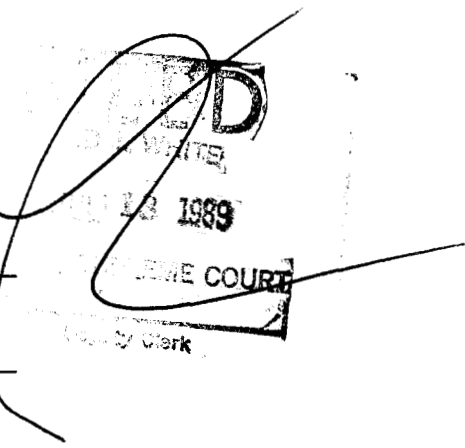


O/A 9-8-89

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 REPLY BRIEF ON THE MERITS

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DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT
COURT OF APPEAL

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SUMMARY OF ARGUMENT

Respondent's brief merely accepts at face value the questionable rationale of Smith v. Ryder Truck Rentals, Inc. and argues that it should be applied to uphold the result below. Respondent has totally failed to rebut the attack on the rationale of Smith contained in petitioner's initial brief.

Respondent argues that the dangerous instrumentality doctrine was intended to protect the public and not fellow employees who are protected by the workers' compensation law. This argument begs the question and fails to address the important issue of whether any justification exists for immunizing equipment owners, who have given no quid pro quo for their immunity, at the expense of the injured worker's right to recover.

Respondent has failed to respond to petitioner's arguments for resolving the conflict between the Fifth and First Districts in the event Smith is reaffirmed. Therefore, no further argument of those issues is required.

ARGUMENT

RESPONDENT HAS FAILED TO ADDRESS OR REBUT PETITIONER'S ARGUMENTS FOR OVERRULING SMITH V. RYDER TRUCK RENTALS, INC. OR, ALTERNATIVELY, ADOPTING THE FIRST DISTRICT'S EXCEPTION TO SMITH

Respondent's brief asks this Court to perpetuate the faulty reasoning of Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966) and has totally failed to address the changes in workers' compensation immunity subsequent to Smith which justify reexamining its premise.

Respondent accurately outlines the rationale of Smith on p. 4 of its brief but does not take issue with nor rebut the strong challenges to the rationale raised in Petitioner's initial brief. Thus, there is no rebuttal to the assertion that the contractor should indeed have a right of subrogation against an equipment lessor for benefits paid under the workers' compensation law, thereby removing the perceived inequity that formed one of the bases of the Smith decision.

Respondent also blithely accepts the statement in Smith that Section 440.11 is an exception to the rule that release of one tortfeasor does not release all others. No attempt has been made to examine that statute to determine what language Smith could possibly have been relying upon in reaching that conclusion. The fact is that there is no such language. The statute expresses an intent to extend immunity to fellow employees of the injured worker but there is no language that states or implies that the immunity extends to other tortfeasors such as equipment owners. The statutory scheme implies

exactly the opposite in expressly reserving the worker's cause of action against third parties subject to the employer's lien rights. Respondent's brief has done nothing more than paraphrase the highly questionable rationale of Smith and use that rationale to attempt to justify the result below.

Respondent has also seized on the largely irrelevant concluding language of Smith that the primary purpose of the dangerous instrumentality doctrine is for the protection of third parties and not for fellow employees protected by the workers' compensation law. The underlying premise of that statement is that the protection of the workers' compensation law is sufficient and that the workers do not need any additional rights to compensation. That premise, which silently stalks many of the older decisions in this area, is clearly a thing of the past as amply demonstrated in petitioner's initial brief. Immunity under the workers' compensation law is now bestowed as a quid pro quo for providing benefits and is not given as a fortuitous gift to bystanders because of the perception that the employer has adequately covered the worker's needs.

However, since Smith does not extend workers' compensation immunity to lessors but rather creates common law immunity, Iglesia v. Floran, 394 So.2d 994, 995-996 (1981), a serious reevaluation is in order to determine whether there is any justification in taking away the injured person's otherwise revered right to recover in order to protect an equipment lessor who has furnished no consideration and

suffered no detriment to earn the immunity. It is submitted that there is none and that Smith should therefore be overruled.

Respondent's brief has totally ignored petitioner's arguments in regard to resolution of the conflict between the decision below and the previous decisions of the First District in the event that Smith is reaffirmed. There is therefore no need to belabor those arguments here.

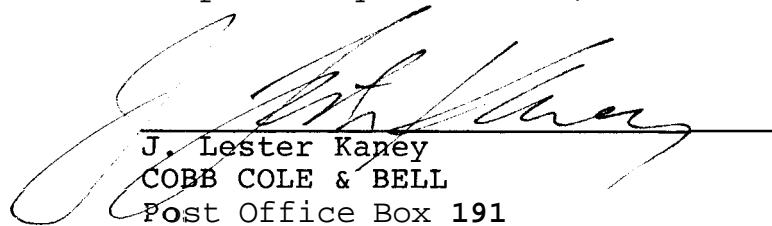
CONCLUSION

Respondent has chosen to dismiss out of hand, rather than debate, the merits of petitioner's arguments in favor of overruling Smith. It is submitted that strong reasons exist for removing the anomalous exception to the dangerous instrumentality doctrine created by Smith and it is respectfully requested that this court do so by overruling Smith.

If Smith remains, it should be recognized as a narrow exception to the otherwise strong policy of the dangerous instrumentality doctrine and limited to situations involving term leases of equipment for the reasons argued in petitioner's initial brief.

The decision of the Fifth District should be reversed and this action should be remanded with instructions to reinstate the final judgment in favor of Halifax Paving, Inc.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 12 day of July, 1989 to: Richard W. Prospect, Esquire, Post Office Box 6511, Daytona Beach, FL 32022.



Attorney