

6-30 0/Aa-8-89

IN THE SUPREME COURT OF FLORIDA

FILED
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CASE NO. 73,746

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

Appellant,

v.

SCOTT & JOBALIA CONSTRUCTION COMPANY, INC.

Appellee.

APPELLANT'S INITIAL BRIEF ON THE MERITS

✓
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DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT
COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

This case requires resolution of a conflict in the application of two well established doctrines of Florida law: 1) the common law dangerous instrumentality doctrine and 2) the statutory workers' compensation immunity doctrine. The Fifth District in its opinion below held that where an owner of construction equipment temporarily lends the equipment to a contractor who has provided workers' compensation coverage to his employees, and an employee is injured by a fellow employee's negligent operation of the equipment, the equipment owner is entitled to immunity from suit by the injured employee under the workers' compensation law. Scott & Jobalia Construction Co., Inc. v. Halifax Paving, Inc., 538 So.2d 76, 82 (Fla. 5th DCA 1989) Accordingly, the equipment owner, who settled the claim of the injured employee, was not entitled to common law indemnity from the employer/contractor since there was no duty to pay the claim of the injured employee. In reaching this decision, the Fifth District concluded that the rule established in Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966) controls the result and refused to follow the decisions of the First District in Leseur v. Leseur, 350 So.2d 796 (Fla. 1st DCA 1977) and Mann v. Pensacola Concrete Construction, Inc., 527 So.2d 279 (Fla. 1st DCA

1988), which had distinguished Smith on facts substantially similar to those in the present case.

Willie Grier ("**Grier**") was injured on December 31, 1981 while working on a construction site for Scott & Jobalia Construction Co., Inc. ("**S&J**"). S&J provided workers' compensation benefits to Grier. At the time of his injury, Grier was working near a crane which was owned by Halifax Paving, Inc. ("**Halifax**") and operated by Calvin Lampp ("**Lampp**"). S&J did not own a crane and had borrowed the crane and operator from Halifax for temporary use on a "**courtesy**" basis. There was no lease or rental agreement for the crane nor was there any consideration paid for its use.

Lampp's operation of the crane was controlled by employees of **S&J** who directed his activities with hand signals. The jury found and the Fifth District affirmed that Lampp was the borrowed servant of **S&J** at the time of the accident. Scott & Jobalia at 79.

Grier sued Halifax and on September 10, 1985, Halifax's carrier, USF&G, paid Grier the sum of \$67,500.00 in settlement of his claim. Halifax (f/u/b/o USF&G) then sued S&J for common law indemnity claiming that its liability was grounded on vicarious or technical liability imposed solely due to its ownership of the crane. The jury found in favor of Halifax and a judgment totalling \$95,586.86 was entered

which included prejudgment interest, costs and attorneys' fees.

S&J appealed the judgment to the Fifth District Court of Appeal. On February 2, 1989, the district court rendered its lengthy opinion reversing the trial court. Although the district court's opinion discussed in detail each issue raised on appeal, its reversal was based on the single point that the owner of a dangerous instrumentality that is provided to a job site on loaned or courtesy basis is protected from liability for job site injuries by workers' compensation immunity. In reaching this conclusion, the court acknowledged that its decision was in conflict with Leseur and Mann. Scott & Jobalia at 79.

Halifax timely filed its notice under Rule 9.120(b), Fla. R. App. P., invoking the jurisdiction of this Court to resolve the conflict created by the decision of the district court. By order dated May 11, 1989, this Court accepted jurisdiction of this action.

ISSUES ON APPEAL

POINT I

SMITH V. RYDER TRUCK RENTALS, INC., UPON WHICH THE DISTRICT COURT RELIED IN REVERSING THE TRIAL COURT, IS BASED ON AN OUTDATED RATIONALE AND SHOULD BE OVERRULED

POINT II

ALTERNATIVELY, THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN SCOTT & JOBALIA AND MA" BY ADOPTING THE MA" RULE THAT THE OWNER OF TEMPORARILY LOANED CONSTRUCTION EQUIPMENT REMAINS LIABLE UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE

SUMMARY OF ARGUMENT

The cornerstone of the opinion of the Fifth District is this Court's decision in Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (1966). Smith held that the owner of construction equipment who supplied the equipment "on a lease for a term basis" to an employer was immune from suit by employees of the employer who were injured by the equipment on the job site.

