IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 27 1989
CLERK, SUPREME COURT
By ______
Deputy Clerk

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

Petitioner,

vs. Case No. 73,746

SCOTT & JOBALIA CONSTRUCTION
COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

RICHARD PROSPECT, ESQUIRE
HAAS, BOEHM, BROWN, RIGDON,
SEACREST & FISCHER, P.A.
Post Office Box 6511
457 South Ridgewood Avenue
Daytona Beach, FL 32022
(904) 258-3341
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	Page
Table of Contents	i
Citation of Authorities	ii
Summary of Argument	1
Question Presented	2
WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH **MANN vs. PENSACOLA CONCRETE CONSTRUCTION COMPANY, INC.**, 527 So.2d 279 (Fla. 1st DCA 1988) and **LESEUR vs. LESEUR**, 350 So.2d 796 (Fla. 1st DCA 1977), SO AS TO PROPERLY INVOKE THIS COURT'S DISCRETIONARY JURISDICTION?	
Argument	3
Conclusion	7
Certificate of Service	8

CITATION OF AUTHORITIES

	Page
Leseur vs. Leseur, 350 So.2d 796 (Fla. 1st DCA 1977)	2,4,5
Mann vs. Pensacola Concrete Construction Company, Inc., 527 So.2d 279 (Fla. 1st DCA 1988)	2,5,6
Smith vs. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966)	3

SUMMARY OF ARGUMENT

Though the Fifth District Court of Appeal acknowledged the existence of "conflict", a thorough examination and understanding of the facts in all relevant cases shows that the conflict is neither express nor direct within the meaning of this court's constitutional discretionary jurisdiction. The three cases involved are factually distinguishable and thus there is no need to review further the judgment and decision of the Fifth District Court of Appeal.

<u>QUESTION PRESENTED</u>

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH **MANN vs. PENSACOLA CONCRETE CONSTRUCTION COMPANY, INC.,** 527 So.2d 279 (Fla. 1st DCA 1988) and **LESEUR vs. LESEUR,** 350 So.2d 796 (Fla. 1st DCA 1977), SO AS TO PROPERLY INVOKE THIS COURT'S DISCRETIONARY JURISDICTION?

ARGUMENT

Initial consideration of the petitioner's argument asserting the existence of express and direct conflict provides some degree of facial appeal. However, the level of conflict required by the Constitution seems to exist only in petitioner's belief. Indeed, if the conflict were as clear and "emphatic," as Petitioner says it is, then why is it that the District Court merely acknowledged the existence of conflict and failed to certify the requisite level of conflict contemplated in Article V, Section 3(b)(4), Florida Constitution (1980)?

Respondent submits that the absence of such a certification both allows and requires a close examination of the three relevant decisions in order to detect the existence of any possible basis of distinguishment.

It is of course conceded that the First District Court of Appeal is of the opinion that the absence of any type of lease agreement removes the existence of the employer's immunity provided for by statute. Indeed, prior to the issuance of the decision sought to be reviewed, it appears that the First District was the only court to interpret this court's decision in **Smith vs. Ryder Truck Rentals, Inc.**, 182 So.2d 422 (Fla. 1966), as requiring the existence of such an agreement as a condition precedent to that immunity.

It is likewise conceded that the Fifth District Court of Appeal, based on the facts before it, has decided that the existence of a lease is a distinction without significance and

one which is irrelevant to achieving the announced objective of protecting the public. Nevertheless, it is respectfully submitted that the conflict, if any, is superficial at best and does not rise to the level necessary so as to require or invite this court to exercise its jurisdiction. This is so due to a difference in facts present in each of the cases.

In **Leseur vs. Leseur,** 350 So.2d 796 (Fla. 1st DCA 1977), the First District relied upon the absence of a lease to conclude that the crane involved therein was not equivalent to one owned by the plaintiff's employer. Perforce, the immunity created by section 440.11, Florida Statutes (1971), did not apply to a co-owner and operator of that crane. Though the trial court "held," in a summary judgment proceeding, that the co-owner/operator was an employee or borrowed servant of the plaintiff's employer, the District Court considered the owner's status as irrelevant to any issue. In fact, in apparently rejecting the trial court's finding, the court stated that the owner/operator was the general employee of no one so he obviously could not be considered as either a lent or a special employee of the plaintiff's employer. This irrelevancy was predicated upon then existing law to the effect that a general employer remained liable to an injured fellow employee for negligence. (Section 440.11 was amended subsequent to the decision in **Leseur.**) Additionally, the court noted that the owner was not injured and the plaintiff's employer's liability was not in issue.

In contrast, in the decision sought to be reviewed, the

liability of the plaintiff's employer very definitely was in issue. Also, rather than a trial court rendering a "holding" regarding a borrowed servant, the instant cause contains a specific jury finding of fact that Lampp was the borrowed servant of respondent, Scott & Jobalia Construction Company. As a result, Lampp was a co-employee of Grier and the immunity of existing law did apply.

In **Mann vs. Pensacola Concrete Construction Company, Inc.**, 527 So.2d 279 (Fla. 1st DCA 1988), the individual operating the crane when the plaintiff was injured was the plaintiff's supervisor. In reiterating the decision in **Leseur, supra**, the court rejected Pensacola Concrete's argument that the crane should have been treated as if owned outright by the plaintiff's employer. It could be argued (and apparently successfully was) that the mere providing of the crane without any instruction, control or other form of participation was insufficient to trigger the immunity provisions of the statute.

Here, however, Halifax did more than merely provide the crane to Scott & Jobalia. It also provided a trained and experienced operator. Though that operator worked at the direction of Scott & Jobalia as the job required, his legal status as a trained operator and borrowed servant was sufficient to clothe Halifax with the same immunity that was enjoyed by Scott & Jobalia. In other words, the lender of the crane in the instant cause did more than did the lender of the crane in **Mann, supra**. This factor is emphasized by considering the existence of

the unusual and reckless operation of the crane in **Mann** which ultimately resulted in the injuries.

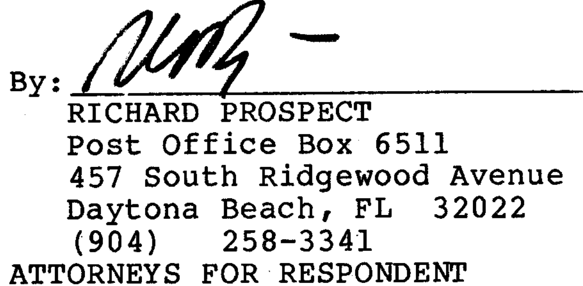
Therefore, a close and careful reading of the three decisions under consideration produces a sufficient basis of distinguishment such that all three cases can harmoniously co-exist; the apparent conflict fails to withstand serious scrutiny.

CONCLUSION

Respondent submits that the decision of the Fifth District does not expressly and directly conflict with those of the First District. Respondent therefore asks that the request to invoke discretionary jurisdiction be denied.

Respectfully submitted,

HAAS, BOEHM, BROWN, RIGDON,
SEACREST & FISCHER, P.A.



By: ______________________
RICHARD PROSPECT
Post Office Box 6511
457 South Ridgewood Avenue
Daytona Beach, FL 32022
(904) 258-3341
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 22nd day of March, 1989, to J. Lester Kaney, Esquire, Post Office Box 191, Daytona Beach, FL, 32015.

Attorney

/pr