IN THE SUPREME COURT
STATE OF FLORIDA

BEVERLY WILLIAMS,

Petitioner,

vs.

FORT PIERCE TRIBUNE and CLAIMS CENTER,

Respondents.

NO. 82,409

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BRIEF ON THE MERITS ON BEHALF OF AMICUS CURIAE, CAPE PUBLICATIONS, INC. d/b/a FLORIDA TODAY, NEWS-PRESS PUBLISHING COMPANY, INC. d/b/a NEWS-PRESS, AND PENSACOLA-NEWS JOURNAL, INC. d/b/a PENSACOLA-NEWS JOURNAL, IN SUPPORT OF THE RESPONDENTS

ON THE QUESTIONS CERTIFIED FROM
THE FIRST DISTRICT COURT OF APPEAL
CASE NO. 91-4018

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WHETHER, IN LIGHT OF THE EVOLVING BUSINESS RELATIONSHIP BETWEEN NEWSPAPER PUBLISHERS AND PERSONS DELIVERING NEWSPAPERS, THE HOLDING IN MIAMI HERALD PUBLISHING CO. V. KENDALL, 88 SO.2D 276 (FLA. 1956), REMAINS VIABLE?

IF THE DECISION IN MIAMI HERALD REMAINS VIABLE, IS ITS APPLICATION LIMITED TO TORT ACTIONS FOR DAMAGES, OR DOES IT EXTEND AS WELL TO WORKERS' COMPENSATION CASES?

Williams v. Fort Pierce Tribune, 622 So.2d 1368 (Fla. 1st DCA 1993).

SUMMARY OF THE ARGUMENT

In 1956 this Court applied Florida common law principles and the Restatement of the Law of Agency to hold, as a matter of law, that newspaper carriers who control the manner and means of delivering papers, as did Petitioner, Beverly Williams, are to be recognized as independent contractors. Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956). The reasoning behind that decision remains equally valid today. Moreover, because of the thoroughness of the analysis employed by this Court in Kendall, the decision, for over thirty years, has served as a model by which newspaper publishers and carriers have fashioned independent contractor relationships. There is no basis for now receding from Kendall and there is every reason to preserve the stability it has provided.

Though applied to a tort liability case, the reasoning of Kendall must be equally applicable to a workers' compensation claim. There is no basis in law for holding that a newspaper carrier, who is an independent contractor for tort purposes, should somehow hold a different status for workers' compensation purposes. Moreover, the Florida Legislature recently declined to extend workers' compensation coverage to newspaper carriers who work as independent contractors, leaving that determination to common law principles. Since Kendall represented this Court's articulation of common law principles, the Florida Legislature

obviously accepted the status of newspaper carriers as being one of an independent contractor, unless exceptional circumstances dictate otherwise. For this Court to now hold otherwise, would be for this Court not only to act, without basis, against the weight of stare decisis, but also to legislate -- and to legislate in an area where the Florida Legislature itself deferred to this Court's articulation of common law principles.

This Court should, therefore, hold that its decision in Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956) remains viable and that its application extends to workers' compensation cases and should affirm the decision of the District Court of Appeal, First District.

ARGUMENT

In Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956), this Court established, as a matter of law, that carriers who contract to deliver newspapers, under the circumstances set forth in that case, are to be treated as independent contractors. That decision represented a considered application of common law principles and a careful weighing of the criteria used to distinguish independent contractors from employees. The decision reflected a reality that remains unchanged today. There is no basis for receding from it.

Through its decision in Kendall, this Court set forth in detail the business activities of a carrier, including the rights and duties that can be agreed to between a publisher and a carrier who acts as an independent contractor. Under Kendall, a carrier, while still being an independent contractor, can be required to:

1. Pay the publisher for papers, whether or not subscribers pay for delivery;
2. Furnish the names of new subscribers;
3. Pay to the publisher within a certain time money collected;
4. Present within 48 hours claims for shortages in papers;
5. Call the newspaper's attention to errors and statements within 6 days;
6. Handle the Miami Herald exclusively;
7. Keep in confidence the names of subscribers;
8. Select a substitute in the event he is unable to make his deliveries;
9. Be responsible for the substitute;

10. Bear all costs of enforcing the contract;
11. Give bond for his faithful performance of the agreement;
12. Acquaint any successor with his route and list of subscribers;
13. Secure deliver of papers in good condition; and
14. Undertake to increase the number of subscribers. Id. at 278-79.

