TO: Judge
FROM: Donald
DATE: 2-7-84
RE: 82-264
Ronald W. Frazier v. Ky. Power Company & Wayne Palumbo

This case is set for trial on March 5, 1984, subsequent to a summary jury trial that was held in August of '83.

The defendants have moved the Court for leave to file their second amended answer, and the plff has opposed the motion on the grounds that it is too late in the game to allow the defendants to change their admissions, since it is too late for the parties to have adequate discovery pertaining to the change in the proposed amended answer.

The plff has filed a pretty good memo in support of his position that the Court should not allow an amended answer to be filed at this point in time. Plff sets forth that the defendants have had from July of '82 to make the proposed change and that it would be unduly fair to the plaintiff to allow the amended answer, since the plff relied on the defendants' prior answers in making discovery.

The proposed amended answer seeks to withdraw the defendants' previous admission that Palumbo was a master/servant of Ky. Power Company in the event that the Court holds that Frazier was not an employee of Ky. Power.

It seems that what the defendants are trying to do is avoid liability on this theory: If Frazier is held to be an employee of Indiana-Michigian Power, rather than Ky. Power, then Palumbo should likewise be deemed an employee or servant of I-M, since Palumbo was assigned to work under or help Frazier on the project which brought Frazier to Kentucky in the first place.

What has God wrought?

I had no idea what ought to be done with this one. After you have had the opportunity to review the memos in support of and opposition to the amended answer, and the amended answer, (Items 49, 50, & 51), please advise what you think should be done with this matter, and I shall prepare the appropriate Order.

Before addressing plaintiff's

~~Opp~~ Motion to amend

denied:

(1) Not timely

(2) Resulting prejudice.

undue delay

; Prejudice

Post in Office file

TO: Judge
FROM: Donald
DATE: 6-23-83
RE: 82-264
Ronald W. Frazier et. al., v. Ky. Power Co. & Wayne Palumbo

Synopsis: Plff was severely injured in a one-vehicle accident while he was on the job. Plff was a passenger; def. Palumbo was driving. The vehicle left the road and went down a hillside. Plff will apparently be partially paralyzed for the rest of his life.

Both parties have moved the Court for S/J. At the PC in October, the Court took their motions under advisement and notified the parties that the Court's ruling would be certified as a final partial judgment for purposes of appeal.

Comments:

1. My impression is that this case turns on who Frazier's employer was, as a matter of law, at the time of the accident. If he is deemed to be an employee of Ky. Power, then the Court properly could enter S/J in favor of defendants and dismiss this action. If, on the other hand, Indiana-Michigan is deemed to be Frazier's employer, this tort action against the defendants would not be barred.

2. After reading both parties memos in support of their S/J motions, I am having problems in deciding who his employer is. There are factors which support a finding either way, as follows:

A. Factors favoring S/J in favor of plff.

The record seems to indicate that plff was "on loan" from I-M to Ky. Power for the sole purpose of supervising a construction project. K-P did not have an employee who was qualified to do this job. Pursuant to a Mutual Assistance Agreement under which the power companies were operating, K-P requested I-M to loan it an employee for this project. Frazier was available and agreed to do the job. He came to K-P in May and was here until August, when the accident occurred. He stayed at the Citadelle motel in Hazard. He was furnished a vehicle by I-M for the duration of this project. He continued to be paid by I-M, and I-M reimbursed him for all costs (motel, food, etc.) he incurred while here working for K-P. He seemed to be working in the capacity of an independent contractor, in that no one actually supervised him or told him what to do. He knew what had to be done, & he was free to perform his job in the matter he thought was best. His hours, time, & expenses were verified by a K-P employee before he turned them in to I-M for payment. K-P then, in turn, would reimburse I-M for Frazier's salary & expenses.

Additional support for the theory that Frazier never lost his status as an I-M employee is found in the Mutual Assistance Agreement, to-wit:

> 3. Employees of the responding company (I-M) shall at all time during the giving of emergency aid be deemed to remain employees of the responding company and shall not at any time or for any purpose be deemed to become employees of the requesting company (K-P).

Frazier is relying on KRS 342.700 in this action, and he is attempting to classify defendants as "some other person", other than the employer (I-M) who are obligated to pay damages to him. Under this statute, he is entitled to collect from either the employer or these "other persons", but not both.

Additionally, plff relies on the case of Rice v. Conley, Ky. Court of Appeals, 414 SW2d 138 (1967), which sets forth the three-prong test in determining when the loaned employee doctrine applies:

> "When a general employer (I-M) lends an employee to a special employer (K-P), the special employer becomes liable for Woekmen's Compensation only if
> (a) the employee had made a contract of hire expressed or implied with the special employer,
> (b) the work being done is essentialy that of a special employer, and
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for Workmen's Compensation. (At page 140).

B. Factors favoring S/J in favor of defendants:

Defendants contend that KRS 342.690 controls the outcome of this action, which provides that the employer's exclusive liability is the workmen's comp. insurance paid to the employee, and that the injuried employee or spouse, legal representative, etc. cannot maintain any other cause of action against the employer.

Of course, defendants are maintaining that Frazier was a K-P employee, pursuant to the loaned servant doctrine. They assert that since Frazier consented to coming here to work for K-P, and that since all of the work he performed was for the sole benefit of K-P, and that since K-P indirectly paid him while he was here, he was employed by K-P.

Defendants submit that the test set forth in Rice v. Conley, supra, is satisfied, because plff's consent to this job amounted to an implied contract, the work was for K-P, and K-P controlled the details of the work.

There is authority for defendants' position in 53 Am. Jur. 2d, Master & Servant, §26, page 101, and in Larson on Workmen's Comp., §48.10.

3. HELP! Where do we go from here?

4. After you have looked over this Catch-22, if you can give me some direction, God knows I need it. I think whatever the Court decides it will be appealed.

5. Defendants' memo is #22; plaintiffs' memo is #28.

This is an action wherein Frazier, an employee of a power company in Indiana/Michigan was loaned to a power company in Kentucky for the purpose of inspecting/overseeing the construction of a right-of-way line.

This loan is made between the power companies pursuant to an agreement to utilize the expertise of employees. The loaned employee remained on the payroll of I/M. He was given a vehicle by I/M. Becasue of his expertise, he set his own hours and duties. His insurance and workmen's compensation was maintained by I/M. However, I/M was reimbursed for all of its expense of Frazier by Kentucky-Power.

While inspecting a right-of-way, which was being constructed. Frazier was riding in a vehicle owned by Kentucky-Power. An employee of KEntucky Power was driving his vehicle. Frazier got out of the Kentucky Power vehicle and into his own vehicle which was being operated by Palumbo an employee of Kentcky Power. The vehicle wrecked andF Frazier has sued Kentucky Power, who contnds that Frazier was an employee of Kentucky Power and thus barred by the Fellow Servant Rule and is limited to his workmens compensation.

