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Court of Appeals No. 77948-6-I

No. 98045-4

IN THE SUPREME COURT
STATE OF WASHINGTON

OSCAR MENDOZA, individually and as class representative,

Respondent-Plaintiff,

v.

FRED MEYER STORES, INC.,
Petitioner-Defendant,

and

EXPERT JANITORIAL, LLC,
Defendant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND SUMMARY OF PETITION

Petitioner Fred Meyer Stores, Inc. ("Fred Meyer") asks this Court to review a decision from the Court of Appeals: (1) declining to consider whether employees may resolve potential wage claims in private settlements without preapproval by either a court or government agency, and (2) reversing the trial court's order granting Fred Meyer summary judgment based on collateral estoppel's virtual representation doctrine. These are issues of substantial public importance that the Court should review under RAP 13.4(b)(4).

Washington "law favors the private settlement of disputes and gives releases great weight in order to support the finality of such settlements."[1] After nearly six dozen putative members in a class asserting wage violations against Fred Meyer individually settled their claims in exchange for immediate compensation, Fred Meyer moved for summary judgment, arguing that the written releases they signed precluded them from pursuing the litigation. The trial court denied a similar motion in a companion class action case on that basis, reading a 1918 case from this Court about a different and long repealed statute to hold that parties may never settle state wage and hour claims without first obtaining court or agency approval. This

[1] *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 395, 739 P.2d 648 (1987).

is a novel holding in modern practice. Indeed, the trial court admitted its ruling in the companion case was "very different from what even [the judge] did as a practitioner" but felt compelled to invalidate the written releases even still.[2] The trial court here did not reach the issue and the Court of Appeals too declined to consider it, leaving it an open question without recent appellate authority.

The trial court instead granted Fred Meyer's summary judgment motion on an alternative basis: the class members were estopped under the virtual representation doctrine from raising an issue that the court had already decided in a companion case after a long bench trial. Both this and the companion case made the same class action claims and the same allegations. Both cases involved the same lawyers in front of the same judge. But the Court of Appeals reversed in an opinion that questioned whether the virtual representation doctrine—and thus whether collateral estoppel—may be applied to class actions at all.

This case allows the Court to consider two issues of broad public import that can affect any employee or putative class member in Washington. Review under RAP 13.4(b)(4) is appropriate here.

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[2] Clerk's Papers (CP) 1023.

II. CITATION TO COURT OF APPEALS

Fred Meyer asks the Court to review the October 28, 2019 opinion of the Court of Appeals in *Mendoza v. Expert Janitorial Servs., LLC*, 450 P.3d 1220, 1222 (Wash. Ct. App. 2019), along with its December 3, 2019 order denying Fred Meyer's motion for reconsideration.

III. ISSUES PRESENTED FOR REVIEW

1. Whether an employer and employee may resolve potential state wage and hour claims in a private settlement for compensation *without* first obtaining court or government approval of the settlement terms.

2. Whether the virtual representation doctrine applies in class actions so that litigants may be collaterally estopped from relitigating issues in later actions.

IV. STATEMENT OF THE CASE

This is one of several cases in which janitors employed by a national janitorial company's subcontractor allege that Fred Meyer owes them back and overtime pay as a "joint employer" under the test this Court announced in *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014).

A. RELATIONSHIP BETWEEN MENDOZA AND ESPINOZA.

This case, *Mendoza*, is intertwined with its companion case, *Espinoza v. MH Janitorial Servs. LLC*, COA No. 76752-6-I, 2019 WL 5697886 (Wash. Ct. App. Nov. 4, 2019).

Espinoza is a class action asserting wage and hour violations on behalf of a class of janitors who cleaned Fred Meyer stores under a contract between their direct employers and Expert Janitorial Services, LLC ("Expert"). Expert was the contractor to which Fred Meyer outsourced its janitorial work during the relevant time periods. Together with claims against their direct employers, *Espinoza* asserted that Expert and Fred Meyer were liable as joint employers. *Espinoza* was filed in September 2014.

Mendoza is a class action filed by putative *Espinoza* class members who accepted Expert's individual settlement offers in 2015 (discussed below), which released claims against Fred Meyer. The class period is May 2012 through September 2014. *Mendoza* was filed in August 2016.

Both cases asserted that Expert and Fred Meyer were liable as joint employers. The same attorneys represent the janitors in both cases, and have done so the entire time. Both cases were set for bench trials before the Honorable Beth Andrus.

B. MENDOZA CLASS MEMBERS SETTLE CLAIMS AGAINST FRED MEYER.

Oscar Mendoza was a putative class member in *Espinoza*, until he released his claims. After an unsuccessful mediation in *Espinoza* in the fall of 2015, Expert sent putative *Espinoza* class members a cover letter and settlement agreement, written in both English and Spanish. CP 1200-1203.

The settlement offers were made in return for a release of claims that included the putative class members' claims against Fred Meyer.

These documents gave putative class members detailed information about *Espinoza*, including:

- The existence of *Espinoza* (including case name, jurisdiction, and cause number);
- The claims asserted in *Espinoza* (janitors cleaning Fred Meyer stores claiming unpaid wages, overtime, missed meal/rest breaks, improperly paid a salary, not always paid minimum wage, and asserting that Expert and Fred Meyer were joint employers and responsible to pay the janitors);
- The identity of the lead attorney for the class (who speaks Spanish);
- The Espinoza plaintiffs wanted to represent "other employees, including you, in the lawsuit so they could try to recover money for you;" and
- If the individual accepted the settlement offer, he or she "***would give up the right to receive any payment that might otherwise be obtained for you in the lawsuit***." [emphasis in original].

Id. (also attached to appendix). Mr. Mendoza and 68 other putative *Espinoza* class members accepted Expert's individual settlement offers, signing the agreements and releasing claims against Fred Meyer in exchange for a settlement payment.

The trial court did not include Mr. Mendoza or the other 68 *Mendoza* class members in *Espinoza* only because they had accepted Expert's settlement offer and no *Espinoza* class representative had also signed a release agreement. Had these janitors done nothing, they would have been

in the later-certified *Espinoza* class. Instead, these janitors accepted immediate payment in exchange for a release of Fred Meyer.

C. MENDOZA AWAITS THE TRIAL IN ESPINOZA.

Mr. Mendoza, through plaintiffs' counsel in *Espinoza*, sued Fred Meyer in August 2016 on behalf of all janitors who settled and thus were excluded from the *Espinoza* class. The *Mendoza* complaint is identical to the Espinoza complaint, except for allegations about the settlement releases. From that point the *Mendoza* putative class took no action (no motion for class certification, no discovery, and so on.) until months after the *Espinoza* trial was complete. As the trial court noted: "It is clear that counsel chose to await the outcome of *Espinoza* before proceeding in . . . Mendoza." CP 2409.

Espinoza was tried for seven weeks in January and February 2017. The trial court applied the multi-factor *Becerra* test to determine whether either Expert or Fred Meyer were the janitor's joint employers. The trial court ultimately issued 67 pages of findings and conclusions that found Fred Meyer was not a joint employer, among other things. CP 1232-1298.

D. TRIAL COURT DISMISSES MENDOZA BASED ON COLLATERAL ESTOPPEL AND DOES NOT REACH EFFECTIVENESS OF SETTLEMENT RELEASES.

After the trial in *Espinoza*, plaintiffs' counsel stipulated that the settlement agreements they signed were the only reason putative *Mendoza*

class members were excluded from *Espinoza* and that the evidentiary record admitted in *Espinoza* trial would be offered in *Mendoza*. The trial court certified the *Mendoza* class in July 2017.

Later Fred Meyer moved for summary judgment on many alternative grounds, two of which are relevant here. First, Fred Meyer argued that collateral estoppel applied to the trial court's finding that Fred Meyer was not a joint employer based on the doctrine of virtual representation. Virtual representation "allows collateral estoppel to be used against a nonparty when the former adjudication involved a party with substantial identity of interests with the nonparty." *Garcia v. Wilson*, 63 Wn. App. 516, 520, 820 P.2d 964 (1991). Second, Fred Meyer argued that *Mendoza* class members released their claims in writing in exchange for immediate compensation.

The trial court (the same court that had tried *Espinoza*) heard oral argument and issued its order granting summary judgment in Fred Meyer's favor. The trial court held that virtual representation doctrine precluded *Mendoza* class members from arguing that Fred Meyer was their joint employer. It did not reach the alternative grounds asserted by Fred Meyer, including the enforceability of the settlement releases.

But in *Espinoza*, the same trial court had before considered whether parties can privately settle wage claims. Relying on *Larsen v. Rice*, 100

Wn. 642, 171 P. 1037 (1918) and RCW 49.46.090(1),[3] the trial court held that this Court's precedent requires employers to submit privately negotiated settlements for approval:

> I completely understand that *Larsen* is a very old case from 1918, but it is, from this Court's determination, valid law, and I cannot—despite the fact that it is very different from what even I did as a practitioner, it is the law . . . of the state, and I can't find a way to overlook this precedent.

CP 1023. Neither *Larsen* nor any statute or administrative rule explains how an employer would obtain approval from a court or agency.

E. COURT OF APPEALS REVERSES, QUESTIONING APPLICABILITY OF VIRTUAL REPRESENTATION DOCTRINE IN CLASS ACTIONS AND REFUSING TO CONSIDER EFFECTIVENESS OF SETTLEMENT RELEASES.

The *Mendoza* class members appealed. After the parties fully briefed both issues—virtual representation and settlement—the Court of Appeals reversed the trial court and remanded for another trial on Fred Meyer's joint employer status. It held that virtual representation did not apply here because *Mendoza* class members had tried to join the *Espinoza* class but were excluded by the individual settlement agreements. Finding

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[3] "Any employer who pays any employee less than the amounts to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount due to such employee under this chapter, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer allowing the employee to receive less than what is due under this chapter shall be no defense to such action."

no relevant state appellate guidance on the applicability of the virtual representation doctrine to class actions, the Court of Appeals turned to *Smith v. Bayer Corp.*, 564 U.S. 299, 131 S. Ct. 2368, 180 L. Ed.2d 341 (2011), to question whether virtual representation can apply to class actions:

> Although the *Espinoza* janitors were granted class certification, *Bayer Corp.* supports the *Mendoza* janitors' contention that determinations made in a class action lawsuit cannot bind those who were, by court order, denied membership in the class. Here, as in *Bayer Corp*., we decline to stretch the definition of party so far as to cover the Mendoza janitors who were explicitly excluded from the *Espinoza* class by court order.

Opinion at 8.

The Court of Appeals did not rule on the effectiveness of the settlement releases; instead, it declined to consider the issue in a footnote. Opinion at 18. Fred Meyer moved the Court of Appeals to reconsider that decision and address Fred Meyer's argument that *Mendoza* class members released their claims, since the record is complete and the issue was fully briefed both at the trial court and on appeal. A majority of the panel declined.

