IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 85,403
District Court No. 93-2052
c/w 93-02904
Circuit Court No. 91-5051-CA-01

ELGIN THOMPSON,

Respondent

vs.

FLORIDA DRUM COMPANY d/b/a
PENSACOLA SHIPYARD,

Petitioner
_____/



APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT COURT OF APPEAL

# RESPONDENT'S ANSWER BRIEF

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## PREFACE

This is an Appeal on a Notice to Invoke Discretionary Jurisdiction of the Supreme Court to review the decision of the First District Court of Appeal rendered February 21, 1995, passing on a question certified to be of great public importance.

Respondent, Elgin Thompson, will use the following terminology in this Brief:

**Elgin Thompson** - will be referred to as Respondent, Plaintiff, or Elgin Thompson, as required by the context.

**Pensacola Drum Company, d/b/a Pensacola Shipyard** - will be referred to as Petitioner, Defendant, or Pensacola Shipyard, as required by the context.

**R** - refers to Record on Appeal.

**TI** - refers to Volume I of the Transcript of Proceedings held on April 27, 1993.

**TII** - refers to Volume II of the Transcript of Proceedings held on April 27, 1993.

**TIII** - refers to Volume III of the Transcript of Proceedings commencing on April 27, 1993 and ending on April 28, 1993.

**D** - refers to Record Deposition Testimony.

## POINTS ON APPEAL

The First District Court of Appeals certifed the following question:

**IN AN ACTION FOR BREACH OF CONTRACT, MAY THE BREACHING PARTY PRESENT EVIDENCE OF THE INJURED PARTY'S CASUALTY INSURANCE IN MITIGATION OF DAMAGES?**

### Point I

**THE TRIAL COURT ERRED IN THIS NEGLIGENCE/BREACH OF CONTRACT ACTION BY ALLOWING THE PETITIONER TO PRESENT EVIDENCE OF AND ARGUE TO THE JURY THE EXISTENCE OF RESPONDENTS OWN INSURANCE COVERAGE.**

### POINT II

**THE FIRST DISTRICT COURT DID NOT ERR BY REVERSING THE TRIAL COURT DECISION TO RULE AS A MATTER OF LAW AND INSTRUCT THE JURY THAT ERIC LUNDQUIST AND BUD SCHUMAN WERE EMPLOYEES OF ELGIN THOMPSON AND THEREFORE, ELGIN THOMPSON WAS RESPONSIBLE FOR THEIR ACTIONS OR INACTION.**

### POINT III

**THE TRIAL COURT ERRED BY NOT GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT ON THE ISSUE OF LIABILITY.**

## RESPONDENT'S STATEMENT OF THE CASE

Respondent, Elgin Thompson, adopts Petitioner's Statement of the Case only, which concludes after the first paragraph on page 4 of the Petitioner's Initial Brief on the Merits.

## RESPONDENT'S STATEMENT OF FACTS

Respondent, Elgin Thompson, cannot adopt Petitioner's Statment of Facts because it is incomplete, and cites only those portions of the testimony and evidence that Petitioner obviously feels lends support to its Case.

This is a simple case of negligence on the part of the Defendant, Pensacola Shipyard, which allowed Elgin Thompson's Yacht to fall to the ground, causing massive damage. However, through at least two critical mistakes by the Trial Judge below, the Jury became confused as to whom to attribute that negligence, and as to how the consequences of that negligence were to be remedied. As will be explained below, after the Court decided that it would not grant Summary Judgment on the issue of liability, this Case went to Trial where clear, undisputed testimony indicated that the shipyard simply failed to properly support the boat because it did not have enough jack stands available. The shipyard was very busy, and an employee of the shipyard admitted to Elgin Thompson that they were short of jack stands.(TI-90). That same employee, Phillip Conway, testified that if they had more long neck jack stands available they would certainly have used

them.(TI-91). This accident, and the catastrophic damages caused to the Yacht, could have been avoided if the Shipyard had simply waited until more jack stands were available.

On March 11, 1991, Plaintiff and Defendant entered into a Written Agreement whereby the Defendant would "pull" Plaintiff's Yacht, Aramis II, and place it on jack stands for the purpose of maintenance.(R-5). On March 11, 1991, the boat was pulled and placed on four long neck jack stands. Two of the Defendant's employees, Phillip Conway and William Phelps, testified that Aramis II was placed on the only four long neck jack stands available at the time. Conway was specifically asked at Trial whether he would have used more long neck jack stands when they pulled Aramis II if they had them, and he answered, "Yes, sir".(TI-91). William Phelps, who was supervisor of the Shipyard, testified that the boat was extremely heavy, and for that reason it was left near the crane.(TI-96). The Aramis II weighed in excess of 25 tons and is 47 feet long.(TI-167).

On March 13, 1991, the Aramis II fell from the four jack stands and was seriously damaged. It will require repair which will cost an amount in excess of $50,000.00. (Damages are not an issue in this Appeal because the Jury, based on the Court's instructions, found no negligence on the part of the Shipyard).

After the Yacht had been hauled and placed on the four jack stands, Eric Lundquist and Bud Schumann, who are partners

in a company that does boat maintenance, began to work on Aramis II. Eric Lundquist testified that he was asked to refinish and re-paint the bottom. In his words, "My partner and myself were going to sand and do the prep work and re-paint the bottom for Mr. Thompson".(TI-119). It is not Appellant's intention to set forth in this Brief all of the testimony of Eric Lundquist, and Bud Schumann, which makes clear that they worked as independent contractors for Elgin Thompson. However, their testimony and their relationship to Elgin Thompson are critical to this Case for the simple reason that Judge Tarbuck instructed the Jury that they were employees of Elgin Thompson's, and not independent contractors. Therefore, Elgin Thompson would be responsible for their actions, or inactions. Attorney Hill, for the Appellee, convinced the Court, and therefore, was allowed to successfully argue to the Jury, that Lundquist and Schumann should have requested more jack stands if they were needed and, therefore, Elgin Thompson is vicariously liable for their inaction in not requesting those jack stands.