For its part the publisher can fix the retail price of the papers, furnish papers to the carrier at a stipulated price, supply the carrier with names and addresses of all persons wishing the newspaper to be delivered to them in the territory assigned the carrier, credit the carrier with shortages of papers and credit the carrier with subscriptions paid in advance. Id. The publisher can also employ an agent to oversee carriers to assure that deliveries are made to the subscribers and that everything is going "all right," receive complaints from subscribers, see that the subscriber "received a good paper," and fine or dismiss the carrier. Id. at 278.

In reviewing the respective rights and duties of the publisher and carrier, this Court found, despite a substantial involvement of the publisher in the business activities of the carrier, the method by which the newspaper was delivered was still left to the carrier. Id. at 279. This Court also noted that even though the distribution of newspapers is a part of the regular business of the publisher, there is no reason such business cannot be done by independent contract. Id.

The Kendall decision provided a finality and a certitude that has governed the newspaper publishing industry for over 37 years. During that time publishers and carriers who desired an independent contractor relationship have been able to pattern their respective rights and duties after ones found by this Court in Kendall to be those of an independent contractor. By virtue of the Kendall decision, publishers who have no training or experience in delivering newspapers have been free to contract that work out to independent contractors better equipped to perform such a service and who undertake responsibility for doing so. Publishers have been able to do so without having to fear that such independent contractors might one day be labeled employees, thereby not only imposing substantial additional costs upon the publishers (costs never envisioned by either the publishers or the carriers), but also subjecting the publishers to potential tort liability and even penalties for having failed to provide carriers with workers' compensation coverage or Social Security benefits.

Perhaps no industry employs independent contractors more extensively than does the newspaper publishing industry. Whereas most businesses rely upon corporate carriers such as Federal Express to deliver their product, newspapers have traditionally relied upon independent carriers responsible for delivering papers within a limited pre-assigned territory. By its decision

in Kendall, this Court permitted publishers to retain literally thousands of carriers without having to fear enduring a liability trial every time one of them happened to be involved in an accident or made a workers' compensation claim. This Court thereby provided a stability and consistency vital to the publishing industry.

Since Kendall, the relationship of the publisher and carrier has remained fundamentally unchanged, in that the publisher still has no control over the vehicle the carrier uses to deliver the newspaper, when the newspapers will be delivered, other than before 6:30 a.m., how many people will be used to deliver them, the persons that may be employed by the carrier to assist him, the route the carrier will take, the speed the carrier will drive or any of the myriad details affecting the method by which the newspapers are delivered. In contracting with a publisher, a carrier assumes the role of an independent contractor and takes full responsibility for his actions. To now impose liability, whether in tort or for workers' compensation claims, upon the publisher would be to rewrite the agreement between publisher and carrier, to disregard this Court's own precedent upon which publishers have relied and to subject the newspaper industry to totally unwarranted uncertainties.

In rendering her Order of March 25, 1991, the Judge of Compensation Claims ("JCC") applied Section 220 of the

Restatement of the Law of Agency, weighed the criteria set forth therein as she saw fit, and concluded that Beverly Williams was an employee. In so holding, the JCC ignored the fact that this Court in Kendall had itself applied Section 220 to almost precisely the same work relationship and had found the carrier in that case to be an independent contractor. On appeal the District Court of Appeal recognized that the facts of this case were indistinguishable from those considered in City of Port Saint Lucie v. Chambers, 606 So.2d 450 (Fla. 5th DCA 1992), review denied, 618 So.2d 208 (Fla. 1993), and reversed. In Chambers the court expressly applied Kendall, recognizing the circumstances of that case were factually indistinguishable.

It is important to emphasize that this Court's decision in Kendall was based upon its application of Restatement of the Law, Agency, Section 220(2). This Court first applied Section 220 in 1941, in Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941). At that time Section 220(2) provided as follows:

> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others are considered:
>
> (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; and
>
> (i) whether or not the parties believe they are creating the relationship of master and servant. Id. at 860.

Although a second edition of the Restatement of Agency was adopted after Kendall, the new edition did not change a single word of Section 220(2). It simply added subsection (j) which required a consideration of "whether the principal is or is not in business." Restatement (Second) of Agency § 220(2). Since this Court in Kendall obviously recognized that the Miami Herald was in business, this Court effectively applied all the criteria of Section 220(2). The Kendall decision, therefore, represents this Court's summation of common law as applied to the independent contractor/employee status of a newspaper carrier.