V. ARGUMENT

A. REVIEW IS NEEDED UNDER RAP 13.4(B)(4) BECAUSE THESE QUESTIONS AFFECT THOUSANDS OF PEOPLE IN WASHINGTON.

Review under RAP 13.4(b)(4) is appropriate for critical issues that have a statewide impact. For example, this Court noted that the "prime

example of an issue of substantial public interest" was an appellate decision that had "the potential to affect every sentencing proceeding in Pierce County." *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (emphasis added). This Court has also reviewed cases involving such substantial public issues as sex offender registration, termination of parental rights and statutory child support obligations. *See Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017); *In Re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016); *In re Marriage of Ortiz*, 108 Wn.2d 643, 646, 740 P.2d 843 (1987). This Court's decisions in all of those cases necessarily has wide-reaching effects and is important to more than just the parties involved. As discussed below, the same is true here.

B. THE COURT SHOULD CONFIRM IF PRIVATE WAGE CLAIM SETTLEMENTS MUST BE APPROVED FIRST, AND IF SO, EXPLAIN HOW TO DO SO.

This Court should accept review to address an issue that no state appellate court has since *Larsen* over a century ago: whether employers and individual employees may resolve wage and hour claims by private settlements without first obtaining court or government approval. This is an issue of substantial public importance calling for review under RAP 13.4(b)(4), since it affects all employees who may have claims for wage violations under Washington law, along with the agencies and courts

that may need to approve settlements. Fred Meyer and others have sought guidance on this issue since at least 2016 to no avail.[4]

Washington law encourages private settlements. See, e.g., *Chadwick v. Northwest Airlines, Inc.*, 33 Wn. App. 297, 300 (1982), *aff'd*, 100 Wn.2d 221 (1983). Settlements have many benefits: they compensate for injuries, they reduce delay, they mitigate litigation risks, and they unclog busy dockets. For those reasons, courts view a settlement that includes a knowing release of past claims with finality. *Stottlemyre v. Reed*, 35 Wn. App. 169, 173, 665 P.2d 1383 (1983).

Parties may settle any claim, even those arising from statutes that further important public policies. *Chadwick*, 33 Wn. App. at 300-04 (upholding private settlement of discrimination claim). Wage claims should be no different. In fact, parties routinely settle such claims through private agreements without incident and without court approval. For example, in *Pugh v. Evergreen Hosp. Med. Ctr.*, employees claimed they were owed compensation for missed rest breaks. Although the employer disputed liability, it paid the employees to settle those past claims. *Id.*, 177 Wn. App.

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[4] On top of Fred Meyer's briefing at the trial court and Court of Appeals—both of which declined to reach the issue—Expert moved for discretionary review of the trial court's order in *Espinoza* holding that wage claim settlements are unenforceable unless approved. Fred Meyer joined that motion, and the trial court certified the issue for immediate appellate review. But the Court of Appeals denied review. *Espinoza v. Fred Meyer Stores, Inc.*, COA Case No. 74956-1-I (commissioner's ruling attached as an appendix).

at 352-54. The Court of Appeals later rejected the employees' argument that under RCW 49.52.050 (the Industrial Welfare Act), those settlements were agreements to "pay [an] employee a lower wage than the wage such employer is [statutorily] obligated to pay" and thus unlawful. *Id*. at 359. It held that individual employees—not the courts or government—"were best situated to determine whether the settlement was a fair compromise" of their claims. *Id*. at 361. Employees better understand the balance between their injuries and the risks of continued delay and litigation, and so accepting less in compromise early than their claim might be worth later does not void the agreement.

Even still, the trial court in *Espinoza* declined to enforce private settlement agreements without court or government approval, citing *Larsen*. Fred Meyer raises the same issue here that the Court of Appeals refused to consider. *Larsen* interpreted a 1913 statute that established a commission tasked with setting a minimum wage for women in varying occupations. *Larsen*, 100 Wash. at 642-44 (citing Laws of 1913, Ch. 174). There an employee alleged that her employer paid her less than the required minimum wage, and the employer offered the employee a settlement that included two components: a retrospective payment for back wages and a prospective agreement that the employee would continue to work for the employer for six more months. *Id*. at 647-48. *Larsen* determined that this

particular contract implicated the public interest and was "voidable, if not void" unless the state approved it. *Id*. at 648.

Larsen is an anachronism. The statute it interpreted predated the Minimum Wage Act by decades, and no reported Washington appellate case has cited it for the proposition that an employer and employee cannot settle disputed wage claims absent government intervention.[5] ***In fact, no reported appellate case has cited <u>Larsen</u> since 1936***. If it is relevant today at all, *Larsen* is best understood as prohibiting parties from contracting around statutory minimum wage requirements. The court called out the "executory" nature of the settlement—which required the employee to accept future employment—as denying the employee "the wage to which she [was] justly entitled." *Id*. at 650. That is because the employer was not offering unconditional, immediate compensation to settle a past claim; the employee was, in essence, working off most of the settlement payment by staying employed another six months later. And the long-repealed statute *Larsen* interpreted contemplated involvement of a government commission on wages. No such language exists in the current Minimum Wage Act.

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[5] Just one unpublished case from Division II, itself two decades old, mentions *Larsen*'s purported rule in *dicta*. *See Harrison v. Chapman Mech., Inc.*, 92 Wn. App. 1034 (1998) ("[W]e see no reason why the worker/claimant and the employer cannot settle a prevailing wage dispute if the State approves.") (citing *Larsen*).

Larsen's apparent resurrection is neither clear nor consistent. As the trial court admitted, requiring approval of private wage claim settlements differed from her practice as a lawyer. It differs from the collective five decades' of experience of Fred Meyer's lawyers here, and even plaintiffs' counsel remarked that "he'd been doing this for years" and only recently "found the *Larsen*" case. CP 1014. Trial judges are unsure whether *Larsen* requires court or agency settlement approval. *See, e.g.*, *Toering v. Ean Holdings LLC*, No. C15-2016 JCC, 2016 WL 4765850, at *2 (W.D. Wash. Sept. 13, 2016) ("[A]lthough the Court makes no ruling on the releases now, it is possible they are void or voidable under *Larsen v. Rice*[.]" (emphasis added)). This issue cries out for guidance from this Court, which is that best suited to clarify—or if needed overturn—its own precedent.

Even if *Larsen* means that courts or agencies must approve private wage claim settlements, review is still needed to explain *how* parties seek approval. Unlike other state and federal laws, there is no explicit judicial, statutory or administrative mechanism to facilitate approval of wage claim settlements.[6] Must litigants file a declaratory judgment action in superior

[6] For example, Washington's Industrial Insurance Act has language that requires the Department of Labor & Industries to approve settlements of worker's compensation claims. *See* RCW 51.24.090(1) ("Any compromise or settlement of the third party cause of action by the injured worker or beneficiary which results in less than the entitlement under this title is void unless made with the written approval of the department or self-insurer."). Likewise the federal Fair Labor Standards Act has language that requires the Department of Labor or the courts to approve wage claim settlements. *See* 29 U.S.C. § 216(c) ("The Secretary is authorized to supervise the payment of the unpaid minimum

court? If so, how does the trial court determine whether to approve or reject a private settlement? How does an appellate court review that determination? Or must employers first exhaust some yet-unknown administrative process, with the courts then having only limited appellate jurisdiction? Those are just some of the significant questions left open by the trial court's holding and the Court of Appeals' refusal to consider them.

This Court has a chance to answer those questions and guide both trial judges and practitioners. It should accept review.

C. THE COURT SHOULD CLARIFY IF THE VIRTUAL REPRESENTATION DOCTRINE APPLIES TO CLASS ACTIONS.

This Court should likewise review under RAP 13.4(b)(4) the applicability of the virtual representation doctrine in class actions because it could affect any of the thousands of putative class members litigating in state courts each year. It likewise could reduce duplicate cases pending on court dockets, protect against tactical filing of serial class actions and enhance judicial economy.

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wages or the unpaid overtime compensation owing to any employee . . . and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee" to wages owed."); *see also Lynn's Food Stores, Inc. v. U.S. By & Through U.S. Dep't of Labor*, 679 F.2d 1350, 1353 (11th Cir. 1982) ("When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness."). Administrative rules facilitate these statutory mandates. ***There are no similar state administrative rules creating a process to approve wage claim settlements under the Minimum Wage Act***.

Virtual representation is a Washington common law doctrine supplementing collateral estoppel's requirement that "party against whom the collateral estoppel is asserted was a party or in privity with the party to the prior adjudication." *Lemond v. Wash. Dep't of Licensing*, 143 Wn. App. 797, 804-05, 180 P.3d 829 (2008). "This doctrine allows collateral estoppel to be used against a nonparty when the former adjudication involved a party with substantial identity of interests with the nonparty." *Garcia v. Wilson*, 63 Wn. App. 516, 520, 820 P.2d 964 (1991). In essence, where nonparties have still had "a vicarious day in court" through the prior litigation, they are in privity and the court's prior ruling will bind the nonparty. *Id*. at 520-21. Virtual representation has several benefits, with "obvious ties to class-action preclusion." Wright & Miller, 18A Fed. Prac. & Proc. Juris. § 4457 (2d ed.).

Because it arose from *state* common law, there is no *federal* equivalent to virtual representation. In fact, federal courts usually reject it. *See Taylor v. Sturgell*, 553 U.S. 880, 898, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008). But the Court of Appeals still resorted to federal case law to question the doctrine because "no Washington authority directly addresses whether virtual representation may be applied" to class actions. Opinion at 7. In doing so, it substantially limited the virtual doctrine created by this

Court, *see Bacon v. Gardner*, 38 Wn.2d 299, 302, 229 P.2d 523 (1951), without this Court getting the chance to consider the doctrine in this context.

The Court should grant review and clarify if the virtual representation doctrine may preclude parties from relitigating issues in similar and sequential class actions. This case is the ideal vehicle to do so. It involves two nearly identical class actions, one filed after the other, that seek to litigate the same issue: Whether Fred Meyer is a joint employer of its contractor's employees. The *Espinoza* court said no after a seven-week bench trial. Yet under the Court of Appeals' opinion, plaintiffs in *Mendoza*, represented by the same attorneys and relying largely on the same record as in *Espinoza*, get to try for their desired outcome again. This is why the virtual representation doctrine exists:

> [w]here there are many potential plaintiffs and a single defendant . . ., the so-called railroad anomaly arises; a succession of actions may be brought, with the result that each victory by the defendant is a victory only against the particular plaintiff, while a single victory for any plaintiff may be used by all remaining plaintiffs to estop the defendant.

Note, Collateral Estoppel of Nonparties, 87 HARV. L. REV. 1485, 1499 n.89 (1974) (cited favorably by *Garcia*, 63 Wn. App. at 521).

