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May 23, 1994
BC-10843-M

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 83,208
DCA #: 92-03037
Fla. Bar No.: 710482

STEPHEN KEITH,

Appellant,

vs.

NEWS & SUN SENTINEL COMPANY
and CRAWFORD & COMPANY,

Appellees.

ANSWER BRIEF ON THE MERITS ON BEHALF OF THE RESPONDENTS, NEWS & SUN SENTINEL COMPANY AND CRAWFORD & COMPANY

PYSZKA, KESSLER, MASSEY, WELDON,
CATRI, HOLTON & DOUBERLEY, P.A.
The 110 Tower, 20th Floor
110 Southeast Sixth Street
Fort Lauderdale, Florida 33301-5015
(305) 463-8593

BY: EDWARD D. SCHUSTER, ESQUIRE

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES & RULES

MISCELLANEOUS AUTHORITIES

PREFACE

Throughout this brief, the Respondents, NEWS & SUN SENTINEL COMPANY and CRAWFORD & COMPANY, will be referred to collectively as the "Sun Sentinel. The Respondent, STEPHEN KEITH, will be referred to by his proper name, surname, or as the "claimant". References to the Record will be preceded by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS AND CASE

This case comes to this Court from an Order rendered by the First District Court of Appeal in a workers' compensation case based upon the following certified question:

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

The question was raised when the First District Court of Appeals affirmed a ruling by the Judge of Compensation Claims in the case at bar that Keith is not able to receive workers' compensation benefits. The basis for the Judge's determination was that Keith is neither a direct nor an indirect employee of the Sun Sentinel.

By Order dated Thursday, February 17, 1994, this Court postponed its decision regarding whether to exercise its discretion and accept jurisdiction. This Court also established a briefing schedule on the merits in the event it decided to do so.

More specifically, in the First District Court of Appeal, Keith challenged a ruling entered by the Judge of Compensation Claims that Keith, who was struck by a car when he was preparing to sell copies of the Sun Sentinel newspaper as a street vendor, is not entitled to receive workers' compensation benefits. In the First District, Keith argued that the Judge erred because his version of the evidence supported his claim that an employer/employee relationship existed between Keith and the delivery agent, Behrouz Babapour and between Babapour, and the Sun Sentinel. Keith argued that the evidence supported his claim thus

entitling him to receive workers' compensation benefits.

Keith also attacked this Court's decision rendered in Miami Herald Publishing Co. v. Kendall, 88 So.2d 76(Fla. 1956) as being outdated and no longer applicable in the modern world. The Sun Sentinel responded by showing that the Judge of Compensation Claims' findings are supported by competent, substantial evidence. The Sun Sentinel also pointed out that the Miami Herald decision applied precisely the same Restatement of Agency factors which Keith argues applies at bar, and that have been utilized in this State for over 50 years. Thus, there is no need to question the vitality of the Miami Herald decision

The First District Court of Appeal decided the case against Keith. However, the Court decided to certify a question to this Court questioning the Miami Herald decision's vitality.

EVIDENCE REGARDING THE RELATIONSHIP BETWEEN BABAPOUR AND THE SUN SENTINEL[1]

Babapour, a delivery agent with the News & Sun Sentinel for ten or eleven years, testified live at the hearing. (R. 29) He was the first one to open the intersectional location at which Mr. Keith was injured. (R. 34) On a typical day, Babapour would drive his own vehicle to wherever the newspapers were printed. (R. 35-36)

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[1]. The Sun Sentinel recognizes that pursuant to Fla. R. App. P. 9.210(c), its statement of the case should be omitted and only the areas of disagreement with the Petitioner's statement of the case and of the facts should be set forth in its statement of the case and of the facts. However, Keith has set only forth those facts that are most favorable to him in a manner most favorable to him. Therefore, the Sun Sentinel is compelled to present the additional facts in this brief.

He would then load the newspapers into his vehicle, a truck. Babapour was assisted by a helper he paid to help him load his truck. (R. 36) Babapour was not assisted by Sun Sentinel employees in performance of this task. (R. 36) Babapour would then travel to a warehouse to pick up advertising inserts, if any, that were to be inserted into the newspaper. Babapour then proceeded to various locations at which street sellers, with whom he agreed to sell papers for him, would be located. (R. 38)

The Contract

Each year, Babapour would enter into a contract with the Sun Sentinel to deliver newspapers. (R. 38) The contractual agreement provided that it was entered into in order to fulfill the desire of the Sun Sentinel to retain Babapour as an independent contractor, to deliver newspapers throughout a specified territory in the contract. (R. 354) The relevant provisions of the contract applicable to Babapour revealed that the Sun Sentinel required deliveries to be completed in a dry condition by 6:30 a.m. (R. 354) By the agreement, Babapour is prevented from altering the product, that is, the newspaper, and is also prevented from altering the charges for the product as set forth in the agreement. (R. 374)

The contract provided that Babapour is to keep records showing the amount of sales at various locations. (R. 355) Babapour was required to post a deposit of $5,000.00 with the Sun Sentinel, payable in $50.00 a week installments for which Babapour was paid interest and which amount would be returned to him at the end of the performance of the contract. (R. 355)

The provisions regarding termination of the contract reveal that Babapour could terminate the contract without cause--contingent upon providing the Sun Sentinel thirty(30) days written notice. (R. 356) The contract provided that it could be terminated by the Sun Sentinel or could elect it to modify the methods of distribution of if it intended to consolidate Babapour's territory. (R. 356) The contract also stated that it would be terminated if Babapour died. (R. 356)

The contract through which the Sun Sentinel secured the services of Babapour to deliver bundles of newspapers throughout the territory importantly provided the following:

> "8. The delivery agent is a self-employed independent contractor and not an employee of the company. The delivery agent will have the right to operate his business as he chooses. The delivery agent shall hire his own employees and shall have the right to engage such other sub-agents as he may deem necessary or desirable and the delivery agent shall exercise the sole and exclusive control and supervision over all said persons. The delivery agent shall, however, personally supervise and participate in the actual delivery of the newspaper. In addition, the delivery agent is free to engage in such other business activities as he may desire to pursue, including delivering other publications or products, so long as any such other business activities do not interfere with the delivery agent's performance hereunder or violate the provision of paragraph 1(d) or 7(a) of this agreement. The delivery agent will be responsible for the cost of conducting and operating his business and will comply with all applicable laws. The company is interested only in the results to be obtained by the delivery agent as described in the agreement, in the manner and means to be employed by the delivery agent are matters entirely within the authority and discretion of the delivery agent....
>
> 9. The delivery agent shall not use, as part of the name under which the delivery agent's business is conducted, or display on any of the delivery agent's vehicles or equipment, the name of the "newspapers" or any other trademark, tradename, service mark, or other

> worked, mark or design which the company may use in connection with the newspapers in the conduct of its business. The delivery agent shall prohibit the delivery agent's employees and sub-agents from using any such name or mark or displaying the same on vehicles or equipment."