Halifax first contends that Smith should be overruled because it was based on erroneous premises and because it is out of step with subsequent changes in the workers' compensation immunity doctrine. Smith based its conclusion on three principles:

1. Acceptance of workers' compensation benefits effects a **"release"** of the worker's claim against his employer;

2. Workers' compensation immunity is an exception to the general rule that a release of one tortfeasor is not a release of all. Since the employee **"releases"** the employer by acceptance of benefits, he thereby releases the equipment owner who, with respect to the employee's claim, is a joint tortfeasor with the employer.

3. The employer is precluded, as bailee of the equipment and as employer of the fellow employee who caused the injury, from recovering benefits paid for workers'

compensation from the equipment owner. It is therefore inequitable for the injured employee to recover beyond his workers' compensation benefits.

The "**release**" argument is faulty because the workers' compensation law, as it existed in 1966 and currently, expressly reserves to the employee his claims against third party tort feasons. There is nothing in the workers' compensation law that supports the premise that an equipment owner should be classified as a "statutory employee" rather than a third party tort feason and thus there is nothing to support the conclusion that the acceptance of benefits releases the equipment owner by operation of law. Since Smith was decided, the scope of workers' compensation immunity has been drastically reduced by eliminating immunity of subcontractors from claims by employees of other subcontractors. Further, this Court has adopted the concept that a party seeking immunity must show that he has provided a benefit to be so entitled. In the light of the evolving concept of workers' compensation immunity, an equipment owner has no claim to immunity.

Smith's second premise, that the employer is precluded from recovery of workers' compensation benefits against the equipment owner, is also faulty. The Court assumed that such a claim would be barred because the fellow employee's negligence would be imputed to the employer. However, the

reimbursement provisions of the workers' compensation statute are predicated on subrogation. The employer's claim should therefore not be affected by any defenses that are not available in a claim by the employee. The employee's claim against the equipment owner would not be subject to this defense and would not be barred by the workers' compensation immunity of his fellow employee. There is therefore no impediment to recovery of benefits by the employer through subrogation, and the perceived inequity does not exist.

While this Court has recognized limited exceptions to the dangerous instrumentality doctrine, the rationale of those exceptions does not apply to the construction equipment leasing context and there is no compelling reason why an exception should be carved out for that situation.

Alternatively, if Smith is not overruled, the exception to Smith established by Leseur v. Leseur, 350 So.2d 796 (Fla. 1st DCA 1977) and Mann v. Pensacola Concrete Construction, Inc., 527 So.2d 279 (Fla. 1st DCA 1988) should be recognized. In Smith, the equipment was leased to the contractor and became a part of his inventory of working tools. In those circumstances there is a greater expectation that the contractor will assume full dominion and responsibility for the equipment. There is less reason for that expectation by the parties, and by third parties,

where the relinquishment of control is only temporary and informal. Given the strong public policy considerations that support the dangerous instrumentality doctrine, exceptions to its application should be granted only where necessary to avoid harsh results. No harsh results will accrue to the owner of equipment by being required to remain responsible for its operation during brief interludes when it is loaned to others.

ARGUMENT

POINT I

SMITH V. RYDER TRUCK RENTALS, INC., UPON WHICH THE DISTRICT COURT RELIED IN REVERSING THE TRIAL COURT, IS BASED ON AN OUTDATED RATIONALE AND SHOULD BE OVERRULED

The sole basis for the district court's reversal of the judgment in favor of Halifax Paving was the court's view that Smith v. Ryder Truck Lines, Inc., 182 So.2d 422 (Fla. 1966) controls this case. In Smith, the plaintiff was injured by a fellow employee while operating a motorcycle leased to his employer by Ryder. This Court upheld summary judgment in favor of Ryder on plaintiff's action.

