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IN THE SUPREME COURT
STATE OF FLORIDA

BEVERLY WILLIAMS,

Petitioner,

v.

FORT PIERCE TRIBUNE and CLAIMS CENTER,

Respondents.

CASE NO. 82,409

BRIEF OF RESPONDENTS

On Certified Questions from the
First District Court of Appeal

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Table of Contents

Table of Authorities

Page

Cases

Other

Introduction

Petitioner Beverly Williams asks the Court to cast aside a precedent, *Miami Herald Publishing Co. v. Kendall*, 88 So. 2d 276 (Fla. 1956), which has governed and defined the relationship between a newspaper and its home delivery carriers for over 30 years. No cogent explanation is offered for disregarding *stare decisis* other than a generalized appeal to the laudable social goal of providing protection under the workers' compensation law to a broad spectrum of Florida workers. That worthy social policy, however, has repeatedly been found to be inapplicable, both under the workers' compensation statute and in the common law, where workers -- including newspaper carriers who contract with publishing companies -- are not "employees" but rather independent contractors who maintain control over the manner and means by which their private business enterprises are conducted. Williams offers no sociological or technological change which warrants the upheaval of longstanding commercial relationships.

Except in the most nebulous of terms, Williams neither identifies any change in the social fabric that would call for casting aside the decision in *Miami Herald Publishing Co. v. Kendall*, nor formulates a coherent legal theory under which that decision and its progeny should be overruled. Opposing Williams are sound principles of *stare decisis*.

Supplemental Statement of the Facts

Williams' brief sets forth a partial recitation of her own testimony, a small portion of the testimony of respondents' witness, and a lengthy recapitulation of the order

entered by the compensation judge.[1/] Pursuant to Rule 9.210(b)(3) of the Florida Rules of Appellate Procedure, respondents Fort Pierce Tribune and Claims Center (collectively the Tribune) supplement the record facts for a full presentation to the Court.

Williams had been helping her husband with his Miami Herald route in Okeechobee when she began delivering the Tribune in the same geographical area. (R2: 51, 73). William McKay, the Tribune employee responsible for single copy sales of the newspaper (R2: 72), previously had worked for the Herald and had known Williams from his employment there. (R2: 73). Williams and her husband had a "piggyback" operation by which she and he would simultaneously deliver both newspapers. (R2: 51, 73, 85-86). The Tribune was aware of such arrangements among carriers and never sought to interfere. (R2: 71-73).[2/]

McKay testified that distribution is an "integral part" of the business. (R2: 88).[3/] The Tribune's arrangement with its carriers contemplated that the carriers would pick up the papers and receive a list of homes to which they were to deliver, along with "a list of start[s] and stops and any other miscellaneous information." (R2: 74, 83). The carriers are free to be entrepreneurial by selling subscriptions, and by placing new racks in stores and other locations. (R2: 75-76). The sequence of deliveries was left to the carriers'

1/ Williams' brief at 1-11.

2/ McKay testified that "[i]t's [to] our advantage that they have two [routes]" (R2: 80) particularly in less-populous areas, since it is "the only way in most cases those people . .. could get any newspaper at all." (R2: 81).

3/ He has been in this line of work for 20 years.

discretion, meaning "[t]hey could deliver it any way they wanted to." (R2: 75). Carriers are "in charge of their own routes [and] their own operations." (R2: 79-80).

Tribune carriers are not paid a salary. (R2: 77). They are charged five cents per newspaper by the Tribune, and are paid from "an accumulation of the funds gathered together for two weeks the difference [between] what they paid for the paper and what they charged the customer for the paper." (*Ibid.*).[4/] Carriers receive none of the usual incidents of employment: paid vacations, sick leave, meal allowances, pensions or profit sharing. (R2: 78). If a carrier is ill, he or she makes arrangements to have the route covered, and bears responsibility to pay the substitute carrier. (R2: 79). Carriers use their own vehicles to make the deliveries, and they are not compensated for fuel or mileage expenses. (R2: 79).

According to Williams, she would receive her papers in Fort Pierce from the Tribune early each morning (near midnight), and would load them into her car for transport to the Okeechobee area. (R2: 14, 21). The method of delivery was not controlled by the Tribune, and she was never supervised while making deliveries. (R2: 56). She was permitted free rein to retain assistants and in fact did so, using her husband and three other persons to aid in her deliveries. (R2: 49-50).

The job of newspaper carrier for the Tribune required that Williams deliver her papers, in readable condition, by 6:30 a.m. each day. (R2: 21).

4/ The carriers do not actually pay the five cents per paper at the loading dock each morning, although this is the practice in larger metropolitan areas. (R2: 90).

A: . . . [W]e had just a time limit. We knew what time to deliver up to and that's it.

Q: And in fact what the Tribune was concerned with was the end result that is making sure that the papers got out by 6:30 in the morning?

A: Yes.

Q: How you went about doing that was pretty much your business; isn't that true?

A: Yes.

(R2: 59). She depicted the arrangement, the route, as her "business." (R2: 59).

Summary of Argument

The decision in *Miami Herald Publishing Co. v. Kendall*, 88 So. 2d 276 (Fla. 1956), is based on fundamentally-sound principles of tort law, which have neither changed in the intervening 38 years nor been brought into question by societal upheavals. Absent a compelling doctrinal rationale or a civic change so pressing as to warrant the reshaping by the courts of legal precepts, overruling *Kendall* would amount to forbidden and unsettling judicial legislation. Williams cannot demonstrate any unfairness or distress that has been worked by the application of *Kendall* -- either in tort cases or in workers' compensation cases. No such showing was even attempted below.

