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SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,
Respondent/Defendant.

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Amicus Curiae Brief by Washington Employment
Lawyers Association

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I. Interest of Amicus Curiae

The Washington Employment Lawyers Association (WELA) is an organization of lawyers licensed to practice law in Washington and devoted to the protection of employee rights. *See* WELA Amicus Motion.

II. Introduction and Summary of Argument

“State laws play a crucial role in protecting workers’ rights and creating a level playing field for businesses.”¹ Nevertheless, “[p]ervasive violation of both federal and state wage and hour laws across the United States is well documented.”² According to a landmark survey conducted in 2008, for example, 76 percent of employees who worked more than 40 hours in the previous week were not paid the legally required overtime rate by their employers.³ These workers averaged 11 hours of overtime—hours that were either underpaid or not paid at all.⁴

In an effort to protect the welfare of working people in Washington, the Legislature enacted the Minimum Wage Act (MWA), RCW 49.46.005, *et. seq.* The MWA is broad in scope and liberally construed to ensure that its remedial goals are realized. Because it is based on the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-

¹ Jacob Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators*, at 7 (2011), available at http://www.law.columbia.edu/center_program/ag/policy/Labor/wagehour (last visited Jan. 9, 2012).

² *Id.* at 5.

³ Annette Bernhardt et. al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 2 (2009), available at http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited Jan. 9, 2012).

⁴ *Id.*

219, Washington courts look to federal authority for guidance when interpreting and applying the MWA.

Two important issues are presented here. The first concerns representative evidence, which is regularly allowed in FLSA actions to prove liability and damages. The trial court below issued an instruction precluding the plaintiff-drivers from using such evidence to prove that FedEx Ground Package System, Inc. (FedEx) violated the MWA on a class-wide basis. The Court of Appeals held the trial court's instruction was in error. The utilization of representative evidence is fundamental to the vindication of class action claims—especially claims that affect the public interest—and is consistent with the policies behind the MWA and CR 23. Thus, the drivers should be allowed to use representative evidence to prove FedEx's liability to the class.

The second issue is how to determine whether a worker is an "employee" entitled to the protections of the MWA. The trial court used the common law right to control test, which derives from tort law. Recognizing that social legislation like the MWA justifies a departure from common law principles, the Court of Appeals reversed and adopted the economic realities test used in analogous cases under the FLSA. The economic realities test furthers Washington's longstanding policy of protecting employees. Thus, the economic realities test should be used to determine the employment status of the drivers.

For the following reasons, WELA respectfully asks this Court to affirm the decision of the Court of Appeals.

III. Argument

A. Allowing the Use of Representative Evidence Furthers Washington's Policy of Resolving Numerous Common Claims in One Efficient Action.

1. Class Actions Are an Important Tool for the Enforcement of Claims in the Public Interest.

“Washington’s CR 23 authorizes class actions and demonstrates a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007). *See also Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002) (“[A] primary function of the class suit is to provide a procedure for vindicating claims which, taken individually are too small to justify individual legal action but which are of significant size and importance if taken as a group.”). Because the rule “avoids multiplicity of litigation” and “saves members of the class the cost and trouble of filing individual suits,” Washington courts liberally interpret CR 23. *Behr Process*, 113 Wn. App. at 318 (citation omitted).

The MWA “was enacted to provide ‘an effective mechanism for recovery even where wage amounts wrongfully withheld may be small,’” and the statute “encourages private enforcement in the public interest.” *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 533, 128 P.3d 128 (2006) (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998)). In Washington and elsewhere, wage and hour disputes routinely proceed as class actions. *See, e.g., Pellino v. Brink’s*

5. The Multi-District Litigation Involving FedEx Is Distinguishable.

In its briefing, FedEx cites to certain decisions from the multi-district litigation (MDL) against the company, but those decisions are distinguishable. As the court itself recognized, “[t]he nationwide character of [that] litigation makes it a truly unique set of cases, unlike anything that has appeared in the cases cited in the parties’ briefs.” *In re FedEx Ground Package Sys., Inc.*, 758 F. Supp. 2d 638, 654 (N.D. Ind. 2010). Among other things, “the procedural posture” of the litigation “substantially limited the scope of evidence available to [the] court to decide the drivers’ generalized employment status question.” *Id.* at 655. For this reason, the court specifically noted: “These cases might or might not come out differently under a different procedural posture allowing wider scope for review of extrinsic and particularized evidenced, but that situation is not before the court . . .” *Id.*

Furthermore, the court in the MDL dealt with claims brought under the laws of various states that do not have wage and hour statutes. Alabama, for example, “does not have a state overtime law.” Meyer & Greenleaf, *supra* note 1, at 164.¹⁴ The drivers from that jurisdiction therefore alleged “violations of the Alabama Deceptive Trade Practices Act and fraud.” *In re FedEx Ground*, 758 F. Supp. 2d at 661. With no wage laws to consider, the court applied tort law in determining whether the drivers are employees or independent contractors. *Id.* at 662.

¹⁴ Remarkably, 17 states still lack any form of state overtime law. *See id.* at 164-76.

Inc., ___ P.3d ___, 2011 WL 5314222 (Wash. Ct. App. Nov. 7, 2011); *Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009); *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 202 P.3d 1009 (2009); *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007); *Miller v. Farmer Bros. Co.*, 136 Wn. App. 650, 150 P.3d 598 (2007); *Mothers Work*, 131 Wn. App. 525. Indeed, the California Supreme Court has noted that "sound public policy" calls for "use of the class action device" to enforce remedial wage laws "for the benefit of workers." *Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 209 (Cal. 2004) (citation omitted); cf. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 835-37, 161 P.3d 1016 (2007) (holding "class suits are an important tool" for enforcing consumer claims).

