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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,746

HALIFAX PAVING, INC., f/u/b/o
UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioner,

vs .

SCOTT & JOBALIA CONSTRUCTION COMPANY, INC.

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

✓
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DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT
COURT OF APPEAL

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SUMMARY OF ARGUMENT

The holding of **Smith vs. Ryder Truck Rentals, Inc.**, 182 So.2d 422 (Fla. 1966), affords immunity to the owner of a dangerous instrumentality because of the owner's status as a joint tortfeasor. Nothing in that holding requires absolutely that a lease exist before that immunity exists. **As** long as the owner of the dangerous instrumentality is not actively negligent, statutory immunity vests such that an injured employee cannot maintain an action against the owner who has either leased the instrumentality or merely loaned it to an employer.

As long as both employees and members of the general public retain rights to recovery for injuries caused by the use of a dangerous instrumentality, immunity can and should vest with the owner of the instrumentality who merely loans it to the employer. There is no justification for the view that immunity fails to exist unless and until a lease exists. The view of the Fifth District is sensible and should be the preferred rule of law in this state.

QUESTION PRESENTED

WHETHER PUBLIC POLICY REQUIRES, IN ORDER TO CLOTHE THE OWNER OF A DANGEROUS INSTRUMENTALITY WITH STATUTORY IMMUNITY, THAT THE DANGEROUS INSTRUMENTALITY BE THE SUBJECT OF A LEASE AGREEMENT BETWEEN THE OWNER AND AN EMPLOYER WHO IS USING THE DANGEROUS INSTRUMENTALITY?

ARGUMENT

In the decision under review, the court considered the basic issue of whether the payment made by Halifax to Grier in settlement of the claim was either voluntary or one it was legally obligated to make. In concluding that the payment was in fact voluntary, the court reviewed the various and related principles which this court has established over the years, and focused its attention on the specific rule set forth in **Smith vs, Ryder Truck Rentals, Inc.**, 182 So.2d 422 (Fla. 1966).

The court then considered the treatment of the **Smith** rule in the decisions of the First District Court of Appeal in **Leseur vs. Leseur**, 350 So.2d 796 (Fla. 1st DCA 1977), and **Wam vs. Pensacola Concrete Construction, Inc.**, 448 So.2d 1132 (Fla. 1st DCA 1984), and reaffirmed in **Wam vs. Pensacola Concrete Construction, Inc.**, 527 So.2d 279 (Fla. 1st DCA 1988). In those cases, the First District interpreted **smith** to require that a dangerous instrumentality be leased before it could be considered equivalent to that actually owned by the lessor so as to provide immunity from suit. In support of its "no lease -- no immunity" rule, the

First District relied solely on obiter dictum; no rationale or legal basis was provided. The Fifth District could not detect any legal significance behind the rule announced by the First District. To the former, **it** mattered not that the dangerous instrumentality was leased or whether **it** was borrowed; the court believed that the true purpose of protecting the public was served in either instance. This conclusion is correct especially since the First District failed to offer any rationale for its peculiar view of **Smith**.

Rather than squarely confronting the holding of the Fifth District, the instant petitioner instead presents a multi-faceted, yet largely irrelevant attack on **Smith** as its effort to convince the court that the Fifth District wrongly decided the case because this court wrongly decided **Smith**. Petitioner's remarks addressed to the only relevant question are quickly distilled into the representation that the **Leseur** rule is good simply because **it** is there and ought to be retained. Like the court that created the rule, petitioner can offer no rationale to support **it**.

While an analysis of **Smith** is obviously necessary for the business at hand, we reject the one offered by the petitioner especially since **it** was predicated on the initial proposition that **Smith** "should be overruled because **it** was based on erroneous premises and because **it** is out of step with subsequent changes in the worker's compensation immunity doctrine." (Petitioner's brief, page 5.)