It is extremely important to analyze the rationale of the Smith case because the foundation for much of that rationale no longer exists as justification for the result. One possible rationale of the decision is that the immunity provisions of the workers' compensation statute were "**extended**" to include the lessor of equipment used by the employer. The Fifth District in its decision below apparently felt that this was the rationale when it concluded, "Thus, we hold that Halifax (indemnitee in this case) shared Scott & Jobalia's worker's compensation immunity from suit by Grier..." Scott & Jobalia at 82.

It can easily be demonstrated that the Smith decision was not based on the inclusion of equipment owners as immune

parties under workers' compensation immunity. First, that rationale is mentioned in the opinion only in reference to the petitioner's argument that immunity should not be so extended. In view of the fact that the concept of extending immunity to lessors of equipment finds no support in the statutory immunity language, and in view of the remaining discussion in Smith of the controlling rationale, it is submitted that workers' compensation immunity was not the basis for this Court's decision in Smith. This conclusion is further reinforced by the following statement from this Court's opinion in Iglesia v. Floran, 394 So.2d 994, 995-996 (1981), which reaffirmed the holding in Smith:

With respect to Hertz Corporation, the trial judge correctly granted summary judgment on the basis of Smith and Zenchak. [Zenchak v. Ryder Truck Rentals, Inc., 150 So.2d 727 (Fla. 3d DCA 1973, cert. discharged, 164 So.2d 200 (Fla. 1964))]. The workmen's compensation statute has absolutely no effect on Hertz Corporation's immunity from suit under the common law doctrine we have previously announced. (Emphasis added)

Thus, Smith is not a case of statutory construction but one of common law evolution. The true rationale for the decision is found in the lengthy paragraph beginning at the bottom of page 423 of the opinion. There, the Court noted the following principles as bearing of the issue of the equipment lessor's liability:

1. Acceptance of workers' compensation benefits operates to **"release"** the employer from tort liability;

2. The employer, as lessee of the equipment cannot recover from the equipment lessor the benefits paid to the injured employee under workers' compensation coverage;

3. Fla. Stat. Sec. 440.11 (1965), providing immunity to the employer and all fellow employees, is an exception to the general statutory rule of Fla. Stat. Sec. 54.28 (1965) [the predecessor of Fla. Stat. Sec. 768.31(5) (1987)] that release of one tortfeasor does not release other tortfeasors. Since the employee cannot sue the employer, he cannot sue the lessor, whose liability to the employee would be as joint tortfeasor.

After reciting these principles, the Court stated:

We think the foregoing is the legal reason for the decision below in this case and for the decisions in (citations omitted) refusing to extend the dangerous instrumentality doctrine announced in 1920 by this Court in Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A. L. R. 255, to situations of the kind appearing in said cases.

Smith at 424.

Each of the principles on which the Smith decision is based should be reanalyzed in light of the current state of the law as to each.

1. Acceptance of worker's compensation benefits as release of employer's liability.

Of course, this legal principle is still in effect, but it is questionable whether this principle should affect the

liability of a third party tort feasor. Since 1966 when Smith was decided, the extent to which the employee gives up his remedies against others has been severely limited by the amendment to Fla. Stat. Sec. 440.10 in 1974 eliminating the immunity previously granted to all subcontractors and employees of subcontractors on the job. Determination of entitlement to workers' compensation immunity has moved away from determining whether the injured party is a "statutory employee" to a determination of whether the defendant has provided benefits that earn him immunity:

The justification for limiting liability or granting immunity is the substitution of something else in its place, a quid pro quo. The duty to provide workers' compensation benefits supplants tort liability to those injured on the job. Jones v. Florida Power Corp., 72 So.2d 285 (Fla. 1954). If the duty to provide such coverage does not exist, then one has no reason to expect immunity from wrongdoings committed against a third party.

Employers Insurance of Wausau v. Abernathy, 442 So.2d 953, 954 (Fla. 1983).

In addition to the statutory reduction of the class of parties to whom immunity is granted under the workers' compensation statute this Court has, subsequent to Smith, recognized an exception to the employer's immunity by holding that the employer can be held liable for common law indemnity by third parties whose liability to the employer's worker is solely vicarious and where the employer is guilty

of active negligence. Trail Builders Supply Co. v. Reagan,
235 So.2d 482 (Fla. 1970).