At issue here is 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." *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 68, 244 P.3d 32 (2010). Because the use of representative evidence to prove claims on behalf of a larger group is consistent with Washington's policies regarding class actions and the enforcement of wage laws and is supported by an abundance of analogous federal court decisions, the decision of the Court of Appeals to admit representative evidence should be affirmed.

2. Representative Evidence Allows Workers to Efficiently Obtain Relief for Widespread Employment Violations.

“Class actions are representative suits on behalf of others similarly situated.” 1 William B. Rubenstein, *Newberg on Class Actions* (*Newberg*) § 1:5 (5th ed. 2011); *see also* 1 *Newberg* § 1:1 (“Class actions are a form of representative litigation,” and “Rule 23 . . . identifies the circumstances under which this form of representative litigation is appropriate.”). “[A] primary purpose of the class suit is to promote efficiency by enabling representatives to litigate for absent class members.” *Newberg* § 1:5.

Though the trial court certified the claims in this case for class action treatment under CR 23, the court instructed the jury that it could not consider representative evidence in determining liability. *See Anfinson*, 159 Wn. App. at 65-71 (discussing Instruction 8, CP 2194). This allowed FedEx to argue that plaintiffs were required to offer proof as to each of the 320 drivers: “If plaintiffs showed you that only 319 class members were employees and one wasn’t, your verdict should be for FedEx Ground because they haven’t met their burden. They have to show you all.” *Id.* at 65-66 (internal marks omitted; quoting RP (Mar. 30, 2009) at 78).

A prohibition against representative evidence effectively nullifies the class action procedure and makes it impossible for workers to obtain relief for widespread wage and hour violations by employers. It is simply impracticable to have every member in a class of hundreds testify at trial, let alone a class comprised of thousands of workers. Moreover, “forcing numerous plaintiffs to litigate the alleged pattern or practice of [unlawful

conduct] in repeated individual trials [also] runs counter to the very purpose of a class action.” *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 256-57, 63 P.3d 198 (2003).

Washington’s appellate courts have not squarely addressed the appropriateness of representative evidence outside of this case, but the State’s trial courts have allowed employees to use such evidence to prove widespread violations in numerous wage and hour class actions, and those decisions have been affirmed on appeal. In the recent case of *Pellino v. Brink’s Inc.*, ___ P.3d ___, 2011 WL 5314222, at *3 (Wash. Ct. App., Div. I Nov. 7, 2011), for example, the trial court certified a class of 182 drivers who worked for Brink’s in Seattle and Tacoma over a three-and-a-half-year period. During a 14-day bench trial, “[e]ight representative class members testified on behalf of the class. Four of the class members who testified worked in the Seattle branch, and the other four worked in the Tacoma branch.” *Id.* The trial court held that this testimony, in conjunction with other evidence, “established Brink’s engaged in a class-wide pattern or practice of failing to provide sufficient ‘rest and meal break minutes’ during the work day.” *Id.* at *4-6.

Brink’s asserted that the trial court’s conclusion was in error, arguing rest and meal break issues “varied from employee to employee” and were “characterized by a lack of uniformity,” but the Court of Appeals disagreed: “[t]he consistency of the class member testimony regarding the policies and practices at Brink’s with respect to rest and meal breaks confirms its representative nature.” *Id.* at *7-8. The Court of Appeals

affirmed judgment in favor of the class because the named plaintiff proved by a preponderance of evidence that “Brink’s had actual or constructive knowledge that the class members were not receiving lawfully adequate breaks and therefore may be held liable for the missed time.” *Id.* at *6, 9.

Representative testimony has also been used in jury trials involving wage and hour violations. In *Ramirez v. Precision Drywall, Inc.*, No. 08-2-26023-2 SEA (King Co. Super. Ct. Apr. 16, 2010), for example, two drywall workers brought a class action on behalf of more than 300 similarly situated employees, alleging overtime and rest break violations, among other things. *See* App. A (Instr. 9). The trial court provided the following instruction to the jury:

Plaintiffs have put on testimony alleged to be fairly representative of the Class in order to establish a pattern or practice of violations and the total damages owed to the Class as a result of those violations. Plaintiffs do not need to present testimony from all Class members in order to prove a pattern or practice or to establish the back wages owed. Instead, Plaintiffs need only present testimony from a reasonably sufficient number of representatives that, when considered together with all of the other evidence presented in the case, establishes a pattern or practice and the total damages owed. No exact number or percentage of Class Members is required to testify.

App. A (Instr. 10); *see also* Apps. B & C. For each cause of action, the jury had to find the defendants “engaged in a pattern or practice of such violations” in order to impose liability on a class-wide basis. *See* App. A (Instrs. 18 & 27). After a five-week trial that included representative

testimony, documentary evidence, and expert damages calculations, the jury returned a verdict in favor of the class on the overtime claims but in favor of the employer-defendants on the rest break claims. App. D.

