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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 635182

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

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Repondents,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Petitioner.

FILED
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STATE OF WASHINGTON
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RESPONDENTS' ANSWER TO PETITION FOR REVIEW

William Rutzick, WSBA #11533
Martin S. Garfinkel, WSBA #20787
SCHROETER, GOLDMARK & BENDER
500 Central Building, 810 Third Avenue
Seattle, Washington 98104
(206) 622-8000

Lawrence Schwerin, WSBA #4360
Dmitri Iglitzin, WSBA # 17673
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT
18 West Mercer Street Suite 400
Seattle WA 98119
(206) 285-2828

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A. IDENTITY OF RESPONDENTS

Respondents are 320 individual drivers (herein “plaintiffs”) who worked for Federal Express Grounds Package System, Inc. (“FedEx” or “defendant” herein).

B. COURT OF APPEAL’S DECISION AND ORDER

Plaintiffs agree with Section B of the Petition.

C. RESPONDENTS’ STATEMENT OF ISSUES PRESENTED FOR REVIEW

FedEx’s articulation of Issues 1 and 3 in its “Statement of Issues Presented For Review” misstates what the Court of Appeals actually said in *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 59, 244 P.3d 32 (2010). See discussion, *infra*, under the Argument section below.

D. RESPONDENTS’ STATEMENT OF THE CASE

In the first part of this case in the trial court, both sides focused on the right of control as the issue for distinguishing employees from independent contractors. It was FedEx which first argued to the trial court in October 2008 that the Fair Labor Standards Act’s (“FLSA”) “economic reality test” was applicable to that issue. On October 6, plaintiffs filed a motion in limine relating to plaintiffs’ tax returns. CP 264-272. Plaintiffs argued there that:

The FLSA standard and its attendant “economic realities” test is different from Washington’s “control” test and therefore it is not relevant to the question before the jury in this wage-and-hour class action.

CP 268. In opposing plaintiffs’ at CP 768-771, FedEx argued on October 10, 2008, citing with substantial Washington and federal authority, that the trial court should use FLSA cases interpreting whether an employee-employer relationship existed in deciding the same question under the MWA:

The MSA [Washington Minimum Wage Act] is based on the FLSA, however, and Washington courts consider the interpretation given to comparable provisions of the FLSA by federal courts as persuasive authority in construing the MWA. *Innis v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000)

. . . .
The U.S. Supreme Court has adopted an “economic realities” approach to determining whether an employer-employee relationship exists within the meaning of the FLSA. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33, 81 S. Ct. 933, 6 L.Ed. 2d 100 (1961). Under this approach, “employees are those who as a matter of economic reality are dependent upon the business to which they render service.” *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

Id. at CP 768, 771.¹ Plaintiffs were persuaded by this analysis and a week later they submitted alternative proposed jury instructions utilizing the

¹ FedEx also correctly argued at the same CP that Washington courts should look to federal courts’ interpretation of the FLSA as:

[P]ersuasive authority in interpreting the MWA particularly where, as here, no reported Washington case has interpreted [the definition of “employee” under the MWA] or identified the correct legal standard for distinguishing between an

FLSA economic reality test, as did FedEx. *Compare* Defendant's CP 994-995 *with* Plaintiffs' Proposed Instruction No. 13A at 1078.

The trial court, after considerable discussion by both sides and over plaintiffs' opposition, gave a preliminary and ultimately a final instruction that turned on the common law right to control, but included a number of the FLSA factors, a guide to determining right to control. *See* RP 03/02/09 (morning session), RP 03/27/09 (morning session), pp. 10-17. FedEx raised in the trial court the issue of judicial estoppel concerning plaintiffs' arguments about the FLSA, but the "[t]he trial court appears to have rejected FedEx's argument by dealing with the issue on the merits." *Anfinson*, 159 Wn. App. at 62-63.²

The trial court in its Finding and Order Granting Class Certification specifically contemplated the use of representative evidence:

Further, in light of FedEx's centralized method of doing business, the use of representative evidence from a manageable number of drivers will permit resolution of the merits of the dispute.

CP 217. Consequently, plaintiffs proposed several jury instructions dealing with representative evidence and related matters. *See, e.g.,*

employee and an independent contractor for purposes of an MWA claim.
(Emphasis added).