Eric Lundquist stated unequivocally on the witness stand that he is not an employee of either Pensacola Shipyard, or an employee of Elgin Thompson.(TI-120). He said that he subcontracted strictly to do the bottom of the boat with anti-fouling paint. He considers himself an independent contractor, and Elgin Thompson never deducted any Social Security, or FICA taxes, or in any other way took any action

which would make him the employer and, therefore, responsible for Eric Lundquist's actions. Lundquist made clear that his normal way of doing business at Pensacola Shipyard is as an independent contractor.(TI-121).

Lundquist and Schumann began their work on the boat on March 11, 1991. The Attorney for the Appellee convinced the Court below that Elgin Thompson had "control" over Lundquist and Schumann and, therefore, he was their employer. The facts presented at Trial conclusively establish that Elgin Thompson did not "control" Lundquist and Schumann. Incredibly, the Court made this ruling even after Eric Lundquist testified that on the second day that the boat was out of the water, March 12, 1991, he and his men were busy "up in the main yard working on two other projects that we had going on".(TI-139). They did not resume their work on Aramis II until the next day, which is the day that the Yacht fell.

Bud Schumann, Lundquist's partner, was the next witness to testify, and he was asked the same questions about the relationships between Lundquist, Schumann and Elgin Thompson. In response to that question, he testifies as follows:

> Q. Briefly, if you will, tell the Jury what your relationship was, of this gentleman, Mr. Thompson?
>
> A. We had contracted--agreed to do his boat bottom. Sand the bottom and re-paint it.
>
> Q. Would you characterize yourself as an independent contractor in this situation?
>
> A. Yes, sir. (TI-152).

Schumann also testified that he and Lundquist were on a list of subcontractors at the boat yard, where they did 60% of their work.(TI-155). He had worked with Eric Lundquist for almost eight years.

Attorney Hill, after convincing Judge Tarbuck to rule that Lundquist and Schumann were employees of Thompson, then took advantage of the following fact. Slightly before the boat fell, Eric Lundquist asked for more jack stands.(TI-123). He went to Mr. Granger, the manager of the shipyard, and asked for more jack stands, but did not have time to get them there before the boat fell over.(TI-141). As will be shown below, Attorney Hill successfully argued to the Jury that since the Court had instructed them that Lundquist and Schumann were employees of Thompson, it was their responsibility to obtain more jack stands before the boat fell. Since they had not, Mr. Thompson, as their employer, was at fault for not requesting more jack stands. This point was critical and virtually assured a defense verdict on the issue of liability.

The Court below had the benefit of argument citing Florida Case Law on the employer-employee, verses independent contractor relationships, as it relates to the issue of negligence. Despite that fact, the Court determined that Elgin Thompson had the requisite "control" over Lundquist and Schumann required to make them his employees, based on the following testimony elicited by Defendant's Attorney:

> Q. During the course of you doing the work out there, if Mr. Thompson had come up to you while you were

pressure washing it--you were through and he thought you were through, and he said, "Well, it looks like it could use a little more work under this area," would you have accommodated him and done that?"

A. Yes, we would have.

Q. And during the time of doing the sanding on the bottom of of the boat, if you had thought you were finished with the sanding, putting any gel coat on it or anything like that that you needed to do, and Mr. Thompson came up and said to you, " Well, it looks like you missed a spot over here," or "maybe over here, we need to do something a little different," would you have accommodated Mr. Thompson?

A. We probably would have done whatever necessary to make him happy."(TI-136-137).

While Respondent appreciates the fact that the Statement of Facts is not the appropriate forum for Argument, the Trial Court's confusion concerning this issue of fact is of paramount importance. During the Jury Instruction Charge Conference Judge Tarbuck stated:

The Court: I disagree. I think he did have some input. If he didn't have, he could have. There is some testimony that they would have done whatever he instructed them. I recall that they would do anything to make him happy. That was one phrase that he utilized.(TII-376).

The Conference continued:

Mr. King: Judge, I cannot imagine a situation that falls more into an independent contractor. We're talking about a simple proposition.

The Court: You already told that to me and I disagree. I rule that these people are employees of Mr. Thompson.(TII-377,378).

The second critical error made by the Court concerned its Ruling allowing evidence of the existence of Elgin Thompson's insurance. The Jury heard testimony and received evidence concerning the cost and repair to the Yacht. The pertinent fact which is vital to this Appeal, is Defense Attorney's ability to introduce to the Jury the existence of Mr. Thompson's own insurance coverage. Mr. Thompson did inform his insurance carrier, Ocean Underwriters, that there had been an accident concerning the boat. Over strenuous objection, Defense Counsel was able to read the deposition of a representative of Mr. Thompson's insurance company. Peter Shaw, on behalf of Ocean Underwriters, testified that he instructed a company known as Southern Yacht Surveyors to perform a survey concerning damage to the Yacht.(TII-290). Attorney Hill was permitted to present to the Jury the preliminary survey which estimated a certain cost of repair for the Yacht. Very importantly, he presented the evidence that Mr. Thompson did not desire to pursue a claim through his own insurance company, but rather, wanted to proceed directly against Pensacola Shipyard.(TII-296). Again, making new law, the Court allowed Appellee's Counsel to argue the existence of insurance which would cover, at least partially, repair to the Yacht in this negligence case. The prejudicial effect of that information in the Jury's deliberations will be argued below. As it will be shown, the Court's ruling allowed Defendant's Attorney to argue, among other things, "if you have insurance

coverage that will cover the cost of repairs, it does require you to go out, get those repairs made at the expense of your insurance company, let them worry about whether there was somebody at fault."(TII-442).

It should also be noted that at no time did Petitioner's Counsel argue that Pensacola Shipyard should be allowed to introduce evidence of Elgin Thompson's casualty insurance because this was a breach of contract action. A review of the ruling by the Court below on April 19, 1993 denying Elgin Thompson's Motion in Limine (R-59) indicates that the Court did not distinguish between a negligence action and a breach of contract action when ruling that proof of insurance could be introduced. The Ruling had nothing to do with the distinction between breach of contract actions and actions founded in negligence.

