Court of Appeals No. 76752-6-1

No. 97951-1

SUPREME COURT
STATE OF WASHINGTON

MARIA ESPINOZA and JUAN FRANCISCO HERNANDEZ TORRES, Individually and as Class Representatives,

Petitioners,

v.

FRED MEYER STORES, INC.,
Respondent,

and

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

Defendants.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

Petitioners ("Janitors") do not raise any issues suitable for this Court's review. Though the Janitors argue that both courts below somehow misinterpreted the joint employer rule this Court announced in *Becerra v. Expert Janitorial, LLC*,[1] in reality they are challenging factual findings the trial court made after a seven-week bench trial. Using those findings and many others not challenged here, the trial court applied *Becerra*'s nonexclusive 16-factor "economic realities" test to conclude that Fred Meyer Stores, Inc. ("Fred Meyer"), was not the Janitors' joint employer. The Court of Appeals agreed.

Now before this Court, the Janitors do not argue that the trial court failed to consider a *Becerra* factor. They do not argue that the trial court should have considered some other factor not contemplated in *Becerra*. They do not argue that the trial court erred in admitting or excluding evidence. Instead, the petition argues only that the trial court should have made different factual findings about some of the *Becerra* factors and come to a different conclusion. If there is a conflict with *Becerra* here at all, it is the Janitors' argument for review, which contradicts this Court's guidance that the economic realities test is "not an algorithm. That is why toting up

[1] *Id.*, 181 Wn.2d 186, 332 P.3d 415 (2014).

[the factors] is not enough" to decide whether someone is a joint employer.[2] Yet toting up the factors is exactly what the Janitors want this Court do, just in a different way. Their argument for review here also contradicts their attorneys' argument against review in *Becerra*, where they told this Court that "'the determination of [joint] employment status is properly a question for the trier of facts.'"[3]

As our state's highest tribunal, this Court "sits not to correct errors in individual cases but to decide matters of larger public import."[4] While the ultimate determination whether someone is a joint employer under *Becerra* is a legal question, the existence and degree of each of the factors is a factual one and so necessarily case specific.[5] The trial court correctly applied *Becerra* after listening to dozens of witnesses and reviewing hundreds of exhibits at trial. But even if this Court might have come to a different conclusion from the facts here, it would merely be correcting an error—its opinion would have little or no practical application to anyone but the parties here. This is not a chance for the Court to say anything about *Becerra* beyond the facts unique to this case. For those reasons, the petition

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[2] *Id.*, 181 Wn.2d at 198.

[3] Resp. Answer to Fred Meyer Inc.'s Petition for Review (No. 89534-1), App. A-14, quoting *Anfinson v. Fedex. Ground*, 159 Wn.App. 35, 72, 244 P.3d 32 (2010).

[4] *See Halbert v. Michigan*, 545 U.S. 605, 618, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

[5] *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 705-06, 309 P.3d 711 (2013), *aff'd*, 181 Wn.2d 186.

does not qualify for review under RAP 13.4(b). The Court should deny it.

II. BACKGROUND

The Janitors seek review of a seven-week bench trial involving more than 50 witnesses and nearly 450 exhibits that the trial court synthesized into a 67-page written decision.

A. *Becerra v. Expert Janitorial, LLC*

Like this case, *Becerra* was brought by janitors claiming the same janitorial services management company (Expert) and customer (Fred Meyer) were liable as joint employers for wages not paid by their direct employer, Expert's subcontractor (aka, Service Provider, or "SP"). The Janitors' attorneys also represented the *Becerra* plaintiffs. But unlike this case, *Becerra* appealed an order granting Fred Meyer summary judgment rather than entering judgment following a long bench trial.

The Court of Appeals reversed,[6] and the Janitors' counsel opposed Fred Meyer's petition for review in *Becerra*. They argued that the joint employer question "'involves a wide array of disputed factual issues" and that "'[w]here the facts are disputed, the determination of employment status is properly a question for the trier of facts.'"[7] The Janitors' counsel also

[6] *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 309 P.3d 711 (2013), *aff'd*, 181 Wn.2d 186 (2014).

[7] Resp. Answer to Fred Meyer Inc.'s Petition for Review (No. 89534-1), App. A-7, A-14, quoting *Anfinson v. Fedex. Ground*, 159 Wn.App. 35, 72, 244 P.3d 32 (2010).

argued against a rule that would require a court to discuss extensively every factor of a multi-factor test like that involved in both *Becerra* and here.[8]

This Court ultimately granted review and affirmed the *Becerra* Court of Appeals. In doing so, it synthesized both state and federal case law to adopt the nonexclusive 16-factor economic realities test for joint employers. That test applies to any putative joint employer, regardless of industry or fact pattern. Unlike this appeal, it did not depend on a fully-developed, case-specific record. Instead, this Court remanded for the trial court to consider "whether Fred Meyer and Expert functioned as joint employers of the janitors" under the newly adopted test. *Becerra*, 181 Wn.2d 186 at 200. And even then, this Court reserved the possibility that summary judgment for Fred Meyer could be appropriate under the new test.

B. History and trial in this case

After this Court issued *Becerra*, the Janitors brought wage and hour claims against Fred Meyer, Expert and other defendants on behalf of a class similarly situated janitors. Again they asserted that both Expert and Fred Meyer were liable as the janitors' joint employers.

One trial judge presided over most of this case and so was well-versed in both the facts and applicable law. The Honorable Beth Andrus

[8] *Id*. at A-15.

was involved in class certification stage, many dispositive motions and all pretrial hearings. Before trial even began, Judge Andrus had reviewed thousands of pages of briefing, exhibits, declarations and deposition testimony and heard hours of oral argument on many issues.

The bench trial lasted seven weeks and involved live testimony from 43 witnesses (CP 979, 787-88), more deposition testimony from six of those live witnesses (CP 979), and nine more witnesses by deposition alone. *Id.* (52 witnesses.) The trial court considered 443 admitted exhibits. *Id.*

Then after substantial post-trial briefing, the trial court issued a 67-page order on findings of fact and conclusions of law. While it found three of the co-defendants were liable to the Janitors—including Expert as a joint employer—the trial court found Fred Meyer was not a joint employer and so not liable. CP 977-978. As the Janitors admit, the trial court came to that conclusion after consideration all *Becerra*'s factors. Petition at 7.

C. Facts relevant to the petition

For the reasons discussed in this answer, the issues raised in this petition are fact-dependent and ill-suited for discretionary review. Even so, Fred Meyer will summarize a few key facts to put the petition in context. More information about the facts that were tried to Judge Andrus can be found at pages 3-16 of Fred Meyer's briefing below.

1. Fred Meyer and Expert's interactions with and knowledge of the janitors were different.

The Janitors continue to conflate the evidence about what Expert knew about possible wage violations by its SPs (which employed the janitors) and what Fred Meyer knew about them. But Fred Meyer and Expert are different parties and different actors. After considering the evidence presented at trial, the trial court recognized these differences, including:

- Unlike Expert, Fred Meyer did not know what Expert paid its SPs or, in turn, what Expert's SPs paid their janitors. *See, e.g.*, RP 2338:9-12; CP 1179:23-1189:14.

- Expert knew that one of its SPs paid janitors a salary as if they were exempt, something Fred Meyer did not know until months after the problem was fixed. CP 965.

- Unlike Expert, Fred Meyer did not audit the janitors' time cards and pay records.[9] CP 942-943, 960, 965, 971.

- Expert helped form the primary SP involved here even though it knew the SP's principal had violated wage and hour laws at a different company. CP 925, 955 -56 ("[SP] was in essence Expert's creation") 964. By contrast, Fred

[9] Indeed, and also unlike Expert, Fred Meyer followed the advice of the janitors' expert witness, John Ezzo, that customers like Fred Meyer should require janitorial management companies like Expert to periodically review the payroll and time records of its SPs to ensure wage and hour compliance. CP 194 (Ezzo May 2011 *Becerra* declaration; at ¶¶ 43-45). That is exactly what Fred Meyer required of Expert following *Becerra*. Unfortunately, Expert repeatedly misled Fred Meyer about the adequacy of the audits it was conducting and about whether its SPs were complying with the law. CP 971, 960 ("Starting in 2012, Expert audited MHJ every two months, or at least represented to Fred Meyer it was doing so, to ensure the janitors were being paid."); 942-943 (Expert's representations to Fred Meyer were "inaccurate in several material respects and misleading in others"), 965.

Meyer did not help set up the new SP or know about the past violations.

- Expert required the janitors to perform certain tasks each night. CP 956-957 (Expert's regional manager created a list of "nightly basics" and insisted that the janitors complete this set of tasks each shift.). Fred Meyer sought only the final result of a store ready for customers and did not dictate nightly tasks. RP 1181:3-1182:25; 1184:25—1185:6; 1191:4-1192:9; 2913:5-15.

- When there were issues of poor service, Fred Meyer communicated with Expert. Expert communicated with the SPs. CP 931-932, 957, 969.

These are just some of the key differences between Expert and Fred Meyer in evidence at trial on the issue of "joint employment."

2. Expert is a legitimate janitorial management company.

Expert is not a fly-by-night operation. It provides services nationwide to retailers like Barnes & Noble, Dick's Sporting Goods, and Rite Aid. CP 918; RP 2287:16-21; 2288:20-2289:3, 2289:13-2290:16. Expert provided over 500,000 separate cleaning services a year to its various clients, only three percent of which were the Fred Meyer stores at issue. RP 2306:6-237:10. Expert engages SPs to meet its contractual obligations to Expert's customers, and it had over 1500 SPs at the time of trial. *Id.* Expert's annual revenues ranged from $40-to-$43 million per year, of which Fred Meyer paid only about $4 million. RP 2369:1-11; CP 918.

3. No Fred Meyer manager was on site while the janitors cleaned, and no Fred Meyer employee monitored the janitors.

Janitors employed by Expert's SPs cleaned Fred Meyer's stores at night while they were closed. CP 919. Except for rare occasions, the only Fred Meyer employees onsite when janitors were working were employees without supervisory or discipline authority, even over other Fred Meyer employees. *See, e.g.*, RP 2725:12—2726:19. No Fred Meyer employee regularly monitored the janitors performing duties, trained or instructed them how to clean or perform their duties, or hired, fired, or disciplined any janitors. CP 969; RP 909:22-24; 910:4-6; 1227:11-23; 1892:8-11; 1901:10-15; 2727:21-2783:3.

