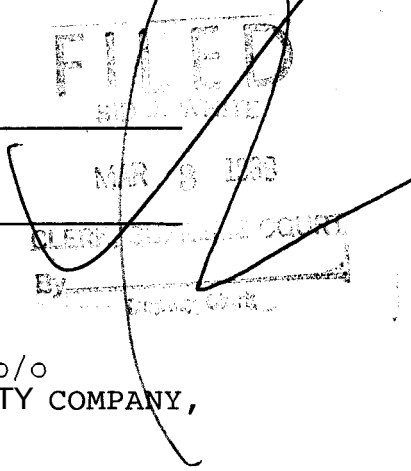
3-26

IN THE SUPREME COURT OF FLORIDA



CASE NO. 73,746

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

Petitioner

v.

SCOTT & JOBALIA CONSTRUCTION COMPANY, INC.,

Respondent

PETITIONER'S BRIEF AND APPENDIX ON JURISDICTION

J. LESTER KANEY
COBB COLE & BELL
Post Office Box 191
150 Magnolia Avenue
Daytona Beach, FL 32015
(904) 255-8171
ATTORNEYS FOR PETITIONER
Fla. Bar No. 156553

DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT
COURT OF APPEAL

TABLE OF CONTENTS

CITA I OF AUTHOF

Florida Rules of Appellate Procedure:

Cases:

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 worker's compensation immunity doctrine.

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 worker's compensation benefits to Grier. Grier was injured in an accident involving operation of a crane which was owned by Halifax Paving, Inc. ("Halifax") and operated by Calvin Lampp ("Lampp"). S&J had borrowed the crane and operator from Halifax for temporary use on a "courtesy" basis. There was no lease or rental agreement for the use of the crane nor any specific consideration paid.

Lampp's operation of the crane was controlled by employees of S&J who directed his activities through use of hand signals. The jury found and the district court below affirmed that Lampp was the borrowed servant of S&J at the time of the accident. (A-3).

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

vicarious or technical in nature, 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 a single narrow point. The court held that the owner of a dangerous instrumentality that is provided to a job site on a loaned or courtesy basis is protected from liability for job site injuries by worker's compensation immunity. In reaching this conclusion, the court expressly acknowledged that its decision was in conflict with two decisions of the First District Court of Appeal. (A-9)

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.

ISSUES ON APPEAL

I.

THE OPINION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH MANN V. PENSACOLA CONCRETE CONSTRUCTION COMPANY, INC., 527 So.2d 279 (Fla. 1st DCA 1988) and LESEUR V. LESEUR, 350 So.2d 796 (Fla. 1st DCA 1977)

SUMMARY OF ARGUMENT

The district court below held that where a dangerous instrumentality is borrowed without consideration for use in a construction project, the owner of the equipment is protected from suit under the worker's compensation immunity doctrine for injuries caused by the equipment, and is not liable under the dangerous instrumentality doctrine.

The opinion of the district court expressly and directly conflicts with the decisions of the First District Court of Appeal in Mann v. Pensacola Concrete Construction, Inc., 448 So.2d 1132 (Fla. 1st DCA 1984), Mann v. Pensacola Concrete Construction, Inc., 527 So.2d 279 (Fla. 1st DCA 1988) and Leseur v. Leseur, 350 So.2d 796 (Fla. 1st DCA 1977). In each of those decisions, the court held that where no lease or rental agreement exists, the equipment is not considered the equivalent of the contractor's equipment and the owner of the equipment is therefore not protected by the worker's compensation immunity doctrine.

ARGUMENT

THE OPINION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH MANN V. PENSACOLA CONCRETE CONSTRUCTION COMPANY, INC., 527 So.2d 279 (Fla. 1st DCA 1988) and LESEUR V. LESEUR, 350 So.2d 796 (Fla. 1st DCA 1977)

The dangerous instrumentality rule is a longstanding and well established doctrine of Florida law. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (Fla. 1920). This Court has been reluctant to allow the doctrine to erode by creating exceptions. One of the rare exceptions was established in Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966). In that case, this Court affirmed the lower court's refusal to impose liability under the dangerous instrumentality doctrine on the owner/lessor of a motorcycle where an employee of the lessee (who provided worker's compensation benefits) was injured by a fellow employee while operating the motorcycle. A key element of this decision was the following language:

> "On a lease for a term basis to an employer, the motorcycles in this case became, insofar as his employees were concerned, the equivalent of vehicles owned by the employer. They are, so to speak, the vehicles or working tools used in carrying on the employer's business." 182 So.2d at 424.

