

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,

Appellants/Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington  
for King County  
(Cause No. 04-2-39981-5-SEA)

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## I. INTRODUCTION

A basic theme of FedEx Ground's ("FedEx" or "defendant") opposition brief ("Def.Br.") is that the challenged instructions do not require reversal because plaintiffs could argue their theories of the case.<sup>1</sup> Washington law actually requires instructions to meet each part of a three-part test: "[i]nstructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law." Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 266, 96 P.3d 386 (2004); Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Defendant's position also was rejected, both for "civil and criminal cases" in State v. Wanrow, 88 Wn.2d 221, 236-37, 559 P.2d 548 (1977).<sup>2</sup> Those cases refute such arguments as "plaintiffs suffered no prejudice because [Instruction 9] allowed them the freedom to introduce evidence and argue their theory of the case." Def.Br., p. 39.

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<sup>1</sup> Much of defendant's brief discusses "The Evidence Introduced At Trial Allowing Each Party To Argue Its Theory Of The Case." Id. at 13-21. Furthermore, defendant's first argument was "The Jury's Verdict Should Not Be Disturbed so Long as The Court's Instructions Afforded Plaintiffs a Fair Opportunity to Argue Their Theory of the Case and Did Not Constitute a Clear Misstatement of the Law," and it repeatedly defends the instructions using that same argument. (Id. at pp. 22, 39, 40-41, 47-48).

<sup>2</sup> Wanrow held that the "test of an instruction's sufficiency is an additional safeguard to be applied only where the instruction given is first found to be an accurate statement of the laws. Furthermore, it would be illogical to apply such a test to erroneous instructions – of what significance is it that counsel may or may not be able to argue his theory to the jury when the jury has been misinformed about the law to be applied?" (Emphasis added.) That holding in Wanrow has repeatedly been adopted in cases such as Price v. Labor and Industries, 101 Wn.2d 520, 529, 682 P.2d 307 (1984), and State vs. MacMaster, 113 Wn.2d 226, 233, 778 P.2d 1037 (1989).

A second theme to defendant's opposition is to ignore authority it is unable to refute. For example, plaintiffs' opening brief ("Pl.Op.Br.") repeatedly cited, but defendant's brief ignored, the crucial U.S. Supreme Court Fair Labor Standards Act ("FLSA") cases interpreting "employ" and "employee," e.g., Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947), Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947), and U.S. v. Rosenwasser, 323 U.S. 360 (1945). Nor does defendant dispute the authority explaining why there is a difference between the "right to control details of work" test designed to apply *respondeat superior* to tort cases and the "economic dependence" test designed to provide wage protection to workers. Pl.Op.Br., pp. 25-26. Other examples are cited in this Reply at pp. 5, 6, 9, 15, 17, and 20.<sup>3</sup>

Defendant is forced into those positions because the challenged instructions are inconsistent with applicable law. For example, under Instruction 9, if the jury found that defendant did not control (nor have the right to control) the details of class members performance of their work, the jury was required to find for defendant even if the jury believed that,

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<sup>3</sup> Plaintiffs and defendant cite the report of proceedings differently which may cause confusion. When plaintiffs cite the report of proceedings in their opening brief and in this reply, the page number they give is the one at the bottom of the page of the particular transcript. It appears that defendant, when citing the same transcripts, uses the page numbers that appear in the right-hand side of the page. Plaintiffs believe that the transcripts before the Court contain both of those page numbers.

as a matter of economic reality, class members were economically dependent on FedEx.

## II. INSTRUCTION 9 WAS PREJUDICIALLY ERRONEOUS

### A. Washington Courts Consistently Follow FLSA Authority In Interpreting The MWA When The Language Of The Two Statutes Is Similar.

Plaintiffs have located sixteen published Washington appellate opinions including thirteen final opinions which discuss the use of FLSA authority in interpreting the Washington Minimum Wage Act (“MWA”).<sup>4</sup> For example, in Chelan County, after explaining that it was necessary to decide whether certain on call time “is compensable under the MWA,” the Supreme Court at 109 Wn.2d at 292-93 held: “it is appropriate and helpful to refer to the approach used by federal courts” under the FLSA. In Hisle, 151 Wn.2d at 861-62, the Supreme Court first explained that

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<sup>4</sup> Weeks v. Chief of State Patrol, 96 Wn.2d 893, 896-97, 639 P.2d 732 (1982); Sheriffs’ Association v. Chelan County, 109 Wn.2d 282, 292-93, 745 P.2d 1 (1987); Tift v. Nursing Services, 76 Wn. App. 577, 582-83, 886 P.2d 1158 (1995); SPEEA v. Boeing Co., 139 Wn.2d 824, 836, n. 7, 991 P.2d 1126 (2000); Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 298, 996 P.2d 582 (2000); Inniss v. Tandy Corp., 141 Wn.2d 517, 524-25, 7 P.3d 807 (2000); Anderson v. DSHS, 115 Wn. App. 452, 456-57, 63 P.3d 134 (2003); Stahl v. Delicor of Puget Sound, 109 Wn. App. 98, 109, 34 P.3d 259, rev’d, 148 Wn.2d 876, 884-85, 64 P.3d 10 (2003); Clawson v. Grays Harbor College Dist. No. 2, 109 Wn. App. 379, 383, 35 P.3d 1176, aff’d, 148 Wn.2d 528, 61 P.3d 1130 (2003); Webster v. Public School Employees of Washington, Inc., 148 Wn.2d 383, 60 P.3d 1183 (2003); Hisle v. Todd Pac. Shipyards, 113 Wn. App. 401, aff’d, 151 Wn.2d 853, 862-63, 93 P.3d 108 (2004); Mitchell v. PEMCO Mut. Ins. Co., 134 Wn. App. 723, 732-33, 142 P.3d 623 (2006); and Miller v. Farmer Bros. Co., 136 Wn. App. 650, 656-57, 150 P.3d 598 (2007). The reference to “final opinions” refers to both Supreme Court decisions and unreviewed Court of Appeals opinions.