## SUMMARY OF ARGUMENT

### I.

The Trial Court committed prejudicial and reversible error by allowing Defense Counsel to argue the existence of Plaintiff's own insurance coverage. The Court denied Plaintiff's Motion in Limine on this point and disregarded the well settled premise that evidence of insurance coverage is not to be injected into a Jury Trial involving a question of negligence. The existence or amount of such insurance has no bearing on the issue of liability and damages, and such evidence should not be considered by a Jury.

### II.

The Court made extremely prejudicial error by ruling, instructing the Jury, and allowing Defendant's Counsel, to argue that Eric Lundquist and Bud Schumann were employees of Elgin Thompson, and not independent contractors. Petitioner then successfully argued that the need for more jack stands to support the Yacht was the responsibility of Elgin Thompson's "employees" and not Pensacola Shipyard. This Ruling by the Court ignores the settled Florida law on this point. Each of the factors to be considered in making the distinction irrefutably make clear that these individuals were independent contractors, not employees, and therefore, Elgin Thompson was not responsible in any way for their action, or inaction.

## III.

The Court erred by not granting Plaintiff's Motion for Partial Summary Judgment on the issue of liability. At the Hearing on the Motion the Court was provided with deposition testimony which made clear that Pensacola Shipyard had exclusive possession and control of Plaintiff's Yacht. By the terms of the Agreement entered into between the Parties, the Shipyard was charged with the responsibility of properly "hauling" the Yacht and placing it safely on jack stands. Appellant fulfilled his burden of offering more than sufficient admissible evidence to support his Claim of the non-existence of a genuine issue on the issue of liability. Defendant presented no counter-prevailing facts or inferences sufficient to defeat Plaintiff's Motion. The Motion should have been granted and this matter proceed only on the issue of damages.

## ARGUMENT

### POINT I.

**THE TRIAL COURT ERRED BY ALLOWING THE DEFENDANT TO ARGUE TO THE JURY THE EXISTENCE OF ELGIN THOMPSON'S OWN INSURANCE COVERAGE.**

On April 15, 1993, the Court below entered an Order denying Plaintiff's Motion in Limine.(R-59) In that Order, Judge Tarbuck makes the following statement:

> In this instance Defendant has sustained the burden of convincing the Court that although the matter of insurance coverage should not be injected in this Trial, it should be for the limited purpose of taking issue with Plaintiff's claim for damages because of loss of use and loss of sale and loss of profits due to the damage sustained by the Yacht when it fell. This Court is further of the opinion that the probative value of the evidence sought to be admitted by Defendant is great and with appropriate instruction by the Court, any claim prejudice to the Plaintiff because of mention of said insurance can be avoided.(R-59)(Emphasis added)

By ruling that Defendant could introduce evidence of Plaintiff's insurance coverage, which included both liability and casualty, the Court below appears to have made new law in Florida. Defendant never cited one case to the Court below in support of its argument that it could talk about the Plaintiff's insurance with the Jury. In fact, after the Court ruled in Defendant's favor on Plaintiff's Motion in Limine, Defendant filed a Motion in Limine to prevent the Plaintiff from mentioning the existence of the Defendant's insurance.(R-115). On that occasion, the Court ruled that insurance could not be mentioned by the Plaintiff.(R-119).

Well settled Florida law makes clear that the Court below was correct in its ruling prohibiting the Plaintiff from mentioning insurance. In fact, the only reason Plaintiff resisted Defendant's Motion in Limine was, after the Court had ruled that Defendant could talk about insurance, Plaintiff wanted to at least "level the playing field", and be able to make sure that the Jury knew that the Defendant also had insurance. It has long been held in Florida that in any negligence action, the existence, or amount of insurance coverage has no bearing on issue of liability and damages, and such evidence should not be considered by the Jury. This would, of course include a negligence action which also happens to include a breach of contract Count. It is not feasible for the trial court to give a curative instruction which would have any effect on the jury and make that jury forget the insurance coverage it heard about when it considers the negligence Count. In Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325 (Fla. 1981), the Florida Supreme Court cited language from its opinion in Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969) where it stated:

> We are cognizant that the primary reason advanced in those jurisdictions which have sustained 'no joinder clauses' in the area of liability insurance is that such a clause serves to prevent prejudice to the insurer by the prophylactic effect of isolating from the Jury's consideration any knowledge that coverage for the insured exists. Such a result is deemed desirable because of the notion that a Jury is prone to find negligence or to augment damages, if it thinks that an affluent institution such as an insurance company will bear the loss. Purdy at p. 1330.

The First District Court of Appeal does not mince words on this topic. In Crowel v. Fink, 135 So. 2d 766 (Fla. 1st DCA 1961), the hard and fast rule is set forth. The Court held as follows:

> The conclusion is inescapable that the import of the testimony given by Defendant's witness was that Plaintiff's vehicle was covered by automobile liability insurance and that any damage that she may have sustained in the collision had already been paid to her by the insurance company. In addition, this testimony implies that the Plaintiff's own insurace carrier had investigated the facts surrounding the collision and had reached the conclusion that Plaintiff was guilty of negligence and in discharge of this liability the insurance company had paid the damages suffered by the Defendant resulting from the collision. It is difficult to conceive how any evidence more damaging to the Plaintiff's right to a fair, impartial trial could have been brought to the Jury's attention.
> The situation presented by this Record insofar as damaging effect of testimony relating to the existence of liability insurance is the reverse of situations usually present in trials of this kind. Such evidence normally result in an unfair benefit to the Plaintiff and a detriment to the Defendant. Crowel at p. 768.

In Crowel, the First District went on to quote the 1953 Florida Supreme Court Case of Carl's Markets, Inc. v. Myer, et. al, 69 So. 2d 789 (Fla. 1953) where the Court stated:

> We are committed to the rule that evidence of insurance carried by a Defendant is not properly to be considered by the Jury because that body might be influenced thereby to fix liability where none exists, or to arrive at an excessive amount through the sympathy for the injured party and the thought that the burden would not have to be met by the Defendant. Crowel at p.768.

