IN THE SUPREME COURT OF FLORIDA

COMMERCIAL COATINGS OF NORTHWEST FLORIDA, INC.,

Petitioner,

v.

CASE NO.: 79,488

District Court of Appeal
1st District - No. 90-1170

PENSACOLA CONCRETE CONSTRUCTION COMPANY, INC.,

Respondent.

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# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## PREFACE

For purposes of this brief, Respondent, Pensacola Concrete Construction Company, Inc., for the use and benefit of Stonewall Insurance Company, will be referred to as "Pensacola Concrete,'' Stonewall Insurance Company will be referred to as "Stonewall" and Petitioner, Commercial Coatings of Northwest Florida, Inc. will be referred to as "Commercial Coatings." Frank Randall Mann will be referred to as "Mann" and Donald Moore will be referred to as "Moore." The decision of the First District Court of Appeal in the case of Mann v. Pensacola Concrete Construction Company, Inc., 448 So.2d 1132 (Fla. 1st DCA 1984) will be referred to as "Mann I" and the First District Court of Appeal's opinion in Mann v. Pensacola Concrete Construction Company, Inc., 527 So.2d 279 (Fla. 1st DCA 1988) will be referred to as "Mann II".

## STATEMENT OF THE *CASE*

Respondent, Pensacola Concrete, adopts the Statement of the Case of Petitioner, Commercial Coatings, with the following additions.

In its opinion of February 19, 1992, the First District Court of Appeal stated that the opinion of the Fifth District Court of Appeal on the indemnity issue in Scott & Jobalia Construction Ca., Inc. v. Halifax Paving, Inc., 538 So.2d 76 (Fla. 5th DCA 1989), which was approved by the Supreme Court, turns on the fact that "since the employer's immunity extended to the crane owner, who therefore had no legal liability to the injured worker, the settlement for which the crane owner was seeking indemnity from the employer was voluntarily paid, so that a claim for common law indemnity would not arise." 17 F.L.W. at D542. (emphasis in original) The court further observed that "it is clear from the facts of the present case that the payment for which Pensacola Concrete seeks indemnity from Mann's employer, Commercial Coatings, was not voluntary, but was made pursuant to a full judicial determination of Pensacola Concrete's legal liability to Mann." Id. Finally, the court stated that "the fact that the Supreme Court, having twice declined to review the question upon which Pensacola Concrete's legal liability was determined, then later disapproved this court's rulings on that question, does not change the fact that Pensacola Concrete satisfied its judicially determined liability to Mann and thereafter commenced its suit for indemnity, to which it was entitled under the common law." Id.

The First District Court of Appeal then held that since it was judicially determined that no immunity existed with respect to Pensacola Concrete, and its legal liability was affirmed, the law of indemnity permits Pensacola Concrete to bring an action against Commercial Coatings. Id. Accordingly, the First District Court of Appeal did not feel it appropriate, under the particular circumstances of the case, to apply the Supreme Court's ruling on the immunity question in Halifax Paving to this indemnity action. It was only after these clear distinctions were outlined that the court certified the question to this Court as one of great public importance, given the unique procedural context of this case.

After the First District Court of Appeal rendered its opinion on February 19, 1992, no motion for rehearing was filed by Petitioner and no motion to stay the issuance of the mandate was filed. Accordingly, the mandate in this case issued on the same day that petitioner served its Notice to Invoke Discretionary Jurisdiction.

## STATEMENT OF THE FACTS

Respondent, Pensacola Concrete, adopts the Statement of Facts of Petitioner, Commercial Coatings, with the following additions. At the time the Amended Complaint was filed in March, 1983, on Mann's tort claims, Donald Moore, an employee of Commercial Coatings, was a named defendant. (R-5) At the time trial began, Donald Moore was a defendant. (R-80) During the direct and cross examination of Mann, Donald Moore was a defendant. (R-95)

Additionally, the deposition of Donald Moore was read into the record, (R-95) and at said deposition, Donald Moore was represented by counsel. (R-123) During the course of trial, Moore also gave live testimony, at which time Moore was represented by counsel. (R-97) During the course of trial, James Murphy, the President of Commercial Coatings, testified live at trial. (R-99) During the course of the trial, Moore was dropped as a party defendant. Nonetheless, prior to and during trial, Commercial Coatings' employee, Moore, was a party defendant.