In light of the 1974 amendment to Fla. Stat. Sec. 440.10, if an employee of one subcontractor is injured by the employee of a different subcontractor while operating a leased vehicle, the employer of the negligent operator can be sued even though both subcontractors provide workers' compensation coverage, but if Smith is applied, the owner of the equipment escapes liability. This hypothetical demonstrates that the 1974 amendment clearly knocked a major foundation block from the Smith rationale.

2. Inability of employer to recover workers' compensation benefits from lessor.

The Court apparently felt that precluding the employer from recovering paid benefits from the lessor while allowing the employee to recover would be inequitable. This reasoning is somewhat hard to follow in that the employer has received the considerable benefit of tort immunity in return for payment of benefits, but is it really true that the employer cannot recover? The Court in Smith stated:

{I}t is elementary law that petitioner's employer, as lessee and in control of the motorcycle allegedly negligently operated and causing petitioner's injury, could not sue Ryder, lessor of the motorcycle, under the dangerous instrumentality doctrine to recover amounts paid petitioner for workmen's compensation benefits.

Smith at 423-424.

This statement relies on the premise that the negligence of the fellow employee would be imputed to the employer in his action against the lessor, thus barring his claim. This reasoning fails to recognize that the reimbursement rights of the employer under Fla. Stat. Sec. 440.39 (1965) are predicated on subrogation to the rights of the employee. Any defenses that the lessor would have to a direct claim by the employer are not available in a subrogation action. In subrogation, the subrogee "stands in the shoes" of the subrogor, Allstate Ins. Co. v. Metropolitan Dade County, So.2d 976,978 (Fla.3d DCA 1983) and only a bar to the subrogor's cause of action will bar the subrogee's action. Holyhoke Mut. Ins. Etc. v. Concrete Equipment, Inc., 394 So.2d 193,197 (Fla. 3d DCA 1981). Therefore, since the right of the employer to recover benefits paid is wholly dependent upon the employee's rights against the lessor, it begs the question to say that the employee should not recover because the employer cannot recover. There is no legal impediment to recovery by the employer and there is therefore no inequity in allowing recovery by the employee.

Whether the employee has the right to recover against the equipment lessor should turn solely on whether the lessor can be held vicariously liable for the negligence of a fellow employee who has immunity under the workers'

compensation statute (assuming that the "gross negligence" and "unrelated works" exceptions to statutory immunity do not apply, and neither apply in this case). This Court has previously held that a husband's interspousal tort immunity will not preclude an action by his wife against a vehicle owner for injuries due to his negligent operation of the vehicle. May v. Palm Beach Chemical Company, 77 So.2d 463 (Fla 1955). A recent federal court decision reached the same result in an action against a rental car company by a wife who was injured by the negligence of her husband while operating the rented vehicle. Hernandez v. Hertz Corporation, 680 F.Supp. 378 (S.D. Fla. 1988). It has also been held that where sovereign immunity precludes an action against an agent, the principal is not entitled to immunity by reason of the agency relationship. Jaar v. University of Miami, 474 So.2d 239 (Fla. 3d DCA 1985).

By analogy, there is no reason to grant to the owner/lessor of a vehicle the benefit of the workers' compensation immunity possessed by the fellow employee. Accordingly, there should be no impediment to an action by the injured employee against the owner of the equipment, and thus no bar to the employer's subrogation claim.

3. Fla. Stat. Sec. 440.11 (1965) as release of all joint tort feasons.

The Court in Smith also premised its decision on the principle that Sec. 440.11 represents a statutory exception to the rule embodied in Fla. Stat. Sec. 54.28 (1965) that a release of one tort feason does not release others. While it is doubtful whether workers' compensation immunity should be treated the same as a voluntary release, even if the "release" characterization is accepted, it does not follow that Sec. 440.11 was intended to release all tort feasons. Fla. Stat. Sec. 440.39 (1965), as it existed when Smith was decided and as it exists today, expressly preserves the employee's action against third party tort feasons, subject to the employer's subrogation and lien rights. Nothing in Fla. Stat. Sec. 440.11(1965) suggested that the lessor of equipment used on the job site should be considered a "statutory employee" entitled to immunity. It is therefore extremely difficult to reconcile the Court's conclusion that the "release" effectuated by statutory immunity should extend to an equipment owner.

