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IN THE SUPREME COURT OF FLORIDA

COMMERCIAL COATINGS OF NORTHWEST  
FLORIDA, INC.,

Petitioner,

vs.

Case No. 79,488

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

PENSACOLA CONCRETE CONSTRUCTION  
COMPANY, INC.,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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## PREFACE

For purposes of this brief, Respondent will be referred to as "Pensacola Concrete" or "Stonewall" and Petitioner 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 reference to the First District Court's opinion in Mann v. Pensacola Concrete Construction Company, Inc., 527 So.2d 279 (Fla. 1st DCA 1988) will be as "**Mann II.**"

References to the Record on Appeal will be denoted as (R-\_\_\_\_) and references to the Transcript of the Hearing held on March 14, 1991, as (TR-\_\_\_\_).

## STATEMENT OF THE CASE

On September 29, 1989, Pensacola Concrete for the use and benefit of Stonewall filed a Complaint against Commercial Coatings alleging that Pensacola Concrete was entitled to common law indemnity from Commercial Coatings for the sum of \$1,073,391.78, together with interest, attorneys' fees **and** costs, in connection with a judgment paid by Stonewall to Mann in the case of Frank Randall Mann v. Pensacola Concrete, Case No. 82-2287, Circuit Court of Escambia County, Florida. (R-1). Pensacola Concrete's Complaint sought indemnity against Commercial Coatings on the basis that Pensacola Concrete was free from any negligence in connection with Mann's accident, and that said accident was caused by the negligence of Commercial Coatings and its employees. (R-1-2). Additionally, the Complaint sought indemnity from Commercial Coatings on the basis that Pensacola Concrete's liability for the injuries to Mann arose solely out of Pensacola Concrete's ownership of a crane involved in said accident because, pursuant to the laws of the State of Florida, a crane is considered to be a dangerous instrumentality. (R-4). Pensacola Concrete alleged that since it was not actively negligent in the operation of or in the supervision of the operation of the crane, its liability was purely constructive, derivative, technical or vicarious, and accordingly, Pensacola Concrete **was** entitled to indemnity for the amounts paid. (R-4).

An Answer was filed on behalf of Commercial Coatings on

**March** 5, 1990, (R-27) and thereafter, a Reply to the Affirmative Defenses set forth by Commercial Coatings **was** filed on March 9, 1990. (R-29). On January **8**, 1991, Pensacola Concrete filed a Motion for Summary Judgment, with supporting affidavits and exhibits. (R-31; R-38; R-46; R-76; R-78; R-80; R-123). On February 5, 1991, Commercial Coatings filed a Motion far Summary Judgment on the basis that workers' compensation was the exclusive remedy for an employee who was injured in an accident involving a crane that **was** informally borrowed. (R-44).

A hearing on the two Motions for Summary Judgment **was** held before the Honorable William H. Anderson on March 14, 1991. (TR-1). On March 15, 1991, Judge Anderson entered an Order and Final Summary Judgment granting Commercial Coatings' Motion for Summary Judgment. (R-154; R-155). A timely appeal was filed on April 10, 1991, by Pensacola Concrete. (R-156).

After briefs and oral argument, the First District Court of Appeal rendered the Opinion of February 19, 1992, certifying the question as one of great public importance and forming the basis for this petition to invoke discretionary jurisdiction. **The** Notice to Invoke Discretionary Jurisdiction was served on March 6, 1992, and this Court's Order Postponing Decision on Jurisdiction and Briefing Schedule was rendered on March 12, 1992.

### STATEMENT OF THE FACTS

In June, 1981, pursuant to an oral agreement between Pensacola Concrete and Commercial Coatings, Commercial Coatings leased or borrowed a crane owned by Pensacola Concrete for use on Commercial Coatings' job site in Escambia County, Florida. (R-1). On June 6, 1981, Moore, an employee of Commercial Coatings, who **was** at all times acting within the course and scope of his employment with Commercial Coatings, was operating the crane at Commercial Coatings job site when Mann, another employee of Commercial Coatings, was seriously injured. (R-1; R-80; R-123).