Additionally, Babapour was also responsible for filing his own state and federal tax returns, social security contributions, if any, and filing tax returns and social security contributions for those within the contract to sell newspapers on the streets. (R. 356-357)

The Parties' Conduct

Behrouz Babapour testified live at the hearing concerning his understanding of the contract and his performance of the delivery services secured by the Sun Sentinel pursuant to the agreement. He testified that at the time of the hearing, he had approximately fifty sub-agents selling papers at fifty various locations throughout Broward County. (R. 43) He stated that he could sell other newspapers if he wanted to, and considered himself an independent contractor. (R. 42, 111) Indeed, another delivery agent such as Babapour delivered for the Miami Herald at the same time he delivered the Sun Sentinel. (R. 101-102)

At the time of the accident, Babapour provided accident insurance to those he hired to distribute newspapers at the various locations at his own expense. (R. 45) Now, street vendors such as Keith pay for their own insurance should they desire it. (R. 46) The insurance cards are obtained by the Sun Sentinel from an independent insurer who includes the charges for the insurance on Babapour's statement. The street vendors can either accept or

reject the insurance as they wish. (R. 45, 47)

Babapour testified that he can begin selling newspapers at any location within his territory. However, he must also inform Anthony Alonzo, who works with the Sun Sentinel. (R. 53, 55) At the time of the hearing, three delivery agents occupied three seperate zones or territories within the Sun Sentinel's distribution area. (R. 53)

Babapour exercised his discretion in determining whether he needed additional papers. If, for instance, a major news event was occurring, he would advise the Sun Sentinel that he needed more papers. (R. 78) If sales did not meet Babapour's projections, he addressed it with his vendors. (R. 95-96) It was Babapour's sole responsibility to see that an appropriate number of sellers, in his discretion, are at the sale locations. (R. 110)

Anthony Alonzo, the Single Copy Division Manager who works with the Sun Sentinel, also testified at the hearing. (R. 129) It is his job to keep in touch with the trends that affect the distribution of the newspapers and to determine the number of papers to alot Mr. Babapour. (R. 130-131) He stated that if someone wanted to enter into a delivery agent contract with the Sun Sentinel, that person would contact him, since he is the sole contact at the Sun Sentinel to obtain a street delivery agent contract such as Babapour's. (R. 133-134) He testified that he drove to various locations and looked for vendors who are creating safety hazards such as drinking while in traffic, not wearing brightly colored shirts, and to generally make sure that traffic

hazards are not created. (R. 136-137, 139) In fact, Alonzo noted that Mr. Keith was drunk on the job on one occasion and he advised Babapour about it. (R. 140) Generally, if the situation reported by Alonzo is not corrected by Babapour, Alonzo would ask Babapour why it had not been corrected. (R. 142)

Also regarding safety concerns, the street vendors are provided with the opportunity to attend safety classes provided by the National Safety Council and the attendance is paid by the Sun Sentinel. (R. 142) However, Mr. Alonzo stated he does not encourage enrollment of the vendors and there are no sanctions against street vendors for failing to attend the meetings. (R. 171) Indeed, Babapour testified that on one occasion, only ten out of sixty-four sub-agents employed by him attended a Safety Council meeting. (R. 109-110)

If any complaints are lodged against a street vendor due to misbehavior, it is a matter that is handled between Babapour and the individual street vendor. (R. 157) Alonzo testified that he never told Babapour that a certain vendor should be prohibited from selling newspapers for safety reasons, or because of drunkenness or other reasons. (R. 158) Alonzo makes no notes of his observations on the street and if there are problems, he "beeps" Babapour to take care of it. (R. 161) Mr. Alonzo stated that he does not discourage a street vendor from selling other papers because he has no relationship with those street vendors. (R. 166) Indeed, Alonzo stated that he had no right to tell Babapour how to perform his responsibilities under the contract. (R. 170) Alonzo testified

that he had no authority to tell Babapour's street vendors/sub-agents what to wear. (R. 170) Mr. Alonzo stated that when riding in various occasions, he does not stop and exercise control over the street vendors with whom Babapour contracts to sell papers. (R. 170) Alonzo has no authority to take the vendor off the street and not let him sell papers. (R. 169) Alonzo testified that his main function is to insure the safety of the program. (R. 170)

Consistent with the delivery agent agreement and Babapour's testimony, Alonzo testified that Babapour could initiate sales at new locations--even if Alonzo was advised of the new location a few days later. (R. 172) Alonzo stated that he did have veto power over Babapour's selection of street vending locations if the location is a safety hazard. (R. 172) Other than the safety factors, Alonzo is not concerned with how the street vendors did their jobs. (R. 174)

EVIDENCE CONCERNING THE RELATIONSHIP BETWEEN BABAPOUR AND KEITH

Babapour testified that he had no control over people such as Keith regarding when, and where, they sold newspapers. (R. 108) For instance, if Keith had wanted to work at different locations, selling newspapers in Broward County, and on another date, if he wished to work selling the Miami Herald in Dade County, Keith could do that. (R. 108) In fact, Babapour testified that : "A lot of people have done that." (R. 108)

Mr. Babapour does not tell vendors such as Keith what to say or how to sell the papers. (R. 105) Babapour testified that the

street vendors can work as much as they choose to and that he has no control over the amount of work they perform. If a vendor works for an hour and leaves, he cannot control that. (R.104) Other than safety concerns, Babapour does not tell the vendors how to sell newspapers. (R. 104) Babapour has no control over the vendors other than the safe sale of newspapers at the intersections. (R. 107-108) It was Babapour's understanding that neither he nor Keith were employees of the Sun Sentinel. (R. 111) Babapour stated that he never fired vendors, but would take newspapers away for the day if they were intoxicated or creating a traffic hazard. (R. 112-113)

In order to enhance visibility and increase safety while in traffic, the vendors wore brightly colored shirts and were instructed regarding how to time traffic lights so as to not be in moving traffic and were told not to be intoxicated in traffic. (R. 104-105) Babapour did not tell them how to present change; did not require hair cuts; and did not require a specific sales pitch or greeting. (R. 105-106) Babapour stated that he does not change the vendors' habits in selling newspapers. (R.06-107)

There is no requirement that a "Sun Sentinel" T-shirt be worn during the time the street vendors are selling newspapers. Babapour testified that as long as the T-shirts are brightly colored, they do not have to be Sun Sentinel T-shirts. (R. 110-111) Babapour affirmatively stated that people such as Keith are not required to wear a hat or an apron bearing the Sun Sentinel logo. (R. 62) And, Babapour stated that it was his idea to wear the

shirt for safety reasons. The shirts are reflective, glow in the dark, and the issue of wearing reflective shirts was raised in safety classes. (R. 64, 69)

James Bustraan also testified at the hearing. Mr. Bustraan is a Vice President and Circulation Director with the Sun Sentinel. He is responsible for the distribution of newspapers for the Sun Sentinel. (R. 179-180) He testified that he is not responsible for responding to customer's complaints concerning street vendors. (R. 180) Mr. Bustraan interpreted the contract between the Sun Sentinel and Babapour to mean that Babapour is an independent contractor. (R. 187)

Stephen Keith also testified at the hearing. He first began selling newspapers when he heard that if he wanted to sell them, he had to go to one of two locations where the delivery agents picked them up. (R. 197) Contrary to Babapour's testimony, Keith stated that Babapour transported him to his selling location every day. (R. 198) Consistent with Babapour's testimony, Keith stated that he could take breaks whenever he wanted and he could go to work wherever he wanted. When he had a doctor's appointment, or had to go to the clinic, or when he did not show up, he affirmed that he was never reprimanded. (R. 224, 227-228) Keith never reported to Babapour the tips he made and he could have walked down the block to sell papers if he so choose. (R. 231) He stated that he heard of Babapour firing a "couple of people" for leaving the corner early. But Keith also testified that even though he worked an average of two days per week, he was never reprimanded. (R. 222,