In order to extract the true holding of **Smith**, the reader must differentiate between the holding and the court's responsive remarks to the specific "excellent" arguments presented by the petitioner in that case. In concluding that the owner of the motorcycles was immune from suit by the injured employee, the basic underlying premise was that the employer and the owner of the motorcycles were joint tortfeasors. Given this fundamental fact, the court's reasoning is best expressed and understood in the following:

1. The injured employee could not sue his employer since the employer enjoyed statutory immunity.
2. The employer could not sue the owner of the motorcycles for any amounts paid to the employee in terms of worker's benefits.
3. General law precluded absolvment of liability of a joint tort feasor by release of the other **except** as modified by statute. Since section 440.11 provided for this exception, the statutory release of the employer also worked as a release to the owner of the motorcycles.

Simply put, since the employer and the owner were joint tortfeasors, the statutory immunity enjoyed by one was enjoyed by the other such that the release of one also released the other.

The other basic premise underlying the decision in **Smith** is the notion that the doctrine of dangerous instrumentality was created primarily for the protection of third party members of the public, and not to provide a vehicle for recovery for injuries sustained by fellow employees. It was

on this premise that the equivalency doctrine language was based. In other words, the motorcycles that the two employees were using were no different than other motorcycles that the employer may have owned outright. Whether leased or owned, the activity of the employees using the motorcycles did not, at least in that case, involve "third party members of the public." 182 So.2d at 424. The protection of the Workman's Compensation Act was designed specifically for workmen and thus, the operation thereof vis-a-vis the dangerous instrumentality doctrine insulated the motorcycle owners from suit.

That the public policy relating to protection of third party members of the public was the essential component of resolution of the issue in **Smith**, one need only refer to **Hunt vs. Ryder Truck Rentals, Inc.**, 216 So.2d 751 (Fla. 1968). There, the employee fell through the bottom of the floor of a delivery truck which had been leased to his employer by the owner of the truck. The employee received worker's compensation benefits from his employer and he then sued the truck owner claiming that the owner had negligently supplied a dangerous and defective truck and had thus breached its duty to exercise reasonable care to maintain the truck in a safe condition.

In response to a reliance on an affirmative defense of statutory immunity, the trial court granted summary judgment and that judgment was affirmed on appeal based on this

court's decision in **Smith, supra**. Upon review, however, this court reversed, holding that the employee had a right to maintain the suit against the actively negligent third party tortfeasor (Ryder), and in so doing took the opportunity to explain the **Smith** rationale. In determining that **Smith** did not apply to the facts in that case, the court deemed it necessary to review the decisions in **Smith vs. Poston Equipment Rentals, Inc.**, 105 So. 578 (Fla. 3d DCA 1958) and **Zenchak vs. Ryder Truck Rentals, Inc.**, 150 So.2d 727 (Fla. 3d DCA 1968), (decisions specifically referred to in **Smith, supra**), **Goldstein vs. Acme Concrete Corporation**, 103 So.2d 202 (Fla. 1958), and **Street vs. Safway Steel Scaffold Company**, 148 So.2d 38 (Fla. 1st DCA 1963). Measuring the principles extracted from these decisions against the rationale of **Smith**, the court preliminarily held:

"From the above examination of prior cases on this subject and the legal reasoning which led to the conclusions therein, it should become clear that the essential requirement for immunity is the obligation on the part of the lessee (contractor) to provide Workmen's Compensation for his own employees and those of others employed on the job and falling within the common employment doctrine. Where such obligation exists, the immunity enjoyed by the contractor extends to the lessor (subcontractor) for injuries received by or caused by the common employees." 216 So.2d at 755

Continuing, the court also discussed, and in so doing, reaffirmed the fundamental premise of **Smith** thusly:

"Secondly, where the lessee is the negligent party, either directly or

vicariously and enjoys the immunity, the assertion of vicarious liability against the lessor under either the dangerous instrumentality doctrine or that of respondeat superior must fail, since, at best, he is a joint tortfeasor with the lessee, whose liability has been released by statute. Thus, the lessor is also released."

