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IN THE SUPREME COURT OF FLORIDA

FILED
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APR 17 1995
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

FLORIDA DRUM COMPANY,
D/B/A PENSACOLA SHIPYARD,

Petitioners

vs.

ELGIN THOMPSON,

Respondent

CASE NO.: 85,403
DISTRICT COURT OF
APPEAL - FIRST DISTRICT
DCA CASE NO.: 93-2052
c/w 93-02904

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

This is an Appeal taken 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.

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

Elgin Thompson will be referred to as Respondent, Plaintiff or Elgin Thompson, 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.

"A-" refers to items of records contained in the Appendix to the Initial Brief of Plaintiff/Appellant in the First District Court of Appeal.

"D-" refers to Record Deposition Testimony.

POINTS ON APPEAL

Point I

The First District Court of Appeal certified the following question as being as matter of great public importance:

> **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 II

> **WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED BY REVERSING THE TRIAL COURT DECISION RULING AS A MATTER OF LAW AND INSTRUCTING THE JURY THAT ERIC LUNDQUIST AND BUD SCHUMANN WERE EMPLOYEES OF ELGIN THOMPSON, NOT INDEPENDENT CONTRACTORS, AND THEREFORE, ELGIN THOMPSON WAS RESPONSIBLE FOR THEIR ACTIONS OR INACTION.**

STATEMENT OF THE CASE AND OF THE FACTS

The Appeal before the First District Court of Appeal was from the Circuit Court's Final Judgment entered on April 30, 1993, and the Court's subsequent Order Denying Appellant's Renewed Motion for Directed Verdict and New Trial, entered on June 9, 1993. (R-125 and 208).

On November 5, 1991, Elgin Thompson filed a Two-Count Complaint seeking damages against Pensacola Shipyard on the basis of negligence, and breach of contract, concerning the method used to haul and block his yacht, Aramis II, so that service could be performed. (R-1). Thereafter, on November 14, 1991, an Amended Complaint was filed to properly designate the name of the Defendant. (R-5).

Service was perfected on the Shipyard, and Defendant filed an Answer to the Amended Complaint, which included an Affirmative Defense alleging comparative negligence, on February 3, 1992. (R-18).

Plaintiff then filed a Motion for Summary Judgment on the issue of liability on February 26, 1992. (R-24). Defendant filed a Counter-Claim seeking payment for storage and services rendered concerning the yacht on March 9, 1992. (R-27). Plaintiff filed his Answer denying the allegations of the Counter-Claim on May 14, 1992. (R-31).

On February 3, 1993, Plaintiff moved for Partial Summary Judgment on the issue of liability. (R-33). Thereafter, Defendant filed an Amended Answer alleging two (2) Affirmative Defenses, comparative negligence and failure to mitigate damages. The Court entered an Order denying Plaintiff's Motion for Partial Summary Judgment on the issue of liability on March 23, 1993. (R-44).

Plaintiff next filed a Motion in Limine seeking to prevent the Defendant from arguing to the Jury that Plaintiff should have used his own insurance. (R-45). On April 19, 1993, the Court denied Plaintiff's Motion in Limine. (R-59).

Defendant then filed a Motion in Limine to prohibit Plaintiff from introducing any evidence of Defendant's insurance. (R-115). The Court ruled that Plaintiff could not introduce evidence, or argue the existence of, Defendant's insurance. (R-119).

A Jury Trial was held, and a Verdict was rendered, on April 28, 1993, finding that the Defendant was not negligent. (R-122). Final Judgment was entered on April 30, 1993. (R-125).

On May 7, 1993, Plaintiff filed a Renewed Motion for Directed Verdict and Alternative Motion for a New Trial. (R-205). Memoranda in Support of these Motions was also filed on May 7, 1993. (R-126). The Court entered an Order denying Plaintiff's Renewed Motion for Directed Verdict and New Trial on June 19, 1993. (R-208).

Plaintiff filed a timely Notice of Appeal on June 25, 1993 (R-209) and an Amended Notice of Appeal on July 7, 1993 (R-210). The Appeal before the First District Court of Appeals was heard, and the Opinion was rendered by the First District Court of Appeals on February 21, 1995, reversing the Trial Court. (A copy of the Opinion of the First District Court of Appeal is attached hereto as the Petitioner's Appendix to the Brief on the Merits.)

