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IN THE SUPREME COURT OF THE STATE OF FLORIDA

82,409

DISTRICT CASE NO. 91-4018

Beverly Williams,

Petitioner,

vs.

Fort Pierce Tribune,

Respondent.

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ON THE QUESTION(S) CERTIFIED AS OF GREAT PUBLIC IMPORTANCE FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS ON BEHALF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF CERTIFIED QUESTIONS[1]

> Whether in light of the evolving business relationship between newspaper publishers and persons delivering newspapers, the holding in *Miami Herald Publishing v. Kendall*, 88 So. 2d 276 (Fla. 1956), remains viable.

If the question above is answered in the affirmative, then

> If the decision in *Miami Herald* remains viable, is its application limited towards actions for damages or does it extend as well to workers compensation cases?

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[1] The undersigned files this Brief, Motion for Leave to File Amicus Curiae Brief and accompanying Motion for Oral Argument on Behalf of the Academy of Florida Trial Lawyers (AFTL), an interested party in this case. This Brief is directed at the first certified question, requesting (in support of the petitioner) that this Court answer the question in the negative.

STATEMENT OF FACTS

In this case, the employer and its insurance carrier, Fort Pierce Distributing and Claims Center, appealed an award of compensation benefits which were based upon the finding of the judge of compensation claims that the Appellee, Beverly Williams, a newspaper carrier for the Fort Pierce Tribune, was an employee rather than an independent contractor, thereby allowing her entry to be found compensable. The Court, in reversing, found those facts to be indistinguishable from *City of Port St. Lucie v. Chambers*, 606 So. 2d 450 (Fla. 1st DCA 1992), *rev. denied, 618 So. 2d 208 (Fla. 1993)*. The Third District in the case at bar noted Judge Barfield's concurring opinion in *Chambers* and Judge Sharp's special concurrence in *Walker v. Palm Beach Newspapers*, 561 So. 2d 1198 (Fla. 5th DCA 1988), *appeal dismissed*, 576 So. 2d 294 (Fla. 1990), and like in Walker,[2] then the Court certified the following question(s) of great public importance:

> (1) Whether in light of the evolving business relationship between newspaper publishers and persons delivering newspapers, the holding in *Miami Herald Publishing v. Kendall*, 88 So. 2d 276 (Fla. 1956), it remains viable; and
>
> (2) If the decision in *Miami Herald* remains viable, is its application limited towards actions for damages or does it extend as well to workers compensation cases?

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[2] The Fifth District Court in Walker vs. Palm Beach Newspapers, Inc., 561 So. 2d 1198 (Fla. 5th DCA 1988), also had certified the following question to the Florida Supreme Court:

> Whether, in light of the evolving business relationship between newspaper publishers and persons delivering the newspaper, the holding in Miami Herald Publishing Company vs. Kendall, 88 So.2d 276 (Fla. 1956), is still viable.

SUMMARY OF ARGUMENT

This Court should officially recognize (or re-recognize) Section 220 of the Restatement (Second) of Agency as the appropriate test for determining whether an individual is an employee or independent contractor. It should direct that all factors should be considered, with the right of control over the method and more in which the work is to be accomplished as the principal factor. It should re-announce that ordinarily, this determination is one of fact, from the particular circumstances of each case. This Court should distinguish and reject as dicta the discussion and alleged holding in Miami Herald to the extent that it created a per se presumption that newspaper delivery men are independent contractors.

ARGUMENT

I. IN LIGHT OF THE EVOLVING BUSINESS RELATIONSHIP BETWEEN NEWSPAPER PUBLISHERS AND THE PERSONS DELIVERING THE NEWSPAPER, THE HOLDING IN MIAMI HERALD PUBLISHING CO. VS. KENDALL, 88 So. 2d 276 (Fla. 1956) IS NO LONGER VIABLE.

This Court should recede from the Miami Herald Publishing Company, to the extent that it created a presumption that newspaper delivery men are independent contractors. The Miami Herald decision does not create an automatic independent contractor presumption regardless of the facts, and that Court failed to properly consider all of the required section 220 factors found within the Restatement (Second) of Agency (1958). Alternatively, even if we apply the Miami Herald case, there is sufficient evidence to support that the jury should be permitted its right to determine whether that party was an employee or independent contractor.

A. THE MIAMI HERALD CASE DOES NOT CREATE ANY PRESUMPTION THAT ALL NEWSPAPER DELIVERY MEN ARE INDEPENDENT CONTRACTORS.

It is true that this Court in Miami Herald found that the particular newspaper person in that case was an independent contractor. However, that finding should not be construed to create a per se presumption that all newspaper delivery persons are independent contractors. Accordingly, the first certified question should be answered in the negative.