As is also undisputed, "[t]he janitors actually had very little direct supervision." CP 958. As the Janitors' expert witness explained, the standard practice for two-person janitorial crews was to have no direct supervisor on site, but have one of the janitors take the lead, and have the supervisor accessible by phone if needed. RP 269:8-21, 280:22-281:7. The expert used this same structure in his business. RP 362:4-363:12. (Class representative; "all the instructions and orders came from [MHJ's manager]" and the other janitor); 288:19-289:2 (same); RP 1229:25-1230:10 (same).

4. Fred Meyer paid enough for janitors to receive a lawful wage.

The Janitors concede that for most of the class period, Fred Meyer paid Expert enough for its SPs to pay their janitors a lawful wage. The Janitors' only allegation about insufficient payment stems from the contract that Expert and Fred Meyer renegotiated in 2014. But the renegotiated contract also reduced the janitors' scope of work—which reduced the number of hours worked—and in turn lowered the amount that Fred Meyer paid to Expert. As elaborated in Fred Meyer's Court of Appeals brief, the Janitors misconstrues the evidence about the 2014 contract in many ways.

In any event, although the total amount paid by Fred Meyer was reduced along with the reduction in services for which it contracted (and led to fewer hours being worked by the janitors), there was no change in the total amount that Expert paid its SP. RP 1090:9-14. That is, there was no direct link between what Fred Meyer paid and what Expert's SPs paid their employees.

III. ARGUMENT

This Court accepts discretionary review in few circumstances. RAP 13.4(b). The petition alleges that all seven of issues raised are reviewable under each of RAP 13.4(b)(1), (2) and (4), since the Court of Appeals opinion somehow conflicts with prior precedent, and the petition

raises issues of substantial public interest. None of those bases for review support it here.

A. Review is not warranted under RAP 13.4(b)(1)-(2) because neither the trial court's order nor the Court of Appeals' opinion conflicts with precedent.

Review under RAP 13.4(b)(1) or (2) is "narrow;" the petition must show that the Court of Appeals has run afoul or ignored this Court's precedent or that there is a conflict among the Courts of Appeal. *See* Wash. App. Prac. Deskbook § 18.2(3). The petition alleges that the Court of Appeals' opinion conflicts only with this Court's opinion in *Becerra* and the Court of Appeals' *Becerra* opinion that preceded it. Petition at 6. The Court of Appeals' opinion here conflicts with neither.

It is important that both *Becerra* opinions were decided after the trial court held Fred Meyer was not a joint employer on summary judgment. Neither *Becerra* opinion involved, interpreted or applied the economic reality test to a fully developed trial record. In fact, this Court recognized that the evidence adduced at trial might be different: "While our review of the record suggests that summary judgment was improperly granted on the merits, we do not mean to bind the trial court's hands on remand." *Becerra,* 181 Wn.2d at 199. The Court of Appeals issued a similar caution about its scope: "We defer to the trial court on remand to consider [the disputed]

evidence" to decide the joint employment issue. *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 718, 309 P.3d 711, 722 (2013).

The petition tries to cast the trial court's findings as conflicting with *Becerra*'s statements about why disputed facts precluded summary judgment. But the trial court resolved factual disputes here after a seven-week bench trial, and in doing so, concluded that Fred Meyer was not the janitors' joint employer under the economic realities test. That's exactly what this Court and the Court of Appeals contemplated in *Becerra*. Because the economic realities test is a holistic one—merely "a way to think about the subject and not an algorithm"—facts that *could* support joint employment in the abstract on summary judgment *need not* support it when considered with all the facts at trial. As the Janitors' counsel told this Court to oppose review in *Becerra*, "the importance of a dispute as to some individual factors depends on the totality of the circumstances. . . . That of course is a fact-specific determination."[10]

The Janitors also fault the trial court and Court of Appeals for allegedly failing to address each of *Becerra*'s factors in explicit detail, despite their admission that both courts properly laid out the test. Again, that does not conflict with either *Becerra* opinion, which lay out a

[10] Respondents' Answer to Memo. of Amici Curiae (No. 89534-1), App. A-37.

"nonexclusive" test, nor did the trial court miss any of the factors in its 67-page findings and conclusions. And perhaps more importantly, Janitors' counsel concede that it is "good enough for [a] court[] to state that it has considered all of the factors and specifically and extensively discuss many, but not all, of the factors in a multi-factor test."[11] *See also Espinoza v. MH Janitorial Servs. LLC*, No. 76752-6-I, 2019 WL 5697886, at *6 (Wash. Ct. App. Nov. 4, 2019). Going through the test factor-by-factor to manufacture reversible error—as the petition tries to do—is antithetical to this Court's holding that joint employment is not decided by tallies on a scorecard.

In sum, nothing about the trial court's findings or the Court of Appeals' opinion conflicts with the *Becerra* cases. Review is not appropriate under either RAP 13.4(b)(1) or (2).

B. Review is not warranted under RAP 13.4(b)(4) because the petition does not raise any issue of substantial public importance.

The Janitors also argue that the Court should accept review because this case involves an issue of substantial public interest. Review under RAP 13.4(b)(4) is reserved for critical issues that have a statewide impact. For example, this Court noted that the "prime example of an issue of substantial public interest" was an appellate decision that had "the potential

[11] Respondents' Answer to Fred Meyer Inc.'s Petition for Review (No. 89534-1), App. A-15.

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

The Janitors suggest the public has a substantial interest here because the Court's decision might apply to "other potentially liable employers."[12] Setting aside that the Janitors don't show that this fact pattern is likely to recur, the petition confirms that the issues raised are limited to the specific record here: "were [trial court's] findings supported by substantial evidence;" "did the trial court properly find that Factor 15 was neutral;" "did the trial court properly interpret Factor 16 as applied to Fred Meyer."[13] This Court's answers to those questions are necessarily case and fact specific. They do not merit review under RAP 13.4(b)(4), which is

[12] Petition at 5-6. Janitors also find a substantial public interest because this Court's decision would affect "more than 100 janitors in the class action"—in other words, the parties here. If that qualified for review under RAP 13.4(b)(4), then so would every case.

[13] Petition at 2-3.

proper only for issues with "ramifications beyond the particular parties and the particular facts of an individual case." Wash. App. Prac. Deskbook § 18.2(3).

And the Court of Appeals did not publish its opinion. So while another party could cite the decision as persuasive authority (in the unlikely event their fact pattern mirrored that here), the decision is not precedential authority. GR 14.1. This emphasizes the fact that the petition does not raise issues of substantial public importance.

IV. CONCLUSION

This case presents fact-specific issues that neither conflict with *Becerra* nor allows this Court to say something about it relevant to anyone but the parties here. The Court should deny review.

RESPECTFULLY submitted this 31st day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on January 31, 2020, I caused the foregoing to be delivered via e-mail to the following:

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APPENDIX

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 **FRED MEYER STORES, INC.'S** PETITION FOR REVIEW

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TABLE OF CONTENTS

Table of Contents, continued

Table of Contents, continued

TABLE OF AUTHORITIES

Page

Cases

Table of Authorities, continued

I. IDENTITY OF RESPONDENTS

Plaintiffs Carolina Becerra Becerra, Julio Martinez Martinez, Orlando Ventura Reyes, Adelene Mendoza Solorio 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 Fred Meyer's Petition for Review ("Petition" or "Pet.").

III. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to RAP 13.4(b)(4), the Supreme Court should reject review of this case, because:

1. The Court of Appeals set forth the applicable "economic realities" test for deciding MWA "joint employment" issues consistent with Fair Labor Standards Act ("FLSA") authority and in conformity with the related "economic realities" test adopted in *Anfinson v. FEDEX Ground Package System, Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012).

2. The present case involves a wide array of disputed factual issues pertinent to multiple "economic reality" factors. Summary judgment in favor of Fred Meyer was erroneous.

3. Fred Meyer repeatedly mischaracterizes the Court of Appeal's Opinion and the record below in its effort to obtain review. Correctly characterized, these are not errors.

IV. COUNTERSTATEMENT OF THE CASE

A. Fred Meyer's Contracts Establish Janitor Working Terms And Conditions.

Up until mid-2004 Fred Meyer used its own janitorial workforce to clean its Pacific Northwest stores. CP 719.[1] Between 2004 and 2009, Fred Meyer entered into almost identical janitorial service contracts with Expert Janitorial LLC and its two predecessors. CP 1428-1446, 1447-48 and 1334-1352. These contracts controlled in detail virtually all aspects of the work that would be performed by janitors in the Fred Meyer stores.[2]

Paragraph 4 of the contract provided that Fred Meyer managers would conduct a daily inspection in each store, with the janitors required to correct "all deficiencies." CP 1430; CP1336.[3] Fred Meyer managers walked the stores with janitors, often keeping the plaintiffs in the stores well after the 7:00 a.m. end of shift – sometimes as late as 9:30 a.m. CP 1032, 1034-35, 1039-40, 1051-52, 1194-96, 1202-03, 1227 & 1235.

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[1] Fred Meyer janitors were paid union wages and were not scheduled to work overtime. CP 790-91. As discussed, *infra*, that changed drastically for the janitor plaintiffs and their fellow janitors.

[2] The "Schedule A" Scope of Service to the contract listed 66 nightly tasks, plus a few dozen less-frequent tasks. CP 1065, CP 1428 & 1440-45 and 1334 & 1343-48; see Slip Op. at 2-3. The "Schedule A" task list "is far more prescriptive tha[n] performance based" and "reads like a procedural manual." CP 1055 (Ezzo ¶ 4). Under "Schedule C" to the contract Fred Meyer selected and supplied chemicals, tools and all but one piece of equipment to be used by the janitors. CP 1055-56; CP 1324 & 1350-52. The Schedule C items comprised a monthly expense in excess of $2,500 at a 100,000 square foot store. CP 1055-56; CP 719 (few stores less than 100,000 sq. ft.). Paragraph 2 limits the work hours to between 10:30 p.m. to 7:00 a.m. (CP 1335 & 1429), although, as is discussed *infra*, Fred Meyer managers kept the janitors past 7:00 a.m. on a regular basis pursuant to their right to control the end of the shift under ¶ 4.

[3] The contracts define Schedule A as the "Work" (CP 1334 & 1428) and it is this "Work" that supervisors reviewed in their daily ¶4 inspections. CP 1336 & 1430.