The workers' compensation law, since its inception, has imported common law agency principles into the statute. The *Kendall* decision has been engrafted into the workers' compensation law. Consequently, Williams is not asking merely for a departure from the Court's prior precedent (a request which, standing alone, should not be granted) but for the judicial reconstruction of a legislative enactment. This request is

not even one which Williams is entitled to have heard, much less granted, unless she can mount a facial challenge to the statute itself. Notably, no such challenge is made.

Williams' challenge to the application of *Kendall* and *City of Port Saint Lucie v. Chambers* to the facts of her case, presents nothing that warrants serious consideration by the court. Her contractual relationship with the Tribune is precisely the same as that of the carrier and newspaper in the *Kendall* decision, and there is no basis for finding her to have been an employee entitled to compensation coverage.

Argument

1. Williams has failed to make a case for overruling *Miami Herald Publishing Co. v. Kendall.*

The first certified question asks whether the *Kendall* decision is viable. That question should be answered in the affirmative. *Kendall* is resoundingly vibrant and viable, from every point of view.

The *Kendall* decision inquired whether a newspaper company was vicariously liable for an act of negligence committed by its newspaper carrier. The Court held that the company was not liable, but the significance of the case is not so much its result as its reasoning and analysis. The Court's decision is a model precedent -- a paradigm of judicial analysis which brought to bear the application of legal principles to particular facts. The enduring quality of *Kendall* is the force of its reasoning, and its craftsmanship.

The appropriate place to begin an inquiry into the viability of *Kendall* is an examination of the structure of the decision. The Court began by describing the nature of the controversy, then quickly moved to the contentions of the parties. The newspaper company asserted that its carrier, Molesworth, was an independent contractor, while the

injured plaintiff argued that he was an employee. The label to be ultimately applied would determine whether the publishing company was vicariously liable for Molesworth's admitted tort.

The Court drew from two sources for its analysis of the issue: the common law distinction between "independent contractor" and "employee", and the summation of national precedent on the issue as compiled in the Restatement of the Law of Agency. The Court's analysis of precedent was not confined to newspaper carrier cases. It was done in reference to principles of agency/employee law which were universal.

> [A]ppellant reminds us of a familiar criterion by which it may usually be determined whether one performing services is an independent contractor or employee, that is, roughly, 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. From the common law and the Restatement, a cardinal principle was discerned by the Court: that the facts of each particular case determine whether a master-servant relationship or an independent contractor relationship exists.

> We agree with the [carrier] that the facts peculiar to each case govern the decision . . . .

88 So. 2d at 279.

Against this background of principled reasoning, the Court carefully reviewed the objective manifestations of the contract between the company and Molesworth. "We have detailed the provisions of the contract with reference to the obligations of the publisher. We now condense the contents of the contract defining the obligations of the newscarrier." 88 So. 2d at 278. Then, as precedent dictated and the parties asserted, the

Court with equal thoroughness recounted the manner and means by which the parties carried out of their respective contractual duties.

Having evaluated universally accepted principles to be applied to the relationship, and having identified all relevant factual features of the relationship, the Court announced its conclusion.

> We do not find that the extra-contractual activities of the contracting parties neutralized the provisions of the agreement which to us were obviously intended to make Molesworth an independent contractor.

88 So. 2d at 279. In reaching that conclusion, the Court pointed to one indicium which it deemed most pertinent to a newspaper company/newspaper carrier relationship: the degree of control to be found over the manner and means by which the carrier discharged the physical delivery function after having picked up the papers in bulk from the company:

> that is, the method Molesworth was to employ in carrying the papers to the subscribers once he had received them from [the publisher]. Not only in the contract but in the practical operation under it, . . . it was left entirely to Molesworth to select the conveyance which he would use to transport the papers from the point of origin to the subscribers' front porches.

88 So. 2d at 278. In view of the totality of factors relevant to the issue, the Court held that the newsboy[5/] was an independent contractor, for whose torts the newspaper company was *not* liable.

The delivery of newspapers to homeowners and to racks on the public streets has been and remains nothing more than one step in the chain of sale of a product. The distribution of the product is an indispensable feature of every sales transaction, whether the product is distributed to ultimate consumers individually or is distributed through wholesalers to retailers for consumer pickup at a central facility (such as magazines at newsstands, orange juice in grocery stores, or linguine at restaurants). It just happens to be the case that the newspaper industry uses independently-contracted home delivery of its products, for the convenience of its customers. The fact that more diverse types of persons may have chosen to be a part of the chain of distribution since 1956 is interesting, but legally unimportant. The historical fact that newsboys dominated the

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5/ The term "newsboy" is frequently used in the Court's opinion to describe the carrier whose motorcycle injured the plaintiff. One appellate court judge in Florida recently criticized the Court for outmoded insensitivity to current, politically correct terminology. In her concurring opinion *Walker v. Palm Beach Newspapers, Inc.*, 561 So. 2d 1198 (Fla. 5th DCA 1990), Judge Sharp criticized the Court by suggesting that its decision was "colored by a turn of the twentieth-century stereotype" which was "dated when written, and it has not aged well since." 561 So. 2d at 1199. She noted that newspaper carriers in the 1990's include women, girls, retired persons and families. That criticism is unwarranted.

Absolutely nothing in the Court's opinion suggests that the term "newsboy" was used in the pejorative, or diminuitively. The term was used solely as a descriptive abbreviation for the class of persons who, at that time in history, represented virtually everyone who delivered newspapers for publishing companies. Nothing in *Kendall* hinges the outcome, or applies the legal principles of agency/employee, to the masculinity or puberty of Molesworth. The Court's opinion is absolutely gender and age neutral. With due respect to Judge Sharp, her social commentary is completely irrelevant to any issue here or in the *Kendall* decision.

distribution chain in 1956 certainly had no bearing whatever on what the Court did in the *Kendall* decision.