At the conclusion of the evidence, the jury was instructed as a matter of law that Pensacola Concrete, as the owner of the crane in question, was responsible for any negligence of Moore in the operation of the crane unless it was determined that there was a lease of the crane to Commercial Coatings. (R-121) The jury was further instructed that as a matter of law, there was no defect in the crane or any negligence on the part of Pensacola Concrete which was the legal cause of the injuries sustained by Mann. (R-121) Accordingly, the jury was instructed that the issues for

its determination on the claim of Mann against Pensacola Concrete were whether Donald Moore was negligent in operating Pensacola Concrete's crane and if so whether such negligence was a legal cause of loss, injury or damage sustained by Mann. (R-121-122) There was no evidence nor any finding whatsoever as a matter of law that Pensacola Concrete was negligent in connection with Mann's accident, and instead, the jury, after hearing all testimony presented, determined that Moore was 60% negligent, Mann was 40% negligent, that the crane had not been leased, and accordingly Pensacola Concrete was vicariously liable for Mann's injuries. (R-38)

## SUMMARY OF ARGUMENT

At the time Pensacola Concrete filed its Complaint against Commercial Coatings seeking subrogation and indemnity for the judgment paid to Mann, the law in Florida was clear that Pensacola Concrete, as the owner of a crane loaned to Mann's employer, could be held liable for injuries to Mann under the dangerous instrumentality doctrine and under principles of vicarious liability. It was equally clear at that time that Pensacola Concrete had the right to sue Commercial Coatings for indemnity and subrogation on the basis that Pensacola Concrete was free from any negligence whatsoever in connection with Mann's injuries, and that said injuries were caused by the negligence of Commercial Coatings. The case of Halifax Paving, Inc. v. Scott & Jobalia Construction Co., Inc., 565 So.2d 1346 (Fla. 1990) should not alter Pensacola Concrete's right to pursue its indemnity and subrogation action. First, Halifax Paving is factually, legally and procedurally distinguishable from the present case and is therefore inapplicable. Second, Halifax Paving should not be applied retroactively to deprive Pensacola Concrete of its right to a remedy against Commercial Coatings. The First District Court of Appeal was correct in determining that Halifax Paving should not be applied to the present case, and accordingly, it is respectfully submitted that this Court should not accept jurisdiction herein.

I. GIVEN THE CLEAR FACTUAL, PROCEDURAL AND LEGAL DISTINCTIONS BETWEEN HALIFAX PAVING AND THE PRESENT CASE, IT IS CLEAR THAT THE FIRST DISTRICT COURT OF APPEAL PROPERLY REFUSED TO APPLY HALIFAX PAVING, AND PROPERLY REVERSED THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF COMMERCIAL COATINGS.

The First District Court of Appeal was correct in reversing the summary judgment entered by the trial court below given the distinct factual, procedural and legal differences between the Halifax Paving case and the present case, as well as the clear precedent governing this case at the time Pensacola Concrete's cause of action against Commercial Coatings accrued. Consequently, this Court should decline jurisdiction herein.

On the date Pensacola Concrete's cause of action against Commercial Coatings accrued, the date Pensacola Concrete paid the judgment to Mann, the law in Florida was well settled that an innocent party, who is forced to pay damages to an employee of another due to the imposition of vicarious liability, is entitled to seek indemnity from the employer whose negligence caused the underlying accident. Trail Builders Supply Co. v. Reaqan, 235 So.2d 482, 484 (Fla. 1970); Bodin Apparel, Inc. v. Superior Steam Service, Inc., 328 So.2d 533, 535 (Fla. 3rd DCA 1976); Atlantic Coast Development Corp. v. Napoleon Steel Contractors, Inc. 385 So.2d 676, 680 (Fla. 3rd DCA 1980); SunSpan Engineering and Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4, 7-8 (Fla. 1975); and L.M. Duncan & Sons, Inc. v. City of Clearwater, 478 So.2d 816 (Fla. 1985).

