IN THE SUPREME COURT OF THE STATE OF FLORIDA

STEPHEN KEITH,

Petitioner,

vs.

NEWS & SUN SENTINEL COMPANY and CRAWFORD & COMPANY,

Respondents.

_____/

CASE NO. 83,208
(DCA No. 92-03037)

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REPLY BRIEF ON THE MERITS ON BEHALF OF PETITIONER, STEPHEN KEITH

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PRELIMINARY STATEMENT

Petitioner/Appellant, Stephen Keith, shall be designated as "Petitioner" or "Claimant." The Respondents, News & Sun Sentinel Company, and Crawford & Company, shall be designated as "Respondents" or "Employer." Reference to the Answer Brief shall be "A.B.", followed by the page number, all in brackets [ ]. Reference to the Record on Appeal shall be "R", followed by the appropriate page number, all in parentheses ( ).

SUMMARY OF THE ARGUMENT

This Court's jurisdiction has been properly invoked by the District Court of Appeal's certification of a question of great public importance. This Court's review extends to the decision of the District Court, and not only the question on which it passed. Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (Fla. 1956), is factually distinguishable from the instant case. In spite of the factual differences precluding its application, the decision rests upon a historical view of the newspaper industry that does not comport with modern day realities and is no longer a viable precedent.

A careful review of the factors set forth in the Restatement (Second) of Agency Section 220 dictate a result of an employer/employee relationship contrary to the Respondent's assertion that there existed no control over the details of the work performed by Babapour (the delivery agent) by the News & Sun Sentinel.

Utilizing the same factors in analyzing the relationship between Babapour and the Petitioner/street vendor, competent substantial evidence leads to the inevitable conclusion that Babapour was his supervisor and thus they were co-employees of the News & Sun Sentinel. Thereby, entitling the Petitioner to Workers' Compensation benefits for an injury that occurred within the course and scope of his employment.

ARGUMENT

I. WHETHER, IN LIGHT OF THE EVOLVING BUSINESS RELATIONSHIP BETWEEN NEWSPAPER PUBLISHERS AND PERSONS DELIVERING NEWSPAPERS, THE HOLDING IN MIAMI HERALD PUBLISHING COMPANY V. KENDALL, 88 SO.2D 276 (FLA. 1966) REMAINS VIABLE?

Contrary to the Respondent's assertion that the Petitioner has not made a showing as to why this Court should depart from Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (Fla. 1966), the Petitioner, in its Initial Brief has specifically pointed out that the Court's holding was predicated upon a philosophy "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'... ." Miami Herald, at 279. It is exactly this historical perspective that colored the Court's decision, and which represents a romanticized view of the newsboy as a specialist, which is not only factually distinguishable from the street vendor, Petitioner, in the case at bar, but is no longer (if it ever was) representative of those individuals who sell the newspaper.

The holding in Miami Herald should be departed from when there are changes in our social and economic customs and present day conceptions of right and justice. United States of America v. Loren Dempsey, 19 Fla.L.Weekly S198 (Fla. April 21, 1994), citing Hoffman v. Jones, 280 So.2d 431, 435 (Fla. 1973).

As Justice Kogan eloquently stated in Dempsey, at 199, this court has repeatedly recognized that our common law "must keep pace with changes in our society." (Citations omitted). "The common

law may be altered when the reason for the rule of law ceases to exist, or when changes demanded by public necessity are required to vindicate fundamental rights."

In Dempsey, this Court expanded common law to allow a parent to recover for the loss of an injured child's companionship where the underlying reason for denying it (the master servant theory) was based on an outdated perception. Here too, in the instant case, the notion that the Petitioner/Claimant was a specialist as he stood out on the street corner handing out a newspaper was based on an outdated perception that he was a specialized independent contractor; that theory no longer holds true. There is no just reason why a class of individuals (newspaper delivery persons/street vendors) cannot be brought under the protective umbrage of the Florida Workers' Compensation Act.

"The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed." Gates v. Foley, 247 So.2d 40, 43 (Fla. 1971).

