NO. 98045-4

SUPREME COURT
OF THE STATE OF WASHINGTON

OSCAR MENDOZA, *individually and as Class Representative*,

Respondent-Plaintiff,

v.

FRED MEYER STORES, INC.,

Petitioner-Defendant.

Court of Appeals No. 77948-6-1

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT AND SUMMARY OF ARGUMENT

Respondent ("Plaintiff") represents the certified class of 69 janitors who worked at Petitioner Fred Meyer's ("Defendant") stores. Defendant's only claimed basis for seeking review on two specific issues pursuant to RAP 13.4(b)(4) does not call for this Court's review for multiple reasons. First, as discussed below, Defendant's two claims do not challenge multiple independent reasons the Court of Appeals ("COA") gave for reversing and remanding the trial court's summary judgment. Secondly, Defendant's primary argument seeks review on an issue that neither the trial court nor the COA ever addressed.[1] Thirdly, and most importantly, Defendant's analysis of the first issue it presents for review is inconsistent with RCW 49.46.090(1) and controlling precedent, and an analysis of the second issue raised by Defendant for review relating to virtual representation shows no error by the COA.

II. CITATION TO COURT OF APPEALS

Respondent asks this Court to deny the Petition for Review of the COA's decision as well as the Order Denying the Defendant's Motion for Reconsideration.

[1] For example, none of the decisions cited by Defendant at p. 10 of its petition, regarding this Court's acceptance of review of substantial public issues, appear to include review of issues that were not addressed by either the trial court or the COA.

III. RESPONDENT'S STATEMENT OF THE CASE

A. The Fall 2015 releases are the type of releases subject to no-release principles.

The 69 janitor class members who accepted settlement money executed documents that were mailed to them in the fall of 2015 by Expert Janitorial LLC, purporting to release all wage and hour claims. See CP 1200-1203; CP 88-92. The releases were tendered without Court approval or supervision. CP 1510. The offers were a small fraction of the janitors' judgments in the Espinoza case and of the amounts that the U.S. Department of Labor believed the janitors were due. CP 1871 to 1876.[2] The janitors were not of a class that would have equal bargaining power with Expert. See CP 1878-1884 (¶¶ 10-14). The letters and releases were complex and not likely to be understood by class members. Id.; see CP 88-92; 1202-1203, 1208 (¶2), 1210 (¶12), 1214 (¶¶ 10-12), 1217 (¶¶7-8), 1222 (¶¶15-16).[3]

B. The facts in the record demonstrate the inapplicability of the doctrine of virtual representation for purposes of summary judgment.

The COA correctly held that with respect to the related action of Espinoza, the facts do not support the applicability of the doctrine of virtual representation to this case. None of the criteria for virtual representation established by Garcia v. Wilson, 63 Wn.App. 516, 820

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[2] The Espinoza and Gaspar judgments were entered 18 months after the fall 2015 extrajudicial settlement payments. If the additional accrued interest is backed out, the fall 2015 settlements were **15%** of the October 2015 value of the janitors' claims as determined in Espinoza and Gaspar.

[3] The above CP cites are to the English translations of Mendoza janitor declarations submitted in support of certification in Espinoza. See CP 1172 (¶6).

P.2d 964 (1991) have been met – there was minimal participation by the Mendoza janitors in the Espinoza trial, and the evidence in the two cases would not be identical. The COA also correctly relied on Smith v. Bayer Corp., 564 U.S. 299, 313-15 (2011) to hold that virtual representation does not apply under the facts presented in the record.

IV. ARGUMENT

A. The Fall 2015 releases do not bar the class Washington Minimum Wage Act ("MWA") claims.

1. Pursuant to RCW 49.46.090(1), these extrajudicial releases are not a defense to class members MWA claims

As of 2015, RCW 49.46.090(1) contained two sentences and provided:

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

By its plain meaning, the first sentence makes "any," i.e., "every," employer[4] liable to "any" employee not paid at proper wage rate under the MWA "for the full amount due" under the MWA less "any amount actually paid to such employee by the employer." By its plain meaning,

[4] WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (Unabridged) (2d Ed) at p. 83, subsection 4, defines "any" to mean "every."

the second sentence provides that "any," i.e., every agreement between "such employee and the employer, shall not be a defense to such action." Since any such agreement "shall not be a defense to any such action," the agreements signed by class member employees in this case did not bar the action and do not change any liability imposed by the MWA.[5]