On March 11, 1991, the Plaintiff and the Defendant entered into a written agreement whereby the Defendant would haul the Plaintiff's yacht and place it on jack stands for the purpose of maintenance. (R-5) At the time the boat was hauled, Philip Conway testified that, while there were only four (4) long neck jack stands available to use on the boat, he could have used short neck jack stands if he felt that the boat needed more jack stands, but he thought that four (4) was enough. (TI-91) While it is true that William Phelps, the supervisor of the shipyard, testified the boat was extremely heavy and for that reason was left near the crane (TI-96), Mr. Phelps further testified that he felt four (4) jack stands were adequate in this situation. (TI-97) He further testified that even if more long neck jack stands had been available, he would not have used them since he did not think it was necessary. (TI-98) Mr. Phelps further testified it was his feeling that the boat having been blown over was an "act of God" which he could not control. (TI-100) It is undisputed that, on March 13, 1991, the Aramis II was blown over while it was being supported on four (4) jack stands at the Pensacola Shipyard. From

the date it was hauled, March 11, 1991, until the date it was blown over, March 13, 1991, the boat had been worked on by Eric Lundquist and Bud Schumann, who are partners that perform boat maintenance, and who were hired by the Plaintiff, Elgin Thompson, independent of Pensacola Shipyard. (TI-119) While it is true that Eric Lundquist testified he was neither an employee of Pensacola Shipyard nor Elgin Thompson and that he considered himself to be an independent contractor (TI-120-121), he further testified he did not have a written agreement with Mr. Thompson to do the work on this boat (TI-136), that, if Mr. Thompson had told them the pressure washing needed a little more work in a particular area, they would have done that additional work (TI-136), that if Mr. Thompson thought they had not done an adequate job with the sanding or putting on the gel coat, they would have "done whatever necessary to make him happy." (TI-137) Further, the following questions and answers occurred at trial with Mr. Lundquist on cross-examination:

Q. If Mr. Thompson had come to you and said "Mr. Lundquist, they just hauled the boat and put it on here. It's only got four stands under it and I think that it needs more than four stands under it," would you have tried to accommodate that by talking to the shipyard and getting them to put additional stands under there?

A. I think that anytime that we feel like the boats that we haul are not safe, we'll request additional help, and the shipyard has always accommodated us with whatever we request.

Q. So it wasn't whether Mr. Thompson requested that or not, you would have requested it if you felt that it was necessary?

A. If we felt so, yes.

Q. But specifically -- answer my question -- Mr. Thompson came to you and said, "Look, when they hauled this boat, they set it down and it had these four long neck stands, and I thought they needed some more, but they said they don't have any available. Can you get some more stands under there," would you have accommodated Mr. Thompson?

A. I probably would have tried to get additional stands.

(TI-137-138)

Bud Schumann, Eric Lundquist's partner, testified that, when they first went to work on the boat pressure washing the boat, they had no concerns at all about their own safety or the safety of any of their men that were working there. (TI-156-157) This was true even though they knew the boat had four (4) jack stands under it. (TI-157) He further testified that if he had had any concerns about the boat's safety before it was blown over, he would have talked to Eric Lundquist or to Pensacola Shipyard about getting some more stands under the boat. (TI-157) Even at the time he was working on the boat about fifteen (15) minutes or so before it fell, he was not concerned about his safety or the safety of any of his men. (TI-158) Finally, he testified that it was his opinion that Pensacola Shipyard was not negligent in any way in allowing this boat to blow over and that he thought the shipyard had taken all adequate precautions that they needed to take at the time. (TI-158-159)

Shortly before the boat was blown over, Mr. Eric Lundquist did request that the shipyard place more jack stands under the boat (TI-123), but there was not adequate time to place additional jack stands under the boat before it blew over. (TI-141) Mr. Lundquist also testified that during the time he and his crew were working

underneath the boat, where they would have been in danger if the boat were not stable, he did not have any concern about his own safety or the safety of any of his workers. (TI-140) Further, if any of his crew or if he had had any concern about the safety of anybody working underneath that boat, he would have gone to the shipyard and told them. (TI-142)

Douglas Granger, the General Manager of the Pensacola Shipyard, was called by Plaintiff's lawyer as an adverse party witness and testified that he felt the four (4) jack stands provided adequate protection against the boat blowing over or falling over. (TII-229) Mr. Granger further testified, quite clearly, that he felt Mr. Thompson, the Plaintiff, was no more at fault than Pensacola Shipyard, because he felt both the Plaintiff and Pensacola Shipyard had equal opportunity to see what the weather was going to be doing and to be sure that there were enough supports for the boat. (TII-233) Mr. Thompson never voiced any concerns to him about the number of stands being used (TII-234) and this boat had previously been hauled at the Pensacola Shipyard and was supported with four (4) stands without incident. (TII-236)