These early cases are often cited for the hard and fast rule, that in a negligence action, the existence or amount of insurance coverage has no bearing on the issues of liability

and damages and such evidence should not be considered by the Jury. Stecher v. Pomeroy, 244 So. 2d 488 (Fla. 4th DCA 1971); Beta Eta House Corp., Inc., of Tallahassee v. Gregory, 237 So. 2d 163 (Fla. 1970); Allstate Insurance Company v. Wood, 535 So. 2d 699 (Fla. 1st DCA 1988).

More recent cases also appear to be dispositive of this issue. In Gold, Vann, & White, d/b/a Doctors Clinic v. DeBerry, 18 Fla. Law Weekly D2014 (Fla. 4th DCA, September 15, 1993) the District Court used the phraseology "hornbook law" when it held that a jury should not learn of the existence of insurance coverage, or insurance limits, in a case involving liability and damages. Likewise, in Colford v. Braun Cadillac, 627 So.2d 780 (Fla. 5th DCA 1993) the Court through Judge Peterson, makes Florida Law crystal clear. There he states:

> The potential harm inherent in allowing knowledge of insurance to creep into trials is not limited to the influence that it may have upon a jury verdict; it includes the extent to which innovative counsel may proceed to expand the focus upon the idea of coverage and availability of insurance funds. Colford at p. 783.

It is equally well settled that the rational behind the rule precluding the Jury's consideration of evidence of insurance carried by a Defendant in negligence actions obtains with equal cogency in regard to Plaintiff's insurance. 23 Fla. Jur. 2nd Evidence and Witnesses, Section 193-195.

The Petitioner argues that since it raised as an Affirmative Defense an argument that the Plaintiff had failed

to mitigate his damages because he did not use his own insurance to fix the damaged Yacht and, therefore, should not be entitled to damages for loss of use or diminished value, he was, therefore, entitled to talk to the Jury about the Plaintiff's insurance. Petitioner also argues that it was entitled to introduce evidence of and talk about Plaintiff's insurance because Courts routinely instruct Juries to reduce the amount of compensation to which a Plaintiff would otherwise be entitled to on account of wages, disability benefits, medical insurance benefits, or other benefits, such as PIP. That argument must fail because those cases deal only with the action arising out of the ownership, operation, use or maintenance of a motor vehicle. This is illustrated by Florida Standard Jury Instructions 6.13. In tort actions generally, a Jury is not to reduce the amount of compensation to which the Plaintiff is entitled on account of any such insurance or other benefits. If the Plaintiff has received these benefits from another source, the Court will then go back and reduce the award to the extent of those benefits under the Collateral Source Rule. It follows that the Defendant should not have been allowed to introduce evidence of Elgin Thompson's Yacht Policy in the Case at Bar. Note number one of Instruction 6.13 states that if <u>improper evidence</u> of collateral source benefits is <u>inadvertently admitted</u> or if, in the circumstances of the case the payment of collateral source benefits is inferred then a curative

charge should immediately be given to the Jury. The Court's acceptance of the Petitioner's argument that insurance should be introduced, concerning the mitigation of damages only, is completely without merit. Realistically, it is obvious that the Jury would, and probably did, consider the existence of insurance when deciding the case in chief.

The issue of the prejudicial effect of the mention of insurance was argued in Open Court even before Voir Dire. It was then that Attorney Hill argued his Motion in Limine to prevent the Plaintiff from mentioning Pensacola Shipyard's insurance. The Court agreed with him and ruled in his favor. Judge Tarbuck's reasoning bears noting:

Mr. King: You don't think it would prejudice or bias a jury to know that one side is insured and not the other side?

The Court: It could very well be, but I think the prejudice has been brought on by your client. And I'll be glad to instruct the Jury to any extent that you wish that is reasonable. I think appropriate instructions have already been prepared, and I'm going to rule in favor of the Motion in Limine filed by the defense.(TI-5) (Emphasis added).

Incredibly, Judge Tarbuck conceded the creation of prejudice by his Ruling, but said it was justified because of Elgin Thompson's actions. This must also create "new law" in Florida.

Understandably, Attorney Hill took full advantage of the Court's Ruling. In Opening Statement, Defendant's Attorney made the following argument:

Anything that has to do with it being a yacht is covered

> under that hull policy, and it doesn't matter who's at fault. Fault doesn't play a role at all. It's just like your automobile insurance. If you buy collision coverage on your car, it doesn't matter who's at fault in causing the accident. Your car can be repaired by your own insurance company, then they can subrogate it, if they want to, against the party who ran the stop sign and hit you. If they wanted to, they can file a lawsuit to get their money back from the party who caused the accident. Same is true here. If Mr. Thompson wanted to have his insurance company pay for the repairs to the boat, he could have asked for them to do that. They would have done that, and they could have, then, subrogated against Pensacola Shipyard, if they felt Pensacola Shipyard was at fault, and they could have filed a lawsuit aginst Pensacola Shipyard. They could have hired an attorney to do that and could have included Mr. Thompson's damages that weren't covered under their policy in such a lawsuit. And you'll hear testimony to that effect from the representative of the insurance company.(TI-81, 82) (Emphasis added).

It is hard to imagine a more prejudicial and Jury confusing statement. Attorney Hill is telling the Jury, with the Court's blessing, that Elgin Thompson had no business suing Pensacola Shipyard if he feels they are at fault, because his insurance company should be the one doing it. So, again, with the Court's blessing, Attorney Hill is telling each Juror that they would have no right to bring a lawsuit against a driver of an automobile who they thought negligently caused an accident with them because only their insurance company should do that. Again to quote Petitioner's Attorney, "Fault doesn't play a role at all. It's just like your automobile insurance."(TI-81).

