IN THE SUPREME COURT OF FLORIDA

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

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ON APPEAL FROM THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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PREFACE

Because the Respondent structured his Answer Brief differently than the Petitioner's Initial Brief on the Merits, this Brief will be structructed to reply to the Answer Brief and will, therefore, address the three (3) points on appeal as addressed in the Respondent's Answer Brief.

SUMMARY OF ARGUMENT

I. The Trial Court correctly allowed defense counsel to argue the existence of Plaintiff's own insurance coverage as a means by which Plaintiff could mitigate his damages in this case.

II. The Trial Court also properly instructed the jury that Eric Lundquist and Bud Schumann were employees of Elgin Thompson, not independent contractors, and, even if the Trial Court erred in this instruction, it was harmless error since the jury never reached the issue of Plaintiff's comparative negligence, having found no negligence on the part of the Defendant. At best, there was an issue of fact created as to whether these individuals were independent contractors or employees and that issue should be submitted to the jury if there is a new trial in the case.

III. The Trial Court was correct in denying the Plaintiff's Motion for Partial Summary Judgment on the issue of liability. Clearly, factual issues existed from which reasonable men could conclude that there was no negligence on the part of Pensacola Shipyard. Indeed, this jury did so conclude after hearing all of the evidence. The issue boiled down to one of whether or not the use of four (4) jack stands under this boat constituted negligence on the part of Pensacola Shipyard, Bud Schumann and Eric Lundquist, and the Plaintiff, himself, if anyone, and this issue was property submitted to the jury.

ARGUMENT

POINT I: THE TRIAL COURT DID NOT ERR BY ALLOWING THE DEFENDANT TO ARGUE TO THE JURY THE EXISTENCE OF ELGIN THOMPSON'S OWN INSURANCE COVERAGE.

Respondent has stated that Judge Tarbuck conceded the creation of prejudice by his ruling on the issue of allowing insurance coverage into evidence in regard to the mitigation of damages defense at Page 17 of the Respondent's Answer Brief. Judge Tarbuck did not concede that there was any creation of prejudice by his ruling, but merely said that if there had been such a creation of prejudice, then the prejudice was brought on by the Plaintiff himself by his failure to use that coverage to mitigate his damages as he is required to do under the law. The portion of the opening statement of defense counsel quoted by the Respondent on Pages 17 and 18 of the Respondent's Answer Brief merely highlights the fact that the defense attorney was attempting to be sure that the jury understood that the hull policy was not a liability policy that would be paid only in regard to who was at fault, but rather was a casualty policy, just like collision coverage on a car, that pays

regardless of who is at fault. Defense counsel was attempting to be sure not to prejudice the jury by suggesting that this was a liability policy that would cover Mr. Thompson or his employees for their acts of negligence. Indeed, defense counsel took great pains to explain to the jury that the casualty carrier of Mr. Thompson could have paid for the repair to the boat and then subrogated against Pensacola Shipyard to recover their money back if Pensacola Shipyard was at fault. The Respondent has totally mischaracterized the statement made by defense counsel to the jury because it was never suggested to the jury that Mr. Thompson did not have the right to bring this action against Pensacola Shipyard in an attempt to prove that they were negligent, it was merely suggested to the jury that Mr. Thompson had a duty to mitigate his damages and to call upon his own insurance carrier which provided casualty coverage to the pay for the repair of his boat or, in the alternative, not to seek damages caused by a delay in repairing his boat, which delay was brought on by his own actions. Indeed, the second quoted closing argument of defense counsel beginning on Page 18 of the Respondent's Answer Brief clearly says to the jury that the limited purpose of this testimony from Mr. Shaw, with the casualty carrier, was for purposes of mitigation of damages.

If the Respondent's attorney felt at trial that there was prejudice as a result of the Trial Court's denial of Plaintiff's Motion in Limine to prohibit the mention of insurance, the

Plaintiff was given the opportunity by the Trial Court to have a curative instruction given to the jury to instruct them on the limited basis for which the evidence was admitted. Plaintiff refused such an instruction and should not now be heard to complain that the jury might have considered the evidence beyond the limited reason for which it was admitted.

POINT II: 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.

Petitioner will not further argue this point as it has been previously argued in the Petitioner's Initial Brief on the Merits under Point Number II, except to say that if this Court remands for a new trial in this case, then, at the very least, the issue of whether these individuals were employees or independent contractors of the Plaintiff should be submitted to the jury as a trier of fact and the Trial Court should not be instructed to determine as a matter of law that these individuals were independent contractors as held by the First District Court of Appeal.

POINT III: THE TRIAL COURT DID NOT ERR BY REFUSING TO GRANT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY.

