O/a 2-5-85

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 THE MERITS

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INTRODUCTION

This brief is filed on behalf of the defendant/appellant/respondent, Pepperidge Farm, Inc. ("Pepperidge Farm"), and its liability insurance carrier, Liberty Mutual Insurance Company, in this discretionary review of the Fourth District reversal of the judgment in favor of plaintiff/appellee/petitioner, Gerald Booher ("Booher").

Booher was a truck driver for Pepperidge Farm injured on the job. The trial court erred in two respects. First, the Court failed to rule on the question of Booher's employment status as a matter of law and failed to enforce Pepperidge Farm's immunity from suit as provided by the workmen's compensation laws of Florida. Second, if statutory immunity was a jury issue, then the trial court erred in excluding from the jury's consideration testimony and documentary evidence relevant to the issue. The Fourth District reversed, holding that Pepperidge Farm was enti-

tled to its immunity defense, rendering the evidentiary issues moot. Record and transcript references will be designated "R." and "T." An appendix is attached ("A.").

STATEMENT OF THE FACTS

Sections A and B of this statement of the facts have been prepared exclusively from Booher's own testimony (T. 315-415). Section C summarizes the evidence excluded from the jury's consideration.

A. The Accident

Booher began working for Pepperidge Farm in June, 1979 (T. 394). Each work day he loaded a truck with Pepperidge Farm products at the Pepperidge Farm Hialeah depot and proceeded to the Pepperidge Farm Fort Lauderdale warehouse where he unloaded a portion of the product. In order to unload the truck it was necessary for him to lift and attach a ramp to the back of the truck. A ramp, a dolly, and a fork lift were provided by Pepperidge Farm and were available for his use in unloading the truck at the Fort Lauderdale warehouse. After unloading a portion of the product at Fort Lauderdale, he proceeded on to Pepperidge Farm warehouses in West Palm Beach and Titusville. He picked up additional product in Titusville and made the return trip, again stopping in Fort Lauderdale and again unloading product with the use of the ramp, the dolly, and fork lift. Twice a day, four days a week, Booher lifted the ramp to the back of the truck and off loaded Pepperidge Farm products.

On September 5, 1979, after several months of following this routine, Booher hurt his back while lifting the ramp to the back of the truck. He had been lifting the ramp in the same way in the months prior to his accident. It was the quickest and easiest way for him to do it. He had never before injured his back during those several months (T. 403).

Booher made a compensation claim against Dixie Drivers. The Dixie Drivers compensation carrier, Firemen's Fund Insurance Company, paid the benefits (T. 352).

B. The Employment

Booher started driving a truck when he turned 18 (T. 318). He held a variety of trucking jobs from 1965 through 1979 when he came to drive for Pepperidge Farm. He had driven small and large trucks (T. 318-320). Most of his truck driving jobs were through Pacemaker or Dixie Drivers Service Inc. Pacemaker and Dixie Drivers are affiliated driver leasing companies. Pacemaker serves the Midwest and Dixie Drivers serves the Southeast (T. 321). Pacemaker and Dixie Drivers are labor brokers, providing drivers for private carriers. As Booher describes it, "It is just mainly a leasing outfit of drivers." (T. 321).

Booher obtained most of his truck driving positions through Pacemaker or Dixie Drivers (T. 322). If Booher liked the company that he was driving for and the company was satisfied with him, he could stay there indefinitely (T. 322). If he was dissatisfied with a particular company, he could apply for a transfer to another area through Pacemaker or Dixie Drivers. If there were other jobs available, they would transfer him at his

request (T. 322). Booher's first job was with Dayton Tire and Rubber Company of Dayton, Ohio. He was hired through Pacemaker (T. 322). Booher worked for Dayton Tire and Rubber Company for several years (T. 323). After working there, he went into what Pacemaker calls an "extra board", a pool of drivers available as temporary substitutes for drivers in permanent positions (T. 323). For example, if a permanently placed driver is on vacation or out sick, Pacemaker or Dixie Drivers supplies a temporary substitute from the "extra board" for the duration of his absence (T. 324).

While working through Pacemaker and Dixie Drivers, Booher held several "permanent" placements. His first position with Dayton Tire and Rubber Company is one example. He also worked for Anaconda for a year or more (T. 324). "Certain jobs, if the company that I worked for liked me, and I liked them, then I would have a permanent job if they were satisfied." (T. 324). Booher's placement with Pepperidge Farm was intended to be permanent. He was not employed as a temporary substitute from the extra board.

Dixie Drivers was responsible for maintaining his driving record, licensing, and all of the other things required by the ICC and the DOT (T. 325). When a permanent position is taken, it is the individual driver's responsibility to apply for and obtain the license for that state (T. 326).

Booher did not secure all of his driving positions through Pacemaker or Dixie Drivers. Prior to his working for Pepperidge Farm, he had left Dixie Drivers and was driving for

Transamerican Freight Lines, hauling perishable foods (T. 331). Things slowed down for him with Transamerica Freight Lines, so he called Dixie Drivers to see if there was a job available (T. 331-332). Dixie Drivers told him about the job with Pepperidge Farm in South Florida (T. 332). That sounded good to him, so he agreed to take the job (T. 332). To return to Dixie Drivers, Booher had to fill out another application and bring his file up to date (T. 332). In order to drive for Pepperidge Farm, he had to get a Florida driver's license (T. 332-333).

Before going to work for Pepperidge Farm, Booher was required to go to the Pepperidge Farm regional office where he was interviewed by Pepperidge Farm (T. 333-334). The interview was favorable and Booher was accepted by Pepperidge Farm. He then proceeded directly to Miami where he was met by Pepperidge Farm personnel (T. 334). Mr. Klug of Pepperidge Farm met him at the Pepperidge Farm plant in Hialeah, took him on the route and familiarized him with all of the stops (T. 334).

Booher worked four days a week. He loaded the Pepperidge Farm truck with products from the Pepperidge Farm plant in Hialeah and proceeded to deliver the product to Pepperidge Farm warehouse distribution points in Fort Lauderdale, West Palm Beach, and Titusville (T. 336). Mr. Klug of Pepperidge Farm showed him the route that he was to drive and Mr. Klug showed him what he was supposed to do at each stop (T. 336).

While Booher worked for Pepperidge Farm, he received his paychecks from Dixie Drivers (T. 350-351). All of the employment benefits, salary, fringe benefits, etc. were received through Dixie Drivers (T. 354).