It was particularly appropriate for this Court to have made its decision in Kendall as a matter of law. As this Court in

Magarian recognized, even when applying Section 220(2), "Where the inference is clear that there is, or is not, a master and servant relationship, it is made by the court. . . ." Id. at 860. Thus, this Court acted appropriately in Kendall when it applied Section 220(2) and held, as a matter of law, that a newspaper carrier, acting in the same manner as the carrier in that case, was an independent contractor.

Since the Kendall decision, courts from around the country have continued to recognize that newspaper carriers should, as a matter of law, be considered independent contractors. See, e.g., Lutz v. Cybularz, 607 A.2d 1089 (Pa. Super. Ct. 1992); LaFluer v. LaFluer, 452 N.W.2d 406 (Iowa 1990); Webster v. Mississippi Publishers Corporation, 571 So.2d 946 (Miss. 1990); Janice v. Hondzinski, 439 N.W.2d 276 (Mich. Ct. App.), appeal denied, 1989 Mich. LEXIS 2281 (1989); Madley v. The Evening News Association, 421 N.W.2d 682 (Mich. Ct. App.), appeal denied, 1988 Mich. LEXIS 2092 (1988); Fankhauser v. Knight-Ridder Newspaper, 500 N.E.2d 407 (Ohio Ct. App. 1986); Cable v. Perkins, 459 N.E.2d 275 (Ill. Ct. App. 1984); Adams v. Times-Picayune Publishing Corp., 418 So.2d 685 (La. Ct. App. 1982); Murrell v. Goertz, 597 P.2d 1223 (Okla. Ct. App. 1979); Fleming v. Foothill-Montrose Ledger, 139 Ca. Rptr. 579 (Cal. Ct. App. 1977); Mid-Continent Freight Lines, Inc. v. Carter Publications, Inc., 336 S.W.2d 885 (Tex. Civ. App. 1960); Mirto v. News-Journal Company, 123 A.2d 863 (Del. 1956).

Recent decisions from courts around the country and over 37 years of practiced experience in this state point to the inescapable conclusion that there is today no valid reason for questioning the wisdom of this Court's decision in Kendall. Moreover, there is no way to distinguish the facts of the instant case from those considered in Kendall. As the First District recognized, the relationship between Williams and the Fort Pierce Tribune was virtually the same as that which existed between Kendall and the Miami Herald. The underlying relationship between newspaper carrier and publisher has not evolved. Therefore, there can be no basis for questioning the continuity viability of Kendall. As a result, the doctrine of stare decisis must weigh heavily against Williams in this case. See Walker v. Armco Steel Corporation, 446 U.S. 740, 749 (1980). Since the relationship of a newspaper carrier under circumstances like those present in the instant case was established by this Court in Kendall, the doctrine of stare decisis dictates that Kendall should have been followed in this case. See Della-Donna v. Nova University, Inc., 512 So.2d 1051, 1054 (Fla. 4th DCA 1987).

Nor does the fact that Williams' claim was for workers' compensation benefits distinguish it from Kendall. The Florida Legislature has recognized that whether a newspaper delivery person is an independent contractor should be governed by common law principles and not by the criteria set forth in the statutory

Florida's Workers' Compensation Law. In 1993, when the Florida Legislature held a Special Session and amended Florida's Workers' Compensation Law, Chapter 93-415, Section 2, Laws of Florida (1993) (to be codified at Section 440.02, Florida Statutes), it established the following criteria that had to be met for an individual to be considered an independent contractor:

> (d) "Employee" does not include:
>
> 1. An independent contractor, if:
>
> (a) The independent contractor maintains a separate business with his own work facility, truck, equipment, materials, or similar accommodations;
>
> (b) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employee identification number under state or federal requirements;
>
> (c) The independent contractor performs or agrees to perform specific services or work for specific amounts of money and controls the means of performing the services or work;
>
> (d) The independent contractor incurs the principal expenses related to the service or work that he performs or agrees to perform;
>
> (e) The independent contractor is responsible for the satisfactory completion of work or services that he performs or agrees to perform and is or could be held liable for a failure to complete the work or services;
>
> (f) The independent contractor receives compensation for work or services performed for a commission or on a per-job or

