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No. 85949-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.

Petitioner.

ANSWER OF FEDEX GROUND TO AMICUS CURIAE BRIEF OF
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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ORIGINAL

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I. INTRODUCTION

The Washington Employment Lawyers Association (WELA) raises issues not raised by the parties and misrepresents the record and arguments in this case. The trial court did not preclude class plaintiffs from attempting to establish liability through representative evidence. Instead, it instructed the jury that such evidence must be “common” or, as plaintiffs concede, “frequent and usual.” The trial court correctly instructed the jury to distinguish between employees and independent contractors using a non-exclusive set of factors that included those used by the federal courts under FLSA. This Court should reject WELA’s new arguments and improper authority and hold that the trial court’s hybrid instruction on plaintiff’s claims and its direction to the jury to determine whether employee status was “common to the class” were not prejudicial error justifying vacation of the jury’s verdict after a four-week trial.

II. ARGUMENT IN RESPONSE TO AMICUS

A. The Trial Court Did Not Preclude Class Plaintiffs From Attempting to Establish Liability Through Representative Evidence. Instead, It Instructed The Jury That Such Evidence Must Be “Common” Or, As Plaintiffs Concede, “Frequent and Usual.”

WELA’s argument touting the virtues of representative evidence in a class action raises an issue that is not before the Court.¹ See *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 303 n.4, 103 P.3d 753 (2004) (Court will not consider issues raised solely by amicus). The issue is not “whether the Court of Appeals was correct in holding that ‘plaintiffs [in a wage and hour class action] may rely on testimony and evidence of representative employees to prove that the defendant’s practices or policies impacted similarly situated employees,’” as WELA posits. (WELA Br. 4) This class action was tried through representative witnesses and the trial court’s instructions did not direct the jury to ignore plaintiffs’ representative evidence. Instruction 8 instead told the jury that its verdict must be based on a finding that “‘employee’ status was common to the class members during the class period.” (CP 2194)

¹ WELA’s argument also violates RAP 10.3(a)(6), RAP 10.3(a)(8), and RAP 9.11, by attaching as appendices and relying upon instructions and verdict forms from four superior court cases. These pleadings are not proper authority and could not be relied upon by a party or by amicus curiae. See *Yousouflan v. Office of Ron Sims*, 168 Wn.2d 444, 469, ¶¶ 50-52, 229 P.3d 735 (2010) (striking amici briefing referencing superior court decisions).

The Court of Appeals wrongly held that this instruction was “misleading and likely prejudicial,” not because it precluded the jury from relying on representative evidence, but because in closing argument FedEx Ground argued that “‘common’ means ‘all.’” 159 Wn. App. 45, 65-66, ¶¶ 77-79.² In arguing that the jury should be authorized to consider representative evidence to impose liability in a class action, WELA misrepresents the instruction that was actually given and ignores the standard for class liability that class plaintiffs themselves proposed. FedEx Ground has not argued that a defendant’s liability to a class cannot be based on representative evidence, and the trial court’s instruction presents no issue regarding whether the jury may consider representative evidence.

The parties and the trial court all agreed that in order to impose liability, representative evidence must truly be representative of the class. Class plaintiffs’ own proposed instruction would have required the jury to

² As discussed in FedEx Ground’s Petition for Review and Supplemental Brief, the Court of Appeals erred in reviewing under the de novo standard applicable to jury instructions whether counsel’s closing argument was reversible error. (Pet. 16 n.8; Pet. Supp. Br. 19-20) Where, as here, there was no objection to the argument and no motion for a new trial, the Court will not reverse unless the argument “is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied* 514 U.S. 1129 (1995); *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993).

find that plaintiffs established not only that the named class plaintiffs “are employees and not independent contractors,” but in addition, that “there is a pattern or practice of this employment status throughout the class of plaintiffs during the class period.” (CP 2031) Plaintiffs’ instruction would have told the jury that “events which are isolated, sporadic or infrequent did not establish a pattern or practice.” (CP 2031)

Plaintiffs’ proposed instruction defined the term “pattern” as “a regular, mainly unvarying way of acting or doing” and the term “practice” as “a frequent or usual action.” (CP 2031) There is no meaningful distinction between the term “common” as used in the trial court’s Instruction 8, and the term “pattern or practice” that plaintiffs proposed be used instead to set the threshold for liability to the class. The term “common” has as its synonyms “regular” and “frequent,”³ as well as “customary, daily, everyday, familiar . . . general, [and] habitual. . . .” Roget’s 21st Century Thesaurus (Philip Lief Group 3d Ed. 2009), available at [http://thesaurus.com/ browse/common](http://thesaurus.com/browse/common) (last visited Jan. 31, 2012).