Booher maintained his driver logs and he turned them in to Pepperidge Farm. This was done on instruction from Mr. Novotny of Pepperidge Farm (T. 390). Mr. Klug of Pepperidge Farm maintained his payroll record (T. 351). Mr. Klug forwarded Booher's time reports and payroll information to the Pepperidge Farm regional office (T. 352).

Pepperidge Farm instructed Booher on what his job responsibilities were and he did what the Pepperidge Farm people told him to do (T. 354). Booher testified that he did this because he was a good driver being leased by Dixie Drivers and he wanted to uphold the Dixie Drivers standards (T. 354).

Pepperidge Farm, like any other Dixie Drivers account, had the right to accept or reject any particular driver provided by Dixie Drivers. If Pepperidge Farm said that they did not want Booher working for them, then he would be replaced. Booher was then subject to reassignment to some other account by Dixie Drivers (T. 356).

During the months he drove the truck for Pepperidge Farm he worked for no one else but Pepperidge Farm (T. 396). He was not allowed to do anything for anyone else. While working for Pepperidge Farm he drove the Pepperidge Farm tractor trailer and delivered Pepperidge Farm products. He picked up the trailer at the Pepperidge Farm Hialeah depot. Pepperidge Farm told him what stops to go to and what time to leave. They told him what route to drive. Every time he went any place with the Pepperidge Farm tractor trailer he went to a Pepperidge Farm warehouse or facility. Pepperidge Farm told him how to do his job, whatever

it was that he had to do. Pepperidge Farm supervisors told him what to do (T. 395-396).

All of the duties that he performed during the months that he worked for Pepperidge Farm were for Pepperidge Farm. This included the loading, unloading, the driving, everything. Pepperidge Farm could dismiss him from their job, although they could not "fire" him in the technical sense of the word (T. 396-397).

Pepperidge Farm determined the days that Booher worked, the hours he worked, the truck he drove and the route he followed (T. 398). There was no one from Dixie Drivers at the Hialeah terminal other than himself (T. 398). There was no one from Dixie Drivers supervising him (T. 398). Everybody from Dixie Drivers was located in Greenville, South Carolina (T. 398). No one from Dixie Drivers ever came to South Florida while he was there (T. 399).

C. The Excluded Evidence

Dixie Drivers and Pepperidge Farm had a written contract under which drivers such as Booher were supplied by Dixie Drivers to Pepperidge Farm. Booher quotes selected portions of the agreement in his brief. A copy of the entire agreement is appended (A. 1-9). In addition to the parts quoted by Booher, the agreement also provides:

> WHEREAS, Pepperidge Farm and its component division, within the scope of and in furtherance of its nontransportation primary business, conducts a private carriage operation for the purpose of delivering its own merchandise to its customers or of picking up materials

belonging to it for delivery to its own warehouses, stores, etc.; and

WHEREAS, Pepperidge Farm either owns or leases the vehicles used to implement this private carriage operation; and

WHEREAS, Pepperidge Farm is desirous of utilizing drivers supplied by Dixie Drivers Service; and

WHEREAS, Dixie Drivers Service is desirous of supplying drivers who are employees of Dixie Drivers Service, to Pepperidge Farm which it may utilize in furtherance of its private carriage operation; [A. 1].

* * *

IT IS AGREED BY PEPPERIDGE FARM:

1. That Pepperidge Farm will dispatch, direct the loading and unloading of vehicles; select routes, direct the drivers as to pick-ups, deliveries and other matters related to the day to day operation of the vehicles utilized by Pepperidge Farm.

* * *

7. That Pepperidge Farm will pay Dixie Drivers Service for services provided in accordance with the attached schedules. [A. 3].

Included within the fee schedules attached to the agreement are the following provisions:

II. FRINGE BENEFITS AND TAXES

A. Holidays

Each driver will receive the following paid holidays at $60.00 per holiday. Pepperidge Farm will be billed for the exact cost of each holiday. . . .

B. Vacation

The driver would earn one week of paid vacation at his average weekly earnings, after the completion of his first year of assignment to Pepperidge Farm's operation, and two weeks of paid vacation after his second year of assignment and three weeks after five years of assignment.

C. Insurance

Pepperidge Farm will be billed for the cost of each regular driver's health care and life insurance coverage. . . .

D. Disability Income Insurance

Each eligible driver shall receive disability income insurance for himself. The coverage shall amount to $100 per week when program conditions are met. The cost to Pepperidge Farm for this coverage is currently $2.01 per week per driver.

E. Pension Benefit

Each eligible driver will participate in the Dixie Drivers Service pension program at a cost to Pepperidge Farm of $9.81 per week per participating driver.

F. Funeral Leave

. . .

G. Jury Duty

. . .

H. Worker's Compensation

Pepperidge Farm will be billed for the exact cost of Worker's Compensation coverage at the standard manual rate with experience modifier applicable. . . .

I. F.I.C.A. Taxes

> Pepperidge Farm will be billed for the exact cost of F.I.C.A. taxes incurred. . . .
>
> J. State Unemployment Taxes
>
> Pepperidge Farm will be billed for the exact cost of unemployment taxes at the standard manual rate applicable in each respective state. . . .
>
> K. Federal Unemployment Taxes
>
> Pepperidge Farm will be billed for the exact cost of Federal Unemployment taxes. . . . [A. 7-9].

Booher's counsel sought to introduce into evidence the main contract between Dixie Drivers and Pepperidge Farm (R. 1032). Pepperidge Farm asked that the balance of the agreement - the schedules - be introduced into evidence with the contract. The Evidence Code provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section. [Fla. Stat. § 90.108].

When the trial court required Booher to introduce the entire agreement into evidence, Booher then elected not to introduce the agreement at all (R. 1043-5). Later, when Pepperidge Farm sought to introduce the entire agreement into evidence as part of its case, Booher claimed a violation of the pre-trial order and claimed surprise as the basis for excluding the agreement and the incorporated schedules (T. 464). The trial judge

refused to admit the contract into evidence and refused to allow any testimony tangentially related to the contract.

The trial judge sustained a "best evidence rule" objection to all testimony about the relationship between Pepperidge Farm and Dixie Drivers because the "best evidence" of the relationship was the contract. The proffered testimony of Mr. Novotny, Pepperidge Farm's purchasing agent and distribution manager, was excluded from the jury's consideration (T. 501-532).