As if to even further establish the notion, the court specifically stated that the joint tortfeasor status ". . ." was the focal point of **Smith vs. Ryder.**" 216 So.2d at 755. Finally, Justice Ervin, the author of **Smith**, contributed the observation in a concurring opinion that had Hunt's action been based on either a vicarious liability or dangerous instrumentality doctrine, **Smith** would have precluded any recovery.

Thus it is quickly seen that the rationale of **Smith** is just as viable today as it was when **Smith** was decided. Neither subsequent amendment of law nor petitioner's strained arguments affect the fundamental principal for which **Smith** stands. Indeed, the "quid pro quo" basis for determining the existence of immunity was specifically enunciated by this court in **Hunt**. It should become clear to petitioner that Scott & Jobalia was obligated to provide worker's compensation benefits to its employee Grier. In addition, since Lampp was, by jury determination, a borrowed servant and thus an employee of Scott & Jobalia, the latter was also obligated to provide those benefits for Lampp. For purposes of worker's compensation considerations, Lampp and Grier were

co-employees. Halifax was no less a joint tortfeasor because of the loan than it was had the crane been formally leased.

Left remaining is a determination of whether the existence of a lease is the only situation which provides immunity for the owner of a dangerous instrumentality. Actually, the decision under consideration is not the first instance of a disagreement with the First District's no lease -- no immunity rule. As the Fifth District recognized, the Third District in **Jackson vs. Harine Terminals, Inc.**, 422 So.2d 882 (Fla. 3d DCA 1982 rev. den. 427 So.2d 737 Fla. 1983), correctly identified this court's rationale in Smith as the interest to protect members of the public. The court in **Jackson** appeared initially to reject the First District's rule, but nevertheless did rely on the fact that the dangerous instrumentality involved there was in fact leased. Actually, though referring to the existence of a lease, the ultimate holding of the court was that immunity existed where the employer had tendered "valuable consideration for use of the offending instrumentality." 422 So.2d at 884. Whether valuable consideration is given or whether the instrumentality is merely loaned, the fact nevertheless remains that members of the general public are just as protected in either situation. In fact, had a member of the general public been injured in the instant cause, that individual could have cared less whether Halifax's crane had been leased or loaned; his legal rights to recovery for

damages caused by his injuries would have remained absolutely unaffected in either situation. It is for this reason that the equivalency language in **Smith** simply does not carry the significance that petitioner thinks it does. Whether a dangerous instrumentality is borrowed for a day or for a year, or whether it is leased for a day **or** for a year, the actual user of the equipment treats it as if it were in fact owned, at least for the period of the loan or lease.*

As illustrated in the colorful examples provided by the Fifth District, the protection of members of the general public remains intact in either a lease or a loan situation. That money may have changed hands does not and cannot alter this legal fact. It is for this reason that the Fifth District properly could determine no significant distinction between the two situations, and it is for this reason that the ultimate holding of the Fifth District should be approved as controlling law in this state on the subject.

*Of interest is Halifax's own evidence contained in the testimony of its President that Halifax and Scott & Jobalia enjoyed a "very friendly, close relationship." The two businesses had worked on jobs before and Halifax had loaned pieces of equipment before. Moreover, and perhaps most importantly, Scott & Jobalia had lent Halifax pieces of equipment before (**R-655**). Given this relationship, it is more than a reasonable conclusion that the two entities, as the need arose, clearly considered each other's equipment as that of their own. In fact, one might consider that there existed a mutual standing agreement such that Scott & Jobalia's promise to lend Halifax equipment served as the "valuable consideration" required in **Jackson, supra**.

CONCLUSION

The conflict to be resolved exists because one district court requires the existence of a lease before allowing the owner of a dangerous instrumentality to share statutory immunity with the employer, and another district court considers the need for a lease immaterial. Because the Fifth District Court of Appeal properly determined that the general public remains protected regardless of whether the instrumentality is leased or loaned, its decision should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 23rd day of June, 1989, to: J. Lester Kaney, Esquire, P. O. Box 191, Daytona Beach, FL, 32015.



Attorney

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