The court below applied the Court's decision in *Miami Herald Publishing Co. v. Kendall* to Williams' arrangement with the Tribune, as well it should have. That case has been held, without exception, to be the controlling authority on the status of newspaper carriers under the workers' compensation law.[6/] *Fort Pierce Tribune v. Williams*, 622 So. 2d 1368 (Fla. 1st DCA 1993); *accord*, *Keith v. News and Sun Sentinel*, No. 82-3037 (Fla. 1st DCA Feb. 1, 1994); *City of Port Saint Lucie v. Chambers*, 606 So. 2d 450, 451 (Fla. 1st DCA 1992), *review denied*, 618 So. 2d 208 (Fla. 1993); *Hopkins v. State, Department of Transportation*, 596 So. 2d 680, 681 (Fla. 1st DCA 1991); *Parker v. Sugar Cane Growers Co-Op*, 595 So. 2d 1022, 1023 (Fla. 1st DCA 1992).

As a principle of tort law, *Kendall* uniformly has been followed by the Florida courts. *Walker v. Palm Beach Newspapers, Inc.*, 561 So. 2d 1198, 1199 (Fla. 5th DCA), *dismissed*, 576 So. 2d 294 (Fla. 1990); *Singer v. Star*, 510 So. 2d 637, 640 (Fla. 4th DCA 1987); *Howard v. Shirmer*, 334 So. 2d 103, 104 (Fla. 3d DCA 1976); *Short v. Allen*, 254 So. 2d 34, 35 (Fla. 3d DCA 1971).

Williams' assertion that *Kendall* should be overruled is grounded on two insubstantial and nebulous arguments. First, Williams reiterates Judge Barfield's belief, reflected in his concurring opinion in *City of Port Saint Lucie v. Chambers*, that the *Kendall* decision created an inappropriate, conclusive presumption that carriers are

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[6/] Prior to *Kendall*, the Court had held in *Florida Pub. Co. v. Lourcey*, 141 Fla. 767, 193 So. 847 (1940), that a newspaper distributor who purchased papers from the publisher, furnished his own transportation, and delivered the papers to assigned customers, was an independent contractor.

independent contractors.[7/] If anything, the *Kendall* decision does just the opposite from applying a conclusive presumption, by rejecting mechanical tests and analyzing each fact pattern in its own right. Judge Barfield has misread *Kendall*. He was, it appears, merely at odds with the Court's identification of carrier discretion following a pickup of newspapers from the publisher as the most significant factor to be considered in the legal relationship. The Tribune respectfully suggests, however, that the Court hit the nail on the head when it identified that period of activity as the most significant.

In the *Kendall* case, the carrier picked up his newspapers at 4:30 in the morning and undertook whatever steps he deemed appropriate to get them to customers by 6:30 a.m. In that interval, he was in complete control of his mode of transport and the route he took to discharge his duties. Molesworth apparently used a motorcycle to travel his newspaper route. (See 88 So. 2d at 276). The harm that could be caused to others from Molesworth derived from his skills or carelessness with a motorcycle -- a matter completely outside the publisher's control. Any such harm did *not* stem from the fact that the publisher named Molesworth's customers, prescribed his territory, set the price for its newspapers, collected money directly from its customers, charged the carrier for undelivered papers, barred his insertion of flyers in the newspapers, or otherwise reserved to itself discretionary matters *unrelated to the physical acts of delivery*. None of these indicia of the contractual relationship created the potential for tort liability, as

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7/ Brief at 18 - 19. She essays the argument that this purported "conclusive presumption" violates due process of law. *Id.* at 18, n. 8. This argument, which was not raised in the First District or before the compensation judge, may not be presented for the first time here. *E.g., Morales v. Sperry Rand Corporation*, 601 So. 2d 538, 540 (Fla. 1992).

contrasted with the means and manner by which the newspapers were physically delivered.

Quite appropriately, the Court held in *Kendall* that vicarious liability should not be imposed where both the contractual arrangement contemplates, and the facts bear out, that all control over the delivery process -- including the means of transport and the hiring of helpers or substitute delivery personnel -- rests in the hands of the carrier. Molesworth chose to use a motorcycle. No principled reason existed for his publisher to assume responsibility for the care with which he drove, given the parties' agreement that he was free to do as he wished so long as clean, dry newspapers were received by the publisher's customers by 6:30 a.m. That contractual relationship was no different from that of any other independent contractor's assumption of a project, to be performed in the manner and by the means uncontrolled by the person for whom the job is to be completed.

The changing times which concerned Judge Sharp have in no way eroded the logic or force of the *Kendall* decision as regards the most appropriate aspect of a publisher/newspaper carrier relationship. Petitioner Williams is a prime example. She may not be a "newsboy" in the old, neighborhood sense, yet she is far and away more of an "independent contractor," in the ways that count, than was Molesworth. She picked up her newspapers at midnight in Fort Pierce, obviously using some motor vehicle of her own choosing to get from that place to her "route" in Okeechobee. As was the case in *Kendall*, the Tribuine had no control over the type of vehicle that Williams used, or her level of skill in operating that vehicle. She had a 6:30 a.m. deadline for delivery, but the way in which she chose to meet that deadline was hers alone to select. She delivered

papers to homes, placed them in sidewalk dispensers, and delivered them to stores in bulk. She managed her time and her route for those activities as she saw fit. She used alternate personnel, and her husband, to assist in the deliveries, but she herself selected who those people would be. The Tribune merely contracted with her for a result, while she maintained total control over the means and manner of performance leading to the successful accomplishment of that result.