In March, 1983, Mann filed an Amended Complaint against Pensacola Concrete and other defendants, including Donald Moore, for the injuries he sustained on June 6, 1981. (R-5). On April 26, 1983, the Honorable M. C. Blanchard granted a Motion for Summary Judgment filed by Pensacola Concrete on the basis that Pensacola Concrete, as lessor of the crane, enjoyed the workers' compensation immunity afforded to an employer. (See Mann v. Pensacola Concrete Construction Co., Inc., 448 So.2d 1132, 1134 (Fla. 1st DCA 1984) (Mann I)). Additionally, the Trial Court found that there was no evidence of negligence on the part of Pensacola Concrete, nor was there any evidence that the crane was defective. (448 So.2d at 1134) (Mann I). This Final Summary Judgment was reversed on appeal by the First District Court of **Appeal** in Mann I, on the basis that, because there was no lease of the crane to Commercial Coatings, the crane was not the equivalent of one owned

by Commercial Coatings, and the workers' compensation immunity of Smith v. Ryder Truck Rentals, Inc. did not extend to Pensacola Concrete. (Mann I, 448 So.2d at 1134). The First District Court of Appeal affirmed the trial court's holding that there was an absence of negligence on the part of Pensacola Concrete, but then found the Amended Complaint sufficiently raised the issue of vicarious liability predicated on the dangerous instrumentality doctrine, an issue which had not been passed upon by the trial court. (448 So.2d at 1135). A Petition for Review of this decision was denied by the Florida Supreme Court at 461 So.2d 115 (Fla. 1984).

On March 5, 1987, the jury returned a verdict in favor of Mann against Pensacola Concrete in the amount of \$2,000,000, reduced to \$1,200,000 due to Mann's 40% comparative negligence. (R-7-8). Additionally, the jury did not find any negligence on the part of Pensacola Concrete, (R-7-8); and, in fact, there was no evidence presented that Pensacola Concrete was negligent. (R-121). Instead, the jury found that the negligent acts of Mann and the negligence of Commercial coatings' employee Moore were the sole causes of the injuries to Mann. (R-7-8). Because Pensacola Concrete was the owner of the subject crane, and because a crane is considered to be a dangerous instrumentality, Pensacola Concrete's liability for the injuries to Mann arose solely out of Pensacola Concrete's ownership of the crane.

One of the issues which was vigorously contested at trial was whether Commercial Coatings borrowed or leased the crane for

consideration. The jury made an express finding that the crane was not leased for valuable consideration from Pensacola Concrete. (R-7).

The jury verdict of March, 1987, was appealed to the First District Court of Appeal and was affirmed. In Mann v. Pensacola Concrete Construction Company, Inc., 527 So.2d 279 (Fla. 1st DCA 1988) (Mann 11), the First District Court determined that Commercial Coatings did not lease the crane for valuable consideration, and accordingly, under the case of Smith v. Ryder Truck Rentals, Inc., 182 So.2d 421 (Fla. 1966), Pensacola Concrete did not enjoy workers' compensation immunity from liability for Mann's injuries. Mann 11, 527 So.2d at 280.

Pensacola Concrete filed a Petition for Review with the Florida Supreme Court. Said Petition for Review was denied at 534 So.2d 400 (Fla. 1988).

On October 13, 1988, Stonewall paid the sum of \$1,073,391.78 to Mann on behalf of its insured, Pensacola Concrete, pursuant to its policy of insurance covering Pensacola Concrete. (R-47). USF&G, Pensacola Concrete's primary insurance carrier, paid to Mann the initial sum of \$371,300.97 representing USF&G's policy limits of \$300,000 plus its **share** of costs and interest. The amount paid by Stonewall represents the balance of the amount **owed** to Mann by Pensacola Concrete pursuant to the jury verdict, plus its share of costs and interest. (R-47).

Commercial Coatings was not a party to either Mann I or Mann II or the jury trial culminating in the decision of the First

District Court of Appeal in Mann II; indeed, neither Commercial Coatings nor Commercial Coatings' employee Moore was a party at the time of the jury's verdict awarding \$2,000,000 and finding Moore 60% at fault and Mann 40% at fault. (R-7-8). The style on the verdict form (R-7) and the style on the Final Judgment (R-9) show only Pensacola Concrete Construction Company, Inc. and United States Fidelity & Guaranty as defendants.