“[t]he FLSA is persuasive authority because the MWA is based on the FLSA,” and then relied on Minizza v. Stone Container Corp., 842 F.2d 1456 (3d Cir. 1988), an FLSA case. The opinions in every one of those 13 Washington final appellate opinions adopted FLSA authority.<sup>5</sup> The same result should follow in this case.

Defendant argued to the trial court in favor of applying FLSA authority to the MWA.<sup>6</sup> Now, at page 24 of its brief, defendant veers away from its earlier position and instead relies on the Court of Appeals decision in Stahl v. Delicor, which labeled “unhelpful” the “leading” federal case of Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173 (7<sup>th</sup> Cir. 1983). See 109 Wn. App. at 109. The Supreme Court in Stahl, however, rejected that characterization since it cited Mechmet favorably

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<sup>5</sup> The only partial exception was in Drinkwitz, where the Court utilized the Department of Labor’s definition of “salary basis,” 140 Wn.2d at p. 300 and also relied on federal case law, including Auer v. Robbins, 519 U.W. 452, 461 (1950). Id. at 304. Drinkwitz, however, did not adopt the FLSA “window of correction” exception because federal case law on that exception was “convoluted and complicated.” Id. at 305-06. Here, as discussed at pages 17-22 of the opening brief, federal appellate courts are unanimous in applying an “economic dependence” test in cases determining whether employees are workers or independent contractors for FLSA purposes. The cases are neither complicated nor convoluted.

<sup>6</sup> For example, defendant argued at CP 768: No reported Washington case has interpreted that definition, or identified the correct legal standard for distinguishing between an employee and an independent contractor for purposes of a MWA claim. The MWA 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 (emphasis added).

(presumably finding it helpful), and thus followed FLSA case authority.  
148 Wn.2d at 885.<sup>7</sup>

Plaintiffs' opening brief at pp. 16-17 also analyzed a line of cases holding that when Washington borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts. See also Juanita Bay Valley Com. v. Kirkland, 9 Wn. App. 59, 68-69, 510 P.2d 1140 (1973) (same).<sup>8</sup> Those Washington cases strengthen even more the "persuasive effect" of cases such as Walling and Rutherford, which interpreted the definition of "employee" and "employ" under the FLSA before those definitions were incorporated substantively into the MWA. Consequently, those interpretations were incorporated into the MWA.<sup>9</sup> Defendant never acknowledges or rebuts that line of cases.

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<sup>7</sup> Defendant also argued at n. 23 that RCW 4.04.010 justified the trial court's largely using the common law test. That statute does not apply here, however, states only the common law applies when there is no "inconsistent" state or federal statute, such as the statutory definitions of "employ" and "employee" in RCW 49.46.010. See also In re Parentage of LB, 155 Wn.2d 679, 689, 122 P.3d 161 (2005) (RCW 4.04.010, fills in "gaps" in statutes).

<sup>8</sup> Similar legal principles are used in other states. See, e.g., Hartnett v. Union Mut. Fire Ins. Co., 569 A.2d 486, 487 (1989) (Vermont Supreme Court applied Washington interpretation of statute adopted from Washington because "where Vermont adopts a statute copied from another state, the presumption is that the Legislature also adopted the construction given the statute by the courts of the other state"; Century Steel, Inc. v. State, 137 P.3d 1155, 1159 (Nevada Supreme Court 2006) (similar presumption).

<sup>9</sup> Walling, 330 US at 148, interpreted the definitions of "employee" and "employ" under the FLSA to be different than common law classification, such as is used in Hollingbery v. Dunn, 68 Wn.2d 75, 79, 411 P.2d 431 (1966) and WPI 50.11.01.

**B. “Employ” And “Employee” Under The MWA Are Defined Similarly To The FLSA.**

The definitions of “employ” and “employee” in the MWA and FLSA are very similar and, therefore, FLSA precedent interpreting those words should be followed. As defendant acknowledged at CP 1274:

The two statutes are substantively identical, which is all that is required for this Court to apply FLSA case law. *E.g.*, *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000).

The FLSA provides that “‘employ’ includes to suffer or permit to work.” The MWA provides that “‘employ’ includes to permit to work.” RCW 49.46.010(3). “Suffer” means “to allow or permit.” BLACK’S LAW DICTIONARY DELUXE (7<sup>th</sup> Ed.), p. 1446 (emphasis added). Thus, the two definitions are substantively identical. The MWA provides that an “employee” “includes any individual employed by an employer but shall not include. . . .” RCW 49.46.010(5). That language, too, was largely taken from 29 U.S.C. §203(e)(1) of the FLSA which provides:

Except as provided in paragraphs (2), (3), and (4) the term “employee” means any individual employed by an employer.

Defendant does not dispute this similarity which calls for using (for purposes of the MWA) the interpretation of those terms by the federal appellate courts interpreting the FLSA.<sup>10</sup>

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<sup>10</sup> A further reason for following FLSA precedent in this case is “Washington’s ‘long and proud history of being a pioneer in the protection of employee rights.’” *Bostain v. Food Express*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007), *Drinkwitz*, 140 Wn.2d at 300 and

**C. The FLSA Interpretation Of “Employ” And “Employee” Is Tied To Economic Dependence Which Is Different From And Broader Than The Common Law Right Of Control Test.**

At pages 17-19 of their brief, plaintiffs cited three key U.S. Supreme Court cases interpreting the definitions of “employee” and/or “employ” contained in the FLSA: U.S. v. Rosenwasser, 323 U.S. at 362-63 (describing the extreme breadth of the FLSA definition of employee); Walling, 332 U.S. at 150-51 (“this Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category”) (emphasis added); and Rutherford (reaffirming and applying Walling). Plaintiffs also cited Bartels v. Birmingham, 332 U.S. 126, 130 (1947), which held that the focal point for determining whether a worker is an employee or independent contractor is “whether the individual is economically dependent on the business to which he renders services ... or is, as a matter of economic reality in business for himself.”<sup>11</sup> Defendant does not distinguish any of these four cases which rejected the common law “right

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Fire Fighters v. City of Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002). It would be inconsistent with that history to reject the broader FLSA interpretation of “employee” and “employ” and use the narrower common law interpretation. Moreover, the MWA is a remedial statute which “should be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.” Id.