Everything about Williams' job today suggests that the *Kendall* rationale for not assigning vicarious liability to the activities of newspaper carriers was in 1956, and is today, right on the money. The very changes in society which have occurred since 1956 more clearly compel the same result: greater danger in the delivery process as a result of longer distances traveled, higher speed transportation, more vulnerability for female and elderly carriers travelling in the middle of the night alone, etc. In short, were *Kendall* decided today with the facts of Williams' situation, the result would be exactly the same, for the same reasons, and perhaps even more compellingly.

Against the logic of *Kendall*, Williams makes only one argument. Sandwiched in her brief, following five pages of direct quotation from an Arizona decision, is the only articulated ground for discarding the *Kendall* decision:

> Perhaps it is time to consider the independent contractor question when newscarriers are involved in the same light and with the same level of objectivity as are other workers.

(Brief at 23). What lack of objectivity exists in *Kendall* is not explained. Indeed, the Tribune suggests that a more objective approach for determining employee or independent contractor status than the one used in *Kendall* could not be devised. That standard tracks exactly the test applied to other workers.

Williams, it seems, is seeking nothing more than a "status" exception to the most rudimentary of agency/employee principles -- a result that has been considered and rejected repeatedly by the Florida courts. It should carry no weight that the judge of industrial claims was persuaded in her case not to follow Florida law, and would have acceded to Williams' request for "employee" status.

The entirety of Williams' argument in support of the proposition that *Kendall* is outdated precedent is a five-page quotation from an Arizona Supreme Court decision which applied the Restatement factors to reverse a summary judgment in favor of a newspaper in an action based on the alleged negligence of a carrier.[8/] There follows an *ipse dixit* that *Kendall* "should go the way of contributory negligence." (Williams' brief at 23-24). Williams' arguments fall far short of the compelling case that is needed to overturn precedent.

> [T]he rule we follow is that the common law will not be altered or expanded *unless demanded by public necessity or where required to vindicate fundamental rights.*

In re T.A.C.P., 609 So. 2d 588, 594 (Fla. 1992) (citations omitted; emphasis supplied); *accord, e.g. Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993).[9/] As a general proposition, "changes in the common law should come from the legislature, not the

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[8/] Williams' brief at 19-23, quoting *Santiago v. Phoenix Newspapers, Inc.*, 794 P.2d 138 (Ariz. 1990).

[9/] *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), falls into the first category -- public necessity. Contributory negligence as a doctrine had become "almost universally regarded as unjust and inequitable" when applied to modern automobile accident litigation. *Id.* at 436. *Haag v. State*, 591 So. 2d 614 (Fla. 1992), is an example of the second category -- vindication of fundamental rights. There the Court adopted the "mailbox rule" to govern compliance by incarcerated citizens with filing deadlines in criminal cases, citing "the demands of justice and the principles of constitutional law" in recent United States Supreme Court precedent.

courts." *Shands Teaching Hospital and Clinics, Inc. v. Smith*, 497 So. 2d 644, 646 (Fla. 1986).[10/]

In the absence of "great social upheaval," the courts do not modify common law principles. *Hoffman v. Jones*, 280 So. 2d at 431. Without it, the rule of *stare decisis* commands the maintenance of precedent:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to

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[10/] Interestingly, Judge Barfield, upon whose concurring opinion in *City of Port Saint Lucie v. Chambers* Williams places great emphasis, also authored a concurring opinion in the First District's decision in the *Shands* case, in which he cautioned against just the sort of standardless approach to nullifying precedent as is urged by Williams:

> Imaginative interpretation of constitutions and statutes is well within the prerogative of the judiciary, but when courts ignore the broad powers within their prerogative and attempt to modify common law rules because they are "outmoded" or "anachronistic", they confuse the judicial role with the legislative. To the extent that a common law rule is inconsistent with our constitutions or statutes, it is within the courts' prerogative to declare it not of force in this state. If, however, the only fault courts can find with a rule is that it does not reflect contemporary societal values or that its application is impractical in our modern world, the proper judicial function is to point out to the legislatures the shortcomings of the rule and the need for change. A fear that legislatures may be slow to reform the law does not invest the judiciary with the authority and duty to take over the reins and institute comprehensive changes. The difficulty is not "the degree of wrongness of particular decisions, but the fundamental wrongness of the judges turning their own value choices into law." Confidence that the judiciary can produce better and quicker solutions to political problems is sometimes difficult for judges to resist, but resist they must in order to preserve the independence of our judicial system.

Shands Teaching Hospital and Clinics, Inc. v. Smith, 480 So. 2d 1366, 1375 (Fla. 1st DCA 1985) (Barfield, J., concurring), (footnotes omitted), *approved*, 497 So. 2d 644 (Fla. 1986).

> relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 376, 403 (1970), 90 S.Ct. 1772, 26 L.Ed.2d 339 (Fla. 1970). Thus, *stare decisis* "is not an ironclad and unwavering rule that the present must always bend to the voice of the past," but it most certainly "*is* a rule that precedent must be followed except when departure is necessary to vindicate other principles of law or to remedy continued injustice." *Haag v. State*, 591 So. 2d 615, 618 (Fla. 1992) (citation omitted) (emphasis added).