The Respondent's assertion that "the instant case is not in a constitutional posture sufficient to allow review of the certified question" is without merit. Article V, Section (3)(b)(4), Florida Constitution, expressly provides that this court "[m]ay review any decision of a District Court of Appeal that passes upon a question certified by it to be of great public importance. ..." It is not necessary that the District Court of Appeal hold that the decision in Miami Herald was outmoded. In fact, it is axiomatic that an

appellate court of this state can, if it so chooses, question the viability of precedent, but it cannot ignore any Supreme Court pronouncement. It is not the certification of the appellate court's decision that triggers this Court's jurisdiction, but rather, it is the certification of a question of great public importance that triggers the exercise of jurisdiction of the Supreme Court. This Court's review extends to the decision of the District Court, and not only the question on which it passed. Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

Unlike, in the instant case where the District Court of Appeal specifically cited to the Miami Herald decision as precedent by which it was constrained to uphold the order under review, in Revitz v. Baya, 355 So.2d 1170 (Fla. 1977), the Court was without jurisdiction "...since, sub judice, the District Court specifically found it unnecessary to pass upon the question now certified to this Court... ."

Thus, the question proffered by the District Court of Appeal as being one of great public importance is in a proper posture for this Court to accept jurisdiction to consider and decide not only the question, but the decision, as well.

The Respondent's description of this Court's standard of review leaves out three key words. The Petitioner states "...this Court may not substitute its view for that of the judge." [A.B 22] The words missing are "...this Court may not substitute its view of the evidence for that of the judge." The Petitioner, of course, does not quarrel with that general principle of law. However, as

has been previously alluded to, this Court can reverse the Judge of Compensation Claims where the Judge of Compensation Claims has given an incorrect legal affect to the findings of fact. Herman v. Roche, 533 So.2d 824 (Fla. 1st DCA 1988).

THE MERITS OF THE CERTIFIED QUESTION

The Petitioner takes great exception to the Respondent's glossing over of the Initial Brief determining that "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." [A.B. 17] The Petitioner begins at page 15 of its Initial Brief with the premise that the rationale for the holding in Miami Herald is factually distinguishable from the case at bar so as to preclude its application.

Thereafter, the Petitioner specifically cited to Parker v. Palm Beach Newspapers, Inc., 561 So.2d 1198 (Fla. 5th DCA 1990), wherein Judge Sharp, specially concurring,

> ...submit[ted] the court's conclusion that newspaper delivery boys are presumptively independent contractors was colored by a turn of the 20th century stereotype of a young capitalist making a fortune, after starting out selling newspapers Ala Horatio Alger. Such a scenario was dated when written, and it has not aged well since. ... at 1199
>
> The original linchpin for exempting publishers from child labor laws was the claim that the children were neither their employees nor anyone else's. The unprotected status of child carriers has, throughout the twentieth century, been defended on the grounds that a paper route is a rite of passage providing valuable experience for future entrepreneurial independence. This defense is a manifestation of the long familiar argument of newspaper publishers that child distributors of newspapers are not their employees but 'little merchants' who hold independent contracts with them. ... Linder, From Street Urchins to Little Merchants: The Juridical

Transvaluation of Child Newspaper Carriers, 63 Temple L. Review 829, 830 (1990).

If it was not evident from the Initial Brief's argument, it surely was evident from the concurring opinions cited therein of Judge Sharp and Judge Barfield that the notion that the persons delivering newspapers on behalf of the publishers are independent contractors no longer comports with modern day realities.

In the case at bar, the District Court of Appeal, felt compelled (without addressing the Restatement (Second) of the Law of Agency, Section 220 factors) to adhere to the Miami Herald decision. The begrudging adherence to stare decisis, and the District Court of Appeal's certification of the question as being one of great public importance, indicates not only that appellate panel's reluctance to follow precedent, but that of the previous panels in Fort Pierce Tribune v. Williams, 622 So.2d 1368 (Fla. 1st DCA 1993) and Parker v. Palm Beach Newspapers, Inc., supra.