It appears to be conceded that Frazier ~~wqasz~~ was a loaned servant and covered by Rice v. Conley, 414 S. W. 2d 138, which sets forth a three pronged test in determining when the loaned employee doctrine applied: The special employer becomes liable for workmens compensation only when:

(1) the employee had made a contract of ~~hirex~~ hire EXPRESSED OR IMPLIED with the special employer.

It appears in this case Kentucky Power dealt or negotiated specifically with the Indiana-Michigan Power Company. However, the employee FRAZIER did agree to go to Kentucky to perform the services. It does not appear that there was an expressed contract of ~~hirex~~ hire but the defense contends that there is an implied contract.

The American Law Institute,Restatement of Contracts deals with Implied contracts in several different wasy.

It first explaints in a comment that contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Implied contracts are distinguished from quasi-contracts, which although called implied contracts are contracts implied in law to prevent unjust enrichment. which isn*t the present case.

Thus for purposes herein, the issue did Frazier manifest assent to a contract of hire with Kentucky Power.

§ 5, ALI, Restratement, HOW A PROMISE MAY BE MADE.

Except as stated in § 72 (2) a promise in a contract must be stated in such words either oral or written OR MUST BE INFERRED WHOLLY OR PARTLY FROM SUCH CONDUCT as justifies the promissee in understanding that he promisor intended to make a promise.

The exception § 72 (2) is acceptance by exercise by dominion.

(a) Where the offeree exercises dominion over things which are offered to him, such exercise of dominion IN ABSENCE OF OTHER CIRCUMSTANCES SHOWING A CONTRARY INTENTION in an acceptance. There was no such exercising of dominon in this case of Frazier by Kentucky Power and the payments of social security, workmens compensation, hospitalization, withholding of taxes, etc., notwithstanding reimbursemt are considered by the Court as circumstances showing a contrary intention.

Does the agreement of Frazier with Indiana/Michigan to go to Kentucky and inspect the construction of a power-line imply an agreemnt to a contract of employment ?

Assuming there was a promise by Frazier, was there consideration for his promise and is such consideration, if any, sufficient? An informal promise is not binding unless an agreed price has been paid for it.

In a bilater contract, return pomise is the consideration. Ina unilateral contract, the consideration is something other than a promise.

This is a consensual contract, which is a contrat of hiring in the Roman Law, in which the contract arises from the mere consensus of the parties without other formalities, Bouvier's Law Dictionary.. Is the reimbursement of pay by Kentucky Power to I/M for Frazier sufficient consideration to supprt an implied agreement by FRAZIER to come to Kentucky?

A says to B if C will come to Kentucky I will pay his wages and expenses. C comes to Kentucky and performs services for the benefit of A, B pays C but is reimbursed by A. Is there an implied contract between A and C?

A says to B, a fellow business man, if you will permit C, who is an employee of B, to come to Kentucky and perform services for the benefit of A, I will pay his wages and expenses. B conveyed the offer to A C who went to Ky and performed services for the benefit of A. B paid the wages and expenses of C but was reimbursed by A.

IS THERE AN IMPLIED CONTRACT OF EMPLOYMENT BY C TO A?

B"s permission to go is a loaned servant. Is C's going afer being informed of A's request an implied assent. Is A"s reimbursement sufficient consideration for A's C's services for his benefit.

An offer is an expression by one party of his assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express his assent to the identically same terms. Corbin on Contracts § 11, offer defined.

A mere statement that if your man will do the same work for me that he does for you I will pay him the same that you do is or is not an offer to the employee, but is a statement or offer to K with the employer. The loan of the employee was a contract. between A and B.

A promise is an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promisee that he may justly expect performance and may reasonably rely thereon.

Contract implied in fact; Contract implied in law. (Quasi)

A unilateral contract is a promise for an act. The only person uner a legally enforceable legal duty is the promisor. Until the offer has been accepted the contract is unilateral and cannot be enforced. Both parties must be bound or neither is bound is erroneous Rehm - Zeiher Co., v. F. G. Walker Co. 160 S. W. 777

A is the holding company for 7 or 8 other companies. Each of these companies is a separate corporation operating in a separate and distinct geographical area. Their commercial purpose and primary venture is the production, distribution and sale of electrical energy. Each company or corporation is subject to a public commission or board in its particular district. Under the guidance of A the various companies have executed a mutual assistance pact. In an emergency there is a lending and transference of materials and personnel for which reimbursement is made. This practice, over a period of time, has been expanded to non emergency instances.

For insurance purpose for employees, A procured the services of a brokerage firm in New York. Each company pays a premium to the firm, which arranges its coverage. Several of the companies are self-insured and the companies herein involved are covered by the Insurance Company of North America.

(There is presently pending before the Public Service Commission of the State of Kentucky, an application by one of the companies operating in Kentucky, for permission to contribute to the development costs of a plant of a sister company in a neighboring state and to make this contribution a part of its basis for the charge of rates to its users in Kentucky.)

B, one of the operating companies, at the request of C, another operating company, loaned a specialized employee for a specific purpose. FRAZIER, the loaned employee, was a specialist in the following of plans for clearing of right-of-way and the setting of poles thereon. C was installing a new line to a developing coal mine and hired an independent contractor to clear the right-of-way and set the poles thereon. FRAZIER was to inspect the job to see that it complied with the plans. He, as a loaned employee, remained on the payroll of B and under their insurance plan. He was furnished a vehicle by B and informed that he was being assigned to C, to which he did not object. C reimbursed B for the salary and expenses of FRAZIER.

assistancae
In the course of FRAZIER performing his task he requested/of the coordinator of the project. The coordinator was an employee of C, the one to whom FRAZIER initially reported and who verified FRAZOER's workcard and expenses, which Frazier turned in to his employer B.

The coordinator assigned to FRAZIER, an assistant, PALUMBO, who was a specialist, a civil engineer. He was under the control of FRAZIER. There

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-264

RONALD W. FRAZIER
and JOYCE FRAZIER — PLAINTIFFS,

VS: VOIR DIRE, SUMMARY JURY TRIAL

KENTUCKY POWER COMPANY
AND WAYNE PALUMBO — DEFENDANTS.

* * * * * * * * * * *

LADIES AND GENTLEMEN OF THE PROSPECTIVE JURY, TODAY A JURY WILL CONDUCT WHAT IS CALLED A SUMMARY JURY TRIAL.

A SUMMARY JURY TRIAL IS ONE WHEREIN THE JURY RECEIVES EVIDENCE THROUGH THE STATEMENT OF ATTORNEYS AND/OR EXHIBITS RATHER THAN THROUGH THE PERSONAL TESTIMONY OF WITNESSES.

PERHAPS THE JURY IS FAMILIAR WITH THE TERMS DEPOSITIONS AND STIPULATIONS. THESE ARE MEANS WHEREIN THE JURY RECEIVES EVIDENCE OTHER THAN THROUGH THE PERSONAL TESTIMONY OF WITNESSES.

A DEPOSITION IS WHERE THE TESTIMONY OF A WITNESS IS TAKEN AT A DIFFERENT TIME AND PLACE AND LATER READ TO THE JURY. IN SUCH INSTANCE THE COURT INSTRUCTS THE JURY THAT IT WILL GIVE SUCH EVIDENCE THE SAME WEIGHT AND BELIEF AS IT WOULD IF SUCH WITNESS WERE PRESENT AND SO TESTIFYING.