> competitive-bid basis and not on any other basis;
>
> (g) The independent contractor may realize a profit or suffer a loss in connection with performing work or services;
>
> (h) The independent contractor has continuing or recurring business liabilities or obligations; and
>
> (i) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.
>
> However, the determination as to whether an individual included in the Standard Industrial Classification Manual of 1987, Industry Numbers 0711, 0721, 0722, 0751, 0761, 0762, 0781, 0782, 0783, 0811, 0831, 0851, 2411, 2421, 2435, 2436, 2448, or 2449, or a newspaper delivery person, is an independent contractor is governed not by the criteria in this paragraph but by common law principles, giving due consideration to the business activity of the individual.

As can be seen, the Florida Legislature expressly excluded the determination of whether a newspaper carrier is an independent contractor from the case-by-case analysis provided in Chapter 93-415. Instead, the Florida Legislature declared that such determination should be made under "common law principles, giving due consideration to the business activity of the individual." As discussed above, this Court in Kendall exhaustively considered the "business activity" of a newspaper carrier and applied common law principles to determine that such carriers are independent contractors. Accordingly, Kendall

represents this Court's articulation of the common law as applied in determining the independent contractor/employee status of a newspaper carrier. Since Kendall represents this Court's articulation and application of common law, the Legislature effectively adopted that decision as to newspaper carriers.

Moreover, by declaring that common law principles are to be applied in determining the independent contractor/employee status of a newspaper carrier, the Florida Legislature effectively answered the First District Court of Appeal's second certified question in the negative. In Chambers, 606 So.2d at 451, the court found "no basis for distinguishing between workers' compensation and civil cases when determining whether a person is an independent contractor or an employee." Since no distinction is made in common law between an independent contractor for tort purposes and an independent contractor for workers' compensation purposes, Kendall must extend to workers' compensation claims as well as tort claims.

Furthermore, in one of the most thoughtful recent decisions relative to a workers' compensation claim like that made by Williams, the Pennsylvania Commonwealth Court recognized that the logic of Kendall must apply equally to workers' compensation claims. Johnson v. Workmen's Compensation Appeal Board (Dubois Courier Express), 631 A.2d 693 (Pa. Commw. Ct. 1993). In Johnson, a carrier who was hit by a car as he attempted to cross

a street filed a claim with the Workmen's Compensation Board. Id. at 694. In considering whether the carrier was entitled to workers' compensation benefits, the court made the following findings of fact:

> 5. At the time of taking over the paper route, the claimant reported to the Defendant's Promotion Director and was, basically, interviewed and instructed in the duties and responsibilities that were expected of him by the Defendant, as well as by the customers being served. Each paper boy is assigned a certain area, or route, within which he delivers newspapers to customers.
>
> 6. There was no written contract or agreement between the Defendant and any paper boy.
>
> 9. The Defendant supplies and delivers newspapers to a designated drop point selected by the carrier. In this case, the claimant's newspapers were delivered, along with newspapers for other carriers in the city, to Urban's Gas Station. The newspapers were picked up by the claimant and the paper boys, and they then proceeded to deliver the newspapers.
>
> 10. The Defendant supplied the bag in which the newspapers were carried, but there was no uniform, or dress code for any paper boy.
>
> 11. Newspapers were delivered six (6) days per week, and the carrier paid 5 cents for each newspaper delivered, on a daily basis. Carriers were paid by check mailed to them every two weeks.
>
> 12. Customers paid the Defendant directly for the newspapers; and the carrier did not handle any money. The carrier, or news boy, did not have the right to increase or decrease the price of the newspaper.

13. The Defendant paid the carrier an extra $1.00 every two (2) weeks for good service, and 50 cents was deducted for any customer that was "missed", with no delivery.

14. The Defendant delivered newspapers to the drop point at approximately 2:45 p.m.; and the paper boy was expected to deliver the newspaper to the customer no later than 6:00 p.m.

15. The paper boy determined the manner in which he delivered the newspaper, by foot, bicycle, or other vehicle. The paper boy was not reimbursed for any expense of equipment or materials used in delivery.

16. The claimant determined his own route of travel; and controlled the means of accomplishing the delivery of the newspaper.