These cases demonstrate it is possible for judges and juries to make class-wide liability and damages determinations based, at least in part, on evidence and testimony from representative workers.⁵ WELA is unaware of any authority that prohibits plaintiffs from utilizing such evidence to prove the claims of absent class members. Likewise, WELA is unaware of any authority supporting the proposition that it is inappropriate to find liability on a class-wide basis if a small portion of the class is found to have not been harmed by the violations at issue. Rather, numerous courts have reached the opposite conclusion.⁶ As one court recognized: “The presence of [a] marginal element of nonclaimants did

⁵ To meet the burdens of proof and persuasion for both liability and damages, workers will typically couple their representative evidence with various other types of evidentiary proof, including documentary evidence and expert testimony regarding statistical analyses, sampling techniques, and damages aggregation procedures. *See, e.g., Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 550 (Cal. Ct. App. 2004) (affirming use of statistical methodologies to determine class-wide damages); *Reich v. Waldbaum, Inc.*, 833 F. Supp. 1037, 1049 (S.D.N.Y. 1993) (awarding damages to non-testifying employees based on “within-store averaging” and “across-store averaging”), *rev'd in part on other grounds*, 52 F.3d 35 (2d Cir. 1995). As a leading treatise provides, “[p]roof of aggregate monetary relief for the class is feasible and reasonable under various circumstances,” and “[c]hallenges that such aggregate proof affects substantive law and otherwise violates the defendant’s due process [rights] . . . will not withstand analysis.” 3 William B. Rubenstein et al., *Newberg on Class Actions* §§ 10:2, 10:5 (4th ed. 2011).

⁶ *See, e.g., Bell*, 9 Cal. Rptr. 3d at 550 (allowing class action to proceed where “9 percent of the class members did not claim unpaid overtime compensation”); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 n.2 (4th Cir. 1985) (“Though some employees testified that they received thirty minute breaks, that testimony pales in comparison to the much more extensive testimony that the pattern of conduct was to the contrary.”); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973) (employer demonstrated that ten employees “had reported all overtime hours,” and trial court “omitted them and one other from its award” to the class).

not make the class less ascertainable or significantly reduce the required community of interest . . . [or] deprive plaintiffs of their representative status Finally, it did not affect the common issues of law and fact.” *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 568 (Cal. Ct. App. 2004).

3. Federal Courts Routinely Allow Workers to Use Representative Evidence.

“Because the MWA is based upon the FLSA, federal authority under the FLSA often provides helpful guidance.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). Though the procedures for determining who falls within a representative action differ under CR 23 and the FLSA, the former being an opt-out procedure and the latter being an opt-in procedure, MWA claims pursued on a class basis are very similar to FLSA claims pursued on a collective basis. Under both approaches, a few plaintiffs are alleging that an employer is liable to a group of workers for wage violations.

Federal courts have long allowed plaintiffs in FLSA cases to use representative evidence to prove that an employer engaged in a pattern or practice of unlawful conduct toward a large class of workers. Indeed, such evidence is allowed to establish both liability and damages.⁷ Furthermore, at least one federal appellate court has affirmed the use of representative

⁷ See *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1298 (3d Cir. 1991) (“It is not necessary for every single affected employee to testify in order to prove violations or to recoup back wages.”); *Bel-Loc Diner*, 780 F.2d at 1116 (“Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of employees.”); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 469, 472-73 (11th Cir. 1982) (finding liability and awarding damages to 207 workers based on representative testimony of 23 witnesses).

evidence to prove claims under the FLSA and “related provisions” of the MWA. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 900 (9th Cir. 2003). In that case, the Ninth Circuit held that “representative evidence adduced by the plaintiffs adequately and accurately supported a damage award for all plaintiffs” under both laws. *Id.* at 901-02.

Because the use of representative evidence promotes the ability of workers to enforce Washington’s wage laws and to resolve numerous common claims in an efficient manner, this Court should affirm the decision of the Court of Appeals.

B. The Economic Realities Test Furthers Washington’s Longstanding Policy of Protecting Employees.

1. The Minimum Wage Act Is Remedial and Must Be Liberally Construed to Protect Workers.

Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz*, 140 Wn.2d at 300. The Legislature has evidenced this strong policy of protection by creating a “comprehensive” set of state laws that grant workers “nonnegotiable, substantive rights regarding minimum standards for working conditions, wages, and the payment of wages.” *Schilling*, 136 Wn.2d at 157. One of those laws is the MWA, which provides that employees who are not otherwise exempt under the statute must be paid overtime compensation. RCW 49.46.130(1).

The Legislature enacted the MWA “for the purpose of protecting the immediate and future health, safety and welfare of the people of this

state.” RCW 49.46.005. Thus, it is remedial. *Drinkwitz*, 140 Wn.2d at 301. This Court has repeatedly construed both wage and hour and other remedial employment statutes in a manner providing the greatest protection to workers.⁸ The definition of “employee” under the MWA deserves similar treatment.

As a remedial statute, the MWA is entitled to liberal construction. *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002). “[T]he rule of liberal construction means that the coverage provisions of the MWA must be liberally construed in favor of the employee.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007). “Exemptions from remedial legislation, such as the MWA and FLSA, are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.” *Drinkwitz*, 140 Wn.2d at 301.

At issue here is whether the Court of Appeals was correct in adopting the economic realities test as the applicable test for determining

⁸ See, e.g., *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712-13, 153 P.3d 846 (2007) (construing “hours worked” under MWA to include all hours worked by Washington employees, whether within state or not, because this protects employees); *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 360-62, 20 P.3d 921 (2001) (holding individual supervisors may be liable as “employers” under discrimination statute because this “is consistent with the broad public policy to eliminate all discrimination in employment”); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (construing “salary basis” test under MWA in manner favoring employees); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994) (refusing to limit application of discrimination statute where doing so would “undermin[e] the fundamental purpose of the act, deterring discrimination [against employees]”); *Everett Concrete Prods., Inc. v. Dep’t of Labor & Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988) (broadly construing Prevailing Wage Act because “employees, not the contractor or its assignee, are the beneficiaries of the Act”).

whether Washington drivers who work for FedEx fall within the scope of the MWA. The economic realities test is broader in coverage than the right to control test, is consistent with the objectives of the MWA, and is used by the federal courts when construing an identical provision under the FLSA. For these reasons, the decision of the Court of Appeals should be affirmed.

