65,255

IN THE SUPREME COURT OF FLORIDA

CASE NO.: Not Yet Assigned

FILED
SID J. WHITE
MAY 7 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

GERALD BOOHER,

Petitioner,

vs.

PEPPERIDGE FARM, INC. and LIBERTY MUTUAL INS. CO.,

Respondents. /

PETITIONER'S BRIEF ON JURISDICTION (CONFLICT JURISDICTION)

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TOPICAL INDEX

LIST OF CITATIONS and AUTHORITIES

OTHER AUTHORITIES:

I.

INTRODUCTION

The petitioner, Gerald Booher, was the plaintiff in the trial court and was the appellee in the District Court of Appeal, Fourth District. The respondents, Pepperidge Farm, Inc. and Liberty Mutual Insurance Co., were the defendants/ appellants, respectively. In this brief of the petitioner on jurisdiction, the parties will be referred to as the plaintiff and defendants, and, alternatively, by name. The symbol "A" will refer to the petitioner's rule-required appendix which accompanies this brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

JURISDICTIONAL STATEMENT

This proceeding has been instituted, and the jurisdiction of this Court is invoked, under the aegis of Article V, §3(b)(3) of the Florida Constitution, as amended April 1, 1980, and Rule 9.030(2), Fla.R.App.P. The petitioner contends that the decision of the District Court of Appeal, Fourth District, herein sought to be reviewed, is in express and direct conflict with the decisions rendered by other Florida appellate courts, including this court, specifically:

A. Shelby Mutual Ins. Co. v. Aetna Ins. Co., 246 So.2d 98 (Fla.1971);

B. Thornton v. Paktank Florida, Inc., 409 So.2d 31 (Fla. 2d DCA,1981);

C. Williams v. Pan-American World Airways, Inc., 3rd DCA, Case No.: 83-1759, April 10, 1984 (9 FLW 873).

III.

STATEMENT OF THE FACTS & THE CASE

Dixie Drivers Service contracted with national companies to provide truck-drivers to various national accounts. Essentially, they acted as brokers or contractors of trained, professional drivers. One of their accounts was the defendant, Pepperidge Farm. The defendant utilized Dixie Drivers Service to provide drivers to operate tractor-trailers leased from Ryder Systems for the purpose of moving their products to warehouse depots where the products would then be transferred to delivery trucks. Aside from driving, it was the responsibility of the driver to both load and off-load the products from the truck.

Between 1965 and 1979, when he began driving for Pepperidge Farm, most of the driving jobs acquired by the plaintiff were through Dixie Driving Service or Pacemaker, which was an affiliate. If the plaintiff was satisfied with the company to which he was assigned, and the company was satisfied with him, he could stay there indefinitely. However, if

either were dissatisfied with the other, the plaintiff could request a transfer or the company could request a replacement.

If no permanent position were available, the plaintiff would work as a temporary substitute from the "extra board". However, Booher's position at Pepperidge was a permanent one.

Dixie Drivers was responsible for maintaining the plaintiff's driving record, licensing and all other record-keeping and permits required by the ICC and DOT.

While Booher worked for Pepperidge Farm, he received his paychecks directly from Dixie Drivers and all employment benefits, fringe benefits, etc., were received through Dixie Drivers. While Pepperidge Farm instructed Booher on what his job responsibilities were which he performed as best as he was able, 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.

In 1980, Booher was injured at one of Pepperidge Farms' depots. He sued Pepperidge Farm and alleged that it had breached its duty to provide a reasonably safe work environment. The defendant answered, denying liability, and asserting plaintiff's comparative negligence, as well as claiming immunity from suit under the Workers' Compensation laws of Florida.

Pepperidge Farm sought and was granted leave to file a third party complaint for indemnity against Dixie Drivers Service, Inc. Dixie Drivers and Pepperidge Farm had a contract under which drivers, such as Booher, were supplied by Dixie Drivers to Pepperidge Farm. The agreement expressly provided that Dixie Drivers would indemnify and save Pepperidge Farm harmless from any claims, liabilities and demands of its employees for injury, regardless of whether such claims are alleged to have been caused in sole or in part by any complaint was severed from the main action. The contract also provided that Dixie Drivers Service would require, as a condition of continuing employment, <u>its employees</u> to operate Pepperidge Farm's vehicles from such origin and to such destination; along such routes and accordingly to such schedules; perform such delivery services with respect to the receipt and delivery of Pepperidge Farm merchandise and observe and comply with safety regulations as Pepperidge Farm may from time to time require.

Following trial and a lengthy hearing on defendants' Motion for Directed Verdict on the issue of the special employer doctrine, which was denied, the case was submitted to the jury by Judge Polen. The instruction was delivered regarding a special employer relationship with the doctrine enunciated by Professor Larson in his treatise on Workers' Compensation

Law, which has long since become the legal doctrine in virtually all states that do not have a statutory provision, to-wit: "(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."