Under ¶ 9.2, Fred Meyer had the right to require that janitors be paid in compliance with the FLSA and other governmental laws. CP 1432-33; CP 1338-39. Expert had virtually no janitorial employees of its own, getting janitors from local companies who are known as 2nd tier subcontractors. CP 1314 & 1330.[4]

By 2004, when this outsourcing occurred, Fred Meyer was aware that use of 2nd tier janitorial subcontractors often led to the abuses that occurred herein – misclassification as independent contractors, 7-night workweeks and non-payment of overtime and minimum wage. CP 1061-63. In the late 1990s and early 2000s a Fred Meyer subsidiary, Ralphs, was one three large Southern California supermarket chain defendants in a widely-publicized janitorial wage and hour class action involving 2nd tier janitorial subcontractors. The supermarkets were denied summary judgment on the janitors' "joint employer" claims. CP 1061-63, 1139-42 & 1179-81.[5]

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[4] The multi-tiered system used by Fred Meyer and Expert herein was developed in the Southern California retail market in the mid-1990s by a 1st-tier subcontractor, Building One, and is known as "layering." CP 1072-82 & 1136-37. The retail market for janitorial services is price sensitive. CP 1072-82. The retail chains subcontract to 1st tier national janitorial companies who hire no janitors. The 1st tier companies achieve substantial savings by subcontracting to local 2nd tier providers who are paid very little. *Id.* Many 2nd tier companies then achieve an immediate 20% cost savings by misclassifying janitors as independent contractors. *Id.* The 2nd tier subcontractors often achieve additional savings by working the janitors 7 full shifts per week and not paying overtime and, often, not paying the minimum wage. *Id.* This system depends upon a pool of workers who are willing to work under these conditions and, therefore, it originated and spread with the influx of available immigrant labor in the 1990s and 2000s. CP 1077 (Ezzo ¶ 33).

[5] Fred Meyer, at Pet., p. 3, argues its decision to outsource the janitorial work in 2004 was to enable "store directors [to] concentrate on Fred Meyer's core retail business."

B. All Janitorial ("AJ") and All American Janitorial ("AAJ").

AJ achieved success as a 2nd tier subcontractor, expanding from 1 to 19 Fred Meyer stores between 2006 and January 2010.[6] It misclassified janitors as independent contractor because otherwise it would have lost money on its contract with Expert. CP 1245-46.[7] By August 2011, AJ had stopped all operations and had no assets. CP 1060 & 1316. Meanwhile, in January 2010, AAJ was created to take over AJ's19 Fred Meyer stores. CP 1040 & 1269-78. It was a "baby company," using AJ's janitors and supervisor (Marcos Flores). CP 1269-78; CP 1285-86. It had no contracts other than Fred Meyer stores and never made a profit. CP 1269-78; CP 1285.[8]

CP 719. However, that is in dispute. Store directors were told that the 2004 subcontracting was to save money. CP 1053. Moreover, the decision gave *more work* to store management, because they were given the *new* responsibility of performing daily inspections and there was thinner staffing with the immigrant janitors. *Id.*

Under the Fred Meyer – Expert contracts, 2nd tier subcontractors did "little if anything beyond supplying the janitors and engaging in the kind of illegal business practices that are characteristic" of the layering system in major retail stores. CP 1058-59. They were "not deciding what cleaning needed to be done, how to do it, how often to perform various tasks, what chemicals, tools or equipment to use or how to supervise a staff of janitors." CP 1058-59. AJ and AAJ did not have a meaningful supervision plan for the janitors. CP 1056. Other than a ½ shift of training for one plaintiff, AJ and AAJ did **no** in-store supervision of plaintiffs. CP 1039-40, 1192 & 1200, 1210-1211, 1222, 1227, 1231-33. Instead, Fred Meyer was the **only** source of in-store supervision – the daily walkthrough and eventual signing-out. CP 910, 1032, 1034-1036, 1039-40, 1050-53, 1056-57 & 1203.

[6] CP 1015 & 1250 (1 to 19 stores).

[7] The store prices were set by Expert on a take-it-or-leave basis. CP 1245. The amounts Expert offered were unlikely to attract a 2nd tier subcontractor who complied with labor laws. CP 1085 (Ezzo ¶ 59).

[8] Second tier subcontractors commonly cease business when their wage/hour violations come to light. CP 1060-61. Their lack of assets is what enables them to risk a business model with egregious wage and hour abuses for relatively little in compensation. *Id.*, *accord, Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 409 (7th Cir. 2007)(Judge Posner stating: "when a contractor has no business or personal wealth at risk, he may be

C. Plaintiffs' Fred Meyer Store Work, Misclassification, 7-Day Workweeks and Wage/Hour Law Violations.

Plaintiffs worked only in Fred Meyer stores.[9] They and the other janitors worked 7 full-night-shifts per week, [10] were classified as independent contractors,[11] were not paid overtime[12] and often were not paid minimum wage.[13] AJ and AAJ janitors spoke Spanish and did not speak English. CP 703.[14]

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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."). Fred Meyer, at Pet., p. 7, seems to criticize plaintiffs for not proceeding rapidly to a separate trial against AJ's owner, Sergey Chaban. Plaintiffs, however, prefer to have one trial with all defendants.

[9] CP 1031-32; CP 1193; CP 1039; CP 1201; CP 1233.

[10] CP 1031-32, 1039, 1192, , 1200 & 1234; *see* CP 1303-04 (AJ work schedule with every janitor at 19 Fred Meyer stores working 31 days that month) & CP 1296-97 (explanation of schedule). *See* Slip Op. at 3. Giving new meaning to the term "paid sick leave", three plaintiffs took rare sick days but they were required to find a suitable person to cover **and had to pay their replacement.** CP 1194; CP 1201; CP 1215.

[11] CP 1244 (AJ was not paid enough by Expert to classify janitors as employees).

[12] CP 1244-45; *see* CP 1032 &1039. Plaintiff Alma Becerra and her co-workers at the Fred Meyer Sumner store also worked 7 nights a week without overtime pay in 2006 under a different 2nd tier subcontractor – not AJ or AAJ. CP 1031-32.

[13] CP 194-198.

[14] According to plaintiffs' industry expert, John Ezzo, "[t]he events in this case are not aberrant or due to unusual behavior by All Janitorial or All American Janitorial." CP 1063-64 (Ezzo ¶ 24). Rather, the layering business model is the root of the problem, because it meets the financial interests of the retailer and 1st tier subcontractor. Retailers get janitors at the lowest possible price while being able to maintain tight control over what is done and how it is done. 1st tier subcontractors win bids by engaging 2nd tier subcontractors who are willing to violate laws and tap into a pool of easily-exploited immigrant laborers.

V. ARGUMENT

A. The Court Of Appeals Appropriately Surveyed And Applied FLSA Case Law And *Anfinson*, Finding Sufficient Material Disputes Of Fact To Preclude Summary Judgment.

1. The Court Properly Set Forth the FLSA/MWA "Economic Reality" Analysis For Resolving Joint Employer Disputes.

The Court of Appeals agreed with Fred Meyer and plaintiffs that the FLSA "economic reality" authority provides useful guidance in apply the "joint employer" test under the MWA. E.g., Slip Op. at 1 – 2 & n. 1. The Court of Appeals expressly adopted the "economic reality" test, noting the similarities between the MWA and FLSA and citing *Anfinson*. *Id.* at 6-7. It relied on cases starting with the "seminal" case of *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), and continuing with United States Court of Appeals authority for the propositions that "economic reality" is the touchstone and that multi-factor tests (in their various formulations) are non-exclusive. Slip Op. at 1-2, n. 1, 9-16 & nn. 25-58.[15]

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[15] This Court in *Anfinson* explained that because the Washington Minimum Wage Act ("MWA") was adopted from the Fair Labor Standards Act ("FLSA") in 1959, the Legislature intended to adopt the federal construction of the FLSA as of 1959:

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

In re Heidari, 174 Wn.2d 288, 298, 274 P.3d 366 (2012) (emphasis added). That means that the pre-1959 FLSA Supreme Court interpretation of joint employment in *Rutherford* is more significant on this issue for purposes of the MWA then post-1959 federal opinions.

Essentially, Fred Meyer is asking this Court to accept review to review a detailed factual record in order to determine whether there are disputes of fact in this particular case. It attempts to buttress its petition by mischaracterizing the Court of Appeal's opinion and the record and making inferences – reasonable and unreasonable – in its favor.

2. The Court Of Appeals Applied The Economic Reality Test In This Summary Judgment Motion Consistently With Washington Summary Judgment Law And With Summary Judgments Under The FLSA.

The Court of Appeals' decision appropriately relied on MWA and FLSA authority in deciding this summary judgment. *See, e.g.*, Slip Op., pp. 5-8. The Court well supported its holding that:

> There are genuine issues of material fact regarding the existence and degree of some of the relevant economic reality factors determinative of joint employment that should have precluded the trial court's dismissal."

Id. at 5. After citing cases from the U.S. Supreme Court, and the Second, Third, Ninth and Eleventh Circuits as well as several district court cases (*id.* at 10-20) and explaining, *inter alia*, that no court has held that there is an exclusive list of factors (*id.* at 10-11), the Court of Appeals indicated that it had considered all of the various factors, *e.g.*,

> While they conceded that Fred Meyer did not maintain the janitors' employment records, they argue that there were genuine issues of material fact with respect to all other factors. We substantially agree.

Id. at 21 (emphasis added).

The opinion goes on to specifically discuss the following factors regarding the janitors: Fred Meyer's "supervisorial control of their work;" its "control of their employment conditions;" the janitors use of Fred Meyer "premises and equipment" (*id* at 21-23); "firing or modifying the janitors' employment;" "permanence of the janitors' employment;" "whether the janitors' work required initiative, judgment or foresight" (*id.* at 23-24); and whether:

> [T]he 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."

(*id.* at 25), or was a "legitimate type of subcontracting arrangement." *Id.* at 29.

While Fred Meyer cites *Moreau v. Air France,* 356 F.3d 942 (9th Cir. 2004) for the proposition that the ultimate question of joint employment "is a legal question," the Court of Appeals in *Anfinson v. FedEx Ground*, 159 Wn. App. 35, 72, 244 P.3d 32 (2010), citing both Washington and FLSA cases, properly held that "[w]here the facts are disputed, the determination of employment status is properly a question for the trier of facts." (Footnote omitted.) Even though as discussed above, the Court of Appeals stated it considered all the factors included in Fred Meyer's joint employment status, and discussed them extensively at pages 21-29 of the Slip Opinion, Fred Meyer argues that it did not explicitly discuss and weigh every factor. Pet., p. 9. However, there is no

rule that it is not good enough for appellate courts to state that it has considered all of the factors and specifically and extensively discuss many, but not all, of the factors in a multi-factor test (*see, e.g., 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)), where the Court discussed "some, but not all, factors."

