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.

PETITIONER'S REPLY BRIEF ON THE MERITS

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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.

Respondent's entire argument before the First District Court of Appeal and now before this Court is two-pronged: first, Halifax Pavins, Inc. V, Scott & Jobalia Construction Co., Inc., 565 So.2d 1346 (Fla. 1990) is distinguishable because the party seeking indemnity therein paid the plaintiff voluntarily and not as a result of any final judgment ordering payment and, secondly, this Court's decision in Halifax constituted a clear departure from settled law in the state of Florida.

The real issue that needs to be decided in this case is whether Halifax should apply to the parties in this proceeding as well as to all other parties retroactively. To attempt to distinguish Halifax on the basis that the party seeking indemnity was a "volunteer" is merely a way of avoiding the issue. The fact that Halifax Paving chose to settle the case with the injured party, rather than paying pursuant to a final judgment, should not be the sole basis for holding that a party in Halifax Paving's position should not be able to seek indemnity from the employer.

The public policy considerations are clear from the language in the Fifth District Court of Appeal decision in Scott & Jobalia cantained at page 82 as follows:

> 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.

This public policy of not preferring "the mercenary over **the** patriot" was adopted by this Court in Halifax. Implementation of this public policy should not depend an whether the owner of the crane voluntarily pays the injured party damages or pays pursuant to a final judgment. Otherwise, such a public policy wauld penalize a party such as Halifax Paving, who settles a case, while rewarding a party such as Pensacola Concrete who fully litigates such a case and loses, at the expense of a party such as Scott & Jobalia or Commercial Coatings, who has no control over the actions of the party seeking indemnity as to whether that party will voluntarily settle or only pay upon a final judgment being entered against it.

If Halifax is applied retroactively there can be no argument that Commercial Coatings does not enjoy worker's compensation immunity. Rather, Respondent's position is that Commercial Coatings' immunity is somehow lost because Respondent was wrongly denied its immunity and paid on the Final Judgment. From a public policy viewpoint, it makes no sense to hold that Commercial Coatings loses its immunity if Pensacola Concrete pays on a wrongly entered Final Judgment, but retains its immunity if Pensacola Concrete pays as a **"volunteer"** as did Halifax Paving.

The attempt by Respondent to distinguish this Court's decision in Halifax on the basis of the "volunteer" status of Halifax Paving avoids the real issue of whether the decision of this Court in Halifax should be applied retroactively. The Respondent's argument on the retroactivity of the Halifax decision rises or falls on the basis of whether or not this Court's decision in Halifax constituted a clear departure from the settled law of the state of Florida. Unless it did constitute such a clear departure from the settled law, then this Court's decision in Halifax should be applied retroactively to all parties in Florida, including these parties. This Court in Halifax has already answered this question by saying that the decision in Halifax did not depart from the law of the state of Florida as enunciated in Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966). In discussing the rationale of the Fifth District Court of Appeal in Scott & Jobalia and its own rationale in Halifax, this Court stated as follows at page 1347:

> Indeed, the central policies of worker's 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.
>
> ***
>
> We acknowledge, as Halifax notes, that more recent conceptions of worker's compensation have cast into doubt at least some of the rationale of Smith. Halifax correctly notes, for instance, that we made the following observation in Employer's Insurance of Wausau v. Abernathy, 442 So.2d. 953, 954 (Fla. 1983):

> The justification for limiting liability or granting immunity is the substitution of something else in its place, a quid pro quo. The duty to provide workers' compensation benefits supplants tort liability to those injured on the job.... If the duty to provide such coverage does not exist, then one has no reason to expect immunity from wrongdoings committed against a third party.

(Citation omitted; emphasis added). However, we believe that the last sentence of this quotation is fully in accord with the central premise of Smith and with the result we reached today.

> The point of both Smith and our opinion here is that, while the third party certainly had na duty to provide worker's compensation to the injured party, neither did the third party in any logical sense contribute to the work-place injury that actually occurred. In both logic and fairness, the injury here and in Smith was a work-place injury occurring as a result of a dangerous instrumentality in the lover. This conclusion is only underscored by the fact that the jury below agreed with Halifax that any act of negligence was attributable to S&J. When this is the case, the exclusive remedy is worker's compensation.

Thus, not only did this Court recognize that its decision in Halifax was furthering its opinion in Smith and not departing from that opinion, but this Court further noted that Mann I, Mann II and LeSuer were disapproved and, therefore, wrongly decided under the Smith case. Further, this Court fully explained in Halifax the public policies involved in the decisions of Smith and Halifax, those policies being to protect employers from potentially bankrupting tort liability for work-place accidents. To uphold the First District Court of Appeal's decision in this case would

totally abrogate such a policy as appliedto Petitioner, Commercial Coatings.