Mr. Novotny testified outside of the presence of the jury that he was personally responsible for the payments made to Dixie Drivers by Pepperidge Farm for the drivers supplied by Dixie Drivers. "We paid, to my knowledge, everything to do with the drivers plus a fee to Dixie Drivers." (T. 522). This payment to Dixie Drivers included their direct wages, FICA, hospital insurance or medical benefits, disability insurance, state unemployment compensation, federal unemployment compensation, workers compensation, and pension benefits (T. 522). Pepperidge Farm paid Dixie Drivers on a weekly basis.

> First of all, we had an agreement, an understanding with Dixie Drivers, and that was in effect at any given time as to the rates that we would pay in all these various categories. Then on a weekly basis, the drivers would literally turn in a time sheet showing any -- They were on a fairly steady basis, so we were aware of what they should be. They turned in a sheet showing what they termed to be the number of drops they made because in a given week it may change from the norm. [T. 523].

Time sheets were turned in to Mr. Novotny. All of the drivers' information was due in his office by Sunday night. He

then filled out a form showing every drivers' name and the various payroll categories. After putting it together he called Dixie Drivers and read them the information and then mailed it to them (T. 523-524). Dixie Drivers put the information into their computer, prepared checks for the individual drivers, and prepared an itemized bill to Pepperidge Farm (T. 524). Upon receipt of the itemized bill from Dixie Drivers, Mr. Novotny approved the bill for payment and sent it on to the accounting department (T. 525). Billing and payment was done on a weekly basis (T. 525).

The Dixie Drivers bills included an itemized accounting of Mr. Booher's direct wages, social security, hospitalization, disability, state unemployment, federal unemployment, and workmen's compensation (T. 526-527). Booher did not receive pension benefits because he had been with the company less than a year (T. 527). Dixie Drivers secured and paid for the worker's compensation insurance. Dixie Drivers got the policy and Dixie Drivers charged Pepperidge Farm for it (T. 529). The jury, however, heard none of this (T. 501-532).

ARGUMENT

PEPPERIDGE FARM WAS THE SPECIAL EMPLOYER OF BOOHER AND WAS ENTITLED TO STATUTORY IMMUNITY FROM SUIT.

A. Special Employment Is A Question Of Law.

Booher's introductory use of the Cardozo quotation is not without precedent. In Stuyvesant Corp. v. Waterhouse, 74 So.2d 554 (Fla. 1954), this Court began its opinion with the same

reference. Although the law of special employment may be "beset with delicate distinctions," this Court was up to the task and was able to determine, as a matter of law, a special employment relationship.

> [W]e think the facts in the instant case depict a situation in which a contract of hire between Lombardi and the claimant must be implied as a matter of law. [74 So.2d at 557].

It was argued that the substantial evidence rule precluded a finding contrary to that of the Deputy Commissioner as fact finder. There was, however, "practically no conflict in the evidence and the relationship of the claimant to Lombardi and to Casablanca was a question of law." (74 So.2d at 558).

In Rainbow Poultry Company v. Ritter Rental System, Inc., 140 So.2d 101 (Fla. 1962), this Court again led off with the Cardozo quotation and again found a special employment relationship as a matter of law, notwithstanding the Industrial Commission's contrary determination as fact finder. Although Rainbow Poultry is a truck lease case, not a labor broker case, the lessee of the truck and driver was the special employer of the driver as a matter of law. The factual relationship of the lessor, lessee and driver was not in dispute, making the special employment issue "purely a question of law." (140 So.2d at 104). As this Court concluded, it was "a classic example of the commissioner misconstruing the legal effect of the evidence." (140 So.2d at 104). The same essentially holds true here. The Fourth District correctly applied the law to the undisputed facts of this case, finding that the trial court had misconstrued the legal effect of the evidence.

B. The Florida Case Law On Tort Immunity In A Labor Broker Relationship.

The controlling Florida precedent is Hamilton v. Shell Oil Company, 233 So.2d 179 (Fla. 4th DCA 1970), cert. denied, 237 So.2d 762 (Fla. 1970). There is an earlier Hamilton v. Shell Oil decision reported at 215 So.2d 21 (Fla. 4th DCA 1968). In its opinion in this case, the Fourth District mistakenly cites to its earlier Hamilton decision. It is the latter opinion, at 233 So.2d 179, that was intended and is controlling.

It is well established Florida law that a special employer is entitled to workmen's compensation immunity from suit. The criteria by which special employment is measured are equally well established. The indicia of the special employer/employee relationship are:

> (1) Whether or not a contract for hire, express or implied, exists between the employee and the alleged special employer,
>
> (2) Whether or not the work being done at the time of the injury was essentially that of the alleged special employer, and
>
> (3) Whether or not the power to control the details of work being done at the time of the accident resided in the alleged special employer.

Hamilton, 233 So.2d at 181-182.

Hamilton was an employee furnished to Shell Oil by Manpower, a labor broker. Hamilton was injured on the job, recovered compensation benefits from Manpower, and brought a negligence action against Shell Oil. Shell Oil raised worker's compensation immunity as a defense, the trial court granted summary judgment on the defense, and the Fourth District affirmed.

The three pronged criteria for special employment was met. In Hamilton, the Fourth District properly held:

> This is not a question of fact for the jury to decide, it is a question of law which must ultimately be decided by the Court. [233 So.2d at 181].

Here, too, it was a question of law for the court. Booher agreed to drive a truck for Pepperidge Farm and Pepperidge Farm agreed to have Booher perform this service for it. Neither was compelled to initiate this relationship and neither was compelled to continue it. Booher agreed to work under the supervision, direction and control of Pepperidge Farm - work which benefited Pepperidge Farm.

Booher was paid by Dixie Drivers, a labor broker in the business of "leasing" drivers to customers such as Pepperidge Farm. The relationship was typical of numerous labor brokers, employment agencies, and temporary help services, the most notable of which are Manpower, Inc. and Kelly Girl, Inc. The Fourth District opinion in Hamilton v. Shell Oil Co., supra, is but one of a long line of decisions nationwide that have held, as a matter of law, that the customer of a labor broker is a special employer of the employee furnished by the labor broker and is entitled to workmen's compensation immunity from suit by the employee who sustains an injury while performing the customer's work.

The only Florida decision that is arguably contrary is Thornton v. Paktank Florida, Inc., 409 So.2d 31 (Fla. 2d DCA 1981). Paktank hired a crew from an independent contractor, Gale

Porter Temporary Help, for the specific and sole purpose of cleaning a coal barge under a contract between Paktank and the barge owner. The contract between Paktank and Temporary Help expressly provided that the workers furnished would not be employees of Paktank "for any purpose." Relying upon this express contractual language, the majority of the court held that Paktank could be sued in negligence for injuries sustained by the plaintiff while working on the coal barge. Judge Grimes dissented.

