NO. 89534-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioners.

RESPONDENTS' ANSWER TO EXPERT JANITORIAL, LLC's PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Table of Authorities, continued

I. IDENTITY OF RESPONDENTS

Plaintiffs Carolina Becerra Becerra, Julio Martinez Martinez, Orlando Ventura Reyes, and Alma Becerra ("plaintiffs") are the responding parties.

II. DECISION OF THE COURT OF APPEALS

A copy of the Court of Appeals decision at issue was attached to Expert's Petition for Review ("Petition" or "Pet").

III. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether review should be granted where the Court of Appeals correctly acknowledged the persuasive authority of FLSA case law, applied this Court's analogous authority of *Anfinson v. FEDEX Ground Package System, Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) and engaged in an appropriate, fact-intensive analysis of "economic realities" before remanding to the trial court for further factual analysis.

2. Whether the Court of Appeals engaged in a reasoned multi-factor analysis of "economic realities" prior to reversing summary judgment, or did it hold that a dispute as to only some factors -- which Expert says means "any" factor -- precludes summary judgment.

3. Whether review should be granted so that this Court can select a specific federal circuit's multi-factor test, where it is undisputed

that no list of factors is exclusive and Expert's Brief to the Court of Appeals argued "there is no material difference among the various descriptions of the ... different federal circuits." (Emphasis added.)

IV. RESPONDENTS' COUNTER-STATEMENT OF THE CASE

A. Factual Background.

Expert's factual background omits every fact in the record supporting either plaintiffs' position or the Court of Appeals' opinion. Those include Expert's factual concessions that the janitors work "was an integral part of its janitorial business," that it "required little initiative, judgment or foresight," and that the janitors had "little opportunity for profit or loss." Slip Op., p. 30.[1] Expert also omits all evidence supporting (a) Expert's indirect power to hire or fire (CP 238, 1395-96 quoted at Slip. Op., pp. 30-31), (b) that the contract between Expert and "plaintiffs direct employer" passed from one subcontractor to another without material changes (CP 1996 discussed at Slip Op., p. 32), and (c) that the plaintiffs' work was permanent (CP 193-98 discussed generally at Slip Op., p. 32). Finally, Expert omits evidence that it exercised supervision or control over janitors. CP 385 (Suen Dep.).[2]

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[1] The concessions are contained at CP 10-11, CP 1998-1999. These concessions are relevant, *inter alia*, to factors 5, 6, and 8 in *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997).

[2] For example, Mr. Suen testified about a typical day for him at a Fred Meyer store as follows:

Several sources also provided evidence in the record that Expert was engaged in a business model that did not provide enough money for janitors to be paid in accordance with the MWA and had repeatedly been advised of violations. For example, at paragraphs 55-58 of his May 1st declaration (CP 567-68), Mr. Ezzo opined that Expert was operating in a model that led to non-payment of overtime and to other wage and hour violations, *e.g.*:

> 56. Seven day workweeks and non-payment of overtime is another defining characteristic of the model. ....
>
> 57. The above factors lead toward putting Expert and All Janitorial in a model that encourages and leads to janitorial misclassification and, as a typical consequence, wage and hour violations. (Emphasis added.)[3]

Mr. Ezzo's testimony on this issue was substantiated by Mr. Chaban, the owner of All Janitorial which contracted with Expert to

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> A typical day I would start at 7:00. I would go into a Fred Meyer store, and my responsibility is to make sure that the janitorial crew had completed the scope of work and has been signed off by the MOD, manager on duty, and making sure that there is no other issues or challenges that the Fred Meyer stores have or need. And I will go to the different locations. So, you know, when I visit each location, I would, you know, see the crew.

CP 385(emphasis added).

[3] Mr. Ezzo also stated at CP 568:

> 59. I have applied my knowledge of industry bidding practices, productivity, square footage, overhead costs, and the other costs of running a business. I have looked at actual labor expenses paid by All Janitorial and, as discussed above the lack of ability to further reduce labor hours. Based on these factors I am of the opinion that the payment offered by Expert are unlikely to attract 2nd tier subcontractors whose business practice has built into it regular compliance with classification and wage and hour laws. (Emphasis added.)

provide janitors for Fred Meyer, including plaintiffs. Mr. Chaban testified that he could not have made a profit from the money he received from Expert if he treated his workers as employees and paid them overtime. CP 240-241.