**2. The Economic Realities Test Protects Workers,
Whereas the Right to Control Test Protects Employers.**

The MWA's basic definition of "employee" is expansive. The term "includes any individual employed by an employer." RCW 49.46.010(3).⁹ Thus, this Court has found the Legislature "broadly defined" the term "employee"—and the scope of the MWA's coverage—in a manner consistent with the goal of protecting workers. *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 884, 64 P.3d 10 (2003).

Numerous courts recognize that the economic realities test is broader in scope than the right to control test. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). Indeed, many workers who would not be considered "employees" under the common law test nevertheless qualify as employees under the economic realities test. *See*

⁹ For purposes of statutory construction, the word "includes" is a "term of enlargement." *Brown*, 143 Wn.2d at 359. Likewise, "Washington courts have consistently interpreted the word 'any' to mean 'every' and 'all.'" *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 884-85, 64 P.3d 10 (2003).

Schultz, 466 F.3d at 304. This is because the two tests serve very different purposes.

The common law test is designed to place limits on the vicarious liability of purported employers defending against tort claims. See *Niece v. Elmview Group Home*, 131 Wn.3d 39, 48, 929 P.2d 420 (1997).¹⁰ As such, “[t]he sole concern of the vicarious liability rule . . . is with the master.” *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 554, 588 P.2d 1174 (1979). Wage laws, on the other hand, are designed “to protect the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.” *Schultz*, 466 F.3d at 304 (internal marks omitted and citation omitted); see also RCW 49.46.005. “The reasons for blocking vicarious liability at a particular point have nothing to do with the functions of [remedial wage laws].” *United States Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1544 (7th Cir. 1987) (J. Easterbrook, concurring).

With a focus on the worker, the economic realities test questions “whether the worker ‘is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself.’” *Schultz*, 466 F.3d at 304 (internal marks omitted and citation omitted). Under this test, employee status is not limited to those who are

¹⁰ Notably, the pattern jury instruction that underlies the test adopted by the trial court in this case provides: “This instruction is designed for tort cases only.” 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 50.11 (5th ed.); see also WPI 50.00 (“The instructions are intended for use in tort actions in which plaintiff seeks to establish the vicarious liability of a principal for the tortious conduct of an agent . . . This chapter does not cover . . . actions based on . . . non-tort theories . . . [or] between principals and agents.”).

subject to the physical control of an employer. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). “Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.” *Id.* (punctuation added). Thus, while control is one of the factors to be considered in the economic realities test, it is not dispositive. *Real*, 603 F.2d at 754-56; *Schultz*, 466 F.3d at 298.

Here, the trial court issued an instruction to the jury that made control the decisive factor:

You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. ***This decision requires you to determine whether FedEx Ground controlled, or had the right to control, the details of the class members’ performance of the work.*** In deciding ***control or right to control***, you should consider all the evidence bearing on the question

Anfinson, 159 Wn. App. at 47 (emphasis in original) (quoting Instruction 9, CP 2195). By focusing on control rather than “the economic realities of the total circumstances,” *Real*, 603 F.2d at 756, the trial court narrowed the coverage of the MWA, making it more difficult for the drivers to qualify for the Act’s protections.

The Legislature intended the MWA to provide minimum protections for workers and to encourage employment opportunities in Washington. RCW 49.46.005. “Statutes should be interpreted to further,

not frustrate, their intended purpose.” *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994). A test that narrows the scope of the Act’s coverage will eliminate safeguards and discourage employment opportunities because a proprietor can require “independent contractors” to work for less pay and longer hours than it can workers who qualify as “employees.” See *Bostain*, 159 Wn.2d at 712 (“[a] restrictive reading of the . . . MWA would be inconsistent with protecting workers”).

The Court of Appeals was correct in holding that “th[e] distinction between tort policy and social legislation justifies a departure from common law principles when an employer claims that a worker is excluded as an independent contractor from a statute protecting ‘employees.’” *Anfinson*, 159 Wn. App. at 52. Indeed, this Court has recognized on several occasions that a worker may be an independent contractor under one legal framework but an employee under another. See *Fisher v. City of Seattle*, 62 Wn.2d 800, 805, 384 P.2d 852 (1963) (“[A] workman might be deemed an ‘employee’ for purposes of the vicarious liability of a master to a third party while, under the same facts, he may not be an ‘employee’ for purposes of workmen’s compensation issues.”); *Hollingbery v. Dunn*, 68 Wn.2d 75, 80, 411 P.2d 431 (1966) (same); *Novenson*, 91 Wn.2d at 554 (same).

3. The Right to Control Test Conflicts with the MWA.

In addition to placing too much emphasis on control, the common law test for determining employment status includes factors that are

inconsistent with the MWA. For example, the trial court instructed the jury to consider “[w]hether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.” *Anfinson*, 159 Wn. App. at 47 (quoting Instruction 9, CP 2195). Intent of the parties, however, is irrelevant to the question of MWA coverage. The Legislature has specifically determined that a worker’s agreement to forego the protections of the MWA is no defense to a claim for overtime compensation. RCW 49.46.090(1). Statutory wage and hour rights are simply “nonnegotiable.” *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 419, 54 P.3d 687 (2002), *aff’d*, 151 Wn.2d 853, 93 P.3d 108 (2003).