Judge Grimes appropriately noted that the decisional law relied upon by the majority did not involve general employers in the business of employing temporary help. He also noted that the case law relied upon by the majority was suspect in that the legal relationship of the parties involves a determination of law. A special employer should not be bound by its own misinterpretation of its status. "It is the employment relationship which should be controlling, and not what the parties say it is." 409 So.2d at 35. The Fourth District was critical of Paktank in its opinion in this case, preferring Judge Grimes dissent.

The First District has voiced similar criticism of Paktank in Rumsey v. Eastern Distributors, Inc., 445 So.2d 1085 (Fla. 1st DCA 1984), pet. denied, 451 So.2d 850 (Fla. 1984). Rumsey was an employee of Right Hand Man, a labor pool, injured while assigned to Eastern Distribution. Eastern Distribution was granted a summary judgment on its immunity defense as the "special employer" of Rumsey. The First District affirmed,

rejecting the argument (identical to Booher's) that no contract for hire existed. Consent to employment was implied in the acceptance of the assignment to the special employer customer. The immunity defense was established as a matter of law.

This case is governed by Hamilton v. Shell Oil Co. and Rumsey v. Eastern Distribution, not Thornton v. Paktank. The contract in this case does not contain a provision that the drivers furnished by Dixie Drivers would not be employees of Pepperidge Farm "for any purpose." Thornton is thus distinguishable from Hamilton, Rumsey, and this case. Here, the Fourth District properly followed its own precedent in Hamilton and rejected Thornton to the extent there was conflict.

C. The Labor Broker Cases From Other Jurisdictions.

In his Paktank dissent, Judge Grimes recognized the distinctive characteristics of the labor broker relationship with its customer and employee. He provided an extensive list of borrowed servant cases involving general employers in the business of furnishing temporary help, to emphasize the point that an agency employee cannot claim damages against his special employer for injuries suffered while working on the temporary job. Judge Grimes listed the following cases.

1. Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (4th Cir. 1980);

2. Maynard v. Kenova Chemical Co., 626 F.2d 359 (4th Cir. 1980);

3. Beaver v. Jacuzzi Brothers, Inc., 454 F.2d 284 (8th Cir. 1972);

4. St. Claire v. Minnesota Harbor Service, Inc., 211 F.Supp. 521 (D. Minn. 1962);

5. Martin v. Phillips Petroleum Co., 42 Cal.App.3d 916, 117 Cal.Rptr. 269 (1974);

6. Highway Insurance Co. v. Sears Roebuck & Co., 92 Ill.App.2d 214, 235 N.E.2d 309 (1968);

7. Renfroe v. Higgins Rack Coating & Manufacturing, 17 Mich.App. 259, 169 N.W.2d 326 (1969);

8. Danek v. Meldrum Manufacturing & Engineering Co., 312 Minn. 404, 252 N.W.2d 255 (1977);

9. Wright v. Habco, Inc., 419 S.W.2d 34 (Mo. 1967);

10. Chickachop v. Manpower, Inc., 84 N.J. Super. 129, 201 A.2d 90 (1964);

11. Shipman v. Macco Corp., 74 N.M. 174, 392 P.2d 9 (1964);

12. Daniels v. MacGregor Co., 2 Ohio St.2d 89, 206 N.E.2d 554 (1965);

13. Meka v. Falk Corp., 102 Wis.2d 148, 306 N.W.2d 65 (1981).

To Judge Grimes' list, Pepperidge Farm adds the following labor broker cases which recognize the customer as the special employer of the temporary help, entitled to tort immunity.

14. Beach v. Owens-Corning Fiberglas Corp., 542 F.Supp. 1328 (N.D. Ind. 1982), aff'd., 728 F.2d 407 (5th Cir. 1984);

15. Simmons v. Atlas Vac Machine Co., 493 F.Supp. 1082 (E.D. Wis. 1980);

16. Counts v. Monsanto Co., 278 F.Supp. 655 (N.D. Ala. 1966);

17. Campbell v. Central Terminal Warehouse, 56 Ohio St.2d 173, 383 N.E.2d 135 (1978);

18. Northern v. Fedrigo, 115 Mich.App. 239, 320 N.W.2d 230 (1982);

19. Hoffman v. National Machine Company, 113 Mich.App. 66, 317 N.W.2d 289 (1982);

20. Freeman v. Krause Milling Co., 43 Wis.2d 392, 168 N.W.2d 599 (1968);

21. Robinson v. Omark Industries Inc., 46 Or.App. 263, 611 P.2d 665 (1980).

22. Terry v. Read Steel Products, 430 So.2d 862 (Ala. 1983);

23. English Lehigh County Authority, 286 Pa.Super. 312, 428 A.2d 1343 (1980);

24. Bennett v. Mid-South Terminals Corporation, 660 S.W.2d 799 (Tenn. App. 1983);

25. Doboshinski v. Fuji Bank Ltd., 78 A.D.2d 537, 432 N.Y.S.2d 99 (1980);

26. Fox v. Contract Beverage Packers, Inc., 398 N.E.2d 709 (Ind. 1980).

The First District in Rumsey listed nine of the above in support of its decision. All but two of these twenty-five decisions decided the issue in favor of the customer/special employer as a matter of law. The other two affirmed a factual finding of special employment without addressing the issue of whether it was a question of fact or a question of law.

As the many referenced cases reflect, there are variations in labor broker arrangements, but the inescapable conclusion is that the broker's customer is a special employer immune from suit by the employee. Pepperidge Farm will not discuss every labor broker case listed above. The following selections, however, expressly reject the contentions made by Booher here.

In Simmons v. Atlas Vac Machine Company, 493 F.Supp. 1082 (E.D. Wis. 1980), the court granted summary judgment for a customer of a labor broker upon its workmen's compensation immunity defense. The plaintiff applied for employment with Olsten of Milwaukee, Inc., who was engaged in the business of providing temporary help to various businesses and factories. Olsten assigned the plaintiff to work at Myro. The plaintiff received her instructions from Myro supervisors and it was a Myro supervisor who directed her to operate the allegedly defective machine that caused her injury. The plaintiff was paid her wages by Olsten. Olsten had the right to discipline or fire the plaintiff or to reassign her to another workplace. When the plaintiff was injured, it was Olsten's insurance carrier that paid her workmen's compensation benefits. At the time of the accident, the plaintiff considered herself an employee of Olsten.