Plaintiff himself testified that the first year he had the boat hauled by the Pensacola Shipyard, he did all of the work as far as cleaning the bottom and putting new paint on the bottom of the boat. (TII-352) Similarly, the third year that he had the boat hauled by the Shipyard, he did the work on the bottom of the boat. (TII-356) Mr. Thompson also testified that, after his conversation with Mr. Phelps about there not being enough long neck

jack stands, he did not get upset and did not talk with Douglas Granger, the Manager of Pensacola Shipyard. (TII-357) Mr. Thompson verified that he never told Mr. Lundquist or Mr. Schumann that the boat needed more jack stands under it (TII-362), that he did not observe anything about the boat that made him think that it was unsteady (TII-363), and that neither Mr. Lundquist nor Mr. Schumann ever made any comments to him about the boat being unsteady or unstable. (TII-364)

At the time of trial, the Aramis II had not been repaired and remained at Pensacola Shipyard. Defense counsel was allowed to read to the jury, over objection of Plaintiff's counsel, the deposition of a representative of Plaintiff's insurance company, Ocean Underwriters. This was the deposition testimony of Peter Shaw that was read to the jury concerning Plaintiff's insurance with Ocean Underwriters, the survey they requested from Southern Yacht Surveyors (TII-290), and the fact 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).

SUMMARY OF ARGUMENT

The Trial Court properly allowed the Defendant to argue to the jury that the Plaintiff had a means, through his casualty insurance, to mitigate his damages, and that he purposely failed to mitigate his damages by calling upon his casualty insurance company to pay for the repairs to the boat. The testimony was uncontroverted that the boat could have been put in the water within three (3) to six (6) months after the boat was blown over if the repairs had been started shortly after the incident, but the Plaintiff was claiming damages for loss of use for over two (2) years because the boat had not been repaired. The insurance coverage afforded to the Plaintiff was only addressed by the Defendant in regard to the defense of the Plaintiff's failure to mitigate damages and was not argued in any way by the Defendant in regard to the issue of liability of the Defendant.

The Trial Court also properly instructed the jury that Eric Lundquist and Bud Schumann were employees of Elgin Thompson, not independent contractors, and, therefore, "was responsible for their actions or inaction." Even if the Trial Court erred in this instruction, it was a harmless error since the jury never reached the issue of Plaintiff's comparative negligence, having found no negligence on the part of the Defendant.

ARGUMENT

POINT ON APPEAL

I

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

The Trial Court made it clear in his April 15, 1993, Order Denying the Plaintiff's Motion in Limine (R-59), that the issue of the Plaintiff's casualty coverage 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." (R-59) It is respectfully submitted that the Defendant faithfully abided by the Judge's determination and limited any and all arguments in regard to the Plaintiff's own casualty insurance to the issue of the availability of that insurance as a means for the Plaintiff to mitigate his own damages, a duty which he had under the law of the State of Florida. Indeed, the Defendant agreed with the Judge that an instruction could be given to the jury by the Court as to the limited purpose for which this evidence of insurance coverage was

injected into the trial. (TII-384-385) The Plaintiff's attorney decided, for whatever tactical purpose, that they did not want the curative instruction given to the jury regarding the limited purpose of the introduction of the casualty insurance afforded to the Plaintiff. (TIII-385)

Petitioner agrees with the District Court of Appeal that the law in Florida, as well as other states, is that liability insurance coverage should not be mentioned in front of a jury. The difference is that the District Court failed to go beyond that general statement and look at the reasons for that general statement of the law in the State of Florida and in other states. All of the cases clearly state that the injection of insurance coverage in regard to the liability issue can only serve to confuse a jury and prejudice the party that has such coverage in the eyes of the jury. The Defendant was seeking, however, to introduce into trial evidence of the Plaintiff's casualty insurance, which insurance would have paid for the damages to the Plaintiff's boat regardless of fault and regardless of liability of the Plaintiff, Pensacola Shipyard, or any other party. The Defendant nowhere argued to the jury or even suggested to the jury that this insurance would cover Mr. Thompson for his acts of negligence or Mr. Schumann or Mr. Lundquist for their acts of negligence. Rather, it was strictly limited to an argument that Mr. Thompson had available to him a means to have his boat repaired at an earlier date to avoid further losses that he was claiming, for loss of use and loss of sale of his boat, as well as diminution in the