This case is controlled by the decision of this Court in the **case** of Halifax Paving, Inc. v. Scott & Jobalia Construction Co., Inc., 565 So.2d 1346 (Fla. 1990), holding that the exclusive remedy is workers' compensation where the injury was a work place injury occurring as a result of a "dangerous instrumentality in the control of the employer." Id. at 1348. Such was clearly the case herein **and** the Trial Court was correct in entering summary judgment on the basis of the exclusivity of the Workers' Compensation Statute.

The general rule recognized in Florida is that a decision of the court of last resort is retrospective as well as prospective in its operation unless specifically declared by the opinion to have a prospective effect **only**. Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944). In the **Halifax case**, this Court did not state that **its** opinion would have prospective application only. Rather, this Court noted that its decision, to the extent of any conflict with Mann I, Mann II and LeSuer v. LeSuer, 350 So.2d 796 (Fla. First DCA 1977), specifically disapproved those three opinions of the First District. Id. at 1348. Accordingly, the Trial Court's order and judgment granting Commercial Coatings' Motion for Summary Judgment should have been affirmed **by** the First District Court of Appeal, which instead **refused** to apply this Court's decision in Halifax. It is respectfully submitted that this Court should accept jurisdiction,

reverse the decision of the First District Court of Appeal and  
reinstate that of the Trial Court granting Summary Judgment to  
Commercial Coatings.

## ARGUMENT

THE TRIAL COURT WAS CORRECT IN GRANTING THE SUMMARY JUDGMENT MOTION FILED BY COMMERCIAL COATINGS ON THE BASIS OF THE SUPREME COURT DECISION IN HALIFAX AND THE FIRST DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT AND REFUSING TO APPLY HALIFAX TO THESE PARTIES.

It is uncontested that Sunspan Engineering and Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4 (Fla. 1975) and L.M. Duncan & Sons, Inc. v. City of Clearwater, 478 So.2d 816 (Fla. 1985) hold that an employer may be held liable for indemnity to a third party tortfeasor in the appropriate situations such as constructive, derivative, technical or vicarious liability. The issue to be decided in this case by the Trial Court below was not whether Pensacola Concrete enjoyed workers' compensation immunity, but whether Commercial Coatings enjoys workers' compensation immunity, as alleged in its affirmative defense and in its Motion for Summary Judgment, based upon this Court's decision in Halifax. It is undisputed that, at the time Pensacola Concrete paid Mann pursuant to the jury verdict and the final judgment, the only Supreme Court decision on the issue involving a leased crane as a dangerous instrumentality **was** Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966). The First District Court of Appeal had decided LeSuer v. LeSuer, Mann I and Mann II at the time that Stonewall paid the judgment on or about October 13, 1988. (R-3) However, by the time Pensacola Concrete filed the Complaint in the underlying action on September 29, 1989 (R-4), the Fifth

District Court of Appeal had already decided the case of Scott & Jobalia Construction Co., Inc. v. Halifax Paving, Inc., 538 So.2d 76 (Fla. 5th DCA 1989), which was decided February 2, 1989. It held that this Court's decision in Smith v. Ryder Truck Rentals applied in the case of a loaned crane as well **as** in the case of a leased crane, specifically disagreeing with Mann I, Mann 11, and LeSuer. Id. at 81. The Fifth District Court of Appeal stated at page **82** of its decision the following:

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 "hand shake" basis. Therefore, common law indemnity does not lie in this case, since the indemnitee owed no legal obligation to Grier. However, we note and acknowledge that this result is in conflict with Mann v. Pensacola and LeSuer.

Relying on the Fifth District Court of Appeal's decision in Scott & Jobalia, Commercial Coatings filed its answer asserting the affirmative defense of workers' compensation immunity on March 5, 1990. (R-27-28) This Court then agreed with the Fifth District

Court of Appeal in the Halifax v. Scott & Jobalia case decided July 26, 1990, and Commercial Coatings moved on February 5, 1992, for summary judgment on the basis of this Court's decision in Halifax.