3. Fred Meyer's Criticisms Regarding The "Supervision" And "Control" Factors Misread The Court's Opinion And The Record.

Fred Meyer's Petition, at 10-12, sharply criticizes the Court of Appeals and argues that "no federal case holds that 'coming close' to supervision is the same as supervising. Slip Op., p. 22." Fred Meyer ignores the court's flat statement at page 22 that the janitors "were supervised by Fred Meyer employees" and mischaracterized the statement it purports to quote, which actually was "Fred Meyer was the organization that came closest to supervising the janitors on a day-to-day basis." Slip. Op. at 22 (emphasis added). Fred Meyer's Schedule A required janitors to perform 66 daily tasks, and Fred Meyer did a daily inspection to assure compliance as a condition of janitors being able to end their shifts. The Court of Appeals summarized the record at Slip. Op., pp. 25-26 and conservatively concluded "it is a genuine issue of material fact whether the janitors were, in the end, supervised by Fred Meyer." *Id.* Furthermore, plaintiff's expert, Ezzo, opined that sole day-to-day supervision "correlates with affecting discipline." CP 1058 (¶ 13). AJ's

Chaban testified that Expert told him "there should be personnel changes as a result of dissatisfaction" with performance on Fred Meyer's part, with AJ's "practice" being to let the janitor go. CP 1242, *see* Slip Op., p. 24. There is ample evidence creating an issue of fact regarding Fred Meyer indirect control over both supervision and firing or modifying employment.[16]

4. Fred Meyer's Service Industry Case Law Discussion Misreads The Law.

Fred Meyer's analysis of "service industry" law concerning joint employment at pages 11-14 of its Petition misinterprets (a) the Court of Appeals' treatment of that law, and (b) FLSA joint employment case law.

(a) According to Fred Meyer, the Court of Appeals "state[ed] that special treatment should be given to "service-providing sectors" because they are the economy's "'fasting growing.' App. 18." Pet., p. 11. That is the opposite of what the Court of Appeals actually said. The Opinion rejects the trial court's effort to narrow the focus in the service sector to the *Bonnette* factors "in part because [the trial court] felt that the other [non-*Bonnette*] factors applied more to 'production line' type jobs." Slip Op., p. 17 (emphasis added). The Court of Appeals was not saying that

[16] Fred Meyer also criticizes the Court of Appeals for concluding that Fred Meyer supplied "equipment." *See* Pet., pp. 4-5 and 15-16. In fact, Fred Meyer supplied each store with approximately $2,500 per month in Schedule C chemicals, tools and equipment. *Supra* at n. 2. By way of contrast, AJ spent approximately $50/month per store to supply and maintain a mechanized scrubber/waxer machine – that means 98% came from Fred Meyer and 2% came from AJ. CP 1017 & 1023-24. (Chaban estimated $750 per month for "Equipment Replace or Repairs" at a time when AJ had 15 Fred Meyer stores).

service jobs should be given special consideration; rather, it was saying that service type jobs should be treated similarly to other jobs.

(b) Fred Meyer's claim that "service industry case law overwhelmingly supports" its position is also incorrect. It is incorrect in part because Fred Meyer omitted from the cases it cites at pages 12-13 of its Petition, almost every service industry case finding joint employment. Perhaps most significantly, it failed to cite *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008), in which the Second Circuit characterized the plaintiff nurse as a service worker and held Bellevue Hospital to be a joint employer using an analysis very similar to the Court of Appeals in this case. The Court of Appeals opinion in this case repeatedly cited to *Barfield.* Slip Op., p. 11, n. 22, 19, n. 34, 25, n. 82.[17] Furthermore Fred Meyer also failed to mention in this context *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006) another

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[17] In *Barfield,* 537 F.3d at 143, the Second Circuit well explained how different factors may be applicable in different circumstances such as whether the issue involves "formal control" or "functional control":

> From this precedent, we conclude that the various factors relied upon by this court (1) to examine the degree of formal control exercised over a worker, *see Carter v. Dutchess Cmty. Coll.*, 735 F.2d at 12; (2) to distinguish between independent contractors and employees, *see Brock v. Superior Care, Inc.*, 840 F.2d at 1058–59; and (3) to assess whether an entity that lacked formal control nevertheless exercised functional control over a worker, *see Zheng v. Liberty Apparel Co.*, 355 F.3d at 72, state no rigid rule for the identification of an FLSA employer. To the contrary, as we noted in *Zheng*, they provide "a nonexclusive and overlapping set of factors" to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA. *Id.* at 75-76. With this in mind, we turn to the facts of the case before us.

In the present case, as in *Barfield*, both formal and functional control are present.

service industry case involving security personnel, which also found joint employment.[18]

Much of Fred Meyer's discussion of the cases it does cite at pages 12-13 of its Petition is also wrong. For example, Fred Meyer criticizes the Court of Appeals for not mentioning *Itzep v. Target Corp.*, 543 F. Supp. 2d 646 (W.D. Texas 2008) which, according to Fred Meyer is a "'janitorial contracting" case with "highly relevant analysis." Pet., p. 12. However, the Court of Appeals quoted from *Itzep* at page 11 of its opinion relating to its conclusion that "any one list of factors is not exclusive, but rather "depends upon the circumstances of the whole activity." The *Itzep* court not only denied summary judgment on joint employment but did so with much less discussion of the relevant factors than does the Court of Appeals in this case. *See* 543 F. Supp. 2d at 655. *Itzep* thus directly supports the Court of Appeals' decision here.

Fred Meyer also repeatedly cites *Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762 (D. Md 2008). *See* Pet., pp. 12, 13, 18, 19. Significantly, the Court there not only granted the motion to dismiss on the basis of facts very different from those in this case, as discussed, *infra,*

[18] Nor did Fred Meyer mention district court cases such as *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005) (denying motion to dismiss FLSA claim against Wal-Mart involving janitors alleging joint employment); *Vega v. Contract Cleaning Maintenance, Inc.*, 2004 WL 2358274 (N.D. Ill) (denying motion to dismiss joint employment claims against UPS involving janitors); *Ansoumana v. Gristede's Operating Corp.*, 255 F.Supp. 2d 184, 193-96 (S.D.N.Y. 2003) (grocery delivery workers); and *Glatt v. Fox Searchlight Pictures Inc.*, --- F.R.D. ---, 2013 WL 2495140 (S.D.N.Y) (interns at movie studio).

but did so after denying plaintiffs effort to submit three additional affidavits "showing the likelihood that a joint employment relationship may have existed." *Id.* at 775-76. The utility of *Quinteros* to this case is thus doubtful.[19]

B. The Court of Appeals Did Not Make "Numerous And Significant Errors Regarding The Trial Court Record."

None of the four errors claimed by Fred Meyer are errors of the court. Rather, Fred Meyer's claims of error are clouded by its misreading what the Court of Appeals said, misunderstanding the common definitions of words used by the Court, or misreading the record.

1. The Court of Appeals Correctly Characterized The Trial Court's Focus On The *Bonnette* Factors.

According to Fred Meyer "the panel is mistaken in its assertion that Judge Spearman considered only the *Bonnette* factors." Pet., p. 14.

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[19] Other errors by Fred Meyer in its discussion at pages 11-12 include characterizing as "service industry cases" three cases involving "cable technicians" who installed equipment in a customer's home. *See, e.g.*, Jacobson v. Comcast Corp., 740 F. Supp. 2d 683 (D. Md. 2010), *Jean-Louis v. Metropolitan Cable Communications, Inc.*, 838 F. Supp. 2d 111 (S.D.N.Y. 2011), *Zampos v. W&E Comm., Inc.*, --- F. Supp. 2d ---, 2013 WL 4782152 (N.D. Ill. 2013). Workers installing cable equipment seem a lot more like skilled workers such as electricians than like the janitors in this case who do not speak English and require essentially no training at all for their jobs. In that same section, Fred Meyer also claims that *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997) was decided under the "Agricultural Protection Act (not FLSA)." *Id.* at n. 3. That is contrary, *inter alia*, to the first paragraph of the opinion in *Torres-Lopez*. Moreover, given that *Torres-Lopez* states the law in the Ninth Circuit which includes Washington, it seems odd that Fred Meyer – which is also subject to the FLSA – criticizes the Court of Appeals' use of Ninth Circuit FLSA precedent. Finally, Fred Meyer complained that the Court of Appeals "failed to credit the holdings of service industry cases such as "...*Grenawalt [v. AT&T Mobility LLC*, --- F. Supp. 2d ---, 2013 WL 1311165 (S.D.N.Y. 2013)] ..., *Jean-Louis* ..., [and] *Godlewska* [v. HAD, 916 F. Supp. 2d 246 (E.D.N.Y. 2013)]." Since Fred Meyer never cited those cases to the Court of Appeals, it seems inappropriate to criticize the Court of Appeals for failing to "credit" them. . These cases arose in the Second Circuit and therefore are controlled by the *Barfield* and *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) decisions addressed in the Court of Appeals' opinion.

What the Court of Appeals actually said regarding the trial court's analysis in connection with the Fred Meyer motion at page 16 was:

> In its order granting Fred Meyer's motion for summary judgment, the trial court acknowledged that it focused on only the *Bonnette* factors, rather than also examining those enunciated in *Torres-Lopez*. (Emphasis added.)

"Focus" in this context means "**4.** close or narrow attention; concentration." AMERICAN HERITAGE DICTIONARY (3d Ed), p. 703. The record quoted by the Court of Appeals fairly indicates that the trial court "focused" or "concentrated" on the *Bonnette* factors. The Court also correctly concluded that the trial court's focus on the *Bonnette* factors "limit[ed] its analysis." *Id.* at 17. While the trial court mentioned other factors, the Court of Appeals fairly concluded that those factors were subordinate in the trial court's analysis and that cases such as *Rutherford, Barfield*, and *Torres-Lopez* were inconsistent with the trial court's focus.

2. The Record Contains Substantial Evidence That Fred Meyer Provided Equipment Used By The Janitors.

The Court of Appeals correctly stated at page 22 of the Slip Opinion that the janitors used Fred Meyer equipment. CP 1688-89 and 1350-51. Fred Meyer supplied janitors in the typical store with approximately $2,500 per month of Schedule C cleaning supplies, including mops, dust pans, scrapers, pads, gloves, brushes and cleaners. CP 1055-56 (Ezzo ¶ 5); CP 1324 & 1350-52. The AMERICAN HERITAGE DICTIONARY (3d Ed.) at page 622, defines "equipment" as "something with which a person, an organization, or a thing is equipped." That same

dictionary defines "equipped" as "to supply with necessities such as tools or provisions." Under that definition, Fred Meyer supplied janitors with an abundance of "equipment" including the mops, dust pans, pads, gloves, scrapers, brushes and cleaning supplies. Fred Meyer seems to be limiting its definition of equipment to a mechanized waxer/scrubber machine. *See* Pet., p. 15. A waxer/scrubber is a machine that comprises "a minor part of the business of a janitorial service provider company." CP 1059. AJ's equipment budget was only $50/month per Fred Meyer store[20] – 1/50 of Fred Meyer's per store Schedule C expense. Moreover, Fred Meyer ignores AAJ's testimony that Fred Meyer supplied AAJ with waxer/scrubbers in about five stores. CP 1269. Fred Meyer supplied 98% of the materials, including much equipment, used by the janitors.