RCW 49.46.090(1) does not apply only to prospective agreements "to work." Rather, by its terms, the statute applies to "any agreement … to work for less than such [MWA imposed] wage rate." Its provisions limit the effect of an agreement that would permit sub-MWA wage rates whenever it was signed, as the effect of such an agreement would be to permit violations of the MWA. Such an agreement would have that same effect whether it was signed the day before the work was performed, the day after the work was performed but not yet paid, or months after the work was performed and paid for in violation of the MWA. Any such agreement would therefore be "any agreement" to work for less than what the MWA requires, whenever it was signed.

Furthermore, the second sentence of RCW 49.46.090(1) refers to "such employee," which by plain meaning references back to "employee" in the first sentence. "Such employee" thus refers to an employee who has a claim under the statute because he has been paid

[5] While the releases are not a defense to this action, Plaintiff does not dispute that consideration paid by Expert to the employees for the releases would properly be considered to be an "amount actually paid to such employee by the employer," and thus would reduce the damages.

less than MWA wages. The first sentence "employee" had already done the work and has a cause of action when paid improperly. A prospective-only interpretation thus also conflicts with the "such employee" statutory language.

Defendant argues at p. 15 of its motion to reconsider that:

> The plain meaning of this provision [the second sentence of 49.46.090(1)] is to preclude employers and employees from prospectively contracting out of the statutory minimum. It says nothing about after-the-fact settlements of disputed wage and hour claims."[6]

Defendant's arguments are flawed for multiple reasons. As discussed above, that provision applies not to an agreement "to work," but to "any agreement … to work for less than such wage rate." Any such agreement could easily be made after the work was done (which is ordinarily a prerequisite to being paid). For example, an employer on pay day after the work was done could require an employee to agree to take less than minimum wage as a condition of the employer paying the worker that day. A desperate or needy employee could also be induced by an employer to agree to give up his or her MWA rights after being paid an inadequate amount under the MWA in order to continue to remain employed by that employer. As also discussed above, the plain meaning of the references to "[a]ny employee" and "[a]ny agreement" supports a broad interpretation of the provision.

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[6] Defendant's argument at p. 48 of its original brief to the COA also was that the plain meaning of 49.46.090(1) was "simply that employers and employees may not prospectively enter into employment agreements 'to work' for less than the statutory minimums."

2. Defendant's proposed interpretation is also inconsistent with accepted principles of statutory interpretation, the purposes of the MWA, and prior precedent by this Court.

Interpreting RCW 49.46.090(1) as suggested by Defendant is also incorrect because it would be inconsistent with (a) judicial recognition of the unequal bargaining power between employers and employees; (b) Washington precedent that the MWA should be liberally interpreted; and (c) prior Washington Supreme Court precedent, which strongly supports Plaintiff's position.

(a) The requirement that an agreement between an employer and employee cannot properly be interposed as a defense if the employee has not in fact been paid the statutory minimum goes to the core of the MWA and overtime requirements. Those laws largely exist because there is unequal bargaining power between employers and employees. Parrish v. West Coast Hotel, 185 Wash. 581, 585, 55 P.2d 1083 (1936), aff'd sub nom West Coast Hotel v. Parrish, 300 U.S. 379 (1937) ("'[E]mployees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered'").

(b) The MWA is remedial legislation, which must be liberally construed. See Becerra v. Expert Janitorial, LLC, 176 Wn. App 694, 309 P.3d 711 (2013), aff'd, 181 Wn.2d 186, 195, 332 P.3d 415 (2014). As is discussed infra, there is a long history under both

Washington law and the Federal Fair Labor Standards Act ("FLSA") of refusing to recognize extrajudicial settlements as a defense to statutory wage claims, regardless of whether these agreements occur prior to, at the same time as, or, as here, after the performance of the work. Defendant's interpretation of that provision in no event comports with a liberal interpretation of that provision of the MWA.

(c) Washington has a "long and proud history of being a pioneer in the protection of employee rights." Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 299-300, 996 P.2d 582 (2000).[7] As its primary example of that long and proud history, Drinkwitz discussed the Laws of 1913, ch. 174, Washington's minimum wage law for women and children, which predated the FLSA by 25 years. 140 Wn.2d at 586-87.