17. Very little skill or instruction was required to deliver the newspapers in question.

18. The claimant would deal directly with the customer to obtain instructions as to where to leave the newspaper at the customer's home or place of business.

19. The Defendant exercised no day to day supervision over the claimant, or any other paper boy.

20. The Defendant did not fix the claimant's working hours, other than the newspapers were expected to be delivered prior to 6:00 p.m. so that the customers received "news, not history".

21. The claimant, himself, determined when or at what hour he would deliver the newspapers, within the recommended time frame of 2:45 p.m. to 6:00 p.m., so as to maintain customer satisfaction.

22. The claimant was free to substitute another person to deliver the newspapers

without notice or prior approval by the Defendant.

23. The Defendant did not direct the manner and way that the claimant carried out the delivery of the newspapers in question.

24. The claimant and other paper boys were permitted and encouraged to solicit customers within their area, so as to increase their earnings.

25. If a customer requested the Defendant to deliver a newspaper to his home, and that home was located within the claimant's delivery area, the Defendant would notify the claimant of the new customer; and the claimant would handle the delivery of that newspaper.

26. The Defendant did not withhold any taxes or other charges from the claimant's pay; and the claimant was not treated as one of the Defendant's regular employees, as far as benefits, etc., were concerned.

27. The newspaper masthead contained a notice that if any customer had a service problem, to call the Circulation Department; and any complaints on delivery or service were made by the customer directly to the Defendant.

28. In the event of customer dissatisfaction, or other cause shown, the Defendant had the right to dismiss or fire the claimant or any other paper boy, if that paper boy did not remedy the situation that prompted the complaint. Id. at 694-95.

In considering Johnson's claim, the court, as did this Court in Kendall, recognized that the question of whether or not a workers' compensation claimant is an independent contractor or an employee is a question of law. Id. at 696. The court further

recognized that in making that determination the key element "is whether the alleged employer has the right to control the work to be done and the manner in which it was performed." Id. The court went on to note that there were certain factors in that case which indicated an employee relationship, including the fact that: (1) the publisher delineated the territory, supplied the names and location of the customers and controlled the time by which papers had to be delivered; (2) the carrier could be terminated at will; (3) customers made payments directly to the publisher; (4) the publisher paid the carrier every two weeks and even permitted him to buy accident insurance through the publisher's carrier. On the other hand, the court recognized that the publisher did not control the carrier's "work or the manner of his performance, but only the result." Id. at 697. "He was not told when he should begin delivering papers, whether he should walk, ride a bicycle or use a vehicle to deliver his papers." Id. He was not prohibited from carrying competing newspapers nor was he required to get prior approval if he wished to substitute another person to deliver the papers. Based on a careful weighing of all of these factors, the court determined that the carrier was an independent contractor, not an employee. Id. at 698.

Appellant would now have this Court subject newspaper carriers to the same case-by-case analysis the Florida

Legislature has expressly rejected. For that reason, it is not without significance that the Florida Trial Lawyers filed an Amicus Brief in the court below. They, and ultimately they alone, would benefit by this Court replacing the stability guaranteed by Kendall with a case by case application of the ten criteria set forth in the Restatement -- criteria which resemble the nine criteria the Florida Legislature chose not to apply to newspaper carriers. Each time a carrier submitted a workers' compensation claim, each time the carrier became involved in a tort, the publisher could be subjected to a different analysis by a different jury of the ten criteria. In each case, a different determination could be made, even though the carriers all performed the same duties for the same publisher.

CONCLUSION

In Kendall, this Court did precisely what the Florida Legislature recently reaffirmed it should do. It applied common law principles, including the Restatement of the Law of Agency, to the basic factual circumstances governing the relationship between the newspaper publisher and the carrier in that case to determine, as a matter of law, that newspaper carriers, under the circumstances of that case, are independent contractors. As the First District recognized, the essential facts of the instant case are indistinguishable from those this Court considered in

Kendall. The control over the method and means by which newspapers are delivered was intrusted to Williams, just as it was intrusted to the petitioner in Kendall. Williams has cited no basis for changing that law, other than her after-the-fact desire to obtain workers' compensation benefits. For all of the above reasons, the decision of the District Court of Appeal, First District, should now be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of amicus curiae was furnished by U. S. Mail this 9th day of March, 1994 to: **Arthur J. England, Jr., Esquire,** and **Elliot H. Scherker, Esquire**, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, FL

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