(R-44) The Trial Court then correctly denied Pensacola Concrete's Motion for Summary Judgment and granted Commercial Coatings' Motion for Summary Judgment on March 15, 1991. (R-154)

Despite the fact that the First District Court of Appeal twice held that because the crane was loaned to Commercial Coatings without consideration, Pensacola Concrete did not enjoy workers' compensation immunity in Mann I and Mann II, and, despite the fact that this Court refused to grant petitions for review in Mann I and Mann II, this Court now has spoken on whether or not the rationale of Smith v. Ryder Truck Rentals applies in the situation of a loaned dangerous instrumentality as well as in the situation of a leased dangerous instrumentality. Halifax Pavinu, Inc. v. Scott & Jobalia Construction Company, 565 So.2d 1346 (Fla. 1990). This Court in Halifax agreed with the Fifth District Court of Appeal that the only differences between the facts in Halifax and the facts in Smith v. Ryder Truck Rentals were not sufficient to justify a different result than in Smith. Those differences, as noted by this Court, were "that the dangerous instrumentality in this instance was informally borrowed, not leased, and the operator of this instrumentality **was** a borrowed servant, not a fellow servant." 565 So.2d at 1347.

This Court in Halifax finally noted as follows at page 1348:

For the foregoing reasons, the opinion of the Fifth District Court is approved. To the extent of any conflict with this opinion, we disapprove the opinions of the First District in Mann v. Pensacola Concrete Construction Co., Inc., 527 So.2d 279 (Fla. 1st DCA) rev. den., 534 So.2d 400 (Fla. 1988); Mann v. Pensacola Concrete Construction Co., Inc., 448 So.2d 1132 (Fla. 1st DCA), rev. den., 461 So.2d 115 (Fla. 1984) and LeSuer v. LeSuer, 350 So.2d 796 (Fla. 1st DCA 1977).

This Court agreed with the Fifth District Court of Appeal regarding the central rationale of Smith being "that leased equipment used on a job site in effect has become the working tool of the employer." Id. at 1347. The Fifth District Court of Appeal noted in its decision that this Court in Smith v. Ryder Truck Rentals approved of the "latent, though unexpressed" rationale that "the thought that vicarious liability founded on the doctrines of dangerous instrumentality and respondeat superior is primarily for the protection of third party members of the public, rather than injuries sustained by fellow employees under workmen's compensation from negligence inter se". 538 So. 2d at 81.

Thus, it is clear that this Court, in deciding Halifax v. Scott & Jobalia, did not change the law of the State of Florida from that enunciated in Smith v. Ryder Truck Rentals, but rather agreed with the Fifth District Court of Appeal that the rationale of Smith should apply to a loaned crane as well as a leased crane and that the First District Court of Appeal **had** wrongly interpreted Smith v. Ryder Truck Rentals in Mann I, Mann II. and LeSuer. The fact that the First District Court of Appeal had wrongly interpreted this Court's ruling in Smith v. Ryder Truck

Rentals should not work an injustice on Commercial Coatings in this case and the Trial Court was correct in granting summary judgment to Commercial Coatings based upon this Court's enunciation of the law of the State of Florida on this precise issue.

Pensacola Concrete has argued that the Halifax opinion of this Court should not be applied to this case for two reasons: (1) Halifax settled with the injured party rather than paying a jury verdict, therefore not having a legally imposed liability; (2) Halifax should not be applied retroactively to deprive Pensacola Concrete of a right to seek indemnity against Commercial Coatings.

The first distinction is one that should make no difference in this case. Commercial Coatings is claiming workers' compensation immunity as granted by the Workers' Compensation Statute **and** interpreted under Smith v. Ryder Truck Rentals and Halifax v. Scott & Jobalia. Whether Pensacola Concrete had paid Mann as a volunteer in a settlement or had paid pursuant to a jury's verdict which was erroneously affirmed on appeal in Mann II should not affect Commercial Coatings' workers' compensation immunity in this case. In order to recover indemnity from another, one must first discharge an obligation of the party from whom indemnity is sought. Under Halifax, Commercial Coatings had no such obligation which was discharged by Pensacola Concrete. Pensacola Concrete merely discharged its own obligation to Mann which arose from its inability to convince the First District Court of the correctness of its position on workers' compensation immunity. At least Pensacola Concrete had two chances on appeal,

Mann I and Mann 11, to try to convince the First District Court of Appeal to apply the rationale of Smith v. Ryder Truck Rentals to a loaned crane situation. Commercial Coatings had not had such opportunity until its Motion for Summary Judgment was heard by the Trial Court herein.

