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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,

Respondents,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

The Court of Appeals reversed a jury's verdict, which found after a four-week trial that the 320 class members were independent contractors, not FedEx Ground employees, for purposes of Washington's Minimum Wage Act (MWA) and Industrial Welfare Act (IWA). The jury made this determination after hearing evidence that class members can buy and sell their delivery routes, often for a substantial profit, that they own or lease their delivery vehicles from third parties, and that a third of the class members hire others to perform the services they have contractually agreed to provide for FedEx Ground.

The Court of Appeals erroneously held that Instruction 9 was reversible error. Instruction 9 set out a legal standard incorporating all the factors requested by the plaintiffs, including those they advocated based on federal cases interpreting the Fair Labor Standards Act (FLSA). Division One disagreed with the instruction because it "focuses on whether an employer has the 'right to control the details of the class members' performance of the work.'" 159 Wn. App. 35, 45 ¶ 16. But plaintiffs convinced the trial court to certify the case as a class action under this "right to control" test, argued throughout trial that "right to control" was the appropriate standard, and did not preserve their current objection to inclusion of the term "right to control" in Instruction 9.

Further, plaintiffs fail on appeal to articulate any meaningful distinction between their now preferred term “dependence” and the “right to control.”

The Court of Appeals also erroneously held “misleading” and “likely prejudicial” Instruction 8, which asked the jury to decide whether “employee’ status was common to the class members.” 159 Wn. App. at 65, ¶ 74. As plaintiffs conceded below, common evidence establishing a uniform practice is a necessary predicate to finding a defendant liable to a plaintiff class.

The Court of Appeals decision improperly reverses a jury’s verdict based on instructions that allowed plaintiffs to present and argue their theory of the case, under legal standards that were correct and that plaintiffs were estopped to deny and in fact encouraged the trial court to adopt. This Court should reverse and reinstate the trial court’s judgment on the jury’s verdict dismissing the plaintiffs’ class action.

II. ARGUMENT

A. Plaintiffs Are Estopped From Claiming On Appeal That The Trial Court Erred In Instructing The Jury On “Right To Control” Because They Relied On This Test To Certify The Class And Throughout Trial, And Failed To Object To The Term “Right To Control” In The Preamble.

Plaintiffs steadfastly asserted that the “right to control” is the critical distinction between an independent contractor and an employee under Washington’s MWA and convinced the trial court to certify a class

based on the “right to control” test. Further, plaintiffs did not object to Instruction 9 on the ground that it used the term “right to control” in the preamble. (3/27 a.m. RP 17) Plaintiffs are barred from challenging on appeal the trial court’s reference to “right to control” in Instruction 9.

The plaintiffs affirmatively advanced “right to control” as the proper legal standard throughout this litigation. In seeking class certification, plaintiffs argued that the test of employee status was the “right to control:”

Under Washington law, an employee is defined as ‘one whose physical conduct in the performance of the service is subject to the other’s right of control.’ In contrast, an independent contractor is one who contracts to perform services for another, ‘but is not subject to the other’s right to control his physical conduct in performing the services.’ *Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 497-98, 663 P.2d 132 (1983), citing *Hollingbery, Jr. v. Dunn*, 68 Wn.2d 75, 79, 411 P.2d 431 (1966). *Ebling* is particularly on point because it distinguishes between employees and independent contractors in the context of the Washington wage statutes. The test of control is not the degree to which the employer actually interferes with the agent, but the presence of the right to exercise that control. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119-120, 52 P.3d 472 (2002). The proof here will be that FedEx Ground both had the right of control, and routinely exercised that right.

(Motion for Class Certification, CP 2867)

In granting class certification, the trial court adopted plaintiffs’ proposed findings that “[t]he critical test is whether FedEx [Ground] had the ‘right to control’ the manner and means of the work performed” (CP

211), and that “the overriding issue in this litigation is whether defendant FedEx [Ground] has the right to control the manner and means of the work performed by putative class members.” (CP 214)