³ In closing argument, plaintiffs’ counsel told the jury that the term “common” in Instruction 8 meant “[w]as it more usual than unusual. Was it typical that they were treated as an employee.” (3/30 RP 152)

The parties therefore agree that representative evidence must meet a requisite threshold of commonality to impose liability in a class action. WELA makes no mention of plaintiffs' proposed instruction and fails to address the proper issue before this Court – whether the trial court erred in instructing the jury that the representative evidence must be “common to the class members during the class period” (CP 2194), rather than instructing the jury that there must be a “pattern or practice of this employment status throughout the class of plaintiffs during the class period,” as plaintiffs proposed. (CP 2031)

WELA similarly ignores the standard for this Court's review of the adequacy of Instruction 8. The trial court “has considerable discretion in deciding how the instructions will be worded.” *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985). Instructions are inadequate only when they prevent a party from arguing his or her theory of the case or misstate the applicable law. See *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (citing *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993); *Farm Crop Energy, Inc. v. Old Nat'l Bank of Washington*, 109 Wn.2d 923, 933, 750 P.2d 231 (1988)). Because neither plaintiffs nor WELA has articulated any significant difference between the trial court's requirement of “common” representative evidence and plaintiffs'

proposed requirement of a “pattern or practice,” WELA cannot claim that the trial court abused its discretion in wording the instruction as it did. *See Goodman v. Boeing Co.*, 75 Wn. App. 60, 74, 877 P.2d 703 (1994) (rejecting appellant’s argument that instruction was erroneous where appellant proposed substantially similar language in its instruction), *affirmed*, 127 Wn.2d 401, 899 P.2d 1265 (1995).

Plaintiffs had no difficulty arguing their theory that the representative evidence established that “practices of FedEx, the rules and the operating agreement, which we know are all standardized was widespread to the class, were frequent to the class. That’s enough.” (3/30 RP 56) WELA’s contention that a jury may rely on representative evidence in a class action does not address any issue raised by the parties on review. Instruction 8 did not preclude the jury’s consideration of representative evidence, did not misstate the law, and allowed each side to argue its theory of the case. The Court of Appeals erred in holding that Instruction 8 was “misleading and likely prejudicial.” This Court should reverse the Court of Appeals and reinstate the verdict.

B. The Trial Court Correctly Instructed The Jury To Distinguish Between Employees And Independent Contractors Using A Non-Exclusive Set Of Factors That Included Those Used By The Federal Courts Under FLSA.

The trial court properly instructed the jury to consider the totality of the circumstances in distinguishing between independent contractors and employees under the MWA and IWA using a non-exclusive test that incorporated the FLSA factors and emphasized that what made a contractor “independent” was the control and right to control his or her own work. Like amicus Department of Labor & Industries, WELA ignores plaintiffs’ IWA claim entirely in arguing that the jury should only consider the FLSA factors under a nebulous “economic reality” standard rather than under the trial court’s hybrid instruction that combined eight non-exclusive factors with the IWA test, which indisputably requires a determination whether “said individuals control the manner of doing the work and the means by which the result is to be accomplished.” WAC 296-126-002(2)(c).