A STIPULATION IS WHERE THE PARTIES AGREES TO CERTAIN MATTERS AND THE COURT INSTRUCTS THE JURY THAT IT WILL ACCEPT SUCH AGREEMENT AND IT ISN'T NECESSARY TO CALL WITNESES OR PRESENT EVIDENCE AS TO THE MATTER UPON WHICH THE PARTIES ARE IN AGREEMENT.

IN A SUMMARY JURY TRIAL, THE PARTIES AGREE THAT IF THE WITNESSES WERE PRESENT AND TESTIFIED THAT THEIR TESTIMONY WOULD BE THE SAME AS ~~THAT~~ STATED BY THE ATTORNEYS; HOWEVER, THEY DO NOT AGREE TO THE WEIGHT AND CREDIBILITY OF SUCH EVIDENCE. THE COURT INSTRUCTS THE JURY THAT IT WILL DETERMINE THE WEIGHT AND CREDIBILITY TO BE GIVEN SUCH EVIDENCE THE SAME AS THE JURY WOULD IF SUCH WITNESSES WERE PRESENT AND PERSONALLY TESTIFIED.

ALSO, THIS TRIAL WILL BE A BIFURCATED TRIAL. THAT IS, THE JURY WILL MAKE ONLY A PARTIAL DECISION. IN AN ORDINARY TRIAL A JURY MAKES A FINDING OF FACT AS TO LIABILITY AND DAMAGES. IN THIS CASE THE JURY WILL HEAR THE EVIDENCE THROUGH THE STATEMENT OF COUNSEL AND MAKE A FINDING OF FACT WHICH ULTIMATELY DECIDES THE ISSUE OF LIABILITY THROUGH ANSWERS TO WRITTEN QUESTIONS BY THE COURT. THE JURY WILL NOT RECEIVE ANY EVIDENCE AS TO DAMAGES NOR MAKE ANY DECISION REGARDING SAME.

THE ISSUE IN THE SUMMARY JURY TRIAL IS WHETHER THE PLAINTIFF, RONALD W. FRAZIER, ON 5 AUGUST 1980, WAS AN EMPLOYEE OF INDIANA-MICHIGAN ELECTRIC COMPANY OR KENTUCKY POWER COMPANY.

THE PROCEDURE TO BE FOLLOWED IN THIS SUMMARY JURY TRIAL IS AS FOLLOWS:

(1) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, WILL MAKE A BRIEF STATEMENT OF THE CASE; COUNSEL FOR PLAINTIFF BEING FIRST.

(2) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, WILL THEN INFORM THE JURY OF ITS EVIDENCE IN SUPPORT OF ITS CASE; COUNSEL FOR PLAINTIFF BEING FIRST.

(3) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, WILL MAKE A BRIEF CLOSING STATEMENT OR FINAL ARGUMENT; COUNSEL FOR DEFENDANT BEING FIRST.

(4) COURT WILL INSTRUCT THE JURY AS TO THE LAW AND PRESENT TO THEM THE COURT'S WRITTEN QUESTIONS.

(5) JURY WILL RETIRE AND ANSWER THE WRITTEN QUESTIONS OF THE COURT.

THIS 6 DAY OF JULY, 1983.

G. WIX UNTHANK, JUDGE

3B (Two Pages)
CONSIDERATION OF THE EVIDENCE, ETC.
(Corporate Party - Agents & Employees)

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes ~~the sworn testimony of the witnesses~~ that which the attorney states this witnesses will so testify and the exhibits admitted in the record.

Except for the period during which the attorneys are relating to you what their witnesses would testify you are to Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so

doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

FACE PAGE - INTRODUCTION

UNITED STATES DISTRICT COURT
DISTRICT OF

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

2B

DUTY TO FOLLOW INSTRUCTIONS
(Corporate Party Involved)

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

CREDIBILITY OF WITNESSES

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiff or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

5A

IMPEACHMENT

(Contradictory Evidence - Inconsistent Statements)

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

7A
BURDEN OF PROOF
(Generally)

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.

ANSWERS-DELIBERATION

The jury is instructed that its answers to the Court's written questions do not have to be unanimous. However, each juror is given a copy of the questions by the Clerk and must answer all the questions therein. After all the questions have answered each juror must affix his or her signature to the copy of the questions answered by such juror and fill in the date in the space provided for same.

Although the answers of the jury are separate, the jury may discuss the questions and answers among themselves while in deliberation. The jury will not return to the jury room until all the questions have been answered by all the jurors and dated and signed. Should a question arise among and between the jury before it has completed its duties and it is necessary to communicate with the Court, please reduce your message or questions to writing and pass the note to the marshall who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the Courtroom so that I can address you orally.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

_____ EXHIBIT NO. _____, REFLECTS THAT A MUTUAL ASSITANCE AGREEMENT HAD BEEN EXECUTED BETWEN THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY. THIS AGREEMENT PERMITTED A COMPANY TO PROVIDE AN EMPLOYEE OR EMPLOYEES TO ANOTHER COMPANY IN AN EMERGENCY WITHOUT THE LOANED EMPLOYEE BECOMING AN EMPLOYEE OF THE BORROWING COMPANY.

LAW

THE JURY IS INSTRUCTED THAT PARTIES MAY ENTER INTO AN AGREEMENT AND THE TERMS OF SUCH AGREEMENT ARE BINDING THEREUPON. MOREOVER, IF IT IS THE MUTUAL INTENT AND AGREEMENT OF THE PARTIES, SUCH AGREEMENT MAY BE AMENDED OR CHANGED BY WORDS, CONDUCT AND PRACTICES OF THE PARTIES.

QUESTION

I.

DOES THE JURY FIND, BY A PREPONDERANCE OF THE EVIDENCE, AT SAID TIME AND PLACE, THAT THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY, IN LOANING AND BORROWING RONALD W.FRAZIER,

MUTUALLY INTENDED TO LOAN AND BORROW AN EMPLOYEE PURSUANT TO THE MUTUAL ASSISTANCE AGREEMENT CONTAINED IN _____ EXHIBIT NO. _____?

YES _____ NO _____

II.

DOES THE JURY FIND, BY A PREPONDERANCE OF THE EVIDENCE, AT SAID TIME AND PLACE, THAT THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY, BY WORDS, CONDUCT AND PRACTICE, HAD CHANGED OR AMENDED THE TERMS OF THE MUTUAL ASSSTANCE AGREEMENT:

(a) FROM EMERGENCY TO NON-EMERGENCY PROJECTS OR SITUATIONS?

YES _____ NO _____

IF THE JURY'S ANSWER IS "YES" IT WILL ANSWER THE FOLLOWING, AS FOUND IN ANSWER (a): DID THE PARTIES MUTUALLY INTEND THAT THE LOANED EMPLOYEE WOULD REMAIN AN EMPLOYEE OF THE LOANING COMPANY?