² FedEx only raised judicial estoppel before the Court of Appeals in footnote 28, of its brief. FedEx cited only one Washington case, *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008), and admitted that "Washington cases appear to apply judicial estoppel primarily to inconsistent factual assertions."

Moreover, they argued in the trial court for such instructions both as preliminary and final instructions.³

E. ARGUMENT

1. Introduction.

The Court of Appeal's Opinion cites and relies on more than twenty Washington appellate cases, including three cases from this Court explaining how Washington courts should use authority under the FLSA to interpret comparable provisions of the MWA.⁴ The opinion also relies on at least four U.S. Supreme Court cases⁵, and numerous federal Court of Appeal's decisions. FedEx's Petition For Review does not dispute the Court of Appeal's analysis in *Anfinson* of a single such case, and fails

³ Defendant asserts in its Statement of the Case that:

During closing argument, plaintiffs made no objection to FXG's explanation of the jury instructions (including FXG's statement with respect to Instruction 8 that "common" meant "all") and did not seek any curative instruction.

Pet., p. 5. However, FedEx fails to point out that while going through jury instructions plaintiffs specifically asked the trial court not to permit defendant to make the argument that "common" means "all", but the trial court refused to do so. RP 03/26/09 (1:33 p.m. session), p. 97.

⁴ *Stahl v. Delicor of Puget Sound*, 148 Wn.2d 876, 64 P.3d 10 (2003); *Innis v. Tandy Corp.*, 141 Wn.2d 517, 7 P.3d 807 (2000); and *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 996 P.2d 582 (2000).

⁵ *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *United States v. Silk*, 331 U.S. 704 (1947); *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945); and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

even to cite the great majority of those cases, including *Stahl*, the Washington case extensively relied upon in the *Anfinson* Opinion.⁶

While RAP 13.4(b) lists four considerations governing acceptance of review, FedEx also relies only on the fourth: “(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” FedEx thus acknowledges that the nothing in the Court of Appeal’s decision is in conflict with a decision of the Washington Supreme Court or Court of Appeals. *See* RAP 13.4(b)(1), (2).

FedEx’s effort to explain why this Court should review the Court of Appeal’s Opinion largely depends on a misreading of the opinion and of applicable law to create rigidity and inconsistency when neither exist. For example, defendant argues that “[t]he Court of Appeals rigid approach to the FLSA test ignores its non-exclusive, multi-factor nature.” Pet., p. 9. However, the Court of Appeals did not apply the FLSA factor rigidly with respect to the MWA. To the contrary, it left open the possibility that, on remand, the trial court might be persuaded to adopt “the belief of the parties” as an additional factor. 159 Wn. App. at 59. Similarly, FedEx argues that FLSA representative evidence cases “have never been

⁶ For example, FedEx argues at page 7 of its Petition that the MWA’s definition of “employee” is “circular” and “of little help in defining who is an employee and independent contractor under the Act, while ignoring *Stahl*, which held that “[t]he legislature broadly defined employee in RCW 49.46.010(5) to include any individual employed by an employer.” 148 Wn.2d at 884 (emphasis added; footnote omitted).

interpreted to establish the existence of an employment relationship, i.e., whether workers are employees or independent contractors in the first place.” Pet., p. 18. That assertion is contradicted by numerous federal Court of Appeals cases under the FLSA deciding whether workers are employees or independent contractors by relying on evidence of work practices that do not affect all workers.⁷

There is no significant public interest in having this Court determine issues which have been properly determined by the Court of Appeals with due regard to State and Federal precedent as well as to administrative interpretation. Moreover, the Court of Appeal’s Opinion gives proper guidance to the trial court on those issues which it concluded will require further development. See 159 Wn. App. at 59, 64, 66-71.

2. The Court of Appeals Correctly Concluded That Instruction 9 Was Improper While Providing the Trial Court Guidance On Remand.

a. Instruction 9 Did Not Properly Inform The Jury By Making The “Right To Control” The Ultimate Test For Whether A Worker Is An Employee Or Independent Contractor.