Another factor in the common law test that conflicts with the MWA is “[t]he method of payment, whether by the time or by the job.” *Anfinson*, 159 Wn. App. at 47 (quoting Instruction 9, CP 2195); *see also* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 50.11.01(7) (5th ed.), Workers who fall within the scope of the MWA are entitled to overtime compensation regardless of whether they are paid by the hour or by the piece. *See* WAC 296-128-035; *accord Rutherford*, 331 U.S. at 729 (FLSA covers “those who are compensated on a piece rate basis”). Allowing a jury to consider piecework pay as a ground for finding independent contractor status tips the scales in favor of purported employers. Because it is inconsistent with the provisions in the MWA, the common law test should be rejected.

4. Adoption of the Economic Realities Test by Federal Courts Weighs in Favor of Adoption in Washington.

The MWA is patterned on the FLSA. *Stahl*, 148 Wn.2d at 885-86. In fact, the Legislature amended the overtime provisions of the MWA to conform to the FLSA in 1975. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000). The basic definition of “employee” in the MWA is essentially identical to the basic definition of “employee” in the FLSA.¹¹ The same is true for the definition of “employ.”¹²

The primary purpose of the FLSA is to protect workers. *See Schultz*, 466 F.3d at 304. Federal courts have found the statute has “the broadest definition of ‘employ’ that has ever been included in any one act,” and it encompasses “working relationships, which prior to the FLSA, were not deemed to fall within an employer-employee category.” *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 69 (2d Cir. 2003) (internal marks and citations omitted). For these reasons, federal courts have concluded that “the definition of ‘employ’ in the FLSA cannot be reduced to formal control over the physical performance of another’s work.” *Zheng*, 355 F.3d at 70; *see also Nationwide Mut. Ins. Co. v. Darden*, 503

¹¹ Compare RCW 49.46.010(3) (“[e]mployee’ includes any individual employed by an employer”), with 29 U.S.C. § 203(e)(1) (“‘employee’ means any individual employed by an employer”). When the Legislature enacted the MWA in 1959, the definition of “employee” under the FLSA used the term “includes” rather than “means.” *See Dunlop v. Carriage Carpet Co.*, 548 F.2 139, 142 (6th Cir. 1977). In 1974, the definition was amended to its current form. *See id.* Courts have determined that the substitution of “means” for “includes” was of “no particular significance,” noting the 1974 amendments “were meant to expand—not narrow—the coverage of the Act.” *Smith v. BellSouth Telecommunications, Inc.*, 273 F.3d 1303, 1308 n.6 (11th Cir. 2001) (quoting *Dunlop*, 548 F.2 at 142)).

¹² Compare RCW 49.46.010(2) (“[e]mploy’ includes to permit to work”), with 29 U.S.C. § 203(g) (“[e]mploy’ includes to suffer or permit to work”).

U.S. 318, 326 (1992) (the “striking breadth” of “permit to work” “stretches the meaning of ‘employee’” to cover parties who might not qualify as such under “traditional agency principles”). Instead, federal courts use the economic realities test to determine employment status under the FLSA—a test “designed to capture the economic realities of the relationship between the worker and the putative employer.” *Schultz*, 466 F.3d at 305.

When the Washington Legislature enacts “a statute which is identical or similar to one in effect in another state or country, the courts . . . usually adopt the construction placed on the statute in the jurisdiction in which it originated.” *Everett Concrete Prods., Inc. v. Dep’t of Labor & Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988). With respect to the MWA, Washington courts consider the interpretation of comparable provisions of the FLSA as persuasive authority. *See Stahl*, 148 Wn.2d at 885-86; *Drinkwitz*, 140 Wn.2d at 298. Because the definition of “employee” in the MWA derives from an identical definition in the FLSA and both statutes are designed to provide the broadest protections to workers, Washington should follow the federal courts and adopt the economic realities test.¹³

¹³ Application of the common law test could lead to the absurd result that workers are “independent contractors” under the MWA but “employees” under the FLSA.

5. The Multi-District Litigation Involving FedEx Is Distinguishable.

In its briefing, FedEx cites to certain decisions from the multi-district litigation (MDL) against the company, but those decisions are distinguishable. As the court itself recognized, “[t]he nationwide character of [that] litigation makes it a truly unique set of cases, unlike anything that has appeared in the cases cited in the parties’ briefs.” *In re FedEx Ground Package Sys., Inc.*, 758 F. Supp. 2d 638, 654 (N.D. Ind. 2010). Among other things, “the procedural posture” of the litigation “substantially limited the scope of evidence available to [the] court to decide the drivers’ generalized employment status question.” *Id.* at 655. For this reason, the court specifically noted: “These cases might or might not come out differently under a different procedural posture allowing wider scope for review of extrinsic and particularized evidenced, but that situation is not before the court . . .” *Id.*

Furthermore, the court in the MDL dealt with claims brought under the laws of various states that do not have wage and hour statutes. Alabama, for example, “does not have a state overtime law.” Meyer & Greenleaf, *supra* note 1, at 164.¹⁴ The drivers from that jurisdiction therefore alleged “violations of the Alabama Deceptive Trade Practices Act and fraud.” *In re FedEx Ground*, 758 F. Supp. 2d at 661. With no wage laws to consider, the court applied tort law in determining whether the drivers are employees or independent contractors. *Id.* at 662.

