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SUPREME COURT, STATE OF FLORIDA

CASE NO.: 65-255

GERALD BOOHER,

Petitioner,

vs.

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

Respondents. /

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

IRA J. DRUCKMAN, P.A.
For the petitioner
Commonwealth Building, 3rd Floor
46 S.W. First Street
Miami, Florida 33130

(305) 374-7750

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INTRODUCTION

The petitioner, GERALD BOOHER, was the plaintiff in the trial court and the appellee in the District Court of Appeal, Fourth District. The respondents, PEPPERIDGE FARM, INC. and LIBERTY MUTUAL INSURANCE COMPANY, were the defendants/appellants. At the trial level, following a denial of Motions for Directed Verdict on the issue of employer immunity, the jury entered a verdict in favor of the petitioner for damages after determining that no special employer relationship existed between Pepperidge and Booher. On Appeal to the 4th DCA, that court decided that the trial judge erred, as a matter of law and should have entered a directed verdict in favor of the respondents. In addition, they also determined in all cases involving labor brokers who supplied temporary help to its customers, a general employer/special employer situation existed, thereby cloaking the customer/special employer with Workers' Compensation immunity.

II.

STATEMENT OF THE FACTS & THE CASE

Dixie Drivers Service contracted with national companies to provide truckdrivers to the various national accounts. Essentially, they acted as brokers or contractors of trained, professional drivers. One of their accounts was the respondent, Pepperidge Farms. The respondent utilized Dixie Drivers Service to provide drivers to operate cabs and trailers leased from Ryder Systems for the purpose of moving their products from railhead 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 Farms, most of the driving jobs acquired by the petitioner were through Dixie Driving Service or Pacemaker, which was an affiliate. If the petitioner 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 petitionner could request a transfer or the company could request a replacement.

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

It was Dixie Drivers' responsibility to maintain the respondent's driving record and ICC licensing; provide for bi-

annual physical examinations pursuant to the rules and regulations of the DOT; provide information on safety and maintain ongoing records regarding its employees, including Booher (TR-325-26).

While Booher worked for Pepperidge Farms, he received his paychecks directly from Dixie Drivers and all employment benefits, fringe benefits, etc., were received through Dixie Drivers. While Pepperidge Farms instructed Booher on what his job responsibilities were and he performed as best as he was able, Booher testified that he did this because he was 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 Farm's depots, as a result of which he suffered herniated cervical and lumbar intervertebral discs resulting in multiple surgical procedures. 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 the petitioner'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 active negligence of Pepperidge Farm, its servants or agents. The third party complaint was severed from the main action. The contract also provided that Dixie Drivers Service would require, as a condition of continuing employment, its employees 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's merchandise and observe and comply with safety regulations as Pepperidge Farms 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 regarding a special employer relationship with the doctrine enunciated by Professor Larson in his treatise on Workmens' 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" was given to the jury.

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

The respondent appealed. The District Court of Appeal, Fourth District, ruled that the trial court erred in denying the Motion for Directed Verdict of the respondent 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. Upon denial of plaintiff's timely Motion for Rehearing, this Petition for Writ of Certiorari was taken.

POINT INVOLVED

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THE SECOND AND THIRD DISTRICT COURTS OF APPEAL AND THIS COURT.

ARGUMENT POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THE SECOND AND THIRD DISTRICT COURTS OF APPEAL AND THIS COURT.

The petitioner, in his Answer Brief to the 4th DCA, under the argument as to whether or not Pepperidge Farm was a "special employer", as a matter of law, began his argument with the following quotation:

> "The law pertaining to general and special employers is beset with distinctions so delicate that chaos is the consequence", Cardozo, (A Ministry of Justice, 1921) 35 Harvard Law Review, 113, 121.

Sixty-three years later, chaos remains the benchmark of this doctrine. Unfortunately, until such time as the legislature sees fit to statutorily define the precise relationship between "employee" and "employer", as a few states have done, thereby abrogating the burdensome concept of general employer/special employer, the confusion of disparate appellate decisions must continue, both intrastate and interstate.