3. The Record Supports The Court Of Appeals' Conclusion That "Employment Changes Were Required By Fred Meyer."

Fred Meyer at page 16 of its Petition admits that as to janitors who Fred Meyer considered shoplifters, it "directed Expert to remove them from the store." It is pretty obvious that a janitor who is removed from the store cannot function as a janitor at that store. A janitor being removed from Fred Meyer stores is like a nurse being removed from Bellevue Hospital in *Barfield.* In *Barfield*, at page 144, the Second Circuit held that the ability of Bellevue to exclude a nurse from working at that hospital meant that "Bellevue had the undisputed power to hire and fire at will

[20] CP 1017 & 1023-24 ($750/month for 15 stores).

agency employees referred to work on hospital premises." That is precisely what the Court of Appeals concluded in this case.[21]

4. Fred Meyer Never Objected to Alma Becerra's Testimony Regarding Fred Meyer's Role In Her Termination.

At Slip Op. 28, the Opinion states that Fred Meyer failed to object below to "the **testimony** of one of the janitors, Alma Becerra, regarding her termination." (Emphasis added.) Ms. Becerra testified at CP 1224 that she was told when she and her co-worker were discharged that a Fred Meyer manager "didn't want us there anymore." Fred Meyer did not object to this testimony.

Fred Meyer, at CP 775 and 781, introduced similar statements in Fred Meyer emails. Fred Meyer then objected to the emails that it put into evidence, but never objected to Alma Becerra's testimony. CP 2109; RP 11-13. The Court's Opinion at page 28 is correct, and Fred Meyer's argument is quite misleading.

C. The Court Of Appeals Decision Is Consistent With The Remedial Purposes Of The MWA, While Allowing Businesses To Leave The "Economic Realities" Of Janitorial Work To Subcontractors.

Fred Meyer argues at pages 18-19 that the "economic reality" test applied below is unworkable and will make every business entity that has

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[21] The record here also contains additional evidence that goes beyond the evidence in *Barfield*. Notably, the email exchange at CP 1395-96 and Mr. Chaban's testimony at CP 1242 provides ample support for the Court of Appeals discussion at page 24 of the Slip Opinion. The only case cited by Fred Meyer on this argument was *Jean-Louis v. Metropolitan Cable Communications, Inc.*, 838 F. Supp. 2d 111 (S.D.N.Y. 2011), a district court case within the Second Circuit. Fred Meyer ignored *Barfield*.

janitorial services performed on its premises into a joint employer. That is not so. While 66 years under *Rutherford* gives courts the flexibility to consider a non-exclusive set of factors in deciding the "economic realities," the opinion herein guides Washington businesses as to many of the factors that would support finding janitors are jointly employed and which therefore should be avoided if one wishes to avoid being a joint employer:

- All work is done on your premises and you are largely the only source of on-site supervision;
- You review the work and decide when the janitors are free to leave each day;
- You provide almost all of the cleaning supplies and equipment;
- Your evaluations of performance fill a void in on-site supervision and therefore indirectly result in janitor discipline or alteration of working conditions;
- The same janitors work full-time-plus on your premises exclusively for a period of months or years;
- The work is performed pursuant to extremely detailed lists of specific work tasks that you provide;
- You allow use of 2nd tier subcontractors who do little more than place vulnerable workers in your stores with you having constructive knowledge that wage and hour law violations are likely.

See Slip Op. at 2 & 22-24. This is a non-exhaustive list. *Id.*

At 18-19, Fred Meyer relies on *Quinteros* as support that the Court of Appeals herein opened up all users of janitorial services to joint employer claims. However, the *Quinteros* record demonstrates that Fred Meyer's subcontracting was very different than the Regal Cinema's subcontracting:

- Sparkle Cleaning supplied the cleaning materials and equipment – not Regal Cinemas (*id.* at 770),
- Sparkle trained employees on the equipment (*id.*),
- Sparkle transported the janitors to the theaters in Sparkle-owned vehicles (*id.*), and
- Janitors made only a "conclusory statement" that their work was "overseen" by Regal – no employee of Regal "supervises ... or instructs" the janitors.

532 F. Supp. 2d at 770 & 775-76. The present case is not *Quinteros.* Washington businesses will be able to hire janitorial service providers and allow them onto their premises to have their employees perform cleaning without ipso facto becoming subject to "joint employer" claims.

Equally important, the FLSA and MWA are remedial legislation designed to protect employees from substandard wages. *E.g.,* Slip Op. at 22 (citing *Anfinson*). The standards exist to protect workers, not to guide employers on how to avoid liability particularly when they are principally purchasing cheap labor.[22] The Court of Appeals opinion provides sufficient guidance on the issue of MWA "joint liability" such that Supreme Court review is not necessary.

[22] Treating the principal firm as a joint employer "is essential to assuring workers' rights are honored" where a principal relies on a "fly-by-night" or dishonest labor suppliers. *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 409 (7th Cir. 2007). The principal can protect itself by dealing with reputable firms and paying enough to cover proper wage payment. *Id.* Here, Fred Meyer exerted great control over these janitors and their work. Its contracts with Expert provided in ¶ 9.2 that Expert would assure FLSA compliance and further provided in ¶ 6 that Expert would indemnify it for attorney fees and damages. The missing piece is the workers' rights which can only be protected by using the MWA to scrutinize the "economic realities" presented herein.

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 15th day of November, 2013

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Subject: RE: Becerra v. Expert Janatorial, Division I, Cause # 89534-1

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To: OFFICE RECEPTIONIST, CLERK
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Subject: Becerra v. Expert Janatorial, Division I, Cause # 89534-1

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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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 MEMORANDUM OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Plaintiffs and the Amici agree on much of what the Court of Appeals did in its decision below[1], to wit:

- Recognized that "joint employment" under the Washington Minimum Wage Act ("MWA") is an issue of first impression.
- Adopted the Fair Labor Standards Act ("FLSA") "economic reality" test as the proper basis for deciding the issue, much like this Court did in *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012), on the analogous issue of MWA employee versus independent contractor status.
- Obtained guidance from the "seminal United States Supreme Court case" of *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), which it analyzed it in light of *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997), *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004), *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), and *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71 (2d Cir. 2003).

The Court of Appeals also followed the FLSA, with support from *Anfinson*, for the propositions that joint employment status is a question of law, while "the existence and degree of each factor is a question of fact." 309 P.3d at 716. Neither the parties nor Amici dispute any of the above principles.

The Court of Appeals reversed the trial court because its analysis was (a) too limited to the *Bonnette* factors and (b) misapplied several factors, as is discussed *infra*. The Amici ask this Court to accept review for two purposes. One is to "clarify which [economic reality] test applies," *i.e.*, create a definite list of factors, and the other is to "explain how the various factors of the appropriate test may be correctly applied"

[1] *Becerra v. Expert Janitorial, LLC*, -- Wn. App. --, 309 P.3d 711 (2013).

presumably herein and to cases generally. *See* Amici Mem., p. 7. As to a definitive list, the United States Supreme Court, the Circuit Courts of Appeal, the United States Department of Labor and the *Amici* all agree that there is no one exclusive list of factors. 309 P.3d at 715; *Amici* Mem., p. 6 ("the factors comprising the various versions of the economic reality test are not exclusive"). As to an explanation of the factors, as is discussed *infra*, the Court of Appeals gave substantial guidance on many factors to the trial court herein and future trial courts.

The Court of Appeals decision is judicious, *i.e.*, carefully sets forth largely undisputed principles for determining joint employment status and leaves it to the trial court to apply those factors, albeit with needed guidance as to the breadth of factors and insight as to application of specific factors. The opinion has not created confusion for Washington businesses, almost all of whom are subject to the same 9th Circuit authority relied upon by the Court of Appeals.[2] It will not "drive business costs in Washington higher" except to the extent that some putative joint employers may take greater care in selecting contractors where they have an ongoing, full-time-plus and close relationship with the contractor's employees, as herein. That is consistent with the MWA.[3] Contrary to the Amici's arguments, the present case is best suited for remand.

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[2] Ironically, Fred Meyer criticizes the Court of Appeals for relying too much on 9th Circuit opinions. Fred Meyer Pet., p. 12, n.3.

[3] As is discussed in plaintiffs' earlier briefing, Fred Meyer was already attuned to the joint employment issue. It obtained Expert Janitorial's promises (a) that the janitorial work would be done in compliance with the FLSA and (b) Fred Meyer be indemnified. Presumably, that somewhat increased Fred Meyer's subcontracting expense. It is also

II. ARGUMENT

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

The Court of Appeals relied on this Court's holding in *Anfinson* that the "MWA is based on the Fair Labor Standards Act of 1938," when it looked to the federal courts application of the FLSA to determine what constitutes joint employment under the MWA. 309 P.3d at 714. This Court in *Anfinson* also (a) recognized that "federal courts have established competing lists of nonexclusive factors that are relevant to the determination," and (b) did not either adopt or call for an exclusive list of factors. 174 Wn.2d at 869. The Court of Appeals did the same thing in this case for similar reasons. 309 P.3d at 716. This Court also agreed with the decision of the Court of Appeals in *Anfinson* to leave to the trial court some flexibility in determining factors. *See* 174 Wn.2d at 858, n. 1. The Court of Appeals in this case did the same. *Id.* at 720-21.