<sup>11</sup> While not a FLSA case, Bartels has been repeatedly cited by FLSA Court of Appeals cases for the quoted holding. See, e.g., Donovan v. Sureway Cleaners, 656 F.2d 1368,

to control” test and adopted the broader “economic dependence” test that should be used in this case.

Defendant’s discussion of other U.S. Supreme Court cases cited by plaintiffs is both incorrect and disingenuous. For example, at page 29, defendant argues that an unhelpful statutory definition of “employee” should be deemed no definition at all and should be interpreted in accordance with the common law. Defendant’s only citation for this argument is Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992), an ERISA case which, defendant suggests, held that the FLSA, MWA and ERISA definitions of “employee” are “identical” and equally unhelpful. However, defendant misstates Darden by ignoring page 326 quoted here at footnote 12<sup>12</sup> which explains that the FLSA definitions of “employee” and “employ” are broader than the common law, but were not

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1370 (9<sup>th</sup> Cir. 1981); Brock v. Mr. W. Fireworks, 814 F.2d 1042, 1043-44 (5<sup>th</sup> Cir. 1987); Donovan v. Dial America Marketing, Inc., 751 F.2d 1376, 1382-83 (3<sup>rd</sup> Cir. 1985).

<sup>12</sup> The court stated at 503 U.S. 326:

The definition of “employee” in the FLSA evidently derives from the child labor statutes, *see Rutherford Food, supra*, at 728, 91 L.Ed. 1772, 67 S.Ct. 1473, and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” 52 Stat. 1060 §3, codified at 29 USC §§203(e), (g) [29 USCS §§203(e), (g)]. This latter definition, whose striking breadth we have previously noted, *Rutherford Food, supra*, at 728, 91 L.Ed 1772, 67 S.Ct. 1473, stretches the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles, ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA’s concept of “employee.” (Emphasis added.)

contained in ERISA. Either defendant stopped reading Darden at page 324 or decided not to acknowledge the Supreme Court's actual position.

Defendant's treatment of the Court of Appeals cases cited by plaintiffs at pages 20-21 of their opening brief is equally one-sided and inaccurate. Plaintiffs argued, citing cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits that "Lower Federal Appellate Courts Repeatedly Hold Economic Dependence To Be The Focal Point In Determining Employee Status Under The FLSA." Id. at 20. Defendant does not bother to respond to cases such as Baker v. Flint Eng., 137 F.3d 1436, 1443 (10<sup>th</sup> Cir. 1998) which held:

Our final step is to review the findings on each of the above factors and determine whether plaintiffs, as a matter of economic fact, depend upon Flint's business for the opportunity to render services, or are in business for themselves. (Emphasis added.)

Nor does defendant respond to cases to the same effect cited by plaintiffs from the Third, Fourth, Fifth and Sixth Circuits.<sup>13</sup>

The one Court of Appeals case defendant discusses in this context is Donovan v. Sureway Cleaners. See, e.g., Def.Br., pp. 25, 27, 29, arguing that the trial court's instruction 9 included the right of control and

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<sup>13</sup> See, e.g., Schultz v. Capital Int'l. Security, Inc., 466 F.2d 278, 304 (4<sup>th</sup> Cir. 2006); Donovan v. Dial America Marketing, Inc., 757 F.2d 1376, 1381 (3d Cir. 1985); McLaughlin v. Seafood, Inc., 861 F.3d 450, 452 (5<sup>th</sup> Cir. 1988). Plaintiffs challenged defendant to cite any federal appellate FLSA case holding that "right of control rather than economic dependence is the proper focal point." Pl.Op.Br., pp. 21-22. Defendant cited no such case in its opposition brief.

other factors set forth in Sureway and thus was supported by that case.

However, defendant's argument is inconsistent with the repeated holding in Sureway that all of those factors are relevant only insofar as they provide evidence on the ultimate test of "economic dependency," i.e.:

[U]ltimately, whether, as a matter of economic reality, the individuals "are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1550, 91 L.Ed. 1947 (1947).

656 F.2d at 1370.<sup>14</sup>

Nor is defendant more accurate in discussing the state law cases which, it claims, support Instruction 9.<sup>15</sup> Those cases interpret statutes materially different from the MWA or FLSA. First, Borello interpreted the California Workers Compensation Act, which was not based on the FLSA. See 48 Cal.3d at 349. Moreover, that Act at § 3353 inserts the 'control-of-work' test in the statutory definition. Id. Second, unlike the MWA which defined "employee" and "employ", the court in Estrada held that

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<sup>14</sup> See also 656 F.2d at 1372-73:

From the foregoing analysis, we are convinced that as a matter of economic reality the "agents" are dependent upon the business to which they render service and therefore are employees within the meaning of the Fair Labor Standards Act. (Emphasis added.)