The railroad anomaly is on display here. *Espinoza* was tried and resulted in determinations that Expert was a joint employer but Fred Meyer was not. Under the basic collateral estoppel doctrine, Mr. Mendoza could

apply the *Espinoza* decision to estop Expert from claiming in *Mendoza* that it was not a joint employer. But without the virtual representation doctrine, Fred Meyer cannot rely on *Espinoza*'s finding that it was not a joint employer, since Mr. Mendoza was not an actual party in *Espinoza*. Fred Meyer could end up having to defend itself in successive class action trials on the same claims and evidence, brought by the same attorneys asserting the same fundamental issue. There is no reason why a case's status as a class action should preclude the doctrine from applying.

VI. CONCLUSION

This case presents two questions of substantial public importance. First, must the courts or a state agency approve private settlements between employers and employees for wage and hour claims, and if so, how? And second, can the long-standing common law virtual representation doctrine apply to similar, sequential class actions? The answers to those questions will affect thousands of employers, employees and litigants across this state.

For all those reasons, Fred Meyer asks the Court to accept review under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 2nd day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on January 2, 2020, I caused the above be delivered via e-mail to the following:

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APPENDIX A

A-1—A-19 Court of Appeals Opinion Reversing Summary Judgment

A-20—A-21 Court of Appeals Order Denying Motion for Reconsideration

A-22—A-25 Plaintiff Oscar Mendoza’s settlement release and cover letter

A26—A-35 Court of Appeals Commissioner's Ruling Denying Discretionary Review in *Espinoza v. MH Janitorial Servs. LLC*, COA No. 76752-6-I

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OSCAR MENDOZA, individually and as class representative, Appellant, v. EXPERT JANITORIAL SERVICES, LLC, Defendant, FRED MEYER STORES, INC., Respondent.	DIVISION ONE No. 77948-6-I PUBLISHED OPINION FILED: October 28, 2019

DWYER, J. — A party has no ground to complain of unfairness when faced with a consequence of obtaining the relief it requested and received from the trial court. Here, having successfully obtained an order excluding Oscar Mendoza and 68 of his fellow janitors (the Mendoza janitors) from a prior class action lawsuit (Espinoza)—in which a group of janitors who worked in Fred Meyer Stores, Inc. retail facilities throughout the Puget Sound area sought to recover damages for violations of Washington's Minimum Wage Act (MWA), chapter 49.46 RCW—Fred Meyer nevertheless seeks to avoid the consequences of its choice by barring the Mendoza janitors from pursuing this separate lawsuit.

Accepting Fred Meyer's contention that the Mendoza janitors were virtually represented by the efforts of the class in Espinoza from which they were

excluded, the trial court herein ruled that the Mendoza janitors were collaterally estopped from bringing their claims under the MWA against Fred Meyer. Because the Mendoza janitors attempted to join but were, at Fred Meyer's urging, excluded by court order from the class in Espinoza, we hold both that the doctrine of virtual representation is not applicable to the Mendoza janitors and that application of collateral estoppel herein works an injustice. Fred Meyer must accept the consequences of its decision to successfully seek the exclusion of the Mendoza janitors from the Espinoza lawsuit. Accordingly, we reverse.

I

In Espinoza, a group of janitors who worked in Fred Meyer stores in the Puget Sound area between September 2011 and September 2014 filed suit alleging violations of the MWA by All American Janitorial LLC (AAJ), M.H. Janitorial LLC (MHJ), Expert Janitorial Services, LLC (Expert), and Fred Meyer. Fred Meyer contracted out its janitorial work to Expert who—in turn—subcontracted the work to AAJ and MHJ, who directly employed the Espinoza janitors.

In September 2015, after the Espinoza lawsuit was instituted but prior to the certification of the Espinoza class, Expert sent putative class members settlement agreements that offered compensation to those who released their claims against Expert and Fred Meyer. The Mendoza janitors are those who were a part of the putative class but accepted these settlement offers. Later, five of the Mendoza janitors submitted declarations in support of a request for relief

seeking to include all of the Mendoza janitors as part of the class in Espinoza.[1]

At the urging of Expert and Fred Meyer, the trial court, in its order certifying the class in Espinoza, excluded the Mendoza janitors because none of the class representatives had signed the proffered 2015 agreement and the trial court was concerned that their interests could conflict with the Mendoza janitors' interests. The Mendoza janitors subsequently filed this lawsuit in August 2016, asserting many claims identical to those in Espinoza, but also including allegations relating to the validity of the 2015 settlement agreements.

The Espinoza lawsuit was tried in January and February 2017. Following trial, the trial court concluded that AAJ, MHJ, and Expert were liable for violations of the MWA. It also ruled that Fred Meyer was not the Espinoza janitors' joint employer under the MWA and was therefore not liable to the janitors.

Shortly thereafter, the Espinoza and Mendoza janitors learned that Expert was financially unable to pay the wages owed. As a result of Expert's financial difficulties, it settled with the Espinoza and Mendoza janitors for $720,000 in a settlement approved by the trial court.

Meanwhile, in July 2017, the trial court herein certified the class of Mendoza janitors. Fred Meyer then moved for summary judgment, asserting that the Mendoza janitors should be collaterally estopped—by the Espinoza ruling that Fred Meyer was not the janitors' joint employer under the MWA—from bringing their claims against Fred Meyer under the MWA. The trial court agreed, concluding that the Mendoza janitors were collaterally estopped on the issue of

[1] Another six of the janitors who signed settlements in 2015 submitted declarations on behalf of Expert opposing their inclusion in the class.

Fred Meyer's status as a joint employer under a theory of virtual representation. The Mendoza janitors appeal from the order dismissing their claims.

II

The Mendoza janitors contend that the trial court erred by dismissing their claims against Fred Meyer on summary judgment. This is so, the Mendoza janitors assert, because the trial court incorrectly concluded that collateral estoppel barred their MWA claims against Fred Meyer. According to the Mendoza janitors, the application of collateral estoppel to them was improper because they were not parties to, nor in privity with parties to, the Espinoza lawsuit, and because application of the equitable doctrine would work an injustice. We agree.

A

We review de novo a trial court's grant of summary judgment. Greensun Grp., LLC v. City of Bellevue, 7 Wn. App. 2d 754, 767, 436 P.3d 397, review denied, 193 Wn.2d 1023 (2019). We affirm an order granting summary judgment only "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Woods View II, LLC v. Kitsap County, 188 Wn. App. 1, 18, 352 P.3d 807 (2015). On review, we "conduct the same inquiry as the trial court and view all facts and their reasonable inferences in the light most favorable to the nonmoving party." Greensun Grp., 7 Wn. App. 2d at 767 (citing Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 350, 144 P.3d 276 (2006)).

The doctrine of collateral estoppel applies when the following four factors are present: "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied." Malland v. Dep't of Ret. Sys., 103 Wn.2d 484, 489, 694 P.2d 16 (1985). "Whether collateral estoppel applies to preclude relitigation of an issue is a question of law that we review de novo." Lemond v. Dep't of Licensing, 143 Wn. App. 797, 803, 180 P.3d 829 (2008) (citing State v. Vasquez, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001)); accord Weaver v. City of Everett, No. 96189-1, slip op at 6 (Wash. Oct. 17, 2019), http://www.courts.wa.gov/opinions/pdf/961891.pdf.

B

The Mendoza janitors first contend that they were not parties to, nor were they in privity with parties to, the Espinoza lawsuit such that they should be collaterally estopped from asserting that Fred Meyer is their joint employer under the MWA. Fred Meyer concedes that the Mendoza janitors were not actual parties to the Espinoza lawsuit, but asserts that they nevertheless satisfy the party or party in privity requirement under the virtual representation doctrine. In response, the Mendoza janitors assert that (1) the virtual representation doctrine is not applicable in the class action context when the party against whom the doctrine is applied attempted to join but was denied membership in the prior class action lawsuit, and (2) even if the doctrine was generally applicable to such cases it does not support the application of collateral estoppel to the Mendoza

janitors' claims.

Under Washington law, the virtual representation doctrine provides an exception to the collateral estoppel "requirement that one be a party or in privity with a party to the prior litigation." Hackler v. Hackler, 37 Wn. App. 791, 795, 683 P.2d 241 (1984); accord Bacon v. Gardner, 38 Wn.2d 299, 229 P.2d 523 (1951); Briggs v. Madison, 195 Wash. 612, 82 P.2d 113 (1938); Howard v. Mortensen, 144 Wash. 661, 258 P. 853 (1927). This doctrine is applied cautiously so as to avoid unjustly depriving a nonparty of his or her day in court. Garcia v. Wilson, 63 Wn. App. 516, 520, 820 P.2d 964 (1991). To this end, we have previously identified four factors that courts should consider before applying the doctrine:

> (1) "whether the nonparty in some way participated in the former adjudication, for instance as a witness," (2) "[t]he issue must have been fully and fairly litigated at the former adjudication," (3) "the evidence and testimony will be identical to that presented in the former adjudication," and (4) "there must be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly decline the opportunity to intervene but presents no valid reason for doing so."

Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 66, 316 P.3d 1119 (2014) (alteration in original) (quoting Garcia, 63 Wn. App. at 521). A court may apply the virtual representation doctrine when a sufficient number of these factors are present to ensure that application of the doctrine is fair to the party against whom collateral estoppel is sought to be applied. Garcia, 63 Wn. App. at 521.

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The Mendoza janitors assert that the virtual representation doctrine is not

applicable to class action lawsuits. Because no Washington case authority directly addresses whether virtual representation may be applied in a case such as this to satisfy the third factor of the collateral estoppel formula, the Mendoza janitors cite to Smith v. Bayer Corp., 564 U.S. 299, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011), in support of their position.[2]

In the cited case, the United States Supreme Court considered whether an injunction issued by a federal court barring a state court from certifying a class action lawsuit against Bayer Corp. fell within the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. Bayer Corp., 564 U.S. at 302. Two separate lawsuits were filed against Bayer Corp. seeking identical class certification to sue on behalf of West Virginia residents who purchased Baycol, an allegedly hazardous drug sold by Bayer Corp. Bayer Corp., 564 U.S. at 302-03. One of the lawsuits was removed to federal court, where the federal district court, applying Federal Rule of Civil Procedure 23, declined to certify the proposed class. Bayer Corp., 564 U.S. at 303-04. Shortly thereafter, the federal district court, at the request of Bayer Corp., issued an injunction prohibiting the West Virginia state court from certifying the class in the other lawsuit. Bayer Corp., 564 U.S. at 304.