B. The Court of Appeals Gave Guidance on How to Apply Many Joint Employment Factors

The Court of Appeals gave considerable guidance to the trial court regarding specific factors, much as this Court did in *Anfinson.* For example, the Court of Appeals (309 P.3d at 724-26) lists at least eight "relevant joint employment factors with regard to defendant Expert," relying on non-exclusive factors utilized by various federal appellate

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one of many factors evidencing that Fred Meyer and Expert has more than a causal connection with these janitors who worked 7 nights and 60 hours a week without minimum wages or overtime pay.

courts. In the following table, plaintiffs list the factors the Court of Appeals found relevant to Expert, as well as citing FLSA authority.[4]

Factor	P.3d Cite	Cases That Refer To That Factor
1 Maintain employment records	724	-*Torrez-Lopez*, at 642 -*Moreau*, at 950 -*Layton*, at 1176
2 Determine the janitors' rate and method of payment	724	-*Torrez-Lopez*, at 642 -*Moreau*, at 950 -*Barfield*, at 145
3 "Expert concedes the existence of several factors, one of which is that the janitors' work was an integral part of its janitorial business"	724	-*Antenor*, at 937 -*Barfield*, at 145 -*Zheng*, at 72 -*Reyes*, at 408 -*Layton*, at 1176 -*Torrez-Lopez*, at 640 -*Moreau*, at 952 -DOL Opinion Letter
4 Expert also acknowledged that the janitors' work "required little initiative, judgment, or foresight"	724	*Rutherford*, at 730 *Torrez-Lopez*, at 644 -*Reyes*, at 408
5 The janitors had "little opportunity for profit or loss"	724	-*Rutherford*, at 730 -*Torrez-Lopez*, at 644 -*Moreau*, at 952
6 There is a genuine issue of material fact whether Expert had the power to fire or alter the employment conditions of All Janitorial and All American workers	724	-*Torres-Lopez*, at 642 -*Antenor*, at 935 -*Hodgson*, at 237 -DOL opinion letter
7 There was a genuine issue of material fact whether the janitors' employment was "permanent"	725	-*Torres-Lopez*, at 644 -*Moreau*, at 952 -DOL opinion letter

[4] *Rutherford Food Corp. v. McComb*, 331 U.S 722 (1947); *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004); *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996); *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973); *Torrez-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003); *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008); *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403 (7th Cir. 2007); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983); and DOL Opinion Letter, 2001 WL 1558966 (May 11, 2001).

8 The Expert contract passed "from one subcontractor to another without material changes" when All American Janitorial replaced All Janitorial	725	-*Rutherford*, at 730 -*Torres-Lopez*, at 644 -*Zheng*, at 72 -*Reyes*, at 408 -*Barfield*, at 145

Similarly, the Court of Appeals (309 P.3d at 721-24) identified relevant joint employer factors as to Fred Meyer as follows:

1 Indirect supervision and control of plaintiffs' work	721	-*Rutherford*, at 730 -*Torres-Lopez*, at 642 -*Layton*, at 1176 -*Reyes*, at 408 -*Antenor*, at 934 -*Moreau*, at 951
2 Control of plaintiffs' employment conditions	721	-*Rutherford*, at 730 -*Torres-Lopez*, at 642 -*Layton*, at 1176 -*Reyes*, at 408 -*Antenor*, at 935 -*Hodgson*, at 237 -DOL opinion letter
3 Plaintiffs' use of Fred Meyers premises and equipment	721	-*Rutherford*, at 730 -*Hodgson*, at 237 -*Torres-Lopez*, at 644 -*Reyes*, at 408 -*Barfield*, at 145 -*Antenor*, at 936-37 -*Moreau*, at 951 -DOL opinion letter
4 Permanence of plaintiffs' work	722	-*Moreau*, at 952 -DOL opinion letter
5 Degree of initiative judgment or foresight required by work	722	-*Rutherford*, at 730 -*Torres-Lopez*, at 644 -*Reyes*, at 408 -DOL opinion letter
6 Evidence that Fred Meyer's activities were subterfuge or sham to avoid MWA obligations	724	-*Castillo*, at 192 -*Barfield*, at 146 -*Zheng*, at 73-74 -*Reyes*, at 408-09

The Court of Appeals' decision gives the trial court substantial guidance.

C. Amici's Brief Misreads The Court of Appeals' Opinion As Well As FLSA Authority

According to Amici, the Court of Appeals' decision was "opaque," leaving the trial court and business community without any guidance. Amici Brief, p. 5 (it "didn't say"). To the contrary, in the subsequent portions of the opinion entitled "Status of Fred Meyer" and "Status of Expert", the Court repeatedly discussed the relevance of specific factors. For example, the court held with respect to Expert that "there are genuine issues of material fact with respect to a number of the relevant joint employment factors." 309 P.3d at 724. The above tables go through the Court of Appeals' analysis of those factors in some detail.

Amici's view of the extent of guidance on these matters is equally myopic. For example, the Amici (a) assert that "federal courts have given extensive guidance on which factors are and are not relevant to determine joint employment," and (b) argue that "by failing to decide which relevant factors apply and what relevant weight should be given them, the Court in reality adopted none of them." Mem. at 6.

(a) Defendant's first statement ignores the wide variation in the listed factors among the various federal circuits. The Amici's members doing business in different federal circuits are faced with different factors. Using, for example, circuit court cases cited by Amici, a company facing an FLSA joint employment claim in Pennsylvania would use the *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation,*

683 F.3d 462 (3d Cir. 2012) four-factor test, while the same company doing business in Florida would use the eight-factor *Layton* or *Antenor* test which adds factors not contained in the *Enterprise* test such as "ownership of the facilities where the work occurred." *Id.* at 1180. The same company in New York would use a four-factor test or a six-factor test or both depending on the nature of the claim. *See Zheng* and *Barfield, supra.*

Amici's analysis also ignores how factors evolve within individual circuits. In *Barfield,* Second Circuit explained that "the 'economic reality' of a particular employment situation" may require a "different set[] of relevant factors." *Id.* at 141-42.[5]

(b) *Layton* also illustrates why it is impossible to determine in the abstract "what relative weight should be given among" the various factors. There, the factor of "relative investment in equipment and facilities" did "not aid our joint-employment inquiry" because "both Skyland and DHL made significant investments in facilities and equipment." *Id.* at 1181. That factor would have been of more significance had only the putative

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[5] *Barfield* goes on to explain at page 143:

> Our more recent holding in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, reiterates the necessary flexibility of the economic realities test. In *Zheng*, we considered whether an entity that lacked formal control over workers – as defined by the four *Carter* factors – could nevertheless be considered their employer based on its exercise of functional control. .... Relying on language drawn from *Rutherford Food Corp. v. McComb*, 331 U.S. at 724-25, 67 S.Ct. 1473, *Zheng* set forth a six-factor test "pertinent" to identifying the "economic realities" of the employment relationship "in these circumstances," 355 F.3d at 72.

joint employer made significant investments in facilities and equipment. *Zheng*, 355 F.3d at 70, cited *Rutherford* for the proposition that "in certain circumstances, an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them."

D. Review Should Not Be Granted for the Purpose of Deciding Whether "a Dispute as to Some Individual Factors" Is Outweighed by "the Balance of Factors as a Whole.

The Amici request the Court accept review to decide whether "a dispute as to some individual factors preclude a grant of summary judgment when the balance of factors as a whole militates against a finding of joint employment." Mem. at 4. However, the importance of a dispute as to "some individual factors" depends on the totality of the circumstances. The Amici's formulation of the issue assumes the disputed individual factors are outweighed by a "balance of factors as a whole", *i.e.*, that a court has fully analyzed and weighed all relevant factors. That of course is also a fact-specific determination. Here, the trial court too narrowly focused on *Bonnette* factors, failed to consider the importance of Fred Meyer's daily janitor inspection/sign-out and in other ways did not do a full analysis and weighing of factors. The judicial process is better served by a remand.

E. The Present Case Is Not Garden-Variety Outsourcing; The Court of Appeals Did Not Adopt a Unique Test that Makes It "Impossible to Explain" Joint Employment.

The Amici argue that "while perhaps unintended" the Court of Appeals' decision could create MWA joint employment status for "even garden variety outsourcing or contracting." Mem. at 7. It concludes that "it is impossible to explain" to Washington companies the circumstances under which they may be exposed to joint employment liability. Neither statement is accurate. The Amici fail to explain what they mean by garden variety outsourcing or contracting. Here, Fred Meyer determined minutiae of the cleaning schedule and tasks, decided on and purchased all supplies and chemicals, retained the right to control payment of overtime, provided daily in-store inspections of the janitors' work – the only detailed and only on-site supervision, decided when the janitors were free to leave the store each workday and provided the only work-quality information on which to review janitor performance.

Expert Janitorial adopted a business model which relied on labor suppliers – like All Janitorial and All Janitorial – to supply the bodies to perform its principal service – cleaning. Fred Meyer and Expert operated in a national business environment where they knew that retail store janitor cost savings were widely being achieved by exploitation of immigrant workers, which included misclassification of janitorial workers and non-payment of minimum wages and overtime. They each had notice of widespread violations by All Janitorial and All American Janitorial.

Neither Fred Meyer nor Expert expected or wanted anything from All Janitorial and All American Janitorial other than cheap labor and use of a waxer/scrubber machine. This is not garden variety contracting and goes to the core of MWA concerns.

The Amici seem to be seeking a definite set of factors that if followed will be an inoculation against joint employment status. Wisely, whatever the facts, neither *Rutherford*, in 1947, nor any subsequent decision has done that. Nor would doing so be desirable to accomplish the remedial purposes of the FLSA and MWA. A definite set of factors unmoored to the facts could be used to structure relationships to appear to avoid a joint employment relationship, while exploiting economically dependent immigrant and other workers. The MWA would be better served by encouraging entities such as Fred Meyers who take workers into their stores for full-time-plus employment to exercise their power to promote MWA compliance. There is no need to accept review of the Court of Appeal's decision which simply extended FLSA "economic reality" analysis to this MWA joint employer issue.

III. CONCLUSION

Respondents respectfully request that the petitions for review be denied.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

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OF THE STATE OF WASHINGTON

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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.	NO. 89534-1 AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
County of King)

I, Nona Farley, being first duly sworn upon oath, declare and state:

1. I am an employee of Schroeter, Goldmark & Bender, over the age of 18, not a party to this action, and competent to make the following statements.

2. On January 10, 2014, I filed the Respondents' Answer To Memorandum of Amici Curiae and this Affidavit of Service via email to supreme@courts.wa.gov and served copies of Respondents' Answer To

Memorandum of Amici Curiae and this Affidavit of Service via legal messenger on the attorneys of record for Petitioners at the following address:

Jeffrey Youmans Melissa Mordy Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, Washington 98101-3045 **Attorney for Expert Janitorial LLC**	Frank van Dusen Madeline Engel Miller Nash LLP 601 Union Street, Suite 4400 Seattle, WA 98101 **Attorney for Fred Meyer**
Kristopher I. Tefft Association of Washington Business 1414 Cherry Street SE Olympia, WA 98057 Attorney for Amici Curiae	

Nona Farley

SUBSCRIBED AND SWORN TO BEFORE ME this 10th day of January, 2014.