Similarly, the law was equally settled on the date Pensacola Concrete's cause of action accrued that where no lease of a crane exists, the crane is not the equivalent of one owned by the borrowing employer, and, therefore, the true owner of the crane does not acquire the employer's immunity from suit by an injured employee. In Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966) the Florida Supreme Court found that the provision of the Workers' Compensation Act limiting the liability of an employer to payment of Workers' Compensation did not extend to the lessor of a dangerous instrumentality unless the lease was supported by valuable consideration.

In Smith, the plaintiff and a co-employee were involved in an accident while operating motorcycles for their employer. Id. at 423. Ryder, the owner of the motorcycles, had leased them to the plaintiff's employer. Id. The trial court entered summary final judgment in favor of Ryder, a judgment which was affirmed by the Third District Court of Appeal and subsequently by the Florida Supreme Court. Id.

At trial and on appeal, the plaintiff argued that the Workers' Compensation Act limiting the liability of an employer to payment of workers compensation did not extend to Ryder, the lessor of the motorcycles, and that Ryder, as lessor, was a tort-feasor subject to an employee's suit for injuries. Id. In rejecting these contentions, this Court specifically found that on a lease for term basis to the employer, the motorcycles became, insofar as the employees were concerned, the equivalent of

vehicles owned by the employer. Id. at 424. Accordingly, the lessor shared the same immunity as the plaintiff's employer. Id.

Cases decided subsequent to Smith v. Ryder Truck Rentals, Inc. firmly established that an owner of a dangerous instrumentality who leases the dangerous instrumentality to an employer for valuable consideration enjoys the same immunity as the employer, while owners who simply loan such an instrumentality to an employer do not share such immunity. In LeSuer v. LeSuer, 357 So.2nd 796 (Fla. 1st DCA 1977), overruled 565 So.2d 1346 (Fla. 1990), the First District Court of Appeal held that the owners of a crane were not immune from liability. Id. at 796. In LeSuer, the crane had been loaned to the plaintiff's employer as a result of a family relationship. Because there was no lease of the crane, so as to render the crane the "equivalent" of one owned by the employer, the crane owner did not enjoy immunity. Id. at 797. See also Iglesia v. Floran, 394 So.2d 994 (Fla. 1981), (the owner of a rental vehicle leased by an employer who has paid workers' compensation benefits enjoys immunity from suit by an injured party); Jackson v. Marine Terminals, Inc., 422 So.2d 882 (Fla. 3rd DCA 1982) (the owner of a dangerous instrumentality is not liable to a worker injured by a fellow worker and compensated under the Longshoreman's and Harbor Workers' Compensation Act where the injured worker's employer had tendered valuable consideration for the use of the offending instrumentality.)

In the underlying cases of Frank Randall Mann v. Pensacola Concrete Construction Company, Inc. (Mann I and Mann II), the

First District Court of Appeal twice upheld the principles set forth in Smith, LeSuer, Iglesia and Jackson and specifically found that because the crane at issue was loaned to Commercial Coatings without consideration, Pensacola Concrete did not enjoy the Workers' Compensation immunity afforded to Mann's employer, Commercial Coatings. In Mann I, the Court held that "as was the case in LeSuer ...here there was no lease, so the crane was not the 'equivalent' to one owned by Commercial Coatings. Accordingly, the Smith immunity does not extend to Pensacola Concrete.... " Mann I, 448 So.2d 1132, 1134 (Fla. 1st DCA 1984), pet. rev. denied 461 So.2d 115 (Fla. 1984), overruled 565 So.2d 1346 (Fla. 1990). In Mann II the First District Court of Appeal similarly held:

> 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...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.

Mann 11, 527 So.2d 279, 280 (Fla. 1st DCA 1988), pet. rev. denied 534 So.2d 400 (Fla. 1988), overruled 565 So.2d 1346 (Fla. 1990). Pensacola Concrete filed petitions for review with this Court with respect to both decisions. On both occasions, this Court denied the petitions. Mann I, pet. for rev. denied, 461 So.2d 115 (Fla. 1984) and Mann 11, pet. for rev. denied, 534 So.2d 400 (Fla. 1988).