As part of its consideration as to whether the injunction was permissible under the Anti-Injunction Act, the Court explained that, for this to be so, the

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[2] The Mendoza janitors assert that application of the virtual representation doctrine violates procedural notice protections set forth in CR 23, see CR 23(b)(3), (c), and cite Bayer Corp. to support this argument. However, there is no dispute herein that the Mendoza class members received notice of the Espinoza lawsuit. Thus, we consider Bayer Corp. not for its specific analysis of Federal Rule of Civil Procedure 23 but, rather, for the general principles it espouses concerning who may fairly be considered a party and thus may be precluded from pursuing a separate lawsuit.

plaintiff in the state court lawsuit, Smith, "must have been a party to the federal suit, or else must fall within one of a few discrete exceptions to the general rule against binding nonparties." Bayer Corp., 564 U.S. at 308. Bayer Corp. asserted that Smith was bound by the federal district court's ruling because the federal lawsuit's primary plaintiff, McCollins, had been acting in a representative capacity for Smith and all other West Virginia residents that purchased Baycol when he sought and was denied class certification in federal court. Bayer Corp., 564 U.S. at 314-15.

The Court rejected this contention, explaining that "[t]he definition of the term 'party' can on no account be stretched so far as to cover a person like Smith, whom the plaintiff in a lawsuit was denied leave to represent." Bayer Corp., 564 U.S. at 313. The Court went on to further explain that

> Federal Rule 23 determines what is and is not a class action in federal court, where McCollins brought his suit. So in the absence of a certification under that Rule, the precondition for binding Smith was not met. Neither a proposed class action nor a rejected class action may bind nonparties.

Bayer Corp., 564 U.S. at 315.

Although the Espinoza janitors were granted class certification, Bayer Corp. supports the Mendoza janitors' contention that determinations made in a class action lawsuit cannot bind those who were, *by court order*, denied membership in the class. Here, as in Bayer Corp., we decline to stretch the definition of party so far as to cover the Mendoza janitors who were explicitly excluded from the Espinoza class *by court order.*[3]

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[3] Fred Meyer does not provide any argument in its briefing pertaining to Bayer Corp. In its order granting summary judgment, the trial court attempted to distinguish Bayer Corp. by

The Mendoza janitors next assert that, even were we to determine that the doctrine of virtual representation could be applicable to those in the situation of the Mendoza janitors, the record herein does not support the trial court's conclusion that the Mendoza janitors were virtually represented in Espinoza. This is so, the Mendoza janitors assert, because they did not participate in the Espinoza litigation, the evidence and testimony that will be presented in a trial on the Mendoza janitors' claims will not be identical to that presented in Espinoza, and the Mendoza janitors' separate lawsuit was not the product of their manipulation or tactical maneuvering. We agree.

To illustrate the inapplicability of the virtual representation doctrine herein, we turn, for comparison, to our prior decision in Garcia. Therein, Garcia was a passenger in a motor vehicle being driven by her roommate Teodoro Macias when the vehicle collided with a vehicle driven by Rebecca Wilson. Garcia, 63 Wn. App. at 517. Both Macias and Garcia sustained injuries in the collision. Garcia, 63 Wn. App. at 517, 521-22.

A few months later, Macias filed a lawsuit against Wilson, seeking to recover damages for personal injuries. Garcia, 63 Wn. App. at 517. The suit proceeded to trial, at which Garcia testified on behalf of Macias. Garcia, 63 Wn.

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noting that here the Espinoza class was actually certified, just without the Mendoza janitors as a part of the class. Under Bayer Corp., however, the issue was not merely whether any class had been certified, but whether McCollins could be fairly said to have represented Smith given that McCollins was "denied leave to represent" Smith by court order. Bayer Corp., 564 U.S. at 313. Thus, the distinction between the cases pointed to by the trial court does not, in actuality, diminish the force of the United States Supreme Court's pronouncement.

App. at 517. At the conclusion of trial, the trial court entered judgment for Wilson. Garcia, 63 Wn. App. at 517.

Subsequently, Garcia filed her own lawsuit against both Macias and Wilson, bringing an identical claim against Wilson as had been brought in Macias's lawsuit against Wilson. Garcia, 63 Wn. App. at 518. The trial court, however, dismissed Garcia's claim against Wilson on summary judgment, concluding that she was barred under the doctrine of collateral estoppel from bringing her claim. Garcia, 63 Wn. App. at 518. Garcia appealed.

On appeal, we concluded that the virtual representation doctrine applied and that the trial court had properly dismissed Garcia's claim against Wilson. Garcia, 63 Wn. App. at 522-23. We explained that Garcia had directly participated as a witness in Macias's lawsuit on Macias's behalf, was living with Macias at the time, and was, therefore, "fully aware of the character and issues of the first suit." Garcia, 63 Wn. App. at 521. It was also undisputed that all of the issues presented by Garcia's claim against Wilson had been fully and fairly litigated in Macias's lawsuit and that there would not be any difference from the first lawsuit in the evidence and witnesses presented should Garcia be permitted to pursue her claim against Wilson. Garcia, 63 Wn. App. at 521. In addition, we noted that "Garcia began seeing a doctor the day after Macias filed his complaint, leaving no other conclusion but that she was interested in the results of the trial and could have intervened in Macias's action." Garcia, 63 Wn. App. at 521-22. Furthermore, we concluded that, because Garcia "failed to demonstrate to the trial court [that] any prejudice" could have resulted had she intervened, her

decision not to do so "appear[ed] purely tactical. If Macias had won, Garcia would have gained a tactical advantage in pursuing her own claim." Garcia, 63 Wn. App. at 522. Thus, we concluded that Garcia could fairly be collaterally estopped, by application of the doctrine of virtual representation, from pursuing her separate lawsuit against Wilson. Garcia, 63 Wn. App. at 522-23.

Unlike in Garcia, herein the fourth factor—that the separation of the suits was the product of the Mendoza janitors' manipulation or tactical maneuvering—is notably absent. Five of the Mendoza janitors specifically sought inclusion of all the Mendoza janitors in the Espinoza class. Fred Meyer and Expert successfully opposed their inclusion, resulting in the trial court ordering that the Mendoza janitors be excluded from that litigation. The trial court's order excluding the Mendoza janitors, against their express wishes, was clearly not a tactical maneuver orchestrated by the Mendoza janitors.[4] Indeed, the Mendoza janitors' exclusion is most aptly characterized as being the result of Fred Meyer's tactical maneuvering, not that of the Mendoza janitors.

Fred Meyer now wishes to avoid the primary consequence of its opposition to the Mendoza janitors' request to be included in Espinoza—a separate lawsuit. Fred Meyer asserts that—notwithstanding their exclusion by a

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[4] Our Supreme Court indicated its agreement with this proposition in Dean v. Lehman, 143 Wn.2d 12, 17-18 n.4, 18 P.3d 523 (2001). Therein, it declined to apply collateral estoppel to a group of inmates' spouses bringing a class action against the Department of Corrections (DOC). Dean, 143 Wn.2d at 15-16. The inmates had themselves brought claims against DOC in an earlier federal class action lawsuit. DOC sought to apply the rulings from that case to that of the inmates' spouses. Dean, 143 Wn.2d at 17-18 n.4. The Supreme Court declined to do so, noting that it would "clearly work an injustice" to apply collateral estoppel because the inmates' spouses had attempted to join the class in the federal action and had been excluded by order of the trial court. Dean, 143 Wn.2d at 17-18 n.4. The Supreme Court plainly did not view the spouses' exclusion by court order to be a tactical maneuver of the spouses.

court order promoted by Fred Meyer—the Mendoza janitors could have intervened in the Espinoza lawsuit at a later time to request that the trial court reconsider its ruling, chose not to do so, and that this choice was a sufficient tactical maneuver to permit application of the virtual representation doctrine. This is nonsense.

First, Fred Meyer sought the order excluding the Mendoza janitors. If, as Fred Meyer now asserts, reconsideration of that order was appropriate or necessary to avoid prejudice to Fred Meyer, then Fred Meyer should have sought reconsideration of that order. That Fred Meyer declined to do so was a tactical decision by Fred Meyer. When Fred Meyer requested the exclusion of the Mendoza janitors, it was asserting that the Mendoza janitors needed to bring any claims they had against Fred Meyer in a separate lawsuit. Fred Meyer must now accept the consequence of its tactical decision.[5]

Furthermore, the Mendoza janitors had good reason for declining to intervene in Espinoza at a later time. Both the Espinoza janitors and the Mendoza janitors are, and were at the time of the Espinoza trial, represented by the same counsel. If, as Fred Meyer urges, the Mendoza janitors were required to intervene and seek vacation of the order excluding them from the Espinoza lawsuit in order to ensure that they could ever have their day in court, it might well have created a conflict of interest for the janitors' counsel. This is so because successful intervention—at that late stage—might well have delayed

[5] Fred Meyer's assertion that the Mendoza janitors were obligated to do anything other than comply with the trial court's adverse ruling excluding them from the Espinoza litigation appears quite disingenuous—particularly given that no such assertion was ever raised by Fred Meyer prior to it prevailing in the Espinoza trial.

final resolution of the Espinoza janitors' claims, pitting the Mendoza janitors' interest in obtaining their day in court against the Espinoza janitors' interest in resolving their claims as expeditiously as possible. The two groups of janitors were not required to put their interests in opposition merely to relieve Fred Meyer of the consequence of its litigation strategy. Both sets of janitors were entitled to carry on with the services of their chosen attorneys.[6]

Our analysis of the remaining factors similarly distinguishes the present matter from Garcia and supports our conclusion that the doctrine of virtual representation was not properly applicable to the Mendoza janitors. Although it is undisputed that the issue of joint employment was fully litigated in Espinoza, the Mendoza janitors assert that the factors of participation in the prior lawsuit and identical evidence are not met here. The Mendoza janitors advance a sound argument.

The Mendoza janitors contend that the first factor of the virtual representation analysis weighs against application of the doctrine because most of the Mendoza janitors did not participate at all in the Espinoza litigation, and none testified at trial in support of the Espinoza janitors.[7] We agree.

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[6] Fred Meyer asserts, and the trial court appears to have accepted, that there would not have been any delay for the Espinoza janitors or any detriment to their interests had the Mendoza janitors intervened because the trial court could have bifurcated any non-common issues between the Espinoza and Mendoza janitors to avoid any delay of the trial on the issue of joint employment. This is not at all as plain as Fred Meyer avers. Even if the trial court had bifurcated the trial, both Espinoza and Mendoza janitors would have likely had to attend and testify in multiple trials, the trial on the issue of joint employment could have been delayed if the Mendoza janitors required additional discovery, and proceeding with multiple trials could have led to multiple appeals or requests for discretionary review, all of which could have greatly extended the time to finalize any award of damages to the Espinoza janitors.

[7] This contrasts notably with Garcia, wherein Garcia herself testified at trial as a witness on behalf of Macias before subsequently bringing a separate lawsuit. 63 Wn. App. at 521.