Larsen v. Rice, 100 Wash. 642, 171 Pac. 1037 (1918) not only upheld the constitutionality of this 1913 minimum wage law, Laws of 1913, ch. 174, but also held that a private settlement of minimum wage claims between private parties conflicted with public policy underlying the minimum wage law. After ending her employment, a former movie theater employee returned to the workplace and demanded $274 in minimum wage act damages. The parties disputed the hours worked per

[7] In Drinkwitz, the Court cited that "long and proud history" as a rationale to provide greater overtime protection to professional employees than were provided by FLSA regulations, even though the operative statutory language was the same. Id. at 300; accord Bostain v. Food Exp., Inc., 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (citing "long and proud history," MWA applied to out-of-state driving by Washington-based truck drivers, despite contrary DLI regulations and policy).

day (5½ hrs. versus 3½ hrs.), disputed the legality of state agency orders setting the applicable minimum wage, and disputed whether the employee's job was covered by the orders. Id. at 647-48. The parties engaged in a "full and free discussion" regarding the claims and entered into a written, signed settlement agreement under which the former employer paid $40 and promised six months of future employment at a rate that was higher than the state minimum wage. See id. at 648-49.[8] The former employee signed the agreement, accepted (but did not cash) the check and worked in her new position "'for a considerable length of time,'" but then brought suit. Id.

Larsen's analysis began by reciting at length Washington policy favoring settlements (id. at 649-50[9]), a policy that the janitors agree continues to this day in appropriate circumstances. This Court, however, held that the wage and hour settlement was different because the

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[8] The applicable state minimum wage was $10 for a 48-hour work week; the new employment would pay $5 for a 21-hour work week, i.e., enough pay to cover a 24-hour work week. See id. at 645, 647-48.

[9] This Court in Larsen wrote:

> It is undoubtedly a general rule that private controversies between individuals sui juris may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled and that the other gave up rights to which he was fully entitled; this, on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. …

100 Wash. at 649 (emphasis added). That added element of state interest is described in the text's quote from Larsen, 100 Wash at 649-50, infra.

minimum wage law involved a public right, and therefore a state interest in settlements. This Court went on to hold that:

> [The settlement] was not wholly of private concern. It was affected with a public interest. The state … has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage, and by giving to the employ a right of action to recover the difference between the wage actually paid and such minimum wage. … It was believed that the welfare of the public requires that wage-earners receive a wage sufficient for their decent maintenance. **The statute being thus protective of the public as well as of the wage-earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable, if not void**. ….

Id. at 649-50 (emphasis added).

The features of the 1913 minimum wage law quoted in Larsen above are part of today's MWA.[10] The anti-waiver-by-agreement

[10] As with the Law of 1913, RCW ch. 49.46 was:

- "enacted for the purpose of protecting the immediate and future health, safety and welfare of the people of this state" with "a minimum wage for employees [being] a subject of vital and imminent concern to the people of this state," RCW 49.46.005,
- makes violations a penal offense. RCW 49.46.100(1), and
- provides the employer "shall" be liable for violations and gives the employee or former employee a private right of action. RCW 49.46.090(1).

language in the 1913 law largely parallels that in RCW 49.46.090(1).[11] The release holding in Larsen remains undisturbed.[12] As is discussed infra, Larsen uses the same public policy rationale advanced in FLSA cases that preclude extrajudicial FLSA releases.[13]

3. The Washington cases relied upon by Defendant to distinguish Larsen are not on point.

Defendant's petition fails in its attempt to discredit Larsen by relying on several distinguishable cases[14] and giving an inaccurate

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[11] The two sections, side by side, read as follows:

Laws of 1913, § 18.	RCW 49.46.090(1).
If any employe [sic] shall receive less than the legal minimum wage …, said employe [sic] shall be entitled to recover in a civil action the full amount of the legal minimum wage as herein provided for, together with costs and attorney's fees to be fixed by the court, **notwithstanding any agreement to work for such lesser wage**. In such action, however, the employer shall be credited with any wages which have been paid upon account.	Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. **Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.**

[12] State and federal cases apply different standards to non-minimum wage employment statutes where the statutes do not have the same animating force of establishing a floor that cannot be eroded by unequal bargaining. Other employment statutes, such as civil rights law, in fact have built-in private settlement mechanisms. In addition, there is no public policy against private settlement of employment contract disputes.