Even before one approaches the myriad of presumptions, prerequisites and exceptions to the doctrine of general employer/special employer or "borrowed servant" or "lent employee", it must be determined from which direction the approach to the doctrine is being made. In making its all-encompassing rule of law, the 4th DCA failed to understand the initial step, which is essential to any real insight to the

problem. Professor Larson suggests that the courts first determine from which side of the board the litigants are playing the game: workers' compensation statutes or the common law. In Larson's Workmen's Compensation Law, §47.42(a), he states:

> "It was observed at the outset of this section that one of the reasons for requiring clear consent by the employee to a contract of hire is that by coming within the compensation act, the employee may lose valuable common-law rights. When the person relying upon the employment relation is not an employee seeking compensation, but an employer seeking a defense to a common-law suit, it should not be thought surprising if a court is somewhat more exacting in the evidence it will accept to establish an employment agreement by implication. If this seems to be lack of perfect symmetry, it should be remembered that there also is not perfect symmetry in what is at stake in the two situations: the first is a matter of providing protective statutory benefits, while the second is a matter of destroying valuable common-law rights that have existed for centuries."

Since, in the former situation, if an employment agreement is established, moderate statutory benefits are available to the injured worker; however, reaching such a conclusion in the second situation results in the destruction of valuable common-law rights to the injured workman. Therefore, consent to an employment agreement with Pepperidge should not be imputed to Booher since material factual questions exist regarding Booher's and Pepperidge's consent to enter into a contract of hire. If the foregoing reasoning is acceptable, it is then axiomatic that directed verdicts should not be entered if the evidence is

conflicting and permits different reasonable inferences. Riccio v. Allstate Insurance Co., 357 So.2d 420 (Fla. 3d DCA,1978). A motion for directed verdict should be granted only when the court, after viewing the evidence and testimony in the light most favorable to the non-moving party (plaintiff in the case sub judice) concludes that the jury could not reasonably differ as to the existence of a material fact or inference and that the movant is entitled to judgment as a matter of law, Gates v. Chrysler Corp., 397 So.2d 1187 (Fla. 4th DCA,1981). Where there is any evidence upon which a jury could lawfully find for the movant's adversary, a verdict should not be directed. Newsome v. St. Paul Fire & Marine Ins. Co., 350 So.2d 825 (Fla. 2d DCA,1977). Further, a verdict for the defendant should never be directed by the court unless it is clear that there is no evidence whatever adduced that would in law support a verdict for the plaintiff. If the evidence is conflicting, or will admit of differing reasonable inferences, and if there is evidence tending to prove the issue, it should be submitted to the jury as a question of fact to be determined by them, and not taken from the jury and passed upon as a question of law. Moore v. Dietrich, 183 So. 2.

Prior to discussing the actual conflict between the decision under review and decisions of both this court and other district courts of appeal, it should be clearly accepted that §47, et seq. of Larson's Workmen's Compensation Law is the legal standard in virtually all states which have not codified the precise

definitions of employer and employee and their relationship to one another. To the petitioner's knowledge, only four states have done so. Consequently, a review of the decisional law on the subject throughout the United States provides us with an ever-repetitive, shoulder-shrugging theme: it is impossible to lay down a rule by which the status of a person performing a service for another can be definitely fixed as an employee, as ordinarily no single feature of the relation is determinative, but all must be considered together and each case must depend on its own particular facts, Bendure v. Great Lakes Pipe Line Co., 433 P.2d 558 (S.Ct.Kan.,1966).

All courts utilize Larson's test for special employer and employee regardless of whether it is to establish the employee's right to workers' compensation benefits or his right to pursue a common law remedy for negligence. However, in common law actions, nationwide, the burden is on the defendant to establish their affirmative defense of special employer by the greater weight of the evidence and Florida is no exception. This Court, in Shelby Mutual Ins. Co. v. Aetna Ins. Co., 246 So.2d 98 (Fla. 1971) stated as follows:

> "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 has been 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)

Parenthetically, the 4th DCA was "particularly influenced" by this decision. Actually, the 4th DCA did not examine the issue of whether or not Pepperidge carried its burden of proof at the trial level as to each item of Professor Larson's test for a special employer/employee relationship. Had they done so, they would have reached the same decision as the jury, Hamilton v. Shell Oil Co., 215 So.2d 21 (Fla. 4th DCA,1968), notwithstanding. This case stands for the exception rather than for the rule. The facts in that case, when viewed in the light most favorable to Hamilton, the plaintiff, unquestionably bespeak one conclusion: Shell Oil Co. was his employer from the day he was hired.

Since Hamilton never knew that Shell hired its employees through Manpower (he walked onto the gas station premises seeking a job), he certainly expected that Shell was his employer. As a gas station attendant, the details of his work and control of his activities on an hour-to-hour basis were governed by his supervisors, and the work he performed was essentially that of the primary business of Shell: selling gasoline and allied products. Accordingly, no verdict could have been available to him and a directed verdict was in order based on those facts.

