IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 67 142

FILED
SID J. WHITE
JUN 17 [illegible]
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

BRIAN J. SHEEN,

Petitioner,

vs.

ARCHIBALD LYON and
ROSE LYON,

Respondent..
_____/

BRIAN J. SHEEN,

Petitioner,

vs.

NICHOLAS TATUSKO and ANNA
TATUSKO,

Respondents.
_____/

PETITIONER'S BRIEF ON JURISDICTION

EASLEY MASSA & WILLITS
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and
LARRY KLEIN, of
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PREFACE

The parties will be referred to as plaintiffs and defendant.

The following symbol will be used:

A - Petitioner's Appendix.

STATEMENT OF THE FACTS

The facts are shown in the opinion of the Fourth District. Plaintiffs claimed Merrill Lynch and its employee stockbroker committed improprieties in the handling of a customer's account. The matter was settled by payment made to plaintiffs and their executing a general release which released Merrill Lynch and "agents, employees, successors ... ".

Plaintiffs then sued the employee stockbroker who raised the release as an affirmative defense, claiming it covered him because he was an employee of Merrill Lynch at the time the cause of action arose. The trial court granted defendant's motion for summary judgment and plaintiffs appealed to the Fourth District, which reversed, stating:

> The important operative fact here is that at the time the general release was given, the stockbroker no longer worked for Merrill, Lynch and the release only named Merrill, Lynch, together with its agents, employees, successors and assigns. Nonetheless, the stockbroker claims that the general release did cover him because he was in the employ of Merrill, Lynch at the time the cause of action arose and because of the circumstances out of which it arose.
>
> We are sympathetic to this argument but find from a reading of the general release that the individual stockbroker was not, in fact, included within its language. As a consequence, we find that the granting of the summary judgment in his favor was erroneous and, accordingly, we reverse and remand for further proceedings.

ISSUE

DOES THE DECISION OF THE FOURTH DISTRICT CONFLICT WITH FORD V. COLEMAN, 462 SO.2D 834 (FLA. 5TH DCA 1984)?

In the present case the Fourth District has held that a release which releases the employer and the employee or agent does not release the employee or agent if he was employed at the time of the incident but is not employed at the time of the release.

In Ford v. Coleman, 462 So.2d 834 (Fla. 5th DCA 1984), the plaintiff was injured in an accident by one defendant who was driving an automobile owned by another defendant.

Plaintiff settled with the owner of the vehicle and executed a release discharging the owner and its "agent, servants" etc. Plaintiff then sued the driver, who set forth the release as an affirmative defense alleging he was an agent of the owner. The trial court held as a matter of law that the driver, as a permissive user of the vehicle, was the owner's agent at the time of the accident and therefore was released. The Fifth District affirmed, holding that the driver was covered by the release because he was the owner's agent at the time of the accident. This holding is in direct conflict with the decision of the Fourth District in the present case, in which it was held that if the agent is not the agent at the time the release is executed then a release which purports to release an agent does not accomplish that.

Not only is there express and direct conflict in these two opinions, but the decision of the Fourth District does not comport with logic and reason. If the agent in the present case had still happened to be employed by Merrill Lynch at the time the release was executed, he would have been released. The decision of the Fourth District means that whenever a release purports to release a principal or employer and an agent or employee, the claim against the agent or employee will not be released unless they happened

to still be the agent or employee at the time the release is executed. This will create uncertainty in the law applicable to releases. The Fifth District properly held that a release releasing an agent is applicable to an agent of the owner at the time of the accident, regardless of when the agency later terminates.

CONCLUSION

There is direct conflict and this decision should be reviewed on the merits.

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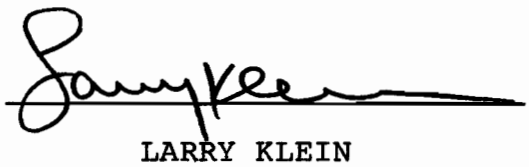
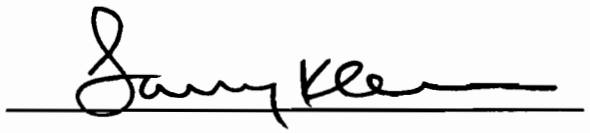
By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 14th day of June, 1985, to: RAYMOND G. INGALSBE, INGALSBE, McMANUS, WIITALA & CONTOLE, P.A., P. O. Box 14125, North Palm Beach, FL 33408.



LARRY KLEIN