Expert also admitted at CP 1981 that its contracts with Fred Meyer gave Expert the right and obligation to require that plaintiffs' work comply with wage and hour laws:

> [E]xpert's contract with Fred Meyer requires that the work performed comply with all applicable laws and regulations, including the federal Fair Labor Standards Act. Pacey Decl. Ex. A, § 9.2. (Emphasis added.)[4]

Expert ignores evidence that its contracts with Fred Meyer and its business practices set up the 2nd tier subcontractors to be little more than "labor suppliers." The 2nd tier subcontractors were not given responsibility to decide what work to perform, relied on others to provide janitor supervision, did not decide upon or purchase supplies, did not engage in bidding jobs and had little customer contract. CP 565. . *See also* CP 243 & 249 (Fred Meyer manager daily inspection sheet). Here, Expert's price model and practice was to benefit principally by AJ's and AAJ's

[4] At CP 47, Expert's CFO also admitted that his understanding of the purpose of section 9.2 of Expert's contract with Fred Meyer was that it was to obligate Expert to prevent Expert and its subcontractors from violating the law, *i.e.*, to protect Fred Meyer from "negative publicity that might result if contractors or subcontractors were to violate the law, which could hurt Fred Meyer's reputation and sales." (Emphasis added.) CP 53-54 includes §9.2 of the contract between Expert and Fred Meyer.

willingness to achieve savings by egregious misclassification and MWA violations (which Expert ignored), *i.e.*, a system presenting plaintiffs and other immigrant janitors with a pretty harsh "economic reality." CP 565-68.

B. Procedural History.

Expert cites but does not quote the trial court's written order granting summary judgment for Expert on joint employment. The actual order quoted below supports the Court of Appeal's position that the trial court's ruling on that issue "limits its consideration of relevant factors as to those stated in *Bonnette*." Slip Op., p. 10.[5]

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[5] The trial court's ruling at CP 2263 relating to joint employment was as follows:

> 1. There is no genuine issue of material fact on the issue of whether Expert was Plaintiffs' joint employer, and the defendant is entitled to judgment as a matter of law. Specifically, the Court concludes that Expert was not Plaintiffs' joint employer under the test set forth in *Bonnette v. California Heath (sic) and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). Expert was not involved in hiring or firing the plaintiffs, did not supervise their work schedules or conditions of employment, was not involved in determining the plaintiffs' rate of pay and did not maintain their employment records. Plaintiffs admit that nobody from Expert ever told them what to do or how to do their jobs. In fact, the plaintiffs could not even identify any employees who worked for Expert. (Emphasis added.)

Expert tries to back away from the trial court's written ruling by referring to the trial court's oral comments in connection with granting Fred Meyer's motion for summary judgment several months later. The trial court at RP 9/2/11 at 36 was responding to a statement made in plaintiffs' brief opposing Fred Meyer motion for summary judgment. Plaintiffs' actual statement was:

> Plaintiffs are aware that this Court utilized the four *Bonnette* factors in granting Expert's motion for summary judgment on the joint employment issue. However, Fred Meyer's invitation to rely exclusively on those factors would, if accepted by this Court, be inconsistent with the Ninth Circuit's position on this matter.

V. ARGUMENT

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

According to Expert (though not to its co-petitioner Fred Meyer), the Court of Appeals' decision should be reviewed pursuant to RAP 13.4(b)(1). That subsection applies only when "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." Expert argues that:

> Contrary to *Anfinson*, its [the Court of Appeals] decision interprets and applies the test in a number of ways that are inconsistent with any version of the test used by the federal courts. This Court should therefore grant review under RAP 13.4(b)(1). (Emphasis added.)

The Court of Appeals is consistent with substantial FLSA authority and none of Expert's claimed inconsistences with "any version of the test used by the federal courts" withstands analysis.

1. The Court Of Appeals Properly Found Disputed Issues Relating To Expert's Indirect Power To Fire Plaintiffs Or Modify Their Conditions of Employment.