<sup>15</sup> Defendant argues at pages 28-29 of its Brief:

Moreover, state and federal courts have interpreted state statutes based on the FLSA to create a hybrid test incorporating common law factors as well as FLSA factors. *See, e.g., S.G. Borello & Sons Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341, 354-55, 769 P.2d 399, 256 Cal. Rptr. 543 (1989),<sup>30</sup> *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4<sup>th</sup> 1, 10, 64 Cal. Rptr. 3d 327 (Ct. App. 2007), *Baltimore Harbor Charters Ltd. v. Ayd*, 365 Md. 366, 392, 780 A.2d 303 (2001).

“[b]ecause the Labor Code does not expressly define ‘employee’ for purposes of section 2802, the common law test of employment applies.” 154 Cal. App. 4<sup>th</sup> at 10 (emphasis added). Third, Baltimore Harbor held that “[i]n drafting the Wage Act, the Maryland General Assembly neither provided a definition for the term ‘employee,’ as used in the statute, nor did it limit the potential scope of the term.” 780 A.2d at 314-15.<sup>16</sup>

**D. None Of Defendant’s Arguments Justify Instruction 9.**

Defendant’s efforts to justify Instruction 9 set forth at Def.Br., pp. 25 and 29, ignore the essential flaw in the instruction, i.e., it directs the jury to make the “right of control” the details of the work rather than “economic dependency” the basis for the ultimate determination. “Economic dependency” does not mean the same thing as “the right to control the details of the class member’s performance of the work.” Numerous courts comparing those two concepts have concluded that the economic dependency test results in classifying workers as employees who would not be so classified under the common law right to control test. Walling, 330 U.S. at 150-51; Darden, 503 U.S. At 326; Hopkins v.

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<sup>16</sup> In State v. Acropolis McLoughlin, Inc., 150 Or. App. 180, 183-94, 945 P.2d 647 (Ct. App. 1997), the plaintiff waived the objection to the use of the common law test. The actual test used by the state is the economic dependence test. See Presley v. Bureau of Labor & Indus., 200 Ore. App. 113, 117, 112 P.3d 485, 487 (2005).

Cornerstone, 545 F.3d 338, 347 (5<sup>th</sup> Cir. 2008); Schultz, 463 F.3d at 304; Wolf v. Coca Cola, 200 F.3d 1337, 1343 n. 4 (11<sup>th</sup> Cir. 2000). That makes sense because employers of economically dependent workers who do relatively uncomplicated tasks could easily limit their right to control the details of such work and thus avoid paying minimum wages or overtime.

Defendant similarly argues at p. 34 that:

“Economic Reality” and “Economic Dependence” are Mere Labels That are Largely Devoid of Meaning Except as Expressed Through the Actual Factors of the FLSA Test.

That argument fails because, unless you agree with Humpty Dumpty,<sup>17</sup> words have objective meanings. That is why dictionaries are published. Moreover, Washington law holds that undefined terms in jury instructions should be interpreted using standard dictionary definitions. State v. Kyлло, 166 Wn.2d 856, 863-64, 215 P.3d 177 (2009), State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990).<sup>18</sup> The standard definitions of the words “economic dependence” do not mean the same as the words “the right to control the details of the work.”

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<sup>17</sup> “‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’” Through the Looking Glass, Chapt. 6.

<sup>18</sup> Moreover, economic dependency cannot be defined simply by the factors in the FLSA test, since those factors are “non-exclusive” as defendant acknowledges at p. 30 of its brief.

Defendant also argues that Instruction 9 is not erroneous because it contains all of the factors listed in Sureway. Def.Br., pp. 25-26. However, unlike Sureway, in which the fact finder used those factors in determining whether the worker was economically dependent on a company, the jury here was directed to use those factors to determine the very different issue of right of control of the details of work. Under defendant's argument, it would make no difference what the ultimate test was so long as the Sureway factors were used. That makes no sense.

Defendant also echoes the trial court's statement that "economic dependency" and "economic reality" are "truisms"<sup>19</sup> which are not appropriately included in an instruction. Def. Br, p.35. However, nothing in the language of Instruction 9 makes it "obvious and well known" to jurors that right of control means economic dependence as a matter of economic reality. As pointed out above, "control" and "economic dependence" are hardly synonyms.

**E. Judicial Estoppel Does Not Apply Here.**

Defendant at pp. 26-27 argues that plaintiffs should be judicially estopped from relying on FLSA precedent because they did not raise that precedent when seeking class certification. Defendant raised this same

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<sup>19</sup> WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (Unabridged, 2d Ed.), p. 1962, defines truism as "a statement the truth of which is obvious and well-known." (Emphasis added.)

argument to the trial court (CP 1793, 1830) which did not accept it, but instead dealt with this issue on its substantive merits. RP 03/27/09, morning session, pp. 16-17.<sup>20</sup> Defendant fails to show that the trial court abused its discretion in not accepting that argument.

Defendant's arguments regarding judicial estoppel are wrong for several reasons. First, as explained in Holst v. Fireside Realty, Inc., 89 Wn. App. 245, 259, 948 P.2d 858 (1997), judicial estoppel,

[P]revents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation. (Emphasis added.)<sup>21</sup>

In this case, the assertions about which defendant complains are legal assertions regarding what MWA law is, rather than factual assertions so judicial estoppel does not apply.<sup>22</sup>

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<sup>20</sup> Indeed, the trial court at FedEx's request utilized FLSA precedent in Instruction 9 and agreed that FLSA and common law criteria were "cobbled together" to create Instruction 9. RP 3/26/09, morning session, p. 78.