Like the Department, WELA also mistakenly refers to the trial court’s instruction as adopting a “common law control” test. (WELA Br. 12-16) In fact, the trial court combined the FLSA factors with relevant factors used under the common law, crafting a hybrid instruction that allowed both sides to argue their theories of the case. And like the

Department, WELA fails to acknowledge that “control” is what makes a contractor “independent” as a matter of economic reality.⁴

WELA’s argument that a Washington jury applying the MWA is limited to the six factor FLSA test also fails to recognize that even under the FLSA “[t]he factors that have been identified by various courts in applying the economic reality test are not exclusive.” *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988). Instead, the existence of an independent contractor or employer/employee relationship under the FLSA “depends upon the circumstances of the whole activity.” *Real v.*

⁴ FedEx Ground also addresses these arguments in its Answer to the Department’s amicus brief. In particular, however, FedEx Ground challenges WELA’s claim that the right to control test “protects employers.” (WELA Br. 12-13) A worker is no less protected where the right to a minimum wage turns on his or her control over the basic terms and conditions of work. Moreover, an entrepreneur who cannot be “controlled” by the entity with whom it has contracted is also “protected” in his or her right to hire others to provide the contracted services, to pursue other business opportunities, and to sell the business. In this case, for instance, the jury heard testimony from class members and other contractors that they formed their own businesses (3/24 RP 97; *see also* 3/10 RP 51-52, 100; 3/4 RP 119-20; 3/12 RP 69-70), hired others to drive or service their contract areas (3/16 RP 54-55; 3/11 RP 29-34, 49, 110-12, 124; 3/10 RP 101-02; 3/23 RP 238), routinely sold their routes, often at a profit (3/5 RP 66-67 (\$51,535 profit); 3/9 RP 54 (\$42,000 profit); 3/11 RP 52 (\$15,000 profit); 3/11 RP 197-200 (\$22,000 profit); 3/12 RP 58-59 (\$4500 profit after six months); 3/17 RP 87 (\$35,000 profit); 3/17 RP 134 (\$37,000 profit); 3/24 RP 94), and made independent arrangements with other route owners to manage fulfillment of their contract obligations. (3/12 RP 219; 3/16 RP 111, 218-19; 3/17 RP 92; 3/18 RP 165, 180; 3/19 RP 196-97; 3/23 RP 242-44) Plaintiffs themselves tried the case on the theory that FedEx Ground had the “right to control” the class members. (*See* Pet. Supp. Br. 15-17; 3/3 RP 34-35, 39; 3/24 RP 147, 150) Focusing on right to control is particularly appropriate in a class action such as this because the determination whether defendant has that right will necessarily be common to the class. The “economic reality” of plaintiffs’ “economic dependence” on defendant, on the other hand, may vary widely.

Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754, 754 n.14 (9th Cir. 1979) (economic reality test “is not exhaustive;” “The presence of any individual factor is not dispositive of whether an employee/employer relationship exists”).

WELA’s criticism of the trial court’s multifactor hybrid instruction should be rejected for the additional reason that it improperly expands the issues beyond those properly raised by the parties. *Zuver*, 153 Wn.2d at 303 n.4. For instance, WELA argues that the trial court could not instruct the jury to consider “the method of payment, whether by the time or by the job,” as one of the factors to consider in distinguishing between employees and independent contractor. (CP 2195; WELA Br. 16) But plaintiffs neither excepted to that factor in Instruction 9 nor argued that it was error in the Court of Appeals.⁵ This Court should not consider it now when raised only by amicus.

Even were the Court to consider WELA’s argument, the trial court did not err by including in its list of non-exclusive factors the manner and means of payment and the belief of the parties. The way in which a party is paid, though not controlling, is relevant in considering whether plaintiffs

⁵ Plaintiffs excepted to trial court’s Instruction 9 on the ground that it did not use the term “economic reality,” and that it did not include as a factor the parties’ “relative investment” but told the jury to consider the “class members’ investment.” (CP 2195; 3/27 RP 17)

maintain sufficient independence over the terms and conditions of their work such that they are in business for themselves and not employees. For example, in holding that carpenters were “autonomous businessmen” and therefore not “economically dependent” on a home building company, the Fifth Circuit considered the fact that the carpenters were paid by a set price per linear foot, as well as the fact that they supplied their own equipment, were not supervised by the alleged employer, and controlled their own work in *Trustees of Sabine Area Carpenter’s Health & Welfare Fund v. Don Lightfoot Home Builder, Inc.*, 704 F.2d 822, 825-27 (5th Cir.1983).