As explained in cases such as *Torres-Lopez v. May,* 111 F.3d 633, 640, 642-43 (9th Cir. 1997), a relevant factor is "the right, directly or

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The trial court largely agreed with plaintiffs:

> I know that the plaintiffs raised in their brief to the Court the Expert's case and seemed to rely more on the *Bonnette* factors than on the *Torres-Lopez* factors. I think that I did, and I think that I did because the non-regulatory factors seem to apply more to the Boeing case and that type of thing.

indirectly to hire, fire or modify the employment condition of the workers." *See also Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 238 (5th Cir. 1973). Expert's argument that there is no disputed evidence about its indirect power to fire employees such as plaintiffs is conflicts with the evidence discussed by the Court of Appeals at pages 30-31 of the Slip Opinion. Such evidence included that Mr. Chaban, the owner of All Janitorial had been asked by Expert personnel to "replace the personnel" if they did "a bad job continually," that he took that as "more than a suggestion," and that it typically was his practice in that situation to let the worker go. The evidence also included an email exchange that the Court of Appeals properly concluded "belies Expert's claim that '[t]he service provider is free to move the janitor to work on other contracts it has with other customers." *Id.* at 33.

Expert also argues, citing *Jean-Louis v. Metropolitan Cable Communications, Inc.*, 838 F. Supp. 2d 111, 125 (S.D.N.Y. 2011) that the Court of Appeals "ignored federal case law on this issue, which consistently holds that the type of request made by Fred Meyer and communicated by Expert does not amount to even indirect power to fire." That is an inaccurate reading even of that case. *Jean-Louis* not only rejected the rationale of *Jacobson v. Comcast*, 740 F. Supp. 2d 683, 689-90 (D. Md. 2010) (another case cited by Expert in its petition), but reached

its decision at least in part because of the absence of the kind of evidence that exists in this case as described above. The *Jean-Louis* court makes clear that it was the lack of such evidence that influenced its decision:

> But there is no evidence in the record that Metro terminated any employee about which Time Warner specifically complained, never mind that Metro did so as a matter of course. (Emphasis added.)[6]

In this case, the Chaban testimony about "typically" terminating such employees and the email between Chaban and Expert provide just such evidence. Moreover, the Court of Appeals analysis on this issue follows, *inter alia*, cases such as *Torres-Lopez* and *Barfield v. New York City Health & Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008).

2. Evidence Of A "Layered Subcontracting Practice Being An Attempt To Evade Labor Laws" And Of Expert's Awareness Of Multiple Claims Of Violation Of Wage And Hour Laws Is Relevant To Issues Of Whether Expert Was A Joint Employer And Is Consistent With *Anfinson*.

Expert's claim at page 11 of its Petition that the Court of Appeals "Created New Factors That Are Not Part Of The Economic Reality Test" is wrong. The Court of Appeals in this case properly cited cases from the

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[6] Expert also makes the argument that there is no evidence that Expert "evaluated janitors' job performance." Pet. At 10-11, *citing Godlewska v. HAD*, 916 F. Supp. 2d 246, 260-61 (E.D.N.Y. 2013). Not surprisingly, Expert makes no mention of Mr. Suen's testimony quoted above where he testified that his responsibility included "mak[ing] sure the janitor crew had completed the scope of work."

U.S. Supreme Court and the Second and Ninth Circuits as well as the opinion of the U.S. Department of Labor as support for its position that:

> [T]he federal courts as well as the federal Department of Labor agree that any one list of factors is not exclusive.[32] Rather, "the determination of an employment relationship [depends] ... 'upon the circumstances of the whole activity.'"[33] This point is central to our disposition of this case.

Slip Op., p. 11 (emphasis added; footnotes omitted). Since the factors are not "exclusive," adding additional factors is obviously contemplated by the federal case law. Moreover, this Court in *Anfinson,* 174 Wn.2d at 869, agreed that the lists of factors utilized by the federal courts are "non-exclusive." There is thus no basis for a general challenge that adding additional relevant factors violates either federal FLSA cases or *Anfinson.*

The two specific claims that Expert makes with regard to "additional factors" ignore what the Court of Appeals actually said about Expert and focus almost exclusively on the Court's discussion concerning Fred Meyer. According to Expert, although federal decisions dealing with joint employment appropriately consider evidence relating to "subterfuge or sham" to "avoid wage and hour obligations," they do so "when discussing the purpose behind other specific factors, not as a separate stand-alone factor." Def. Pet., p. 11. Thus, according to Expert, "the Court of Appeals has mistaken one of the purposes of the economic reality

tests to uncover sham subcontracting arrangements – as a factor in and of itself." *Id.* at 12.