During Closing Argument, The Shipyard's Attorney phrases it yet another way:

> You have a duty to try to avoid damages that you can reasonably avoid. Now, that doesn't mean that you have

> to fork out $35,000 or $40,000 of your own money to repair a boat to get it back in the water so that you can avoid damages, necessarily. If you have plenty of money, that may not be unreasonable for you to expect. But it does expect you to, if you have insurance coverage that will cover the cost of repairs, it does require you to go out, get those repairs made at the expense of your insurance company, let them worry about whether there was somebody at fault. Let's talk about how that insurance works a little bit, and we'll talk about Peter Shaw's[1] deposition testimony that was read to you.(TIII-442) (Emphasis added).

Allowing the Shipyard to talk about Elgin Thompson's insurance opened the door to the creation of prejudicial and other confusing arguments to the Jury. In his Closing Statement, Attorney Hill also said:

> And if there are any other losses, like, the loss of use, the loss of personal property, they can include that for their insured and subrogate a lawsuit. Mr. Shaw said he explained all of that to Mr. Thompson. That's the way it works. (TIII-443).

The Jury was misled because Mr. Shaw never said that the insurance company would bring a lawsuit which would include a claim for loss of use and loss of property. What he did say in response to a question from Attorney Hill was that the insurance company would include in its subrogation claim Elgin Thompson's deductible.(TII-296). It is not suggested in any way that Attorney Hill deliberately misstated the testimony or the law in this area, but this is illustrative of one reason why the mention of insurance and all of its variables, is strictly prohibited in a negligence/liability trial. The exception would, of course, be an uninsured/underinsured motorist case.

[1]Peter Shaw's testimony was objected to in its entirety. The objection was overruled.

In summary, the Court's denial of Plaintiff's Motion in Limine to prohibit the mention of insurance led to incurable and reversible error. Once the door was open for Petitioner's Attorney to begin talking about Elgin Thompson's insurance there was no possible way for the Court to limit the Jury's consideration of insurance to "mitigation of damage". Defendant's continuous reference to Plaintiff's insurance accomplished the very thing that Florida law attempts to prohibit, that is: the existence of insurance having the effect of influencing the Jury to find or not to find negligence, or augment damages, if it thinks an insurance company will bear the loss.

## POINT ON APPEAL

## II

**THE TRIAL COURT ERRED IN RULING AND INSTRUCTING THE JURY THAT ERIC LUNDQUIST AND BUD SCHUMAN WERE EMPLOYEES OF ELGIN THOMPSON, NOT INDEPENDENT CONTRACTORS, AND THEREFORE, ELGIN THOMPSON WAS RESPONSIBLE FOR THEIR ACTIONS OR INACTION.**

The Jury in this case returned a Verdict Form which answered question number one "No". That is, the Jury did not find that there was negligence on the part of Pensacola Shipyard which was the legal cause of damage to Elgin Thompson. By reviewing the fundamental error made by Judge Tarbuck in instructing the Jury that Eric Lundquist and Bud Schuman were employees of Elgin Thompson, it is a simple matter to understand why the Jury made this determination. The Attorney for Pensacola Shipyard was allowed to argue throughout the Trial, and in Closing Argument, that if the Shipyard was responsible for placing enough jack stands under Aramis II for proper support, so were Elgin Thompson's employees, Eric Lundquist and Bud Schuman. Attorney Hill very skillfully pointed out that Lundquist and Schuman had the opportunity during two days of work on the boat to request more jack stands if they felt there was any danger of the boat falling. This in turn means, as a matter of law, that Elgin Thompson would be responsible as their employer. This would absolve the Shipyard of their duty since it was, as Attorney Hill pointed out, the two "employees" who would be in the best position to tell whether the boat needed more support. When

so instructed by the Court, the Jury had no choice. They had to accept Attorney Hill's argument and absolve the Shipyard.

Judge Tarbuck's Ruling can truly be classified as fundamental error. The case law presented to the Court prior to his Ruling and Instruction to the Jury can best be described as "black letter law". Despite that black letter law, the Court instructed the Jury that "Elgin Thompson is responsible for any negligence of his employees who performed the work or cleaning and sanding the Yacht".(RIII-445).

The seminal case dealing with this issue is Midyette v. Madison, 559 So. 2d 1126 (Fla. 1990). That case was first addressed by the First District Court of Appeal in Madison v. Midyette, 541 So. 2d 1350 (Fla. 1st DCA 1989). In that Case, the First District Court certified the following question to the Florida Supreme Court:

> Is the clearing of land by fire, and its resulting natural consequences, smoke, an inherently dangerous activity which may cause liability to be fastened upon the employer of an independent contractor for personal injuries suffered by third persons, outside the premises of the property cleared?

In its Opinion, the First District Court set forth the long-settled Florida law which defines independent contractors, as opposed to employees. The Court held, as do all of the Courts in Florida, that the primary factor used in making this determination is the degree of control exercised over the details of the work. In that particular case, Mr.

Reaves was paid by the job, and the work was his regular business. He hired an assistant to help, and supervised the assistant's work. Mr. Reaves was responsible for providing all of the labor, tools, and equipment. The undisputed facts in the Case indicated that the Appellee, Midyette, did not control the details of the work of Mr. Reaves, and therefore, established that Mr. Reaves was an independent contractor. See Madison at p. 1317. The case went on to certify a question to the Supreme Court which deals with the liability of a person hiring an independent contractor who is performing inherently dangerous work. The Florida Supreme Court held that when "an inherent danger" of the type that existed in that case was present, the principle's liability for the undertaking was not transferred to the independent contractor. However, there was no question that Mr. Reaves was an independent contractor.

Except for the inherent danger issue, it is hard to imagine a more closely aligned situation than the one at Bar. Before citing those portions of the Record, and Transcript, which make this clear, Appellant will cite some of the many cases in Florida with the same holding, and which will persuade this Court that the District Court was correct in reversing the Trial Court and holding Eric Lundquist and Bud Schuman were independent contractors.

In Adams v. Department of Labor and Employment Security, Division of Unemployment Compensation, 458 So. 2d 1161 (Fla. 1st DCA 1984), the Court found that the workers in the case

were not independent contractors free from control with regard to details of the engagement, but were instead employees. This is because evidence indicated that the employer:

1. Determined and controlled the equipment;

2. Determined what cleaners were used by the workers;

3. Determined the method for using the equipment and cleaning the Cleaners; and,

4. Determined the customers for whom the workers would clean.

This rendered the individuals employees, and clearly, their employer would be responsible for their negligence.