RHONDA L. JONES
Notary Public in and for the state of Washington, residing at Silverdale.
My Commission Expires: 07/11/17

OFFICE RECEPTIONIST, CLERK

To: Farley, Nona
Subject: RE: Becerra v. Expert Janatorial, Division I, Cause # 89534-1

Rec'd 1/10/14

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: Farley, Nona [mailto:farley@sgb-law.com]
Sent: Friday, January 10, 2014 4:09 PM
To: OFFICE RECEPTIONIST, CLERK
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From: Farley, Nona
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Subject: Becerra v. Expert Janatorial, Division I, Cause # 89534-1

Attached please find Respondents' Answer To Memorandum of Amici Curiae and Affidavit of Service for filing today in Becerra v. Expert Janitorial, et al., Division I, Cause # 89534-1.

These documents are filed by:

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No. 76752-6-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

MARIA ESPINOZA and JUAN FRANCISCO HERNANDEZ TORRES,
Individually and as Class Representatives,

Appellants,

v.

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

FRED MEYER STORES, INC.,
Respondent.

RESPONDENT FRED MEYER STORES, INC.'S APPEAL BRIEF

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Issue Pertaining to Assignment of Error. Where Appellants and Expert Janitorial entered into agreements so that Appellants received consideration in exchange for releasing claims against Expert Janitorial and Fred Meyer (but not their direct employer), did the Trial Court err in ruling that the releases are unenforceable as a matter of law because they were not pre-approved by a court or government official?

Fred Meyer respectfully informs this Court that this very same error and issue is presented for the entire class in the companion case of *Mendoza v. Fred Meyer Stores, Inc., et al.*, Washington Court of Appeals, Div. I, Case No. 77948-6-1, which involves the same trial court, parties, and counsel as are involved herein. Fred Meyer intends to more fully address this legal error in the *Mendoza* appeal. Because this issue is only asserted herein in the event the Court grants Appellants' appeal, Fred Meyer will not double-brief the issue now. Case law and pertinent facts can be found in CP 883-899.

IV. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND AND TRIAL

1. Pre-trial.

In September 2014, Appellants filed a class action case asserting wage and hour violations by their direct employers M.H. Janitorial LLC ("MHJ") and All American Janitorial LLC ("AAJ") and their owners/managers, respectively Esteban Hernandez ("Hernandez") and Raul Campos ("Campos") related to their work cleaning Washington Fred

Meyer stores. Appellants also asserted claims against Expert Janitorial and Fred Meyer, alleging that both were joint employers of Appellants. Fred Meyer had contracted with Expert Janitorial for cleaning services; Expert Janitorial subcontracted with MHJ and AAJ to fulfill its obligations to Fred Meyer. Appellants never served AAJ or Campos, who were therefore dismissed from the case.

The Honorable Beth Andrus, King County Superior Court judge ("the Trial Court") presided over the class certification stage, multiple dispositive motions, and all pretrial hearings, procedural and substantive. Before trial began, Judge Andrus had already reviewed thousands of pages of briefing, exhibits, declarations, and deposition testimony, and heard hours of oral argument on many issues.

2. Trial and Post-trial.

The trial lasted seven weeks, from January 3 to February 13, 2017. CP 915. The Trial Court heard live testimony from 43 witnesses (CP 979, 787-88),[1] additional deposition testimony from six of those live witnesses (CP 979), and nine more witnesses by deposition alone. *Id.* (A total of 52 witnesses.) The Trial Court also considered 443 admitted exhibits. *Id.*

[1] The Court's appendix to the Order (CP 979) omitted seven live witnesses (Mark Scheid, Alma Martinez Valesquez, Paul Petillo, John Ashmore, Jose Valencia Ramirez, Guadalupe Suarez, and Richard Klockeman), who all appear on the Clerk's record of witnesses (CP 787-788). Note, the Clerk's Record is missing two witnesses, Juan Francisco Hernandez Torres (one of the named plaintiffs) and Esteban Hernandez (a defendant). Compare CP 787-88 to CP 979.

After substantial post-trial briefing, the Trial Court issued a 67-page Memorandum Order. 914-980. It found three of the four remaining defendants to be liable to the class, including Expert Janitorial as a joint employer. The Trial Court also found that Fred Meyer was not a joint employer and so not liable to the class. CP 977-978.

B. FRED MEYER CONTRACTS WITH EXPERT JANITORIAL TO CLEAN ITS WASHINGTON RETAIL STORES

Fred Meyer is a retailer with no particular expertise in providing janitorial services. CP 917. In fact, it is the only party here who is not in the janitorial business. In 2004, Fred Meyer contracted with a company eventually purchased by Expert Janitorial[2] to clean some of its stores in Washington. Outsourcing that work allowed Fred Meyer to focus its efforts on retailing and merchandising—Fred Meyer's core business—rather than cleaning and maintaining the store. Appellants' expert confirmed that it is common for retailers to outsource janitorial work. Appellants concede that janitorial services are not integral to Fred Meyer's business and not a necessary or inherent part of the process of selling consumer products. CP 970-971.

Expert Janitorial is not a fly-by-night operation. It provides

[2] Fred Meyer first contracted with Industrial Cleaning Management LLC, which subsequently became Janitorial Management Services LLC ("JMS"); JMS was acquired by Expert Janitorial in2007. CP 917-918.

services nationwide to retailers like Barnes & Noble (its largest client), Dick's Sporting Goods and Rite Aid. CP 918; RP 2287:16-21; RP 2288:20-2289:3, 2289:13-2290:16. Expert Janitorial provided over 500,000 separate cleaning services a year to its various clients, only three percent of which were the Fred Meyer stores at issue in this case. RP 2306:6-237:10. Expert Janitorial's annual revenues ranged from $40-to-$43 million per year. RP 2369:1-11; CP 918. Fred Meyer paid Expert Janitorial about $4 million annually. *Id.*

Expert Janitorial does not self-perform janitorial work but subcontracts with Service Providers ("SPs"). CP 918. Typically there are 1500 SPs that perform the janitorial work for Expert Janitorial's customers. *Id.* Expert Janitorial advertised that one of the services it offers was monitoring the wage and hour compliance of its subcontractors. *Id.*

The parties agree that the contracts between Fred Meyer and Expert Janitorial assigned the responsibility for legal compliance of the performance of the janitorial services to Expert Janitorial, including wage and hour compliance, and Expert Janitorial agreed to ensure that its subcontractors would comply with wage and hour laws. CP 920.

C. FRED MEYER IS EXPERT JANITORIAL'S CUSTOMER

Under its contract with Fred Meyer, Expert Janitorial provided daily cleaning services. Fred Meyer sought to have its stores appear clean

when they opened for customers at 7:00 a.m. Expert Janitorial controlled the visual standard, and the Fred Meyer-Expert Janitorial contract identified various cleaning tasks that could be implemented to achieve the level of cleanliness that Fred Meyer desired. RP 1181:3-1182:25; 1191:4-1192:9 ("The expectation was that it was prepared and ready for [Fred Meyer's] customer ….. it was a visual standpoint to meet"). Fred Meyer did not require janitors to perform each task every each night. *Id.*; RP 1184:25—1185:6; 2913:5-15.

Expert Janitorial's manager Susan Vermeer directed the SPs on what they needed to do to meet the required standard. First, she created a limited list of "nightly basics" for the SP's janitors to complete each night. CP 956. Vermeer also developed a rotating vacuuming schedule, as well as other interval schedules. CP 956-957.

D. NO FRED MEYER MANAGER ON SITE WHILE THE JANITORS CLEANED, AND NO FRED MEYER HOURLY EMPLOYEE MONITORED THE JANITORS

Appellants cleaned the stores at night when they were closed. CP 919. It is undisputed that except for very rare occasions, the only Fred Meyer employees on site while the store was being cleaned by Appellants were Fred Meyer hourly, union employees without any hire/fire/discipline authority, even over Fred Meyer employees. *See, e.g.,* RP 2725:12—2726:19. No Fred Meyer employee regularly monitored the janitors

performing duties, trained or instructed them how to clean or perform their duties, or hired, fired, or disciplined any janitors. CP 969; *see also, e.g.*, RP 909:22-24; 910:4-6; 1227:11-23; 1892:8-11; 1901:10-15; 2727:21-2783:3.

"The janitors actually had very little direct supervision." CP 958. Appellants' expert witness John Ezzo explained that this is standard practice for two person janitorial crews, as is not having a direct supervisor on site. One of the janitors takes the lead and the supervisor is accessible by phone if needed. RP 269:8-21, 280:22-281:7. Expert Janitorial's SPs followed this model, with two person crews in the stores and supervisors available by phone. RP 362:4-363:12 (class representative; "all the instructions and orders came from Esteban [MHJ manager]" and the other janitor); 288:19-289:2 (same); RP 1229:25-1230:10 (same).

E. FRED MEYER COMMUNICATED COMPLAINTS TO EXPERT JANITORIAL FOR RESOLUTION; MHJ DECIDED HOW TO RESOLVE THE SITUATION

At times Fred Meyer managers believed that the stores were not as clean as Expert Janitorial had promised. When that happened, Fred Meyer told Expert Janitorial. CP 931-932, 957, 969. Appellants suggest these complaints amount to Fred Meyer exerting ultimate power over their employment. But there was substantial evidence at trial to the contrary.

Hernandez (MHJ's manager) repeatedly testified that it was his decision about how to resolve an issue of poor service. He might send in additional help, retrain or transfer janitors, or a chronic issue might cause him to decide to eventually terminate. *See, e.g.*, RP 723:2- 725:6, 773:16-20, 718:10-719:15. While he sometimes complied with Expert Janitorial's request that he transfer a janitor, CP 959, there was no such finding as to Fred Meyer. *See also* CP 1225-1233 (chart summarizing evidence showing a lack of connection between Fred Meyer complaints about poor service and subsequent janitor history).

F. MHJ ALWAYS CLASSIFIED APPELLANTS AS EMPLOYEES, NOT INDEPENDENT CONTRACTORS

MHJ was the SP for the stores at issue from mid-December 2011 to September 2014 (all but about ten weeks of the class period). It is undisputed that MHJ always classified the janitors as employees, and not as independent contractors. *See, e.g.,* CP 941.

Prior to MHJ, the SP for about 19 of the 40 stores at issue in this case was AAJ. AAJ was also a defendant in *Becerra v. Expert Janitorial*, and in August 2011, AAJ's owner Raul Campos was deposed. As the Trial Court noted, Campos/AAJ had been treating janitors as independent contractors prior to the filing of *Becerra* but was converting them to employees over time. CP 923. As of the deposition, Campos/AAJ still

had to convert about half their janitors. *Id.*[3] Shortly thereafter, Fred Meyer was dismissed from *Becerra* on summary judgment. EX 1025.