Contrary to the Respondent's assertion that there has been no evidence to show that a vast change in the business relationship has occurred since the Miami Herald decision, street vending sales are a relatively recent device by which the News & Sun Sentinel has been vending its newspapers. Babapour, the delivery agent, had been vending newspapers through street hawkers for approximately ten to eleven years prior to the time of the Merits Hearing. (R. 20). By use of street hawkers, the Respondent, News & Sun Sentinel, has been able to sell 22,000 daily copies, and approximately 28,000 to 30,000 Sunday papers. (R. 181). This mode of distribution is in stark contrast to the Miami Herald newsboy of

the 1950's. There are 130 to 150 street vendors selling the News & Sun Sentinel in Broward and Palm Beach Counties, alone, that are not covered by the News & Sun Sentinel for workers' compensation insurance coverage. This is not the only newspaper conducting business in this manner. See, Miami Herald Publishing Co. v. Hatch, 617 So.2d 380 (Fla. 1st DCA 1993). Thus, it is of great public importance for this Court to either distinguish the Miami Herald decision, or expressly recede from it as having improperly created a distinct class of individuals for which Workers' Compensation law does not apply.

It is respectfully suggested that to protect currently unprotected workers upon whom the Respondent, News & Sun Sentinel, has been able to increase its circulation by over 22,000 daily copies, that this Court hold that the Petitioner, a street hawker vending Respondent's newspapers, is entitled to the same benefits afforded other employees of the newspaper pursuant to the Florida Workers' Compensation Act.

The Respondent's blind adherence to stare decisis fails to recognize the beauty of our common law system of justice. "All rules of the common law are designed for application to new conditions and circumstances as they may be developed by enlightened commercial and business intercourse and are intended to be vitalized by practical application in advanced society. ..." Hoffman v. Jones at 436.

The courts have the duty to examine the common law and attempt to determine the reason for and the underlying philosophy

supporting the rule. Ripley v. Ewell, 61 So.2d 420 (Fla. 1952). Blind adherence to them [decisional law] gets us nowhere. Beverly Beach Properties v. Nelson, 68 So.2d 604, 607 (Fla. 1953).

Thus, the Petitioner has asserted cogent reasons for receding from the Miami Herald decision, not from the Restatement (Second) of Agency factors. Furthermore, this Court can reverse the Judge of Compensation Claims where the Judge of Compensation Claims has given an incorrect legal affect to the findings of fact. Herman v. Roche, 533 So.2d 824 (Fla. 1st DCA 1988).

The Respondent's brief at pages 22 through 23, ignores the glaring fact that the Judge of Compensation Claims in the case at bar, nowhere within the confines of the Order, referred to, recognized, or analyzed the Restatement (Second) of Agency Section 220 factors and applied each one of them to the facts in the case at bar. Thus, the order appealed from below was defective from the outset, and this Court does have the authority to determine whether there was competent substantial evidence and whether the Judge of Compensation Claims correctly applied the principles of law thereto. See, Adams v. Wagner, 129 So.2d 129, 131 (Fla. 1961).

II. WHETHER THE JUDGE OF COMPENSATION CLAIMS CORRECTLY DETERMINED THAT THE DELIVERY AGENT, BABAPOUR, WAS AN INDEPENDENT CONTRACTOR OF THE SUN SENTINEL FOR THE PURPOSE OF DELIVERING ITS NEWSPAPERS.

Despite the Respondent's protestations that the Sun Sentinel did not ride herd over Babapour, as the newspaper did in Miami Herald, there is abundant record evidence of such activity. Babapour was responsible in his day-to-day operation to maintain records for each and every location where he sold the News & Sun Sentinel papers. (R. 39) Babapour wore a beeper for which the Sun Sentinel's single copy distribution manager, Alonzo, had the number. Babapour considered Alonzo "his supervisor." (R. 61) Upon Alonzo beeping Babapour, he returned his phone call and would be instructed by Alonzo to correct situations concerning the cleanliness of street corner locations, respond to complaints of News & Sun Sentinel customers about street vendors, and expected to rectify the problem. (R. 59)

Alonzo, the delivery agent, testified that it was his job to "supervise the delivery agents" by driving on a daily basis through the various locations to check up on the street vending sites. By virtue of Alonzo exerting his authority over the delivery agents and reviewing the number of papers each agent will need for that day's sales, he ensures that the papers get sold by his employees and that the Respondent does not get stuck with an avalanche of unsold papers.