The second argument posited by Pensacola Concrete for not applying Halifax to this case is that it should not be applied retroactively to defeat Pensacola Concrete's right to seek indemnity against Commercial Coatings. Pensacola Concrete has argued that Halifax is a totally new principal of law. Specifically, Pensacola Concrete has relied on Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944), for the proposition that 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. Such an argument assumes that this Court in Halifax v. Scott & Jobalia overruled a prior Supreme Court decision in Smith v. Ryder Truck Rentals. Such is simply not the case herein. This Court and the Fifth District Court of Appeal in the Halifax case noted that their decisions were entirely consistent with this Court's decision in Smith v. Ryder Truck Rentals. In discussing the Smith case, this Court stated: "We see no reason why a different result should obtain in the present case." 565 So.2d at 1347. Thus, this Court did not change the law as previously enunciated by it in Smith when

it decided Halifax.

In argument before the Trial Court, counsel for Pensacola Concrete admitted that the Strickland case addressed statutory construction (TR-21), but even the Strickland court stated the general rule as follows: "Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect **only**." 18 So.2d at 253. In the Strickland case, this Court stated that a claimant in a workers' compensation claim relied upon procedures under the existing holding of this Court in Johnson v. Midland Constructors, Inc., a decision expressly overruled by the decision of this Court in Tigertail Quarries, Inc. v. Ward, 16 So.2d 812 (Fla. 1944).

This Court in Strickland stated as follows:

To this rule, however, there is a certain well recognized exception that 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. . . .Based upon a recognition of this common sense exception to the rule, **some** of the courts have gone so far **as** to adapt the view that the rights, positions, and courses of action of the 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 a subsequent decision of the same court overruling its former decision. 18 So.2d at 253 [Emphasis added].

Thus, for Strickland to be applicable herein, this Court

in Halifax would have had to expressly overrule the decision of this Court in Smith v. Ryder Truck Rentals, just as did this Court in Tigertail expressly overrule Johnson. Such is not the case.

Pensacola Concrete has contended that a retrospective application of Halifax depriving them of the right to seek indemnity against Commercial Coatings is an inequity that should be corrected by applying Halifax only prospectively, at least in regard to these parties. It should be noted that Pensacola Concrete, at any time during the pendency of Mann I and Mann II, could have brought Commercial Coatings into that litigation as a third party defendant and could have sought indemnity from Commercial Coatings based upon the arguments that they are now making. For whatever reason, Pensacola Concrete made a decision not to join Commercial Coatings in that litigation, thus effectively denying to Commercial Coatings the opportunity to present arguments to the First District Court of Appeal on the issue of workers' compensation immunity.

Pensacola Concrete is not **the** first, nor will it be the last, party to ever suffer an "**inequity**" because of the fact that the Supreme Court denies discretionary jurisdiction to review a case and then, upon consideration of the issue on the basis of conflict jurisdiction, disapproves of the earlier decision. Indeed, every time the Supreme Court accepts conflict jurisdiction when the earlier district court decision is final and the Supreme Court later decides that the district court wrongly decided the earlier case, then arguably the losing party has suffered an

"inequity" because the law was wrongly applied to that party. Such a party has no remedy to ask the courts to undo its having suffered the adverse consequences of a decision that was later determined by the Supreme Court to have been wrongly decided. Pensacola Concrete herein is seeking to have the courts undo the wrongly decided First District Court of Appeal decisions in Mann I and Mann II as applied to Pensacola Concrete by shifting that "inequity" to Commercial Coatings, even though Pensacola Concrete had it within its power to avoid any such "inequity" by originally joining Commercial Coatings before the jury trial in Mann II and even though such a shifting of the "inequity" would deprive Commercial Coatings of ever having its day in court on the issue of worker's compensation immunity. Such a shifting of "inequity" corrects no "injustice," rather, in a much broader sense, it does an injustice to the judicial system. In no sense of the word can it be said to be "just" to apply Halifax retrospectively to every legal entity in the state of Florida except Commercial Coatings. Yet to restrict Halifax to a prospective only application as to everyone would only serve to create havoc in the judicial system, a clear injustice to the system.