value of his boat which occurred in the two (2) year period of time from the date of loss to the date of trial. It was for that limited purpose that Judge Tarbuck allowed the Defendant to inject into the case the issue of the casualty insurance of the Plaintiff, Elgin Thompson. On the other hand, the Plaintiff could not give the Trial Court any reason that the liability insurance coverage of the Defendant, Pensacola Shipyard, was relevant to any issues in the lawsuit other than the liability issue. The Trial Court was, therefore, eminently correct in allowing into evidence the existence of the casualty insurance coverage which the Plaintiff could have used to mitigate his damages, but refusing to allow into evidence the liability insurance coverage of Pensacola Shipyard, which could only go to the issue of liability.

Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981), concerned the question of whether evidence of PIP benefits, as well as the amount paid by a Plaintiff to secure PIP insurance benefits, should be introduced into evidence at the trial of a case. The Supreme Court of Florida acknowledged that the cost necessary for obtaining the PIP insurance from which the Plaintiff actually received benefits should be allowed into evidence, as well as the total amount of all collateral sources which have been paid to the Claimant prior to the commencement of the trial. Thus, there are situations in which the Plaintiff's own insurance can be injected into the trial of a case for issues other than the question of liability. A PIP policy, or evidence that benefits have been paid to a Plaintiff under a PIP policy, were held to be

admissible under the collateral sources statute by the Supreme Court in the Purdy case. Plaintiffs's casualty insurance was a collateral source that could have been utilized by the Plaintiff to mitigate his damages. There is not a hard and fast rule that all evidence of all insurance coverage must be eliminated from a jury trial and must be eliminated for consideration by the jury. When that coverage is necessary for an issue other than liability, for instance, collateral sources, then the Trial Court certainly can and should allow introduction of that evidence and can and should instruct the jury on the purposes for the introduction of that evidence, such as for purposes of a set off of collateral sources or for purposes of a source of funds from which the Plaintiff could have drawn to mitigate damages.

In opening statement and closing statement, defense counsel was careful to alert the jury that the insurance coverage of Plaintiff was introduced on the issue of mitigation of damages. (TI-81, 82, 442 and 443).

In summary, both the Trial Court and defense counsel made every effort, including offering to the Plaintiff the option of a curative instruction in regard to the sole purpose for which the casualty insurance was injected into the case, to avoid any prejudice to the Plaintiff because of the introduction into evidence of this existence of "casualty" insurance. The Plaintiff's attorneys decided not to avail themselves of the curative instruction, but the defense and the Judge, throughout the course of the trial, limited their statements and arguments to the

existence of this casualty insurance strictly as it related to the duty of the Plaintiff to mitigate his damages. The Trial Court's denial of the Plaintiff's Motion in Limine to prohibit the mention of insurance was a correct ruling and his stating unequivocally to the Plaintiff that he would give a curative instruction so that the jury fully understood the limited reason for the admission of such evidence was appropriate. Plaintiff was not adversely affected in the trial of this cause by virtue of the admission into evidence of this coverage for the limited purposes for which it was used.

POINT ON APPEAL

II

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED BY REVERSING THE TRIAL COURT DECISION RULING AS A MATTER OF LAW AND INSTRUCTING THE JURY THAT ERIC LUNDQUIST AND BUD SCHUMANN WERE EMPLOYEES OF ELGIN THOMPSON, NOT INDEPENDENT CONTRACTORS, AND THEREFORE, ELGIN THOMPSON WAS RESPONSIBLE FOR THEIR ACTIONS OR INACTION.

The Trial Court did not err by ruling that Eric Lundquist and Bud Schumann were employees of Elgin Thompson and not independent contractors. Further, even if the Court did err in that determination, that error was harmless, in that the jury never reached the issue of comparative negligence of the Plaintiff, Elgin Thompson, as the employer of Eric Lundquist and Bud Schumann. The jury simply found that there was no negligence on the part of the Defendant, Pensacola Shipyard. The Defendant could have argued the negligence of Eric Lundquist and Bud Schumann, if any, as third parties not present at trial if the Court had not ruled that they were employees of Elgin Thompson, but were independent contractors. The testimony showed, however, that the Plaintiff had the ability to control, not only the outcome of the work of Eric Lundquist and Bud Schumann, but the detailed means by which they accomplished that outcome and, specifically, whether or not they should request additional jack stands. Because the Plaintiff retained the right to control the detail of the performance of the work being done by

Eric Lundquist and Bud Schumann, they were properly determined to be employees by the trial court. The First District Court of Appeal erred in reversing that determination by the Trial Court.

