No. 85949-3

C. JOHNSON, J. (dissenting)—The majority reverses a jury finding where a review of the plaintiffs' proposed instructions regarding the test for determining "employee" versus "independent contractor" status, and of the instruction given by the trial court, reveals that the plaintiffs essentially received what they requested. Not only did the instruction permit the plaintiffs to argue their "evolving" theory of the case, it did not clearly misstate Washington law. The majority nevertheless changes the law and finds prejudice where none exists. In the course of doing so, the majority does not attempt to distinguish or overrule the Washington case discussing the determination of "employee" versus "independent contractor" status that was relied upon repeatedly by the parties and the trial court.

More troubling, the majority adopts an unworkable "economic dependence" definition that by its terms sweeps too broadly and could arguably be applied to almost any work performed by one person on behalf of another. An instruction regarding the determination of "employee" versus "independent contractor" status

for Washington Minimum Wage Act (MWA), chapter 49.46 RCW, purposes should help the jury to draw a line between persons for whom coverage was intended and persons for whom it was not. Focusing on "dependence," rather than "control," effectively blurs this line out of existence. For these reasons I dissent.

In their motion for class certification, the plaintiffs argued commonality based on the employee status of all class members. Citing *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 498, 663 P.2d 132 (1983), they defined "employee" for class purposes as "'one whose physical conduct in the performance of the service is subject to the other's right of control.'" Clerk's Papers (CP) at 2867. They asserted at that time that *Ebling* is particularly on point because it "distinguishes between employees and independent contractors in the context of the Washington wage statutes."[1] CP at 2867. In granting class certification, the trial court, also citing *Ebling*, agreed that the critical test for determining employee status is whether

[1] *Ebling* involved a claim for unpaid wages. A sailboat salesman who formerly sold boats for the defendant, Ebling sought damages for commissions withheld, plus double damages pursuant to wage statutes, RCW 49.52.050(2) and RCW 49.52.070. The defendant contended Ebling was an independent contractor and therefore could not recover under the statutes, which apply only to "employees." The Court of Appeals defined "independent contractor" as "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" and defined "employee" as "one whose physical conduct in the performance of the service is subject to the other's right of control." *Ebling*, 34 Wn. App. at 498 (citing *Hollingbery v. Dunn*, 68 Wn.2d 75, 79-80, 411 P.2d 431 (1966); Restatement (Second) of Agency § 2(3) (1958)). The court held Ebling was an employee within the meaning of the statute, citing "abundant evidence" that the defendant and Ebling believed the defendant had the right to control Ebling's work. *Ebling*, 34 Wn. App. at 498.

FedEx Ground Package System, Inc. (FedEx) had the right to control the work performed. This definition works well in this context.

The plaintiffs successfully opposed FedEx's motion to decertify the class by citing *Ebling* and maintained in their trial and supplemental trial briefs that *Ebling* set forth the proper test for distinguishing employees from independent contractors "*in the context of Washington wage and hour law.*" CP at 1760; *see* CP at 1045. In those briefs, the plaintiffs argued that *Ebling* directly supported their proposed instruction regarding "employee" versus "independent contractor" status, which stated:

> In 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 that defendant had this right of control during the class period, you must find the plaintiffs were employees of defendant. If defendant had this right of control, the fact that some plaintiffs hired others to help them perform their work does not turn them into independent contractors.

CP at 962, 1077, 2342. Plaintiffs proposed an alternative jury instruction to be used "*only* in the event the Court [chose] not to follow *Ebling*." CP at 963. That instruction contained factors from the Ninth Circuit's formulation of the economic dependence test in *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981),[2] and instructed the jury to weigh the factors to determine whether plaintiffs

were "so dependent upon defendant's business such that plaintiffs were not, as a matter of economic reality, in business for themselves during the class period." CP at 1078.

The trial court ultimately adopted an instruction that incorporated *Ebling* and *Sureway*.[3] The introduction to the instruction followed *Ebling*, generally satisfying

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[2] The plaintiffs' initial alternative instruction was modeled on the Fifth Circuit's five-factor formulation of the economic dependence test, and stated:

"In order to determine whether an individual is an employee or an independent contractor, you must consider the following five factors:

"(1) the degree of defendant's right of control over the manner in which plaintiffs' work is to be performed;

"(2) the extent of the relative investments of the plaintiffs as compared to the defendant;

"(3) the degree to which plaintiffs' opportunity for profit or loss is determined by defendant;

"(4) the skill required of plaintiffs in performing the work; and

"(5) the permanency of the relationship." CP at 1078. Plaintiffs later turned to the Ninth Circuit's six-factor test and proposed an additional alternative instruction which included the Ninth Circuit's sixth factor: the extent to which the work is an integral part of the alleged employer's business.