Pensacola Concrete has also argued below that Commercial Coatings will receive a windfall due to a change in the law. Commercial Coatings is receiving no windfall, but is simply relying on its workers' compensation immunity which was available to it prior to and at the time of the decision of this Court in Smith v. Ryder Truck Rentals, as well as prior to and at the time of this

Court's decision in Halifax vs. Scott & Jobalia. To quote from this Court's decision in Halifax at page 1347:

Indeed, **the** central policies of workers' compensation are 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. Both of these policies are best advanced by the rule adopted by the District Court below. [Emphasis added.]

Likewise, both of these policies are best advanced by applying the law of Halifax retrospectively as well as prospectively. In addition, this Court itself, in Halifax v. Scott & Jobalia, could have stated that its decision would have prospective application only. It chose not to do so, and, therefore, the general rule that the decision should have retrospective as well as prospective application should govern in the case herein. This Court has not hesitated in the past to limit its decisions to a prospective application if the situation warranted. Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973); ITT Community Bevelopment Corp. 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). More recently, this Court has specifically limited a decision to prospective application only in the case of Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991).

In its opinion below, the First District Court of Appeal acknowledged that this Court's decision in Halifax "creates an immunity from vicarious liability," but concluded that "we do not think it appropriate, under the particular circumstances of this

case, to apply the Supreme Court's ruling on the immunity question in Halifax to this indemnity **action.**" The First District Court of Appeal, however, certified this question to this Court as one of great public importance "in view of the unique procedural **context** of this **case.**"

There is no denying that a "catch 22" has been presented in this case. **One** of the two parties to this litigation will suffer because the First District wrongly decided Mann I and Mann II. The Trial Court noted that in his letter to the attorneys and the First District Court of Appeal noted that on **page 4 of** their Opinion. However, there is no denying the fact that, if Commercial Coatings suffers an injustice due to the First District's refusal to apply this Court's Halifax decision to this case, then Commercial **Coatings** suffers that injustice without ever having been provided its day in court on the issue of its workers' compensation immunity that existed at the time of the accident and at the time of the trial in the first lawsuit. On the other hand, if Pensacola Concrete suffers because the First District wrongly decided Mann I and Mann II, at least it has had two chances previously to try to convince the Trial Court and the First District Court of Appeal of its position in regard to workers' compensation immunity and **it** had two chances to seek review by this Court of the adverse rulings of the First District, chances forever denied Commercial Coatings unless this Court reverses the decision of the First District.

The First District Court of Appeal felt it necessary to quote from the Trial Court's remark to the effect that "**the** Court

that screwed this thing **up** to begin with will make the final **decision.**" A trial judge may not assert his personal construction of the law in the face of an authoritative determination to the contrary by the Supreme Court. Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980). While Judge Anderson correctly followed the decision of this Court in Halifax and indeed expressed his opinion that he was obligated to follow a decision of the Supreme Court directly on the issue, the First District Court of Appeal apparently felt no such obligation, choosing rather to limit Halifax to a prospective application in regard to only these two parties. Such a selective application of a ruling of this Court should not be within the discretion of the district courts of appeal, especially where such a selective application will cause an injustice to a party such as Commercial Coatings by effectively denying it access to the judicial system.

The First District Court of Appeal, not this Court, wrongly decided Mann I and Mann II and is now willing to penalize Commercial Coatings in an effort to undo a perceived "**injustice**" to Pensacola Concrete. (See page 6 of the Opinion of February 19, 1992.) The First District Court of Appeal's veiled reference to the "unique procedural context of this case" (see page 7) intimates that this "**injustice**" was caused by this Court's denial of review in Mann I and Mann II, rather than accepting the fact that, if there is any "**injustice**" done to Pensacola Concrete, it arises because the First District wrongly decided Mann I and Mann II. In an apparent effort to vindicate itself, the First District is

willing to **deny** Commercial Coatings access to the judicial system. There is no justice in such a denial.

Not having been limited to prospective application only, Halifax must be applied retrospectively. Further, the decision of this Court in Halifax did not **result** in a **change** in the law such that retrospective application should be limited. Therefore, the Trial Court was correct in its order granting summary judgment to Commercial Coatings, and the First District Court of Appeal erred in reversing the Trial Court's decision. Unless this Court recedes from its prior **ruling in Hernandez v. Garwood**, the decision of **the** First District Court of Appeal must be reversed as refusing to follow an authoritative determination to the contrary by the Supreme Court.