To support their position, the Mendoza janitors cite to Frese v. Snohomish County, 129 Wn. App. 659, 120 P.3d 89 (2005). Therein, we rejected application of the doctrine of virtual representation to a group of 162 plaintiffs, in part because, "[w]hile a few of the plaintiffs presented declarations in [the prior lawsuit], most did not participate."[8] Frese, 129 Wn. App. at 665. That reasoning resonates. The only participation in Espinoza by any members of the Mendoza class consisted of 11 janitors filing declarations regarding whether they should be included in the Espinoza class—with 5 in favor of inclusion and 6 opposing inclusion—and trial testimony offered by 6 janitors on behalf of *Expert* and *Fred Meyer*.[9] This minimal participation by some of the Mendoza janitors, especially when the bulk of the participation was in support of Fred Meyer's side of the case, does not support application of the virtual representation doctrine to the Mendoza janitors as a class.

The Mendoza janitors next aver that application of the virtual representation doctrine is improper herein because the evidence and testimony in a Mendoza trial will not be identical to that presented in the Espinoza trial. This is so, they explain, because they wish to present new evidence in a trial for

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[8] Fred Meyer asserts that we should disregard Frese because we therein noted that application of collateral estoppel was inappropriate when the respondents had failed to raise the matter before the trial court. While the Frese court did note that the respondent had failed to raise the issue below, and that such failure contributed to our decision not to apply collateral estoppel, we were also clear that the virtual representation factors, including the plaintiffs' limited participation in the prior action, did not weigh in favor of application of the virtual representation doctrine. 129 Wn. App. at 665.

[9] Fred Meyer asserts that all of the Mendoza janitors had the opportunity to testify in Espinoza and that this weighs in favor of applying the virtual representation doctrine. Fred Meyer does not cite to any case authority in support of this assertion. To the contrary, Garcia was clear that courts should consider whether "the nonparty in some way participated in the former adjudication," not whether the nonparty had the opportunity to participate but opted not to do so. 63 Wn. App. at 521.

the Mendoza janitors regarding Expert's financial situation that could support an inference that the janitors were economically dependent on Fred Meyer.[10] Again, we agree.

The trial court explicitly acknowledged that the evidence the Mendoza janitors wished to present at trial was not identical to the evidence presented in Espinoza, but then nevertheless concluded that the new evidence "does not warrant *a new trial* when the vast amount of evidence regarding Fred Meyer's relationship to the janitors will be identical to what was presented" in Espinoza. (Emphasis added.) This is incorrect for several reasons. First, Garcia did not state that the test is whether the evidence will be substantially similar between the two cases. Rather, the standard is whether "the evidence and testimony will be *identical*." Garcia, 63 Wn. App. at 521 (emphasis added). Second, the trial court incorrectly described the Mendoza janitors' request as a request for "a new trial," but the Mendoza janitors have never had a trial. Third, under the summary judgment standard, the Mendoza janitors were entitled to the benefit of any inferences that could be drawn from their new evidence. Evidence of Expert's financial difficulties could support an inference that the Mendoza janitors were economically dependent on Fred Meyer.[11]

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[10] Fred Meyer asserts that, prior to the motion to dismiss, the Mendoza janitors conceded that relitigating the joint employment issue would be unnecessarily repeating a seven week trial, that they stipulated to admitting the Espinoza trial record, and that there are no material differences between the elicited testimony in Espinoza and the testimony that would be offered in a Mendoza trial pertaining to whether Fred Meyer is a joint employer. This is mostly untrue. While the Mendoza janitors did stipulate that the Espinoza trial record would be admissible and offered at a Mendoza trial, they did not agree that relitigating the joint employer issue was unnecessary or that no new evidence could be offered in a Mendoza trial pertaining to the joint employment issue.

[11] For example, because Expert indemnified Fred Meyer for lawsuits brought by janitors, Fred Meyer's legal expenses may have prevented Expert from being financially able to pay the

Additionally, the Mendoza janitors note that in Espinoza, a critical witness, a Fred Meyer manager, was too ill to take the stand during trial, resulting in the use of his deposition testimony in place of live testimony. In a Mendoza trial, the janitors will seek to have him present live testimony. This, too, would be a significant difference from the evidence and testimony presented in Espinoza.

Finally, a Mendoza trial will not include identical parties to those in the Espinoza trial because Expert has settled with the Mendoza janitors. This could result in changes to evidentiary rulings or strategy that may permit or cause different evidence to be admitted at trial.[12] Thus, there are numerous possible differences between a potential Mendoza trial and the Espinoza trial. These weigh against application of the virtual representation doctrine.

We conclude that the virtual representation factors weigh against application of the doctrine. Fred Meyer has failed to establish that the Mendoza janitors were parties, or in privity with parties, to Espinoza as required to apply the doctrine of collateral estoppel.

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janitors. If Fred Meyer had the power to direct Expert to use those funds to pay the Mendoza janitors rather than to litigate against the janitors, it could support an inference that the Mendoza janitors were economically dependent on Fred Meyer.

Fred Meyer asserts that evidence of Expert's insolvency or other financial difficulties subsequent to the class period is irrelevant to determining whether Fred Meyer was the Mendoza janitors' joint employer during the class period because there could be many reasons for Expert's financial difficulties. Fred Meyer points to the trial court's order to support its contention. Therein the trial court noted that there were other possible business reasons why Expert was insolvent other than because it paid to indemnify Fred Meyer against janitor lawsuits. However, just because an inference could be drawn that other business reasons might explain Expert's financial situation does not mean that an inference could not be drawn that Expert's expenses indemnifying Fred Meyer prevented Expert from paying the Mendoza janitors the wages owed. On summary judgment, the Mendoza janitors are entitled to the benefit of all favorable inferences.

[12] Stipulating to the admissibility of the Espinoza trial record is not the same as stipulating to the evidentiary and other legal rulings from Espinoza.

C

The Mendoza janitors next contend that even if the doctrine of virtual representation was applicable to the janitors, application of collateral estoppel was nevertheless improper herein because it worked an injustice. This is so, the Mendoza janitors assert, because they attempted to join the Espinoza class, but the trial court ordered that they be excluded. We agree.

In support of their contention, the Mendoza janitors cite to Dean v. Lehman, 143 Wn.2d 12, 18 P.3d 523 (2001).[13] Therein, the wife of a Department of Corrections (DOC) inmate brought a class action suit against DOC challenging the validity of a statute mandating deductions from all funds received by prison inmates. Dean, 143 Wn.2d at 15-16. DOC asserted that the class should be barred from suit under the doctrine of collateral estoppel based on an earlier federal suit brought by the inmates that raised the same claims. Dean, 143 Wn.2d at 17-18 n.4. In rejecting DOC's contention, our Supreme Court noted that the wives had attempted to join the class in the federal action, but were excluded by court order. Dean, 143 Wn.2d at 17-18 n.4. The court stated that "[e]ven if the first three elements of collateral estoppel were satisfied in this case, barring the Class' claims would clearly work an injustice. The Class attempted,

[13] Fred Meyer contends that the Mendoza janitors did not argue that application of collateral estoppel would be unjust before the trial court and that they therefore may not raise the argument on appeal. "'But if an issue raised for the first time on appeal is arguably related to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal.'" Mavis v. King County Pub. Hosp. No. 2, 159 Wn. App. 639, 651, 248 P.3d 558 (2011) (internal quotation marks omitted) (quoting Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), aff'd, 166 Wn.2d 264, 208 P.3d 1092 (2009)). Here, it is clear that the issue of collateral estoppel was before the trial court, and that the trial court considered, even if only briefly, whether it would work an injustice to apply the doctrine.

but was unsuccessful, in becoming a party to the federal lawsuit." Dean, 143 Wn.2d at 17-18 n.4.

The similarities between Dean and this matter are apparent. The Mendoza janitors sought inclusion in the Espinoza class. The trial court excluded them from the class. Thus, as in Dean, it would "clearly work an injustice," 143 Wn.2d at 17-18 n.4, to apply collateral estoppel.[14]

III

The trial court erred by holding that the Mendoza janitors are collaterally estopped from bringing their claims under the MWA against Fred Meyer.[15] Accordingly, we reverse the trial court's order granting summary judgment and remand for further proceedings.

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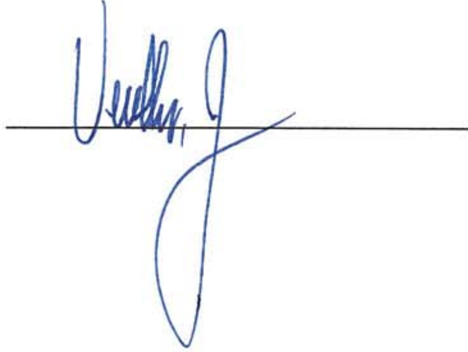
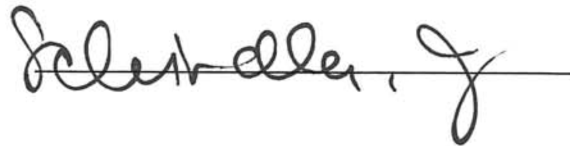
[14] Fred Meyer asserts that Dean does not support the Mendoza janitors' argument because the DOC inmates' wives were only excluded from the federal class action because the "court felt that the issues raised by the Class [of inmates' wives] would be significantly different from those of the inmates." Dean, 143 Wn.2d at 17-18 n.4. Thus, Fred Meyer contends that Dean stands only for the principle that it would be unjust to apply collateral estoppel to a class that was excluded *because its issues were significantly different from the class in the prior lawsuit*. However, even if this were so, the trial court herein excluded the Mendoza janitors because it considered their position to be significantly different than the Espinoza class representatives because the Mendoza janitors had signed 2015 settlement agreements.

[15] Fred Meyer contends that we may also affirm on alternative grounds not considered or ruled on by the trial court. While it is true that appellate courts have the discretion to affirm a trial court's disposition of a summary judgment motion on any basis supported by the record, we decline to exercise that discretion herein. See Potter v. Wash. State Patrol, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). The absence of a sufficient record and briefing on these alternative arguments militates against analyzing, in the first instance, arguments not considered by the trial court.

Reversed and remanded.