This Court has consistently required jury instructions to meet all parts of a three-part test – they must: (a) allow the parties to argue their

⁷ See, e.g., *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981); *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324 (5th Cir. 1993); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299 (5th Cir. 1998); *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982).

theory of the case; (b) not mislead the jury; and (c) when, taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). Moreover, a clear misstatement of the law is “presumed to be prejudicial.” *Thompson v. King Feed & Nutrition*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). The Court of Appeals applied *Cox*, 159 Wn. App. at 41. FedEx recites the same standards, but misreads both *Cox* and the Court of Appeal’s decision.

This can be seen by examining the actual holding and reasoning of the Court of Appeals. The Court of Appeals explained that the common law “right to control” test set forth in cases such as *Hollingbery v. Dunn*, 68 Wn.2d 75, 81, 411 P.2d 431 (1966) and *Massey v. Tube Art Display, Inc.*, 15 Wn. App. 782, 785-86, 551 P.2d 1387 (1976) “is derived from the common law of torts.” *Anfinson* at 51. The FLSA test, on the other hand, was based on “whether as a matter of economic reality,” the “individual is dependent on the business to which he renders service.” *Id.* at 51, citing *Rutherford*, 331 U.S. at 730. Significantly, the Court of Appeals explained that “the United States Supreme Court has held that common law distinctions between employees and independent contractors are not determinative for the purpose of FLSA coverage.” *Id.* at 51, citing *Bartels*, 332 U.S. at 130; *Rosenwasser*, 323 U.S. at 362-63 (emphasis added).

In reaching its holding, the Court explained also that the two tests are different in their primary focus and that by making the ultimate inquiry the “right to control” rather than “dependence based on economic reality,” the trial court misstated the law in Instruction 9:

But the primary focus of the two tests is different. Under Washington's common-law test, the ultimate inquiry is whether the employer has the right to control the worker's performance.⁵⁹ Under the FLSA test, in contrast, the ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on the alleged employer.⁶⁰

With these considerations in mind, we hold that the economic realities test used by the majority of the federal circuits should be the proper legal test for determining whether a worker is an employee under the MWA. Instruction 9, while including some factors drawn from this test, defines the ultimate test for determining whether a worker is an “employee” under the MWA as the “right of control” over the worker's performance. This is legally incorrect.

Id. at 53-54 (emphasis added; footnotes omitted). Defendant does not challenge that analysis.

b. The Court Of Appeals Did Not Adopt An Unvarying List Of Factors To Be Considered By The Jury.

The Court of Appeals, by adopting the “economic realities test” which focuses on dependence based on economic reality, did not adopt the six-factor test commonly used by federal courts as a rigid test that could not be supplemented by the trial court. This can be seen at page 59 of the *Anfinsen* opinion where the Court agreed with plaintiffs “that factor eight

of Instruction 9, the beliefs of the parties, is not a relevant factor under the FLSA test used by a majority of the federal circuits.” The Court nevertheless went on immediately to add that:

While Washington is not bound to strictly follow the test used by the majority of federal circuits, that test is persuasive. We have heard no persuasive argument why that test should not be used here. However, we acknowledge that the trial court, on remand, may hear such arguments, and we do not prejudge any ruling the trial court may make on that question.

The actual language in the Court of Appeal’s Opinion, including the portions quoted above, establishes that the Court’s holding was more limited and nuanced than defendant asserts.⁸ The Court held that Instruction 9 was legally incorrect in making the right of control the ultimate inquiry.⁹ The Court also held that Washington is not bound to follow the six factors used by federal courts although they are

⁸ FedEx is thus simply wrong when it asserts that the Court held that these claims “must be determined by the six factors of the ‘economic realities’ test under the FLSA and that the trial court lacks discretion to include additional factors...” Pet., p. 1 (emphasis added). Similarly, FedEx is also wrong at page 5 of the Petition when it claims that the Court held that instruction 9 was legally incorrect because it “include[d] other factors.” Nor, is it correct, as FedEx mistakenly claims at pages 6-7, either (a) that the Court purported to “adopt FLSA’s six-part ‘economic reality’ test as the rigid standard under the MWA; or (b) that it held “that the trial court lacked discretion to include other factors.” (Emphasis added.)

⁹ FedEx disingenuously refers to the first portion Instruction No. 9 as the “preamble”. Far from being simply an introduction, the first portion of the instruction actually sets forth the ultimate inquiry for determining whether the plaintiffs were employees or independent contractors, when it provides:

You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. This decision requires you to determine whether FedEx Ground controls or has the right to control the details of the class members’ performance of the work.”