(B) YES _____ NO _____

(b) WHEN THE MUTUAL ASSISTANCE AGREEMNT WAS CHANGED AS FOUND IN ANSWER (a), DID THE PARTIES MUTUALLY INTEND THAT THE LOANDED EMPLOYEE WOULD BECOME AN EMPLOYEE OF THE BORROWING COMPANY.

YES _____ NO _____

DATE: _____

_____
JUROR

THE NAMES OF THE PERSONS PRINCIPALLY INVOLVED IN THIS MATTER ARE RONALD W. FRAZIER, THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY.

IN THE EARLY PART OF 1980, RONALD W. FRAZIER WAS AN EMPLOYEE OF THE INDIANA-MICHIGAN ELECTRIC COMPANY. IN MAY, JUNE, JULY AND AUGUST, 1980, HE CAME TO PERRY-LETCHER-KNOTT COUNTIES, KENTUCKY, AREA AND WORKED WITH PERSONNEL OF THE KENTUCKY POWER COMPANY ON A RIGHT-OF-WAY IN PREPARATION FOR THE INSTALLATION OF A POWER LINE FOR THE KENTUCKY POWER COMPANY. IN AUGUST, 1980, WHILE AT WORK, HE WAS INJURED IN AN AUTOMOBILE ACCIDENT.

THE ISSUE IN THE SUMMARY JURY TRIAL IS WHETHER THE PLAINTIFF, RONALD W. FRAZIER, ON 5 AUGUST 1980, WAS AN EMPLOYEE OF INDIANA-MICHIGAN ELECTRIC COMPANY OR KENTUCKY POWER COMPANY.

(1) ANY JUROR HAVING PRIOR KNOWLEDGE OF THIS MATTER?

(2) ANY JUROR EMPLOYED BY COMPANIES OR HAVING ANY STOCK?

(3) ANY JUROR KNOW ANY OF THE PARTIES, ATTORNEYS OR WITNESSES?

(4) ANY JUROR EVER BEEN A PARTY IN AN ACTION SUCH AS THIS OR HAD AN INTEREST IN SUCH AN ACTION THAT YOU WOULD HAVE A FIXED OPINION?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-264

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and JOYCE FRAZIER — PLAINTIFFS,

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ALSO, THIS TRIAL WILL BE A BIFURCATED TRIAL. THAT IS, THE JURY WILL MAKE ONLY A PARTIAL DECISION. IN AN ORDINARY TRIAL A JURY MAKES A FINDING OF FACT AS TO LIABILITY AND DAMAGES. IN THIS CASE THE JURY WILL HEAR THE EVIDENCE THROUGH THE STATEMENT OF COUNSEL AND MAKE A FINDING OF FACT WHICH ULTIMATELY DECIDES THE ISSUE OF LIABILITY THROUGH ANSWERS TO WRITTEN QUESTIONS BY THE COURT. THE JURY WILL NOT RECEIVE ANY EVIDENCE AS TO DAMAGES NOR MAKE ANY DECISION REGARDING SAME.

THE PROCEDURE TO BE FOLLOWED IN THIS SUMMARY JURY TRIAL IS AS FOLLOWS:

(1) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, L MAKE A BRIEF STATEMENT OF THE CASE; COUNSEL FOR PLAINTIFF BEING RST.

(2) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, ILL THEN INFORM THE JURY OF ITS EVIDENCE IN SUPPORT OF ITS CASE; COUNSEL FOR PLAINTIFF BEING FIRST.

(3) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, WILL MAKE A BRIEF CLOSING STATEMENT OR FINAL ARGUMENT; COUNSEL FOR DEFENDANT BEING FIRST.

(4) COURT WILL INSTRUCT THE JURY AS TO THE LAW AND PRESENT O THEM THE COURT'S WRITTEN QUESTIONS.

(5) JURY WILL RETIRE AND ANSWER THE WRITTEN QUESTIONS F THE COURT.

THE COURT IS GOING TO PRESENT TO THE POTENTIAL JURY A THUMB-IL SKETCH OF THE MATTER WHICH THE JURY WILL HEAR. EACH POTENTIAL RY IS CAUTIONED AND ADMONISHED THAT THE COURT'S STATEMENT OF THE CTS ISN'T EVIDENCE (THE JURY WILL RECEIVE THE EVIDENCE FROM THE ATTORNEYS PREVIOUSLY STATED). THE COURT IS MERELY ACQUAINTING THE JURY WITH IE OF THE FACTS TO DETERMINE IF ANY OF THE JURY HAS A PRIOR KNOWLEDGE HE MATTER TO BE CONSIDERED.

(5) DOES ANY JUROR KNOW OF ANY REASON WHY HE OR SHE WOULD BE UNABLE TO SIT, HEAR THE EVIDENCE AND THE COURT'S INSTRUCTIONS AS TO THE LAW, AND MAKE A DECISION AS TO WHCIH COMPANY RONALD W. FRAZIER WAS AN EMPLOYEE AT THE TIME OF HIS INJURY?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

Plaintiff's EXHIBIT NO. "A", REFLECTS THAT A MUTUAL ASSISTANCE AGREEMENT HAD BEEN EXECUTED BETWEN THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY. THIS AGREEMENT PERMITTED A COMPANY TO PROVIDE AN EMPLOYEE OR EMPLOYEES TO ANOTHER COMPANY IN AN EMERGENCY WITHOUT THE LOANED EMPLOYEE BECOMING AN EMPLOYEE OF THE BORROWING COMPANY.

LAW

THE JURY IS INSTRUCTED THAT PARTIES MAY ENTER INTO AN AGREEMENT AND THE TERMS OF SUCH AGREEMENT ARE BINDING THEREUPON. MOREOVER, IF IT IS THE MUTUAL INTENT AND AGREEMENT OF THE PARTIES, SUCH AGREEMENT MAY BE AMENDED OR CHANGED BY WORDS, CONDUCT AND PRACTICES OF THE PARTIES.

QUESTION

I.

DOES THE JURY FIND, BY A PREPONDERANCE OF THE EVIDENCE, AT SAID TIME AND PLACE, THAT THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY, IN LOANING AND BORROWING

RONALD W.FRAZIER, MUTUALLY INTENDED TO LOAN AND BORROW AN EMPLOYEE PURSUANT TO THE MUTUAL ASSISTANCE AGREEMENT CONTAINED IN _____ EXHIBIT NO. _____?

YES _____ NO _____

II.

DOES THE JURY FIND, BY A PREPONDERANCE OF THE EVIDENCE, AT SAID TIME AND PLACE, THAT THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY, BY WORDS, CONDUCT AND PRACTICE, HAD CHANGED OR AMENDED THE TERMS OF THE MUTUAL ASSSTANCE AGREEMENT:

(a) FROM EMERGENCY TO NON-EMERGENCY PROJECTS OR SITUATIONS?