Plaintiffs continued to rely on the “right to control” test for employee status through trial. In arguing that plaintiffs’ tax returns should not be admissible, plaintiffs asserted that “[u]nder Washington law, the jury’s determination regarding the status of class members as either independent contractors or employees will turn on whether FedEx retained the right to control the manner and means of the drivers’ work.” (CP 266), *citing Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 663 P.2d 132, *rev. denied*, 100 Wn.2d 1005 (1983). Plaintiffs went on to argue that “[t]he FLSA standard and its attendant ‘economic realities’ test is different from Washington’s ‘control’ test and therefore is not relevant to the question before the jury in this wage-and-hour class action.” (CP 268)

Plaintiffs told the jury in opening statement that “this case is about control and right of control” (3/3 RP 28; *see also* 3/2 RP 43 (“the issue is control. . .”)), argued at the close of their case that “anecdotal” evidence reflected FedEx Ground’s “control” of class members through company policies (3/12 RP 186), and moved for a directed verdict on the ground that “the evidence re-establishes the control by FedEx [Ground] over the entire class.” (3/27 RP 55) While the jury was deliberating, plaintiffs

opposed decertifying the class by again quoting *Ebling* and arguing that “the right of control is the crucial analysis.” (CP 2206)

In argument over instructions, plaintiffs did not object to use of the term “right to control” in the preamble. Indeed, they originally proposed an instruction that would have told the jury that “[i]n order to determine whether an individual is an employee or an independent contractor, you must determine whether the defendant had the right of control over the physical conduct of the services performed:”

If you find the defendant had this right of control during the class period, you must find that the plaintiffs were employees of defendant. . . .

Plaintiffs’ Proposed Instruction 13 (CP 1077), *citing Ebling* and WAC 296-126-002(2). When plaintiffs proposed an alternative multi-factor test, they continued to maintain “that the *Ebling* standard is the correct test” because “Washington law . . . differs in material ways from the FLSA.” (CP 1049)

Even in final argument over instructions, plaintiffs proposed that the jury be told that it may consider “other relevant factors only if the evidence bears on whether FedEx Ground had the control or right of control over the details of class members’ performance of the work.” (3/26 RP 86) Most importantly, while plaintiffs did propose that the words “economic reality” be added to the instruction, they never took

exception to the use of the term “right to control” in the preamble to Instruction 9;

I will point out that the most specific objection comes to number 3 which fails to include that the – that there should be a relative investment consideration. We specifically object to the giving of factors seven and eight for the reasons we have discussed at great length. And also, of course, to the failure to include any language that these factors are premised on economic reality.

(3/27 a.m. RP 17) This Court should reinstate the jury’s verdict for this failure to properly preserve the objection alone. *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (reversing Court of Appeals’ grant of new trial where plaintiff’s objection to instruction failed to apprise trial court of her contention on appeal).

This Court should also reinstate the jury’s verdict because where, as here, “a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001), quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). The Court of Appeals held that plaintiffs could not be bound to their position on “right to control,” reasoning that “the ‘heart of the doctrine [of judicial

estoppel] is the prevention of inconsistent positions as to facts. It does not require counsel to be consistent on points of law.” 159 Wn. App. at 63, ¶ 67, quoting *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974) (bracketed language added by Court of Appeals).¹

But the judicial estoppel doctrine is not limited to issues of fact. See, e.g., *Hardgrove v. Bowman*, 10 Wn.2d 136, 138, 116 P.2d 336 (1941). Here, plaintiffs’ assertions went to the heart of the determination to be made by the jury – whether, as a class, plaintiffs were independent contractors or employees – an issue that the Court of Appeals itself characterized not as a “point of law” but as “a mixed question of fact and law.” 159 Wn. App. at 46, ¶ 18. On that issue, plaintiffs time and again conceded that defendant’s right to control was “critical.” (CP 211, 1045) And regardless whether the issue is considered factual, legal, or mixed, the doctrines of invited error, law of the case, and judicial estoppel, each protect the “integrity of the judicial process,” *New Hampshire v. Maine*, 532 U.S. at 749, and should have prevented the Court of Appeals from accepting plaintiffs’ argument on appeal that instructing the jury on “right to control” was reversible error.

¹ The *Clodfelter* case considered the admission of evidence under the deadman’s statute, RCW 5.60.030.

B. The Trial Court's Multi-Factor Definition Of "Employee" Accurately Stated The Law And Allowed Plaintiffs To Argue Both "Control" And "Economic Reality."