“persuasive”. Finally, it ruled that FedEx had provided no persuasive argument to the Court of Appeals for adding an additional factor, but the Court was not foreclosing the possibility of the trial court with being provided other arguments that might persuade it. The Court of Appeals was not being inconsistent; it was being careful and precise.

c. Instruction 9 Misstates The Law Under The MWA Even Assuming It Correctly States The Law Under The IWA.

FedEx characterizes Instruction 9 is a “Hybrid¹⁰ Legal Standard for Determining Independent Contractor Status for the Plaintiffs’ Claims Under the MWA and the IWA,” and argues that plaintiffs somehow waived their claim that Instruction 9 misstates the MWA. Pet., pp. 11-13. This argument fails because it misstates both the facts and the law. Factually, plaintiffs’ primary claim was for overtime under the MWA. If successful under that claim, plaintiffs would be entitled to substantial overtime because class members routinely worked well over 40 hours a week, but were never paid overtime. The only claim under the IWA was for reimbursement to class members of the relatively minimal cost of the

In deciding control or right to control, you should consider all the evidence bearing on the question, and you may consider the following factors, upon others. (Emphasis added.)

¹⁰ A hybrid is “anything of mixed origin.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED (2d Ed.), p. 888. Not all hybrids are workable or good ideas. For example, a “centaur” is a hybrid of a human and a horse.

FedEx-required uniforms. FedEx, in fact, admitted to the trial court the primacy of the MWA claim:

The ultimate issue in this case is whether the class members were properly classified as independent contractors, or whether they should have been classified as employees, under the Washington Minimum Wage Act (MWA). (Emphasis added.)

CP 764.¹¹ FedEx's Court of Appeal's brief only alludes to the IWA in two almost identical footnotes (n. 8 and n. 25) stating that "[t]he incorporation of relevant Washington factors was particularly appropriate in this case given that one of plaintiffs' claims for uniform reimbursement under RCW 49.12.450 [IWA], has no equivalent under the FLSA." The Court of Appeals thus correctly concluded that the MWA claim was the primary focus in this case. "[T]he overtime wage provision of the MWA that is primarily at issue for purposes of Instruction 9 is RCW 49.46.130." 159 Wn. App. at 47 (emphasis added).

¹¹ While FedEx asserts at page 3 of its Petition that, "by stipulation the sole issue to be tried to the jury was whether the class members were independent contractors or employees of FXG for purposes of the MWA and IWA. RP 3/27/09, p. 7," the actual stipulation only mentions the MWA:

If the phase one jury or the Court, as appropriate, determines that the class members are employees and not independent contractors, FedEx Ground is liable under the Washington Minimum Wage Act for hours class members worked in excess of 40 per week during the class period and also for uniform reimbursement as determined in phase two of the trial and subject to FedEx Ground's right to appeal the jury's phase one and phase two verdicts and/or the Court's rulings.

RP (3/27/09), p. 7.

Defendant's "hybrid" argument makes no sense legally for several reasons. First, it is not true, as argued by FedEx, that the Court of Appeals "erred by ignoring the dual nature of the claims" [Pet., p. 11], when the Court, as quoted above, recognized that there were two statutes at issue, but correctly focused on the MWA argument as being the primary one. Secondly, the argument is substantively meritless. Defendant proposed Instruction No. 9 and defended it in the trial court by arguing that it was justified under the MWA. The trial court adopted the instruction over the vigorous opposition by plaintiffs as cited above who argued that it was inconsistent both with the FLSA and the MWA. As the Court of Appeals properly found, the instruction offered by defendant and approved by the trial court was inconsistent with the MWA.¹²

FedEx is now arguing that the IWA claim focuses on the "right of control" while the Court of Appeals correctly concluded that the MWA claim focuses on "dependence based on economic reality." The Court of

¹² FedEx cites *Gammon v. Clark Equipment Co.*, 104 Wn.2d 613, 617-18, 707 P.2d 685 (1985), as precedent for the trial court's discretion when fashioning an instruction when two claims are involved. *Gammon* is inapplicable to the present case because in *Gammon* this Court explained that the instruction lists "the elements of the two causes of action separately," and otherwise distinguishes the two causes of action. 104 Wn.2d at 618. Instruction 9 does not remotely do that.

