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Neither side wanted to argue Dynamex retroactivity at state Supreme Court

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In a state Supreme Court hearing aimed at clarifying whether the court's 2018 *Dynamex* decision applies retroactively, attorneys and the justices struggled with an unusual circumstance on Tuesday: Neither side wanted to talk about the specific issue at hand.

Attorneys for the defendant and the plaintiffs asked the high court to decertify the question of *Dynamex*'s retroactivity in the days leading up to Tuesday's oral argument, which was scheduled after the 9th U.S. Circuit Court of Appeals asked the state Supreme Court to rule on the issue last September.

"To say a couple of days before our oral argument, 'Hey, we need to decertify the question,' struck me as curious," Justice Joshua P. Groban said to the plaintiffs' attorney, Lichten & Liss-Riordan PC partner Shannon Liss-Riordan. "Is that what you really think we should do?"

She replied, "I think that's something I came to realize in examining what has happened over the past couple of years, something that wasn't as sharply in perspective when we were filing our briefs last year and earlier this year."

She explained, "This is an unusual situation here in which neither party is asking this court to decide the issue it has accepted for certification. Plaintiffs oppose certification of the retroactivity issue because there has not been conflict among lower courts on that issue."

The case is *Vazquez v. Jan-Pro Franchising International Inc.*, S258191, which Liss-Riordan filed in federal court a decade ago on behalf of franchisees who provide cleaning services using the Jan-Pro moniker. The franchisees alleged Jan-Pro, the franchisor, had misclassified them as independent contractors to avoid paying them minimum wages and overtime compensation.

The court granted summary judgment to Jan-Pro, which the plaintiffs appealed.

While the appeal was pending in the 9th Circuit, the state Supreme Court issued its *Dynamex* decision, which held that California workers would be automatically classified as employees instead of independent contractors unless they meet all three prongs of an "ABC" test. The 9th Circuit ruled in the Vazquez case that *Dynamex* applied retroactively, but later withdrew its decision and certified the retroactivity question to the state Supreme Court.

In a supplemental brief filed Oct. 23, Jan-Pro's counsel asked the high court to decertify the retroactivity question "in light of the severe errors of law which brought *Vazquez* before it." The brief argued it was inappropriate for the high court to decide on the issue in the context of the *Vazquez* case, since the "ABC" test in *Dynamex* does not apply to franchisors like Jan-Pro.

In a response brief filed last week, Liss-Riordan said the plaintiffs "have no opposition to this request — but for a different reason." Arguing that Assembly Bill 5, the law that codified *Dynamex*, "indicated that the statute would apply to matters predating its enactment," Liss-Riordan said, "The question now of whether *Dynamex* itself was retroactive ... is a moot point, since there is now a legislative clarification that the 'ABC' test is, and has been, the law of California."

Jason H. Wilson, a partner at Willenken LLP and counsel for Jan-Pro, reiterated his stance in Tuesday's oral argument that the state Supreme Court should not decide on the retroactivity question in the context of Vazquez.

"This case should be decertified for four reasons, because in this case the 'ABC' test should have never been applied to Jan- Pro," Wilson said. "Jan-Pro isn't a hiring entity under the plain meaning of the court decisions. Jan-Pro didn't do the classification here. An intermediary did. Jan-Pro does not have a contractual relationship with the petitioners in this case. Jan-Pro wasn't the one who hired, so the test itself shouldn't apply to Jan-Pro in this particular instance."

Groban then asked. "You're saying we should now decertify the retroactivity question because you think the court got the joint employer question wrong ... and for that reason we should decertify the retroactivity question here?"

After more prompting from Chief Justice Tani G. Cantil-Sakauye, Wilson agreed to address the question at hand: whether *Dynamex* applied retroactively.

Earlier in the proceedings, Liss-Riordan had argued a "factor that this court looks at in determining whether a decision should be applied retroactively is whether the changes [made by *Dynamex*] are substantive or procedural."

"Plaintiffs submit that this change really is procedural because ... it was a reconfiguring of the factors that had previously been used in Borello," she continued. "It wasn't ... an adoption of a completely new and distinct standard. It was an evolution in procedurally how cases were going to be addressed."

Wilson disagreed. "It's a sea change in the law," he said of *Dynamex*. "It's completely different than Borello." He further argued *Dynamex* could not merely be an evolution of Borello, and said the Legislature effectively affirmed the distinction between the Borello and "ABC" tests by codifying both in Assembly 5. The statute, which requires employers to apply the "ABC" test by default, includes exemptions for certain industries and professions that are held to the Borello standard.

Addressing Wilson's argument, Liss-Riordan said it was "an interesting way of putting it." She added, "But I guess if that's correct … this case does not fall within one of the AB 5 exceptions for which Borello would be applicable. And in fact, the arguments that are being made here that this case shouldn't apply, that *Dynamex* shouldn't apply to this case, really are arguments that are proper for the Legislature, not for this court.

"The defendants' amici here has very strenuously made their case to the Legislature. They've attempted to exempt franchises from AB 5. The Legislature rejected that attempt," Liss-Riordan continued. "There's more than I can say about the joint employment issue but I know the court doesn't have it before it."

In her opening brief, filed in January, Liss-Riordan had asked the court to additionally rule on whether *Dynamex* applies to franchisors, joint employers, and Labor Code Section 2802 claims for work-related expenses. The court did not address those issues Tuesday.

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