[13] The United States Supreme Court affirmance of the Washington Supreme Court in West Coast Hotel, supra cleared the way for passage of the FLSA of 1938. See e.g., former Chief Justice Alexander, Parrish v. West Coast Hotel Co., Did This Washington Case Cause the Famous "Switch in Time That Saved Nine"?, WASH. ST. BAR JOURNAL 24 (Dec. 2010).

[14] Pugh v. Evergreen Hosp. Med. Ctr. (Pugh I), 177 Wn. App. 348, 311 P.3d 1253 (2013); Pugh v. Evergreen Hospital Medical Ctr. (Pugh II), 177 Wn. App. 363, 312 P.3d 665 (2013); Chadwick v. Nw. Airlines, Inc., 33 Wn. App. 297, 654 P.2d 1215 (1982); Stottlemyre v. Reed, 35 Wn. App. 169, 665 P.2d 1383 (1983).

description of an unpublished COA case relying on Larsen.[15] First, Pugh, Stottlemyre and Chadwick are all distinguishable from the present case because none of them interpreted 49.46.090(1). Only Pugh dealt with wage and hour issues, and Pugh did not interpret the MWA so there was no reason for it to interpret RCW 49.46.090(1). Secondly, what this Court actually said in Harrison (which was not an MWA case) was:

> [W]e see no reason why the worker/claimant and the employer cannot settle a prevailing wage dispute if the State approves. In such a situation, the State's participation protects the public interest while giving effect to the worker's right to compromise the claim. See Larsen v. Rice, 100 Wash. 642, 649-50, 171 P. 1037 (1918).

Harrison, 92 Wn. App. at 1034. That language was not dicta since that portion of the opinion rejected a party's argument regarding public policy, and the Court remanded for proceedings "consistent with this opinion." Furthermore, Harrison citing Larsen in holding that the "State's participation protects the public interest" supports Plaintiff's understanding of Larsen.

4. FLSA law largely aligns with Larsen although the FLSA did not explicitly provide a statutory prohibition.

In the 1940s the United States Supreme Court decided two cases that aligned the FLSA with Larsen, preventing extrajudicial releases of FLSA rights. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), held that an employee could not waive his right to recover FLSA

[15] Harrison v. Chapman Mech., Inc., 92 Wn. App. 1034, -- P.2d -- (1998).

liquidated damages. The employer in that case sent a former employee a check for unpaid overtime in exchange for a release, which the former employee signed and returned. The Court noted authority that a "statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." 324 U.S. at 704. Because the FLSA lacked statutory language on the issue, the Court looked at the law's purposes, stating:

> The statute was a recognition of the fact that, due to unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency … No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum wage and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

324 U.S. at 706-07 (emphasis added).

Brooklyn Savings did not rule on whether the outcome would be different if there were a "bona fide dispute" over the workers' claims. 324 U.S. at 714. That question was answered in the negative in D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946) ("Schulte"). Schulte held that the FLSA would not give effect to an extrajudicial settlement even though it involved settlement of a bona fide dispute over whether the FLSA applied to the employees. When some employees then sued for

FLSA liquidated damages, the putative employer made essentially the same arguments made by Defendant herein. Id. at 113.

> Despite bona fide disputes over coverage, Schulte held:
>
> > [T]he same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damages is called for.
> >
> > In a *bona fide* adjustment on coverage, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived.…

Id. at 115-16 (emphasis added). A dispute over FLSA "coverage" is similar to a joint employer dispute – it is a complex legal issue independent of wages paid. The worst situation for public policy is when employers and individual employees negotiate – rather than an employee representative such as a lawyer or union. The releases at issue herein involve such a situation. Brooklyn Savings and Schulte were decided based on the FLSA of 1938, which was largely the basis for the MWA. See Anfinson v. FedEx, 174 Wn.2d 851, 868, 281 P.2d 289 (2012). These cases augment Larsen v. Rice and are consistent with Washington's long and proud history in being a pioneer in protecting workers.[16]