It is undisputed that in August/September 2011, immediately after Campos' deposition, Expert Janitorial's Vermeer began working to replace AAJ. She induced Hernandez to create a new SP company that classified the janitors as employees, and subsequently assigned him all the stores at issue in this case, including the stores that had been assigned to AAJ. By mid-December 2011, AAJ had been replaced by MHJ. CP 926-28.

G. APPELLANTS MISREPRESENT THE RENEGOTIATED 2014 FRED MEYER/EXPERT JANITORIAL 2014 CONTRACT

Appellants do not dispute that from 2011-May 2014, Fred Meyer paid Expert Janitorial enough for Appellants to receive a lawful wage.

Appellants assert, however, that the 2014 renegotiated Fred Meyer-Expert Janitorial contract resulted in a "$2 million dollar reduction" and so as of May 2014, Fred Meyer's payments was insufficient. Appellants' Br. at pp. 41-43. This assertion and argument misconstrue the evidence in numerous ways.

[3] The Trial Court also found that Campos was confused in his deposition. CP 923. Elsewhere in his deposition, Campos testified in response to a straightforward question that he was not currently treating janitors as independent contractors. CP 1453 ("Q: are some of the people who work with you independent contractors? A: No."). Fred Meyer still believes that this explicit testimony is more reliable than the earlier testimony responding to convoluted questions, but acknowledges that the Trial Court concluded this deposition put Fred Meyer on notice that AAJ was not fully complying with wage and hour law.

First, the overall contract price/reduction and rebate of the 2014 contract pertained to all the 77 stores that Expert Janitorial was cleaning for Fred Meyer in Washington, Alaska, and Oregon, not just the 40 stores here. *See* RP 1089:6-1099:8; RP 1198:14-1199:7; EX 1527. Less than half the 2014 price reduction and the never-collected rebate related to the stores at issue. *See* EX 1527.

Second, the renegotiated contract also reduced significantly the amount of work required to complete it. For example, Fred Meyer was installing concrete floors in its stores, which took far less time to clean.[4] Fred Meyer also eliminated the work order process each night, and other reductions were made.[5] CP 946. Expert Janitorial considered these reductions when it bid on the 2014 contract. RP 1101:8-15.

Third, the supposed "loss" from the rebate was only an estimation that Expert Janitorial had on the books, and not actual out of pocket funds. RP 1087:15-1089:5. It is uncontested that when Expert Janitorial told Fred Meyer that paying the rebate would result in a loss, Fred Meyer agreed to

[4] Converting from VCT tile ("a huge cost" to clean) to concrete resulted in significantly less janitorial work. RP 2573:18—2574:14; 2559:18-2560:5 ("And the polished concrete of course you only spend about a quarter of the time cleaning that as opposed to the VCT [tiles]."); 1213:17-22 (concrete floors are "a lot less labor intensive"); RP 256:5-24 (Ezzo); 1094:21-1095:10 (Expert Janitorial); and 745:2-20 (MHJ manager Hernandez).

[5] For example, for the remaining tile-floor stores, the 2014 contract changed the requirement that scratches be removed whenever the appeared (which was almost daily) to only once every eight weeks, window washing was eliminated altogether, and the janitors were no longer cleaning behind the food preparation counters. CP 946; RP 1192:23—1194:19.

give it up, except for $200,000 in the first year.[6] CP 946-947. In the end, Fred Meyer gave up even this reduced rebate. RP 1088:23-25; 1199:8-11.

Fourth, regardless of its arrangements with Fred Meyer, Expert Janitorial did not reduce the overall amount it paid to MHJ in May 2014 or thereafter. RP 1090:9-14. While the amounts per store changed (some went up, some went down) overall Expert Janitorial paid MHJ the same amount even with the reduced scope of services effective in May 2014. EX 1581.

Finally, Appellants assert that the Fred Meyer/Expert Janitorial 2014 contract was entered into after Fred Meyer learned of the U.S. Department of Labor ("USDOL") calculations on allegedly unpaid wages due to the janitors. Again, Appellants are incorrect. Negotiations for the new Fred Meyer-Expert Janitorial contract began in 2013, and Fred Meyer accepted Expert Janitorial's bid on February 28, 2014. EX 1527. USDOL did not transmit its calculations to Fred Meyer until late April 2014. EX 270 (at ¶ 7).

H. FRED MEYER'S KNOWLEDGE IS DIFFERENT FROM EXPERT JANITORIAL'S KNOWLEDGE

As they repeatedly did at trial, Appellants conflate the evidence about what Expert Janitorial knew about possible wage violations by its

[6] Again, this was for the full contract; less than half pertained to the stores at issue here.

SPs and what Fred Meyer knew, making no attempt to distinguish what each party knew and when. This distinction is important because Fred Meyer did not know at any time what Expert Janitorial was paying to its SPs during the class period or, in turn, what the SPs were paying their janitors. *See, e.g.*, RP 2338:9-12; CP 1179:23-1189:14.

1. Beginning after *Becerra*, Expert Janitorial repeatedly represented that it was auditing exactly as Appellants' expert witness recommended.

Fred Meyer did not prepare payroll or pay wages to Appellants, a fact that weighs against joint employment and one that is not challenged on appeal. CP 970. Unlike Expert Janitorial, Fred Meyer did not review the payroll records or timesheet records of Appellants or the SPs. *Id.*

Instead, Fred Meyer reasonably relied on Expert Janitorial's repeated representations that it was auditing MHJ's payroll records to ensure compliance with the law. Appellants' expert witness testified in 2011 that a retailer should require the janitorial management company to monitor SPs' records and ensure they comply with wage and hour laws. He likewise testified that the janitorial management company should periodically review the payroll and time records of its SPs to ensure the SPs were properly paying the janitors. EX 194 (Ezzo May 2011 *Becerra* declaration; at ¶¶43-45).

That is exactly what Fred Meyer required of Expert Janitorial,

which represented several times that its audits uncovered no issues. CP 971, 960 ("Starting in 2012, Expert audited MHJ every two months, or at least represented to Fred Meyer it was doing so, to ensure the janitors were being paid.").[7] Unfortunately Expert Janitorial misled Fred Meyer to believe the SPs were complying with the law, and that it was regularly auditing. CP 942-943 (Expert Janitorial's representations to Fred Meyer were "inaccurate in several material respects and misleading in others"), 965. Fred Meyer had no reason to suspect these post-*Becerra* representations of auditing by Expert Janitorial's CEO, CFO, and local manager were untrue or inaccurate.

2. Expert Janitorial concealed its July 2011 Audit of SP Premier/Esteban Hernandez from Fred Meyer.

It is undisputed that in July 2011 (shortly after Mr. Ezzo's May 2011 *Becerra* declaration), Expert Janitorial conducted its first real wage and hour audit of its Washington SPs. From this audit, Expert Janitorial learned of various wage and hour violations by its SPs,

[7] For example, EX 1541 (March 2012, Expert Janitorial CFO Phil Pacey confirmed legal compliance); EX 39 (June 2012, Expert Janitorial manager Susan Vermeer reported she had audited all payroll records, "MH janitorial is paying properly, including proper overtime for their employees," and that MHJ had passed a government audit); EX 817 (October 2012, Expert Janitorial CEO Milt Cohen represented that "Expert has been regularly auditing its Service Providers to make sure they are correctly classifying their janitors as employees and paying them according to wage and hour laws."); EX 819 (May 2013, Cohen again represented that Expert Janitorial regularly audited MHJ to ensure that janitors were being paid legally); EX 1540 (December 2013, Vermeer again stated she was auditing MHJ's payroll records and "all employees working overtime are properly paid per state and federal law for hours worked.").

including Hernandez. CP 924-926. It is also uncontested, however, that Expert Janitorial did not tell Fred Meyer about this audit, and Fred Meyer did not learn of it until October/November 2016, immediately before trial in this case. RP 1755:20—1756:7 (Vermeer); RP 1050:21-24, 1051:7-9 (Pacey). This undisclosed July 2011 audit gave Expert Janitorial (but not Fred Meyer) knowledge of then-current violations by its other SPs. CP 924-926.

3. 2012/13 U.S. Dept. of Labor Investigation of MHJ.

In May 2013, Fred Meyer learned for the first time that the U.S. Department of Labor ("USDOL") was investigating MHJ about paying the janitors a salary in 2012. By the time Fred Meyer learned of this, the practice had already been corrected. EXS 253, 1586; EX 268 (¶¶ 8-9). A year later, Fred Meyer received a copy of USDOL's calculation of wages due MHJ's janitors, the first indication that USDOL had more concerns than just the salary period. CP 945. At this time, Fred Meyer learned that the USDOL's concern as to it was the work orders, but those had already been eliminated in the new contract effective May 2014. *Id.*[8]

[8] Ultimately, neither Fred Meyer nor Expert Janitorial knew until the trial was over how much was owed to the janitors for the salary period when the Trial Court determined both the number of uncompensated hours the Appellants worked during the class period (CP 945-946) and the appropriate formula to calculate the wages due for the "salary" period. Fred Meyer was not involved in the post-trial briefing or determination regarding calculation of damages, as the Trial Court had not found it liable as a joint employer.

4. Fred Meyer's pre-class knowledge.

Appellants rely heavily on a few pre-class allegations and claims involving different SPs who allegedly treated janitors as independent contractors (and not as employees like MHJ did) to argue that Fred Meyer therefore had contemporaneous knowledge about MHJ's violations.

They point to allegations the *Alcantara* plaintiffs asserted in 2009. It is uncontested that when Fred Meyer learned of these alleged violations, Fred Meyer promptly asked Expert Janitorial to resolve it. Expert Janitorial subsequently chose to settle the claims. CP 936.

Appellants also point to *Becerra* and the fact that Fred Meyer was a defendant in that case. But again, the primary issue in *Becerra* involved the misclassification of janitors as independent contractors which led to incorrect payment of overtime, minimum wages, etc. *Becerra*, 181 Wn.2d at 192 ("plaintiffs contended that they were misclassified as independent contractors."). In any event, it is undisputed that following *Becerra*, significant changes were made, including MHJ classifying the janitors as employees, Expert Janitorial representing it was auditing, etc.

V. ARGUMENT

A. SUMMARY

The Trial Court's preparation and diligence in presiding over this complex and lengthy trial, factual and legal analysis, and articulation of its

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