In Westover v. Stockholders Publishing Company, Inc., 237 F.2d 948, 952 (9th Cir. 1956), the United States Court of Appeals, Ninth Circuit, held that the newspaper publisher therein

was responsible for payment of social security taxes on behalf of newspaper routemen and dealers. The court, in reaching this conclusion, analyzed the publisher's distribution system by use of intermediary groups designated as street district men, route district men, and dealers, and finally, street vendors and home delivery carrier boys. The status of the route district men, who handled subscription home delivery distribution, and of the dealers, who handled either home delivery or single copy sales distribution or both, was in dispute. The latter group of individuals would be equivalent to the News & Sun Sentinel delivery agents of which Babapour, the Petitioner's supervisor, was one. The court there stated, "to begin with a solicitation of subscriptions and the delivery of newspapers is not such a complicated business that requires much control of details.

The Westover court, concluded "from the standpoint of economic reality, it is plain that the routemen and dealers were dependent upon taxpayer's (the publisher) business; if and when their relationship with the taxpayer was terminated they lost their source of income and in plain language, were 'out of a job' like any employee. ..." At 953.

In Hearst Publications, Inc. v. United States of America, 70 F.Supp. 666, 672 (N.D.S.D. Cal. 1946), the publisher sought to avoid an employer/employee relationship by contract. The court there stated:

> The publishers and vendors have, by their contract, attempted to establish a buyer-seller relationship between them. The contracts each recite such to be their intent. But the relationship of buyer and seller between

> them is entirely unrealistic. The publishers are not engaged in the wholesale business of selling newspapers to retailers, and the news vendors are not in any sense retail merchants in the business of buying and selling merchandise. A newspaper is not, in fact, a commodity bought and sold as merchandise at all. It is the medium of disseminating information; it is the information which is sold and the publishers are the distributors and circulators of this information through the agency of their news vendors.

The Petitioner does not "merely shrug off the contract between the Sun Sentinel and Babapour," [A.B. 27] but realizes it for what it is -- a sham to avoid the obligations (imposed by federal and state law) that are incumbent upon all other employers in the state of Florida.

While the obvious purpose to be accomplished by the document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other. Cantor v. Cochran, 184 So.2d 173 (Fla. 1966). The belief of the parties as to whether they are creating the relationship of master and servant must be a bona fide belief discernable from their actions and not based on declarations and the formality of contractual arrangements alone. Hearst, at 673. However, this bona fide belief ought to be irrelevant where there is a statutorily imposed duty to provide workers' compensation benefits when one has greater than four or more employees.

This applicability of workers' compensation coverage is not dependent upon the desires or beliefs of the parties. The Workers' Compensation Act was intended to prevent employers from dividing up work into individual tasks and calling the individual engaged to

perform those tasks an independent contractor. By such devices, employers may not escape their responsibilities to their employees. Herman v. Roche, 533 So.2d 824, 826 (Fla. 1st DCA 1988).

The Respondent's analysis of the Restatement (Second) of Agency factors, Section 220, takes an interesting look at the newspaper industry. [A.B. 32] The Respondent asserts that it is in the business of printing and publishing newspapers (original emphasis). Apparently, the Appellee is not concerned with whether its papers are sold. It is axiomatic that in order for the Respondent to get its message across, whether it be the dissemination of news, or its voluminous advertising, the papers must be sold.

The Respondent contends "it certainly takes organizational skills and a talent for dealing with people in order to do what Babapour does." Whatever organizational skill they are referring to, is not the high degree of skill alluded to in the Restatement (Second) of Agency.

The Respondent's reliance on Ware v. Money Plan International, Inc., 467 So.2d 1072, 1074 (Fla. 2d DCA 1985) is misplaced. There, the court held that the services performed (selling and interpreting insurance contracts) were of the high degree of skill that are not usually performed under the strict supervision of an employer. Neither Babapour, the delivery agent, nor Keith, the vendor, fit that description.

Application of the Restatement factors as argued by the Respondent point to only one conclusion supported by competent

substantial evidence, that is, an employer/employee relationship existed between Babapour and the News & Sun Sentinel.