[16] Shortly after Brooklyn Savings and Schulte, Congress amended the FLSA to provide another avenue for obtaining enforceable FLSA release agreements. In 1949, §16(c) of the FLSA was added, providing that a USDoL-supervised settlement may provide for release of FLSA claims. 61 Stat. 910, 919 (1949) (codified at 29 U.S.C.§ 216(c). Ironically, Defendant had the opportunity to resolve the janitors' claims for 2012 and 2013 as part of an FLSA-supervised settlement. CP 192-193; CP 1167 (¶¶2-9); CP 1847-52. Defendant chose not to avail itself of this long-established method for release of FLSA rights. Instead, as in December 2011, it opted for extrajudicial releases obtained from impecunious, uneducated and unrepresented janitors. A

During the past 70 years, courts have applied Brooklyn Savings and Schulte to prohibit employer-employee agreements to release FLSA claims. A leading decision is Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352-53 (11th Cir. 1982). Therein, an employer negotiated releases with employees, after unsuccessfully attempting to resolve claims with the Department of Labor. The Eleventh Circuit held the releases were unenforceable, relying on the policy considerations expressed in Brooklyn Savings and Schulte:

> Recognizing that there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA's provisions mandatory; thus, the provisions are not subject to negotiation or bargaining between employers and employees.

Lynn's Food, 679 F.2d at 1352. Under Lynn's Food, an FLSA settlement is enforceable only if it is approved by a court "after scrutinizing the settlement for fairness," or the Department of Labor certifies that a supervised settlement is for full wages. Id. at 1353.[17]

USDoL-approved FLSA settlement would have removed any incentive for the present litigation, even though it would not have formally released MWA claims.

[17] Recent FLSA cases follow Brooklyn Savings, Schulte and Lynn's Food. In Nall v. Mal-Motels, Inc., 723 F.3d 1304, 1306-08 (11th Cir. 2013), the court refused to enforce a release negotiated between an employer and unrepresented former employee after an FLSA suit had been filed. In Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, (2d Cir. 2015), the court held that an FLSA release would not be binding unless the trial court scrutinized the terms of the settlement for fairness. The settlement had to be filed in open court and found to be "fair and reasonable" for the FLSA claims to be waived. Cheeks held that FLSA protections were necessary even when employees were represented by counsel. Accord Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) (same); Seminiano v. Xyris Entrp., 602 Fed.Appx. 682, 683 (9th Cir. 2007) (unpublished; same).

5. Laws from other states also support Plaintiff's position.

Other State minimum wage laws have also been held to prohibit private settlements, relying on FLSA authority. E.g., O'Brien v. Encotech Const. Servs., Inc., 183 F. Supp. 2d 1047, 1049 (N.D. Ill. 2002) (FLSA and Illinois law)[18]; Ladegaard v. Hard Rock Concrete Cutters, Inc., 00 C 5755, 2001 WL 1403007, at *1 (N.D. Ill. Nov. 9, 2001); Lewis v. Giordano's Entpr., Inc., 397 Ill. App. 3d 581, 921 N.E.2d 740 (Ill. App. Ct. 2009)(releases in putative class actions); McKeown v. Kinney Shoes Corp., 820 P.2d 1068, 1080-71 (Alaska 1991) (class action).[19]

B. The COA correctly rejected the trial court's summary judgment analysis of virtual representation in this case on multiple grounds, including the single issue raised by Defendant.

The trial court granted Fred Meyer's Motion for Summary Judgment. The COA reversed the trial court's decision holding "both that the doctrine of virtual representation is not applicable to the Mendoza janitors and that applications of collateral estoppel herein works on injustice." Mendoza v. Expert Janitorial Services, LLC, 450 P.3d 1220, 1222 (2019) (emphasis added). The COA made it clear that

[18] "Permitting an employer to violate a minimum wage law and escape legal consequences by paying an employee something to forget about the violation, undermines the proper functioning of these laws almost as effectively as simply failing to follow them in the first instance." 183 F.Supp.2d at 1049.

[19] Defendant also never addresses the fact that the trial court and the COA in Mendoza explicitly did not address this issue. It seems problematic for this Court to address an issue never addressed by any lower court in this case.

it would have reversed the trial court even assuming that virtual representation "could be applicable to those in the situation of the Mendoza janitors.[20] Defendant's Petition at p. 3 seeks review on the issue of "[w]hether the virtual representation doctrine applies in class actions …." Review should not be granted on that issue for two separate reasons: (a) the COA's reversal would stand even if Defendant prevailed on the class action virtual representation issue, and (b) the COA's analysis regarding the inapplicability of virtual representation in this class action context was correct.

