

NO. 94229-3

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on
behalf of others similarly situated,

Petitioners/Plaintiffs

v.

DOVEX FRUIT COMPANY,

Respondent/Defendant

DEFENDANT DOVEX FRUIT COMPANY'S RESPONSE TO
MOTION TO STRIKE PORTION OF ANSWER TO AMICI BRIEFS

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I. INTRODUCTION

Plaintiffs Mariano Carranza and Eliseo Martinez (collectively “Carranza”) filed a Motion to Strike Portion of Dovex Fruit Company’s Answer to Amici Briefs (“Carranza’s Motion”) six days after Respondent Dovex Fruit Co. (“Dovex”) submitted its revised Answer to Amici Briefs (“Answer to Amici”) and three days before the hearing on these matters. Dovex submits this response to Carranza’s Motion. The Answer to Amici complies with all applicable Rules of Appellate Procedure (“RAP”), including RAP 10.4(a)(2) and 10.3(f), as set forth below. Dovex respectfully requests the Court deny Carranza’s Motion and properly consider all the content in the Answer to Amici.

II. ARGUMENT

A. The Answer to Amici complies with RAP 10.4(a)(2).

The Answer to Amici complies with RAP 10.4 (2)’s technical requirements. RAP 10.4 requires that briefs appear double-spaced in 12 point or larger font type. The Answer to Amici is typed in Times New Roman 12 point font with exactly a 24 point space between each line. This fits within the definition of “double-spaced.” That Carranza’s spacing appears to be more than double-spaced does not require Dovex to do the same. In any event, if the Court disagrees with Dovex’s interpretation of

the definition of “double-spaced” then Dovex is prepared to submit a brief with the larger spacing Carranza used in its briefing.

B. The Answer to Amici complies with RAP 10.3(f).

RAP 10.3(f) allows Dovex to answer amicus briefs filed in this case by responding to any new issues brought forward by the amici. RAP 10.3; *See also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 616, FN 25, 90 P.3d 659, 684 (2004). The amicus brief and motion of amici Agricultural Employers, Workers, and Washington Trucking Association (collectively “Amici Workers”) discusses retroactive application of the new law Carranza proposes. *See Amici Workers’ Brief of Amicus Curiae* at 14-16 and *Amici Workers’ Motion for Leave to Submit Amici Brief*, Appendix, Raymond Schmitt Decl. at 5, ¶ 13 and Del Feigel Decl. at 6-7, ¶ 20. To disregard the concern of those in the industry regarding the devastating effect of a retroactive decision here would be inappropriate.

In addition to the concern about retroactivity raised by Amici Workers, the State of Washington via the Attorney General of Washington (“AG”) admitted that Carranza’s request in this case is a new rule of law as set forth in the Answer to Amici and below. This necessarily implicates the issue of retroactive application of the new law.

In its Amicus Brief, the AG stated the State of Washington's position that the Washington State Department of Labor and Industries ("DLI") issued a regulation allowing work-week averaging for piece rate workers and that this regulation is considered binding law. AG's Amicus Curiae Brief at 6. The State of Washington, via the AG, also admitted that a reasonable interpretation of the Washington State Minimum Wage Act ("MWA"), Revised Code of Washington Chapter 49.46, would be to allow work-week averaging for all piece rate workers, including agricultural workers. *Id.* Although the AG argues that the MWA is ambiguous and DLI's lack of any regulation regarding agricultural piece rate workers means that it is not permitted by the MWA, the opposite is actually true. Since the law does not expressly preclude workers from agreeing to include non-picking time in their piece rate pay and also does not preclude work-week averaging as a method of MWA compliance for agricultural piece rate workers, the law allows such agreements and activities. This admission requires a response by Dovex.

Dovex has argued throughout this case that the law clearly permits employers and employees to include non-picking work in the piece rate compensation and also allows work-week averaging for MWA compliance as it relates to paying agricultural piece rate workers in the State of Washington. Dovex has cited to DLI regulations and guidance,

the nearly identical federal minimum wage law and its interpretive regulations, guidance, and case law. Finally, the AG essentially admits what Dovex has been telling the Court all along: Carranza is proposing a change in the law for public policy reasons. The AG's admissions necessitated Dovex's response regarding prospective application of a new rule of law.

When the Court issues a new rule of law, it must necessarily rule on the issue of prospectivity in that same case or else the default application of retroactivity will apply:

Historically, Washington has followed the general rule that a new decision of law applies retroactively unless expressly stated otherwise in the case announcing the new rule of law. *Martin*, 62 Wash.2d at 671, 384 P.2d 833 (citing *Strickland*, 154 Fla. at 476, 18 So.2d 251); *Haines v. Anaconda Aluminum Co.*, 87 Wash.2d 28, 35, 549 P.2d 13 (1976) (citing S.R. Shapiro, Annotation, *Prospective or Retroactive Operations of Overruling Decision*, 10 A.L.R.3d 1371, 1384 (1964)); *Bradbury v. Aetna Cas. & Sur. Co.*, 91 Wash.2d 504, 507–08, 589 P.2d 785 (1979); Lewis H. Orland & David G. Stebing, *Retroactivity in Review: The Federal and Washington Approaches*, 16 Gong. L.Rev. 855, 889 (1980–81) (“Although statements may be found to the contrary, the assumption in Washington cases is that a decision of an appellate court in a civil case has both retroactive and prospective effect unless the decision specifies otherwise or the decision is silent on the point and a subsequent

decision considering the first decision holds otherwise.” (footnote omitted)); *see, e.g., Taskett v. KING Broad. Co.*, 86 Wash.2d 439, 453, 546 P.2d 81 (1976) (Stafford, C.J., dissenting in part).

Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 271, 208 P.3d 1092, 1096 (2009).

Thus, the issue of retroactivity is necessarily before this Court in this case and ripe for review.

It appears that Carranza is now realizing that they should have addressed the issue of retroactivity in their briefing because the AG’s Amicus Brief demonstrates that Carranza are proposing a new rule of law. Carranza had the opportunity to respond to this issue in their Answer to Amici because the issue was clearly raised by the amicus briefs filed herein. Dovex should not be punished by Carranza’s choice not to address the retroactivity issue raised by amici.

III. CONCLUSION

Dovex properly included an argument regarding retroactive application in the Answer to Amici both because the issue was raised by Amici Workers and the AG (via its admissions) in their amici briefs. Dovex respectfully requests the Court consider all content of the Answer to Amici in determining this case and deny Carranza’s Motion.

RESPECTFULLY SUBMITTED AND DATED this 12th day of
September, 2017.

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CERTIFICATE OF SERVICE

I, Clay M. Gatens certify that on September 12, 2017, I caused a true and correct and copy of the foregoing to be filed with the Washington Supreme Court and copies were served to the following counsel of record via email (per agreement of parties):

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