YES _____ NO _____

IF THE JURY'S ANSWER IS "YES" IT WILL ANSWER THE FOLLOWING: AS FOUND IN ANSWER (a):

(b) DID THE PARTIES MUTUALLY INTEND THAT THE LOANED EMPLOYEE WOULD REMAIN AN EMPLOYEE OF THE LOANING COMPANY?

YES _____ NO _____

(c) WHEN THE MUTUAL ASSISTANCE AGREEMNT WAS CHANGED AS FOUND IN ANSWER (a), DID THE PARTIES MUTUALLY INTEND THAT THE LOANDED EMPLOYEE WOULD BECOME AN EMPLOYEE OF THE BORROWING COMPANY.

YES _____ NO _____

DATE: _____

_____
JUROR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

LAW

THE JURY IS INSTRUCTED THAT THE LAW PROVIDES A 3-ELEMENT FORMULA FOR DETERMINING WHETHER OR WHEN AN EMPLOYEE OF ONE COMPANY BECOMES THE EMPLOYEE OF ANOTHER COMPANY WHICH UTILIZES HIS SERVICES:

(1) THERE MUST BE AN EXPRESS OR IMPLIED AGREEMENT BETWEEN THE EMPLOYEE AND THE BORROWING COMPANY THAT HE HAS BECOME THE EMPLOYEE OF THE BORROWING COMPANY;

(2) THE WORK PERFORMED BY THE EMPLOYEE MUST BE FOR THE BENEFIT OF THE BORROWING COMPANY;

(3) THE BORROWING COMPANY MUST CONTROL THE WORK OF THE EMPLOYEE.

"EXPRESSED" AN AGREEMENT IS EXPRESSED WHEN IT IS DECLARED IN TERMS AND SET FORTH IN WORDS BY DIRECT AND APPROPRIATE LANGUAGE.

"IMPLIED" AN AGREEMENT IS IMPLIED WHEN IT IS NOT MANIFESTED BY EXPLICIT AND DIRECT WORDS BUT IS ESTABLISHED BY IMPLICATION OR NECESSARY DEDUCTION FROM THE CIRCUMSTANCES, THE GENERAL LANGUAGE, OR THE CONDUCT OF THE PARTIES.

"CONTROL" WITH RESPECT TO THE DEGREE OF CONTROL WHICH THE BORROWING COMPANY MUST EXERCISE OVER THE WORK OF THE EMPLOYEE, THE DETERMINING FACTOR IS THE "RIGHT" TO CONTROL. FOR PURPOSES OF THIS INSTRUCTION, IF THERE IS THE RIGHT TO CONTROL, THE WORK IS CONTROLLED WORK.

"BENEFIT" A BENEFIT IS NOT LIMITED TO MONEY GAINS, IT ALSO REFERS TO WHAT IS ADVANTAGEOUS, PROMOTES PROSPERITY OR ENHANCES THE VALUE OF PROPERTY OR RIGHTS OF CITIZENS AS CONTRADISTINGUISHED FROM WHAT IS INJURIOUS.

QUESTION

DOES THE JURY FIND, BY A PREPONDERANCE OF THE EVIDENCE, AT SAID TIME AND PLACE, THAT:

(a) RONALD W. FRAZIER EXPRESSLY OR IMPLIEDLY AGREED TO BECOME AN EMPLOYEE OF THE KENTUCKY POWER COMPANY?

YES _____ NO _____

(b) THE KENTUCKY POWER COMPANY CONTROLLED THE WORK OF RONALD W. FRAZIER?

YES _____ NO _____

(c) THE WORK OF RONALD W. FRAZIER WAS FOR THE BENEFIT OF THE KENTUCKY POWER COMPANY?

YES _____ NO _____

_____

JUROR

DATE: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-264

RONALD W. FRAZIER
and JOYCE FRAZIER — PLAINTIFFS,

VS: VOIR DIRE, SUMMARY JURY TRIAL

KENTUCKY POWER COMPANY
AND WAYNE PALUMBO — DEFENDANTS.

* * * * * * * * * * *

LADIES AND GENTLEMEN OF THE PROSPECTIVE JURY, TODAY A JURY WILL CONDUCT WHAT IS CALLED A SUMMARY JURY TRIAL.

A SUMMARY JURY TRIAL IS ONE WHEREIN THE JURY RECEIVES EVIDENCE THROUGH THE STATEMENT OF ATTORNEYS AND/OR EXHIBITS RATHER THAN THROUGH THE PERSONAL TESTIMONY OF WITNESSES.

PERHAPS THE JURY IS FAMILIAR WITH THE TERMS DEPOSITIONS AND STIPULATIONS. THESE ARE MEANS WHEREIN THE JURY RECEIVES EVIDENCE OTHER THAN THROUGH THE PERSONAL TESTIMONY OF WITNESSES.

A DEPOSITION IS WHERE THE TESTIMONY OF A WITNESS IS TAKEN AT A DIFFERENT TIME AND PLACE AND LATER READ TO THE JURY. IN SUCH INSTANCE THE COURT INSTRUCTS THE JURY THAT IT WILL GIVE SUCH EVIDENCE THE SAME WEIGHT AND BELIEF AS IT WOULD IF SUCH WITNESS WERE PRESENT AND SO TESTIFYING.

A STIPULATION IS WHERE THE PARTIES AGREES TO CERTAIN MATTERS AND THE COURT INSTRUCTS THE JURY THAT IT WILL ACCEPT SUCH AGREEMENT AND IT ISN'T NECESSARY TO CALL WITNESES OR PRESENT EVIDENCE AS TO THE MATTER UPON WHICH THE PARTIES ARE IN AGREEMENT.

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Delete from this page

THE ISSUE IN THE SUMMARY JURY TRIAL IS WHETHER THE PLAINTIFF, RONALD W. FRAZIER, ON 5 AUGUST 1980, WAS AN EMPLOYEE OF INDIANA-MICHIGAN ELECTRIC COMPANY OR KENTUCKY POWER COMPANY.

THE PROCEDURE TO BE FOLLOWED IN THIS SUMMARY JURY TRIAL IS AS FOLLOWS:

(1) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, WILL MAKE A BRIEF STATEMENT OF THE CASE; COUNSEL FOR PLAINTIFF BEING FIRST.

(2) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, WILL THEN INFORM THE JURY OF ITS EVIDENCE IN SUPPORT OF ITS CASE; COUNSEL FOR PLAINTIFF BEING FIRST.

(3) COUNSEL FOR EACH PARTY, PLAINTIFF AND DEFENDANT, WILL MAKE A BRIEF CLOSING STATEMENT OR FINAL ARGUMENT; COUNSEL FOR DEFENDANT BEING FIRST.

(4) COURT WILL INSTRUCT THE JURY AS TO THE LAW AND PRESENT TO THEM THE COURT'S WRITTEN QUESTIONS.

(5) JURY WILL RETIRE AND ANSWER THE WRITTEN QUESTIONS OF THE COURT.