Federal courts also consider the understanding of the parties in evaluating the totality of the circumstances under FLSA. *See, e.g., Carrel v. Sunland Constr. Inc.*, 998 F.2d 330, 334 (5th Cir. 1993) (welders “classified themselves as self-employed”); *Sabine*, 704 F.2d at 826 (“the carpenters referred to themselves as ‘subcontractors’ or ‘self-employed businessmen.’”). Contrary to WELA’s argument, the understanding of the parties does not necessarily “tilt the balance” in favor of the defendant. *See, e.g., Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261, 268 n.5 (tax treatment of plaintiff by defendant is “one more factor that supports the conclusion that Halferty is an employee and not an independent contractor.”), *modified on other grounds*, 826 F.2d 2 (5th Cir. 1987);

Baker v. Barnard Const. Co., Inc., 860 F. Supp. 766, 772-73 (D.N.M. 1994) (relying on fact that defendant “held the Plaintiffs out to their customers as employees”), *affirmed sub nom, Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436 (10th Cir. 1998). Thus, an employer’s admission that it considered its workers employees is “highly probative” evidence of actual employment status. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

The way in which the parties view their relationship is not controlling. But it is a valid factor, among others, in determining whether as a matter of economic reality the plaintiff is in business for him or herself, or is under the defendant’s control. In this case, the plaintiffs freely and without objection admitted evidence on this subject, eliciting the testimony of class representatives and others that they “felt” they were treated as employees.⁶ Other witnesses (including some class members)

⁶A. When I first started delivering packages for them [October 2000], we got left alone throughout the day. We got off work earlier. You could run the route the way you wanted. I coached baseball after work, got in a little golf. . . . Then . . . [i]t just became controlling and not my business anymore. I did not like that as I did when I first started.

Q. And you ultimately left?

A. Yes.

(3/5 RP 42)

disagreed.⁷ The jury properly considered this evidence, and this factor, in rejecting plaintiffs' theory of the case as a matter of fact.

Finally, RCW 49.46.090(1), which provides that "[a]ny agreement between such employee and the employer to work for less" than the minimum wage "shall be no defense" to an action under the MWA, does not support WELA's argument that the belief of the parties cannot, as a matter of law, be used as a factor to determine whether the plaintiff is an employee or independent contractor. The Legislature, as a matter of public policy, prohibited employees from waiving their right to a *minimum* wage in their contract of employment. Thus, a contractual label of independent contractor status is not controlling. However, the MWA does not prohibit workers from entering into an independent contractor relationship, or bar the trier of fact from considering the parties' intent in evaluating the nature of their relationship.

⁷ Q: ... you knew you were forming an independent contractor relationship and certainly not an employee-employer relationship with FedEx Ground, correct?

A: Yes, sir, I did.

(3/9 RP 46)

Q: Do you believe you were an independent contractor or an employee during the class period?

A: An independent contractor.

(3/18 RP 177)

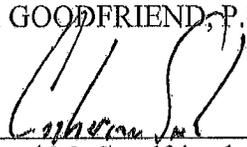
Under WELA's argument, the fact that the class members' contract reflected the parties' mutual intent that FedEx Ground drivers would be in business for themselves by retaining control over the terms and conditions of their work could never be probative evidence. The trial court correctly allowed the jury to consider the totality of the circumstances, including the parties' subjective intent and objective manifestations of that intent, to decide whether the class plaintiffs were independent contractors.

III. CONCLUSION

WELA misrepresents the record and arguments in this case. The trial court did not preclude class plaintiffs from attempting to establish liability through representative evidence and its hybrid instruction allowed plaintiffs to argue their theory of the case to the jury, which rejected plaintiffs' claims on the facts. This Court should reinstate the jury's verdict after a four-week trial and reject WELA's invitation to decide issues not presented by the parties.

Dated this 2nd day of February, 2012.

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DECLARATION OF SERVICE

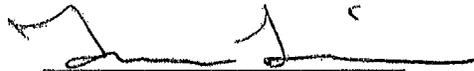
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 2, 2012, I arranged for service of the Answer of FedEx Ground to Amicus Curiae Brief of Washington Employment Lawyers Association, to the Court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 2nd day of February, 2012.



Tara D. Friesen