The rationale of Smith was that it would be inequitable and inconsistent with other legal rights and remedies to allow an injured employee to sue the owner/lessor of equipment causing injury on the job site. Under close scrutiny, this rationale appears faulty and is out of step

with the subsequent evolution of the workers' compensation immunity doctrine.

Recognizing that this Court has permitted exceptions to the dangerous instrumentality doctrine in other contexts, it remains to consider whether any policy reason exists to make an exception for the owner/lessor of construction equipment.

The Court in Smith cited three instances in which exceptions to the doctrine had been recognized: Fry v. Robinson Printers, Inc., 155 So. 2d 645 (Fla.2d DCA 1963); Petitte v. Welch, 167 So.2d 20 (Fla. 3d DCA 1964); and Florida Power and Light Co. v. Price, 170 So.2d 293 (Fla. 1964). **Fry** and Petitte both involved situations in which the owner of an automobile had left it in the care of a repair shop and an injury occurred while it was in the custody of the repairman. The holding in both cases was that the owner is not responsible for injuries due to operation of the vehicle while it is in the custody of the repair shop. This "repair shop" exception has been consistently upheld. It is important to note, however, that when the issue was addressed by this Court, the exception was justified on policy grounds as a limited exception to an otherwise rigid rule:

Our decision to pare back the dangerous instrumentality doctrine in service station and repairman situations stems from considerations of both social policy and pragmatism. An automobile owner is generally able to select the persons to whom a vehicle may be entrusted for general use,

but he rarely has authority and control over the operation or use of the vehicle when it is turned over to a firm in the business of service and repair. Moreover, an owner often has no acceptable alternative to relinquishing control of his vehicle to a service center, after which he has no ability to ensure the public safety until the vehicle is returned to his dominion.

Castillo v. Bickley, 363 So.2d 792,793 (Fla. 1978).

Thus, the rationale for the repair shop exception is the fundamental policy decision that it would be unfair to extend the policy to circumstances in which the average owner has no choice and no practical means of protecting himself. However, this Court has refused to expand the exception beyond its narrow scope even to the point of declining to apply the exception while the vehicle is being transported to and from the repair shop. Michalek v. Shumate, 524 So.2d 426 (Fla. 1988).

There is no analogy between owners/lessors of construction equipment and the typical owner of a private passenger vehicle that would justify applying the Castillo rule to the construction context. The owner of construction equipment typically does have a choice in selecting and screening his lessees and has available to him customary industry practices such as indemnity agreements and insurance requirements to protect himself from exposure. There is no corresponding "social policy" reason to apply the exception to equipment owners.

The final example of exceptions to the doctrine cited by Smith was Florida Power and Light v. Price. That case involved the related "inherently dangerous activity" doctrine as applied to the furnishing of electrical service. The Court held in Price that FPL would not be held liable to an employee of an independent contractor hired by FPL to work on its facilities in the absence of any negligence on the part of FPL that contributed to the injury. In reaching this conclusion, the Court cited the repair shop cases as being analogous and supporting its conclusion. However, it cited those cases for the principle that the repair shop was an "independent contractor" and not for the "social policy" reasons ultimately cited by Castillo as justifying the repair shop exception.

While Price is admittedly still valid law, it is also grounded on policy considerations which have no bearing on the equipment leasing context. In Price, the Court was concerned with upholding the independent contractor doctrine as a means of allowing an owner/contractor to delegate responsibility and potential liability. In the equipment leasing context, the owner is not "delegating" responsibility to the lessee but rather is consenting to having his equipment utilized in a manner that is beyond his control. The Court in Price made it clear that if there was any negligence on the part of the party contracting for

inherently dangerous activities, the exception would not provide a shield. This implies a duty on the part of the contractor to ensure that the party doing the work is qualified. There appears to be no corresponding duty on the part of the equipment lessor to investigate the qualifications of those permitted to use the equipment by the lessee.