III. WHETHER THE JUDGE OF COMPENSATION CLAIMS ERRED IN DETERMINING THAT KEITH WAS NOT AN EMPLOYEE OF BABAPOUR, BUT AN INDEPENDENT CONTRACTOR

The Respondent's analysis of the factual underpinnings of the Miami Herald decision at pages 23 through 25, and its assertion that the facts are nearly identical to this case missed the mark. See pages 18 through 19 of the Petitioner's Initial Brief, wherein Petitioner distinguishes the case at bar from the Miami Herald newsboy. The obvious, most striking difference is that the newsboy acted alone, was a specialist having to remember addresses of subscribers, followed a specific route and bore the risk of loss of the newspapers. None of those factors exist in the instant case. The Petitioner merely handed the Respondent's newspapers out to passing motorists and collected the money.

In Hearst Publications, Inc. v. United States of America, 70 F.Supp. 666, 674 (N.D.S.D. Cal. 1946), the court addressed the same argument that the Respondent has made in the case at bar that the control factors listed in Petitioner's Initial Brief do not address how the street vendor's (Keith) work is going to be accomplished (i.e., how the delivery and collection of the money should be made). In Hearst, the court decided that

> there actually was at least a reasonable measure of general control exercised by the publisher over the manner in which the services of the vendors were performed. ... Here, the vendors were subject to the publishers' control in every respect save in the manner in which they personally offered the newspaper for sale to the public and collected the price. As to those

> features, lack of control is absent because want of necessity for its presence. (Emphasis supplied.) The witness, William Parrish, a news vendor, stated that in the sale of newspapers, "it happens there is only one manner to do it" at 674.
>
> The court went on to further state:
>
> ...when the manner of performing the service is beyond another's control because of its nature, absence of direct control over such details becomes insignificant in the overall view of the facts and circumstances to be taken into account in determining the relationship. (Citations omitted).
>
> Here the news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers. In the performance of these services, they were subject to the general control of the publishers in every respect save where control was unimportant. ... (at 675)

Where the Respondent controls the means by which the results were achieved, then they create a master-servant relationship of employment. Baya's Bar & Grill v. Alcorn, 40 So.2d 468, 469 (Fla. 1949).

The Respondent's further insistence that Rogers v. P-G Publishing Company, 194 P.A.Super. 207, 166 A.2d 544 (1963), is "nearly identical to the case at bar" is mistaken. In Rogers, newspapers "were sold to the decedent who could himself determine what he would charge for them on resale. ..." Furthermore, the essential testimony of the parties is not laid out in the opinions so as to allow the reader an opportunity to discern, what control, if any, the newspaper exerted over the distributor.

The Respondent's final fallback argument is that even if the Petitioner's contentions prevail, he cannot prevail since he did not prove a statutory employer relationship. The Respondent has

never bothered to explain how it would be logically or economically possible under agency law, for an employee's employee (Keith) not to be the employer's employee.[1] See also, Coto v. Anipecu, 371 So.2d 193 (Fla. 3d DCA 1979); Jacobi v. Claude Noland, Inc., 122 So.2d 783, 787 (Fla. 1st DCA 1960).

CONCLUSION

WHEREFORE, based upon the foregoing argument, the Petitioner, Stephen Keith, respectfully requests that this Court accept jurisdiction, answer the certified question holding that the Miami Herald decision is no longer viable, and reverse the decision of the District Court of Appeal and find that the Petitioner is entitled to compensation as an employee of the Respondent, The News & Sun Sentinel.

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[1] See Restatement (Second) of Agency Section 5, Comment (2) E1958

> A subservant relation...may exist where a person is paid by the piece or job and is allowed by the master to select assistants at his own expense, it being understood that the servant is to direct the conduct of the subservant who is to be subject also to the superior power of control which the master may exercise.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 15th day of June, 1994, to: Edward D. Schuster, Esq. and Albert Massey, Esq., 110 Tower, 20th Floor, 110 S.E. 6th Street, Fort Lauderdale, FL 33301 and the original and seven copies were served simultaneously by Federal Express to: The Supreme Court, 500 South Duval Street, Tallahassee, FL 32399.

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