Plaintiff argued in the District Court that the only reason the jury returned a defense verdict in this case was because the Trial Court instructed the jury that Eric Lundquist and Bud Schumann were employees of Elgin Thompson. In fact, however, the gist of the closing argument of the Defendant was that nobody was negligent since nobody is required to have 20-20 hindsight. (TIII-428) Specifically, the Plaintiff's attorney had argued that the Defendant wanted to point fingers at Eric Lundquist and Bud Schumann and say that it was their fault, but the Defendant emphasized in closing argument that neither Bud Schumann nor Eric Lundquist nor any of their workers felt that there was any problem with the stability of the boat and none of them felt there was any negligence on the part of Pensacola Shipyard. (TIII-432) In addition, the Defendants argued that employees of Pensacola Shipyard, Plaintiff Elgin Thompson, Bud Schumann and Eric Lundquist all knew about March winds and all knew about the characteristics of this boat and all knew how this boat was supported and they all did what they thought was necessary to support the boat using reasonable foresight. (TIII-432) Obviously, the jury could reach their decision that no one, including Pensacola Shipyard, was negligent in this case, regardless of whether the Court had instructed them that Bud Schumann and Eric Lundquist were independent contractors or employees of the Plaintiff. The ruling

by the Court that Eric Lundquist and Bud Schumann were employees of the Plaintiff simply would have allowed the jury to consider the negligence, if any, of Bud Schumann and Eric Lundquist, as being attributable to the Plaintiff on the Verdict Form presented to the jury for their finding on the issue of comparative negligence. Since the jury did not get that far, the ruling by the Court on this issue, even if it were to be considered error, would not have been harmful error.

The factors set forth in determining whether someone is an employee or independent contractor are discussed in great detail in the recent case of Alexander v. Morton, 595 So.2d 1015 (Fla. 2nd DCA 1992). That Court stated that probably the most important factor in determining whether a person is an independent contractor or an employee is the extent of control which, by the agreement, the master may exercise over the details of the work. It is clear from the trial testimony of Eric Lundquist, which was unrebutted by any testimony from Mr. Thompson or anyone else at trial, that Mr. Thompson had the ability under the verbal agreement, whether he chose to exercise it or not, to control the details of the performance of the work by Mr. Lundquist and Mr. Schumann. Specifically, Mr. Lundquist testified that, if Mr. Thompson had told him he did not like the way they were pressure washing the boat, they would have done it to his satisfaction, that if Mr. Thompson had told them that he did not like the way they had sanded the boat or put the gel coat on the boat, that they would have done "whatever necessary to make him happy." (TI-136-137) Finally, and

perhaps most importantly, Mr. Lundquist testified that if the Plaintiff had come to him and said there needed to be more jack stands under this boat, Mr. Lundquist would have tried to get additional jack stands from the Defendant, Pensacola Shipyard, to place under the boat. (TI-137-138)

The second of the factors discussed in the Alexander case is whether or not the one employed is engaged in a distinct occupation or business. In our particular case, the testimony was that the Plaintiff himself had engaged in exactly the same activities as those which he hired Lundquist and Schumann to perform. (TII-352-356) This was not an activity that only Mr. Schumann and Mr. Lundquist were qualified to do, but rather it was an activity that the Plaintiff was himself qualified to perform or direct if he so desired. In regard to the third factor discussed in Alexander, that is, whether the work is usually done under the direction of the employer or by a specialist without supervision, there was really no testimony one way or the other at trial in this regard. Again, however, it would be pointed out that Mr. Thompson had the skills necessary to not only perform the work but supervise the work if he so desired. These skills were not unique to Schumann and Lundquist. (TII-352-356) This is also true in regard to the next factor discussed in the Alexander case, that is the skill required in the particular operation. This skill was not peculiar to Lundquist and Schumann as the Plaintiff himself possessed such skills. (TII-352-356)