This Court and Miami Herald did not disregard the particular facts of the case, but rather engaged in an extensive factual analysis to determine whether this particular newspaper boy was an

independent contractor or employee. The Court took pains to examine each and every part of both the contract and the conduct of the parties to determine that the newspaper boy was in fact an independent contractor. Id. at 278. There is a plethora of case law to support that the question of whether one is an employee or independent contractor is usually one of fact, to be determined from the circumstances of each case. (Citations omitted).

In making its determination, the Court in Miami Herald did not apply all of the factors in section 220 of the Restatement (Second) of Agency. In fact, a close look at the Miami Herald case demonstrates that the only reason that the elements were even discussed was in response to the appellant's (in Miami Herald) argument that section 220 should apply. The Court in Miami Herald actually applied a combination of the elements set forth in the 1940 Supreme Court case of Florida Publishing Co. vs. Lourcey, 141 Fla. 767, 193 So. 847 (Fla. 1940), relying heavily on language in that case to determine whether the particular newspaper boy was an employee or independent contractor. In reality, even an examination of the rule of Lourcey should result in answering the first certified question in the negative.

The Court in Lourcey stated that an independent contractor relationship would lie if the independent contractor "could not be questioned as to his method or performance or have his contract canceled as long as he performed." Id. at ____, 193 So. at 848. Relying almost exclusively on this language, this Court in Miami Herald found that the newspaper boy was an independent contractor

because "it was left entirely to Molesworth (the newspaper boy) to select the conveyance which he would use to transport the papers from the point of origin to the subscriber's front porch." Id. at 278. The Court then combined this claimed dispositive analysis with an "after the fact" cursory review of some of the factors found present in the section 220 test.

Even if we apply the test enunciated in the Lourcey case to the facts here, the result supports a finding that a jury is entitled to determine whether the party was an employee of Ft. Pierce Tribune.

B. THE TEN FACTORS OF SECTION 220 OF THE RESTATEMENT (SECOND) OF AGENCY SHOULD HAVE BEEN APPLIED IN THIS CASE.

While this Court in Miami Herald suggested that the Restatement set forth certain factors, the Court in Miami Herald either summarily conducted an "after the fact" analysis to justify its decided presumption that all newspaper delivery men are per se independent contracts, or it otherwise failed to properly apply all of those factors to that case; for, a proper application of those factors illustrate that a jury should make this determination based on the evidence presented at trial.

In actuality, the Restatement (Second) of Agency was not even adopted until 1958, some two years after the Miami Herald decision. A review of this section of the Restatement 2d (particularly section 220) shows that there was no intent that this section of the Restatement create a presumption that (as a matter of law) newspaper boys are independent contractors. Indeed, the cases at

that time illustrate the contrary. See, e.g., Moeller v. The Rose, 222 P. 2d 107 (Cal. App. 1950) (If facts so warrant, newspaper delivery men may be considered employees and employers may be held liable for newspaper delivery man's negligent act of injuring another with his vehicle).

The appropriate test for determining whether one is an employee or an independent contractor was set forth in Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966). In that case, the Florida Supreme Court was asked to determine whether a workmen's compensation claimant, who worked at a grocery store helping customers carry their purchases to their cars, was an employee or an independent contractor for purposes of entitlement to compensation for injuries sustained when the trunk lid of a customer's automobile fell across his back while he was loading bags into the vehicle's trunk.

In finding that the claimant was an employee rather than independent contractor, the Florida Supreme Court adopted the test set forth in 1 Restatement (Second) of Agency (1958) Section 220, and noted that "[the comment on this Section states that the factors set out in Subsection (2) of Section 220 are all to be considered in determining the question which will depend on the existence val non of a sufficient group of favorable factors to establish the relation." Id. at 174. The rule adopted by this Court in Cantor is still applied by courts today. Accord, Delco vs. State, 519 So. 2d 1109 (Fla. 4th DCA 1988); Accord, Edwards vs. Caulfield, 560 So. 2d 364, 369-70 (Fla. 1st DCA 1990); Accord, Zubi

Advertising Serv. vs. State, 537 So. 2d 145 (Fla. 3rd DCA 1989); Robinson vs. Faine, 525 So. 2d 903 (Fla. 3d DCA 1987), Kane Furniture Corp. vs. Miranda, 506 So. 2d 1061 (Fla. 2d DCA 1987) rev. denied, 515 So. 2d 230 (1987), Strickland vs. Progressive Ins. Co., 468 So. 2d 525 (Fla. 1st DCA 1985).