The Court will note that Williams does not even attempt to make a case under these principles. Essentially, she offers the Court the argument that at least one other court, in another state, has taken a different approach to the vicarious liability of a newspaper for injuries caused by a carrier. There is nothing novel in that diversity. Different courts have viewed the issue differently both before and after the *Kendall* decision. *E.g.*, *Janice v. Hondzinski*, 186 Mich.App. 49, 439 N.W.2d 276, 279 (1989) (court applied same rationale as *Kendall* to hold that carrier is independent contractor); *Skidmore v. Haggard*, 341 Mo. 837, 110 S.W.2d 726, 730-31 (1937) (court applied Restatement test to hold that carriers are employees); *World Pub. Co. v. Smith*, 195 Okl. 691, 161 P.2d 861, 863-64 (1945) (carriers are independent contractors); *Wallowa Valley Stages, Inc. v. Oregonian Publishing Company*, 235 Or. 594, 386 P.2d 430, 433-34 (1963) (whether distributor was employee or independent contractor was fact question for jury); *Newspapers, Inc. v. Love*, 405 S.W.2d 300 (Tex. 1966) (carriers are independent contractors if appropriate contractual arrangements are shown). That other jurisdictions have taken differing or conflicting approaches to a tort law question over the years is not

the equivalent of the sort of national, legal revolution which should prompt the Court to reconsider its well-reasoned precedent.

Without articulating the words, Williams is really saying that she would like the Court to shelve *Kendall* simply to come up with a different result. She does not quarrel with its legal principles or reasoning -- indeed, she urges application of just those principles in her brief.[11/] But there is far more at stake in her request than carrier tort and worker compensation consequences. The basic tenets of master-servant tort law which undergird *Kendall* are woven into the warp and woof of Florida law.

In *Cantor v. Cochran*, 184 So. 2d 173, 174 (Fla. 1966), for example, the Court adopted *Kendall* as having established the controlling law on the factors applicable to independent contractor/employee determination having nothing to do with publisher/carrier relationships. The Florida courts continue to adhere to those principles. *E.g., Zubie Advertising Services, Inc. v. State Department of Labor and Unemployment Security, Division of Unemployment Compensation*, 537 So. 2d 145 (Fla. 3d DCA 1989); *Strickland v. Progressive American Insurance Company*, 468 So. 2d 525, 526 (Fla. 1st DCA 1985); *D.O. Creasman Electronics, Inc. v. State Department of Labor and Employment Security*, 458 So. 2d 894, 897 (Fla. 2d DCA 1984).

Notably, Williams nowhere suggests that the rule of *Kendall* has worked injustice in its application. Her advocacy is for a bare, result-seeking change in established law. The dispositive question in a *stare decisis* inquiry, however, is whether some social upheaval has left a rule of law behind. The Tribune has noted that, in the case of

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11/ Williams' brief at 19-22, 26-31, citing precedent based on factors identified in Restatement of Agency.

newspaper carriers, the *Kendall* rule of law is as sound now as then, if not more so. In sum, there is nothing before the Court to warrant the extreme step of overturning the *Kendall* decision.

2. *Miami Herald Publishing Co. v. Kendall* establishes the governing standard in workers' compensation cases.

The second question certified for Court consideration asks whether the maintenance of *Kendall* should extend to workers compensation matters as well as tort matters. The Court should answer this question in the affirmative, as well. There are even more compelling reasons for *continuing* the *Kendall* principles in workers' compensation cases than for preserving *Kendall* in the tort context.

All of the reasons set forth in the previous section of this brief apply with full force here. Williams presents nothing that was not before the Court when it decided *Kendall*, and she makes no case for the sort of egregious injustice, change in the social structure, or technological revolution which have typified the instances in which the Court was willing to reconsider its prior precedent.[12/] Moreover -- and unlike the previous discussion of *stare decisis* -- Williams must here contend with a *statutory*

12/ The entirety of Williams' argument on this point is made following an acknowledgement that the same criteria are used by the Florida courts for workers compensation and tort cases. (Brief at 24). The argument is that, perhaps, the criteria should be *weighted* differently, considering the purposes of the workers compensation laws as opposed to concerns of vicarious liability in tort. (Brief at 25-26). What exactly in the workers compensation field would pull newspaper carriers toward "employee" status is not identified. The legislature's generic concern for the workplace and the protection of working people is not a policy of discouragement for independent contractual relations. People voluntarily choose to be their own bosses, have control over their own destiny, and abjure the emoluments of "employee" status for a host of legitimate reasons.

provision which has long been deemed to have imported the common law distinction between independent contractors and employees into the workers' compensation scheme.

Williams tells the Court, in essence, that the beneficent purposes of the workers' compensation law and the liberality applied to its interpretation require rejection of *Kendall*, even if that decision remains valid in the tort context.[13/] These notions, in the abstract, offer no rationale for distinguishing the employment status of newspaper carriers from the vicarious liability of their publishers. The principle of liberal statutory construction which Williams incants is far from absolute, as the Court has prudently noted:

> [W]e recognize the rule of liberal construction in favor of the injured worker, but . . . the principle cannot be invoked to vary the literal terms of our law.

City of Hialeah v. Warner, 128 So. 2d 611, 613 (Fla. 1961).