<sup>21</sup> *Accord.* Hisle v. Todd Pacific Shipyards Corporation, 113 Wn. App. at 416, King v. Clodfelter, 10 Wn. App. 514, 519, 519 P.2d 206 (1974). As summarized in Tegland Civ. Proc. § 35:57 "The rule applies only to inconsistent assertions of fact; it is not applicable to inconsistent positions taken on points of law." This is also the rule in a number of federal circuits: Johnson v. Lindon City Corp., 405 F.3d 1065, 1069 (10<sup>th</sup> Cir. 2005), Lowery v. Stovall, 92 F.3d 219, 224 (4<sup>th</sup> Cir. 1996), and Royal Ins. Co. of America v. Quinn-L Capital Corp., 3 F.3d 877, 885 n.6 (5<sup>th</sup> Cir. 1993), Sturm v. Boker, 150 U.S. 312, 336 (1893). Defendant admits that "Washington cases appear to factually apply judicial estoppels primarily to inconsistent factual assertions. Def.Br., p. 27, n. 28. Even if non-Washington law controlled, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 659 (7<sup>th</sup> Cir. 2004) (the out-of-state case relied on by defendant) would not apply here because it involved the party being estopped advocating a mixed question of fact and law, *i.e.*, the class was appropriate for a global settlement.

<sup>22</sup> Washington law also establishes that stipulations or admissions on legal points are not binding on the Court. Folsom v. Spokane Cy., 111 Wn.2d 256, 261-62, 759 P.2d 1196 (1988), In the Matter of Jeffries, 114 Wn.2d 485, 496, 789 P.2d 731 (1990). As such, the trial court was free to apply FLSA law even if plaintiffs had argued that it did not apply.

Secondly, in Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008), the only Washington case defendant cited, 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.)

See also New Hampshire v. Maine, 532 U.S. 742 (2001). Factor (2) is not met in this case for two reasons. First, there was no “later proceeding”—all of this took place in the same case. Second, it was defendant who first argued for the application of FLSA authority. Pl.Op.Br., pp. 4-5. No one could fairly view plaintiffs as misleading the court by partially agreeing to defendant’s new FLSA argument. Factor (3) is 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.<sup>23</sup>

### **III. COURT INSTRUCTION 9 WAS ALSO PREJUDICIALLY ERRONEOUS AS TO FACTORS (3) AND (8).**

Plaintiffs’ opening brief at pp. 33-34 pointed out that the Department of Labor, as well as multiple opinions from the Fifth, Seventh,

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<sup>23</sup> Moreover, as defendant argued prior to trial in its Mem. In Opp. to Mot. For Partial SJ dated July 28, 2008, at page 8, n. 9, “this Court has not yet determined the precise factors to be considered in this case” in deciding whether workers are employees or independent contractors. This document was recently designated by plaintiffs and will be supplied with a CP number by the Superior Court Clerk’s Office. The quoted page is attached as Appendix A.

Ninth and Tenth Circuits, held that the relevant question regarding Factor (3) (investment as a factor in determining whether a worker is an employee or an independent contractor) is the “extent of the relative investment by the alleged employer and employee.”<sup>24</sup> Defendant fails to distinguish any of this authority and its own authority is unpersuasive. Defendant cites Freund v. Hi-Tech Satellite Inc., 2006 WL 1490154, at \*2 (11<sup>th</sup> Cir. 2006), an unpublished case which, under Eleventh Circuit Rule 36-2, is “not considered binding precedent” even in the Eleventh Circuit. It also cites Sureway, supra, a Ninth Circuit case that relies heavily on Real, another Ninth Circuit case. Sureway, in no way takes away from the holding in Real quoted supra at n. 24.<sup>25</sup>

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<sup>24</sup> Dec. 7, 2000 opinion by Wage & Hour Administrator (Appendix K to opening brief) (the relevant factor relating to investment is “the extent of the relative investment by the alleged employer and employee”); Hopkins v. Cornerstone, 545 F.3d at 343; Reich v. Circle C. Investments, Inc., 998 F.2d 324, 327 (5<sup>th</sup> Cir. 1993) (“relative investment of worker and alleged employer”); U.S. Dept. of Labor v. Lauritzen, 835 F.2d 1529, 1537 (7<sup>th</sup> Cir. 1987) (“the migrant workers’ disproportionately small stake in the pickle-farming operation is an indication that their work is not independent of the defendants.”); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 755 (9<sup>th</sup> Cir. 1979) (“appellants investment in light equipment . . . is minimal in comparison with the total investment in land, heavy machinery and supplies necessary for growing the strawberries”); Baker, 137 F.3d at 1442 (in making a finding on investment, “it is appropriate to compare the worker’s individual investment to the employer’s investment in the overall operation.”); and Dole v. Snell, 875 F.2d 802, 810 (10<sup>th</sup> Cir. 1989).

<sup>25</sup> Defendant also cited two district court decisions -- Boudreaux v. Bantec Inc., 366 F.Supp. 2d 425, 434-35 (E.D. La. 2005), and Herman v. Mid-Atlantic Installation Services, Inc., 164 F. Supp. 2d 667, 675 (D. Md. 2000). However, as the Court pointed out in Clawson, 148 Wash. at 542, “a District Court decision would be of questionable authority at any rate.” That is particularly true here, given the abundant contrary appellate authority. Defendant also misstates Judge Erlick’s remarks when it claims he said that “‘relative investment’ would be meaningful, if at all, only in the context of a small enterprise.” Def.Br., p. 33. What Judge Erlick actually said at RP 3/23/09, pp. 9-10 was that an argument based on relative investment would be proper: “even if I don’t give an

Defendant's closing argument also emphasized Factor (8).<sup>26</sup>

Nothing in the instructions limited the scope of Factor (8) (the belief of the parties), even though (a) RCW 49.46.090, provides that "[a]ny agreement between such employees and the employer to work for less than [MWA mandated rates] shall be no defense to the action," and (b) overwhelming authority from the Second, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits limits the use of that factor to when the parties' belief mirrors economic reality. See Pl.Op.Br., p. 35.