In a series of decisions to be discussed below, the First District has distinguished the above cited excerpt

from Smith and particularly the language, "lease for a term basis" in drawing the conclusion that where the dangerous instrumentality is not rented or leased but is merely borrowed by the employer, the equipment owner remains liable. The district court below, on facts that are identical in all pertinent respects to those in the First District decisions, held that the Smith rule applies equally to situations involving borrowed equipment, a position that is in direct conflict with the rule established by the First District. The pivotal facts of this case that demonstrate conflict are:

1. Grier was injured on the job site and was accorded worker's compensation benefits.
2. The crane involved in the accident was loaned on a courtesy basis to S&J for no consideration.
3. The sole legal means of imposing liability on Halifax was the dangerous instrumentality doctrine.

These factual determinations, which were approved by the district court, are the same as those on which the First District reached the opposite conclusion in Mann v. Pensacola Concrete Construction, Inc., 527 So.2d 279 (Fla. 1st DCA 1988). Mann also involved a job site injury that resulted from operation of a crane. Mann sued the owner of the crane on the theory that it was vicariously liable under

the dangerous instrumentality doctrine for the negligence of Mann's co-employee in operating the crane. In an earlier decision, the district court reversed a summary judgment in favor of the crane's owner and held that Mann could proceed against the owner under the dangerous instrumentality doctrine. Mann v. Pensacola Concrete Construction, Inc., 448 So.2d 1132 (Fla. 1st DCA 1984) [referred to as Mann I]. In affirming the jury's verdict on the second appeal, the court reaffirmed its position on the point of law:

> "Accordingly, we reaffirm our previous holding in Mann I that where no lease exists, a crane is not the equivalent of one owned by the borrowing employer, and the true owner of the crane will not acquire an employer's immunity under the rationale of Smith v. Ryder Truck Rentals, Inc., [182 So.2d 422 (Fla. 1966)]. We again hold, therefore, that Pensacola Concrete may be held vicariously liable, as the owner of a dangerous instrumentality, for the negligence of Mann's co-employee into whose care Pensacola Concrete committed the crane." 527 So.2d at 280

Leseur v. Leseur, 350 So.2d 796 (Fla. 1st DCA 1977) was yet another crane case. In that case the owner of the crane provided and operated the crane at the request of a relative who worked for the company that needed the crane. An employee of the borrowing company was injured and sued the crane operator for negligence. It is unclear from the opinion whether a claim was made against the operator/owner under the dangerous instrumentality doctrine, but the court

squarely held that he was not protected from suit by the worker's compensation immunity doctrine:

> "Nor does Joseph acquire an employer's immunity under the doctrine of [citing Smith v. Ryder Truck Rentals, Inc. and others], which extended immunity to the lessor of a vehicle, supplied with or without an operator employee of the lessor, to the injured person's employer. Here there was no lease, so the crane was not "equivalent" to one owned by American. Smith v. Ryder Truck Rentals, Inc., 182 So.2d at 424." [Emphasis supplied] Leseur at 797.

The language of Mann and Leseur is in sharp contrast to the controlling language from the decision below:

> "The existence vel non of a lease or compensation owed to the owner of a borrowed crane appears to us to be a distinction without significance. Good public policy based on any common concepts of morality and public interest should not prefer the mercenary over the patriot, the hired gun over the samaritan, the prostitute over the lover, or the paid lessor over the generous friend. To treat lessors and gratuitous lenders of cranes equally does not do damage to the policy enunciated by the supreme court in Smith, since members of the public continue to be protected in either case.
>
> Thus, we hold that Halifax (the indemnitee in this case) shared Scott & Jobalia's worker's compensation immunity from suit by Grier, even though its crane was borrowed on a 'handshake' basis." (A-8)

Thus, the Fifth District creates conflict that is express, direct and emphatic. The circumstances under which these decisions arose are not rare or even unusual and may be expected to occur often in a rapidly growing state with thousands of construction projects in progress at all times.

This Court should accept jurisdiction of this case to resolve this important matter.

CONCLUSION

The decision of the district court below acknowledges disagreement with a line of decisions of the First District on an important issue involving the interaction of two important doctrines of Florida law. The conflicting interpretations need to be resolved because of the importance of this issue to the construction and insurance industries in the State of Florida.

Respectfully submitted,

COBB COLE & BELL

BY _____

J. LESTER KANEY
Post Office Box 191
150 Magnolia Avenue
Daytona Beach, FL 32015
(904) 255-8171
ATTORNEYS FOR PETITIONER

LBI679
LKSZ04/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 2d day of March, 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.

Attorney