227-228) Keith testified that he had to wear a Sun Sentinel T-shirt, apron, could not drink, and had to clean up his own trash. (R. 211) He also stated that he though Babapour worked as a "foreman" for the Sun Sentinel. (R. 319) Mr. Keith affirmatively stated that he was never paid by the Sun Sentinel or Babapour and instead, was paid by customers in the street. (R. 232-233) Although Keith stated that he was advised that the Sun Sentinel personnel would be spot checking, and that many times he saw Mr. Alonzo, Keith also admitted that consistent with Mr. Alonzo's testimony, Alonzo never spoke to him. (R. 212)

Based on the evidence, the Judge found that Babapour is an independent contractor of the Sun Sentinel, that Keith was not a direct employee of the Sun Sentinel and that Keith was an independent contractor of Babapour. The Judge of Compensation Claims therefore found that Keith was not entitled to workers' compensation benefits from the Sun Sentinel. It is from those findings which were affirmed in the First District Court of Appeal that Keith petitions this Court to review the certified question raised by the First District Court of Appeal.

SUMMARY OF ARGUMENT

This Court should decline to answer the certified question raised by the First District Court of Appeal. This is because the question was never passed upon by the First District Court of Appeal and therefore, cannot be Constitutionally considered by this Court as a question of great public importance. Further, the Miami Herald Publishing Co. v. Kendall decision is not outmoded. It applies to the very same principles for which the Petitioner contends should apply to the case at bar. The Restatement of Agency Factors found in §220 of that treatise has been applied in numerous decisions of the courts of this State to determine the status of whether one is an employer or an independent contractor. There is no need to abandon Stare Decisis since the Petitioner has has not presented any reasons to do so and accordingly, the Court should decline to accept jurisdiction or otherwise, it should reaffirm the Miami Herald Publishing Co. v. Kendall decision.

If the Court decides to re-examine the Miami Herald Publishing Co. v. Kendall decision, and also intends to examine the underlying decisions on the merits at bar, the decisions of the lower tribunals should be affirmed. Competent, substantial evidence supports those tribunal's findings that there is neither a direct, nor an indirect, employer/employee relationship between the Sun Sentinel and Stephen Keith.

ARGUMENT

I. 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. 1966) REMAINS VIABLE.

Introduction

The question certified by the First District Court of Appeal must be answered in the affirmative. This Court in Miami Herald Publishing Co v. Kendall applied the identical legal principles applied today by Florida courts to define the legal relationship between parties to a contract as being that of either employer/employee, or that of an independent contractor performing services pursuant to a contract. The Miami Herald decision applied the principles found in the Restatement of Agency in determining that the newsboy was an independent contractor. The Court also focused on the degree of control exercised by the Miami Herald as the heaviest factor to be weighed. Keith has made no showing why this Court should depart from the application of these factors, disregard Stare Decisis, and reject the Miami Herald decision and the principles contained in it.

Nothing about the facts of this case or the decision of the lower tribunals based upon the facts compels a departure from the application of the Restatement of Agency or the Miami Herald decision to the case at bar. Keith cites no authorities, legal principles, or circumstances that compel rejection of precedent that has become woven into Florida's legal fabric. Accordingly, this Court should decline to exercise its discretion to review the

certified question.

The instant case is not in a constitutional posture sufficient to allow review of the certified question.

As a threshold consideration, while the First District Court followed the Miami Herald decision, it did not pass upon the viability of the Miami Herald decision. In other words, the First District did not hold that the decision was outmoded. Further, neither does the decision in Fort Pierce Tribune v. Williams, 622 So.2d 1368 (Fla. 1st DCA 1993) pass upon the viability of the Miami Herald decision. Indeed, it does not even cite it in its ruling. Instead, it cites, City of Port St. Lucie v. Chambers, 667 So.2d 450(Fla. 1st DCA 1992) rev. den. 618 So.2d 208 (Fla. 1992). Since there is no indication that the Court passed upon the question in the case at bar, or even in Ft. Pierce, the certified question should not be considered by this Court. Art. 5, §3(b)(4) Fla. Const. (1980); Revitz v. Baya, 355 So.2d 1170, 1171(Fla. 1970).

The Merits of the Certified Question

The Miami Herald decision is viable and should not be discarded. If it is determined that the District Court passed upon the question certified, Keith has wholly failed to demonstrate the need to depart from the principles announced in the Miami Herald decision. The Miami Herald decision remains as viable as it did the day it was decided.

In Miami Herald, this Court was confronted with an appeal from a jury verdict in Mary Kendall's favor against the Miami Herald. The jury awarded the verdict to Mrs. Kendall for injuries she sustained in a collision with a motorcycle being operated by a

newspaper delivery person named Molesworth, 88 So.2d at 276. This Court was confronted with the issue of whether the delivery person was an independent contractor, in which case the Miami Herald would not be liable for the injuries that were occasioned due to the collision or whether the delivery person was an employee for which the Miami Herald could be vicariously liable. Miami Herald, Id. at 277.

The Court conducted its analysis by examining the delivery contract in which it was stated that the delivery person was an independent contractor. As in the instant case, the contract stated that the newspaper exercised no control over the delivery of the newspaper. Id. This Court examined the contractual provisions regarding the delivery of newspapers to the delivery person, the territory for delivery, and the method of payment. Id. The Court then cited to is prior decision Florida Publishing Company v. Lourcey, 141 Fla. 767, 193 So. 847 (1940), which was cited by the Miami Herald, and focused upon whether the Miami Herald controlled the means by which the task is accomplished. This Court then quoted from the Florida Publishing decision which analyzed the contractual agreement between Newspaper and the delivery person in that case, which led the Court to find that the delivery person was an independent contractor. Id.

Thereafter, the Miami Herald Court engaged in a meticulous review of the extra-contractual evidence which had a bearing on the control over the manner of the performance of the services secured by the publisher. 88 So.2d 279. The Court examined the testimony

concerning the actual degree of supervision, or lack thereof. Id. at 279. The Court reached the conclusion that the extra contractual activities of the parties did not: "...neutralize the provisions of the agreement which to us were obviously intended to make Molesworth an independent contractor." Id. Of extreme importance is the fact that the Court noted that each case turns on its own set of facts on the issue of whether an individual is an independent contractor or an employee. Id.

Next, the Restatement of the Law of Agency, §220 (a-i) was applied to the facts of the case. The Court then decided that the delivery person, Molesworth, was an independent contractor.