Defendant does not dispute the holdings of any of those cases or cite RCW 49.46.090. Instead, it misstates plaintiffs' argument to be "that belief of the parties is irrelevant." Def.Br., p. 31. What plaintiffs actually argued at p. 35 was:

"[w]hile a number of appellate FLSA cases conclude that the parties understanding can be relevant, the relevance is generally limited to situations in which the understanding correctly reflects or "mirrors" economic realities." (Emphasis added.)<sup>27</sup>

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instruction on relativity, plaintiffs should be allowed to argue that theory." The problem with the trial court's analysis, however, is that without an instruction that made relative investment relevant, the jury would disregard such an argument as unsupported by the law. It is for that reason that plaintiffs subsequently excepted to that instruction at RP 03/27/09, morning session, p. 14.

<sup>26</sup> Defendant's counsel told the jury that the operating agreement (which characterizes the workers as independent contractors) is the "only legal contract between the parties," and sets out "the legal relationships between the parties." Counsel also asked the jurors to read the operating agreement and argued that "a deal is a deal" and that plaintiffs were trying to unfairly go back on their deal. RP 3/30/09, pp. 126-128.

<sup>27</sup> That was plaintiffs' exception, as well, at RP 3/27/09 (morning session, p. 14) (objecting to Factors 7 and 8, *inter alia*, because of "the failure to include any language that these factors are premised in economic reality").

Defendant's discussion at the second half of page 31, the first half of page 32 and page 37 is premised on its misstatement and thus misses the mark. Defendant's only other argument – that the intent of the parties was listed as a factor in Hollingbery v. Dunn, 68 Wn.2d 75, 411 P.2d 431 (1966) (a tort case), Ebling v. Gove's Cove, Inc., 34 Wn. App. 495, 663 P.2d 132 (1983) (a non-MWA case),<sup>28</sup> and two California cases with different or no statutory definitions of “employ” or “employee” – do not overcome the overwhelming contrary FLSA and MWA authority.

#### **IV. PROPOSED INSTRUCTION 13C SHOULD HAVE BEEN GIVEN<sup>29</sup>**

Plaintiffs' proposed 13C correctly stated the law. Defendant attacks this instruction at Def.Br., p. 38, arguing:

Plaintiffs cite no case in which this argumentative sentence – nor the entirety of plaintiffs' proposed addition to the Sureway test – was included in any jury instruction or FLSA test formulation. (Emphasis added.)

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<sup>28</sup> Defendant argues to this Court that Ebling “the only Washington wage and hour case on point – is controlling law.” Def.Br., p. 7. That is untrue since, as defendant acknowledged to the trial court at CP 768 as quoted at n. 6, supra, Ebling was not an MWA case.

<sup>29</sup> Plaintiffs' Proposed Instruction 13C (CP 1819-1820) stated, *inter alia*:

No one factor is controlling but you should weigh them all to determine whether or not the class members are so dependent upon defendant's business such that class members are not, as a matter of economic reality, in business for themselves.

This attack fails, since the substance of the sentence quoted at n. 29 appears repeatedly in FLSA cases, e.g., Sureway, 656 F.2d at 1370;<sup>30</sup> Bartels, 332 U.S. at 130; Mr. W. Fireworks, 814 F.2d at 1044; Dole, 875 F.2d at 804; and Rutherford, 331 U.S. at 730. Those same cases support the entire proposed instruction. Defendant's argument at pp. 36-37 that Proposed Instruction 13C would have been "redundant" of the Court's Instruction 9 is also wrong both because 13C was proposed as an alternative to Instruction 9 and because Instruction 9 never used the words or the concepts of "economic reality" or "economic dependence."

#### **V. INSTRUCTION 8 PREJUDICIALLY MISSTATED THE LAW**

Plaintiffs' opening brief at pp. 40-45 explained that:

1. Instruction 8 required plaintiffs to prove that "employee status" was "common to the class members," and that the jury should not consider individualized "work experiences" unless such work experiences "reflect policies, procedures or practices common to the class members." (RP 3/30/09, p. 23)

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<sup>30</sup> Sureway, 656 F.2d at 1370 holds:

Neither the presence nor the absence of any individual factor is determinative. Whether an employer-employee relationship exists depends "upon the circumstances of the whole activity," *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947), and ultimately, whether, as a matter of economic reality, the individuals "are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1550, 91 L.Ed. 1947 (1947).

2. “Common to the class members” is ambiguous since “common” can mean either “widespread” or “all”, i.e., “of or relating to the community as a whole.” AMERICAN HERITAGE DICTIONARY (3d Edition), p. 381, so the instruction could mean plaintiffs must prove either that employee status was widespread within the class (plaintiffs’ position) or that plaintiffs must prove that all class members had employee status (defendant’s position).

3. Substantial case law provides<sup>31</sup> (and the trial judge acknowledged at RP 03/26/09 (1:33 pm session), pp. 88-89; 93-94) that it is not necessary to prove that all members have the identical employment status in order to win a class action and that it is not necessary for a practice to affect all class members in order for the jury to consider evidence of such a practice.

4. Plaintiffs asked the trial court not to permit defendant to make the argument that “common” means “all”, but the trial court refused

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<sup>31</sup> Plaintiffs, at 41-43, cited three Court of Appeals cases interpreting “commonality” inconsistently with a requirement that a class claim is defeated if one class member is not shown to have the characteristic. (Brown v. Brown, 6 Wn. App. 249, 255, 492 P.2d 581 (1991), Miller v. Farmers Brothers, 115 Wn. App. 815, 824, 64 P.3d 49 (2003), Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7<sup>th</sup> Cir. 1992)) and five FLSA Court of Appeals cases distinguishing between employees and independent contractors which relied on evidence of work practices that did not affect all workers. Those five cases include Sureway, 656 F.2d at 1371, Reich v. Circle C Investments, 998 F.2d 324, 328 (5<sup>th</sup> Cir. 1993), Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 305 (5<sup>th</sup> Cir. 1998), and Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982).

to do so. RP 03/26/09 (1:33 p.m. session), p. 97. Defendant made exactly that argument to the jury, i.e.:

[I]f plaintiffs showed you that only 319 [class members were employees] and one wasn't, your verdict should be for FedEx Ground because they haven't met their burden. They have to show you all."