Respondent has stated the following at page 7 of its Answer Brief: "In Smith v. Ryder Truck Rentals, Inc., 182 So.2d 422 (Fla. 1966), the Florida Supreme Court found the provision of the Workers' Compensation Act limiting the liability of an employer to payment of Worker's Compensation did not extend to the lessor of a dangerous instrumentality unless the lease was supported by valuable consideration." This statement by the Respondent lies at the heart of its argument that this Court departed from existing law in the state of Florida in deciding Halifax, and yet this statement cannot be supported by a full and fair reading of the decision of this Court in Smith v. Ryder Truck Rentals. Inc.. This Court in Smith merely found that the owner of a leased vehicle enjoyed the worker's compensation immunity afforded to the lessee-employer. The Smith case did & hold that such immunity "did not extend to the lessor of the dangerous instrumentality unless the lease was supported by valuable consideration." That interpretation of Smith was wrongly made by LeSuer, Mann I and Mann II. This Court in Halifax expressly overruled Mann I, Mann II and LeSuer as being wrongly decided. Therefore, the law in the state of Florida since Smith has always been that the owner of a dangerous instrumentality, whether leased or loaned to an employer, enjoys the employer's worker's compensation immunity from suit by an employee. The real question is whether or not the employer can rely on the correctly decided law which existed in Florida prior to

this Court's decision in Halifax or whether an employer is to be bound by wrongly decided cases, subsequently overruled, simply because the party seeking indemnity could not convince the court which wrongly decided its case to rightly decide the case.

The Respondent argues beginning at page 9 of its brief that, at the time its cause of action against Commercial Coatings for indemnity arose, the law in Florida was undisputed that the non-negligent owner of a dangerous instrumentality did not enjoy immunity from liability when the instrumentality was not leased for valuable consideration. Again, that is a misstatement of the law of Florida at the time that Pensacola Concrete's cause of action accrued. The cases which had so held were wrongly decided and it cannot, therefore, be said that those decisions constituted the undisputed law in Florida. That law was disputed in subsequent cases and was subsequently overruled by this Court. Again, the real issue comes down to whether or not an additional party, Commercial Coatings, should be bound by wrongly decided cases, to which it was not a party, simply because Respondent is so bound.

Further, Respondent has argued at page 11 of its brief as follows: "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 noted above from the quoted language of this court in Halifax, it cannot be said that this Court "substantially changed the

immunity law, thereby deviating fromthe principles it expressed in Smith and Iglesia." This court specifically said in Halifax that it was applying the principles of Smith.

Pensacola Concrete relies on several cases in its argument that this Court's decision in Halifax should not be retroactively applied to these parties. The first case relied upon by Pensacola Concrete, Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944), was discussed by Petitioner at page 14 of Petitioner's Brief on the Merits, and that discussion will not be repeated in this Reply Brief.

Pensacola Concrete has also relied upon the criminal case of Witt v. State, 387 So.2d 922 (Fla. 1980). That case has no application whatsoever to this case as that case concerned the issue of whether or not procedural changes in case law development subsequent to a conviction of a felony should be applied in post-conviction matters. The court weighed the need for finality of judicial convictions against the fundamental rights of a person charged with a crime to take advantage of favorable caselaw. All of the discussion in the Witt v. State opinion concerns a weighing of those factors and the court simply found that, in that particular case, the judicial finality of the conviction of Johnny Paul Witt outweighed any arguments that he was making about subsequent changes in the law.

It is interesting to note that Pensacola Concrete has cited the International Studio Apartment Association, Inc. v. Lockwood case, but has not discussed it in any detail. In

Lockwood, a Florida statute which had been specifically held to be constitutional by the Florida Supreme Court in **1979,** was subsequently held to be unconstitutional by the United States Supreme Court in **1980** and by the Florida Supreme Court on remand in **1981.** The Fourth District Court of Appeal in Lockwood stated at page 1120 **as** follows:

> From **1973** until **1980** parties litigant deposited funds in the registry of Florida courts and the clerks invested those funds and disposed of investment income in reliance on the statute which, in **1979,** was stamped with the imprimatur of the Supreme Court of **Florida.** Had the **1980** decision declaring **the** statute unconstitutional emanated from the Florida Supreme Court rather than the Supreme Court of the United States, it would have qualified as an "overruling decision" and the exception permitting prospective operation only would have applied.

The Fourth District Court of Appeal went on to hold that since neither **the** Supreme Court of the United States nor the Florida Supreme Court specifically addressed the issue of retroactivity, in the absence of a superior and compelling federal principle, the prospective only operation exception would be applied to that case. This was on the basis that the earlier Supreme Court decision had been overruled. Again, that would require that the Supreme Court in **Halifax** have overruled a prior Supreme Court decision in order for there to be prospective application only.

Pensacola Concrete has further relied on the federal case of Chevron Oil Company V. **Huson, 404 U.S.** 97 (1971) **and** its three-pronged test to determine whether a judicial decision should have

retroactive effect. Interestingly enough, the first prong of that test is that the decision to be applied non-retroactively must establish a new principle of law, either by overruling past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Both the Supreme Court in Halifax and the Fifth District Court of Appeal noted that they were merely logically extending the ruling in Smith v. Ryder Truck Rental, and not changing existing law.