The Restatement Principles utilized in the Miami Herald decision and the determination that the amount of control reserved by the party securing the services is the fact that should be given the most weight, has been employed in numerous tort cases and in worker's compensation cases as well.[2] This long history of the

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2. Representative cases that have employed or discussed the Restatement factors when determining the existence or non-existence of an employment relationship are: Magarian v. Southern Fruit Distributors, 146 Fla. 773, 1 So.2d 858 (1941); Peterson v. Highland Crate Co-op, 156 Fla. 539, 23 So.2d 716 (1945); Farmers and Merchants Bank v. Bocelle, 106 So.2d 92 (Fla. 1st DCA, 1958); Bassell v. Al Landers Dump Trucks, Inc., 148 So.2d 298 (Fla. 3d DCA 1963)cert.den. 155 So.2d 148 (Fla. 1963); Gregg v. Weller Grocery Co., 151 So.2d 450 (Fla. 3d DCA 1963);formally approved by this Court in Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Stevens v. International Builders of Florida, Inc., 207 So.2d 287 (Fla. 3d DCA 1968)cert.dis: 217 So.2d 101 (Fla. 1968); Foster v. Lee, 226 So.2d 282 (Fla. 2d DCA 1969); Justice v. Bellford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972); Bass v. Florida Department of Labor and Employment Security, 399 So.2d 62 (Fla. 3d DCA 1981); Moles v. Gotti, 433 So.2d 1380 (Fla. 2d DCA 1983); Hilldrup Transfer and Storage of New Smyrna Beach, Inc. v. State Department of Labor and Security Division of Employment, 447 So.2d 414 (Fla. 5th DCA 1984); VIP Toys of Orlando, Inc. v. State, Department of Labor and

application of the Restatement of Agency factors need not be reexamined. The most obvious reason for this is that Keith's analysis employs the very Reinstatement analysis applied by this Court in the Miami Herald decision. In essence, Keith merely argues that the result should be different. Indeed, there is no argument from Keith that the Miami Herald decision is no longer viable. Instead, Keith applies those very factors to his own case as approved by this Court's decision Cantor v. Cochran, 184 So.2d 173 (Fla. 1963), and utilized in Magarian v. Southern Fruit Distributors, 146 Fla. 772, 1 So.2d 858 (1941). Respectfully, reliance upon the restatement factors by Keith is a clear demonstration that the principles applied in the Miami Herald decision are still viable.

In fact, common law principles have been employed to determine

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Employment Security Division of Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984); D.O. Creasman Electronics, Inc. v. State Department of Labor and Employment Security, Division of Unemployment Compensation, 458 So.2d 894 (Fla. 2d DCA 1984); Strickland v. Progressive American Insurance Company, 468 So.2d 525 (Fla. 1st DCA 1985); Carroll v. Kencher, Inc., 491 So.2d 1311 (Fla. 4th DCA 1986); Messer v. Department of Labor and Employment Security, 500 So.2d 1372 (Fla. 5th DCA 1987); Singer v. Starr, 510 So.2d 637 (Fla. 4th DCA 1987); F.L. Enterprises, Inc. v. Unemployment Appeals Commission, 515 So.2d 1340 (Fla. 5th DCA 1987); Robison by and through Bugera v. Faine, 525 So.2d 903 (Fla. 3d DCA 1987); Delco Industries, Inc. v. State, Department of Labor and Employment Security, 519 So.2d 1109 (Fla. 4th DCA 1988); Global Home Care, Inc. v. State, Department of Labor and Employment Security, 521 So.2d 220 (Fla. 2d DCA 1988); Wiseman v. Miami Rug Company, 524 So.2d 726 (Fla. 4th DCA 1988); Zubi Advertising Services, Inc. v. State, Department of Labor and Unemployment Security, 537 So.2d 145 (Fla. 3d DCA 1989); Edwards v. Caulfield, 560 So.2d 364 (Fla. 1st DCA 1990); Alexander v. Morton, 595 So.2d 1015 (Fla. 2d DCA 1992); Dart Industries, Inc. v. Department of Labor and Employment Security, 596 So.2d 725 (Fla. 5th DCA 1992); and F.T. Blunt Funeral Home v. City of Tampa, 627 So.2d 1272 (Fla.1st DCA 1993).

whether one is an independent contractor or an employee in worker's compensation cases. The First District Court of Appeals has held that the criteria for determining whether the contractee is an independent contractor or an employee is the same whether in worker's compensation or under the common law. Pearson v. Harris, 449 So.2d 339 341-342 (Fla. 1st DCA 1984).

Moreover, Keith failed to state any reason why the Miami Herald decision is no longer viable except to argue that the decision is colored by a historical prospective on capitalism that no longer exists in today's world. This is clearly not a valid reason to overturn precedent. This is so especially where no evidence exists to show that a vast change in the business relationship actually has occurred other than the mere passage of time. Some of the obiter dicta in the decision may be colored by the Justice's view of the world. Yet, the legal principles actually applied by the Court to the evidence before it to reach its conclusion are manifestly applicable to today. In fact, Keith does not assert that the Restatement of Agency Principles should not apply to the instant case -- he just quarrels with the result. However, this Court will not disturb the factual findings unless there is no competent substantial evidence to support the Judge's determination. Adams v. Wagner, 129 So.2d 129, 130-131 (Fla. 1961). There is no need to depart from the principles employed in the Miami Herald decision and in other decisions of this State.

Keith next assails the "Newspaper Industry" and states that it "hangs its hat" on the Miami Herald decision (Keith's brief at

p.16). From there, he quotes a phrase out of the Miami Herald decision in an apparent effort to demonstrate that the decision is no longer viable. Keith argues that the facts of the instant case are distinguishable, but offers no reason other than age to support a departure from the Miami Herald decision. Keith's brief at p.17-19. Even assuming arguendo that the facts are distinguishable, the existence of distinguishable facts has never been a sufficient legal ground to discard 38 years of precedent. The Miami Herald decision recognized that each case turns on its own facts. And, the fact that the Miami Herald decision is a tort case is not a basis to distinguish its applicability to the facts at bar. Pearson v. Harris, supra.

On pages 19-20 of his brief, Keith quotes at length from Walker v. Palm Beach Newspapers, Inc., 561 So.2d 1198 (Fla. 5th DCA 1990)rev.dism. 576 So.2d 294 (Fla. 1990) and apparently argues that Judge Sharp's special concurrence supports a departure from the Miami Herald decision. Respectfully, Judge Sharp's concurrence places a spotlight directly upon the chink in the armor of her analysis, and in Keith's argument. The flaw is that this Court in the Miami Herald decision concluded that newsboys were presumptively independent contractors. No such presumption was exercised by this Court in Miami Herald. Instead, a great deal of factual analysis was employed by the Court and the analysis occurred within the framework of the Restatement of Agency. Pointedly, this Court stated that the facts peculiar to each case governs the determination whether one is an independent contractor

or an employee. Miami Herald, supra, at 279. The focus at bar should not be on a phrase or two in the Miami Herald decision which may be reflective of the times or the view of a particular Justice. Instead, the focus should be on the legal principles applied in the case.

Keith next turns to Judge Barfield's concurrence in City of Port St. Lucie v. Chambers, 606 So.2d 450 (Fla. 1st DCA 1992); rev. den., 618 So.2d 208 (Fla. 1993). Again, and respectfully, Judge Barfield begins at the same point of embarkation as Judge Sharp by somehow reading the Miami Herald decision as holding that presumptively, all newspaper delivery persons are independent contractors. This is a misreading of the Miami Herald decision since it requires each case to be decided on its own facts.