WE CONCUR:





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CASE #: 77948-6-I
Oscar Mendoza, Appellant v. Fred Meyer Stores, Inc., and Expert Janitorial Ser., LLC, Respondents

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Hon. Beth Andrus
Reporter of Decisions

FILED
12/3/2019
Court of Appeals
Division I
State of Washington

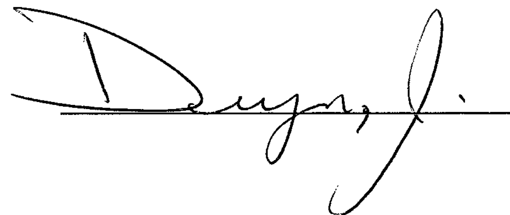
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OSCAR MENDOZA, individually and as class representative, Appellant, v. EXPERT JANITORIAL SERVICES, LLC, Defendant, FRED MEYER STORES, INC., Respondent.	DIVISION ONE No. 77948-6-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Fred Meyer Stores, Inc., having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Expert Janitorial, LLC
14000 Commerce Parkway, Suite D, Mount Laurel, NJ 08054
Línea telefónica gratuita 877.227.6374 • Línea principal 856.762.0510 • Fax 856.762.0519

15 de septiembre de 2015

Oscar A. Mendoza
REDACTED

Ref.: **Oferta de pago de conciliación a empleados de M.H. Janitorial y All American Janitorial**
Maria Espinoza y Juan Francisco Hernandez Torres contra M.H. Janitorial Services, LLC, All American Janitorial, LLC, Expert Janitorial, LLC, Fred Meyer Stores, Inc., y otros
Tribunal superior del condado de King, expediente número 14-2-26201-9-SEA

Estimado Oscar A. Mendoza:

Como sabrá, el año pasado dos antiguos empleados que trabajaron para M.H. Janitorial Services, LLC y All American Janitorial, LLC interpusieron la demanda que se menciona anteriormente. Esos empleados, que representa el abogado David N. Mark en Seattle, declaran que a ellos y a otros empleados no se les pagaron salarios y horas extra por todas las horas que trabajaron, que no se les concedieron o no pudieron tomar pausas completas para comer y para descansar, que en ocasiones se les pagaron salarios en forma incorrecta, y/o que no siempre se les pagó el salario mínimo. También demandan a Expert Janitorial, LLC y a Fred Meyer Stores, Inc. en la reclamación, y declaran que esas compañías eran sus "coempleadores" y por ende también son responsables de pagar el dinero que alegan se les adeuda. Solicitan que la demanda se convierta en una "demanda colectiva", la cual, si es aprobada por el tribunal, les permitiría representar a otros empleados, lo que lo incluye a usted, en la demanda de modo que podrían intentar obtener dinero para usted.

M.H. Janitorial acepta que pagó a los empleados un salario por parte del año 2012 pero por otra parte niega las reclamaciones de la demanda. Expert Janitorial y Fred Meyer niegan haber sido "coempleadores" de los empleados de M.H. Janitorial y All American Janitorial, o tener cualquier obligación de abonar cualquier salario que pueda adeudarse a usted. Sin embargo, debido a que preferimos llegar a un acuerdo respecto de las reclamaciones de la demanda en lugar de seguir pagando los costos de una prolongada contienda legal, hemos decidido intentar llegar a un acuerdo respecto de las posibles reclamaciones en forma directa con usted.

Le escribimos para realizarle una propuesta. **Si acepta esta propuesta, recibiría un pago de conciliación de Expert Janitorial dentro de un plazo de 14 días y no tendría que esperar hasta que finalice el litigio, pero renunciaría al derecho de recibir cualquier pago que de otro modo se obtendría para usted en el juicio, que podría ser superior o inferior a la presente oferta, o nada.**

Pago de oferta de conciliación y liberación de reclamaciones: Si usted preferiría resolver todas las reclamaciones en relación a la remuneración por el trabajo que realizó para M.H. Janitorial y/o para All American Janitorial, entonces Expert Janitorial está dispuesta a pagarle la suma de **USD $1,934.51**, menos impuestos y otras retenciones exigidas por la ley, a cambio de una liberación de reclamaciones. Calculamos este monto en virtud de la cantidad de tiempo que usted trabajó para M.H. Janitorial y/o para All American Janitorial junto con las reclamaciones realizadas en la demanda. Este pago incluiría el acuerdo no solo de las reclamaciones que se describen anteriormente y que se alegan en la demanda, sino también de cualquier otra reclamación que usted pueda tener respecto de salarios con base en su empleo con M.H. Janitorial y/o con All American Janitorial en cualquier momento hasta la fecha en la que firme esta carta y la liberación adjunta. Si desea discutir esta propuesta con nosotros, comuníquese con Helen Dubois de Expert Janitorial al (877) 227-6374 interno 360.

Aceptación del pago: Si desea aceptar esta propuesta de conciliación, firme esta carta y la liberación de reclamaciones adjunta y envíe estos dos documentos a Expert Janitorial en el sobre con franqueo postal prepagado que se adjunta, o envíe una copia de dichos documentos por correo electrónico a settlement@natjan.com o por fax al (856) 762-0519. **Enviaremos su cheque dentro de un plazo de 14 días después de recibir su carta firmada y su liberación.** Esta propuesta expira si Expert Janitorial no recibe su carta firmada y su liberación a más tardar el 7 de octubre de 2015.

Me gustaría aceptar el pago de conciliación que se ofrece más arriba a cambio del acuerdo de conciliación y la liberación de reclamaciones adjuntos firmados.

Firma del empleado: Fecha: 09/21/15

Dirección a la que debe enviarse el cheque: REDACTED WA

Acuerdo de conciliación y liberación de reclamaciones

Este Acuerdo de conciliación y liberación de reclamaciones (la "Liberación") se celebra entre Oscar A. Mendoza ("usted") y Expert Janitorial, LLC ("Expert Janitorial").

A. Anteriormente, usted era empleado de M.H. Janitorial Services, LLC ("M.H. Janitorial"), All American Janitorial, LLC ("All American Janitorial"), o ambas empresas. Usted entiende que se ha interpuesto una demanda contra dichas empresas y otros, denominada *Maria Espinoza y Juan Francisco Hernandez Torres v. M.H. Janitorial Services, LLC, All American Janitorial, LLC, Expert Janitorial, LLC, Fred Meyer Stores, Inc., y otros,* Tribunal Superior del Condado de King, Caso n.º 14-2-26201-9-SEA (la "Demanda").

B. Los demandantes Maria Espinoza y Juan Francisco Hernandez Torres ("Demandantes") alegan en la Demanda que ellos y otros empleados de M.H. Janitorial y All American Janitorial no recibieron el pago de los salarios y las horas extras correspondientes a todas las horas que trabajaron, no se les otorgó o no pudieron hacer uso de los períodos para refrigerio o descanso completos, en ocasiones se les pagó el salario de forma incorrecta, y/o no siempre se les pagó al menos el salario mínimo. Además, los Demandantes alegan que Expert Janitorial y Fred Meyer Stores, Inc. ("Fred Meyer") eran sus "coempleadores" y por lo tanto también son responsables del pago de la suma de dinero que presuntamente se les adeuda. Usted entiende que los Demandantes solicitan al Tribunal que la Demanda proceda en calidad de demanda colectiva, la cual, si cuenta con la aprobación del Tribunal, permitiría que los Demandantes presenten estas reclamaciones en nombre de otros empleados, incluido usted.

C. M.H. Janitorial acepta que pagó a los empleados un salario por parte en 2012 pero por otro lado refuta las reclamaciones realizadas en la Demanda. Expert Janitorial y Fred Meyer niegan haber sido sus "coempleadores". No obstante, usted y Expert Janitorial desean resolver todas estas reclamaciones y cualquier otra reclamación que pueda existir y que se relacione con el pago por cualquier trabajo que usted haya realizado para M.H. Janitorial y/o All American Janitorial en cualquier momento hasta la fecha.

Por lo tanto, usted acuerda cuanto sigue:

1. Pago de conciliación. Expert Janitorial le pagará la suma de **USD $1,934.51**, menos impuestos y otras deducciones requeridas por ley (el "Pago de conciliación"), dentro del plazo de 14 días posterior a la recepción por parte de Expert Janitorial de esta Liberación firmada por usted. Usted acepta que este Pago de conciliación constituye el pago total de todo salario, sanción, y cualquier otro dinero que se le pueda adeudar a usted en relación con su trabajo en M.H. Janitorial y/o All American Janitorial.

2. Liberación de reclamaciones. En función del Pago de conciliación, usted libera y renuncia para siempre a cualquier reclamación legal que pueda tener en relación con su salario o paga, incluidas las reclamaciones que pueda tener respecto de las horas extras, doble perjuicio, intereses y honorarios de abogados (las "Reclamaciones"), contra (1) M.H. Janitorial y sus propietarios, gerentes, y empleados, entre ellos, Esteban Hernandez y Maritza Hernandez; (2) All American Janitorial y sus propietarios, gerentes, y empleados, entre ellos, Raul Campos; (3) Expert Janitorial y sus propietarios, gerentes, empleados, y empresas afines; y (4) Fred Meyer y sus propietarios, gerentes, empleados, y empresas afines. Usted comprende y acepta que al firmar la presente Liberación queda imposibilitado para continuar con tales Reclamaciones, o aceptar cualquier tipo de dinero en relación con tal Reclamación, ya sea mediante la Demanda o cualquier otro procedimiento relacionado con su paga hasta la fecha en que firma esta Liberación.

3. Sin admisiones. La presente Liberación no constituye una admisión por parte de M.H. Janitorial, Expert Janitorial o Fred Meyer de mala acción ni violación de alguna ley.

4. Varios. Si se sostiene que cualquier término de la presente Liberación no es válido o aplicable, los restantes términos de esta Liberación permanecerán en plena vigencia. La presente Liberación entrará en vigencia en la fecha en que usted la firme. Si usted desea aceptar esta propuesta de conciliación en lugar de participar en la Demanda, remita esta Liberación firmada a Expert Janitorial en el sobre adjunto de franqueo pagado, o envíe una copia por correo electrónico a settlement@natjan.com o envíe una copia por fax al (856) 762-0519. **Enviaremos su cheque dentro del plazo de 14 días después de recibir su respuesta.** Esta propuesta expira si Expert Janitorial no recibe su carta de aceptación y Liberación firmadas el 7 de octubre de 2015 o antes de esta fecha.

La aceptación de esta propuesta mediante la firma de la presente Liberación es una decisión que le atañe únicamente a usted. Usted, al firmar a continuación, acepta los términos de la presente Liberación y reconoce que la misma resuelve cualquier reclamación que se relacione con su paga hasta la fecha de firma que figura a continuación. Usted entiende que si firma a continuación, recibirá el Pago de conciliación descrito anteriormente y que no podrá continuar con ninguna de las reclamaciones ni los derechos a los que he renunciado en esta Liberación en ningún momento en el futuro.