Conversely in Wiseman v. Miami Rug Company, 524 So. 2d 726 (Fla. 4th DCA 1988); Lenox v. Sound Entertainment, Inc., 470 So. 2d 77 (Fla. 2nd DCA 1985); and Sarasota Chamber of Commerce v. State of Florida, Department of Labor and Employment Security, Division of Unemployment Compensation, 463 So. 2d 461 (Fla. 2nd DCA 1985) the Courts found that the parties were independent contractors having met the well settled criteria of the independent contractor's status. In DeBolt v. The Department of Health and Rehabilitative Services, 427 So. 2d 221 (Fla. 1st DCA 1983) the Court held that there was a material issue of fact on this question and, therefore, Summary Judgment would not be appropriate. However, the Court was consistent in DeBolt in enumerating the criteria to be applied.

In Wiseman, The Court held:

> The carpet installer was an independent contractor, rather than an employee of the seller, for purpose of

imposing liability on the seller for the installer's negligence, where the installer performed delivery and installation under his own direction, utilizing his own vehicle and tools, and seller exercised no control over the manner in which the installer performed his installation work. (Emphasis added) Wiseman at p. 729.

In fact, the Fourth District affirmed a Summary Judgment finding that the contract between Miami Rug Company and Neal's Carpet Service demonstrated conclusively the relationship of Neal's Carpet Service to the Miami Rug Company was that of an independent contractor, and not an employee.

In Lenox, the Court held:

The primary distinction between an agent or employee and an independent contractor, is the amount of control to which he is subject. If a person is subject to control as to his work results only, he is an independent contractor. If he is also subject to control as to the means used to achieve the results, he is an employee or agent. Lenox at p.78 (Emphasis added).

In Sarasota County Chamber of Commerce, the Court held: The principal consideration in determining whether one is working as an independent contractor or as an employee, is the right of control over his mode of doing the work. If the person is subject to the control or direction of another as to his results only, he is an independent contractor. Sarasota County Chamber of Commerce at p. 462 (Emphasis added).

Finally, the First District in DeBolt held:

The decisive factor in determining whether individuals are independent contractors, agents, or employees is, of course, the degree of control exercised by the employer. See Crawford v. Department of Military Affairs, 412 So. 2d 449 (Fla. 5th DCA 1982). If there is no question as to the existence or non-existence of a master/servant or employer/employee relationship, the issue is one then for the Courts to determine. If, however, the issue is unclear, it becomes a question of fact for the trier of fact to decide based on the evidence presented. See Gregg v. Weller Grocery Company, 151 So. 2d 450 (Fla. 3d DCA 1963).

Finally, and Respondent does not want to belabor this point, since the law is so clear, the case of Alexander v. Morton, 595 So. 2d 1015 (Fla. 2nd DCA 1992) goes even a step further and utilizes the factors set forth in the Restatement (Second) of Agency, Section 220 (1958) which is still well settled law. In that case, the Court discussed the aspects of the evidence bearing upon the ten Restatement factors. Those factors as they apply to this case are as follows:

(a) **The extent of control which, by the agreement, the Master may exercise over the details of the work.**

In the instant case, Elgin Thompson had no control over the method being used by Eric Lundquist and Bud Schuman to clean and paint the bottom of his boat. They were experienced contractors who had performed these services for many years, and they made clear at Trial that they were not controlled by Elgin Thompson.

(b) **Whether or not the one employed is engaged in a distinct occupation or business.**

The evidence at Trial also made clear that Eric Lundquist and Bud Schuman were a partnership, created for and in the business of working on boats. This is a distinct business, having nothing to do with Elgin Thompson.

(c) **The kind of occupation, with reference to whether in their locality, the work is usually done under the direction of the employer, or by a specialist without supervision.**

The Alexander Court noted: "Carpet installers are skilled workers who routinely perform without supervision". The same can be said of the work performed by Lundquist and Schuman.

(d) **The skill required in the particular occupation.**

There is no question that Lundquist and Schuman must have a particular skill in order to perform their kind of services in this very expensive and specialized field.

(e) **Whether the employer or the workmen supplies the instrumentalities, tools, and the place of work for the person doing the work.**

Again, there was clear evidence and testimony that Lundquist and Schuman provided all of their own tools and equipment, and, in fact, had employees of their own.

(f) **The length of time for which the person is employed.**
As in Alexander, the services of Lundquist and Schuman were obtained for a specific "as needed" basis. When their job was finished they had absolutely no relationship with Elgin Thompson.

(g) **The method of payment whether by time or by job.**
Obviously, Lundquist and Schuman were going to be paid by the job, not by the time required to perform the job.

(h) **Whether or not the work is part of the regular business of the employer.**
Elgin Thompson was a retired individual who merely wanted to have his Yacht serviced for his personal use. He had nothing to do with the business of Eric Lundquist and Bud Schuman.

(i) **Whether or not the Parties believe the relationship of master/servant exists.**
Again, the answer to this question is obvious. Lundquist and Schuman had their own partnership, and there was no master/servant relationship with Elgin Thompson, so obviously they did not think that they were servants.

(j) **Whether the principle is or is not in business.**
The evidence was clear from the first day of this litigation that Elgin Thompson was not in the boat maintenance business. Alexander at p. 1017, 1018.

Respondent could readily cite the legion of cases which consistently define the employer/employee as opposed to independent contractor status. All of the cases cited herein were cited and argued at the Trial below. The Court's confusion, and lack of understanding in this area, is evidenced by several statements made during the Jury Charge Conference:

Mr. King: It has been covered in testimony throughout this case and I think that it is clear that these guys are independent contractors, and I think the Court should rule in that direction.

The Court: And because they are independent contractors, Thompson is not responsible for their negligence?

Mr. King: That is correct.

The Court: I don't believe that.

Mr. King: Well I've got a case that I can show you.

The Court: These people that he hired to do his work.