However, when the facts are not as crystal clear, we must apply the test for the existence of a relationship. The first

step of the test has produced more litigation than the other two: (1) whether or not a contract for hire, express or implied, exists between the employee and the alleged special employer. Again, it must be kept in mind that this test was devised to find compensability for employees' injuries within applicable workers' compensation acts. However, under the common law (Restatement of Agency), the master must consent to the service, but nowhere requires that the servant consent to serve the master or even know who he is. Notwithstanding, even utilizing the definition for special employment from the workers' compensation sense, i.e., a mutual agreement must exist between the employee and employer to establish an employee-employer relationship, the facts, in this case, do not support the rule of law Pepperidge Farm never consented to employe Gerald Booher.

The truth of this statement is scattered throughout the record. Clearly and unequivocally Pepperidge, in no uncertain terms, declined to classify Booher as an employee. The intent of Pepperidge appears between pages 773 and 778 of the record and provides, in part:

> "Whereas, Dixie Drivers Service is desirous of supplying drivers who are employees of Dixie Drivers Service to Pepperidge Farm...
>
> ***
>
> 3. That Dixie Drivers Service will 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 services with respect to the receipt and delivery of

> Pepperidge Farm's merchandise and observe and comply with safety regulations as Pepperidge Farm may from time to time require.
>
> ***
>
> 7. That Dixie Drivers Service will pay drivers' wages and provide all fringe benefits...
>
> ***
>
> 8. That Dixie Drivers Service will indemnify and save Pepperidge Farm harmless from any claims, liabilities and demands of its employees or those claiming through or under said employees, including: payroll or Unemployment Compensation claims, injury or death claims, and all similar claims regardless of whether such claims are alleged to have been caused in whole or in part by any act of negligence of Pepperidge Farm, its agents or servants."

From just a practical standpoint, when Booher was injured, Pepperidge certainly did not consider itself an employer under our Workers' Compensation Act. Don Klug, who was in charge of the depot where Booher was injured, testified as follows (TR-85):

> "Q Now, when did you first learn that there had been an accident involving Gerry Booher?
>
> A The following morning. I have it written in my daily log sheet that he supposedly hurt his back.
>
> ***
>
> Q So your log from the next morning indicates that? Whether it has 'supposedly' or not, he was injured. Anything about the injury or how it occurred?
>
> A No.
>
> Q What did you do when you found that out?

A What did we do?

Q No, what did you do?

A I called my superior who in turn got in touch with Dixie Drivers and got a casual driver on the way down here.

Q Did you do anything else?

A No.

Q Like find out how long he was going to be laid up?

A No."

Had Pepperidge, at that point in time, considered itself to be an employer, it would have been required by law to comply with F.S. §440.185(2) which requires:

"(2) Within seven days of actual knowledge of injury or death, the employer shall report same to the carrier and the Division and the employee, on a form prescribed by the Division..."

There is also nothing in the record that is remotely persuasive of the fact that Booher considered himself an employee of Pepperidge. Even if such evidence existed, it is for the jury to draw an inference as to his understanding and consent vis-a-vis an employment relationship with Pepperidge. Pepperidge Farm chose, for their own business reasons, to lease semi-tractor drivers and the semi-tractors. They also chose to contract with Dixie Drivers in a manner which permits them to avoid any responsibility to the drivers themselves. The Washington Supreme Court in Novenson v. Spokane Culvert & Fabricating Co., 588 P.2d

1174, when faced with a laborer supplied by a labor pool under a contract between Spokane Culvert and the labor broker, made the following determination in reversing a directed verdict in favor of Spokane:

> "For whatever reason, Spokane Culvert found it advantageous to contract with Kelly to provide it with temporary workers. As opposed to permanent employees of Spokane Culvert, Kelly laborers were not placed on its payroll, nor were they eligible for company benefits. Spokane Culvert seeks the best of two worlds -- minimum wage laborers not on its payroll and also protection under the Workmen's Compensation Act as though such laborers were its own employees. Having chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require Spokane Culvert to assume its burdens. A potential burden, in this instance, may well be the application of RCW 51.24.010, which permits a common-law action for negligence." (page 1177)

Nebraska courts followed the same line of reasoning in White v. Western Commodities, Inc., 295 N.W.2d 704. The Supreme Court found that the lease agreement to which the injured plaintiff was not privy should be accorded considerable weight in determining the issue of employment and cited as authority for its position Shamburg v. Shamburg, 45 N.W.2d 446, 451 (Neb.1950):

> "There must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created."