At page 18 of its brief, Respondent has stated: "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 worker's compensation immunity. Accordingly, the first prong of the Huson test is met in the present case." A full and fair reading of this Court's decision in Halifax clearly shows that the Respondent has again misstated the position of this Court as expressed in Halifax. Rather than expressly acknowledgingthat it was retreating from its prior position in Abernathy, this Court stated in regard to the quotation from Abernathy:

> However, we believe that the last sentence of this quotation is fully in accord with the central premise of Smith and with the result we reach today. 565 So.2d at 1348.

No fair reading of the Halifax decision could result in a conclusion that this Court expressly acknowledged that it was retreating from its prior position in Abernathy. Rather, this

Court said that the holding in Abernathy was entirely in accord with the central premise of Smith and Halifax.

The second factor expressed in Huson was that the court should weigh the merits and demerits in each **case** by looking to the prior history of the ruling, question its purpose and effect, and whether retrospective operation will further or retard its operation. Both the Supreme Court and the Fifth District Court of Appeal in Halifax noted the purposes behind worker's compensation immunity and noted the purposes of the dangerous instrumentality exceptions, which purposes were to protect the public and not to protect employees. A retrospective application of the Halifax decision furthers the purposes behind Smith **v.** Ryder Truck Rentals and worker's compensation immunity, rather than retarding such purposes. Indeed, a prospective application of the Supreme Court decision in Halifax will retard the stated purposes of Smith v. Ryder Truck Rentals **and** the worker's compensation immunity statute.

The final prong in the three-prong test of Huson concerns a weighing of the inequity imposed by retroactive application. In the present **case**, a prospective only application of Halifax will work an inequity on Commercial coatings as noted by the Trial Court. There is no way, in light of the posture of the present case, that an inequity to one party or the other can be avoided. At least Pensacola Concrete has had its day in court (indeed it has had two bites at the apple in Mann I and Mann II), whereas, if the summary judgment of the Trial Court granted to Commercial Coatings is reversed, then Commercial Coatings has never had its day in

court on this issue of worker's compensation immunity. Such an inequity should not be worked by applying Halifax prospectively only. If the arguments of Pensacola Concrete in this case are to be accepted, then every time that the Supreme Court of Florida accepts conflict certiorari and decides a case, the decision would not be applied retrospectively to any of the parties involved in the decision of the conflicting court with whom the Supreme Court did not agree. Such is simply not, and should not be, the case.

Respondent argues that the First District Court of Appeal's having wrongly interpreted Smith works an injustice on Pensacola Concrete in this case unless they are allowed to pursue their indemnity claim against Commercial Coatings. It is not an injustice to every party who loses a case, exhausts all judicial remedies, still loses, and then has to pay a judgment, simply because the Supreme Court later decides that the District Court of Appeal wrongly decided the case. Even if it were arguably an injustice, that injustice should not be multiplied by shifting the lass to a party who has never had its day in court on that issue.

The public policy principle in this case is the need for an even-handed application of the law to all parties. Commercial Coatings deserves the right to assert its worker's compensation immunity which exists now under Halifax and which existed prior to Halifax under Smith. To take from Commercial Coatings its immunity on the basis of wrongly decided cases in Mann I and Mann 11, cases to which Commercial Coatings was not a party, but to which Pensacola Concrete was a party, not only causes an injustice to

Commercial Coatings, but is an injustice and an insult to the judicial system. Pensacola Concrete had two chances to argue its position concerning immunity, whereas, if the First District Court of Appeal decision is allowed to stand, Commercial Coatings will have had no chance to assert its position. Such an injustice should not be allowed to stand.

Pensacola Concrete has made the spurious argument at pages 19 and 20 that a retroactive application of Halifax Paving will deprive Pensacola Concrete of its right to access to the courts. Pensacola Concrete had access to the Trial Court twice and to the First District Court of Appeal twice, and also sought jurisdiction in this Court twice. Pensacola Concrete was unable to convince the First District Court of Appeal of the wrongness of its decision and was unable to convince this Court to accept jurisdiction. That inability should not be viewed as a failure to have access to the courts. Rather, Pensacola Concrete had access to the courts limited only by its inability to convince the court of the correctness of its position. Pensacola Concrete asserts that Commercial Coatings should not receive a windfall and avoid liability due to a change in the law. When the law says that one has immunity, that cannot be said to be a windfall. Commercial Coatings is simply seeking to assert its rights and privileges under the law of the state of Florida as it existed at the time that Smith was decided and as it existed at the time that Halifax was decided. This in no way can be termed to be a windfall, but is merely another Overstatement on the part of the Respondent in an

effort to seek to have this Court uphold the ruling of the First District Court of Appeal.

The question of great public importance is: must decisions of this Court be applied even-handedly to all parties by all courts in Florida or may the lower courts selectively apply this Court's decisions whenever they perceive that an "injustice" might result if the Supreme Court decision is applied? The integrity of the judicial system demands that this Court not allow such a selective application.

Respectfully submitted,

By: _____
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Florida Bar No. 173908

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Kathryn E. Errington, Esquire, Harrell, Wiltshire, P.A., 201 East Government Street, Pensacola, Florida 32501, by hand delivery an this 15th day of May, 1992.

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