Defendant additionally asserts that the Court of Appeals "erred by simply presuming prejudice with regard to Instruction 9" and, with regard to Instruction 8, equates "likely prejudice" with "possible" prejudice. See n. 6 and 11 to the Petition. Neither assertion is tenable. The Court of Appeal's application of "presumed prejudice" is consistent with a long line of cases this Court cited, *inter alia*, in *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Moreover, "likely" does not mean "possibly." "Likely" means "probably" (WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED (2d Ed)),

Appeals utilized federal FLSA case law, Washington MWA case law relying on the FLSA, and DLI's interpretation. As the Court of Appeal's correctly found, the right of control and the economic realities test often lead to inconsistent results, and the MWA test turns on dependence based on economic reality. Instruction 9 thus misstated the MWA even assuming it correctly followed the IWA test. Since Instruction 9 was proposed by FedEx and properly objected to by plaintiffs, there is no basis for defendant's argument that plaintiffs' somehow waived the right to challenge Instruction 9. Moreover, this is an argument that FedEx never raised to the trial court or the Court of Appeals prior to the issuance of the Court of Appeal's opinion. As such, it cannot properly raise it now.

d. The Court Of Appeals Correctly Both Found DLI Technical Bulletin 11 To Be Helpful And Concluded That It Supported The "Dependent As A Matter Of Matter Of Economic Reality Test" Under The MWA.

Technical Bulletin #11 was issued by DLI's Employment Standards Program.¹³ It states both that this "bulletin is intended as a guide in the interpretation and application of relevant statutes, regulations, and policies," and that the "L&I Employment Standards Program offers this Economic Realities Test to help staff evaluate whether there is an

p. 1048), while "possible" means something "that may or may not happen"; distinguished from "probable." *Id.* at 1406 (emphasis added).

¹³ Defendant does not dispute that Technical Bulletin #11 is authentic.

independent contractor or employer/employee relationship.” (Emphasis added.)

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992), cited by defendant at page 10 of its Petition, holds that to be considered an interpretation it need not be a regulation but that the interpretation “must represent a policy decision by the person or persons involved,” which should be “uniformly applied”. Technical Bulletin #11 at issue here meets both criteria. It is intended as a “guide in the interpretation and application of the relevant statute” and it is to be uniformly applied to “help staff evaluate whether there is an independent contractor or an employer/employee relationship.” This Court’s use in *Stahl, supra*, of recently adopted DLI Administrative Policies directly supports the Court of Appeal’s use of Technical Bulletin #11. The complaint in *Stahl* was filed in 2000 and the Court of Appeal’s decision was filed in November 2001 which was before the January 2, 2002 issuance of the Administrative Policies ES.A. 10.1 and ES.A. 10.2, both of which were relied upon by this Court. 148 Wn.2d at 886-87.¹⁴ This Court thus relied on those DLI Administrative Policies even though they were not published until after the Court of Appeal’s decision. As such, they

¹⁴ Indeed, the *Stahl* Supreme Court opinion points out that these policies were attached to the Petition For Review. *Id.* at 886-887.

were not (and could not have been) seen or relied upon by the parties prior to the Court of Appeal's decision in *Stahl*.

FedEx's Petition, while challenging the use of the bulletin on one hand, makes the argument, on the other hand that defendant argues that the Technical Bulletin "actually supports Instruction 9 by recognizing that control is the most important factor of the non-exclusive factors. It then quotes a portion of a paragraph on page 1 of the Bulletin, while misquoting the last sentence and omitting portions which show both that the Technical Bulletin is both DLI's uniformly applied official policy and is inconsistent with Instruction 9. Page 1 of the Bulletin with the portions omitted by FedEx underlined:

This technical bulletin is designed to aid department staff in regard to the employer/employee relationship between workers and businesses. This bulletin is intended as a guide in the interpretation and application of relevant statutes, regulations and policies.

....

The question to be answered is: is the worker economically dependent on the business, or is the worker, as a matter of economic fact, in business for him or herself? This relationship can be difficult to determine. The Economic Realities Test includes six factors that should be considered in each case. An evaluation of the relationship cannot be based on isolated factors or upon a single characteristic, but depends upon all of the circumstances. All factors must be considered and weighed in combination with each other. Even the obvious presence or absence of an individual factor is not determinative, although case law

suggests that the first factor on the degree of control by the business over the worker is very important.