Firmado por el Empleado:

Fecha: 09/21/15

Expert Janitorial, LLC
14000 Commerce Parkway, Suite D, Mount Laurel, NJ 08054
877.227.6374 Toll Free • 856.762.0510 Main • 856.762.0519 Fax

September 15, 2015

Oscar A. Mendoza
REDACTED

Re: Offer to Pay Settlement to Employees of M.H. Janitorial and All American Janitorial
Maria Espinoza and Juan Francisco Hernandez Torres v. M.H. Janitorial Services, LLC, All American Janitorial, LLC, Expert Janitorial, LLC, Fred Meyer Stores, Inc., and others
King County Superior Court Case No. 14-2-26201-9-SEA

Dear Oscar A. Mendoza:

As you may know, last year two former employees who worked for M.H. Janitorial Services, LLC and All American Janitorial, LLC filed the lawsuit mentioned above. Those employees, who are represented by lawyer David N. Mark in Seattle, claim that they and other employees were not paid wages and overtime for all of the hours they worked, were not given or able to take full meal breaks and rest breaks, were at times improperly paid a salary, and/or were not always paid at least minimum wage. They are also suing Expert Janitorial, LLC and Fred Meyer Stores, Inc. in the lawsuit, claiming that those companies were their "joint employers" and so are also responsible for paying them the money they say they are owed. They are seeking to make the lawsuit a "class action," which, if approved by the Court, would allow them to represent other employees, including you, in the lawsuit so they could try to recover money for you.

M.H. Janitorial agrees it paid employees a salary for part of 2012 but otherwise denies the claims in the lawsuit. Expert Janitorial and Fred Meyer deny that they were "joint employers" of M.H. Janitorial's and All American Janitorial's employees, or have any obligation to pay any wages that may be owed to you. Nevertheless, because we would rather settle the claims in the lawsuit than continue paying the costs for a long legal battle, we have decided to try to settle any potential claims directly with you.

We are writing to you to make you an offer. **If you accept this offer, you would receive a settlement payment from Expert Janitorial within 14 days and would not have to wait until the lawsuit is over, but you would give up the right to receive any payment that might otherwise be obtained for you in the lawsuit, which could be either more or less than this offer, or nothing at all.**

Settlement Payment Offer and Release of Claims: If you would prefer to resolve all potential claims related to your pay for work you performed for M.H. Janitorial and/or All American Janitorial, then Expert Janitorial is willing to pay you the amount of **$1,934.51**, minus taxes and other deductions required by law, in exchange for a release of legal claims. We calculated this amount by considering the amount of time you worked for M.H. Janitorial and/or All American Janitorial along with the claims made in the lawsuit. This payment would include settlement of not only the claims described above and alleged in the lawsuit, but also any other wage-related claims you may have based on your employment with M.H. Janitorial and/or All American Janitorial at any time up to the date that you sign this letter and the enclosed release. If you would like to discuss this offer with us, please contact Helen Dubois of Expert Janitorial at (877) 227-6374 ext. 360.

Accepting Payment: If you wish to accept this settlement offer, please sign this letter and the accompanying release of claims and return both of these documents to Expert Janitorial in the enclosed postage paid envelope, or email a copy of them to settlement@natjan.com, or fax a copy of them to (856) 762-0519. **We will send your check within 14 days of receiving your signed letter and release.** This offer expires if your signed letter and release are not received by Expert Janitorial on or before October 7, 2015.

I would like to accept the settlement payment offered above in exchange for the accompanying, signed settlement and release of claims.

Employee Signature: ______________________________ Date: ____________________

Address to which check should be sent: ______________________________________

____

Settlement Agreement and Release of Claims

This Settlement Agreement and Release of Claims (the "Release") is entered into between Oscar A. Mendoza ("you") and Expert Janitorial, LLC ("Expert Janitorial").

A. You were previously employed by M.H. Janitorial Services, LLC ("M.H. Janitorial"), All American Janitorial, LLC ("All American Janitorial"), or both of those companies. You understand that a lawsuit has been filed against those companies and others, entitled *Maria Espinoza and Juan Francisco Hernandez Torres v. M.H. Janitorial Services, LLC, All American Janitorial, LLC, Expert Janitorial, LLC, Fred Meyer Stores, Inc., and others,* King County Superior Court Case No. 14-2-26201-9-SEA (the "Lawsuit").

B. Plaintiffs Maria Espinoza and Juan Francisco Hernandez Torres ("Plaintiffs") claim in the Lawsuit that they and other employees of M.H. Janitorial and All American Janitorial were not paid wages and overtime for all of the hours they worked, were not given or able to take full meal breaks and rest breaks, were at times improperly paid a salary, and/or were not always paid at least minimum wage. Plaintiffs also claim that Expert Janitorial and Fred Meyer Stores, Inc. ("Fred Meyer") were their "joint employers" and so are also responsible for paying them the money they say they are owed. You understand that Plaintiffs are asking the Court to make the Lawsuit a class action, which, if the Court approves, would allow Plaintiffs to bring these claims on behalf of other employees, including you.

C. M.H. Janitorial agrees it paid employees a salary for part of 2012 but otherwise disputes the claims made in the Lawsuit. Expert Janitorial and Fred Meyer dispute that they were your "joint employers." Nevertheless, you and Expert Janitorial wish to resolve all of these claims and any other claims you may have relating to your pay for work you performed for M.H. Janitorial and/or All American Janitorial at any time up to the present.

Therefore, you agree as follows:

1. Settlement Payment. Expert Janitorial will pay you the sum of **$1,934.51**, minus taxes and other deductions required by law (the "Settlement Payment"), within 14 days of Expert Janitorial's receipt of this Release signed by you. You agree that this Settlement Payment is payment in full for any wages, penalties, and any other money that may be owed to you relating to your work for M.H. Janitorial and/or All American Janitorial.

2. Release of Claims. In exchange for the Settlement Payment, you forever release and give up any legal claims you may have relating to your wages or pay, including claims you may have for overtime, double damages, interest, and attorney fees (the "Claims"), against (1) M.H. Janitorial and its owners, managers, and employees, including Esteban Hernandez and Maritza Hernandez; (2) All American Janitorial and its owners, managers, and employees, including Raul Campos; (3) Expert Janitorial and its owners, managers, employees, and related companies; and (4) Fred Meyer and its owners, managers, employees, and related companies. You understand and agree that signing this Release will prevent you from pursuing any such Claims, or accepting any money in relation to such a Claim, in the Lawsuit or in any other proceeding related to your pay up to the date that you sign this Release.

3. No Admission. This Release is not an admission by M.H. Janitorial, Expert Janitorial, or Fred Meyer of any wrongdoing or violation of the law.

4. Miscellaneous. If any term of this Release is held to be invalid or unenforceable, the remaining terms of this Release will remain in full force and effect. This Release will be effective on the date on which you sign it. If you wish to accept this settlement offer rather than participate in the Lawsuit, please return this signed Release to Expert Janitorial in the enclosed postage paid envelope, or email a copy to settlement@natjan.com, or fax a copy to (856) 762-0519. **We will send your check within 14 days of receiving your response.** This offer expires if your signed acceptance letter and Release are not received by Expert Janitorial on or before October 7, 2015.

Whether or not you accept this offer by signing this Release is completely up to you. By signing below, you are agreeing to the terms of this Release and are acknowledging that this Release settles all claims relating to your pay through the date you sign below. You understand that if you sign below, you will receive the Settlement Payment described above and will not be able to pursue any of the claims and rights that you have given up in this Release at any time in the future.

Signed by Employee:

Date: ______________________ ______________________________________

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

MARIA ESPINOZA and JUAN FRANCISCO HERNANDEZ TORRES,

Plaintiffs/Respondents,

v.

FRED MEYER STORES, INC.; EXPERT JANITORIAL, LLC;

Defendants/Petitioners,

and

MH JANITORIAL SERVICES LLC; ALL AMERICAN JANITORIAL LLC; ESTEBAN HERNANDEZ; and RAUL CAMPOS,

Defendants.

Nos. 74956-1-I
(consol. w/No. 74957-9-I)

COMMISSIONER'S RULING
DENYING DISCRETIONARY REVIEW

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN -3 AM 10:57

This is a class action lawsuit. Over 120 janitors, who worked at Fred Meyer stores as employees of janitorial subcontractors, allege minimum wage and overtime law violations against Fred Meyer Stores, Inc. and its contractor Expert Janitorial, LLC (Expert) as "joint employers." Expert and Fred Meyer seek interlocutory review of a denial of partial summary judgment. The trial court declined to dismiss a portion of the claims based on releases signed by about 30 janitors in December 2011. The court concluded that if Expert and Fred Meyer are found to be joint employers as alleged by the plaintiffs (an issue yet to be resolved), they may not use the releases as a defense to a minimum wage claim. Although the trial court certified the issue for immediate review, the issue affects only a portion of the claims, and immediate review may not

materially advance the ultimate termination of the litigation. Review is denied.

FACTS

Plaintiffs Mari Espinoza and Juan Francisco Hernandez Torres worked as janitors cleaning Fred Meyer stores. They did so as employees of janitorial subcontractors. They first worked for All American Janitorial LLC (All American) and when All American went out of business in early December 2011, for MH Janitorial Services LLC (MH). Fred Meyer contracted with Expert to provide these janitorial services, and Expert subcontracted with All American and then MH to do so.

The allegations in this case appear similar to those alleged in Becerra v. Expert Janitorial, in which a group of janitors filed a lawsuit in 2010 against Fred Meyer, Expert, All American, and another subcontractor, alleging minimum wage and overtime law violations.[1] There, this Court reversed a summary judgment dismissal of the janitors' claims against Fred Meyer and Expert and remanded on the issue of whether the companies were "joint employers."[2] The Supreme Court affirmed this Court and confirmed non-exclusive factors to decide the issue under the "economic reality" test.[3]

Meanwhile, when All American "disappeared"[4] in December 2011, it did not pay its janitors their last paychecks. Expert turned to MH to replace All American. Expert withheld about $100,000 to 120,000 of pay to All American and provided MH with about $97,000 to be paid to the former All American janitors in exchange for a release of

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[1] No. 10-2-11852-7 SEA; Becerra v. Expert Janitorial, LLC, 176 Wn. App. 694, 702-30, 309 P.3d 711 (2013), aff'd, 181 Wn.2d 186, 332 P.3d 415 (2014).

[2] See Becerra, 176 Wn. App. at 702-30.

[3] See Becerra, 181 Wn.2d at 195-200.