THE COURT IS GOING TO PRESENT TO THE POTENTIAL JURY A THUMB-NAIL SKETCH OF THE MATTER WHICH THE JURY WILL HEAR. EACH POTENTIAL JURY IS CAUTIONED AND ADMONISHED THAT THE COURT'S STATEMENT OF THE FACTS ISN'T EVIDENCE (THE JURY WILL RECEIVE THE EVIDENCE FROM THE ATTORNEYS AS PREVIOUSLY STATED). THE COURT IS MERELY ACQUAINTING THE JURY WITH SOME OF THE FACTS TO DETERMINE IF ANY OF THE JURY HAS A PRIOR KNOWLEDGE OF THE MATTER TO BE CONSIDERED.

THE NAMES OF THE PERSONS PRINCIPALLY INVOLVED IN THIS MATTER ARE RONALD W. FRAZIER, THE INDIANA-MICHIGAN ELECTRIC COMPANY AND THE KENTUCKY POWER COMPANY.

IN THE EARLY PART OF 1980, RONALD W. FRAZIER WAS AN EMPLOYEE OF THE INDIANA-MICHIGAN ELECTRIC COMPANY. HE ORIGINALLY CAME FROM THE BELL COUNTY, KENTUCKY, AREA. IN MAY, JUNE, JULY AND AUGUST, 1980, HE CAME TO PERRY-LETCHER-KNOTT COUNTIES, KENTUCKY, AREA AND WORKED WITH PERSONNEL OF THE KENTUCKY POWER COMPANY ON A RIGHT-OF-WAY IN PREPARATION FOR THE INSTALLATION OF A POWER LINE FOR THE KENTUCKY POWER COMPANY. IN AUGUST, 1980, WHILE AT WORK, HE WAS INJURED IN AN AUTOMOBILE ACCIDENT.

Insert: the issue in this summary jury trial is

(1) ANY JUROR HAVING PRIOR KNOWLEDGE OF THIS MATTER?

(2) ANY JUROR EMPLOYED BY COMPANIES OR HAVING ANY STOCK?

(3) ANY JUROR KNOW ANY OF THE PARTIES, ATTORNEYS OR WITNESSES?

(4) ANY JUROR EVER BEEN A PARTY IN AN ACTION SUCH AS THIS OR HAD AN INTEREST IN SUCH AN ACTION THAT YOU WOULD HAVE A FIXED OPINION?

(5) DOES ANY JUROR KNOW OF ANY REASON WHY HE OR SHE WOULD BE UNABLE TO SIT, HEAR THE EVIDENCE AND THE COURT'S INSTRUCTIONS AS TO THE LAW, AND MAKE A DECISION AS TO WHCIH COMPANY RONALD W. FRAZIER WAS AN EMPLOYEE AT THE TIME OF HIS INJURY?

LAW OFFICES
LANDRUM & PATTERSON
SUITE 200 SECURITY TRUST BUILDING
SHORT & MILL STREETS
LEXINGTON, KENTUCKY 40507
(606) 255-2424

CHARLES LANDRUM, JR.
W. R. (PAT) PATTERSON, JR.
LIONEL A. HAWSE
THOMAS M. COOPER
STEPHEN M. O'BRIEN, III
PIERCE W. HAMBLIN
MARK L. MOSELEY
THOMAS H. GLOVER
LESLIE P. PATTERSON
JOHN R. MARTIN, JR.
LARRY C. DEENER
DAVID L. HUFF
JAMES W. SMIRZ
MARK W. HOWARD

NORTHERN KENTUCKY OFFICE
7536 U. S. 42
FLORENCE, KENTUCKY 41042
(606) 525-1711

Hon. Wix Unthank
Judge, U.S. District Court
Federal Courthouse
Pikeville, Kentucky

Re: Ronald W. Frazier and Joyce Frazier
v. Kentucky Power Company and Wayne Palumbo
United States District Court, No. 82-264

Dear Judge Unthank:

Enclosed you will find a Xerox copy of documents in accordance with your Order of the Court concerning Summary Jury Trial in the above-styled action.

The original has been filed with the Clerk in the Court record.

Very truly yours,

CHARLES LANDRUM, JR.

CLjr/sg
Enclosures

cc: Clerk, U.S. District Court
cc: William Watson

may become liable as master by informally or tacitly accepting the informal or tacit offer of another to aid or assist him as his servant.[77]

In a particular case, there may appear to be more than one person who bears at least some of the marks of a principal or master, and it is often difficult to choose between them.

§ 503. —— **More than one master—Borrowed servant—General master and special master.**—One person may be the servant or agent of two or more separate masters. He may act, now for one, and now for another. It is said that there may be a general master and a special master. If I borrow the servant of another for a short period to work for me, he may as to that work be my servant in law, even though all of the time he may remain in the general and continuing employment of the one from whom I borrow him.[78] If, on the other hand, I employ that other person to render some service for me and he sends his servant to perform it, such servant, though he may to a limited extent be under my direction and control, remains in the service of his general master, who will be answer-

77 See Hill v. Morey (1854), 26 Vt. 178, Wambaugh's Cas. 149.

78 One who for his own work, to be done under his own direction, borrows or hires the servant of another, is usually responsible for his negligence while so employed: See Hasty v. Sears (1892), 157 Mass. 123, 31 N. E. 759, 34 Am. St. R. 267; Wood v. Cobb (1866), 95 Mass. (13 Allen) 58, Wambaugh's Cas. 190; Grace & Hyde Co. v. Probst (1904), 208 Ill. 147, 70 N. E. 12; Rourke v. Colliery Co. (1877), L. R. 2 Com. Pl. D. 205, Wambaugh's Cas. 229; Murray v. Currie (1870), L. R. 6 C. P. 24, Wambaugh's Cas. 206; Miller v. Railroad Co. (1888), 76 Iowa 655, 39 N. W. 188, 14 Am. St. R. 258; Powell v. Construction Co. (1890), 88 Tenn. 692, 13 S. W. 691, 17 Am. St. R. 925; Higgins v. Telegraph Co. (1898), 156 N. Y. 75, 50 N. E. 500, 66 Am. St. R. 537; Delaware, etc., R. Co. v. Hardy (1896), 59 N. J. L. 35, 34 Atl. 986; Wagner v. Truck Renting Co. (1922), 234 N. Y. 31, 136 N. E. 229.

Compare New Orleans, etc., R. Co. v. Norwood (1885), 62 Miss. 565, 52 Am. Rep. 191; Standard Oil Co. v. Anderson (1909), 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

able for his torts.[79] The familiar case of the taxi-cab driver will

[79] If, having my own carriage but no horses, I hire horses and driver from a stable-keeper, whose servant is the driver while driving? See Laugher v. Pointer (1826), 5 Barn. & C. 547, Wambaugh's Cas. 105; Quarman v. Burnett (1840), 6 Mees. & W. 499, Wambaugh's Cas. 125; Jones v. Scullard [1898], 2 Q. B. 565.

If, an ice company when its business is dull, hires out a team and driver to a coal company, to work in hauling coal wagons, (the driver being retained on the ice company's pay-roll), whose servant is the driver while hauling a coal wagon? See Joslin v. Ice Co. (1883), 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Ash v. Lumber Co. (1911), 153 Iowa 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Morris v. Trudo (1909), 83 Vt. 44, 74 Atl. 387, 25 L. R. A. (N. S.) 33.