¹⁴ Remarkably, 17 states still lack any form of state overtime law. See Meyer & Greenleaf, *supra* note 1, at 164-76.

The MDL court ultimately entered summary judgment against FedEx drivers from more than 20 states based on versions of the common law right to control test. *Id.* at 661-733. Importantly, though, the court ruled in favor of FedEx drivers from a handful of other states where employment status under remedial wage laws was found to be “broader than the traditional common law concept of the master and servant relation.” *Id.* at 684-85 (quoting 803 Ky. Admin. Regs 1:005 § 1(2)); *see also id.* at 698-99 (New Hampshire employment law “eviscerates the common law distinction between results and means”). That the same set of facts led to such disparate results depending on the factors being applied only underscores the need for this Court to adopt a test that promotes the protective policies of Washington’s MWA.¹⁵

IV. Conclusion

For the reasons set forth above, WELA respectfully asks this Court to affirm the decision of the Court of Appeals.

¹⁵ The suggestion that the economic realities test cannot be applied to resolve claims for a large group of workers is misplaced. *See, e.g., Scovil v. FedEx Ground Package Sys., Inc.*, ___ F. Supp. 2d ___, 2011 WL 4347017, at *2 (D. Me. Sept. 16, 2011) (granting conditional certification under FLSA in collective action by FedEx drivers alleging misclassification of employment status); *United States Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987) (applying economic realities test and holding “[n]o trial is needed to sort out the material facts in these circumstances in order to come to the conclusion of law that these migrant workers are employees, entitled to protection of the FLSA”). As the Court of Appeals has concluded, “any group of employees claiming they were illegally classified as exempt will inevitably have some variations in their job duties,” and “to invalidate [such a] class on the basis of predominance or commonality would practically preclude class certification for any similar claim under the MWA.” *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 827, 64 P.3d 49 (2003).

Dated this 17th day of January, 2012.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, S/ Toby J. Marshall

Toby J. Marshall, WSBA #32726

Email: tmarshall@tmdwlaw.com

Jeffrey Needle, WSBA #6346

Email: jneedle@wolfenet.com

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR
COUNTY OF KING

ISAIAS RAMIREZ, et al.,

Plaintiffs,

v.

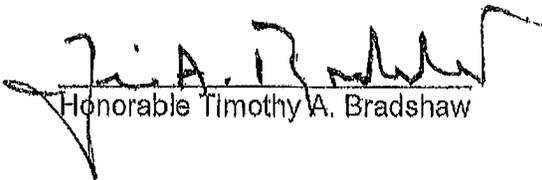
PRECISION DRYWALL, INC, et. al.,

Defendants.

No. 08-2-26023-2 SEA

COURT'S INSTRUCTIONS TO THE JURY

April 16, 2010


Honorable Timothy A. Bradshaw

Instruction 9

This case is being tried as a class action. A class action is a lawsuit in which a single person or a small group of people represent the interests of a larger group. The Court has ruled that the Class in this case consists of more than 300 employees who worked as non-managerial hangers and tapers for Precision Drywall, Inc. in the State of Washington. Plaintiffs Isaias Ramirez and Mario Hernandez are representing the Class. Plaintiffs seek allegedly unpaid wages on behalf of the Class members for the period of time from August 1, 2005 through the date of final disposition of this action, which is referred to as the "Class Period."

Instruction 10

Plaintiffs have put on testimony alleged to be fairly representative of the Class in order to establish a pattern or practice of violations and the total damages owed to the Class as a result of those violations. Plaintiffs do not need to present testimony from all Class members in order to prove a pattern or practice or to establish the back wages owed. Instead, Plaintiffs need only present testimony from a reasonably sufficient number of representatives that, when considered together with all of the other evidence presented in the case, establishes a pattern or practice and the total damages owed. No exact number or percentage of Class members is required to testify.

Instruction 18

With respect to Plaintiffs' claims that Defendants violated Washington's overtime compensation laws, Plaintiffs have the burden of proving the following propositions separately for each Defendant:

1. The Defendant is an employer of the Class members;
2. That the Class members did not receive compensation for their employment in excess of the 40 hours at a rate not less than one and one-half times the regular rate at which they were employed;
3. The Defendant knew or had reason to believe Class members performed this work;
4. The Defendant failed to pay overtime compensation for this work; and
5. The Defendant engaged in a pattern or practice of such violations.

If you find from your consideration of all the evidence that any of these propositions has not been proved, then your answer on the verdict form should be "no." On the other hand, if each of these propositions has been proven, then your answer on the verdict form should be "yes."

Instructions 27

With respect to Plaintiffs' claims that Defendants violated Washington's rest period laws, Plaintiffs have the burden of proving the following propositions separately for each Defendant:

1. The Defendant is an employer of the Class members;
2. The Defendant failed to allow Class members paid 10-minute rest periods for each four hours of working time;
3. The Defendant knew or had reason to believe Class members were performing work when missing rest periods;
4. The Defendant failed to pay an additional 10 minutes of compensation for each missed rest periods; and
5. The Defendant engaged in a pattern or practice of such violations that affected the Class.

If you find from your consideration of all the evidence that any one of these propositions has not been proven, then your answer on the verdict form should be "no." On the other hand, if you find that plaintiffs have proven each of these propositions with respect to a particular Defendant, then your answer on the verdict form should be "yes."