The pertinent statutory provision here is section 440.02(13)(d)1, Florida Statutes (1993), which excludes an "independent contractor" from the definition of an "employee" under the workers' compensation law. That statutory exemption has existed since 1937, shortly after the first enactment of workers' compensation in Florida, and the pertinent common-law definitions (including the view set forth in the Restatement of Agency) were

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13/ Virtually all of Williams' arguments on this point are presented by way of a verbatim recitation of orders entered in *Levine v. The Miami Herald*, 7 F.C.R. 278, *cert. denied*, 280 So. 2d 682 (Fla. 1973), and the subsequent decision of an industrial claims judge in *Levine v. The Miami Herald*, 8 F.C.R. 327 (1974) -- cases in which the former Industrial Relations Commission and an industrial claims judge criticized *Kendall* as inappropriate in workers' compensation cases. Brief at 24-35.

immediately read into the statute. *Margarian v. Southern Fruit Distributors*, 146 Fla. 773, 1 So. 2d 858, 859-61 (1941).

Very soon thereafter, in *Gentile Bros. Co. v. Florida Industrial Commission* 151 Fla. 857, 10 So. 2d 568 (1942), the Court construed the newly enacted unemployment compensation statutes. The Court noted that the definition of "employment" in the pertinent provisions "should be liberally construed to cover or extend [the] beneficent purpose" of unemployment compensation, but it cautioned that, "at the same time these terms cannot be extended" beyond the scope intended by the legislature. *Id.* at 860. Recognizing that "common law concepts that . . . tend to hamper the administration of justice should be abrogated," the Court pointed out that the legislature had been "fully conscious of the master servant relation as it existed at common law," including the distinction between independent contractors and servants, and since the legislature had "expressed no purpose" to negate that distinction the common law would be read into the statute. *Id.* at 860-61; *accord*, *Florida Industrial Commission v. Peninsular Life Ins. Co.*, 152 Fla. 55, 10 So. 2d 793, 794 (1942).

Gentile was quickly adopted by the Court as "the rule we should follow" in workers' compensation cases. *Baya's Bar & Grill v. Alcorn*, 40 So. 2d 468, 469 (Fla. 1949). This approach was continued by the Florida courts, *e.g.*, *Florida Industrial Commission v. Schoenberg*, 117 So. 2d 538, 540 (Fla. 3d DCA 1960) (because the statute does not define independent contractors the courts "are left . . . with the necessity of using the common law definition," citing *Gentile*), until the common law principles as synthesized in the Restatement were brought into the determination of whether an

employer-employee relationship exists for the workers' compensation cases, in *Cantor v. Cochran*, 184 So. 2d at 174.

Since *Cantor*, without exception or protest, the Florida courts have readily applied the common law formulation adopted by the Court for workers' compensation cases. *E.g.*, *Justice v. Belford Trucking Company, Inc.*, 272 So. 2d 131, 134-35 (Fla. 1972); *Buncy v. Certified Grocers*, 592 So. 2d 336, 337 (Fla. 1st DCA 1992); *Edwards v. Caulfield*, 560 So. 2d 364, 370 (Fla. 1st DCA 1990); *Roberts v. Gator Freightways, Inc.*, 538 So. 2d 55, 56 (Fla. 1st DCA 1988); *Herman v. Roche*, 533 So. 2d 824, 825 (Fla. 1st DCA 1988); *Pearson v. Harris*, 449 So. 2d 339, 342 (Fla. 1st DCA 1984); *La Grande v. B & L Services, Inc.*, 432 So. 2d 1364, 1367-68 (Fla. 1st DCA 1983); *Randell, Inc. v. Chism*, 404 So. 2d 175, 177 (Fla. 1st DCA 1981).[14/] Thus, when the First District nonchalantly asks the Court whether *Kendall* principles should apply in workers' compensation cases, it is questioning over 50 years of uniform precedent.[15/] Worse, in asking the Court whether it should

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14/ A further -- and compelling -- indication of the symmetry between workers' compensation law and general tort law on this issue is the fact that *Cantor*'s adoption of common law principles is freely applied by the courts in tort cases. *E.g.*, *Kane Furniture Corporation v. Miranda*, 506 So. 2d 1061, 1063 (Fla. 2d DCA 1987). "The criteria used in determining whether an employer-employee relationship exists is virtually the same under the workers' compensation law and common law." *Ware v. Money-Plan International, Inc.*, 467 So. 2d 1072, 1073 (Fla. 2d DCA 1985) (citation omitted).

15/ As in the tort law context, the law throughout the country is not uniform on the application of common law, master-servant principles in the workers' compensation context. *See, e.g.*, *Laeng v. Workmen's Compensation Appeals Board*, 100 Cal. Rptr. 377, 494 P.2d 1, 4-5 (1972) (under "broad statutory contours" defining "employment," relationship is not based on "common law conceptions of employment"); *Jones v. Aldrich Company, Inc.*, 188 Ga.App. 581, 373 S.E.2d 649 (1988). A survey of American courts which have decided the specific question presented by this case, *i.e.*, whether a newspaper carrier is an "employee" for

(continued...)

alter that body of precedent it is also asking whether the Court should rewrite section 440.02(13)(d) itself. This is so because the common law principles which have been read into the statute since its inception are deemed to *be* the statute.

"Terms of special legal significance are presumed to have been used by the legislature according to their legal meanings." *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 579 n.2 (Fla. 1984) (citation omitted). That is:

> Technical words and phrases that have acquired a peculiar and appropriate meaning in law cannot be presumed to have been used by the legislature in a loose popular sense. To the contrary, they have been presumed to have been used according to their legal meaning. They will ordinarily be interpreted not in their popular, but in their fixed legal, sense and with regard to the limitations the law attaches to them. Where legal terms are used in a statute, unless a plainly contrary intention is shown they must receive their technical meaning.