In regard to the next factor, the supplying of instrumentalities, tools and the place of work for the person doing the work, the place of work was the Pensacola Shipyard which was furnished by a contract that the Plaintiff, Elgin Thompson, had with the Pensacola Shipyard. Therefore, the Plaintiff did provide the place for work, rather than Schumann and Lundquist providing the place for work. In regard to tools and instrumentalities, while the Appellant's Initial Brief says that there was clear evidence and testimony that Lundquist and Schumann provided all of their own tools and equipment, there is no citation in the Appellant's Initial Brief to that testimony. Even if there were such testimony, that would not alone be determinative of this issue in light of the overwhelming evidence in regard to the earlier factors. In regard to the remaining factors, there was no dispute that Lundquist and Schumann were going to be paid by the job and not by the time required to perform the job, but there was testimony that Lundquist and Schumann had been previously hired by the Plaintiff to perform the same job and that there was ongoing annual need for such services, unless Mr. Thompson performed the work himself. (TII 352-356) The Court in Alexander noted that the significance of the last factor, whether the principal is or is not engaged in business is "obscure." There was no testimony that Mr. Thompson was in the boat building business, but this factor should not weigh heavily in a determination of whether Schumann and Lundquist were his employees. Indeed, the Appellant correctly noted that the First District Court of Appeal in Madison v.

Midyette, 541 So.2d 1315 (Fla. 1st DCA 1989) held, as do all of the Courts in Florida, that the primary factor used in making a determination as to whether one is an employee or an independent contractor is the degree of control which the principal may exercise over the details of the work to be performed. The Trial Court herein was well aware of the case law at the time of the ruling and was well aware of the testimony of Mr. Lundquist concerning the degree of control which Mr. Thompson could have exercised under the verbal agreement with Mr. Lundquist and Mr. Schumann in regard to the details of the work to be performed as well as the results to be obtained. It is also the well settled law in Florida that the mere use of the term "independent contractor" by the principal and agent involved is not determinative of the status of the parties. DeBolt v. The Department of Health and Rehabilitative Services, 427 So.2d 221 (Fla. 1st DCA 1983).

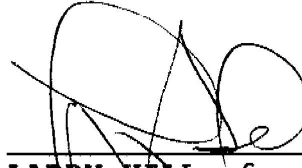
It is respectfully submitted that the Trial Court did not err in his ruling that Eric Lundquist and Bud Schumann were employees of Elgin Thompson because of the degree of control which Elgin Thompson could exercise under the verbal agreement with Mr. Lundquist and Mr. Schumann over the details of the work involved as well as the result obtained. Further, even if the Court erred in making that finding, it would not have affected the jury's determination of the first issue in the case, that is, whether

there was negligence at all on the part of Pensacola Shipyard, but would merely have affected their determination of comparative negligence, a question which the jury never considered because of their ruling on the lack of negligence of the Defendant.

CONCLUSION

Petitioner respectfully urges this Court to answer the certified question in the affirmative for the reasons set forth herein and to reverse the decision of the First District Court of Appeals on the issue of the status of Eric Lundquist and Bud Schumann, thus reinstating the jury's verdict and the Final Judgment herein.

Respectfully submitted



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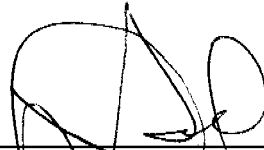
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to O'Gwen King, Esquire, King & Associates, PA, 1622 North 9th Avenue, Pensacola, Florida 32503 by HAND DELIVERY this 13th day of April, 1995.



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IN THE SUPREME COURT OF FLORIDA

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D/B/A PENSACOLA SHIPYARD,

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Respondent

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c/w 93-02904

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT COURT OF APPEAL

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ELGIN THOMPSON,

Appellant,

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Appellee.

CASE NO. 93-2052

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FLORIDA DRUM COMPANY, d/b/a PENSACOLA SHIPYARD,

Appellant,

v.

ELGIN THOMPSON,

Appellee.

CASE NO. 93-2904 CONSOLIDATED

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Opinion filed February 21, 1995.

Appeals from the Circuit Court for Escambia County. Judge Joseph Tarbuck.

O'Gwen L. King, of King & Associates, P.A., Pensacola, for Elgin Thompson.

Larry Hill of Moore, Hill, Westmoreland, Hook & Bolton, Pensacola, for Florida Drum Company d/b/a Pensacola Shipyard.