RP 03/30/09, 10:46 am – 12:04 pm, p. 67 (emphasis added).

Defendant does not dispute most of these arguments or distinguish plaintiffs' cases, such as Brown, Miller, Rosario, Circle C, Herman v. Express, etc., Mr. W. Fireworks, or Donovan v. Burger King. The only case it cites supporting instruction 8 is Oda v. State, 111 Wn. App. 79, 44 P.3d 8 (2002). However, in Oda, while plaintiffs sought class status for all faculty at the University of Washington, the only specific testimony offered was at 1 of 18 schools within U.W. – the School of Dentistry – and the evaluation at issue in the case varied from school to school of U.W. Id. at 99-100. The facts in this case are very different since there was testimony and documentary evidence from many different work sites within Washington, and much evidence of centralization. The eight cases cited by plaintiffs are far more on point than Oda. Nor would it make any sense for Washington law to allow a company to treat 319 of its 320 workers as employees but escape responsibility for paying overtime by treating one of the 320 similar workers as an independent contractor. That

not only would let the “tail wag the dog,” but would be inconsistent with Washington history and policy set forth in Bostain, Drinkwitz and Fire Fighters.

Defendant also argues that the instruction should be approved because Judge Erlick removed the word “all” from his original proposed Instruction 8 and that plaintiffs’ could and did argue that “common” does not mean “all.” Def.Br., pp. 40-41. That argument misses the point; an ambiguous instruction that allows a party to argue a position inconsistent with the law is misleading when such argument is made as it was here.<sup>32</sup> See Capers v. Bon Marche, Div. of Allied Stores, 91 Wn. App. 138, 144-45, 955 P.2d 822 (1998); Falk v. Keene Corp., 113 Wn.2d 645, 656, 782 P.2d 974 (1989) (instructional error exacerbated by closing argument). Moreover, an ambiguous instruction does not accurately state the law, which is a separate requirement for a valid instruction as held in State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996).<sup>33</sup>

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<sup>32</sup> Defendant argued to the jury that the absence of the word “all” in Instruction 8 did not prevent it from requiring that all class member plaintiffs would lose if one of the 320 class members were an independent contractor. RP 3/30/09, pp. 67-68.

<sup>33</sup> LeFaber, 128 Wn.2d at 902-03 holds that “[t]he standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve the ambiguous wording of RCW 9A.16.050 via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction. See Allery, 101 Wn.2d at 595, 682 P.2d 312. Although a juror could read instruction 20 to arrive at the proper law, the offending sentence lacks any grammatical signal compelling that interpretation over the alternative, conflicting, and erroneous reading.” (emphasis added)

Similarly, defendant misses the point when it argues that instruction 8 caused plaintiffs no prejudice because:

[E]vidence concerning the individual work experiences of particular contractors made up the great bulk of plaintiffs' case . . . .

Def.Br., p. 47. However, under Instruction 8 and defendant's argument, the jury would have disregarded all of that evidence unless it found that it applied to every single class member.

## **VI. PROPOSED INSTRUCTIONS 11A AND/OR 12A SHOULD HAVE BEEN GIVEN.**

Plaintiffs' Instructions 11A and 12A (CP 2170-71) were submitted to the trial court on March 27, 2009 and cited opinions of the Fourth and Eleventh Circuit Courts which found proof of a "pattern or practice" relevant for proving FLSA violations.<sup>34</sup> In their opening brief, plaintiffs also cited opinions from the Third and Eighth Circuits, and four district court cases to the same effect.<sup>35</sup> Defendant provides no reasoned basis for not following this extensive authority in favor of the contrary opinions of two trial courts, which cite none of that authority. Def.Br., p. 43.

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<sup>34</sup> Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 471-73 (11<sup>th</sup> Cir. 1982); and Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1116 (4<sup>th</sup> Cir. 1985).

<sup>35</sup> Martin v. Selker Bros., Inc., 949 F.2d 1286, 1298 (3<sup>d</sup> Cir. 1991) ("evidence of representative employees may establish *prima facie* proof of a pattern and practice of FLSA violations"); Martin v. Tony & Susan Alamo Found., 952 F.2d 1050, 1051 (8<sup>th</sup> Cir. 1992); Falcon v. Starbucks Corp., 580 F.Supp.2d 528, 535 (S.D.Tex. 2008); Renfro v. Spartan Computer Servs., 243 F.R.D. 431, 433-434 (D.Kan. 2007); Huang v. Gateway Hotel Holdings, 248 F.R.D. 225, 227-228 (E.D. Mo. 2008); and Wren v. RGIS Inventory Specialists, 256 F.R.D. 180 (N.D. Cal. 2009).