After applying these tests to the facts in this case, the jury determined that Pepperidge Farm was not the special employer.

The defendant appealed. The District Court of Appeal, Fourth District, ruled that the trial court erred in denying the Motion for Directed Verdict of the defendant in that 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. In addition, the court ruled that henceforth where a general employer in the business of providing temporary help provides compensation coverage to an employee while he is on assignment working for another employer, then that employee is barred from suing his special employer for on-the-job injuries (Exhibit A). Upon denial of plaintiff's timely Motion for Rehearing, this proceeding was instituted.

IV.

QUESTIONS PRESENTED

1.

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISIONS RENDERED IN SHELBY MUTUAL INS. CO. V. AETNA INS. CO., SUPRA; THORNTON V. PAKTANK, FLORIDA, INC., SUPRA AND WILLIAMS V. PAN-AMERICAN WORLD AIRWAYS, SUPRA.

2.

DID THE COURT OF APPEAL, FOURTH DISTRICT, VIOLATE THE PLAINTIFF'S RIGHTS TO TRIAL BY JURY PURSUANT TO ARTICLE I., §22, FLA. CONST.?

V.

1.

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISIONS RENDERED IN SHELBY MUTUAL INS. CO. V. AETNA INS. CO., SUPRA; THORNTON V. PARTANK, FLORIDA, INC., SUPRA AND WILLIAMS V. PAN-AMERICAN WORLD AIRWAYS, SUPRA.

ARGUMENT

A.

APPLICABLE JURISDICTIONAL PRINCIPLES

It is too well settled to need detailed citation of authority that this court has jurisdiction to review the decisions of District Courts of Appeal on direct conflict grounds to resolve embarrassing conflicts between decisions and that jurisdiction may be invoked where a District Court of Appeal: (1) announces a rule of law which conflicts with a rule previously announced by another Florida appellate court; or (2) applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by a Florida appellate court; or (3) misapplies precedent; or (4) applies and/or refuses to apply applicable law to a case under consideration. See: Article V, §3, Florida Constitution; Wale v. Barnes, 278 So.2d 601 (Fla.1973); Belcher v. Belcher, 271 So.2d 7 (Fla.1972); Nielsen v. Sarasota, 177 So.2d 731 (Fla.1960).

B.

THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE CASES CITED, SUPRA.

The plaintiff suggests to this Court that the basis for the lower court's ruling that a directed verdict should have been entered by the trial judge was error. In support of its position, the court stated: "We are particularly influenced by the Florida Supreme Court's statement in Shelby Mutual Ins. Co. v. Aetna Ins. Co." However, they ignored the emphasized statement of law in that case, which appears to be directly opposite to the position taken by the Fourth District:

> "The only presumption is the continuance of the general employment, which is taken for granted at the beginning point of any lent-employee problem. To overcome this presumption, it is not unreasonable to insist upon a clear demonstration that a new temporary employer has been substituted for the old, which demonstration should include a showing that a contract was made between the special employer and the employee. Proof that the work being done was essentially that of the special employer, and proof that the special employer assumed the right to control the details of the work; failing this, the general employer should remain liable." (page 101).

Therefore, if a general presumption exists as to the continuation of the general employment, notwithstanding that the instant case involves a negligence action as opposed to a determination of who was responsible for Workers' Compensation benefits, the matter becomes one of fact, not of law.

The Fourth District Court, in its opinion, acknowledges an apparent conflict with Thornton v. Paktank, Florida, Inc., supra. In that case, the Second District Court of Appeal, in reversing a summary judgment on essentially similar facts, said:

> "...the facts of this case simply do not support the conclusion that appellee ever actually became appellant's employer, or that there was any contract of hire, whether express or implied, between them."

In both Paktank and the case at bar, the facts of the cases are of essential significance. Only where the facts are completely settled and the inferences to be drawn from the facts lead to but one conclusion can it be said that the issue is one which may be decided by the court as a matter of law. Where there are varying inferences to be made and conclusions to be drawn, the matter is one which should be submitted to a jury, Gonpere Corp. v. Rebull, 440 So.2d 1307 (Fla. 3d DCA,1983).

The court below utilized as authority for its position its holding in Hamilton v. Shell Oil Co., 215 So.2d 21 (Fla. 4th DCA,1968). They were of the opinion that there was no meaningful distinction between the case at bar and Hamilton. In fact, there is literally no relationship between the two cases. In Hamilton, the injured employee applied for work at Shell, was interviewed, trained and hired by Shell, and, as far as Hamilton was concerned, he was working for Shell. The only relationship between Hamilton and Manpower was that Hamilton signed a W-2 form for Manpower and received his paychecks through Manpower. Hamilton was working for Shell. Consequently, there were no inferences which could be drawn or conclusions reached other than that. Under those circumstances, where the facts were completely settled, a summary final judgment in favor of Shell was appropriate. Such is not the situation in the instant case.

