Cal. 1996) and *Castillo*. Plaintiffs again raised the argument at pages 17-19 and 44-45 of the Opening Brief.

Expert argues that no Fifth, Seventh or Ninth Circuit cases make such inadequate payments or Expert's knowledge of wage and hour violations relevant to this appeal. Expert Brief, pp. 37-38 including, n. 6.

That position is incorrect. Both *Bonnette* and *Torres-Lopez* hold that the court should make its decision on all relevant circumstances, and *Bureerong,* a district court within the Ninth Circuit *citing Castillo,* holds that if payments from one entity to a contractor were too low for the contractor to comply with wage and hour requirements for its workers, the workers were dependent on the entity which paid the contractor. 922 F. Supp. at 1468. That analysis applies here.

Under Expert's position, even if it admitted (a) it paid its contractors too little for them to pay its workers minimum wage under the MWA, and (b) that it knew that workers were not being paid correctly under the MWA, those facts would not be relevant. That would be the case only if the purpose of the MWA was to allow companies like Expert to draw up contracts in such a way as to avoid workers getting paid the minimum wage. That is the opposite of the purpose of the MWA according both to *Anfinson* and the FLSA. It is also inconsistent with the Ninth Circuit in *Narayan,* 616 F.3d at 897, and with the Seventh Circuit in *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 409 (7th Cir. 2007).[39]

[39] As explained in *Reyes* at p. 409:

> But when a contractor has no business or personal wealth at risk, he may be tempted to stiff the workers (as Zarate did), and then treating the principal firm as a separate employer is essential to ensure that the workers' rights are honored. ....

Furthermore, Expert's inadequate payments as explained by Mr. Chaban at CP 241-42 and 246,[40] and its extensive knowledge of MWA violations (*see* CP 364-65, 367, 368-77) discussed at page 21 of Plaintiffs' Opening Brief[41] are strong indications not only that plaintiffs were in fact economically dependent on Expert, but that Expert's arrangement was part of a subterfuge to avoid MWA obligations to plaintiffs. According to Fred Meyer, the sole purpose of the MWA's concern about joint employment was to avoid such shams or subterfuges. FM Brief, pp. 31-32, 46-47. While plaintiffs believe that is too narrow a construction of the MWA and that such a narrow interpretation has been rejected in cases such as *Zheng* and *Barfield*, plaintiffs agree that part of the purpose of the MWA is to prevent situations in which one entity agrees to make sure the wage and hour laws are followed, pays its subcontractors too little for them to comply with the MWA, and is informed that such violations are repeatedly occurring.

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[40] At CP 246, Mr. Chaban explained that another contractor both insisted that the workers be employees and paid All Janitorial enough for that to happen and the workers were treated as employees.

[41] According to Expert, it used nine subcontractors in Western Washington during the 2007-2010 period. Expert Brief, p. 4. Prior to 2010, Expert was told by its own employee that some janitors reported working seven days a week (CP 391), was told by Fred Meyer that two of these plaintiffs were working seven days a week and were not being paid overtime (CP 780-81), was told in 2009 by DLI that it had received many wage and hour complaints about two other of its subcontractors – Lopez & Son and Fernando Lopez d/b/a United Cleaning Solutions (CP 365), was sued in 2009 along with Fred Meyer regarding five janitors who worked with Fernando Lopez for wage and hour violations (CP 369-77), and settled that case because Fred Meyer insisted (CP 261). *See also* CP 195-99 confirming wage and hour violations for the present plaintiffs and CP 245. A trier of fact could reasonably conclude from this evidence that Expert knew that there was a pattern of MWA violations among its subcontractors.

Expert's substantive challenge to plaintiffs' facts and cases also fail. Factually, even assuming that Mr. Chaban's testimony in summary judgments is "self-serving," there is no bar to the use of such testimony. Similarly, while Expert argues that the chart at CP 96-99 somehow undercuts Mr. Chaban's testimony, there is nothing in his testimony or in the chart proving that either the chart or his testimony was based simply on assumptions. To the contrary, his testimony was based on his experience in running All Janitorial.[42]

III. CONCLUSION

For the foregoing reasons, the trial court's granting of summary judgment on behalf of Fred Meyer and Expert should be reversed, and the case should be remanded for trial.

RESPECTFULLY SUBMITTED this 1st day of October, 2012.

WILLIAM RUTZICK, WSBA #11533
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 622-8000
Counsel for Plaintiffs

DAVID N. MARK, WSBA #13908
Counsel for Plaintiffs

[42] Overtime pay must be 1 and ½ times the "regular rate." Thus, 2/3 of any wages paid for overtime would have to be paid as "regular rate" even if the work were not overtime. While Expert informs the court at page 40 that "a whopping 38% of the wages owed" are overtime, 2/3 of that 38% would have had to have been paid as a regular rate even had they not been overtime. John Ezzo also explained at CP 1057-58 that a company such as All Janitorial save time and money having one janitor work seven days a week rather than splitting the seven day week among two or more janitors. All Janitorial would have had to spend that time and money if it had arranged for janitors to work only 40 hours a week.