> The question, however, is not which company plaintiff considered to be her employer, for that is merely a legal conclusion. The question is whether by her actions plaintiff consented to work for Myro. The facts of the case strongly indicate that she did so consent. Plaintiff accepted her assignment to Myro willingly. All of her work was performed on Myro premises. She reported to Myro every morning and performed the tasks assigned to her. She placed herself under the supervision of Myro personnel and took her directions from them. Under the circumstances, it can only be concluded that plaintiff consented to work for Myro. [493 F.Supp. at 1083-4].

In Wright v. Habco, Inc., 419 S.W.2d 34 (Mo. 1967), a summary judgment for the defendant in a negligence action by a temporary employee against his special employer was affirmed.

The plaintiff was in the general employment of Manpower. He was employed with the understanding that he would work for Manpower's customers, such as the defendant. When the employee was injured, neither the defendant nor its insurer made any payment of workmen's compensation or medical benefits to the plaintiff. The plaintiff filed his workmen's compensation claim against Manpower.

The principal question before the Missouri court was whether it could be said, as a matter of law, that the plaintiff was an employee of the customer defendant within the meaning of the workmen's compensation law. With regard to the requirement for an implied employment agreement, the Missouri court said:

> In considering those requirements as applied to the case before us we think it is quite clear that plaintiff consented to work for defendant and that such was pursuant to an implied contract between them. In this case plaintiff knew when he was hired by Manpower that all of his work would actually be performed for various customers of his general employer. The very fact that he entered into an employment arrangement of that nature would constitute a general consent to work for special employers such as defendant. [419 S.W.2d at 36].

On appeal, the plaintiff contended that there was an issue of fact whether there was an express or implied contract between the plaintiff and the defendant. The appellate court rejected this contention, saying:

> The evidence makes it clear that plaintiff consented to work for defendant and actually performed the work under the sole direction of defendant's foreman. We are unable to find any factual issue which should have been presented to a jury. [419 S.W.2d at 37].

In Daniels v. MacGregor Co., 2 Ohio St.2d 89, 206 N.E.2d 554 (1965), a personal injury action was brought by an employee of a corporation which provided temporary help against the company to whom the employee had been furnished. The summary judgment in favor of the customer was affirmed. The plaintiff employee's agreement with Manpower contemplated that Manpower would pay the plaintiff for work done for a customer of Manpower such as the defendant, MacGregor. MacGregor had the right to control the manner and means of performing the work and paid Manpower at least enough so that Manpower could pay the plaintiff what he was willing to accept for doing that work. The court found a contractual relationship among the three. Manpower made payments on behalf of MacGregor to the plaintiff, plaintiff was to work as an employee for MacGregor, and MacGregor was to make certain payments to Manpower.

In Meka v. Falk Corporation, 102 Wis.2d 148, 306 N.W.2d 65 (1981), an employee of a temporary help business brought an action against a customer for personal injuries sustained while providing temporary help. The trial court dismissed the complaint against the customer because it was the special employer of the employee. The Wisconsin Supreme Court affirmed the trial court's action. There, as here, the plaintiff claimed that at all times he considered himself an employee of the labor broker and not an employee of the customer. The plaintiff stated that he did not intend to be the customer's employee. The court held that express consent was not necessary. The implied consent of the plaintiff was found in the actual nature of plaintiff's relationship with the customer.

Several factors supported the trial court's holding that, as a matter of law, the plaintiff had impliedly consented to work for the customer. The plaintiff knew when he was hired by the employment agency that his work would be performed for customers. The plaintiff had already worked for this particular customer for a significant period of time. The plaintiff was subject to a high degree of control and supervision by the customer as to the actual work done. The plaintiff worked on the customer's premises. The plaintiff's work was part of the customer's regular business. The general employer had no control or right to control the nature of the work performed by the plaintiff for the customer. The customer had the right to remove the plaintiff from further work.

> We recognize that Nugent [the broker] paid plaintiff's wages and social security taxes; that Nugent withheld taxes; and that Nugent could terminate plaintiff's employment. The issue, however, is whether Falk Corporation [the customer] became the special employer, not whether Nugent was the general employer. It is clear that Nugent remained the general employer. [306 N.W.2d at 71].

In Fox v. Contract Beverage Packers, Inc., 398 N.E.2d 709 (Ind. 1980), Fox unsuccessfully argued that he was not an employee of Contract or, in the alternative, that his status was a mixed question of fact and law. The Indiana court rejected this contention and affirmed a summary judgment for the defendant on its immunity defense.

> It is undisputed there was an implied contract between Fox and Contract. It was understood by both parties that Fox would be expected to work . . . at the plant of Contract. Both parties entered willingly into

> this agreement because Contract had the right to refuse Fox as an employee and Fox had the right to refuse to work at the Contract plant. [398 N.E.2d at 712].

In Maynard v. Kenova Chemical Company, 626 F.2d 359 (4th Cir. 1980), the federal court affirmed a summary judgment for the defendant, a customer of Manpower. The requirement of an express or implied contract for hire was established as a matter of law.

> When Maynard accepted employment with Manpower, he necessarily agreed to perform work for Manpower's customers. In addition, Manpower employees had the right to refuse certain assignments. This is sufficient to establish that Maynard made an implied contract of hire with Kenova. [626 F.2d at 362].

In Renfroe v. Higgins Rack Coating and Manufacturing Company, 17 Mich.App. 259, 169 N.W.2d 326 (1969), the Michigan court affirmed a summary judgment in favor of a special employer in a negligence claim brought by a temporary employee. The plaintiff received workmen's compensation benefits from the insurance carrier for his general employer, Employers Temporary Service (ETS). The only issue on appeal was whether Higgins, a customer of ETS, was an "employer" of the plaintiff entitled to workmen's compensation immunity. The plaintiff contended that there were material questions of fact for jury resolution. The appellate court disagreed, finding that there was no dispute as to any of the underlying facts, holding, "This is not a question of fact for a jury to decide: it is a question of law which must ultimately be decided by the court." (169 N.W.2d at 326). The court concluded that both ETS and Higgins were employers of

Renfroe, each in a different way. Since either could be liable under the workmen's compensation act, both were protected by it. With respect to the triangular relationship among the parties, the court said:

> By going to the ETS dispatch room, Roy Renfroe agreed to work for ETS, and since the only work to be done was that of ETS's customers, Renfroe must necessarily have agreed to work for the customers of ETS as well (in this case, Higgins Co.). Renfroe did in fact submit to the direction of the ETS dispatcher in the dispatch room and of Higgins's foreman in the factory. [169 N.W.2d at 329].