At the time Pensacola Concrete's causes of action against Commercial Coatings for indemnity and subrogation arose, the law

in Florida was undisputed that the non-negligent owner of a dangerous instrumentality did not enjoy immunity from liability under the Workers' Compensation law when the instrumentality was not leased for valuable consideration. Similarly, such an innocent, vicariously liable owner was entitled to sue the employer of the injured party for indemnity and/or subrogation. At the time Pensacola Concrete filed its indemnity action against Commercial Coatings, this law was still in effect. Accordingly, such is the law which should be applied in this case. The recent decision of Halifax Paving, Inc. v. Scott & Jobalia Construction Co., Inc., 565 So.2d 1346 (Fla. 1990), which the First District Court of Appeal herein held to be factually, procedurally and legally distinguishable, should not provide a different result.

In Halifax Paving, Scott & Jobalia borrowed a crane and its operator from Halifax Paving. While the crane was in operation, one of Scott & Jobalia's employees was injured. Scott & Jobalia Construction Company v. Halifax Paving, Inc., 538 So.2d 76, **77-78** (Fla. **5th DCA** 1989), aff'd 565 So.2d 1346 (Fla. 1990). Scott & Jobalia's employee recovered Workers' Compensation payments from Scott & Jobalia and then filed suit against Halifax Paving as owner of the crane. Id. at 78. After suit was filed, Halifax Paving voluntarily settled the lawsuit by paying the employee **$67,500.00**. Id. Halifax Paving then brought suit against Scott & Jobalia for common law indemnity. The jury returned a verdict against Scott & Jobalia and in favor of Halifax Paving, finding that Scott & Jobalia was negligent in causing the employee's

injuries. Id.

On appeal, the Fifth District Court of Appeal reversed the trial court, finding that the overlay of Florida case law interpreting Florida Statutes on this subject gave Halifax Paving a shared immunity with the statutory employer so as to make its payment or settlement with the employee a voluntary rather than a legal liability. Id. at 80-82. If there was not a legally imposed liability, common law indemnity would not arise. Id. The Fifth District Court of Appeal then went on to secondarily hold that the existence vel non of a lease for compensation with the owner of a borrowed crane appeared to be a distinction without significance and, accordingly, Halifax Paving enjoyed the same Workers' Compensation immunity as Scott & Jobalia. Id. at 82.

Subsequently, this Court accepted a petition for review based on the express and direct conflict between Scott & Jobalia and Mann I and Mann 11. The Supreme Court proceeded to approve the decision of the Fifth District Court of Appeal and expressly disapproved and overruled the opinions of the First District Court of Appeal in Mann I, Mann II and LeSuer. Halifax Paving, 565 So.2d at 1348. Accordingly, in Halifax Paving this Court substantially changed the immunity law, thereby deviating from the principles it expressed in Smith and Iglesia, as well as those principles expressed by the First District Court of Appeal in Mann I, Mann II and LeSuer and by the Third District Court of Appeal in Jackson.

As recognized by the First District Court of Appeal below, however, Halifax Paving is distinguishable from the present case and consequently its application should be limited to its unique facts. In Halifax Paving, Halifax Paving had voluntarily settled with the injured employee prior to any jury determination of liability or prior to entry of a judgment thereon. No legal liability was ever imposed on Halifax Paving by a court or by a jury, and thus its settlement with the employee was purely voluntary. As expressly noted by the First District Court of Appeal in the present case, Pensacola Concrete initially filed a motion for summary judgment prior to trial, prevailed on that motion, suffered a reversal of that summary judgment before the First District Court of Appeal on the basis that it did not enjoy immunity (Mann I), filed a petition for review to this Court of that reversal, which was denied, tried the case to an adverse judgment in March, 1987, filed a cross-appeal of that judgment to the First District Court of Appeal, again attempting to invoke the Workers' Compensation immunity enjoyed by Mann's employer (Mann II), and, upon suffering an adverse decision on the cross appeal (Mann 11), filed a petition for review with this Court which was again denied. It was only after vigorously contesting and debating the issue of its liability for many years that Pensacola Concrete paid the judgment to Mann, an act which was not a voluntary act, but instead an act that was compelled by a jury's finding of a legal liability. These factual, procedural and legal differences are the precise bases of the First District Court of

Appeal's holding in the present case.