The jury found that the class members were independent contractors, and not "employees" under the MWA, RCW 49.46.130, and IWA, RCW 49.12.450, based on an instruction that 1) accurately stated the applicable law; 2) incorporated each factor of the FLSA "economic reality" test; and 3) did not prejudice plaintiffs, but rather allowed both parties to argue their theories of the case:

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 and may consider the following factors, among others:

- (1) The degree of FedEx Ground's right to control the manner in which the work is to be performed;
- (2) The class members' opportunity for profit or loss depending upon each one's managerial skill;
- (3) The class members' investment in equipment or materials required for their tasks, or their employment of others;
- (4) Whether the service rendered requires a special skill;
- (5) The degree of permanence of the working relationship;
- (6) Whether the service rendered is an integral part of FedEx Ground's business;
- (7) The method of payment, whether by the time or by the job; and

(8) Whether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.

Neither the presence nor the absence of any individual factor is determinative.

(Instruction 9, CP 2195)

1. Instruction 9 Correctly Referred To “Right To Control” As The Defining Distinction Between An Employee And An Independent Contractor Under The MWA And IWA

The trial court correctly referred to “right to control” in the preamble to Instruction 9. The instruction gave the jury meaningful guidance for determining whether the plaintiffs were independent contractors or employees for purposes of their claims under both Washington’s MWA and IWA, consistent with the Department of Labor and Industries’ regulation defining an “employee.”

“Control” is an important factor in the FLSA “economic reality” test,² and is the critical factor in distinguishing between an independent

² Although plaintiffs now argue that it was reversible error not to instruct the jury using the FLSA “economic reality” test, federal decisions under FLSA are only “persuasive authority” in interpreting Washington’s MWA, *see Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 862 n.6, 93 P.3d 108 (2004), and are not binding on this Court. For instance, the federal courts review “employee” status under FLSA de novo, as a question of law. *Thibault v. Bellsouth Telecommunications, Inc.*, 612 F.3d 843, 845 (5th Cir. 2010). In Washington, by contrast, while the applicable legal standard is a question of law, whether an individual is an “employee” under that standard is generally a question of fact. *Berrocal v. Fernandez*, 155 Wn.2d 585, 597 ¶ 17, 121 P.3d 82 (2005). *See* 159 Wn. App. at 72-73, ¶ 98 (trial court appropriately directed jury to determine whether plaintiffs were “employees”).

contractor and an employee under the IWA.³ The Department of Labor and Industries (DLI), which administers the IWA and the MWA, distinguishes an “independent contractor” from an “employee” under these statutes based primarily on 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) (emphasis added).⁴ In their attempt to justify a “pure” “economic reality” instruction on appeal, plaintiffs now disavow their “relatively minimal” IWA claim, arguing that the MWA claim was “primary.” (Answer to Petition 10, 12) But plaintiffs never dropped their IWA claim, elicited testimony about FedEx Ground’s uniform and apparel policies at trial (e.g., 3/5 RP 172-73, 3/11 RP 157, 3/12 RP 113), relied on DLI’s regulation at the beginning of the case (CP 1045), and never proposed that the jury be separately instructed

³ Plaintiffs asserted an IWA claim under RCW 49.12.450(1), which can obligate “an employer to furnish or compensate an employee for apparel required during work hours . . .”.

⁴ The issue of “control” remains the most important consideration under other states’ wage statutes as well, many of which are also modeled after FLSA. *See, e.g., Herr v. Helman*, 75 F.3d 1509, 1512 (10th Cir. 1996) (Kansas uses a 20-factor test, “with a particular emphasis placed on the employer’s right to control the worker.”) *See also* 803 Ky. Admin. Regs. 1:005 (“The principal test is whether the possible employer controls or has the right to control the work to be done”); NDAC 27-02-14-01(5)(a) (“Generally, an employment relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services.”)

on their IWA claims. Plaintiffs have waived any argument that their MWA and IWA claims should be considered under different standards.

Instruction 9 properly included the term “right to control” because it provided an understandable concept that the jury could use in determining – under *both* Washington’s MWA and IWA – whether plaintiffs were independent contractors or employees of FedEx Ground.