If an undertaker, in charge of a funeral, hires a carriage, team and driver from a stable keeper, to be used in carrying persons attending the funeral, whose servant is the driver? See Frerka v. Nicholson (1907), 41 Colo. 12, 92 Pac. 224, 14 Ann. Cas. 730, 13 L. R. A. (N. S.) 1122; Hussey v. Franey (1910), 205 Mass. 413, 91 N. E. 391, 137 Am. St. R. 460.

If an express company undertakes to deliver the goods of a merchant who keeps no wagons of his own, whose servant is the driver in so doing? See Moore v. Stainton (1903), 80 N. Y. App. Div. 295, 80 N. Y. Sup. 244 (aff'd 177 N. Y. 581, 69 N. E. 1127).

Suppose the merchant who wishes to have his own delivery system, hires drivers and teams from an express company. See Howard v. Ludwig (1902), 171 N. Y. 507, 64 N. E. 172.

If a city, contracting for paving with a contractor who has no steam-roiler, but must use one, agrees to let him have the city's roller and operator, for a fixed sum, whose servant is the operator while at work on the job? See Stewart v. Improvement Co. (1900), 131 Cal. 125, 63 Pac. 177, 52 L. R. A. 205.

If a steamship company contracts with a stevedore to unload a ship, but agrees that he may use the ship's steam winch and an operator for a fixed consideration, whose servant is the operator? See Murray v. Currie (1870), L. R. 6 C. P. 24, Wambaugh's Cas. 206; Rourke v. Colliery Co. (1877), 2 Com. Pl. D. 205, Wambaugh's Cas. 229. Distinguished in Standard Oil Co. v. Anderson (1909), 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

In Delory v. Blodgett (1904), 185 Mass. 126, 69 N. E. 1078, 102 Am. St. R. 328, 64 L. R. A. 114, the court said that the circumstances would often justify a distinction between injuries arising out of the way the general work was being done under the contractor's direction, and those resulting from the care and management of the team, engine, etc., in the care and protection of

illustrate this. If I call a taxi-cab, the driver will, in general, and in obedience to the directions of the taxi-cab proprietor, take me to the place I designate, and more or less act upon my suggestions as to speed, etc., but for his negligence while driving to that place the taxi-cab proprietor and not I will ordinarily be responsible.[80]

If I direct my chauffeur to take my guest to his home in the evening, he will ordinarily remain my servant in so doing; but if I loan my car and driver to a friend to be used by him for his purposes, and under his own direction, he and not I will usually be responsible for the negligence of the driver while so driving under his direction.

§ 504. —— **Tests for determining.**—Many efforts have

which the driver or operator is supposed to remain the owner's servant.. See also Driscoll v. Towle (1902), 181 Mass. 416, 63 N. E. 922; Shepard v. Jacobs (1910), 204 Mass. 110, 90 N. E. 392, 134 Am. St. R. 648, 26 L. R. A. (N. S.) 442; Lewis v. Railroad Co. (1900), 162 N. Y. 52, 56 N. E. 548; Kellogg v. Church Foundation (1911), 203 N. Y. 191, 96 N. E. 406, Ann. Cas. 1913A, 883, 38 L. R. A. (N. S.), 481; Harding v. Stockyards (1909), 242 Ill. 444, 90 N. E. 205.

Whose servant is the porter on the sleeping-car, in making up the passenger's berth, in carrying his baggage in or out, in polishing his shoes, in brushing his clothes, in running out to mail a letter for him?

If I bargain with a caterer to supply and serve refreshments to my guests at my house, and he sends his waiters to serve, whose servants are the waiters? Suppose I borrow a waitress from my neighbor to assist. Whose servant is she?

In Charles v. Barrett (1922), 233 N. Y. 127, 135 N. E. 199, the court said: "The rule now is that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division. McNamara v. Leipzig (1919), 227 N. Y. 291, 125 N. E. 244, 8 A. L. R. 480; Schweitzer v. Thompson (1920), 229 N. Y. 97, 127 N. E. 904; Meade v. Motor Haulage Co. (1922), 233 N. Y. 527, 135 N. E. 903; Driscoll v. Towle, *supra*."

[80] See Little v. Hackett (1885) 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 653; Irwin v. Taxi-cab Co. [1912], 3 K. B. 588; Richardson v. Van Ness (1889), 53 Hun (N. Y.) 267, 6 N. Y. Sup. 618, 25 N. Y. St. R. 60.

been made to state the test for determining who is the master in these cases. It is sometimes said to be the power of control,—who has the power to direct his actions and remove him from the service for disobedience? In the case of the taxi-cab driver, I, the passenger, have a limited power of control; I may tell him where I wish to go, but if he will not obey my directions, while I may dismiss him and his cab from my service, I can not dismiss him from the service of the cab proprietor.

The most satisfactory test is to ask whose business was the servant performing, and under whose control? In the case of the taxi-cab, again, while the driver came to enable me to pursue my business, he came fundamentally to perform the business of the cab proprietor. The latter was the one who was in the business of furnishing cabs with drivers, and it was in his business that the driver was employed.

§ 505. —— **Freedom of choice—Compulsory employment.** —Freedom of choice in the selection of an agent or servant is ordinarily one of the characteristics of agency. This freedom may be somewhat restricted by law or fact. If, for example, the law requires all truck men to be licensed, so that I must employ a licensed truckman, this would, in fact, somewhat restrict my choice, but so long as there are ordinarily a considerable number of them, my choice would not be so restricted in law as to deprive the one chosen of the quality of my servant or agent;[81] nor would the fact that I arrived so late in the market place on a particular occasion that most of them were already engaged.

But where the law provides for compulsory pilotage, and the owner of a ship is required to take a pilot, but has no voice in his selection, and can not control him or discharge him, it is held that the owner can not be made liable, at common law, for the pilot's negligence.[82]

[81] See Martin v. Temperley [1843], 4 Q. B. 298, Wambaugh's Cas. 129. (Licensed watermen, but there were about 6,000 of them.)

[82] See Ramsdell Transp. Co. v. Compagnie Generale Trans-Atlantique (1901), 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; Guy v. Donald (1906), 203 U. S. 399,

§ 506. —— **Independent cont**

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the person who desires to have it
to an "independent contractor."
as has been seen, is one who carries
ment, in the course of which he
perform a given piece of work fo
his own materials, equipment and
to perform it under his own direc
employer only to produce the agr

The work is typically a job of
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building of a bridge, and the lik
will be a fixed or "lump" sum;
are permissible, the cost plus a pc
Usually also there will be agreed
accordance with which the work
independent contractors may be
as where, in the erection of a b
to one contractor, the carpenter
to another, and so on.