In Doboshinski v. Fuji Bank Ltd., 78 A.D.2d 537, 432 N.Y.S.2d 99 (1980), a temporary employee brought a negligence action against her temporary employer and the temporary employer moved for summary judgment on its workmen's compensation immunity defense. The trial court denied the motion for summary judgment finding that there existed issues of fact regarding the nature of the relationship between the parties. The appellate court disagreed and remanded, finding a special employment relationship as a matter of law.

Doboshinski had sought temporary office employment through City-Wide Temporary Services, Inc. and was assigned to work for the defendant. She was injured while working there. She successfully claimed compensation benefits through City-Wide.

> Here, except for the fact that plaintiff was compensated for her work by checks drawn upon City-Wide, all of the principal concomitants of an employee/employer relationship between herself and the defendant are extant. Plaintiff was directed in her work solely by the defendant, and the record makes clear her understanding that she was to look to the defendant as her employer, albeit only as a temporary employer. [432 N.Y.S.2d at 100].

In Danek v. Meldrum Manufacturing and Engineering Company, Inc., 312 Minn. 404, 252 N.W.2d 255 (1977), the Supreme Court of Minnesota affirmed a summary judgment in favor of the defendant, a customer of a labor broker, and against the plaintiff employee. The court recognized that an essential to the special employment relationship is the existence of a contract of hire, express or implied. The court considered the special relationships inherent in a labor broker case and noted:

> It has been uniformly established in other jurisdictions which have considered the elements of control and consent in labor-broker cases that the temporary worker does become the employee of the labor broker's customer. These cases have implied both the necessary elements of control and consent, making summary judgment proper. [252 N.E.2d at 259-260].

One of the cases relied upon by the Wisconsin court was the Florida precedent, Hamilton v. Shell Oil Company, supra. Agreeing with the reasoning of the numerous cases cited, the court held that the plaintiff was deemed to have consented to perform services for the customer and that all of the necessary elements of the special employer relationship were present. Summary judgment in favor of the customer was appropriate.

All of the cases discussed in this section involve tort immunity in a labor broker setting. There is also an abundance of labor broker cases that find special employment as a matter of law when the issue is entitlement to compensation benefits. Henderson v. Manpower of Gulford County, _____ N.C. _____, _____ S.E.2d ____ (slip opinion, Sept. 18, 1984) is the most recent and is representative (A. 10-14).

Although the weight of authority is not established by numbers alone, there is a near universal consensus that the customer of a labor broker is entitled to worker's compensation immunity from tort claims. The dearth of contrary authority is telling. In addition to Paktank, Booher relies upon only one other labor broker decision. Novenson v. Spokane Culvert & Fabricating Company, 91 Wash.2d 550, 588 P.2d 1174 (1979), is a Washington state court opinion reversing a summary judgment for a labor broker customer in a negligence action brought by a temporary worker, holding that there were factual questions regarding the plaintiff's consent to enter a contract of hire.

The Washington court was split 5-4, with a sharply worded dissenting opinion. With Novenson as with Paktank, Pepperidge Farm will rely primarily upon the dissenting opinion for its critique of the majority view.

> From the facts before the court and the inferences drawn from the facts, it can be concluded only that the element of consent was fulfilled. Plaintiff's argument to the trial court that he worked for Spokane Culvert only "in a spirit of cooperation with the dictates of his employer, KELLY LABOR, who had ordered him to report to defendant to perform services" is both disingenuous and completely at odds both with the facts before us and the inferences to be drawn therefrom. [588 P.2d at 1178].

Booher's comparable argument is equally disingenuous and completely at odds with both the facts and the reasonable inferences in this case.

The Novenson dissent criticized the majority for providing no authority to uphold its position on a set of facts involving a labor broker. "This is not remarkable in that

neither of the parties to this lawsuit nor independent research has revealed such authority." (588 P.2d at 1178). The dissent then went on to list numerous cases from other jurisdictions where summary judgment was granted in similar cases, including the Florida precedent, Hamilton, supra.

The flaw in the majority opinions in Novenson and Paktank is in the misperception that the customer of a labor broker is getting away with something. Both discuss the customer's apparent shirking of employer obligations to the employee. This is simply wrong. The customer of the labor broker pays for the employee's salary, worker's compensation coverage, employment taxes and for all other employee benefits. This is paid to the labor broker plus a fee for the labor broker's services. The customers of labor brokers in general and Pepperidge Farm in particular, are merely relieved of certain administrative and accounting functions, for which the labor broker is duly compensated. All of the burdens of employment vis-a-vis the employee remain with the special employer.

The employee is deprived of nothing. At least it is certainly true here. Booher was entitled to paid holidays, paid vacations, health care and life insurance, disability income insurance, pension benefits, paid funeral leave, supplemental income for jury duty, worker's compensation benefits, FICA benefits, state unemployment benefits, and federal unemployment benefits - all of which were paid for in full by Pepperidge Farm.

This misbegotten avoidance concept was utilized effectively by Booher in the trial court below. Booher's counsel told

the jury in closing argument that if they answered "yes" to the special employer verdict interrogatory then, "Jerry Booher doesn't have a right to sue here and Pepperidge Farm gets away with not paying a penny worth of comp." (T. 631). Booher's counsel accused Pepperidge Farm of looking for a free ride and shirking its responsibility to provide compensation (T. 631-2). This jury argument was facilitated by the trial court's exclusion of all evidence that would have shown the jury, without contradiction, that Pepperidge Farm did in fact pay for Booher's full salary, his worker's compensation coverage, employment taxes, and all of his employee benefits.

In fact and in law, Pepperidge Farm fulfilled all of its employment obligations to Booher. Booher received full compensation benefits for his work related injury. Pepperidge Farm was entitled to its statutory immunity from tort liability as a matter of law.

D. Booher's Truck Lease And Compensation Case Authorities.

Other than Paktank and Novenson, Booher relies upon no other labor broker case to sustain his position. Rather, he relies upon a mixture of compensation claim cases and truck lease cases where both a truck and driver were leased. In so doing, he has succumbed to headnote citation and quotation from factually and legally inappropriate context.

For example, Booher relies upon Turner vs. Schumacher Motor Express, 230 Minn. 132, 41 N.W.2d 182 (1950). First of all, this is a compensation claim, not a tort claim. The

Minnesota court was reviewing a decision of the Industrial Commission. Second, it is not a labor broker case, but a truck lease case. The Minnesota court held that the lessor of the truck which also supplied a driver was the "employer" of the driver and liable for worker's compensation benefits. Under the facts of that case, the driver did not become a special employee of the truck lessee. The Minnesota court invoked the rule that an employee furnished to accompany an instrumentality let by the owner to another, remains the employee of such owner.