Similarly, defendant misstates FLSA authority regarding representative evidence. Contrary to Def. Br, p. 44, representative evidence pursuant to Anderson v. Mt. Clemons, 328 U.S. 680 (1946) has repeatedly been allowed in FLSA cases, even when “there is variability across a class of workers.”<sup>36</sup>

## VII. THE VERDICT FORM IMPROPERLY DID NOT REQUIRE FINDINGS

Plaintiffs’ argument that the trial court erred in giving its verdict form relied on Tift v. Nursing Services, 76 Wn. App. at 582-83 and Brock v. Mr. W. Fireworks, Inc., 814 F.2d at 1045. Pl.Op.Br., p. 49. Defendant does not distinguish Tift which is controlling law. The only Washington case it does cite has nothing to do with the FLSA or the MWA,<sup>37</sup> and the unpublished federal district court cases it cites do not deal with the crucial issue which is that it was necessary for the verdict form to permit the jury to make findings of fact. Only by requiring findings of fact would this Court have been able to review *de novo* the ultimate determination. As

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<sup>36</sup> Bel-Loc Diner at 1116; McLaughlin v. Ho Fat Seto, 850 F.2d 586, 589 (9<sup>th</sup> Cir. 1988); New Floridian Hotel, Inc., 676 F.2d 468, 471-72; Brennan v. General Motors Acceptance Corporation, 482 F.2d 825, 829 (5<sup>th</sup> Cir. 1973). Defendant’s discussion of Reich v. SNET, 121 F.3d 58, 68 (2d Cir. 1997), is incorrect since the portions of the opinion defendant references was directed to the low percentage (2.5%) of worker testimony, rather than to the general concept of representative testimony.

<sup>37</sup> Graves v. P.J. Taggares Co., 94 Wn.2d 298, 616 P.2d 1223 (1980).

explained in Tift, “in reviewing an issue *de novo*, the reviewing court determines the correct law and applies it to the facts as found below.” Id. at 583 (emphasis added).<sup>38</sup> Thus, the trial court’s failure to require findings of fact makes it impossible for this Court to determine whether the ultimate conclusion on employment was correct.

### VIII. CONCLUSION

For the foregoing reasons, the judgment should be reversed and the matter remanded back to the Superior Court for re-trial.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of **January, 2010.**

SCHROETER, GOLDMARK & BENDER

  
\_\_\_\_\_  
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<sup>38</sup> Mr. W. Fireworks made the same point in the employee versus independent contractor context as do the other federal court of appeals cases cited by plaintiffs at page 49 of their opening brief.

NO. 635182

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

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

Appellants/Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

---

Appeal from the Superior Court of Washington  
for King County  
(Cause No. 04-2-39981-5-SEA)

---

**APPENDIX TO  
REPLY BRIEF OF APPELLANTS**

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ORIGINAL

Appellants hereby submit the following Appendix in support of  
Reply Brief of Appellants.

Appendix A: Page 8 of Defendant FedEx Ground Package System,  
Inc.'s Memorandum in Opposition to Plaintiffs' Motion  
for Partial Summary Judgment Based on Collateral  
Estoppel.

DATED this 15<sup>th</sup> day of January, 2010.

SCHROETER, GOLDMARK & BENDER



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Attorneys for Appellants/Plaintiffs

# APPENDIX A

1 tribunals (a jury, on the one hand, and a judge on the other hand).

2 **b. The Differing Legal Tests.**

3 **(1) The Test Enunciated by the *Borello* Court, and**  
4 **Relied Upon by the *Estrada* Court, Differs From the**  
5 **Washington Test.**

6 Contrary to plaintiffs' argument, *Borello* did not declare that "right of control" is the  
7 sole important factor. Pl. Motion, pp. 6-8.<sup>8</sup> Rather, the California Supreme Court in *Borello*  
8 actually observed that "courts have long recognized that the 'control' test, applied rigidly and  
9 in isolation, is often of little use in evaluating the infinite variety of service arrangements."  
10 *S.G. Borello & Sons, Inc. v. Dep't. of Indus. Relations*, 48 Cal. 3d 341, 350, 769 P.2d 399  
11 (1989). The *Borello* court went on to note that "the authorities also endorse several  
12 'secondary' indicia of the nature of a service relationship." *Id.* In listing these "secondary  
13 indicia," the court mentioned first, and gave particular prominence to, "the right to discharge  
14 at will," which it called strong evidence "in support of an employment relationship." *Id.*  
15 Notably, this California factor, which plaintiffs attempt to apply to this case (Pl. Motion, p.  
16 17) is mentioned nowhere in *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 498, 663 P.2d  
17 132 (1983), or in any of the other Washington authorities cited by plaintiffs.<sup>9</sup>

18 It is widely recognized, in California and elsewhere, that "for purposes of preclusion,  
19 issues are not identical if the second action involves application of a different legal standard,  
20 even though the factual setting of both suits be the same." 18 Wright & Miller § 4417

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21 <sup>8</sup> *Borello* did not, as plaintiffs mistakenly claim, declare that "[t]he essence of the test is the 'control of  
22 detail' -- that is, whether the principal has the right to control the manner and means by which the worker  
23 accomplishes the work." Pl. Motion, p. 8. That quotation actually comes from the *Estrada* appellate court  
24 decision (*see* 154 Cal. App. 4th at 10) which could not possibly have been relied upon by the *Estrada* trial court  
25 for the obvious reason that it had not yet been issued.

<sup>9</sup> It should be noted that this Court has not yet determined the precise factors to be considered in this  
case. FedEx Ground reserves the right to brief and argue that issue at the appropriate time. For purposes of  
FedEx Ground's opposition to this motion, it is sufficient to point out that the factors considered by Washington  
courts are not identical to those enunciated by the California Supreme Court in *Borello*.

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Appeal from the Superior Court of Washington  
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**DECLARATION OF SERVICE OF  
REPLY BRIEF OF APPELLANTS AND  
APPENDIX TO REPLY BRIEF OF APPELLANTS**

---

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**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 January 15, 2010, I caused to be delivered in the manner set forth below a true and correct copy of REPLY BRIEF OF APPELLANTS, APPENDIX TO REPLY BRIEF OF APPELLANTS, and this DECLARATION OF SERVICE on the following counsel of record:

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DATED at Seattle, Washington this 15<sup>th</sup> day of January, 2010.



Sheila Cronan