The problem with Expert's complaint is that the Court's discussion at page 33 dealing with Expert does exactly what Expert claims the Court should have done. The Court here discussed that evidence in the context of the existing "lack of initiative or judgment" factor referred to in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 74 (2d Cir. 2003). The Court of Appeals concludes that discussion at page 33 of the Slip Opinion by explaining that similarity to *Zheng*:

> Because the janitors produced evidence that at least created a genuine issue of material fact as to this layered subcontracting practice being an attempt to evade labor laws, Expert's argument is not persuasive for purposes of summary judgment.[7]

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[7] It is true that, with respect to Fred Meyer, the Court of Appeals discusses the issue as an "additional factor" explaining that the court:

> [M]ay analyze whether the evidence presented by the janitors supports their assertion that the system of employment adopted here is a "subterfuge or sham structure [meant] to avoid FLSA obligations."[82] Here, Fred Meyer's potential knowledge of the janitors' overtime work and the possibility that the two tiered contractor model was adopted to save money and avoid compliance with fair labor laws are potentially demonstrative of such a sham.

Slip Op., pp. 24-25. However, Fred Meyer does not complain about this or raise it as an issue in its Petition. Nor could it properly do so given that courts are free to consider additional "factors" that are supported by evidence and relevant to joint employment. Given that Fred Meyer argued in the Court of Appeals that the whole point of the joint employment analysis was to root out "sham and subterfuge," it could hardly argue that those were not appropriate factors.

The only way to make any sense of Expert's position is that it is saying that evidence of a "sham or subterfuge" is fine as part of the "initiative and judgment" factor, but that factor is only relevant to piecework and, since the janitors' job is not "piecework" this evidence is not relevant in this case. The Court of Appeals rejected that idea at pages 17-18 of the Slip Opinion and it seems repugnant to the MWA to set up a "caste" system in which sham and subterfuge is inappropriate for piecework jobs but okay for janitor work. That is the opposite of the purpose of the MWA according to *Anfinson*. It is also inconsistent with the purpose of the FLSA according to the Ninth Circuit in *Narayan v. EGL, Inc.*, 616 F.3d 895, 897 (9th Cir. 2010) and the Seventh Circuit in *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 409 (7th Cir. 2007).[8]

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[8] In *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d at 409, the Seventh Circuit explained:

> [W]hen a contractor has no business or personal wealth at risk, he may be tempted to stiff the workers (as Zarate did), and then treating the principal firm as a separate employer is essential to ensure that the workers' rights are honored. ....
>
> If everyone abides by the law, treating a firm such as Remington as a joint employer will not increase its costs. Recall that it must pay any labor contractor enough to cover the workers' legal entitlements. Only when it hires a fly-by-night operator, such as Zarate, or one who plans to spurn the FLSA (as Zarate may have thought he could do), is Remington exposed to the risk of liability on top of the amount it has agreed to pay the contractor. And there are ways to avoid this risk: either deal only with other substantial businesses or hold back enough on the contract to ensure that workers have been paid in full. (Emphasis added.)

Expert is also wrong in claiming there is no case support for the position that evidence that it was paying too little for the janitors to be compensated according to MWA and had notice that many janitors were raising MWA claims is relevant to it being a joint employer. There was such evidence from Mr. Ezzo and Mr. Chaban discussed above as well as evidence that Expert received notice of second tier subcontractor independent contractor classification issues and wage/hour law compliance problems from the DOL,[9] lawsuits,[10] Fred Meyer,[11] All Janitorial,[12] and a JMS District Manager.[13] Expert did not even investigate defendant All American Janitorial after April 2010 when suit was filed herein even though All American admitted in discovery (CP 405) that it was violating its promise to Expert that it would use employees to work at the Fred Meyer stores. *See* CP 83. Expert did

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[9] CP 364-365 (DLI discussions with Vermeer re two service providers with a history of complaints, failure to pay industrial insurance premiums and overtime problems). Expert Supervisor Vermeer also tells L&I that another of Expert's 2nd tiers is treating janitors as independent contractors. CP 367. L&I produced 275 pages regarding 2nd tier investigations – the first 54 pages referring to Vermeer. CP 209.

[10] The present case and a May 2009 lawsuit, *Alcantara v. JMS* (CP 368-377).

[11] CP 381 (Fred Meyer store director, human resources and maintenance manager believed a janitor had been working 6-7 nights/week; relayed to Expert Manager Susan Vermeer to remedy).

[12] CP 245 (Chaban Dep. 82:4 – 82:24 & 83:25 – 84:9).