> Particular reason for the rule is found in the fact that the lessor ordinarily will want to send his own operator with a valuable machine to see that it is operated and cared for properly. [41 N.W.2d at 184].

In a labor broker context, Minnesota recognizes the customer as the special employer immune from suit as a matter of law. Danek v. Meldrum Manufacturing & Engineering Co., supra; Miller v. Federated Mutual Insurance Company, 264 N.W.2d 631 (Minn. 1978). The distinction to be drawn between the labor broker and the truck lessor was well articulated in Newland v. Overland Express, Inc., 295 N.W.2d 615 (minn. 1980) where a truck lessee unsuccessfully relied upon Danek to support its claim for immunity.

> Fritz, however, is not a labor broker, and such consent cannot be implied under the facts of this case. Fritz provides Overland with equipment in addition to labor, and under his contract with Overland he, rather that Overland, has the right to control his tractors, their drivers, and the manner in which the tractors are operated. Newland considered Fritz to be his employer. There is nothing inherent in the nature of the relationship between Fritz, Newland, and

> Overland which makes it reasonable to imply consent as a matter of law as there was in the labor broker context. [295 N.W.2d at 619].

White v. Western Commodities, Inc., 207 Neb. 75, 295 N.W.2d 704 (1980) is another compensation claim involving a truck lease. It is subject to the same distinctions. The Nebraska court also found significance in the truck lease provision that, "It is the expressed intent of the parties that this agreement should not create an Employer-Employee relationship, and the Lessor, his operators, drivers and employees shall be deemed to be Independent Contractors during the entire term of this lease." (295 N.W.2d at 707). The lease also provided that it was the lessor's responsibility to carry workmen's compensation insurance and that the "Lessor shall pay the premiums on said Policies." (295 N.W.2d at 707).

Gulf Insurance Company v. Boh Bros. Construction Co., Inc., 331 So.2d 897 (La.App. 1976) is also a compensation case. This case did not involve a truck lease, but merely a shipment of goods. The truck driver was killed while unloading his truck. At issue was whether the transfer company's driver had become a "borrowed servant" of the consignee of the shipment when he helped unload the truck. Another Louisiana court has in a different context recognized the customer of a labor broker as the special employer of the employee. Smith v. Kelly Labor Service, 239 So.2d 685 (La.App. 1970).

Hunter Construction Company v. Marris, 388 P.2d 5 (Okla. 1963) and White v. Texas Indemnity Ins. Co., 140 S.W.2d

873 (Tex.Civ.App. 1940) are compensation claim cases where the general employer furnished both truck and driver. Bendure v. Great Lakes Pipe Line Company, 199 Kan. 696, 433 P.2d 558 (1967) is a negligence claim brought by the seller's truck driver against the purchaser of goods delivered.

Booher's reliance upon Marsh v. Tilley Steel Company, 162 Cal.Rptr. 320, 606 P.2d 355 (1980) is wholly misplaced, since that was a suit brought by one employee against the general employer of a "borrowed" employee upon a theory of vicarious liability for the negligence of the "borrowed" employee. The case has no factual or legal similarity to this case. The California decision on point is Martin v. Phillips Petroleum Co., supra, in which the customer of a labor broker was entitled to tort immunity.

Sehrt v. Howard, 187 Cal.App.2d 739, 10 Cal.Rptr. 128 (1960) is also persuasive California authority. There, the plaintiff sustained injury while unloading hay from the defendant's truck. The defendant was an independent contractor who hauled hay for the plaintiff's general employer. If the defendant needed assistance in unloading his truck, a helper was furnished, in this case the plaintiff. The defendant contended that the evidence established special employment as a matter of law and the California appellate court agreed reversing the plaintiff's judgment. Sehrt had worked with Howard on his truck for a good many months prior to the accident; was subject to his orders at the time he was working on the truck; and he was on Howard's truck at the direction of his general employer.

> We are of the opinion that only one inference can be drawn from the evidence and that as a matter of law Sehrt was in the special employment of Howard. [10 Cal.Rptr. at 130].

Wessell vs. Barrett, 62 Cal.App.2d 374, 144 P.2d 656 (1944) is also persuasive California authority. The plaintiff sued for personal injury sustained while loading lumber on a truck operated by him. The plaintiff was a truck driver in the general employ of a grading company, instructed to take his truck to a job site and report to the general contractor. The foreman of the general contractor instructed him where to place his truck and how to load it with lumber. The plaintiff was injured in the process and recovered compensation benefits from his general employer. He brought this negligence action against the general contractor. At the close of his case, the trial court granted a non-suit upon the ground that the plaintiff was a special employee of the defendant, restricted to worker's compensation benefits. There, as here, the facts all came from the evidence offered by the plaintiff. There, as here, the plaintiff was entitled to the benefit of all presumptions and inferences most favorable to him. The California court nevertheless affirmed the non-suit.

> Upon these facts which make the case presented by appellant there can be but one conclusion and that is that, at the very time of the accident, appellant was a special employee of respondent. As such he was entitled to compensation under the Labor Code and is not entitled to prosecute this action for damages. [144 P.2d at 658].

There are truck lease cases in Florida jurisprudence as well. In Rainbow Poultry Company v. Ritter Rental System, supra, this Court found special employment as a matter of law. In Maige v. Cannon, 98 So.2d 399 (Fla. 1st DCA 1957), cert. denied, 101 So.2d 814 (Fla. 1958) the First District found no special employment in a truck lease compensation case. The First Distirct recognized, however, the distinction asserted by Pepperidge Farm here. The First District said:

> The present case is principally distinguished from Stuyvesant Corp. v. Waterhouse, supra, in that Maige was engaged in the business of supplying the services to the other putative employer which provided the opportunity for the injury, while his counterpart in the Stuyvesant case was not; and in the Stuyvesant case the equipment which was a factor contributing to the accident was supplied and controlled by the "special employer." [98 So.2d at 402].

Here, Pepperidge Farm supplied the truck, the ramp, the dolly, and the forklift. Dixie Drivers supplied Booher, to work with Pepperidge Farm equipment, doing Pepperidge Farm work under Pepperidge Farm supervision.

E. The Law Applied To The Facts Of This Case.

The following undisputed facts, taken from Booher's own testimony, establish as a matter of law Pepperidge Farm's workmen's compensation statutory immunity defense.