(Emphasis added.)

3. The Court Of Appeals Correctly Concluded That The Trial Court Did Not Abuse Its Discretion In Not Applying Judicial Estoppel.

None of the elements of judicial estoppel were met in this case. In *Miller v. Campbell*, 164 Wn.2d at 539, the only Washington case defendant cited to the Court of Appeals. This Court held that the core factors used in deciding whether to apply judicial estoppel included:

(2) whether “judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not stopped.” (Emphasis added.)

Factor (2) was not met in this case for two reasons. First, there was no “later proceeding”—all of this took place in the same case. Second, as discussed above, it was defendant who first argued for the application of FLSA authority. No one could fairly view plaintiffs as misleading the court by partially agreeing with defendant’s FLSA argument raised by defendant. Factor (3) was not met because plaintiffs were provided no unfair advantage and defendant no unfair detriment by the use of FLSA authority since its use was first raised by defendant.

Defendant also admitted in its Brief in the Court of Appeals at page 27, n. 28, that “Washington cases appear to apply judicial estoppel primarily to inconsistent factual assertions”. The Court of Appeals agreed with that admission and correctly concluded that the:

heart of the doctrine [of judicial estoppel] is the prevention of inconsistent positions as to facts. It does not require counsel to be consistent on points of law.¹⁵

The Court went on to explain:

Here, Anfinson's position on appeal is not factually inconsistent with his arguments in the class certification proceeding. Thus, the doctrine of judicial estoppel does not apply.

FedEx does not assert that that the Court of Appeals incorrectly interpreted Washington law. Indeed, numerous cases since *King v. Clodfelter*, 10 Wn. App. 514, 518 P.2d 206 (1974) have reiterated its holding.¹⁶ This is not an “issue of substantial public interest that should be determined by the Supreme Court” pursuant to RAP 13.4(b) particularly because there is no basis for concluding that the trial court committed an abuse of discretion in not relying on judicial estoppel.

¹⁵ *Anfinson* at page 63 quoting *King v. Clodfelter*, 10 Wn. App. at 521.

¹⁶ See, e.g., *Miles v. Child Protective Servs. Dep't*, 102 Wn. App. 142, 153 n. 21, 6 P.3d 112 (2000); *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 259, 948 P.2d 858 (1997). Moreover, while FedEx quotes *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 950, 205 P.3d 111 (2009) as suggesting a different approach, FedEx ignores *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 102, 220 P.3d 229 (2009), where the court, citing *Ashmore*, held:

4. The Court Of Appeals Did Not Err In Finding Instruction 8 Erroneous Because It Was Misleading.

As discussed above, jury instructions, inter alia, must not mislead the jury. The Court of Appeals correctly explained why Instruction 8 did not meet that test, and then went on to explain the issues to be addressed by parties on remand:

We note that when the trial court took exceptions to its instructions to the jury, the court expressly rejected FedEx's proposal that this instruction should have stated "that employee status was common to all class members." The court stated in its ruling: "Specifically the court is persuaded that commonality does not require each and every class member be affected individually by the actions, conduct, or work experience if they have promulgated pursuant to a policy or widespread procedure or practice common to the class members during the class period."¹⁰²

Nevertheless, during closing argument, FedEx argued that "common" means "all" or every class member for purposes of this instruction.

....

Under these circumstances, we conclude that the wording of the instruction was misleading and likely prejudicial to Anfinson. It was misleading because it permitted the jury to accept an argument that the court expressly ruled could not be made. "Common" does not mean "all," as FedEx argued during closing.

Based on the briefing on appeal and our independent research we also conclude that the instruction appears to be legally incorrect. In so concluding, we note the complexity

The doctrine concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law. *See Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009). (Emphasis added.)

of this issue and the dearth of persuasive case law addressing the issue. On remand, the parties should brief the question for the trial court to decide, with the following considerations in mind.