[3] That instruction read:

"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 you 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;

the plaintiffs' primary request. The first six factors were taken from *Sureway* and mirrored the factors proposed by the plaintiffs in their alternative instructions. The final two factors were borrowed from the common law "right to control" test and arguably addressed both right to control and economic dependence. Thus, rather than hindering the plaintiffs' ability to argue their theory of the case, which, at the time of trial, embraced notions of both FedEx's right to control the plaintiffs' work and the broader "economic reality" of the relationship, the instruction facilitated their ability to do so by incorporating the focus and factors they requested.

More importantly, the instruction is not a clear misstatement of Washington law. *Ebling* is currently the only Washington wage case discussing the determination of "employee" versus "independent contractor" status. And while courts may consider the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219, authorities as persuasive, such authorities are not controlling in MWA cases. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523-24, 7 P.3d 807 (2000). Because the MWA defines "employee" circularly, in essence providing no definition at all, courts may look to both Washington common law and FLSA authorities for

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"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." CP at 2195.

guidance in defining "employee." Such a review may, based on the facts of a particular case, result in a test incorporating both common law and FLSA factors, as the instruction did in this case. This is especially so given that five of the six *Sureway* factors overlap with the common law "right to control" test.[4] The majority concludes the instruction clearly misstated the law by not adopting the FLSA authorities' reference to "economic dependence" and does so without overruling or distinguishing *Ebling*.

Even more importantly, the majority's adoption of the "economic dependence" test will not help juries draw a line between persons for whom the MWA was intended to cover and persons for whom it was not. Under the majority's new rule, employee status is governed by a single determination—whether the worker is "economically dependent" upon the alleged employer—and any listed factor will be relevant *only* in deciding economic dependence. The problem with the majority's "economic dependence" focus is that it potentially sweeps in by its language almost any work done by one person on behalf of another. Judge Easterbrook correctly illustrated the uselessness of the term "economic dependence" in the context of determining whether migrant farm

[4] Compare factors 1, 3, 4, 5, and 6 in *Sureway*, 656 F.2d at 1370, with factors (a), (d), (e), (f), and (h) in *Hollingbery*, 68 Wn.2d at 80-81.

workers were employees under the FLSA:

> Now the families may be dependent on the pickle business once they arrive at Lauritzen's farm and settle down to work. If a flood carried away the cucumbers, the migrants would be hard pressed to find other work immediately. This, however, is true of anyone, be he employee or independent contractor. A lawyer engaged full-time on a complex case may take a while to find new business if the case unexpectedly settles. Migrant workers are no more dependent on Lauritzen than are sellers of fertilizer, who rely on the trade of the locality and are in the grip of economic forces beyond their control, and the person who fixes Lauritzen's irrigation equipment, a classic independent contractor.

Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1542 (7th Cir. 1987) (Easterbrook, J., concurring).

In this case, the plaintiff drivers are dependent on FedEx for their livelihood. But so too is the painting subcontractor dependent on the builder, the tire manufacturer on General Motors, the aviation electronics firm on Boeing, and so on. Employee status under the MWA is a factual determination that turns on the working arrangement between the parties, including the employer's right to control the work and the parties' subjective intent.[5] We ask juries to draw a line between persons whom the act was intended to cover and persons whom it was not.

[5] Curiously, the majority never analyzes the written operating agreement between the parties, does not challenge the validity of the agreement (although the agreement expressly establishes an independent contractor relationship), or tells us why written agreements that do not violate public policy play no role in determining the employer/employee relationship. This seems odd given the central role the agreement played at trial.

Instructions are provided to help the jury draw this line. While no test for this purpose is without fault, an instruction that centers its focus on "dependence" blurs this line intolerably.

The jury considered the evidence and determined the plaintiffs were not employees under instructions essentially proposed by the plaintiffs and which were legally correct. The jury's decision should be affirmed.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Justice James M. Johnson