Keith cites to Larson's treatise on worker's compensation law and to Evansville v. Sugg, 817 S.W.2d 455 (Ky. Ct. App. 1991) in support of his contention that there is a trend away from finding newspaper delivery persons to be independent contractors in other states. Sugg is unsupportive of Keith's contention here because that decision is based upon a worker's compensation statute which required regular deliverers of newspapers to be covered by worker's compensation insurance. The record at bar reveals that Keith was certainly not a regular seller of newspapers. Additionally, numerous states have recently held that newspaper delivery persons are independent contractors. Venango Newspapers v. Unemployment Compensation Board of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993); La Fleur v. La Fleur, 452 N.W.2d 406 (Iowa 1990); Cable v. Perkins,

121 Ill. App. 3d 127, 459 M.E. 2d 257 (1984); and Richman Newspapers Inc. v. Gill, 294 S.E.2d 840 (Va. 1982).

In sum, Keith has presented no cogent reason for abandoning the Miami Herald decision. Indeed, he presents no authority which guides this Court as to when, and whether, established precedent may be discarded. The principles applied by this Court in the Miami Herald decision are still utilized today as the standard in measuring whether a given set of facts indicate that one is an employee or an independent contractor. Accordingly, the Miami Herald decision should not be re-examined or discarded.

II. THE JUDGE OF COMPENSATION CLAIMS CORRECTLY FOUND THAT THE DELIVERY AGENT, BABAPOUR, IS AN INDEPENDENT CONTRACTOR OF THE SUN SENTINEL FOR THE PURPOSE OF DELIVERING NEWSPAPERS.

A. Introduction

It will be clearly demonstrated below that the Judge's findings are supported by competent substantial evidence and by the longstanding view of the appellate courts in this state and other jurisdictions which have considered the question. It will be plainly shown that many of the issues of "control" raised by the claimant are actually issues that control the method and rate of payment between Babapour and the Sun Sentinel and other monetary details, and wholly fail to indicate any indicia of control over the details of the work for which the Sun Sentinel contracted. It will also be demonstrated that Keith fails to acknowledge that the question here is not whether there may be some conflicting evidence on a point but rather, whether there is any competent, substantial evidence to support the Judge's ruling. Keith also fails to note that it is his burden to establish the existence of reversible error. Plainly, the Order at Bar must be affirmed.

B. Standard of Review

Much like the First District's role on review, this Court may not substitute its view for that of the Judge. Marhoefer v. Frye, 199 So.2d 723 (Fla. 1967). Even if this Court would have reached a different conclusion from the evidence, it is bound to affirm it unless the Order lacks any competent, substantial evidence. Chicken 'n' Things v. Murray, 329 So.2d 302 (Fla. 1976). Lastly,

this Court will not reweigh the evidence to reach a different result. Croft v. Pinkerton-Hayes Lumbar Co., 386 So.2d 535 (Fla. 1980).

Florida Law and the evidence at bar requires affirmance of the Judge of Compensation Claims' finding that the status of the newspaper delivery person, Babapour, is an independent contractor.

The plain import of the Florida decisions that have passed upon the issue involved in this case is that newspaper delivery persons, such as Babapour, are independent contractors and not employees of newspapers such as the Sun Sentinel. And, Babapour's status is that of an independent contractor regardless of the analysis employed.

The Supreme Court first decided that one who delivered newspapers under a written contract with the newspaper is an independent contractor in the decision of Florida Publishing Company v. Lourcey, 141 Fla. 767, 193 So. 847 (1940). The court found it significant that, as in the case at Bar, the provisions in the contract concerning the detail of the payment arrangement between the parties and control over the delivery area could not deprive the newspaper delivery man of his independent contractor status.

Next, the Supreme Court in Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956) again found that a newspaper delivery person under a written contract with the newspaper to be an independent contractor and not an employee. The Court first looked to the terms of the agreement which indeed, must be done in any contractual relationship and noted, just as in the case at Bar,

that the parties intended that an independent contractual relationship existed. Id. at 277. It is important to note that the Supreme Court in Miami Herald applied the factors outlined in the Restatement of the Law of Agency, Section 220, and arrived at the same conclusion as the Supreme Court in Lourcey and the Judge in the instant case. Contrary to the claimant's belief, Miami Herald is not just another "ancient" decision that should be discarded in favor of the application of "modern law". Rather, it applied the very considerations that the claimant argues apply in this case to facts nearly identical to this case and determined that the newspaper delivery person is an independent contractor.

In fact, not only is Miami Herald not outmoded since it applied the Restatement of Agency Factors, but the Miami Herald decision applied those factors to facts very similar to those at Bar. In Miami Herald, the newsboy was to deliver the papers between certain hours and in good condition. Id.,at 278. Complaints would be made to the newspaper who would thereafter advise the newsboy. Id. The paper fixed a retail price. Id., at 279. The Court found a striking similarity of these duties to those present in the earlier decision in Lourcey, supra. The Court then applied the Restatement of Agency Factors and found that when performing the details of the work, that is, making deliveries and collections, the newsboy was :"...acting as a specialist, at least to the extent of following his route, remembering the addresses of subscribers who were in good standing..." Id. e.g. It must be remembered that control over the details of the work contract for

the Sun Sentinel is the proper focus at bar, not control over the method over the amount of payment which may be set forth in the contract.

Indeed, there is even less control reserved by the Sun Sentinel over Babapour in the details of the work than that present in Miami Herald. There is no evidence that the Sun Sentinel made sure that Babapour arose out of bed at the proper time as in Kendall, supra, at 278. And, there is no evidence either direct or inferentially that the Sun Sentinel "rode herd" on Babapour as the newspaper did in Miami Herald. Id. The Sun Sentinel did not inspect Babapour's vehicle as in Kendall. Id. at 278. Plainly, Kendall requires affirmance of the Order at Bar.

Not only does the Kendall decision require affirmance at Bar, Florida courts that have analyzed the legal relationship between a newspaper delivery person and the newspaper have also reached the same conclusion. Thus, in Pearis v. Florida Publishing Company, 132 So.2d 561, 562-563 (Fla. 1961), the Court analyzed factors nearly identical to those at Bar. The issue in that case was whether the newspaper could be liable for a trip and fall accident allegedly occasioned by the newspaper delivery person's failure to retrieve wire loops that were left behind on the sidewalk after the sidewalk sale of newspapers. The Court held that the newspaper carriers, working under written contracts substantially similar to those involved in Lourcey, supra, Miami Herlad, supra, were also independent contractors. Id, at 564.

Other courts have consistently held that the work of a

newspaper delivery person is that of an independent contractor. In Parker v. Sugarcane Growers Co-op, 595 So.2d 1022 (Fla. 1st DCA 1992), the First District Court held that competent substantial evidence supported the judge's finding that a claimant's concurrent earnings from employment as a news carrier, cannot be included the determination of a average weekly wage since that claimant was an independent contractor. To the same effect, See, Hopkins v. State Department of Transportation, 596 So.2d 680 (Fla. 1st DCA 1991).

Recently, the First District reviewed the terms of a delivery agreement similar to that at Bar and agreed with the Judge of Compensation Claims that the claimant in that case was, in fact, an independent contractor. City of Port St. Lucie v. Chambers, 606 2d 450, 451 (Fla. 1st DCA 1992). Importantly, more control was exhibited in Chambers since she was directed where to deliver the papers by the Palm Beach Post. Id. at 451. At Bar, Babapour developed his own territory and added locations as he saw fit, subject to Alonzo's safety concerns. (R.55, 172-173). And, in Walker vs. Palm Beach Newspapers, Inc., 561 So.2d 1198 (Fla. 5th DCA 1990), the Court had also held newspaper delivery persons to be independent contractors.