The Respondent begins his argument on this point by stating that it is likely this case would have settled if the Trial Court had granted his partial summary judgment motion. Certainly, there is no record evidence that that is the case and, even if it were the case, it would have no bearing on this appeal or whether or not the Trial Court should have entered the partial summary judgment in the first place. The Motion for Partial Summary Judgment of the Plaintiff was on the issue of whether or not there was negligence on the part of Pensacola Shipyard which caused the damage to the boat. Not only did the Court properly deny the Motion for Partial Summary Judgment since there were genuine issues of material fact remaining for jury determination, but the jury itself rejected the contention that there was negligence on the part of the Defendant that caused the damage to the Plaintiff's boat. (R-122) The Respondent has acknowledged that the testimony of Douglas Granger, Philip Conway and William Phelps in their depositions which were referenced by the Plaintiff's attorney at the Motion for Partial Summary Judgment was the same as the trial testimony. At the end of all of the evidence, the Judge denied a directed verdict on the

negligence issue in regard to Pensacola Shipyard. The Respondent contends in its Answer Brief at Page 31 that the shipyard had exclusive possession and control of the boat, but the evidence is replete with the testimony that the boat was under control of not only the Plaintiff, but Bud Schumann, Eric Lundquist and their employees just prior to the boat being blown over. (TI-138-142 and 157-158) There is no question but that the Defendant had the duty to properly block the boat on jack stands. The Defendant accepted this responsibility and, as pointed out in the Statement of Facts, all of the employees of Defendant felt they had properly blocked the boat with four (4) jack stands. This alone would create a factual issue for the jury to determine whether or not the use of four (4) jack stands was appropriate.

The Petitioner agrees with the case law cited in the Respondent's Answer Brief to the effect that summary judgments should be sparingly used in negligence cases. The only real reason offered by the Respondent as to why summary judgment in this case should have been granted is that it would have saved the time and expense involved in presenting this case to a jury. However, as can easily be seen in the jury's verdict of no liability, the issue of liability was not only a hotly contested one, but was one on which reasonable people felt there was no negligence on the part of Defendant, Pensacola Shipyard. To say that the Judge should have entered summary judgment finding as a matter of law that there was

negligence on the part of Pensacola Shipyard not only flies in the face of the case law, but also in the face of the jury's findings. Several of the cases cited by the Respondent in its Answer Brief were cases where the Appellate Court reversed summary judgments beginning with Holl v. Talcott, 191 So.2d 40 (Fla. 1966), and including Busbee-Bailey Tomato Co. v Bailey, 463 So.2d 1255 (Fla. 1st DCA 1985), Suggs v. Allen, 563 So.2d 1132 (Fla. 1st DCA 1990), National Airlines, Inc. v. Florida Equipment Co. of Miami, 71 So.2d 741 (1954), Crawford v. Department of Military Affairs of the State of Florida, 412 So.2d 449 (Fla. 5th DCA 1982), Fish Carburetor Corp. v. Great American Insurance Co., 125 So.2d 889 (Fla. 1st DCA 1961), Gregg v. Weller Grocery Company, 151 So.2d 450 (Fla. 3rd DCA 1963) and Howarth Trust v. Howarth, 310 So.2d 57 (Fla. 1st DCA 1975). The Trial Court herein correctly allowed this case to go to a jury trial on the issue of the negligence, if any, of Pensacola Shipyard. The Trial Court, therefore, correctly denied the Motion for Partial Summary Judgment on the question of negligence of the Defendant.

CONCLUSION

Because the Trial Court was correct in each of its rulings or, in the alternative, because the jury's finding of no negligence on the part of the Defendant, Pensacola Shipyard, was not affected by any of the Trial Court's rulings, Petitioner respectfully requests this Court to reverse the decision of the First District Court of Appeals, thus reinstating the jury's verdict and the Final Judgment herein or, in the alternative, if this Court decides to remand for a new trial, then it is respectfully requested that this Court direct the Trial Court to submit the issue of independent contractor/employee to the jury.

Respectfully submitted,

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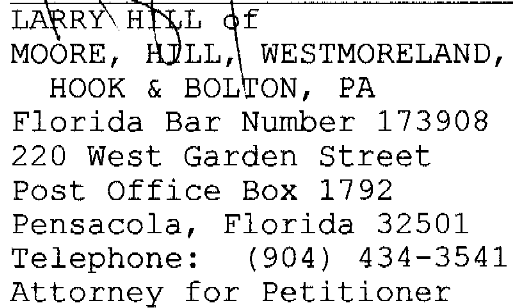
CERTIFICATE OF SERVICE

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 UNITED STATES MAIL this 8th day of June, 1995.



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