Ocasio v. Bureau of Crimes Compensation Division of Workers' Compensation, 408 So. 2d 751, 753 (Fla. 3d DCA 1982) (citation omitted).[16/]

[15/](...continued)
workers' compensation purposes, not surprisingly reveals sharp divergences among the courts. *E.g.*, *Taylor v. Industrial Accident Commission*, 216 Cal. App. 2d 466, 30 Cal. Rptr. 877, 881-82 (1963); *Olsen v. Industrial Claim Appeals Office of State of Colorado*, 819 P.2d 544, 547 (Colo. App. 1991); *Evansville Printing Corp. v. Sugg*, 817 S.W.2d 455, 457 (Ky. 1991); *Laurel Daily Leader v. James*, 224 Miss. 654, 80 So. 2d 770, 773 (1955); *Nevada Industrial Commission v. Bibb*, 374 P.2d 531, 534 (Nev. 1962); *Fankhauser v. Knight-Ridder Newspaper*, 27 Ohio App.3d 236, 500 N.E.2d 407, 408 (1986); *Buchner v. Bergen Evening Record*, 81 N.J. Super. 121, 195 A.2d 22, 27 (1963); *Johnson v. Workmen's Compensation Appeal Board (Dubois Courier Express)*, 631 A.2d 693, 696-97 (Pa. Cmwlth. Ct. 1993); *Bigger v. Consolidated Underwriters*, 315 S.W.2d 681, 683 (Tex. Civ. App. 1958); *Richmond Newspapers, Inc. v. Gill*, 294 S.E.2d 840, 843-44 (Va. 1982). These decisions plainly show that the question is not one of a "modern" view of compensation cases. Rather, the determination in each jurisdiction is based almost completely on a history and statutory scope unique to each state's compensation *statute*.

[16/] The Supreme Court of the United States takes the same approach to statutory construction:

(continued...)

Yet another hurdle faces Williams that has not been addressed -- the guidepost of statutory construction that says a legislative intent to depart from common law must be plainly stated to be found by the courts:

> The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot co-exist, the statute will not be held to have changed the common law.

Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990) (citations omitted). Absent evidence of such a legislative intention (and there is none), there would be little reason to doubt that the use of the phrase "independent contractor" in section 440.02 was intended to import the common law definition into the statute. Indeed, the Court had little trouble in so finding when it first had occasion to address the issue in 1941. *Margarian v. Southern Fruit Distributors*, 1 So. 2d at 859-61.

The continued re-enactment of section 440.02 after construction by the Court up to and including the present definitional section 440.02(13(d)1, without any attempt by the legislature either specifically to define "independent contractor" or to narrow its

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[16]/(...continued)

> It is a familiar "maxim that a statutory term is generally presumed to have its common-law meaning." As we have explained, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

Evans v. United States, --- U.S. ---, 112 S.Ct. 1881, 1885 (1992) (citations omitted).

construction from the common law and Restatement standards, seals the issue beyond any doubt.

> It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment.

Burdick v. State, 594 So. 2d 267, 271 (Fla. 1992) (citation omitted).

The common law definition of "independent contractor" -- and the decision in *Miami Herald Publishing Co. v. Kendall* itself -- must be deemed to have been adopted by the Florida Legislature in its many re-enactments of section 440.02. That being the case, the First District's certified question is asking the Court to rewrite the *statute*. This, the Court well knows, is forbidden: "[c]ourts deal with the construction and constitutionality of legislative determinations, not with their wisdom." *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979). Except in the very limited instance of a narrowing construction applied to save an otherwise unconstitutional enactment from invalidation -- and even then, only "when to do so does not effectively rewrite the enactment" -- the courts may not revamp the laws. *Firestone v. News-Press Publishing Company, Inc.*, 538 So. 2d 457, 459 (Fla. 1989); *accord, e.g., State v. Stalder*, 19 Fla. L. Weekly S56 (Fla. Jan. 27, 1994); *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978). Despite the existence of competing philosophical views, the courts have "no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent." *State v. Barnes*, 595 So. 2d 22, 24 (Fla. 1992) (citations omitted).

These guidelines of judicial construction, of course, parallel sensible policy. "[A] court should be consistent in its construction of statutes and should establish a stable interpretation upon which affected parties should be entitled to rely." *Glass v.*

State, 574 So. 2d 1099, 1102 (Fla. 1991) (citations omitted). Since at least 1956, Florida newspapers and their carriers have relied on the continuing vitality of the *Kendall* formulation for establishing their contractual agreements. Everyone knew the rules of the game and struck their financial bargains accordingly. In the complete absence of any case at all for abandoning that formulation, Williams provides no reason for the Court to disrupt many years of commercial stability.

3. The district court properly applied the *Kendall* standard and *City of Port Saint Lucie v. Chambers* in this case.

Williams raises the application of the *Kendall* decision to her situation as a third issue on appeal, although not certified. The Tribune has already spelled out why her situation is *more* compelling for independent contractor status than in Molesworth's in *Kendall*. Nonetheless, there is more to be said in response on this issue.

The district court found that its prior decision in *City of Port Saint Lucie v. Chambers* was controlling on the question of whether Williams was an independent contractor or an employee under the *Kendall* standard. *Fort Pierce Tribune v. Williams*, 622 So. 2d at 1368. The pertinent facts in *Chambers* on which the court based that conclusion were these:

> Claimant testified that she was given an established paper route by the Post and obtained all her customers from the Post. Claimant was supplied a daily customer list from the Post to determine who would receive the paper on a particular day. Claimant picked up the papers at the Post's warehouse before 4:00 a.m. and delivered the papers before 6:30 a.m. Claimant provided her own transportation and operating costs of her vehicle and was paid 15 cents per daily paper and 45 cents per Sunday paper delivered. No social security or federal taxes were withheld from her check.

