IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,255

GERALD BOOHER,

Petitioner,

v.

PEPPERIDGE FARM, INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

RESPONDENTS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Others

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INTRODUCTION

This jurisdictional brief is filed on behalf of the respondents Pepperidge Farm, Inc. and its liability insurance carrier Liberty Mutual Insurance Company.

JURISDICTIONAL ARGUMENT

THERE IS NO EXPRESS OR DIRECT CONFLICT WITH SHELBY MUTUAL INSURANCE COMPANY V. AETNA INSURANCE COMPANY, 246 So.2d 98 (Fla. 1971); WILLIAMS V. PAN AMERICAN WORLD AIRWAYS, INC., ___ So.2d ___ (Fla. 3d DCA 1984); OR THORNTON V. PAKTANK FLORIDA, INC., 409 So.2d 31 (Fla. 2d DCA 1981).

The only arguable jurisdictional basis for this Court's review of the Fourth District decision is found in Article V, §3(b)(3), Fla. Const. and Rule 9.030(a)(2)(A)(iv) Fla.R.App.P.

which provide for discretionary jurisdiction to review decisions of district courts of appeal that, "expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law."

The lack of any express or direct conflict with Shelby Mutual Insurance Company v. Aetna Insurance Company, supra, or Williams v. Pan American World Airways, supra, is patent, requiring no argument. The only jurisdictional issue of any substance is whether the "apparent conflict" with Thornton v. Paktank, supra, mentioned in the Fourth District opinion, is the constitutional equivalent of the express and direct conflict necessary to the jurisdiction of this Court. Pepperidge Farm will demonstrate that it is not.

The rules of law applied by both the Fourth District and the Second District were the same. Both courts recognize the well established three pronged criteria for special employment. Both courts recognize that, when the facts are undisputed, the issue of special employment is a question of law for the court. In Thornton v. Paktank, the Second District applied these rules of law to the undisputed facts of that case and determined as a matter of law that the defendant was not entitled to a compensation immunity defense. As the opinion reflects, there was one particular fact that the majority of the court found determinative. The contract between the special employer and the regular employer expressly provided that the workers would not be employees of the special employer "for any purpose."

As expressly acknowledged in the opinion below, no such contract was present in this case. Here, the district court concluded upon the undisputed facts of this case that Pepperidge Farm was entitled to its affirmative defense as a matter of law. The facts upon which the district court predicated its decision are undisclosed except for the acknowledged factual distinction with Thornton v. Paktank.[1]

It is apparent that the controversy does not revolve around a point of law, but upon the application of undisputed principles of law to a different set of facts. The court found other factors to exist which in its judgment required a different result. This does not create the express and direct conflict necessary to the jurisdiction of this Court. E.g. Wilson v. Southern Bell Telephone and Telegraph Co., 327 So.2d 220 (Fla. 1976); Florida Power & Light Co. v. Bell, 113 So.2d 697 (Fla. 1959).

After recognizing a factual distinction between the case at bar and Thornton v. Paktank the Fourth District did go on to make the gratuitous comment that it tended to agree with the dissent of Judge Grimes that the provision relied upon by the Paktank majority was not a valid basis for determining special

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1 Although it is not discussed in the Fourth District opinion, the motion for directed verdict and the subsequent appeal were based entirely on the testimony of Booher himself. His own testimony established as a matter of law the criteria for special employment.

employment status.[2] Neither that comment nor the following remarks were necessary to the disposition of the case. It was obiter dictum and nothing more.

> While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value.

Bunn v. Bunn, 311 So.2d 387, 389 (Fla. 4th DCA 1975). In Ciongoli v. State, 337 So.2d 780 (Fla. 1976), this Court concluded that, where the conflicting language was mere obiter dicta, the direct conflict necessary to the jurisdiction of this Court was lacking. See, also, State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973).

> The statement of the District Court of Appeal in its opinion ... was not essential to the decision of that court and is without force as precedent. [276 So.2d at 826].

The petitioner concludes his jurisdictional brief with the separate argument that the Fourth District violated his right to trial by jury guaranteed by Article I, §22, Fla. Const. Assuming momentarily some validity to this argument, there is no jurisdictional basis for this Court to consider it. It does not fall into any of the categories enumerated in Article V or Rule 9.030.

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2 The First District also tends to agree with Judge Grimes. Rumsey v. Eastern Distribution Inc., 445 So.2d 1085 (Fla. 1st DCA 1984) pet. pending, Case No. 65,037.

Notwithstanding the jurisdictional deficiency, the constitutional argument is devoid of merit.

> If the evidence would not in law support a verdict for the plaintiff, there was no violation of the organic right to a jury trial in directing a verdict for the defendant.

Stevens v. Tampa Electric Co., 81 Fla. 512, 88 So. 303, 307 (1921). Neither the state nor the federal constitution prohibits a state appellate court from setting aside a verdict. State ex rel. Cartmel v. Aetna Casualty & Surety Co., 84 Fla. 123, 92 So. 871 (1922).

> A verdict of a jury creates no absolute right: but a verdict is subject to appellate review. The organic right to a jury trial extends only to a determination of contested issues involving the facts of a litigated case. ... [I]n authorized appellate procedure an appellate court may set a verdict aside when it clearly is contrary to law or to the legal effect or the probative force of the evidence adduced under the issues. [92 So. at 873].

CONCLUSION

There being no express or direct conflict with a decision of this Court or of another district court of appeal, this Court is without jurisdiction and the petition should be denied.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on Jurisdiction was mailed to HERBERT W. VIRGIN, III, ESQ., Attorney for Petitioner, 44 West Flagler Street, Miami, Florida 33130; LAWRENCE B. RODGERS, ESQ., Co-Counsel for Petitioner, 155 South Miami Avenue, Suite 1180, Miami, Florida 33130; CHARLES M. HARTZ, ESQ., George, Hartz, Burt & Lundeen, Attorneys for Third Party Defendant, Suite 1110, Ingraham Building, 25 Southeast Second Avenue, Miami, Florida 33130; JUDITH A. BASS, ESQ., Lanza, Sevier, Womack & O'Connor, Attorneys for Pepperidge Farm, Inc., 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134; and IRA J. DRUCKMAN, ESQ., Attorney for Petitioner, 44 West Flagler Street, Miami, Florida 33131, this 25th day of May, 1984.

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