2. Instruction 9 Incorporated The FLSA “Economic Reality” Test That Plaintiffs Advance On Appeal.

This Court should reinstate the jury’s verdict because Instruction 9 correctly stated the law. The Court of Appeals mischaracterizes the trial court’s instruction as deriving from the common law of torts. 159 Wn. App. at 51, ¶ 31. Instruction 9 in fact did not adopt the common law distinction between employees and independent contractors for purposes of tort liability, which is based on agency principles. *See Hollingbery v. Dunn*, 68 Wn.2d 75, 79-81, 411 P.2d 431 (1966); WPI 50.11.01. The trial court instead instructed the jury that it “may consider” eight non-exclusive factors, “among others,” in determining whether class members were employees or independent contractors. (CP 2195)

The first six factors of Instruction 9 were taken directly from the Ninth Circuit’s “economic reality” test under FLSA. *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370-72 (9th Cir. 1981). Other federal circuits

have enunciated different variations of the non-exclusive, multi-factor “economic reality” test used by the trial court. Whether five, six or eight in number, the non-exclusive factors developed by the federal courts are “merely a guide” to determining whether class plaintiffs were “as a matter of economic reality, dependent on [FedEx Ground] and therefore within the protections and benefits afforded by” FLSA. *Sureway Cleaners*, 656 F.2d at 1371. See *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299, 305 (5th Cir. 1998) (considering five factors in affirming determination that delivery drivers were independent contractors). Providing a “guide” is precisely what Instruction 9 did here, directing the jury that it could consider a range of factors “among others” in determining whether FedEx Ground had the right to control the parties’ economic relationship. See *Sureway Cleaners*, 656 F.2d at 1370 (“the list is not exhaustive. . .”).⁵

The plaintiffs themselves proposed not one, but four, different multi-factor instructions. (CP 963, 1078, 1783, 2172) Unlike Instruction

⁵ See also *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 143 (2nd Cir. 2008) (“no rigid rule for the identification of a FLSA employer;” courts have identified “nonexclusive and overlapping set of factors”); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir.) (employing five-factor test; “These factors are not exhaustive, nor can they be applied mechanically to arrive at a final determination of employee status.”), *cert. denied*, 484 U.S. 924 (1987); see generally, Annot., *Determination of “independent contractor” and “employee” status for purposes of sec. 3(e)(1) of the Fair Labor Standards Act*, 51 A.L.R. Fed. 702 (1981).

9, plaintiffs' various proposed instructions did not accurately state the law. Two of plaintiffs' proposed instructions would have limited the jury to five (and then, six) exclusive factors, and directed the jury that it "must find that plaintiffs were employees of defendant" if it found that "the plaintiffs were so dependent upon the defendant's business such that plaintiffs were not, as a matter of economic reality, in business for themselves." (CP 1078, 1783) Plaintiffs' eventual proposed Instruction 13C was also erroneous, as it still would have told the jury that it "should find that class members were employees of defendant" if they were "so dependent upon defendant's business" they were "not, as a matter of economic reality, in business for themselves." (CP 2172) "Dependence" alone cannot make an independent contractor an employee. See *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1356, 1387 (3rd Cir. 1985) (distributors were not employees under FLSA even though "dependent on DialAmerica for continuing their work as distributors."). Were that the test, every small business that relies upon a large client for much of its income would be an "employee."

Instruction 9 instead properly told the jury that the key inquiry is whether one party controls the parties' working relationship. Framed in light of the non-exclusive "economic reality" factors, the instruction required functional "dependence," recognizing that an "employee" lacks

economic and operational control over the essential attributes of the working relationship. See *Baker v. Flint Engineering & Construction Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (“The economic reality test includes inquiries into whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records.”).

The common law “control” standard, like the “economic reality” test, places the “focus on substance and not on corporate forms, titles, labels, or paperwork.” See *Dolan v. King County*, ___ Wn. 2d. ___, 258 P.3d 20, 28-29 ¶ 27 (2011). The FLSA standard incorporates several common law factors, including not only control, but also plaintiffs’ “investment in equipment or materials required for their tasks,” “whether the service rendered requires a special skill,” and the “degree of permanence of the working relationship.” (CP 2195) See WPI 50.11.01. The dichotomy between common law “control” and FLSA “economic reality” thus is by no means as stark as the Court of Appeals posits in reversing the jury’s verdict after a 4-week trial. Instruction 9’s reference to the “right of control” gave the jurors proper guidance to determine whether as a matter of economic reality the class members were employees or independent contractors.

