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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 82,409

Beverly Williams,

Petitioner,

v.

Fort Pierce Tribune/Claims Center

Respondents

_____/

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PETITIONER'S REPLY BRIEF ON THE MERITS

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POINT I

THE DOCTRINE OF MIAMI HERALD PUBLISHING CO. V. KENDALL, 88 SO.2D 276 (FLA.1956), IS NO LONGER VIABLE

Respondents and Amicus Kay seem to miss the point. As Judge Barfield pointed out in this concurrence in City of Port Saint Lucie v. Chambers, 606 So.2d 450 (Fla.1st DCA 1992)[1], review denied 618 So.2d 208 (Fla.1993), there are very few, if any, situations where an Employer has more control over one in service to it irrespective of the label placed on that service, then the relationship between a newspaper and its delivery personnel. They are told by what time the delivery must be made, to whom the delivery must be made and, in this case, the order of delivery as well as virtually every other material aspect of the service rendered. As shown in this case and by the findings of the Judge of

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[1] "I agree that the result reached by the majority is mandated by the decisions cited in the majority opinion. Were it not for those decisions which appear to exclude newspaper carriers as a class from being employees, I would conclude that they must be evaluated individually under th test for independent contractors. When viewed realistically the only things that the newspaper carriers do of their own volition under these facts are provide their means of transportation and find replacements to deliver their papers on the days that they are unable to do so. The notion that the carrier is somehow independent by determining methods of delivery, means of conveyance and type of transportation is like calling a carpenter an independent contractor because he brings his own hammer to work and drives the nails with his left hand rather than his right.

I agree with the majority that the concept of independent contractor should not vary from one legal discipline to another. I do find fault with the historical exclusion of newspaper carriers as a class from coverage as employees. Since the supreme court has chosen to define these identical characteristics as those of an independent contractor, we have no choice but to adhere to that precedent. Perhaps it warrants reconsideration by those that created the class." 606 So.2d at 451

Compensation Claims, there is a disciplinary procedure, informal as it may be, in place. The only thing that seems to be missing from total control is the fact that the carrier may use a vehicle of his or her choice in delivery process. Certainly, if that vehicle was objectionable in some way to the customers of the newspaper, either through a noise factor or some other aesthetic quality, the newspaper would surely have its say as to that and pressure would be brought upon the carrier to change it. After all, the customers dissatisfaction becomes the death knell of the newspaper's business.

Amicus Kay states on page 3 of its Brief that "perhaps no industry employs independent contractors more extensively than does the newspaper publishing industry". That, alone, should be an indication the principles defining those persons as independent contractors is outmoded. As pointed out by Kay in its Brief on its page 6, Restatement of Agency, Second, Section 220, did make the change from the Restatement in effect at the time of Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (Fla.1956), and Florida Publishing Co. v. Lourcey, 193 So. 847 (Fla.1940) to include "whether the principle is or is not in business".

Kendall, supra, and Lourcey, supra, do effectively create a conclusive presumption that all newscarriers are "independent contractors" with the newspaper and such a conclusive presumption flies in the fact of modern jurisprudential thought that the particular facts of a case, alone, should govern and the fact finder should be allowed to apply modern concepts, not those over 30 years old, to modern situations. A conclusive presumption does,

in fact, exist because the facts to which the determinative elements are applied are set out in such detail in Kendall and otherwise so strongly in favor of "employee" that the conclusion of the Court effectively removes any discretion in the fact finder.

The extent of control over the newscarrier by the newspaper is really no different that than of the foreman over the ditch digger where the foreman says to the ditch digger, you may use whatever size shovel you wish and you may put the dirt on either side of the ditch as you desire. The ditch still must be dug in a certain length of time, to a certain depth and to certain standards. The extent of right of independent action that the newscarrier has is really no greater, in this matter, than those possessed by the ditch digger.

POINT II

IF KENDALL IS VIABLE, THE FACT THAT THIS IS A WORKERS' COMPENSATION CASE SHOULD DETERMINE A DIFFERENT OUTCOME

Respondents on page 9 of their Brief make a false statement to the effect that Kendall, supra, has been held "without exception" to be the controlling authority under Florida's Workers' Compensation Law for the relationship between newscarriers and newspapers. They ignore, virtually completely, Levine v. The Miami Herald, 7 FCR 278 (1973), cert denied, 280 So.2d 682 (Fla. 1973), which quite definitely held to the contrary. Levine held, as this Court should hold, that tort principles are not automatically controlling of the law created by the social or remedial legislation that is Workers' Compensation and that Chapter 440 did not and does not exclude newscarriers as a class of delivery persons. In previous cases

cited in Petitioner's Initial Brief, this Court has repudiated such class exclusions. The facts, therefore, are determinative on a case by case basis. See also Levine v. The Miami Herald, 8 F.C.R. 327 (1974). Indeed, up until Parker v. Sugar Cane Growers Co-op., 595 So.2d 1022 (Fla.1st DCA 1992), and Chambers, supra, Levine was controlling case law. What the District Court apparently chose not to accept and what Respondents have ignored, is that Kendall has not governed Chapter 440 adjudications for almost 20 years and that while in a tort setting the level or standard of proof for employee may be to the point where it is effectively a "clear and convincing evidence" standard, in Workers' Compensation the thrust and intent was that coverage should be maximized among those people who work for a living and they should be protected under Florida's Workers' Compensation Law. Erroneously, Respondents state that there have been 38 years of a non-change in the principles defining the relationship between newscarrier and newspaper. That is not true because the change came with Chambers and Parker.