APPENDIX B

FILED
KING COUNTY WASHINGTON

FEB 08 2006

SUPERIOR COURT CLERK
BY EILEEN L. McLEOD
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR
KING COUNTY

<p>DAVID STEVENS, DONALD A. GOINES, and JEFFREY R. PORTER, on behalf of all other similarly situated, Plaintiffs, v. BRINK'S HOME SECURITY, INC., Defendants.</p>	<p>NO. 02-2-32464-9SEA</p>
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COURT'S INSTRUCTIONS TO THE JURY

Dated this 8 day of February, 2006.



PALMER ROBINSON, Judge

INSTRUCTION NO. 13

With respect to plaintiffs' claims that Brink's acted willfully with respect to depriving them of any part of their wages, plaintiffs have the burden of proving each of the following proposition:

1. Defendant engaged in a pattern or practice of not paying the class members a part of their wages during all or part of the class period; and
2. In so doing, defendant acted knowingly and intentionally, and not as the result of mere carelessness or inadvertance;

With respect to these claims, defendant has the burden of proving the following proposition:

3. That any nonpayment of wages was the result of defendant's bona fide belief that it was not obligated to pay the wages.
4. That the plaintiffs knowingly submitted to the nonpayment of wages.

Should you find from your consideration of all the evidence that plaintiffs have proved propositions 1 and 2 above and that defendant has not proved either proposition 3 and 4 above, then your verdict shall be for plaintiffs on their claims of willfulness. On the other hand, should you find from your consideration of all the evidence that plaintiffs have not proved both propositions 1 and 2 or that defendant has proved either proposition 3 or 4, then your verdict shall be for defendant on the claims of willfulness.

INSTRUCTION NO. 14

Plaintiffs have put on testimony alleged to be representative of all of the plaintiffs in this case in order to establish defendant's pattern or practice of failure to pay for all hours worked and the damages owed as a result of the alleged failure. Plaintiffs do not need to present testimony from all affected employees in order to prove the pattern and practice or establish the back wages owed. While no exact number or percentage of the plaintiffs is required to testify, plaintiffs must present a sufficient number of representatives, which, when considered together with all of the other evidence presented in this case, establishes a pattern or practice and the damages owed.

APPENDIX C

CHRISTIAN RYDER, REGINA JONES,
ERIN PETERSON, SANDY CHAMBERS,
LAURI GREGORY, JESLYN HARRIS,
CRYSTAL YOUNG, and MICHAEL
MUNCH, individually and class
representatives,

Plaintiffs,

v.

TACO BELL CORP., a California
Corporation,

Defendant.

CLASS ACTION

NO. 95-2-03738-1 SEA

COURT'S INSTRUCTION TO THE JURY

DATED this 25th day of March, 1997.

Sharon A. Armstrong
HON. SHARON ARMSTRONG

INSTRUCTION NO. 11

With respect to class members' claims for off-the-clock work, plaintiffs have the burden of proving each of the following propositions:

1. Defendant permitted a class member to perform work for which he or she was not paid, in one of the following ways:
 - a. work before clocking in;
 - b. work after clocking out;
 - c. waiting after the start of a shift;
 - d. work not recorded on pay records;
 - e. uncompensated training and meetings;
 - f. excessive laundering due to an insufficient supply of uniforms;
2. Defendant knew or had reason to know that such work occurred;
3. Defendant's conduct violated Washington law;
4. Defendant's conduct occurred in Washington at any time after February 10, 1992;
5. Defendant engaged in a pattern or practice of such violations.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the plaintiff class on that claim. On the other hand, if you find from your consideration of all the evidence that any one of these propositions has not been proven, then your verdict should be for the defendant on that class claim.

INSTRUCTION NO. 12

With respect to plaintiffs class members' claims for uncompensated meal breaks, plaintiffs have the burden of proving each of the following propositions:

1. Defendant violated Washington law for a class member regarding meal breaks in one or more of the following ways:

- a. not allowing meal breaks when required to do so;
- b. failing to compensate for meal breaks when the employer knew or should have known that employees were subject to being called back to work on a moment's notice; and
- c. failing to pay for meal breaks of less than thirty minutes when the employer knew or should have known that meal breaks were shortened in the interest of the defendant.

2. Defendant's conduct occurred in Washington at any time after February 10, 1992.

3. Defendant engaged in a pattern or practice of such violations.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the plaintiff class on that claim. On the other hand, if you find from your consideration of all the evidence that any one of propositions 1 through 3 has not been proven, then your verdict should be for the defendant on that class claim.

INSTRUCTION NO. 16

In proving a pattern or practice of violations, plaintiffs may rely upon representative evidence, that is, evidence by some but not all members of the plaintiff class. In determining whether evidence of testifying class members is fairly representative of the class, you may consider such factors as the length of employment, position held, type of work performed, location of the work, substantial similarity of workers' experiences, as well as other factors. While no exact number or percentage of class members is required to testify, plaintiffs must present a sufficient number of representatives to establish a pattern or practice of violations.

APPENDIX D

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FILED
KING COUNTY, WASHINGTON

APR 20 2008

**SUPERIOR COURT CLERK
BY VICTORIA B. BOGOTNA**

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ISAIAS RAMIREZ and MARIO
HERNANDEZ on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

PRECISION DRYWALL, INC., a
Washington corporation; JAMES LEA,
individually, and the marital community of
JAMES LEA and JANE DOE LEA; DENNIS
LEA, individually, and the marital community
of DENNIS LEA and JANE DOE LEA; and
KELLY WASKIEWICZ, individually, and
the marital community of KELLY
WASKIEWICZ and JOHN DOE
WASKIEWICZ,

Defendants.