3. Instruction 9 Did Not Prejudice Plaintiffs Because It Allowed Them To Argue “Economic Reality” And To Present Their Theory Of The Case That FedEx Ground “Controlled” The Plaintiff Class Members.

Instruction 9’s reference to the “right to control” did not prejudice the plaintiffs. Their theory was that the “contractor” label ignored FedEx Ground’s control over the parties’ relationship, and, as the trial court told plaintiffs, they were free to argue their theory of the case to the jury. (3/27 RP 20) The jury rejected plaintiffs’ theory not because of the instructions, as the Court of Appeals erroneously held, 159 Wn. App. at 55, ¶ 42, but because the jury found based on overwhelming evidence that the class members were independent, and not controlled by FedEx Ground.

Plaintiffs emphasized that “right to control” was the “main question” (3/30 RP 57) not just in final argument (3/30 RP 30, 34, 37, 52, 55), but throughout the case. *See* (3/12 RP 185-86) (argument at conclusion of plaintiff’s case in chief). Consistent with their theory since at least class certification, plaintiffs elicited the testimony of former and current delivery drivers to argue that FedEx Ground maintained this right to control through its contract, its policies, its Ground Manual, its Operations Management Handbook, and with “Contract Discussion Notes,” all of which gave FedEx Ground “control” over minute details of the parties’ working relationship. (3/5 RP 154-56; 3/9 RP 106-11, 3/10

RP 131-35, 170-79, 192-99; 3/11 RP 73-82, 159, 218 (management “controlled . . . everything. They said how high to jump and we did.”)) The trial court did not exclude any of plaintiffs’ evidence, and plaintiffs have never explained how they would have presented their case differently had the instruction’s preamble referred to “economic reality” rather than “right to control.”

Moreover, the jury rejected plaintiffs’ claim not because the instructions were misleading, but because the plaintiffs’ evidence was weak, disputed, and in many instances refuted by plaintiffs themselves. For instance, class members testified that they and other contractors routinely decided to hire drivers for their routes, so that they could pursue other interests or work only part time (3/11 RP 31-32, 41, 49-50); approximately a third of the class members hired others to drive their routes. (3/23 RP 240; 3/24 RP 96) Lead plaintiff Anfinson admitted that FedEx Ground did not require him to come into the terminal at any set time. (3/10 RP 94) The jury also heard evidence that contractors make many managerial decisions that affected their profit and loss, including their form of business entity (3/4 RP 117-20), whether to purchase or lease a vehicle (3/29 RP 192), whether to hire others, and the management of those hired (3/11 RP 49), choice of available routes (3/12 RP 205), efficient route management (3/5 RP 23; 3/23 RP 246-48), and negotiation of purchase

and sale of routes, or portions of routes. (3/9 RP 52-54; 3/12 RP 208-09; 3/10 RP 37 (lead plaintiff Anfinson purchased part of another contractor's route); 3/11 RP 199-200 (route doubled in value in two years))

Instruction 9 did not prevent plaintiffs from ably arguing their theory that FedEx Ground through its policies and procedures controlled the parties' working relationship, making the class members economically dependent. The jury fairly considered, and ultimately rejected, plaintiffs' theory on the facts.

C. The Jury Was Properly Instructed To Consider Plaintiffs' Claims Of Employee Status Based On "Common" Evidence.

Instruction 8 told the jury to make its determination of "employee" status based on evidence that "was common to class members," and to consider "individualized actions, conduct or work experiences" only to extent they are "common to the class members during the class period." (CP 2194) This instruction was not "misleading and likely prejudicial," 159 Wn. App. at 65, ¶ 74, let alone a misstatement of law that mandates reversal of a jury's verdict after a 4-week trial.