As argued in the initial brief, Petitioner suggests that the placement of the "pointer" after consideration of the factors need not be as far towards the "employee" end of the spectrum in a workers' compensation matter as it need be in a tort matter. This was criticized by opponents as being "non specific". Perhaps one way of looking at this would be that the extent of control need not be as great for one to be considered an employee in a workers' compensation setting as in a tort setting.

It is interesting to note that the case cited by Amicus Kay, Johnson v. W.C.A.B. (Dubois Courier), 631 A.2d 693 (Pa.App.1993),

seem to turn on the fact that Johnson had the ability to hire other personnel to help him, apparently without the approval of the employer. See 631 A.2d at 698. That element is not present here as shown by the factual findings of the Judge of Compensation Claims:

> "The claimant, BEVERLY WILLIAMS, testified at the hearing; I have carefully scrutinized her testimony and compared it with the testimony of all other witnesses who have testified in this cause. I find the claimant to be a credible witness and I find that her testimony is entitled to be believed. Having heard and considered all of the evidence relating to the primary issue, namely whether the claimant was an employee of the Fort Pierce Tribune or an independent contractor thereof, I specifically find that the claimant's testimony is credible. This is not meant to imply that other witnesses who have testified on this issue are less than truthful; it is clear to the undersigned that the Fort Pierce Tribune, like many newspapers in order to limit potential liability, would prefer that their delivery people be independent contractors and attempt to organize their distribution systems to accomplish that objective. However, based upon the facts presented in this hearing and the legal conclusions which can be drawn from those facts, that objective was not accomplished by the Fort Pierce Tribune and for the reasons explicated below I find that the claimant, BEVERLY WILLIAMS, was in fact on the date of accident, namely 11/01/89, an employee of the Fort Pierce Tribune. This case is analogous to the decision of the Industrial Relations Commission in Levine v. The Miami Herald, 8 F.C.R. 327 (IRC Order 2-2525, 06/25/74). In that case, the Industrial Relations Commission pointed out that the Workers' Compensation Act is `social legislation designed to protect working men and women of this State in respect of injuries produced by accident arising out of and in the course of their employment. Every doubt is to be resolved in favor of coverage.' The Workers' Compensation Statute provided then, as it does now, that the term `employee' shall not include `independent contractors.' See Section 440.02(11)(d)I. The various Courts of this State in deciding whether an individual is an employee or independent contractor have adopted a number of tests, including that suggested by Section 220 of the Restatement of the Law of Agency (Second Edition). The question of whether or not an individual is an independent contractor ultimately turns on the power to control. Although the testimony in evidence in this cause was conflicting on certain factual points, the undersigned is satisfied that the Fort Pierce Tribune exerted sufficient control over the claimant's activities as a newspaper delivery person to render the claimant an employee as opposed to an independent contractor. While I have considered all of the criteria suggested by the Restatement of the Law of Agency, I find the following indicia to be most persuasive in arriving at

the conclusion that the claimant was an employee of the Fort Pierce Tribune:

a. EXTENT OF CONTROL WHICH, BY THE AGREEMENT, THE MASTER MAY EXERCISE OVER THE DETAILS OF THE WORK. The claimant delivered newspapers for the Fort Pierce Tribune from 06/01/89 until her accident on 11/01/89. At the time the claimant was hired, she was required to fill out an application for employment. The claimant took orders from a distribution supervisor and had an established route with certain confined territorial or geographical limits. The Fort Pierce Tribune provided the claimant with a daily customer list; this computer printout instructed the claimant to deliver papers to new customers, stop delivery to customers who no longer desired the paper and suspend delivery to those who did not pay. In addition, the daily printout contained any customer complaints that had been received by the Fort Pierce Tribune regarding delivery. Each day the claimant would pick up the papers to be delivered and the printout sheet of customers at the Fort Pierce Tribune; the claimant was required to pick up the papers at approximately 12:00 a.m. and to have them delivered by 6:30 a.m. According to the testimony of the claimant, each detail relating to delivery of the paper was dictated by the Fort Pierce Tribune and the claimant did not have any authority or independent power to deviate from the procedures established by the Fort Pierce Tribune. **The totality of facts in this case indicates that the claimant had little, if any, latitude to deviate from the manner and method of delivery prescribed by the Fort Pierce Tribune and that each and every important aspect relating to delivery was controlled by the Fort Pierce Tribune.**