In the most recent case of Williams v. Pan-American World Airways, Inc., 3rd District, Case No.: 83-1759, April 10, 1984, found at 9 FLW 873, the Third District has apparently avoided the special employer/general employer maze by utilizing §440.10, F.S., where the employees are those of contractors or sub-contractors, and, thereby, determining immunity depending upon the employer's classification. In that case, the plaintiff-appellant was an employee of Ground Services, Inc., a division of a company which had contracted with Pan-American World Airways to perform the ground handling of its passengers' baggage.

Since there was a contract between the two companies, the court transformed them into "contractor" and "sub-contractor" which the court characterized with quote marks in an obvious effort to utilize the §440.10, F.S. statutory definitions. In reversing the summary judgment, the Third District Court of Appeal held that, as a matter of law, Pan-Am was not immune from suit. They also found as follows:

> "Second, the purportedly 'sublet' work of carrying baggage was, at best, but a small, surely not indispensable portion and was thus, to use the legal term of art, merely 'incidental' to the essence of the 'prime contracts' - which was clearly to transport the passengers themselves."

This is clearly on all fours with the instant case. Booher worked at transporting trailer-trucks loaded with bread products from a plant or railhead to a distribution point. This work was clearly not indispensable but certainly 'incidental' to the business of Pepperidge Farm.

By the mere characterization of the two employers as "contractor" and "sub-contractor", the Third District Court of Appeal neatly put to rest the perplexing issue of general employer- special employer. Actually, the basic facts in Williams and the instant case are the same. Changing the labels which are stuck to the chests of the parties does not alter their relationships.

Therefore, since there is express and direct conflict, it is respectfully submitted that jurisdiction of this Court be invoked.

VI.

2.

DID THE COURT OF APPEAL, FOURTH DISTRICT, VIOLATE THE PLAINTIFF'S RIGHTS TO TRIAL BY JURY PURSUANT TO ARTICLE I., §22, FLA. CONST.?

ARGUMENT

The Fourth District Court of Appeal denied Booher's constitutional rights to trial by jury. Giving due consideration to the plaintiff's constitutional right to trial by jury, the Supreme Court in Gravette v. Turner, 81 So. 476, addressed the issue as follows:

> "That where there is room for a difference of opinion between reasonable men as to the proofs or facts from which an ultimate fact is to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury. That the credibility and probative force of conflicting testimony was a question for the jury and should not be determined by the court on Motion for Directed Verdict."

What the Fourth District Court of Appeal has done is to legislate the principle that in all cases "where a general employer in the business of providing temporary help provides

compensation coverage to an employee while he is on assignment working for another employer, then that employee is barred from suing his special employer for on-the-job injuries." (A.2). Therefore, notwithstanding whatever the facts are or the contract that exists between the employers or whether or not there is a contractor/sub-contractor relationship by virtue of the contract, or whether there is the presence or absence of an implied or expressed contract for employment between the employee and the special employer, all injured employees will be denied access to a jury trial against the negligent tortfeasor to whom he is temporarily assigned. This is a constitutionally inadequate rule of law.

VII.

CONCLUSION

It is not the function of an appellate court to substitute its judgment for that of the jury on disputed questions of fact. On appeal from an adverse jury verdict, an appellate court must review the record and all reasonable inferences therefrom in the light most favorable to the appellee. Fountainhead Motel, Inc. v. Massey, 336 So.2d 397 (Fla. 3d DCA,1976). By ruling as it did, the Fourth District Court of Appeal has abrogated the three-prong test for determination of special employer status which has been the law for many decades in those cases involving labor brokers or contractors. This is in conflict with the cases cited, and, accordingly, it is respectfully submitted that this Honorable Court accept jurisdiction.

Respectfully submitted,

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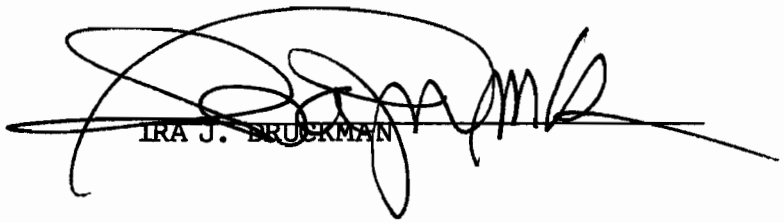
THIS IS TO CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was mailed this 3rd day of May, 1984 to JUDITH A. BASS, Attorney, of LANZA, SEVIER, WOMACK & O'CONNOR, 3300 Ponce DeLeon Blvd., Coral Gables, Florida, 33134; and to JAMES C. BLECKE, Attorney, of BLACKWELL, WALKER, GRAY, POWERS, FLICK & HOEHL, for the respondents, 2400 Amerifirst Bldg., One Southeast Third Avenue, Miami, Florida, 33131.



IRA J. BRUSKMAN