The Court of Appeals erroneously held that the consideration of "commonality" begins and ends at the class certification stage. 159 Wn. App. at 67, ¶ 82. While certification allowed the named plaintiffs to litigate common issues of law and fact, they were still required to prove,

as plaintiffs explained on the first day of trial, “the *common* policies and practices of FedEx [Ground] that gave them the right of control and control over their duties and their jobs.” (3/3 RP 29-30 (emphasis added))

To be representative, evidence must be consistent and apply on a class-wide basis.⁶ Plaintiffs’ own proposed Instruction 11A would have required the jury to find that FedEx Ground engaged in a “regular, mainly unvarying way of acting” toward the plaintiff class, allowing the jury to find liability only if “there is a pattern and practice of this employment status throughout the class of plaintiffs during the class period.” (CP 2170) Plaintiffs argued, as they would have under their own proposed instruction, that “common” meant “frequent and widespread” to the class citing the parties’ “standard” operating agreement. (3/30 RP 56-57)

Plaintiffs chose to bring this action on behalf of a class. Even under their proposed (but inapposite) “pattern and practice” standard, which is applicable only in discrimination claims, plaintiffs must prove that the defendant’s actions were common to the entire class, and not just suffered by individual plaintiffs. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 878, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)

⁶ *See Reich v. Southern New England Telecoms. Corp.*, 121 F.3d 58, 68 (2nd Cir. 1997) (allowing representative evidence when there was “actual consistency among those workers’ testimony” and at issue was “an admitted policy of the employer that was consistently applied”).

(district court could validly reject class-wide liability while finding for individual plaintiffs on individual discrimination claims).⁷

Moreover, to reverse the jury's verdict, plaintiffs must establish more than that Instruction 8 was "misleading." They also "bear[] the burden to establish consequential prejudice." *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558, 564 (2001). The Court of Appeals held that plaintiffs "likely" established prejudice based on FedEx Ground's closing argument that "'common' means 'all,'" reasoning that "absent an objection and a request for a curative instruction, this instruction permitted the jury to decide that Anfinson failed to prove his case if any one member of the class failed to fulfill any of the relevant class criteria." 159 Wn. App. at 65-66; ¶77. By focusing on final argument, rather than the language of the instruction, the Court of Appeals turned on its head the applicable standard for establishing prejudice. As the jury was instructed, counsel's argument was neither evidence nor the law. (CP 2186) Plaintiffs waived any challenge to final argument by failing to give the

⁷ Insufficient representational evidence may also justify decertification of the class under CR 23(c)(1). See *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2555, 1180 L. Ed. 2d 374 (2011) (statistical and anecdotal evidence "falls well short" of establishing that defendant acted "in a common way" toward individual class members); *Cruz v. Dollar Tree Stores, Inc.*, 2011 WL 2682967, *5 (N.D. Cal. July 8, 2011) ("*Dukes* provides a forceful affirmation of a class action plaintiff's obligation to produce common proof of class-wide liability"); *Proctor v. Allsup's Convenience Stores, Inc.*, 250 F.R.D. 278, 283-84 (N.D. Tex. 2008) (representative evidence cannot support class liability under FLSA absent "consistently applied policy").

trial court the opportunity to tell the jury that FedEx Ground's argument was not a correct statement of the law.⁸

The trial court did not err in telling the jury that individual experiences must reflect "policies, procedures or practices common to the class members during the class period." (CP 2194) Plaintiffs were obligated to prove that their common, not idiosyncratic, experiences established liability to the class. They were not prejudiced by an instruction that told the jury to base a finding of employee status on policies, procedures, or practices common to class members. (CP 2194)

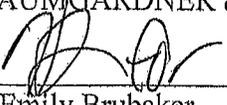
III. CONCLUSION

This Court should reinstate the trial court's judgment of dismissal on the jury's verdict after a 4-week trial.

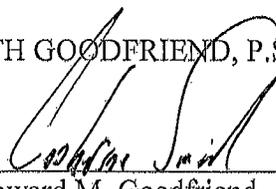
Dated this 24th day of October, 2011.

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⁸ See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993) (objection to closing argument waived where, as here, "the trial court instructs the jury that arguments are not evidence and that argument not supported by evidence is to be disregarded"); *Nelson v. Martinson*, 52 Wn.2d 684, 689, 328 P.2d 703 (1958) (reversing order granting new trial; failure to object waived challenge to improper closing argument).

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 October 24, 2011, I arranged for service of the foregoing Supplemental Brief of Petitioner, to the Court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 24th day of October, 2011.


Tara D. Friesen