b. WHETHER OR NOT THE ONE EMPLOYED IS ENGAGED IN A DISTINCT OCCUPATION OR BUSINESS. The claimant testified that you do not need a professional license or credentials to deliver newspapers. No occupational license is required. The claimant does not do any advertising nor does she deliver newspapers for any other company. The claimant testified that she worked exclusively for the Fort Pierce Tribune. There was conflicting evidence on this point, which may be explained by the fact that the claimant's husband delivers papers for the Miami Herald. There was no competent substantial evidence adduced at the trial that the claimant on 11/01/89 worked delivering newspapers for anyone other than the Fort Pierce Tribune. The claimant did not bill customers for the papers which were delivered nor did she collect money from the customers for papers which were delivered. Billing and collection were handled directly by the Fort Pierce Tribune. The claimant did not have any involvement in setting the price for the papers which she delivered nor did she have any authority to raise the price, give discounts, add or drop customers. **If a subscriber did not pay, it was not the claimant's decision to terminate delivery, rather this was done by the Fort Pierce Tribune and the claimant was notified of the fact by an entry made on the daily customer list prepared by the Fort Pierce Tribune.** The claimant had no authority to create routes outside

her territorial limit nor could she vary the time of delivery of the paper.

c. THE SKILL REQUIRED IN THE PARTICULAR OCCUPATION. Delivering newspapers requires only basic skills, such as being able to drive a motor vehicle, reading a list of customers' names and being physically capable of tossing the paper into a subscriber's yard. Little, if any, training is given or needed.

d. WHETHER THE EMPLOYER OR THE WORKMAN SUPPLIES THE INSTRUMENTALITIES, TOOLS AND PLACE OF WORK FOR THE PERSON DOING THE WORK. With the exception of providing a vehicle for transportation and delivery of the newspapers, the claimant did not provide any tools or materials. The newspapers were picked up daily at the Fort Pierce Tribune. When inserts were required to be delivered, these were also provided by the Fort Pierce Tribune.

e. THE LENGTH OF TIME FOR WHICH THE PERSON IS EMPLOYED. As indicated above, the claimant worked as a delivery person for the Fort Pierce Tribune from 06/01/89 until her accident, which occurred on 11/01/89. This was not casual work; the claimant delivered papers seven days a week, every week. If the claimant knew she was going to be unable to deliver the Fort Pierce Tribune, she had to make arrangements for a substitute and **she needed to obtain the prior approval of the Fort Pierce Tribune for such a substitution.**

f. THE METHOD OF PAYMENT, WHETHER BY TIME OR BY THE JOB. Although the method of compensation is somewhat confusing, the claimant in essence was paid 5 cents for each paper she delivered. Although the records make it appear that the delivery person purchases the papers from the Fort Pierce Tribune, the uncontroverted evidence was that money never changed hands and the claimant received 5 cents per paper delivered after the Fort Pierce Tribune collected from the customer. The claimant also testified that the Fort Pierce Tribune occasionally ran promotional activities to increase the readership and that she would be paid bonuses based upon her productivity.

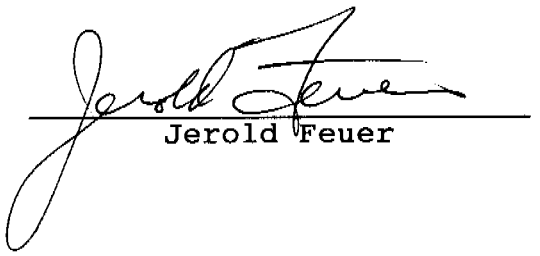
g. WHETHER OR NOT THE WORK IS A PART OF THE REGULAR BUSINESS OF THE EMPLOYER. Bill McKay, the claimant's supervisor at the Fort Pierce Tribune, testified that **distribution is an integral part of production and publication of a newspaper.**

4. While it may have been the intent of the Fort Pierce Tribune to establish an independent contractor relationship with the claimant, BEVERLY WILLIAMS, the facts in this case, particularly those relating to the element of control over the activities of the claimant, lead the undersigned to the inescapable conclusion that she was an employee. Accordingly, based upon the testimony and evidence, as well as the law cited by counsel, particularly the Levine case cited supra, **I find that the claimant was an employee of the Fort Pierce Tribune and reject any defense that the claimant was an independent contractor or involved in non-covered employment. Accordingly, I find that the claimant's accident of 11/01/89 is compensable.**" (R. 131-137)

CONCLUSION

The opinion of the DCA should be reversed and the Order of the JCC reinstated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing document was served by mail this May 3, 1994, on:

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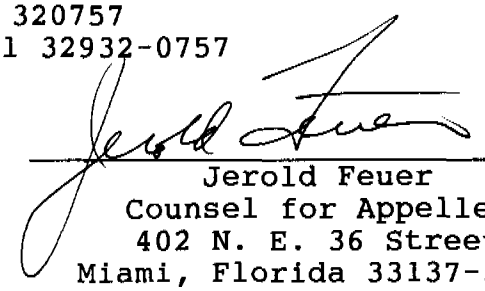

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