Plainly, the factors outlined in the Restatement of Law of Agency have been applied to facts nearly identical to the case at Bar, and has resulted in newspaper delivery persons being determined to be independent contractors. Indeed, the only distinction in many of these cases is that there is, in fact, more control over the independent contractor than in the case at Bar.

Babapour, as a delivery agent, exercises even more discretion than door to door newsboys delivering to the newspaper subscribers. Newspaper delivery persons are a combination of carrier and sales person within a given territory. Babapour is simply an independent contractor/delivery person. Babapour's contract is for the delivery of newspapers much like any other contractor who's duty it is to deliver another's product. See, Fleitas v. Today Trucking, Inc., 598 So.2d 252 (Fla. 1st DCA 1992); Wiseman v. Miami Rug Co., 524 So. 2d 726 (Fla. 4th DCA 1988). The Judge of Compensation Claims' ruling is legally correct based upon his factual findings and the evidence in the record. Next, the Sun Sentinel will address the claimant's argument which wholly fails to carry the burden of establishing clear error and therefore, the Judge of Compensation Claims' Order must be affirmed.

Notwithstanding the above, on page 26 of his brief, the Keith merely shrugs off the fact that the Sun Sentinel and the delivery agent, Babapour, intended to enter into an independent contractual relationship by citing Nazworth v. Swire, Florida, Inc., 486 So.2d 637 (Fla. 1st DCA 1986). Keith argues that the intent of the parties to the contract as recited in the contract is not determinative of the issue. Keith's argument assumes that the contractual recitation of the parties was the only influence upon the Judge of Compensation Claims below and it was not. This can be readily seen from the face of the Order and the evidence. But more importantly, as stated by the Second District Court of Appeal, in determining the legal relationship between parties, the

statement in the contract concerning the parties intent is not solely determinative of the outcome. Yet, where such words are found in a contract, they are to be given meaning and are the best possible evidence of the intent of the parties. Ware v. Money-plan International, 467 So.2d 1072, 1073 (Fla. 2d DCA 1985). Thus, the recitation of the parties that they intended an independent contractual relationship was properly considered by the Judge of Compensation Claims since it is the best evidence as to the intent of the parties regarding whether they intended an employer/employee relationship, or an independent contractual relationship. Simply, no error can be shown by Keith on this point.

Citation to Singer v. Star, 510 So.2d 37 (Fla. 4th DCA 1987) on pages 26-27 of Keith's brief are even more unhelpful to him. First, Singer involved a reversal of a summary judgment on the issue of the vicarious responsibility of the Sun Sentinel for the act of an independent contractor. As a threshold consideration, it should be noted that Summary Judgements are rarely sustained on appeal in such cases. But more importantly, the Court in Singer actually found that the trial court correctly applied Ortega v. General Motors Corp, 392, So.2d 40 (Fla. 4th DCA 1980) in ruling that the putative employee was an independent contractor. Id., at 640. The only basis for the reversal was that there could have been a jury issue as to agency by estoppel, since the minors who were assaulted were issued I.D. badges which indicated that they were "authorized representatives" of the newspaper. At Bar, the Sun Sentinel never issued an I.D. to Keith or to Babapour and,

there is no claim of either direct employment of Keith by the Sun Sentinel raised at bar. If anything, the finding that the trial court correctly determined the parties to be independent contractors on the basis of Ortega and Singer, supports the Sun Sentinel's position here.

The next portion of the claimant's brief on pages 27-39 involve application of the factors announced in Cantor v. Cochran, 194 So.2d 173 (Fla. 1966) which are found in the Restatement (Second) of Agency, Section 220 (2) and Keith argues that the record evidence indicates that an employment relationship is present. These principles are identical to those applied in Miami Herald. However, to reach this result, Keith impermissibly asks this Court to reweigh the evidence, to retry the case, and to render a different result. Of course, this Court cannot reweigh the evidence and indulge Keith in his analysis. However, the Sun Sentinel will, as succinctly as possible, review each factor and demonstrate clearly that the evidence indicating that Babapour is an independent contractor and not an employee of the Sun Sentinel.

a. The degree of control of Babapour's work

About the only point of agreement between the Sun Sentinel and the claimant is that the right to control how Babapour performs the details of the work is the most important factor in determining the issue at Bar. Obviously then, it is important to define the work or the service for which the Sun Sentinel contracted. The service Babapour is to perform under the contract with Sun Sentinel is to deliver newspapers within a territory identified in the contract

and to collect amounts owed from sales at various locations decided by Babapour (R.354). Thus, the proper focus is whether the Sun Sentinel exercised control over Babapour's performance of the delivery of the newspapers within the identified territory and the collection of money from various locations. The evidence will reveal that absolutely no control exists over the details of the work.

Keith's brief on pages 28-30 recites a paraphrased list of contractual provisions he claims allows the Sun Sentinel to exercise control over the details of Babapour's work. However, not even the paraphrased contractual provisions outlined by the claimant speak to how the details of the work, that is, how the delivery and collection by Babapour is to be accomplished. None of the paraphrased provisions allowed the Sun Sentinel the right to control what Babapour does when he is on his route. And, all of the provisions are concerned with the payment method and amount, methods of accounting, or are concerned with the result, that is, the delivery of saleable newspapers to various locations within the territory.

Thus, the fact that the paper must be delivered within a certain territory does not evince the right to control how that work is going to be accomplished. Indeed, it defines the very thing contracted for. So too, designation of the delivery time does not speak to how the delivery and collection of the money should be made. The duty to keep records and render an accounting for papers received and monies collected are administrative dealings between

the independent contractor and the Sun Sentinel and plainly do not speak to how newspapers are delivered or money is collected. These provisions simply do not reserve any control as to how Babapour accomplishes his deliveries. It does not speak to how Babapour opens up new locations, engages sub-agents, how he deals with those sub-agents, the type of vehicle he must use, how or when he services it, or whether the Sun Sentinel can inspect it. The provisions do not relate to the delivery of the newspaper and collection of money from sub-agents. Plainly, Keith's "shotgun approach" at paraphrasing contractual obligations does not establish any "right to control" the details of Babapour's work of delivering newspapers.

On pages 30-32 of the initial brief, Keith makes much of the fact that Mr. Alonzo would go through the territory and therefore, Keith concludes that he controlled details of the performance of the work. First, it is plain that there is no evidence in the Record that Alonzo supervised the delivery and collection of money which is actually the work for which the Sun Sentinel contracted with Babapour. But even more importantly, reservation of the right to inspect the work of an independent contractor, to reject work of an independent contractor, and demand correction does not transform a contractor into an employer. Van Ness v. Independent Construction Co., 392 So.2d 1017, 1019 (Fla. 5th DCA 1981). See also, City of Miami v. Perez, 509 So.2d 242, 346 (Fla. 3d DCA 1987).