1. The COA's decision reversing summary judgment would be unaffected by this Court's resolution of the challenged issue because the COA's remaining bases for reversal would continue to apply.

Defendant never sought review of the COA's holding that under the facts presented herein, summary judgment was improperly granted even assuming virtual representation could have been "applicable to the Mendoza janitors." The COA explained that the criteria established in Garcia v. Wilson, 63 Wn.App. 516, 820 P.2d 964 (1991) for applying

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

Mendoza, 450 P.3d at 1225 (emphasis added).

the virtual representation doctrine had not been met. For example, the COA held that the:

> [M]inimal participation by some of the Mendoza janitors, especially when the bulk of the participation was in support of Fred Meyer's side of the case, does not support application of the virtual representation doctrine to the Mendoza janitors as a class.

450 P.3d at 1228.

The COA also held that a separate reason the virtual representation doctrine was not established was that the evidence in Mendoza and Espinoza would not be identical. See id. at 1225, 1228-29. For example, as observed by the COA, the Espinoza and Mendoza janitors learned shortly after the Espinoza trial that:

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

Id. at 1223. Economic dependence by employees on a putative joint employer is a touchstone of joint employment. Becerra v. Expert Janitorial, LLC, 176 Wn. App at 699, n. 1. Becerra makes that new evidence relevant. As quoted at p. 1228, infra, the COA held there was a reasonable connection between Expert's financial difficulties and the janitors' economic dependence on Fred Meyer.[21] The COA at 1227-28 gave additional reasons why the Garcia factors were not met.

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[21] The COA's unchallenged holding at p. 1228 was that:

> Evidence of Expert's financial difficulties could support an inference that the Mendoza janitors were economically dependent on Fred Meyer.[11]

A final reason for not accepting review on this issue is that it would not affect the result. That is because assuming that Defendant succeeded on its second "issue presented for review," the COA's decision reversing the trial court's grant of summary judgment would still stand. Defendant acknowledges that the cases it cited at p. 10 of its Petition as supporting review under RAP 13.4(b)(1) were "important to more than just the parties involved." (Emphasis added.)[22] Given the multiple unchallenged reasons relied upon by the COA for reversing the trial court, the current importance of this issue to Plaintiff is markedly diminished. For any or all of those reasons, this would not be a proper case to review the applicability of virtual representation in the class action context.

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[11] For example, because Expert indemnified Fred Meyer for lawsuits brought by janitors, Fred Meyer's legal expenses may have prevented Expert from being financially able to pay the janitors. If Fred Meyer had the power to direct Expert to use those funds to pay the Mendoza janitors rather than to litigate against the janitors, it could support an inference that the Mendoza janitors were economically dependent on Fred Meyer.

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

[22] State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005); 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); and In re Marriage of Ortiz, 108 Wn.2d 643, 646, 740 P.2d 843 (1987).

2. The COA's reliance on Smith v. Bayer Corp. was correct.

The COA's analysis on the issue quoted below in footnote 23 relied on Smith v. Bayer Corp., 564 U.S. 299, 313-15 (2011), which specifically dealt with a claim of virtual representation in the Rule 23 class action context.[23] In so doing, the COA pointed out that "Fred Meyer does not provide any argument in its briefing pertaining to Bayer Corp.," and also explained why the trial court's attempted distinction of Bayer did not withstand analysis. Id. at n.3.[24]

Only now does Defendant argue that Bayer is not applicable. However, its reasons misstate the record and misstate both the COA's decision and Bayer. Defendant's argument misstates both the record and the COA's decision since, as discussed above, the COA found that virtual representation did not apply under Washington law. The COA discussed a number of factors that did not apply, including that the evidence in the two trials would be different in relevant respects. Notably, Defendant's Petition does not challenge the holding that even apart from the class action issue, virtual representation does not apply under the present record. As such, Defendant's argument that it could

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[23] The COA, at 1225, stated:

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

[24] Fred Meyer's Motion for Reconsideration also never addressed Bayer.

"end up having to defend itself in successive class action trials on the same … evidence" is blatantly incorrect. The COA properly relied on Bayer rather than Defendant's current misinterpretation of this decision.

V. CONCLUSION

For the foregoing reasons, this Court should deny review of the Court of Appeals' decision and of its denial of Defendant's motion to reconsider.

RESPECTFULLY SUBMITTED this 4th day of March 2020.

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