In Pensacola Concrete Construction Co., Inc. v. Commercial Coatings of Northwest Florida, Inc., 17 FLW D541 (Fla. 1st DCA, February 19, 1992) the First District Court of Appeal reversed the trial court's entry of a summary judgment in favor of Commercial Coatings. Specifically, the First District Court of Appeal noted and held:

> The opinion of the Fifth District Court of Appeal on the indemnity issue in Halifax, which was approved by the Supreme Court, appears to turn on the fact that since the employer's immunity extends to the crane owner, who therefor had no legal liability to the injured worker, the settlement for which the crane owner was seeking indemnity from the employer **was** voluntarily paid, so that a claim for common law indemnity would not arise. It is clear from the facts of this case that the payment for which Pensacola Concrete seeks indemnity from Mann's employer, Commercial Coatings, was not voluntary but was made pursuant to a full judicial determination of Pensacola Concrete's legal liability to Mann. The fact that the Supreme Court, having twice declined to review the question upon which Pensacola Concrete's legal liability was determined, later disapproved this court's rulings on that question, does not change the fact that Pensacola Concrete satisfied its judicially determined liability to Mann and thereafter commenced its suit for indemnity, to which it **was** entitled under the common law. While the Supreme Court's ruling in Halifax, had it been applied to Mann I or Mann 11, would have insulated Pensacola Concrete from liability, it did nothing to affect the law of indemnity. The vicarious liability of the owner of the dangerous instrumentality, absent the owner's active negligence, can still be visited on the active tort-feasor. Halifax does not create a defense to common law indemnity or an immunity from common law indemnity. It creates an immunity from vicarious liability. Since it was determined judicially in this case that no immunity existed and the legal liability was affirmed, the law of indemnity permits Pensacola Concrete to bring its action against Commercial Coatings."

Id. at D542 (emphasis in original).

Accordingly, the First District Court of Appeal found it inappropriate to apply this Court's ruling in Halifax Paving to the present case. Similarly, this Court should not apply the Halifax Paving decision to the present case given the distinct factual, legal and procedural differences between Halifax and Pensacola Concrete.

Contrary to Commercial Coatings' argument, to restrict Halifax Paving to its facts does not create havoc in the judicial system or create any inequities; it simply limits application of Halifax Paving to the situation where a dangerous instrumentality owner has settled with an employee, as opposed to the situation where an innocent crane owner has suffered a legal liability. Additionally, the First District Court of Appeal did not limit Halifax Paving to a prospective application in regard to only these two parties; the District Court of Appeal found that the facts of Halifax Paving were markedly different than the facts of the present case, and accordingly it was not controlling. Therefore, there was no abuse of discretion on the part of the First District Court of Appeal by a selective application of its ruling. Pensacola Concrete did not voluntarily settle with Mann; instead it satisfied a legally imposed liability. Because such legal liability was imposed, Pensacola Concrete is entitled to pursue a claim for indemnity against Commercial Coatings.

Although certified questions from a District Court of Appeal operate to confer jurisdiction of the case upon the Supreme Court, it is not mandatory that the Supreme Court answer them when the

Supreme Court finds them inapplicable to the case. Cleveland v. City of Miami, 263 So.2d 573 (Fla. 1972). Accordingly, in Cleveland, because the Supreme Court found under the facts of the case that a particular Florida statutory section was not applicable as a matter of law, as held by the District Court of Appeal, there was no need to answer the certified question. Id. at 576. Similarly, as the First District Court of Appeal herein found that the Halifax Paving decision was factually and legally distinguishable, and accordingly not applicable as a matter of law, this Court need not answer the certified question which was premised solely upon the procedural history of this case.

It is also Pensacola Concrete's contention that should this Court determine the Halifax Paving decision is controlling herein, which is vigorously denied, it nonetheless should not be applied retroactively to deprive Pensacola Concrete of a right to seek indemnity against Commercial Coatings. When the cases pertaining to retroactivity are examined, particularly in light of the policy underlying said decisions, it is apparent that the Halifax Paving case should not be applied retroactively so as to deny Pensacola Concrete its right of access to the courts.

In International Studio Apartment Association v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982), pet. rev. denied 430 So.2d 451 (Fla. 1983), cert. denied, 464 U.S. 895 (1983), the Fourth District Court of Appeal adopted the seminal case of Chevron Oil Company V. Huson, 404 U.S. 97 (1971), which promulgated a three-pronged test to determine whether a judicial decision should

have retroactive effect. The Huson Court stated:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear, past precedent on which litigants may have relied [citations omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citations omitted]. Second, it has been stressed that we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. [citations omitted]. Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial, inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice' or 'hardship' by a holding of non-retroactivity. [citations omitted].