Under the circumstances of the instant case, to imply a contract for hire between Booher and Pepperidge, in the light of all the circumstances, is pure fabrication.

Assuming, arguendo, that step one of Larson's test could be answered in the affirmative, we then come face-to-face with step three (step two will be examined, below): 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. Needless to say, this prong of the test has not come through the vagaries of litigation unscathed. Cursorily, this phrase to the wandering eye appears rather definitive. Not so! What does control really mean? Does "details of work" mean minute-to-minute supervision or a daily work schedule or a one-time explanation of the duties to be performed? Not unexpectedly, there is case law to support each of the propositions. Again, the facts determine the outcome. Ignoring for the moment the contractual agreement between Pepperidge and Dixie Drivers, ordering them to require performance of certain duties of its employees, such as driving along certain routes and conforming to certain schedules, there is no actual control by Pepperidge. Pepperidge is concerned only with the "end result" of getting its product from warehouse to depot for eventual distribution and sale by its own salaried employees. The mere act of specifying cargo, destination and route is not sufficient control. See White v. Texas Indemnity Ins. Co., 140 S.W.2d 873 (Tex.Civ.1940); Hunter Construction Co. v. Marris, 388 P.2d 5 (Okla.1953); Turner v. Schumacher Motor Express, Inc., 41 N.W.2d 182; Gulf Insurance Co. v. Boh Bros. Construction Co., 331 So.2d 897 (La.App.1976). Except for

prescribing a route and a time frame within which the duties were to be performed, Pepperidge exercised no other control. Dixie Drivers, on the other hand, had control of hiring, firing, transferring the petitioner, providing safety rules, physicals and licensing.

The "details of work" has been addressed by the California Supreme Court in Marsh v. Tilley Steel Co., 606 P.2d 355 (Cal.1980), as follows:

> "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice."
> (Emphasis supplied)

Accordingly, where the evidence, though not in conflict, permits conflicting inferences, the existence or non-existence of a special employment relationship which would bar the injured employee's action at law is generally a question reserved for the trier of fact. Professor Larson states it as follows, at 8-385:

> "It is still true, of course, that the right to control the end result as distinguished from the method of arriving at it falls short of showing employment." (Emphasis supplied)

Step two of the Larson test: whether or not the work being done at the time of the injury was essentially that of the alleged special employer has met with diverse interpretation. In the labor broker situation, the work being done is almost always

that of the alleged special employer. However, many states, including Florida, have inquired as to whether or not the work being done was "essential to" or "incidental to" the business of the alleged special employer. California has held that evidence to negate a special employer relationship can be shown by the employee who is not engaged in the borrower's usual business (Marsh v. Tilley Steel Co., supra). Illustrative in Florida is Williams v. Pan-American World Airways, 448 So.2d 68 (Fla. 3d DCA,1984) where the work of carrying baggage was merely "incidental" to the essence of the alleged employer, Pan-Am, which was clearly to transport the passengers themselves. The "incidental" aspects to Pepperidge Farm's business is the moving of their product from warehouse to depot. That is not to say that the work is not indispensable, but it is certainly not the essence of the business. For this reason, Pepperidge leased both drivers and vehicles.

Finally, when the 4th DCA ruled that Booher was a special employee of Pepperidge Farm and that his tort claim was barred by virtue of the availability of Workers' Compensation, it created an entirely new rule of law for which there is no precedent. This could be tantamount to the abolition of all third-party claims.

The next rule of law propounded by the court is "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. This sweeping pronouncement is obviously intended to cloak the borrowing employer with the "special employer" immunity. It is obvious to the reader of the opinion that the court intended to bar all temporary employees provided by labor brokers from ever maintaining a common-law action against the borrowing employer, provided that the labor broker carries compensation coverage. Essentially, they have created a class of employees who are excluded from the factual test provided by Professor Larson and followed throughout the United States. These employees will no longer be afforded their common law remedy regardless of their relationship with the borrowing employer. This is in conflict with Shelby Insurance Co. v. Aetna Insurance Co., supra; Thornton v. Paktank Florida, Inc., 409 So.2d 31 (Fla. 2d DCA,1981) and Williams v. Pan-American World Airways, supra.

In Thornton, supra, the 2nd DCA reversed a Summary Judgment on essentially similar facts. Essentially similar to the extent that the classification of the parties is the same: labor broker, borrowing employer, contract between broker and borrower and an injured employee. The majority stated:

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

Although the 4th DCA says that there is "arguably" a conflict between the instant case and Thornton, it is submitted

that it is a direct conflict in that given the facts of Thornton, the summary judgment against him would have been affirmed in the 4th District.