606 So. 2d at 451. The district court was eminently correct in applying *Chambers* to hold that Williams was an independent contractor.

The record in this case, without contradiction, shows that Williams was free to deliver by whatever means and in whatever pattern she wished (R2: 56, 74-75), and that she supplied her own vehicle and was not reimbursed for transportation costs. (R2: 51). She, too, had to deliver the papers before 6:30 a.m., and she was provided a list of new customers, "stops," and any customer complaints each morning. (R2: 24, 30-33, 82). Williams was charged five cents for each paper, and her compensation depended upon her collections less the cost of the papers. (R: 53-58, 77-78). Williams assumed the paper route from another carrier. (R2: 46). In addition to these factors, which mirror those present in *Chambers*, the record reflects that Williams was allowed to "piggyback" her route with her husband's Miami Herald delivery route (R2: 51-52, 73), and that by Williams' own testimony the route was her "business." (R2: 59).

Under *Kendall*, the most rudimentary question in determining whether an employee-employer relationship exists is whether "the one securing the services controls the means by which the task is accomplished." 88 So. 2d at 277. The formulation was more recently couched this way:

> The test for determining what constitutes independent service lies in the control exercised, the decisive question being who has the right to direct what shall be done, and when, where and how it shall be done.

Roberts v. Gator Freightways, Inc., 538 So. 2d at 56 (citations omitted).

Williams' argument is geared at the broad contours of the publisher's distribution goal, not the performance of the carriers' job itself. (Brief at 48-49). As noted above, her view was discredited in *Kendall*. There, the Court focused on the critical factor of

the method of delivery, *i.e.*, that "it was left entirely to [the carrier] to select the conveyance which he would use to transport the papers from the point of origin to the subscribers' front porches." 88 So. 2d at 278. There as here, the operative facts and contractual terms coalesced to create independency, as opposed to employment. There as here, the mere fact of general supervision, to ensure that the reasonable expectations of subscribers are met, does not operate to change the independent contractor status of carriers.[17/]

The present version of the Restatement states:

> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
>
> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control *with respect to his physical conduct in the performance of his undertaking* . . . .

Restatement (Second) of Agency, § 2 (emphasis supplied). "The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results." *Id.*, § 220, Comment (1)e. Newspapers carriers who agree "to accomplish results," *i.e.*, appropriate delivery of morning newspapers, are not changed into employees by the mere fact of an agreement to accomplish an objective.

17/ Broad supervision for quality-control purposes, for example, is a feature the Court noted in *Kendall*. A manager there "apparently 'rode herd' on the newsboys to see that deliveries were made to the subscribers and 'that everything was going all right.'" *Ibid.*

The primary consideration in determining the nature of the relationship is the degree of control. *Kendall*, 88 So. 2d at 277; *accord, e.g., Herman v. Roche*, 533 So. 2d at 825 ("[o]f these various factors, the primary one is the exercise or right to exercise direction and control").[18/] Other factors set forth in Restatement (Second) of Agency, § 220(2)[19/] no more lead to a different principled result here than they did in *Kendall*, in which the Court carefully analyzed those same factors before ruling that the carrier's relationship to the newspaper was that of an independent contractor. 88 So. 2d at 279.[20/] There is no basis in the record to support a finding that Williams, unlike the

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18/ For example, the fact that the agreement between Williams and the Tribune was terminable at will by the Tribune (with two weeks' notice) is not dispositive. *La Grande v. B & L Services, Inc.*, 432 So. 2d 1364, 1368 (Fla. 1st DCA 1983) (ability to terminate relationship "at will" is "by no means conclusive on the issue").

19/ Section 220(2)(a) identifies as a pertinent factor "the extent of control" over the person engaged in the work. The remaining factors are:

> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether . . . 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 . . .;
> (f) the length of time for which the person is employed;
> (g) the method of payment . . .;
> (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.

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> We have the definite opinion that newspaper boys as they perform their work generally in this country have a place in the pattern of American life that constitutes a "distinct occupation," Sec. 220(2)(b)

(continued...)

carrier in *Kendall* -- and every other carrier who has made similar arrangements with a newspaper -- was an employee of the Tribune.

Conclusion

The court should not discard straightforward, substantive principles of master-servant law which have informed and guided the relationship between newspapers and their carriers since at least the advent of *Miami Herald Publishing Co. v. Kendall.* There is no meaningful basis for doing so. Accordingly, the Tribune requests the Court to answer the two certified questions in the affirmative.

Similarly, there is no factual basis to differentiate Williams from Molesworth, or any other of numerous independent contractor relationships which have been validated by the courts. The Court should affirm the First District's application of precedent to this case.

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[20]/(...continued)

> . . . . True, there was some supervision by the publisher's representative but while the newsboy was actually making his deliveries, he was acting alone and was a specialist, at least to the extent of following his route, remembering the addresses of subscribers who were in good standing, and collecting and properly accounting for funds . . ., Sec. 220[(2)](c) and (d). The newscarrier furnished his own instrumentality, . . . Sec. 220(2)(e). The length of the engagement, or rather the condition for termination of the engagement, was specified in the contract, Sec. 220(2)(f). The method of payment . . . was the compensation received under the contract, and the newsboy became indebted for papers delivered to him . . . Sec. 220(2)(g). We do not doubt that distribution of newspapers is a part of the regular business of the publisher but there is no reason that this cannot be done by independent contract, Sec. 220(2)(h). From the contract it is clear to us that the parties believed they were making Molesworth an independent contractor, Sec. 220(2)(i).

Ibid.

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