The fact that Alonzo required Babapour to cure safety hazards

such as drinking, fighting in traffic, or the failure to wear bright clothing, does not transform Babapour from his independent contractor status to an employee. Certainly, if the Sun Sentinel is notified that street vendors are creating a traffic hazard, is aware of trash at locations where newspapers are sold, or that Babapour's sub-agents are drunk and creating traffic hazards, then the Sun Sentinel could be liable for any injuries that occur to third parties as a result of this conduct despite the independent contractor status. Pearis, supra.

Most importantly, the contract, and the evidence concerning the parties' performance under the contract, reveals that the Sun Sentinel did not reserve control or exercise control over Babapour's work. (R. 356; 42-43; 55, 98, 100, 111, 157-158, 161, 169-170, 172, 174, 175). The Judge of Compensation Claims correctly concluded that the Sun Sentinel is not the employer of Babapour, and thus, the Order must be affirmed.

In answer to Keith's argument under each factor contained in the Restatement (2d) of Agency, Section 220, the following is offered:

Babapour is in the business of the street level delivery of newspapers and collection of money from those who sell them. In contrast, the Sun Sentinel is in the business of printing and publishing newspapers sold by the company directly to retail outlets and those involved in street sale programs. (R.354). It might be said that part of the Sun Sentinel's business is the distribution of newspapers. But, the fact that Babapour is engaged

by contract to distribute newspapers does not make him an employee. If that were true, every seller or manufacturer of goods who contract with another to sell, transport, or distribute its product would be the employee of the manufacturer. For instance, if a wholesaler of goods contracted with a manufacturer to sell to various retailers owned by the wholesaler or otherwise, the wholesaler would not become the employee of the manufacturer. But, this is Keith's contention here. Of course, distribution of a product is key to many businesses, but distinct businesses perform the task of distribution under independent contracts with the product manufacturer.

Subsection C of the Restatement inquires as to whether the kind of work, with reference to the locality, is done under the direction of an employer or without supervision. At Bar, Babapour drove to each location, delivered the papers, collected money, employed and dealt with his sub-agents as he saw fit. He worked without supervision except to the extent that the Sun Sentinel may be liable for the torts of the subcontractors. (R. 98, 100, 140, 141, 142, 158, 161, 170, 175).

Subsections D and E look at the skill required in a particular occupation and whether Babapour supplied the tools of his trade. It certainly takes organizational skills and a talent for dealing with people in order to do what Babapour does. Babapour supplied the only tool involved in the delivery of the newspapers, the truck. (R.36)

Subsections (F)and (G) involve the length of employment and

this is defined by a contract which certainly, under Florida law, is distinct from that of an employee. Keith contends that Babapour is not an independent contractor because the delivery of newspapers is part of a the sale of newspapers and thus, part of the Sun Sentinel's business. However, this factor alone is not sufficient to establish that Babapour is not an independent contractor as demonstrated by the discussion under sub-section (C), supra. Kane Furniture Co. v. Miranda, 506 So.2d 1061, 1065 (Fla. 1st DCA 1987)rev.den. 515 So.2d 230 (Fla. 1987). Subsection (H) of the Restatement fails to establish an employer/employee relationship since clearly, the parties do not believe they are creating an relationship of master and servant. (R.11, 183, 354-356).

Lastly, regarding subsection (I), the principal is in business. However, this has been held to be an innocuous factor. Miranda, supra, 506 So.2d 1066.

Application of the Restatement factors indicate only one conclusion: there is no employer/employee relationship between Babapour and the newspaper. Competent, substantial evidence supports the Judge's ruling. Accordingly, the Order must be affirmed.

Following the claimant's Restatement factors analysis, he next cites Olsen v. Industrial Claims Appeals, 819 P.2d 544 (Colo. App. 1991) on page 27 of his brief. However, Olsen is wholly off point to the issue at Bar. Unlike in Olsen, Babapour had an independent written contract and there is no claim that the contract between the Sun Sentinel is one implied at law. Therefore, this Court,

unlike the Court in Olsen, cannot supply the terms.

In Cooper v. Ashville Citizen-Times Publishing Co., Inc., 258 N.C. 579, 129 S.E. 2d 107 (1963) the Court found that the question of "agency" was sufficient to affirm a nonsuit in an action against the paper for wrongful death which occurred while the newspapers were delivered. Simply, contrary to Keith's contentions, the Court did not "find" that under the circumstances, the delivery man was not an independent contractor. Cooper, is not dispositive of any issue at Bar.

Keith's citation to Wallowa Valley Stages, Inc. v. The Oregonian Publishing Co., 36 P.2d 430 (Ore. 1963) is not helpful to the claimant since the Court merely affirmed a jury verdict against the newspaper. This highlights the Miami Herald Court's finding that the determination at bar is a factual issue. Indeed, the Court expressly stated that it did not find that the delivery man was an employee: "We do not hold that the amount of supervision exercised in the case at Bar was sufficient to constitute Badget the (delivery man) an employee as a matter of law." Id, at 434. Parenthetical added.

More to the point, a Pennsylvania Court which considered the issue of whether a delivery agent is an employee or an independent contractor of the newspaper within the worker's compensation setting has expressly held on facts nearly identical to the case at Bar to be an independent contractor. Rodgers v. P-G Publishing Co., 194 Pa. Super. 207, 166 A. 2d 544 (1963). The Pennsylvania Court found the following to be supported by competent substantial

evidence:

> "Militating against an employee's status, we find from the contract and testimony of Record that the defendant could not dictate the manner in which the work was to be done, or what hours the decedent had to observe in his performance. The defendant publishes a morning newspaper so it is obvious that early delivery was required before the subscriber left for work. It was the decedent's job to meet that time factor but the schedule of deliveries was entirely within his discretion. He provided his own delivery equipment and carriers to make distribution, and fixed his own time and method of making collections. He is not barred from engaging in other gainful employment and he could have used other personnel in the paper distribution project with a minimum of time spent by himself, so long as the result and net sales income to the defendant was satisfactory to it, from the distribution of papers. Although not a controlling factor, nevertheless a contributing factor in negativing an employer/employee relationship, was that the decedent did not participate in fringe benefits of other employees nor, as readily indicated, did the newspaper withhold any social security tax or pay any unemployment compensation premiums for the decedent". Id. at 547.

Simply, Babapour is an independent contractor. This conclusion is supported by competent substantial Record evidence. The finding of the Judge of Compensation Claims must be affirmed.

Lastly on this point, the claimant apparently feels the fact that the Sun Sentinel did not collect Federal Income Tax or Social Security from Babapour is a non-factor. However, Courts have considered these facts to be further indicia of independent contractor status. Davis v. Dept. of Administration, 585 So.2d 421 (Fla. 1st DCA 1991); Edwards v. Caulfield, 560 So.2d 364 (Fla. 1st DCA; Roberts v. Gator Freightways, Inc. 538 So.2d 55 (Fla. 1st DCA 1989)Approved, 550 So.2d 1117 (Fla. 1989).

Plainly, since the Judge's determination is supported by competent substantial evidence, it must be affirmed.

III. THE JUDGE OF COMPENSATION CLAIMS CORRECTLY DETERMINED THAT KEITH IS NOT AN EMPLOYEE OF BABAPOUR, BUT AN INDEPENDENT CONTRACTOR, SINCE COMPETENT SUBSTANTIAL EVIDENCE in THE RECORD SUPPORTS THE DETERMINATION.