ON MOTION FOR REHEARING AND MOTION FOR CERTIFICATION

We withdraw our opinion filed August 12, 1994, and issue the following opinion:

BARFIELD, J.

In these consolidated appeals we have Elgin Thompson complaining of error resulting in a defense verdict for Pensacola Shipyard, and Pensacola Shipyard complaining that the trial judge erred in denying it an attorney fee award against Thompson. Because we hold that the trial judge erred in admitting, over Thompson's objection, evidence of insurance available to Thompson to mitigate his damage, and erred in instructing the jury that Eric Lundquist and Bud Schumann were employees of Elgin Thompson, we reverse the judgment, grant a new trial and find it unnecessary to address the other asserted errors.

In March, 1991, Thompson delivered his yacht to Pensacola Shipyard, as he had done in the past, to have the yacht pulled from the water for repairs and maintenance. Pursuant to an agreement reached between the parties, the shipyard lifted the yacht from the water and placed it upon longneck jack stands so that the repairs could get underway. To the horror of all a gusty wind blew. The yacht fell and suffered damage. Thompson sued the shipyard alleging negligence in one count and contract breach in another

count. The shipyard answered alleging it was either Thompson's own fault or nature's fault that his boat fell down and broke.

Pensacola Shipyard found out that Thompson had insurance coverage that would repair the boat. It wanted to use this information at trial to show that Thompson failed to mitigate damages by not having his insurance pay for repairs and allowing further damage to accrue. Thompson sought to exclude this information about his insurance because it had no bearing on the issues of liability and damages. The trial judge ruled in favor of the shipyard, reasoning that Thompson had a duty to take whatever steps reasonably necessary to mitigate damages, and by failing to claim against his insurer, he failed to do so.

The damage mitigation issue would only be relevant to the contract breach claim as contended by the shipyard. Notwithstanding Thompson's assertion on appeal that it was "understood" that he had abandoned the contract count, the record reflects no voluntary dismissal of that count. Pensacola Shipyard says it never knew of any abandonment, but acknowledges that the case was sent to the jury only on the negligence claim.

It is our opinion that regardless of the theory of recovery, negligence or contract, it was error to allow the jury to be apprised of Thompson's insurance coverage. There was no provision of the contract requiring Thompson to maintain insurance against loss during the period of repair. Florida has long recognized the concern in negligence cases that the jury's knowledge of a

defendant's insurance coverage may result in the jury attributing liability where none exists, because of sympathy and the belief that the financial burden would not be born by the defendant. Carls Markets v. Meyer, 69 So. 2d 789 (Fla. 1953). The same potential for improper jury influence has been found to exist when the plaintiff has insurance coverage available to ameliorate the loss. Crowell v. Fink, 135 So. 2d 766 (Fla. 1st DCA 1961). Had Thompson chosen to seek recovery from his insurer, it would have been no benefit to Pensacola Shipyard, because it could not have set off the insurance coverage against its own financial liability. Dynair Tech of Fla. v. Cayman Airways, 558 So. 2d 30 (Fla. 3d DCA 1989). It is not a material fact in this case that Thompson could have called upon his insurer to provide money to pay for repairs possibly expediting the work and reducing the exposure to further damage. Pensacola Shipyard could have accomplished the same result by immediately repairing the boat and maintaining its position that Thompson was responsible for all of the repairs. Similarly, it would not be material whether Thompson was wealthy and could have provided the money to pay for the repairs. Such circumstances have no bearing on the liability of the parties. Extraordinary efforts on the part of a plaintiff to mitigate are not required. Hilsenroth v. Kessler, 446 So. 2d 147 (Fla. 3d DCA 1983).

The fear of improper jury influence present in the cases cited above is very much present in this case. We are unable to conclude that the admission of the evidence of Thompson's insurance did not

affect the jury's verdict. The judgment is reversed, and the case is remanded for a new trial.

Upon retrial of this case, the trial judge is cautioned against instructing the jury that Lundquist and Schumann were employees of Thompson in the work they performed on Thompson's boat. Based on the record before us for review, it is clear they were independent contractors. Unless the evidence at trial is remarkably different from that under review, it would be error to instruct the jury as was done in the first trial. The evidence will dictate whether any preemptive charge is warranted or whether a jury question is presented.

Because it appears that the contract breach claim is still pending before the trial court and we believe the matter is of great public importance, we certify to the Florida Supreme Court 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?

ALLEN and WOLF, JJ., CONCUR.