The factors to be considered are as follows:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relationship of master and servant; and

(j) whether the principal is or is not in business.

Cantor, 184 So. 2d at 174-75.

A review of the comments to this Restatement section also clearly supports that all factors should be considered, and that a factual determination has to be made to ascertain whether one is an employee or independent contractor.

C. A PROPER ANALYSIS OF THE TEN FACTORS IN THE CASE AT BAR DEMONSTRATES THAT A QUESTION OF FACT ARISES AS TO WHETHER A NEWSPAPER DELIVERY PERSON IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR.

An examination of the factors demonstrates that there are genuine issues of material fact as to whether Williams was an employee of Ft. Pierce.

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

It has been said that the extent of control is the most important factor in determining whether a person is an independent contractor or an employee. Delco Ind. vs. Dept. of Labor & Emp. Corp. vs. Miranda, 506 So. 2d 1061, 1064 (Fla. 2d DCA 1987). See also Nazworth vs. Swire Florida, Inc., 486 So. 2d 637, 638 (Fla. 1st DCA 1986) ("The standard for determining whether an agent is an independent contractor is the degree of control exercised by the employer or owner over the agent"). Accord, T & T Communications vs. State, Dept. of Labor and Emp. Sec., 460 So. 2d 996 (Fla. 2d DCA 1984); VIP Tours of Orlando, Inc. vs. State Dept. of Labor and Emp. Sec., 449 So. 2d 1307 (Fla. 5th DCA 1984). This right of control may even be inferred. See Nazworth, 486 So. 2d at 639.

The right of control as to the mode of doing the work is the principal consideration. VIP Tours, 449 So. 2d at 1309. If a person is subject to the control or direction of another as to his results only, he is an independent contractor; if he is subject to control as to the means used to achieve the results, he is an employee. D.O. Creasman Electronics vs. State Department of Labor and Employment Security, 458 So. 2d 894 (Fla. 2d DCA 1984). Even

the Court in Miami Herald specifically stated that "if the one securing the services controls the means by which the task is accomplished, the one performing the service is an employee. If not, he is an independent contractor." 88 So. 2d at 277. See also Herbert Hayes Yacht and Ship Sales, Inc. vs. Joel A. Lovell and State of Florida, 406 So. 2d 1259, 1260 (Fla. 4th DCA 1981) (quoting Collins vs. Federated Mut. Implement and Hardware Ins. Co., 247 So. 2d 461, 463 (Fla. 4th DCA), cert. denied, 249 So. 2d 689 (Fla. 1971) (The right of control as to the mode of doing the work contracted for is the principal consideration in determining whether one is employed as an independent contractor or as a servant). Indeed, the case in Miami Herald turned on who controlled the mode of performance. 88 So. 2d at 277.

(b) whether or not the one employed is engaged in a distinct occupation or business.

Presumably, the newspaper company has additional control over its delivery people as it monitored the way in which the work was performed, and they obviously had the right to terminate Williams when appropriate. This fact is significant. For, as stated in Goldstein vs. Gray Decorators, Inc. 166 So. 2d 438 (Fla. 1964), and Lindsey vs. Willis, 101 So. 2d 422 (Fla. App. 1958): "The power to fire is the power to control."[3]

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[3] See also 1 Larson, Workmen's Compensation Law Section 44.35 which states: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the consent of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent of completion as a breach of contract."

The Court in Miami Herald placed significant emphasis on a now outdated presumption that all newspapermen are independent contractors because they are engaged in a distinct occupation. 88 So. 2d at 279. It then used this presumption as a springboard to decide that Molesworth (the newspaper boy) was an independent contractor. Id. Aside from the arguments made within this and the appellant's brief, Amicus would also suggest in the alternative that even if the procedure used in Miami Herald case was applied here today, it still would result in reversal, as it is the jury's exclusive province to make the factual determination of the delivery person's status as employee or independent contractor. The record would demonstrate that Ft. Pierce controlled the method of performance, and told Williams how, when and where to deliver the papers. This "far cry" from the "distinct occupation" theory warrants clarification by this Court.

> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> and
>
> (d) the skill required in the particular occupation;

While it is true that newspaper delivery persons engage in the delivery by themselves, it cannot be reasonably controverted that this kind of occupation is done under the specific direction of the employer. As stated above, they are told how, when and where to deliver the papers.