In reality, this court need not even engage in the instant analysis, since, as shown above, Babapour was not an employee of the Sun Sentinel, and therefore, it matters not whether Keith is or is not an employee of Babapour. However, the following analysis is in response to Keith's contention that he is an employee. The analysis is presented in response to the Keith's argument under each Restatement of Agency Factor in the Order.

a. <u>The extent of control that Babapour exercised over the details of Keith's work</u>

The evidence reveals that Babapour does not tell the vendors how to work. (R.104). He does not tell them what to say. The vendors can work or not as they choose. And, Babapour stated that he had not control over that. (R.104-105). Babapour did not tell people how to sell papers, and had no right of control over when, or where, persons such as Keith sold newspapers. (R.106-108). There is no uniform requirement. As long as the shirt is a bright color sufficient to be seen, the vendors can wear it. (R.110-111, 152). In fact, although Keith stated he "heard of" people getting fired for not keeping a consistent schedule, he also stated that he could leave for doctor's appointments, or for other reasons and never was reprimanded. (R.227-228). Keith made no report to Babapour regarding tips he made. (R.229-230). Keith also knew of people who sold newspapers down the block, away from the specified location. (R.231). Keith also stated he took breaks whenever he

wanted, and admitted he could work wherever he wanted. (R.224). Babapour never "terminated" the vendors, but he had refused to allow them to distribute newspapers on certain days. (R.231). And, Keith had the discretion to work anywhere from two to four days per week. (R. 236).

A brief response is in order to Keith's contentions on page 40 of his brief. Keith's citation to LaGrande v. B & L Services, Inc., 432 So.2d 1364 (Fla. 1st DCA 1983) fails to support his contention that an employer/employee relationship exists when there is evidence of a dress code. This Court found that the claimant in LaGrande was an independent contractor despite the requirement of a uniform. There is no evidence of a "dress code" at bar. The fact that a Sun Sentinel Tee Shirt is worn is not sufficient to create an employer/employee relationship. Ortega, supra.

Babapour's prevention of independent contractors such as Keith from being in the way of traffic when Babapour gains knowledge of their intoxication, fighting, leaving trash as obstacles and other inappropriate behavior, is exactly the type of behavior that Babapour can be liable for despite the independent contractor status. Pearis, supra. Stated another way, prevention of an independent contractor's misconduct, as distinguished from controlling the details of the work, does not transform Babapour into an employer.

b. Whether Babapour is in a distinct business or occupation

Babapour is a distributor of newspapers to at least fifty (50) different distribution points throughout Broward County in a street

distribution program. He does not sell newspapers to people in automobiles. He has fifty(50) designated locations. He has a written agreement with the Sun Sentinel to perform this independent contract for one(1) year. In contrast, Keith works when he wants and where he wants at single locations selling to customers in their vehicles in the street. Occasionally, Keith makes tips. Keith's argument in this regard is plainly without merit.

Keith's citation to Herman v. Roche, 533 So.2d 824 (Fla. 1st DCA 1988) is also without merit. Unlike at bar, the Court found that Herman and Roche performed the same duties and that Herman worked under Roche's supervision. Respectfully, the test is not whether "great skill" is required to be performed by the independent contractor. A highly skilled person in many fields may hire a person to perform a task he is quite capable of, for example, mowing the lawn. However, if the task is not supervised by the hirer and another is injured by the performance of the task, the hirer is not automatically an employer because he could have performed the task himself.

c. Whether the location within the locale is done with or without supervision of an employer.

No one did, or could, supervise over fifty(50) vendors at fifty(50) different locations. Again, on page 43 and 44 of his brief, Keith inappropriately recites the fact that he was supervised regarding drinking or other misconduct on the job. Keith also cites the fact that Babapour kept his sales figures. As established above, the prevention of an independent contractor's misconduct does not transform Babapour into an employer. Reporting

sales figures is not "supervision" of the work but rather, an examination of the results for which Babapour contracted.

d. The skill required in the particular occupation.

Although on the surface it appears that no great amount of skill is required to be a street vendor of newspapers, certainly more than just handing papers to passersby is required by Keith since, according to his own testimony, a large amount of his income was due to tips.

e. Whether the workman or the employer supplies the tools and the work place.

There are no "tools" needed to accomplish the work. The work place is the city streets and the open air. The factor is neutral and not determinative of the relationship between Babapour and Keith. The contention that a specific shirt, hat, or apron is a "tool" is without merit since they are certainly not a requisite for selling the newspapers. (R.110-111, 152).

f. The length of time the contractor is employed.

Keith was employed by the job. The only reason Babapour would "cancel" the contract, that is, pull the papers from him is if he was drunk. (R.59). Keith was not paid by the hour. Although Keith testified that Babapour fired people for leaving the job early, Keith can point to no other reason why a vendor would be terminated during a particular job. Moreover, citation to LaGrande, supra. fails to support Keith's contention here since claimant's contract in LaGrande was terminable at will and still, this the First District found that the claimant was an independent contractor. 432

So.2d 1364 and 1368.

g. The method of payment whether by the time or by the job

Keith received his payment from customers by the job, not by the hour.

h,i and j. Whether the work is part of the regular business of Babapour, whether Babapour and Keith believed they were entering into an independent contract relationship and whether Babapour is in business

As described supra, the business of Babapour is separate and distinct from Keith in just about every respect. Indeed, Keith believed that he worked for the Sun Sentinel (R.219). There is no evidence to suggest that he believed that he worked for Babapour. Babapour thought their relationship was created pursuant to an independent contract. (R.111).

In sum, competent substantial evidence supports the Judge of Compensation Claims' finding that Keith is not Babapour's employee and he is not entitled to worker's compensation benefits.

However, even if the claimant's contentions prevail, recovery still may not be had against the Sun Sentinel for worker's compensation benefits. This is because there has been no evidentiary showing the Sun Sentinel can be liable as a statutory employer under Sec. 440.10 (1) Fla. Stat. This is so since no evidentiary showing or argument has been made that the Sun Sentinel's primary obligation in printing and publishing its product arises out of contract. Roberts, Supra. See also,

Rothman v. Holland, 42. A.D. 2d 1010, 348 N.Y.S. 2d 208 (N.Y. App. 1973).

It is manifest that competent substantial evidence supports the Judge's rulings at Bar. The claimant has wholly failed to make the requisite showing that the Judge reversibly erred without reweighing the testimony and retry the case. Accordingly, the Judge's findings must be affirmed.

CONCLUSION

WHEREFORE, due to the foregoing, the News & Sun Sentinel and Crawford & Company respectfully requests that this Court enter an Order which declines jurisdiction or affirms the decision in the instant case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished by mail on May 23, 1994 to: HOWARD S. GROSSMAN, P.A., HOWARD S. GROSSMAN, ESQUIRE, 2424 N. Federal Highway, Suite 411, Boca Raton, Florida 33431.

PYSZKA, KESSLER, MASSEY, WELDON,
CATRI, HOLTON & DOUBERLEY, PA.
The 110 Tower, 20th Floor
110 S.E. Sixth St.
Ft. Lauderdale, Florida 33301-3400

By: 

EDWARD D. SCHUSTER, ESQUIRE
Attorney for Appellees