[4] Answer to Motion for Discretionary Review (Answer App.) 135 (deposition of Susan Vermeer). Both parties appear to agree that All American disappeared without notice and without paying its janitors their last paychecks.

liability. About 30 janitors, including the two plaintiffs, signed a release ("Wage Payment and Liability Release Agreement") between December 21 and 24, 2011.[5] Almost all of the janitors signed Spanish language releases.[6] The release stated that by signing it, the signing janitor would release Expert, Fred Meyer, and MH from liability under any wage and hour laws, including Washington's minimum wage act, and would acknowledge that Expert and Fred Meyer were not their employers:

> By signing this Agreement and cashing the Payment, Employee acknowledges that [All American] was his/her employer during the Relevant Time Period and that neither Expert nor Fred Meyer were Employee's employer(s) during the Relevant Time Period. Employee acknowledges that MH is his/her present employer and neither Expert nor Fred Meyer are Employee's present employer(s).
>
> By signing this Agreement and cashing the Payment, Employee agrees that he/she has been fully paid for all wages for work performed for [All American] up through the date indicated on this Agreement. The Employee hereby forever releases and covenants not to sue Expert Janitorial, LLC and its agents, officers, successors and assigns, Fred Meyer Stores, Inc. and its agents, officers, successors and assigns, and MH and its agents, officers, successors and assigns, from any and all liability pursuant to any wage and hour laws including but not limited to the Fair Labor Standards Act, the Davis-Bacon Act, the Washington Minimum Wage Act, the Washington Public Works Act, and all related wage/hour laws or claims including but not limited to claims for minimum wage, overtime and exemptions, breaks and schedules, interest, double damages, and prevailing wage.[7]

According to the declaration of Hilary Stern, former executive director of Casa Latina, those janitors appeared to be typical immigrant workers.[8] According to MH's general manager Esteban Hernandez, he and other MH supervisors went to Fred Meyer

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[5] Expert and Fred Meyer argue that the 2011 releases impacts the claims of 30 janitors, while the plaintiffs contend that the releases affect 28 janitors. Reply at 7.

[6] Appendix to Motion for Discretionary Review (Motion App.) 107 (declaration of Phillip Pacey) ¶ 5, 110-159 (releases).

[7] Motion App. 112 (English language release).

[8] Answer App. 111-12 (declaration of Hilary Stern) ¶ 5.

stores to introduce themselves to the janitors, had them sign new employee paperwork, and gave them checks.[9] According to Hernandez, the janitors had to sign the releases in order to get their checks.[10] One of the janitors who signed the releases stated in his Spanish language declaration that no one explained to him what the payment or document was for and that he did not read the document because he could not read.[11]

In June 2014, the United States Department of Labor conducted a wage and hour investigation and concluded that MH had engaged in willful violations of the federal Fair Labor Standards Act (FLSA), including failure to pay minimum wage for all hours worked and failure to pay overtime pay.[12] The federal agency also concluded that both Expert and Fred Meyer were joint employers of MH janitors under the FLSA.

In September 2014, Espinoza and Torres filed a class action complaint in King County Superior Court against Fred Meyer, Expert, All American and its owner, MH, and Hernandez, alleging minimum wage and overtime law violations. They alleged that All American and MH violated the minimum wage and overtime laws and that Expert and Fred Meyer are liable as joint employers. Espinoza and Torres sought to represent a class of janitors who worked at Fred Meyer stores in Puget Sound area under contracts with All American and/or MH between September 2011 and September 2014.

In September 2015, Expert mailed settlement offers to potential class members. 67 janitors, but not the two plaintiffs, accepted the offers and signed releases.

In December 2015, the trial court granted the plaintiffs' motion for class

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[9] Answer App. 109 (declaration of Esteban Hernandez) ¶ 3.

[10] Answer App. 109 ¶ 3.

[11] Answer App. 91 (English translation of declaration of Natanel Lopez Solis) ¶ 7, 94 (Spanish declaration of Natanel Lopez Solis) ¶ 7.

[12] Answer App. 118 Ex. 9, 313-47.

certification in part. The court concluded that the plaintiffs showed common legal and factual issues, including whether Fred Meyer and Expert were joint employers under Washington's minimum wage act and whether the releases signed by the janitors were enforceable. However, with respect to the 2015 releases, the court concluded that the two plaintiffs who did not sign the 2015 releases were not appropriate representatives to assert that the 2015 releases are not enforceable. The court concluded that whether Expert and Fred Meyer were the janitors' joint employers is an issue that predominates over any issue affecting individual members. The court denied certification of the claims related to pre-shift work and missed breaks. The court certified the following class:

> All individuals who performed non-supervisory janitorial work in Puget Sound Area Fred Meyer stores under contracts between (a) Fred Meyer and Expert Janitorial and (b) Expert Janitorial LLC and 2nd tier subcontractors All American Janitorial LLC and/or MH Janitorial Services, LLC, between September 16, 2011 and September 23, 2014, and who did not execute a settlement agreement and release with Expert in 2015.[13]

Expert filed a motion for partial summary judgment, seeking to dismiss the portion of the claims affected by the 2011 releases – claims based on All American's failure to pay up to December 2011. Fred Meyer joined in Expert's motion.

In March 2016, the trial court heard the parties' argument on the partial summary judgment motion and denied the motion. The court concluded that if Expert or Fred Meyer is found to be a joint employer, neither may use the releases as a defense to the plaintiffs' minimum wage claims. But the court granted Expert's motion for certification for immediate review under RAP 2.3(b)(4). The court certified that its order denying partial summary judgment "involves a controlling question of law as to which there is

[13] Appendix to Motion for Discretionary Review (Motion App.) 104 (order granting in part and denying in part motion for class certification at 12).

substantial ground for a difference of opinion, and that immediate review of the order may materially advance the ultimate termination of the litigation."[14]

DECISION

Expert and Fred Meyer seek interlocutory review of the denial of partial summary judgment. "Interlocutory review is disfavored."[15] "It is not the function of an appellate court to inject itself into the middle of a lawsuit and undertake to direct the trial judge in the conduct of the case."[16] RAP 2.3(b) defines four situations in which this Court may grant pretrial review. Expert and Fred Meyer seek review under RAP 2.3(b)(2) and (4), which set forth the following criteria:

> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; [or]
>
> ***
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Expert and Fred Meyer do not satisfy RAP 2.3(b)(2) in part because the denial of partial summary judgment does not substantially alter the status quo or substantially limit their freedom to act. The probable error criterion is generally limited to an injunction or like orders having an immediate impact outside the courtroom, such as an order compelling a party to remove a structure.[17] When "a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the

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[14] Motion App. 46 (order granting certification at 2).

[15] Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)).

[16] Maybury, 53 Wn.2d at 720.

[17] See State v. Howland, 180 Wn. App. 196, 207, 321 P.3d 303 (2014).

conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2)."[18] A denial of summary judgment generally does not satisfy this effect prong.[19] For interlocutory review of the denial of partial summary judgment, Expert and Fred Meyer must show an "obvious" (not merely "probable") error that would render further proceedings useless under RAP 2.3(b)(1). They do not show or assert that further proceedings would be useless when the denial of partial summary judgment affects only a portion of the claims.

Also, the trial court's decision appears to have some support in case law and is not an obvious error. In declining to dismiss a portion of the claims based on the 2011 releases signed by about 30 janitors, the trial court relied on the language of the minimum wage act provision, RCW 49.46.090(1), and a 1918 Supreme Court decision in Larsen v. Rice.[20] RCW 49.46.090(1) provides as follows:

> Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.[21]

In Larsen, our Supreme Court addressed the 1913 minimum wage act for women and children and held that "any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable,

[18] Howland, 180 Wn. App. at 207.
[19] See id. at 206.
[20] 100 Wash. 642, 171 P. 1037 (1918).
[21] RCW 49.46.090(1) (emphasis added).

if not void."[22] The Court explained that although private compromises are favored, the controversy "was not wholly of private concern" because the State, having declared that a minimum wage of a certain amount was necessary to a decent maintenance of an employee, "has an interest in seeing that the fixed compensation is actually paid."[23]

Expert and Fred Meyer rely on this Court's opinion in Pugh v. Evergreen Hospital Medical Center.[24] That case involved alleged violations of meal and rest break rules under the industrial welfare act, RCW 49.12 RCW. This Court rejected an argument that court approval was required for a settlement between a union and union members' employer under CR 23(e).[25] This Court held that the class action rule did not apply in a suit brought by the union in its associational capacity.[26] Pugh did not address the issue of whether a settlement of a minimum wage claim is voidable without the State's involvement and does not present an obvious error in the trial court's decision here.

Lastly, I respectfully decline to accept the trial court's certification for immediate review under RAP 2.3(b)(4). I accept that the enforceability of the releases in this case involves a question of law as to which there is substantial ground for a difference of opinion. But the issue does not appear "controlling," and immediate review may not materially advance the ultimate termination of the litigation. Expert and Fred Meyer cite a federal district court case to argue that review need not be potentially dispositive of the entire case and that all that must be shown is that resolution of the issue on appeal

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[22] Larsen, 100 Wash. at 650.
[23] Id.
[24] 177 Wn. App. 348, 311 P.3d 1253 (2013).
[25] See Pugh, 177 Wn. App. at 356-57.
[26] See id. at 356.

could materially affect the outcome of litigation "in some way."[27]

When RAP 2.3(b)(4) was added as a new basis for review in 1998, the rules and procedures committee contemplated that "this amendment would increase the likelihood of acceptance of review in circumstances that are effectively dispositive of the case."[28] "Examples are denials of motions to dismiss or summary judgments dealing with questions of law such as immunity or statues of limitations."[29]

Here, the denial of partial summary judgment involves releases of only a portion of the claims. This case involves allegations that over 120 janitors were not paid the required minimum and overtime wages for the hours worked during a period between September 2011 and September 2014.[30] The enforceability of the 2011 releases affects only about 30 janitors and only as to the period between September 2011 and December 2011. Regardless of the resolution of the issue, other portions of the claims remain as well as the issue of whether Expert and Fred Meyer are joint employers.

Expert and Fred Meyer urge this Court to accept review, arguing: "If the Order is allowed to stand, it is difficult to overstate the potential disruption to long-standing practices and expectations regarding the settlement of wage claims in this State, not to mention the potential burdens that will be placed on L&I and the courts relating to such settlements."[31] But interlocutory review requires criteria that are different from those for

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[27] Motion for Discretionary Review at 17 (quoting Lakeland Vill. Homeowners Ass'n v. Great Am. Ins. Grp., 727 F. Supp. 2d 887, 896 (E.D. Cal. 2010)).

[28] KARL B. TEGLAND, 2A WASHINGTON PRACTICE: RULES PRACTICE – RULES OF APPELLATE PROCEDURE, RAP 2.3 at 181 (8th ed. 2014) ("WASHINGTON PRACTICE").

[29] WASHINGTON PRACTICE at 181.

[30] In partially granting certification, the trial court noted that Expert had identified 193 putative class members and that if the 2015 releases signed by 67 individuals are valid, there remain over 120 putative class members. Motion App. 97, 99.

[31] Motion for Discretionary Review at 19.

discretionary review from a final decision under RAP 2.3(d), which includes an issue of public interest that should be decided by an appellate court. Expert and Fred Meyer may appeal from a final judgment and may then challenge the trial court's denial of partial summary judgment. Interlocutory review is not warranted.

CONCLUSION

Expert and Fred Meyer fail to satisfy the criteria for discretionary review under RAP 2.3(b). Therefore, it is

ORDERED that discretionary review is denied.

Done this 3rd day of June, 2016.

Court Commissioner

MILLER NASH GRAHAM & DUNN

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