(e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;

Presumably, the record would show that Ft. Pierce provided the newspapers, training, route, price, customers, mode of travel to complete the job, placement\delivery of newspapers, and place of employ.

(f) the length of time for which the person is employed; and

(g) the method of payment, whether by the time or by the job;

While the contract provided that the duration of employment was indefinite, presumably Ft. Pierce could fire petitioner for failing to follow as it dictates.

(i) whether or not the parties believe they are creating the relationship of master and servant; and

It is not dispositive even if the agreement between the parties states that Williams was to be considered an independent contractor. See Singer vs. Star, 510 So. 2d 637, 640 (Fla. 4th DCA 1987). See also Nazworth vs. Swire Florida, Inc., 486 So. 2d 637 (Fla. 1st DCA 1986). Indeed, a jury may infer the existence of an agency even when both the principal and the agent deny it. See Singer, 510 So. 2d at 640, and McCabe vs. Howard, 281 So. 2d 362 (Fla. 2d DCA 1973). Even a volunteer may be considered an employee. Burns vs. Sams, 458 So. 2d 359, 360 (Fla. 1st DCA 1984) (Joanas, J., dissenting).

(h) whether or not the work is a part of the regular business of the employer;

and

(j) whether the principal is or is not in business.

The Court in Miami Herald either improperly juxtaposed (h) and (j), or completely failed to deal with (j), in its analysis of whether the newsboy was an employee or independent contractor. It is quite clear that Ft. Pierce is in the newspaper business, and that Williams presumably had little or no knowledge about his endeavor. However, there is no discussion in Miami Herald about whether the principal was in the business, and what effect that should have on a determination that one is an employee. Indeed, if, for example, Williams' job was to "repave" the parking area of the Ft. Pierce Tribune, instead of engaging in the exact business of the respondent, it may have produced a stronger independent contractor argument (as illustrated by the available case law). However, this was not the case, as delivery of the newspapers is an obvious integral part of a news company's success and employ.

For reasons which are unsupported by any case law, the Court in Miami Herald noted these elements as satisfied, and curiously deemphasized their importance. This arbitrary disregard for a proper analysis of these factors further supports that the Court in Miami Herald was either predisposed because of the now antiquated "distinct occupation" argument, or otherwise misapprehended the relative applicability of the ten factor test. This Court should hold that the Miami Herald case does not create a per se immunity from a determination of employee status, and therefore answer the first certified question in the negative.

D. THE COMMENTS TO SECTION 220 WOULD ALSO SUPPORT THAT THE MIAMI HERALD DECISION DOES NOT CREATE A PER SE RULE

In the ten step analysis, the comments to the Restatement suggest that there are additional concerns that must be addressed. The comment states that one must appreciate that the particular fact scenarios may enhance the finding as to employee or independent contractor. For example, an employee relationship may also be found where the particular job does not require one highly educated or skilled, there is a fixed route or specific area, and/or when the work cannot be delegated to another party, despite that he receives a specified price for a particular job. Restatement Second 220, page 489. In fact, if the work is not skilled, the method of payment may be disregarded and he may be found to be an employee Id. at 490. These particular supporting examples found in the Restatement further supports answering the first certified question in the negative.[4]

CONCLUSION

When analyzing whether a party is an employee or independent contractor, a newspaper delivery person should be considered no different from any other person. The Miami Herald case, to the extent it has been interpreted to provide this arbitrary per se

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[4] A laborer is almost always a servant in spite of the fact that he may receive a specified price for a specified job. Id. at 489. Other examples finding employee status involved where a party hires a woman to open his summer home, and where "A is engaged by P as a resident cook for his household, but P promises not to interfere in any way in the manner of the A's preparation of the food." The comments to the Restatement also specifically state that A is nonetheless an employee. Id. at 497.

immunity from employee status, should be receded from. The determination of the status of a party as employee or independent contractor should be accomplished through the traditional analysis of the 10 factors identified in the Restatement and in the Cantor case. The determination is ordinarily one of fact that should be analyzed from the particular circumstances of each case, and accordingly this Court should answer the first certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy was mailed this 30th day of November, 1993, to Jerold Feuer, Esq., 402 Northeast 36th Street, Miami, FL 33137-3913, and Paul Westcott, Esq., Rissman, Weisberg, Barrett & Hurt, P.A, 1717 Indian River Boulevard, Suite 201, Vero Beach, FL 32960-0864.

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