Mr. Hill: Judge, not only that but--

The Court: Who were they liable to if they are not liable to Thompson? They are liable to themselves?

Mr. King: That's right, they're liable to themselves. (TII-373, 374).

Attorney Hill, in his Opening Statement, makes clear that he was confused about the important difference between the two definitions. In his Opening Statement, Attorney Hill made the following remarks:

> They do not work for Pensacola Shipyard. They work for Mr. Thompson. They were his agents. Mr. King says that they were independent contractors. Well, that just means that they had an independent contract between them and Mr. Thompson, not between them and the Shipyard. Mr. Thompson was going to pay them, and I don't know if he has paid them, but I assume that he has paid them for the work they did on the boat, and they did a couple of days worth of work. Mr. Lundquist and Mr. Schuman are in this business. They are in the business of working on boats while they are hauled, while they're sitting up on the stands. That's what they do. That's how they make their living. That's their livelihood.(TI-73)(Emphasis added).

Again, in his Opening Statement, Attorney Hill makes the following observation:

> Now, picture, if you would, you've got two or three guys and their employees. You've got Bud Schuman and Eric Lundquist and their employees working on this boat for at least a full day, and they're pressure-washing, and they're sanding it, and they are underneath the boat, and they are aware that if the boat falls, it is going to fall on one of them.(TI-74)(Emphasis added).

Finally, the Court evidently believed the following statement made by Attorney Hill:

> If any of his employees--called independent contractors or employees, they are people that he contracted with to the work on his boat, and if they were negligent in any way, in other words, if Mr. Lundquist and Mr. Schuman had as good an opportunity as Pensacola Shipyard to observe the wind conditions and to say, "We need to do something here," and they didn't do it, I think...It is hard to see how, if Pensacola Shipyard is negligent, they're not negligent to, because they were out there the same two or three days that Pensacola Shipyard was out there. "And their negligence is attributable to Mr. Thompson just like our employee's negligence is attributable to us." (TI-79,80). (Emphasis added).

The Transcript will reflect that during Attorney Hill's cross examination of Eric Lundquist, he was asked about the work that had been performed on the Aramis II before it fell. During the questioning, Lundquist said the following:

> Q. And you all had done some work, including the day it had been hauled?
>
> A. Yes.
>
> Q. And a day in the middle?
>
> A. Virtually no work was done on the day in the middle.
>
> Q. So there was a day in between there where it just sat there and there was not a lot of work done?
>
> A. Correct.
>
> Q. Were you or any of your men out there around it at that time?
>
> A. I don't believe so. We were pretty busy up in the main yard working on two other projects that we had going on. (TI-139)(Emphasis added).

The fact that Lundquist and Schuman did not even work on the boat after the second day that it had been hauled, and had

worked on some other "projects", is probably the strongest evidence of their independent contractor's status.

After the Court ruled that Lundquist and Schuman were employees of Elgin Thompson, and so instructed the Jury, Petitioner's Counsel was, therefore, allowed to make the following, and critical statement during Closing Argument:

> And the second question is, should the agents of Mr. Thompson have also foreseen that, and therefore, were they also negligent? That is Eric Lundquist and Bud Schuman. And the Judge will instruct you that they are--they were employees of Mr. Thompson, and they were--he is responsible for them if they were negligent, just like the Pensacola Shipyard. We accept responsibility for our employees, if you find that they were negligent, we accept that responsibility. If you find that Eric Lundquist and Bud Schuman and their crew were negligent, Mr. Thompson bears that responsibility and should, under the law. And the Judge will instruct you that way.(TIII-439)(Emphasis added).

In summary, it is respectfully submitted that the Court made fundamental, reversible error by ruling, and instructing the Jury, that Eric Lundquist and Bud Schuman were employees of Elgin Thompson. Appellee's Attorney successfully used that ruling to argue that Lundquist and Schuman bore the responsibility for not determining that the boat needed more jack stands. Therefore, Elgin Thompson was vicariously liable for their negligence and the Shipyard was excused from its negligence.

## POINT OF APPEAL
## III.

**THE COURT ERRED BY NOT GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ISSUE OF LIABILITY**

This is a Case where the only issue that should have gone to the Jury was that of damages. It is very likely that the Case would have settled if the Court would not have make its erroneous Rulings concerning the issues discussed above. However, the Court could have avoided the need for those Rulings early in the Case. On February 3, 1993, Plaintiff filed a Motion for Partial Summary Judgement.(R-33). Argument was held, and the Court entered a Order denying Partial Summary Judgment on March 23, 1993 (R-44). The Order consists of one sentence, with no explanation as to the Court's reasoning.

At the Hearing, the Court had the benefit of Plaintiff's Memorandum in Support of the Motion, and in that Memorandum references are made to the deposition testimony of Douglas Granger, Phillip Conway, and William Phelps. These are all employees of Pensacola Shipyard. Their testimony in those depositions, just as at Trial, made clear that the Shipyard had exclusive possession and control of the Yacht, and was charged with the duty to properly block the Yacht for service. This fact was reiterated during Phillip Conway's testimony at Trial, where he is asked whether it is the obligation of the shipyard to put the boat on stands, and make sure that the

boat does not fall over. He answered, "yes".(TI-92).

At the Hearing on the Motion for Partial Summary Judgment, the Court was presented with the following undisputed facts:

(1) On March 11, 1991, Plaintiff and Defendant entered into an agreement whereby Defendant would "pull" Plaintiff's Yacht, Aramis II, and place it on jack stands for the purpose of maintenance.(R-5).

(2) On a previous occasion when Aramis II had been pulled by employees of the Shipyard, it had been placed on six long neck jack stands.

(3) On March 11, 1991, the Aramis II was placed on four long neck jack stands because that was all of the long neck jack stands available. If there had been more long neck jack stands available, they would have been used. This statement was made by Phillip Conway and William Phelps in their depositions.(D-Phelps, p.8; D-Conway p.8). It was also reiterated at Trial by Conway when he makes clear that he would have use more long neck jack stands if they had been available.(TI-91).