[13] District Manager William Suen told Ms. Vermeer in 2006 or 2007 that janitors were working seven nights a week, to which Vermeer said it was the service provider's responsibility to give them the day off. CP 391.

nothing to investigate wage and hour law compliance by its second tier subcontractors. CP 259-260; CP 325.

FLSA cases supporting the idea that this evidence is relevant, include *Reyes v. Remington, supra; Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983); and *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105 (5th Cir. 1961). For example, in *Castillo v. Givens,* 704 F.2d at 192, n. 23, the Fifth Circuit stated that:

> Of particular importance is the fact that defendant did not pay Tonche enough for Tonche himself to pay the workers minimum wage; it was therefore impossible for Tonche to comply with the FLSA. *See Mitchell*, 292 F.2d at 109. Tonche, as an economic entity, was not capable of doing business elsewhere. *See Usery*, 527 F.2d at 1315. The economic reality of the situation was that the workers were dependent upon defendant-not Tonche-to pay them the minimum wage. They were dependent upon defendant's cotton growing business-not any "business" of Tonche's.[23]
>
> [23] Of course, these facts also support the conclusion that the field workers were employees of defendant. Since this Court has concluded that Tonche was an employee of defendant, we do not separately discuss the relationship of the employees to defendant. (Emphasis added.)

Similarly, in *Jacobson v. Comcast Corp.,* 740 F. Supp. 2d 683, 685 (D. Md. 2010), the court conditioned the denial of joint employment status on fees being provided in sufficient amounts to permit compliance with the FLSA:

> My view is that the answer is "yes," provided that the fees paid by the company to the direct employers of the workers are sufficient to pay the workers the wages they are due. Here, Plaintiffs have not alleged that the fees paid by Comcast to the Installation Companies were not sufficient to cover the FLSA wages plaintiffs claim. Therefore, I will grant Comcast's motion for summary judgment.

B. The Court Of Appeals' Analysis Of All Relevant Factors Is Consistent With Federal Law And Permits Summary Judgment In Joint Employment Cases.

Expert argues at page 13 of its petition that the Appeals Court:

> holds that because "there are genuine issues of fact regarding the existence and degree of ***some*** of the relevant factors" pertaining to Plaintiffs relationship with Expert and Fred Meyer, summary judgment was inappropriate. App. 2 (emphasis added). By holding that a dispute as to "some" – and implicitly ***any*** – of the factors precludes summary judgment, the decision rules out summary judgment in virtually all joint employment cases. This is contrary to both federal and Washington law. (Emphasis in original.)

That argument ignores what the Court of Appeals actually said and did, and incorrectly defines "some" to always mean "any." At pages 30-35 of the Slip Opinion specifically discussing Expert, the Court of Appeals found either disputed or conceded issues of fact regarding at least six factors, *e.g.*, (1) "the janitors' work was an integral part of its janitorial business," (2) that the work "required little initiative, judgment or foresight," (3) that "the janitors had little opportunity for profit or loss," (4) that "the plaintiffs' work was permanent;" (5) that the contract passed "from one subcontractor to another without material changes; and

(6) Expert had indirect power to fire janitors. A common definition of "some" is "being a certain unspecified (but often considerable) number ..." as "*some* guests are here already.[14] In this case "some" means a "considerable number" rather than "any" as the Court itself made clear when at page 32 it referred to genuine issues of material fact.

Expert also argues that the Court of Appeals somehow violated federal and Washington law because it denied summary judgment because of disputed facts on five factors, and "glossed over or failed to mention the undisputed evidence showing that all four of the *Bonnette* factors, and at least three non-regulatory factors, support the conclusion that Expert was **not** a joint employer. Pet., pp. 15-16 (emphasis in original). Again, Expert is wrong.

First, as pages 30-32 of the Slip Opinion makes obviously clear, there was disputed evidence regarding Expert's power to fire or alter the employment conditions of the janitors, which is a "*Bonnette*" factor. Second, there was evidence of Expert's role in supervising janitors. *See* CP 386. Third, the court did weigh various factors including holding, following *Rutherford Food Corp. v. McComb*, 331 U.S. 722 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), that Expert's concession that the janitors'

[14] WEBSTER NEW UNABRIDGED TWENTIETH DICTIONARY (2d Ed), p. 1729.

work was "an integral part of its janitorial business" was "significant." Slip Op., p. 30.[15]

In *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 72, 244 P.3d 32 (2010), the court relied on both when it held "where the facts are disputed, the determination of employment status is properly a question for the trier of fact." (Footnotes omitted.) This Court did not disturb that holding.