In Williams v. Pan-American World Airways, supra, Pan-Am approached the problem rather uniquely. They avoided the special employer/general employer confusion by utilizing §§440.10 and 440.11 by attempting to categorize themselves as "general contractors" and the labor broker as a "sub-contractor". They then invoked the immunity doctrine as set forth in §440.10. The Third District Court of Appeal, through Judge Schwartz, reversed the summary judgment, holding that Pan-Am was, as a matter of law, not immune from a common-law action.

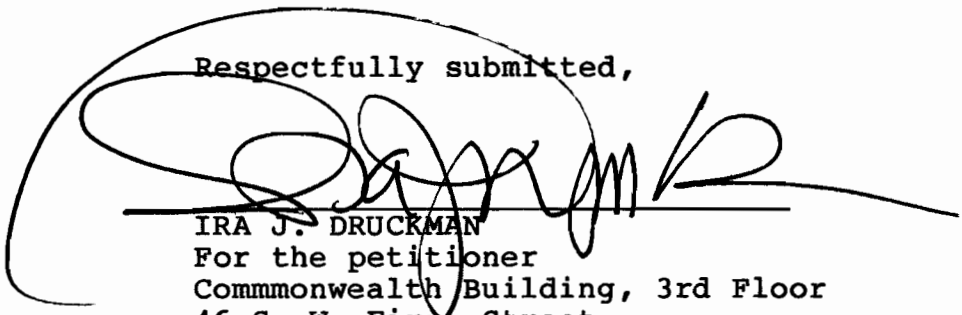
The petitioner offers an approach to the determination of the relationship between the parties that is more in keeping with the times. Frequently, this Court has responded to such social needs. As Judge Ervin pointed out:

> "In the past, the court has not been reticent in changing established principles of law when conditions for their continued application were deemed no longer relevant. The court reserves to itself the option of exercising a 'broad discretion' taking 'into account the changes in our social and economic customs and present day conceptions of right and justice.'" Duval v. Thomas, 114 So.2d 791, 795 (Fla.1959).

The broad application of workers' compensation laws in this country to virtually all employees makes the doctrine of general employer/special employer obsolete. A possible alternative is an

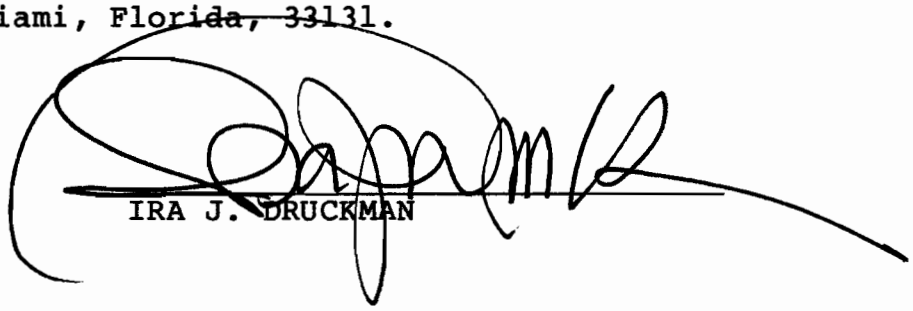
examination of the contractual obligation between the borrowing and the lending employers. If, as in the case at bar, the borrowing employer intends for the loaned employee to be an independent contractor, then he is bound by the terms of his contract. The borrowing employer can not have it both ways: he can not deny the existence of an employer/employee relationship should he be without fault when a workman is injured and invoke the same relationship if his negligence causes the injury. These cases can not be determined in a vacuum which ignores the existence of contractual obligations and intentions. Contrary to the law in this state, the 4th DCA has done just that and its decision in the case at bar can not be left to stand.

Respectfully submitted,



IRA J. DRUCKMAN
For the petitioner
Commmonwealth Building, 3rd Floor
46 S. W. First Street
Miami, Florida 33130

THIS IS TO CERTIFY that a true and correct copy of the foregoing Brief in Support of Petition for Writ of Certiorari was mailed this 7th day of November, 1984 to JUDITH A. BASS, Attorney at Law, of LANZA, SEVIER, WOMACK & O'CONNOR, 3300 Ponce DeLeon Blvd., Coral Gables, Florida, 33134; and to to JAMES C. BLECKE, Attorney at Law, of BLACKWELL, WALKER, GRAY, POWERS, FLICK & HOEHL, for the respondents, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida, 33131.



IRA J. DRUCKMAN