Neither the repair shop cases nor the independent contractor exception provide a strong rationale for retaining an exception to the dangerous instrumentality doctrine for equipment lessors. Now that the umbrella of workers' compensation immunity has been restricted to provide immunity only to those who bargain for it, there is no more justification for awarding immunity to equipment lessors than there is to grant it to automobile leasing companies that enter into long term leases that give the lessees rights tantamount to ownership. Neither consistency of legal principles nor considerations of "**social policy**" and "**pragmatism**" support the exception created in Smith and it should be withdrawn.

POINT II

ALTERNATIVELY, THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN SCOTT & JOBALIA AND MANN BY ADOPTING THE MA" RULE THAT THE OWNER OF TEMPORARILY LOANED CONSTRUCTION EQUIPMENT REMAINS LIABLE UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE

If the common law rule adopted in Smith is upheld, it should be limited to the circumstances to which it was initially applied. The dangerous instrumentality doctrine is also a creature of common law in Florida and is one that has a long history of support in the public policy of the state. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255 (Fla. 1920), Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). There is nothing in Smith to suggest that the Court desired to dilute the doctrine for general policy reasons. Rather, the opinion focuses on the concept that workers' compensation is generally intended as a complete remedy and the perceived inequities that would result if the employee were able to assert additional claims under circumstances in which the employer could not recover the benefits paid the employee. Therefore, if Smith is to be upheld, it should not be extended further than is necessary to achieve its goal as a limited exception to an otherwise strong public policy doctrine.

The owner of construction equipment who lends it to another on an informal and temporary basis cannot reasonably be said to rely on being insulated from liability during its brief absence, whereas one who has leased the equipment on a more formal basis may be expected to have more carefully assessed his potential liability (of which some remains despite the rule in Smith) and factored that into his dealings with the lessee. Also, those using equipment that is routinely part of the contractor's inventory may be expected to rely upon the contractor, rather than the owner, to ensure such matters as competency of operation and safety of operating procedures.

While it may be that the equipment owner would incur liability notwithstanding Smith if he entrusted the equipment to one known not to possess the skills to operate it, it is doubtful that liability would be imposed unless the owner had actual knowledge of the incompetency of the contractor's personnel, and there appears to be no duty on the owner to make an in-depth investigation of competency prior to lending the equipment. The circumstances of temporary relinquishment of control of the equipment generally imply a greater risk of injury and the strong policy of non-delegable responsibility inherent in the dangerous instrumentality doctrine should not allow the owner to escape responsibility when this occurs.

Just as this Court in Michalek refused to expand the repair shop exception approved in Castillo, it should not approve the expansion of the Smith doctrine beyond its original scope.

CONCLUSION

The decision of the Fifth District upheld the judgment of the trial court in every respect except its application of the Smith case. The rationale of the Smith case was questionable when it was decided and is clearly inconsistent with the current law of workers' compensation immunity. The exception to the dangerous instrumentality doctrine created in Smith has no strong policy foundation and it should therefore be withdrawn.

Alternatively, if this Court continues to apply the Smith exception, it should be limited strictly to leases of equipment for a term certain and not expanded to cover temporary and informal lending of equipment.

Halifax therefore respectfully requests that this Court reverse the decision of the Fifth District and remand this case with instructions to reinstate the final judgment in favor of Halifax.

Respectfully submitted,

COBB COLE & BELL

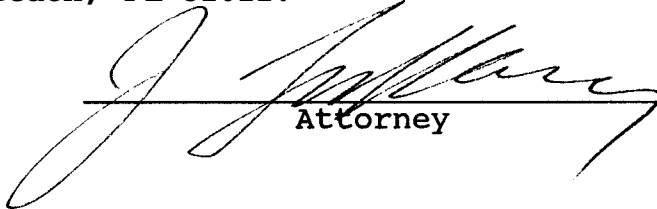
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 5th day of June, 1989 to: Terrence E. Kehoe, Esquire, Post Office Box 2593, Orlando, FL 32802-2593; and Richard W. Prospect, Esquire, Post Office Box 6511, Daytona Beach, FL 32022.



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