Such an independent contract
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responsible for the torts of his
various workmen employed by t
servants or agents of the propri

27 Sup. Ct. 63, 51 L. Ed. 245; General Steam Nav. Co. v. British, etc., Nav. Co. (1869), L. R. 4 Exch. 238.

Compare Durkin v. Coal Co. (1895), 171 Pa. 193, 33 Atl. 237, 50 Am. St. R. 801, 29 L. R. A. 808; Fulton v. Mining Co. (1904), 66 C. C. A. 247, 133 Fed. 193.

83 See Reedie v. Railway Co. (1849), 4 Exch. 244, Wambaugh's Cas. 134; Lawrence v. Shipman (1873), 39 Conn. 586, Wambaugh's

§ 506. —— **Independent contractor.**—Instead of doing a piece of work himself or of hiring his own servants to do it, the person who desires to have it done may often "let the job" to an "independent contractor." The independent contractor, as has been seen, is one who carries on some independent employment, in the course of which he undertakes (or contracts) to perform a given piece of work for another, usually furnishing his own materials, equipment and servants, and being at liberty to perform it under his own direction, and being bound to the employer only to produce the agreed result.

The work is typically a job of some magnitude, like the erection of a building, the construction of a system of sewers, the building of a bridge, and the like. Usually the compensation will be a fixed or "lump" sum; but other methods of payment are permissible, the cost plus a percentage being a common one. Usually also there will be agreed "plans and specifications," in accordance with which the work is to be carried out. Several independent contractors may be employed upon the same work, as where, in the erection of a building, the mason work is let to one contractor, the carpenter work to another, the plumbing to another, and so on.

Such an independent contractor is not a servant or agent of the proprietor within the rules making a principal or master responsible for the torts of his servant or agent; nor are the various workmen employed by the independent contractor the servants or agents of the proprietor within those rules.[83]

27 Sup. Ct. 63, 51 L. Ed. 245; General Steam Nav. Co. v. British, etc., Nav. Co. (1869), L. R. 4 Exch. 238.

Compare Durkin v. Coal Co. (1895), 171 Pa. 193, 33 Atl. 237, 50 Am. St. R. 801, 29 L. R. A. 808; Fulton v. Mining Co. (1904), 66 C. C. A. 247, 133 Fed. 193.

[83] See Reedie v. Railway Co. (1849), 4 Exch. 244, Wambaugh's Cas. 134; Lawrence v. Shipman (1873), 39 Conn. 586, Wambaugh's Cas. 210; Hedge v. Williams (1901), 131 Cal. 455, 63 Pac. 721, 64 P. 106, 82 Am. St. R. 366; Prest-O-Lite Co. v. Skeel (1914), 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474; James v. McMinimy (1892) 93 Ky. 471, 20 S. W. 435, 40 Am. St. R. 200; Pearl v. Railway Co. (1900), 176 Mass. 177, 57 N. E. 339, 79 Am. St. R. 302, 49 L. R. A. 826; Gayle v. Car Co. (1903), 177 Mo. 427, 76 S. W. 987; Reisman v. Pub. Serv. Corp.

TO: Judge
FPOM: Donald
DATE: 10-4-82
RE: 82-264
Ronald W. Frazier & Joyce Frazier vs. Ky. Power Co. & Wayne Palumbo

PC, Monday, 10-4-82, at 9:30 a.m.

SYNOPSIS: This is a tort claim for personal injuries plff Ronald Frazier sustained in a single vehicle accident in Aug. of '80. Defendant Palumbo was driving the vehicle. Ronald Frazier is paralyzed from the waist down, & is seeking $2.5 Million in damages; his wife, Joyce, is seeking $1.0 Million for loss of consortium, etc.

Pending Motions:

1. Item 15 - Defendants motion for leave to amend their answer and add an additional defense to their first answer. Plffs have not yet filed an objection thereto. Answer Tendered.

2. Item 16 - Defendants motion for summary judgment on the grounds that plff should be deemed an employee of defendant Ky. Power Co. (which would destroy diversity), and that plff is precluded from recovering damages from Ky. Power Co. because he is presently covered by the Ky. Workmens' Comp. Act, under which he is receiving benefits. Defendants filed a 29-page memo in support of their motion, as well as several affidavits.

Jurisdiction: 26 U.S.C. 1332(c)
Indiana Plffs
Kentucky Defendants
Amount in controversy more than $10,000.

Defenses Raised: Defendants chief argument is that plff cannot sue them because he is covered by workmens' comp. (KRS 342.690).

Defendants also argue that the "loaned servant doctrine" precludes them from incurring any liability.

(Frazier actually was employed by Indiana & Michigian Electric Company and was "loaned to Ky. Power Co. for a period of several months to help complete & supervise a new powerline construction project. There are 6 electric companies which have entered into a "mutual assistance agreement", whereby they apparently loan each other employees on occasion whenever they need additional expertise in an area where they are lacking. Frazier was loaned to Ky. Power and had been there approx. 4 months before the accident.

The thorny issue is whether Frazier retained his status as an employee of I & M Elec. Co., or did he become an employee of Ky. Power Co. I & M provided him with a vehicle (the one that was wrecked), paid for his motel (LaCitadelle in Hazard) and continued to pay him directly from its office.

However, defendants assert that I & M was totally reimbursed by Ky. Power Co. for all expenses & salary that was paid to Frazier, and that he should be classified as an employee of Ky. Power Co. under the "loaned servant doctrine".

Comments:

1. Defendants memo in support of motion for S/J is lengthy & good.

2. KRS 342.690 helps defendants argument
KRS 342.700 helps plffs argument.

Tapes 2 18
Drawer 8
Photos 13

ASSIGNED FOR PRELIMINARY CONFERENCE AT PIKEVILLE JUDGE UNTHANK

DATE ~~October 1, 1982~~ October 4, 1982 AT ~~9:00 A. M.~~ 9:30 AM

CIVIL ACTION NO. 82-264

RONALD W. FRAZIER AND
JOYCE FRAZIER — William A. Watson

VS:

KENTUCKY POWER COMPANY AND
WAYNE PALUMBO — Charles Landrum, Jr.

DEMAND FOR JURY BY DEFENDANTS

BY Tendered Answer DATE 9/24/82

PRELIMINARY CONFERENCE

6/15/82	#1	COMPLAINT
7/2/82	#2	ANSWER of defts
7/7/82	#3	SUMMONS, w/Marshal's return served on Robert E. Matthews, Process Agt, for KY Power Co. on 6/18/82; on Wayne Palumbo on 6/28/82.
9/16/82	#13	PRELIMINARY TRIAL MEMORANDUM, of plffs
	#13a	PRELIMINARY TRIAL MEMORANDUM, of defts
9/24/82	#15	MOTION, of defts to fil first Amended Answer
		FIRST AMENDED ANSWER, of defts TENDERED 9/24/82
	#16	MOTION, of deft for S/J
	#17	AFFIDAVIT, of W. R. Miller
	#18	AFFIDAVIT, of K. C. Brashear
	#19	AFFIDAVIT, of Worley Yost, Jr.
	#20	AFFIDAVIT, of Dewey Sizemore
	#21	AFFIDAVIT, of Wayne B. Edwards
	#22	MEMORANDUM, of defts n/suppt Mot for S/J.