404 U.S. at 106-107. The Huson Court went on to note that statutory or even judge made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins the modern decisions recognized in the doctrine of non-retroactivity. Id. at 109. Using this test, the Lockwood court then declined to apply a decision retroactively.

Where a statute has received a given construction by a Court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944). Based upon a recognition of this common sense exception to this rule, some of the Courts have gone so far as to adopt the view that the rights, positions, and courses of actions of parties who have acted in conformity with, and in reliance upon, the

construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by subsequent decision of the same court overruling its former decision. Id. Accordingly, such courts have given to such overruling decisions a prospective operation only, in the same manner as though the new construction had been added to the statute by Legislative amendment. Id.

In Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied 449 U.S. 1067 (1980), this Court was faced with the issue of whether a convicted felon had the right to obtain the benefits of subsequent, favorable case law developments relating to capital punishment and to criminal law generally. Id. at 924. Simply stated, this Court was confronted with a threshold decision as to when a change of decisional law mandates a reversal of a once valid conviction and sentence of death. Id. According to the Witt Court, the essential considerations in determining whether a new rule of law should be applied retroactively are essentially: "a) the purpose to be served by the new rules; b) the extent of reliance on the old rule; and c) the effect on the administration of justice of a retroactive application of the new rule." Id. at 926. Using this analysis, this Court refused to retroactively apply the new rules of or changes in the law. Id. at 931.

Applying both these federal and state tests, it is clear that in addition to the fact that Halifax Paving is clearly distinguishable, all factors mandating prospective application of

Halifax Pavknq are present herein. First, this Court's decision in Halifax Paving either clearly overruled clear past precedent on which Pensacola Concrete not only relied but by which it was governed, or, at a minimum, established a ruling of first impression whose resolution was not clearly foreshadowed, but in fact represented a reversal in trend. Halifax Paving broadened the Smith v. Ryder Truck Rental decision to afford immunity not only to those who lease a crane for consideration, but also to those that lend a crane without consideration. Additionally, Halifax Paving clearly overruled Mann I, Mann 11, and LeSuer, the clearly established precedent in the First District Court of Appeal. There was no evolution of Florida case law leading to this Court's decision in Halifax Paving; instead this Court retreated from its prior position and chose to adopt the reasoning of one District Court of Appeal over another. In fact, this Court expressly acknowledged in the Halifax Paving case that it was retreating from its prior position in Employers Insurance of Wausau v. Abernathy, 442 So.2d 953 (Fla. 1983), a case which limited instead of broadened the scope of Workers' Compensation immunity. Accordingly, the first prong of the Huson test is met in the present case.

Contrary to Petitioner's assertions, the fact that the First District Court of Appeal may have wrongly interpreted Smith v. Ryder Truck Rentals, should not work an injustice on Pensacola Concrete in this case. To apply Halifax Paving herein, given the procedural context, the facts, and the history of this case, would

clearly work an injustice on Pensacola Concrete. To apply Halifax Paving would deprive Pensacola Concrete of all access to any court simply because it was ultimately determined by this Court that the First District Court of Appeal made a mistake. Such a result is manifest injustice.

The second element of Huson's test for prospectivity is also met in the present case. When the Halifax Paving decision is examined closely, it is clear that a retrospective operation will retard its stated purpose. In Halifax Paving, this Court noted that the central policy of Workers' Compensation is to provide employees with a swift and adequate means of compensation for injury, and to insulate employers from potentially bankrupting tort liability for work place accidents. 565 So.2d at 1347. Additionally, this Court pointed out that the third-party, "the crane owner", in no logical sense contributed to the work place injury that actually occurred and in both logic and fairness, the injury in Halifax Paving and the injury in Smith were work place injuries occurring as a result of a dangerous instrumentality in the control of the employer. Id. at 1348. If the policy of Halifax Paving and Smith is to protect innocent owners of dangerous instrumentalities from liability, such a purpose will not be furthered if Halifax Paving is deemed controlling and is applied retroactively herein.