NO. 08-2-26023-2 SEA

VERDICT FORM

Reminder: Ten jurors must agree upon any answer. It is not necessary that the jurors who agree on one answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer. When you have completed the form according to the instruction provided, the presiding juror must sign and date the verdict form.

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WE THE JURY, in the above-entitled case, find as follows:

OVERTIME COMPENSATION CLAIMS

Question 1: Did Defendant Precision Drywall, Inc. violate Washington's overtime compensation laws with respect to the Class members?

YES X NO _____

If you answered "Yes" to Question 1, please proceed to Question 2. If you answered "No" to Question 1, please proceed to Question 3.

Question 2: Did Defendant Precision Drywall, Inc. willfully fail to pay overtime compensation to Class members?

YES X NO _____

If you answered Question 2, please proceed to Question 3.

Question 3: Did Defendant James Lea violate Washington's overtime compensation laws with respect to the Class members?

YES X NO _____

If you answered "Yes" to Question 1 or Question 3, please proceed to Question 4. Otherwise, please proceed to Question 5.

Question 4: Did Defendant James Lea willfully fail to pay overtime compensation to Class members?

YES X NO _____

If you answered Question 4, please proceed to Question 5.

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Question 5: Did Defendant Dennis Lea violate Washington's overtime compensation laws with respect to the Class members?

YES X NO _____

If you answered "Yes" to Question 1 or Question 5, please proceed to Question 6. Otherwise, please proceed to Question 7.

Question 6: Did Defendant Dennis Lea willfully fail to pay overtime compensation to Class members?

YES X NO _____

If you answered Question 6, please proceed to Question 7.

Question 7: Did Defendant Kelly Waskiewicz violate Washington's overtime compensation laws with respect to the Class members?

YES X NO _____

If you answered "Yes" to Question 1 or Question 7, please proceed to Question 8. Otherwise, please proceed to Question 9.

Question 8: Did Defendant Kelly Waskiewicz willfully fail to pay overtime compensation to Class members?

YES _____ NO X

If you answered Question 8, please proceed to Question 9.

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REST PERIOD VIOLATION CLAIMS

Question 9: Did Defendant Precision Drywall, Inc. violate Washington's rest period laws with respect to the Class members?

YES _____ NO X _____

If you answered "Yes" to Question 9, please proceed to Question 10. If you answered "No" to Question 9, please proceed to Question 11.

Question 10: Did Defendant Precision Drywall, Inc. willfully fail to allow Class members to take rest breaks?

YES _____ NO _____

If you answered Question 10, please proceed to Question 11.

Question 11: Did Defendant James Lea violate Washington's rest period laws with respect to the Class members?

YES _____ NO X _____

If you answered "Yes" to Question 9 or 11, please proceed to Question 12. Otherwise, please proceed to Question 13.

Question 12: Did Defendant James Lea willfully fail to allow Class members to take rest breaks?

YES _____ NO _____

If you answered Question 12, please proceed to Question 13.

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Question 13: Did Defendant Dennis Lea violate Washington's rest period laws with respect to the Class members?

YES _____ NO X _____

If you answered "Yes" to Question 9 or Question 13, please proceed to Question 14. Otherwise, please proceed to Question 15.

Question 14: Did Defendant Dennis Lea willfully fail to allow Class members to take rest breaks?

YES _____ NO _____

If you answered Question 14, please proceed to Question 15.

Question 15: Did Defendant Kelly Waskiewicz violate Washington's rest period laws with respect to the Class members?

YES _____ NO X _____

If you answered "Yes" to Question 9 or Question 15, please proceed to Question 16. Otherwise, please proceed to Question 17.

Question 16: Did Defendant Kelly Waskiewicz willfully fail to allow Class members to take rest breaks?

YES _____ NO _____

If you answered Question 16; please proceed to Question 17.

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TOOL DEDUCTION CLAIMS

Question 17: Did Defendant Precision Drywall, Inc. violate Washington law by willfully deducting tool expenses from the wages of Class members?

YES X NO _____

If you answered Question 17, please proceed to Question 18.

Question 18: Did Defendant James Lea violate Washington law by willfully deducting tool expenses from the wages of Class members?

YES X NO _____

If you answered Question 18, please proceed to Question 19.

Question 19: Did Defendant Dennis Lea violate Washington law by willfully deducting tool expenses from the wages of Class members?

YES X NO _____

If you answered Question 19, please proceed to Question 20.

Question 20: Did Defendant Kelly Waskiewicz violate Washington law by willfully deducting tool expenses from the wages of Class members?

YES _____ NO X

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DAMAGES

Question 21: *If you answered "Yes" to one or more of the questions in the Overtime Compensation Claims section (questions 1 through 8), please answer the following Question. If you answered "No" to all of those questions, please proceed to Question 22.*

What do you find to be the amount of money owed to the Class members for unpaid overtime hours worked?

Answer: \$ 1,036,143.83

Question 22: *If you answered "Yes" to one or more of the questions in the Rest Period Violation Claims section (questions 9 through 16), please answer the following Question. If you answered "No" to all of those questions, please proceed to Question 23.*

What do you find to be the amount of money owed to the Class members for the rest period violations?

Answer: \$ 0 N/A

Question 23: What do you find to be the amount of money owed to the Class members for tool deductions?

Answer: \$ 14493.45

DATE: April 19, 2010

Robert Kramer
Presiding Juror