1. Dixie Drivers Service Inc. is a labor broker in the business of furnishing truck drivers to customers such as Pepperidge Farm.

2. Booher contacted Dixie Drivers looking for work as a truck driver and was advised by Dixie Drivers of an opening with Pepperidge Farm in South Florida.

3. It was Booher's choice whether to accept placement with Pepperidge Farm. Dixie Drivers did not require Booher to go with Pepperidge Farm.

4. Pepperidge Farm was not required to accept any driver furnished by Dixie Drivers, but had the right to accept or reject any driver submitted to them.

5. Booher interviewed with Pepperidge Farm at its regional office. After the interview, Booher agreed to drive for Pepperidge Farm and Pepperidge Farm agreed to accept Booher as its driver.

6. After his initial acceptance of the placement with Pepperidge Farm, Booher had the right to request of Dixie Drivers his removal from Pepperidge Farm and transfer to another Dixie Drivers customer.

7. After its initial acceptance of Booher as its driver, Pepperidge Farm had the right to terminate Booher and request a replacement from Dixie Drivers.

8. Booher could continue to work for Pepperidge Farm as long as he agreed to work for Pepperidge Farm and Pepperidge Farm agreed to keep him on.

9. Booher's duties included driving a Pepperidge Farm truck from a Pepperidge Farm depot to Pepperidge Farm warehouse distribution points. At each location he loaded and unloaded Pepperidge Farm products. Pepperidge Farm supervisory personnel

established the days he worked, the hours he worked, the routes driven, the quantity and quality of product loaded and unloaded, and the locations from and to which the product was delivered.

10. Booher was hired to work for Pepperidge Farm. Booher worked for no other customer of Dixie Drivers other than Pepperidge Farm.

11. Dixie Drivers did not supervise and had no control over the duties performed by Booher on behalf of Pepperidge Farm.

12. Booher was injured at the Pepperidge Farm Fort Lauderdale facility while preparing to unload Pepperidge Farm products from the Pepperidge Farm truck that he had been driving.

13. Dixie Drivers was Booher's general employer. Dixie Drivers paid Booher a salary based upon the number of hours he worked for Pepperidge Farm. In addition to salary, Dixie Drivers provided Booher all employment benefits. Dixie Drivers paid social security taxes, state and federal unemployment taxes, income tax withholding, etc. Dixie Drivers maintained workmen's compensation insurance coverage.

14. Booher suffered a work related injury in the course and scope of his employment. As a result he has applied for and received workmen's compensation benefits from the compensation carrier for Dixie Drivers.

Each of the foregoing "facts" come directly from Booher's own testimony. Pepperidge Farm personnel also testified to these facts. A directed verdict on the evidence presented to the jury was required. Although not before the jury, it is nonetheless undisputed that Pepperidge Farm paid the full cost of

Booher's worker's compensation coverage, as well as every other employment benefit due him.

Booher's contention that he did not "consent" to the employment by Pepperidge Farm is factually unsupportable. Booher called Dixie Drivers to see if there was a job available (T. 331-332). Dixie Drivers told him about the job with Pepperidge Farm in South Florida (T. 332). That sounded good to Booher, so he agreed to take the job (T. 332). Before going to work for Pepperidge Farm, Booher was required to go to the Pepperidge Farm regional office where he was interviewed by Pepperidge Farm (T. 333-334). The interview was favorable and Booher was accepted by Pepperidge Farm. Pepperidge Farm, like any other Dixie Drivers account, had the right to accept or reject any particular driver provided by Dixie Drivers. If Pepperidge Farm said they did not want Booher working for them, then he would be replaced. Booher was then subject to reassignment to some other account by Dixie Drivers (T. 356). Booher's own testimony conclusively established the express or implied contract for hire necessary to a special employment relationship. The overwhelming body of supporting labor broker case law sustains this conclusion.

Booher also argues that Pepperidge Farm was not in the business of transport of its products, but only in the manufacture and sale of its products. This contention is wholly unpersuasive. The Dixie Drivers/Pepperidge Farm contract belies any such conclusion. It states in the preamble that, "Pepperidge Farm . . . conducts a private carriage operation for the purpose of delivering its own merchandise to its customers or of picking

up materials belonging to it for delivery to its own warehouses stores etc., " (A. 1). In this regard the contract merely states the obvious. The manufacture and sale of its products necessitates the transport of those products to the marketplace and, as such, transportation is a usual, customary, and integral part of Pepperidge Farm's business. See, Feldman v. Dot Delivery Service, 425 S.W.2d 491 (Mo. 1968), which rejected an argument similar to Booher's and affirmed a finding of special employment.

Although no one from Dixie Drivers ever set foot in the state of Florida and Pepperidge Farm instructed and directed him in all aspects of his employment, Booher contends that the "power to control the details of work being done at the time of the accident" remained with Dixie Drivers. Booher's argument on the third of the three indicia of special employment fails as well. See, Hamilton, supra, and Rumsey, supra. See, also, Terry v. Read Steel Products, supra; Wright v. Habco, Inc., supra; St. Claire v. Minnesota Harbor Service, Inc., supra. Even the majority opinions in Paktank and Novenson did not dispute the "control" of the customer over the temporary worker.

Here, the Fourth District concluded:

> We believe the trial court erred in denying the motion for directed verdict of appellant, Pepperidge Farm, Inc., predicated on its affirmative defense that appellee, Gerald Booher, was a special employee of Pepperidge Farm and that his tort claim was barred by virtue of the availability of workers compensation for the claim.

Pepperidge Farm, Inc. v. Booher, 446 So.2d 1132 (Fla. 4th DCA 1984). The decision of the Fourth District was correct.

CONCLUSION

In fulfilling its constitutional directive to harmonize the decisional law of Florida, the Hamilton, Rumsey, and Pepperidge Farm decisions from the First and Fourth Districts should be recognized as correct. Having met all the burdens of the employer, Pepperidge Farm is entitled to the benefit of immunity from suit by its employee. The Fourth District decision should not be disturbed.

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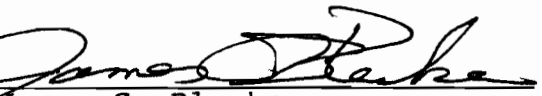
By: 

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on the Merits 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 3rd day of December, 1984.

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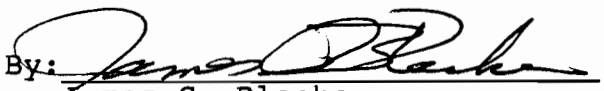
By: 

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