Anfison, 159 Wn. App. at 68 (emphasis added).¹⁷

Defendant refers to the Court of Appeal's ruling as "equivocal" at page 5 of its Petition perhaps because it is confusing the holding that Instruction 8 was erroneous because it was misleading with the Court of Appeal's analysis that the Instruction also "appears to be legally incorrect." *Id.* at 66. Again, the Court of Appeals is not being "equivocal"; it is being precise. Moreover, FedEx is wrong when it asserts that "[t]he Court of Appeals cited only cases that permitted the use of representative evidence to establish the number of hours worked for purposes of damage calculations." Pet., p. 18. To the contrary, the Court of Appeal cited both *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1298 (3d

¹⁷ At page 16, n. 8 of its Petition, FedEx argues that "[p]laintiffs failure to make a contemporaneous objection to a closing argument waives any error" citing *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993), defendant is wrong both factually and legally. Factually, as discussed supra, plaintiffs asked this Court, immediately after it ruled to omit the word "all" from Instruction 8, that defendant not be allowed to make the exact argument it made about needing to prove that all 320 class members were employees. The trial court refused to do so. RP 03/26/09, p. 97. Thus, this objection was made and denied. Legally, *Fisons* is inapplicable because it related to closing argument rather than to a misleading instruction. The Court of Appeals here reversed because the instruction was misleading since it permitted an argument the trial court had already rejected, not because the jury argument was misleading.

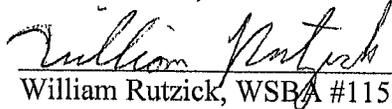
Cir. 1991); and *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3d Cir. 1994). Those cases hold that evidence from representative employees “may be sufficient to establish prima facie proof of a pattern and practice of FLSA violations.” *Id.* at 1298. FedEx also claims that “the trial court did not impose a requirement that the evidence of liability be ‘identical,’ . . . , only that it be ‘common.’” Pet., 19. That seems quite disingenuous given that FedEx successfully argued to the jury that “common” means “all” as the Court of Appeals recognized. FedEx’s position not only would make successful class actions impossible, but is inconsistent with Washington and federal precedent. *See, e.g., Miller v. Farmer Bros.*, 115 Wn. App. 815, 64 P.3d 49 (2003), as well as the cases cited at footnote 7, *supra*.

F. CONCLUSION

For the foregoing reasons, defendant’s Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 25th day of April, 2011.

SCHROETER, GOLDMARK & BENDER



William Rutzick, WSBA #11533
Martin S. Garfinkel, WSBA #20787

SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT

Lawrence Schwerin, WSBA #4360
Dmitri Iglitzin, WSBA # 17673

DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on April 25, 2011, I caused to be e-mailed (per agreement) and placed in the U.S. Mail, first class, postage prepaid, a true and correct copy of this document addressed to the following counsel of record:

Attorneys for Defendant/Respondent:

Emily Brubaker
Corr Cronin Michelson Baumgardner & Preece
1001 – 4th Avenue, Suite 3900
Seattle, WA 98154-1051

Chris Hollinger (pro hac vice)
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111-3305

Co-Counsel for Respondent/Plaintiffs:

Lawrence Schwerin
Dmitri Iglitzin
Schwerin Campbell Barnard Iglitzin & Lavitt
18 West Mercer Street, Suite 400
Seattle, WA 98119

DATED at Seattle, Washington this 25th day of April, 2011.


SHEILA CRONAN
Paralegal

OFFICE RECEPTIONIST, CLERK

To: Cronan, Sheila
Cc: Garfinkel, Marty
Subject: RE: Anfinson v. FedEx Ground; Div. 1 cause #635182

Rec'd 4/25/11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Cronan, Sheila [<mailto:cronan@sgb-law.com>]
Sent: Monday, April 25, 2011 3:29 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Garfinkel, Marty
Subject: Anfinson v. FedEx Ground; Div. 1 cause #635182

Dear Supreme Court:

Attached is the Respondents' Answer to Petition for Review in the case of Anfinson v. Fedex Ground Package System, Inc., Court of Appeals Division I Cause Number 635182. I understand from Lisa Marie in your office that the Supreme Court has not yet issued a number for this case.

Sincerely,

Sheila M. Cronan, Paralegal on behalf of
William J. Rutzick, WSBA #11533 and
Martin S. Garfinkel, WSBA #20787
Schroeter Goldmark Bender
810 Third Avenue Suite 500
Seattle, WA 98104
206-622-8000
(206) 233-1221 direct
206-682-2305 (fax)
cronan@sgb-law.com