C. There Is No Sound Basis For Review Of The Court Of Appeals Decision Under RAP 13.4(b)(4).

Expert's current position before this Court is that:

> This Court should grant review under RAP 13.4(b)(4) to make clear which version of the economic reality test applies to joint employment claims in Washington, and how much weight should be given to the various relevant factors.

Pet., p. 20. That argument is inconsistent with Expert's position in the Court of Appeals in this case that:

> [T]here is no material difference among the various descriptions of the FLSA economic reality test by the different federal circuits. All of them boil down to the same factors, though the courts may enumerate them in somewhat different ways. (Emphasis added.)

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[15] Even cases cited by Expert regarding summary judgment in multi-factor tests do not require that the Appeal Court discuss every single factor. *See Stewart v. Estate of Steiner*, 122 Wn. App. 258, 274, 93 P.3d 919 (2004); *Jackvony v. RIHT Financial Corp.*, 873 F.2d 411, 416-17 (1st Cir. 1989).

Brief of Respondent Expert, p. 20, n. 3. The discrepancy in Expert's two positions illustrates why the approach taken by the Court of Appeals in this case is a sensible one and there is no need for this Court to take review and good reasons for this Court not to take review. For example, if what Expert told the Court of Appeals were correct, and there are no material differences in the factors, then why should this Court review it now? On the other hand, if there are material differences in the lists of factors among the circuits, it is appropriate to let the parties to argue and the trial court to have an opportunity to make an informed decision, using the guidance provided in the Slip Opinion and examining in detail the evidence presented.

The Court of Appeals chose not to carve in stone a definitive list of relevant factors either in this case or for all cases. This is due in part to the Court of Appeals' agreement with repeated admonitions of every appellate court on this issue that no list of factors should be "exclusive", *i.e.*, "any one list of factors is not exclusive." Slip Op., p. 11. Given that any list is not exclusive, there is less point for settling on a non-exclusive list at this stage. This is particularly true because the trial court focused on only a subset of the relevant factors. The Court of Appeals' opinion gives considerable guidance on this matter to the trial court in its opinion including its discussion at pages 29-35 of the Slip Opinion.

This is very much the same as the approach taken both by the Court of Appeals in *Anfinson v. FedEx Ground*, 159 Wn. App. 35, 45, 244 P.3d 32 (2010), and by this Court in *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012). The Court of Appeals there held 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." 159 Wn. App. at 53. However, the Court of Appeals questioned whether "relative investment" should be a factor in that it was employed by less than a majority of the circuits. 159 Wn. App. at 59. This Court in *Anfinson*, reopened the door to **trial court** consideration of "relative investment" on remand, stating at pages 858-59, n. 1:

> [1] We presume that the Court of Appeals intended to leave application of this FLSA factor open on remand in the same way that it left the belief of the parties factor open for consideration by the trial court in the first instance. *See Anfinson*, 159 Wn. App. at 59, 244 P.3d 32.

This Court, thus, not only approved but expanded upon the Court of Appeals' decision to leave it to the trial court in the first instance to decide the precise factors taking into account the appellate decisions and the particular facts in the case. That is just what the Court of Appeals did in the present opinion.

In the guise of a complaint that "the Court of Appeals' decision also provides little guidance regarding the relative weight various factors should be given," Expert again tries to persuade the Court the four *Bonnette* factors are "the most important." Pet., p. 18. Neither its characterization nor its complaint have merit. As the courts stated in *Barfield,* 537 F.3d at 143 and *Torres-Lopez,* the *Bonnette* factors work well when the issue is "formal control," while the remaining *Torres-Lopez* factors and the *Zheng* factors (largely derived from *Rutherford*) work well when the issue involves "functional control." Both kinds of control are relevant to this case.

VI. CONCLUSION

For the foregoing reasons, this Court should deny Expert's Petition for Review.

RESPECTFULLY SUBMITTED this 15th day of November, 2013

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Attached please find Respondents' Answer To Fred Meyer's Petition For Review, Respondents' Answer to Expert Janitorial, LLC's Petition for Review and Affidavit of Service for filing today in Becerra v. Expert Janitorial, et al., Division I, Cause # 89534-1.

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