Finally, the third Huson factor, and perhaps the most important factor, strongly mandates a prospective application of Halifax Paving. If Halifax Paving is deemed applicable and

applied retroactively, it will produce substantial and inequitable results, a fact conceded by Commercial Coatings at the hearing on the motions for summary judgment. (TR-29) To apply Halifax Paving retroactively would force Pensacola Concrete to go without a remedy with respect to a judgment for which, if Halifax Paving is controlling, it should never have been responsible in the first place.

Retroactive application of Halifax Paving will also deprive Pensacola Concrete of its right to access to the Courts. Pensacola Concrete took every possible, conceivable step to challenge its vicarious liability as the owner of a dangerous instrumentality in this case and was defeated at every step of the way. Pensacola Concrete cannot now go back to Mann and demand reimbursement of the sums paid on the basis that the law was wrong; Commercial Coatings likewise should not receive a windfall and avoid liability due to a change in the law.

Commercial Coatings tries to tip the equities balance in its favor by arguing that "at least Pensacola Concrete had its day in Court" and had "two bites at the apple", while Commercial Coatings will never have the opportunity to raise its Workers' Compensation immunity if Halifax Paving is not applied to the present case. This argument simply cannot be accepted as Commercial Coatings will still have available every other defense it would have in a normal indemnity action; it simply will not have the absolute Workers' Compensation immunity defense.

Commercial Coatings argument that Pensacola Concrete could have brought Commercial Coatings in to the underlying litigation as a third-party at any time during the pendency of Mann I and Mann II merits little discussion. Pursuant to the Rules of Civil Procedure, as well as established principles of law, Pensacola Concrete was not obligated to bring Commercial Coatings in as a third-party and could instead sue Commercial Coatings for indemnity at any time within one year following the payment of the judgment. Commercial Coatings' argument that it was then denied the opportunity to present arguments to the First District Court of Appeal on the issue of Workers' Compensation immunity is purely speculative; Pensacola Concrete strenuously argued the issue of Workers' Compensation immunity before the First District Court of Appeal and before this Court on two separate occasions, to no avail. For Commercial Coatings to argue it could have brought about a different result is nothing short of presumptuous.

Finally, Petitioner cites a number of cases in its brief noting that this Court has not hesitated in the past to limit its decisions to a prospective application if the situation warranted. Petitioner cites the cases of Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), ITT Community Development Carp. v. Seay, 347 So.2d 1024 (Fla. 1977), Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973), Aldana v. Holub, 381 So.2d 231 (Fla. 1980) and Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991), in which this Court provided for a prospective application of its rulings. A simple review of these cases

indicates that each is distinguishable from the present case. All of these cases involved decisions which, if applied retroactively, would have created voluminous administrative difficulties across the state. These administrative problems are simply not present herein in that the First District Court of Appeal's opinion would clearly be limited to the same factual situation as is present herein: the owner of a dangerous instrumentality has the right to seek indemnity from a negligent employer after suffering an adverse jury verdict, which was upheld on appeal. Therefore, Commercial Coatings' cited cases are inapposite.

It cannot be seriously argued that Commercial Coatings suffers a greater injustice by application of the First District Court of Appeal's ruling. Commercial Coatings has not been denied its day in court; it is simply being denied an absolute defense which would preclude Pensacola Concrete from ever seeking any redress for the liability imposed upon it. When the equities are weighed, they clearly fall in favor of Pensacola Concrete. When these equities are coupled with the clear factual, procedural and legal distinctions between Halifax Paving and the present case, it is clear that the First District Court of Appeal's per curiam opinion is correct. It is therefore respectfully submitted that this Court should decline to accept jurisdiction herein.

## CONCLUSION

Based upon the express distinctions between Halifax Paving and the present case, the First District Court of Appeal correctly reversed the trial court's entry of summary judgment in favor of Petitioner. Consequently, Pensacola Concrete respectfully requests that this Court decline to accept jurisdiction herein, thereby approving the decision of the First District Court of Appeal below.

Respectfully submitted,

BY: 
KATHRYN E. ERRINGTON
Florida Bar No.: 0650366

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to Larry Hill, Attorney for Petitioner, 9th Floor - Sun Bank Tower, 220 W. Garden Street, Post Office Box 1792, Pensacola, Florida 32598-1792, by hand delivery on this 30th day of April, 1992.

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