(4) On March 31, 1991, at approximately 2:00 p.m., the Aramis II fell from the jack stands and was seriously damaged.(R-5).

(5) By the terms of the Agreement, the Defendant was to take the Aramis II out of the water, block the boat up properly and allow work to be performed on it.(R-5;TI-92).

(6) At the time the Aramis II fell, it was in the exclusive possession and control of Pensacola Shipyard and Elgin Thompson was not present.(TII-343-344).

Florida law concerning Summary Judgment and the burden upon the party moving for one is well settled, and need not be recited in detail in this Brief. Respondent acknowledges the burden of showing conclusively the absence of a genuine issue of material fact when seeking Summary Judgment on the issue of liability. However, when Florida law is applied to the facts

conclusively established in this Case, it is clear that Elgin Thompson was entitled to Partial Summary Judgment on the issue of liability.

The Yacht, Aramis II, was in the exclusive possession and control of the Defendant and its employees at the time that it fell to the ground and was damaged. Defendant raised as an Affirmative Defense, but failed to show through pleadings, depositions, interrogatories, affidavits, or otherwise, any contributory negligence on the part of the Plaintiff, who was not present at the time of the accident. At the Hearing on Plaintiff's Motion, the Court had not yet ruled that Eric Lundquist and Bud Schumann were employees of Elgin Thompson. The Defendant had merely asserted an Affirmative Defense stating that the Plaintiff was in some way guilty of contributory negligence.(R-8).

The Case most often cited in Florida discussing Summary Judgement, in negligence cases, is Holl v. Talcott. 191 So. 2d 40 (Fla. 1966). In Holl, the Florida Supreme Court stated Florida law as follows:

> The rule simply is that the burden to prove the non-existence of genuine triable issues is on the moving party, and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden. Holl at p. 43,44.

The First District Court of Appeal addressed the role of Partial Summary Judgment in the negligence case of DeMesme v. Stephenson, 498 So. 2d 673 (Fls. 1st DCA 1986). In that case,

the Circuit Court granted the Summary Judgment on the issue of liability, and the First District Court of Appeal affirmed. In his often cited Opinion, Judge Mills wrote:

> The initial burden, in Summary Judgment proceedings, is upon the movant. When he tenders evidence sufficent to support his Motion, then the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. The movant, however, does not initially carry the burden of exhausting the evidence pro and con, or even examining all of his opponent's witnesses. To fulfill his burden, the movant must offer sufficient admissible evidence to support his claim of a non-existence of a genuine issue. If he fails to do this his Motion is lost. If he succeeds, then the opposing party must demonstrate the existence of such an issue either by counter-prevailing facts or justifiable inferences from the facts presented. If he fails in this, he must suffer a Summary Judgment against him. See, Harvey Building, Inc. v. Haley, 175 So. 2d 780 (Fla. 1965). DeMasme at p. 675. (Emphasis added).

In Suggs v. Allen, 563 So. 2d 1132 (Fla. 1st DCA 1990), the Court discussed the role of Summary Judgment as follows:

> The Summary Judgment is a Pre-trial mechanism, the principle function [of which] is to avoid the time and expense of a useless trial if it clearly appears from the pleadings, affidavits, depositions and other evidence in the record that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. Fish Carburetor Corp. v. Great American Insurance Co., 125 So. 2d 889-891 (Fla. 1st DCA 1961), quoted with approval, Howarth Trust v. Howarth, 310 So. 2d 57, 58 (Fla. 1st DCA 1975), See also, Busbee-Bailey Tomato Co. v. Bailey, 463 So. 2d 1255 (Fla. 1st DCA 1985).

As early as 1966, the First District Court noted that "the function of the rule authorizing Summary Judgment, as the Supreme Court of Florida held in National Airlines, Inc., v. Florida Equipment Co. of Miami, 71 So. 2d 741 (1954), is to avoid the expense and delay of trials when all facts are admitted, or when a party is unable to support by any

competent evidence a contention of fact. Pearson v. St. Paul Fire and Marine Insurance Company, 187 So. 2d 343 (Fla. 1st DCA 1966).

In Cassel v. Price, 396 So. 2d 258 (Fla. 1st DCA 1981), the Court held:

> Summary Judgment, although sparingly used in negligence cases, is nevertheless a proper and necessary means for accomplishing the purpose of terminating litigation short of a jury trial, which satisfies the constitutional "right of access" to courts as means of resolving civil disputes. Cassel at p. 261, 262.

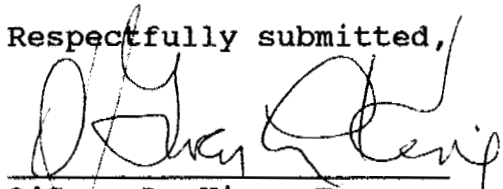
The time and expense involved in presenting this Case to a Jury was unwarranted. The issue of liability should have been settled by Summary Judgment. The indisputable facts show that the Yacht was in the exclusive possession and control of the Defendant at the time of the accident. At the Hearing, Pensacola Shipyard failed to demonstrate the existence of any counter-prevailing facts, or justifiable inferences, from the facts presented, which would defeat the Motion.

For all of these reasons, and as explained in Point One and Two above, the Trial Court should have granted Plaintiff's Motion for Partial Summary Judgment. In fact, at the Hearing Judge Tarbuck stated that if the Motion had come to him one year earlier, he would have granted it. However, he was afraid of being reversed and, therefore, this matter would go to Trial. This is no basis for denying a Motion for Summary Judgment.

## CONCLUSION

For all the reasons cited herein Respondent/Elgin Thompson respectfully requests the Court to issue an Order declining jurisdiction, or, in the alternative, answering the Certified Question in the negative and affirming the decision of the First District Court of Appeal. Respondent also requests this Court to consider his Motion for Partial Summary Judgement on the issue of liability.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY Jthat a true and correct copy of the above Initial Brief has been furnished to Larry Hill, Esq., MOORE, HILL.., Sun Bank Tower, 9th Floor, Pensacola, FL 32598,

by Hand Delivery this 22nd day of May, 1995.

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