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Lurie v. Florida State Board of Dentistry, 288 So. 2d 223 (Fla. 1973)

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any impediment resulting from the *Hagmann* decision will not actually prolong the final distribution of the assets of an estate.

Criminal Law—STATUTORY IMMUNITY—USE OF TESTIMONY PROVIDED PURSUANT TO FLORIDA IMMUNITY STATUTE PROHIBITED IN SUBSEQUENT CRIMINAL OR CIVIL PROCEEDING INITIATED AGAINST DECLARANT BY STATE.—*Lurie v. Florida State Board of Dentistry*, 288 So. 2d 223 (Fla. 1973).

Dr. Jack Lurie, a dentist, was compelled to testify before the Brevard County Solicitor regarding alleged illegal transactions concerning stolen automobiles.[1] One year later Lurie was informed against for receiving a stolen automobile and aiding in the concealment of stolen property. He sought a writ of prohibition from the Fourth District Court of Appeal contending that he was immune from criminal prosecution under Florida's transactional immunity statute.[2] The court

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vent personal liability for claims, the prudent executor will not close the administration and distribute the assets until the nonclaim period has elapsed. J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING 83 (1972). Also, to prevent personal liability for his obligation to pay the estate tax the executor should wait until the return has been audited and approved by the government before he distributes the assets. Since the Internal Revenue Service is running approximately one year behind schedule in its audits, *id.* at 83-84, the consideration of post-death events in connection with the nonclaim statute will have no significant effect on the time of final distribution of estate assets.

1. Arnold Rosenbaum was charged with possession of stolen property and making a false statement on an application for an auto title certificate. His trial on the charges resulted in a hung jury. In order to secure additional witnesses for the retrial, the assistant county solicitor of Brevard County then subpoenaed Lurie and his son, who were questioned under oath about their knowledge of Rosenbaum's activities and about the elder Lurie's acquisition of two autos from Rosenbaum. State *ex rel.* Lurie v. Rosier, 226 So. 2d 825 (Fla. 4th Dist. Ct. App. 1969).

2. FLA. STAT. § 932.29 (1967) provided:

> No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, burglary, larceny, gaming or gambling, or of any of the statutes against the illegal sale of spirituous, vinous or malt liquors, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of

agreed and granted the writ.[3] Almost four years after his compelled testimony was given, Lurie's license to practice dentistry was permanently revoked by the Florida State Board of Dentistry in an administrative proceeding.[4] The Board based its decision on incriminating statements given by Lurie while testifying under the cloak of immunity. Lurie petitioned the Fourth District Court of Appeal for a writ of certiorari, contending that the administrative revocation of his license was a "penalty or forfeiture" prohibited by the immunity statute. The writ was denied per curiam without opinion.[5] Lurie then successfully sought a writ of certiorari from the Florida Supreme Court.[6]

In an opinion by Justice Ervin, the Florida Supreme Court stated that for the immunity statute "[t]o be efficacious in securing testimony of a citizen the immunity extended must be coextensive with all possible governmental penalties and forfeitures, criminal or civil."[7] Reinstating this previously overruled interpretation of the immunity statute,[8] the court held that the action to revoke Lurie's license to prac-

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any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or so produced shall be received against him upon any criminal investigation or proceeding.

This section was renumbered and, in an amended form, is now found in FLA. STAT. § 914.04 (1973). The statute now applies to all crimes, not just the five mentioned above.

3. State *ex rel.* Lurie v. Rosier, 226 So. 2d 825 (Fla. 4th Dist. Ct. App. 1969). The court held that since the subject matter of the inquiry was larceny, one of the five enumerated crimes under § 932.29, the immunity statute applied. Even though the crime of receiving stolen property is not included within the category of larceny, once the immunity statute becomes applicable, the immunity extends to any transaction that the witness was compelled to disclose when his testimony was responsive to questions which are relevant to one of the five crimes. *Id.* at 826.

4. Lurie was charged with willful negligence and malpractice in the removal of a tooth, and conspiracy and concealment of stolen automobiles. Pursuant to FLA. STAT. § 466.24 (1973), the Florida State Board of Dentistry suspended Lurie's license for one year on the first count and permanently revoked his license on the second.

5. Lurie v. Florida State Bd. of Dentistry, 264 So. 2d 479 (Fla. 4th Dist. Ct. App. 1972).

6. Lurie v. Florida State Bd. of Dentistry, 288 So. 2d 223 (Fla. 1973).

7. *Id.* at 226.

8. The court based its holding directly on the reinstatement of Florida State Bd. of Architecture v. Seymour, 62 So. 2d 1 (Fla. 1952). Because *Seymour* reflected the position of the supreme court at the time that Lurie was granted immunity, Lurie claimed that the district court had given retroactive application to Headley v. Baron, 228 So. 2d 281 (Fla. 1969), which overruled *Seymour* and was decided while Lurie's case was pending in the Fourth District.

Apparently accepting this contention, the supreme court granted Lurie's petition for writ of certiorari based on a conflict with Florida Forest & Park Serv. v. Strickland, 18 So. 2d 251 (Fla. 1944), which held that where property or contract rights had been obtained under one construction of a statute, those rights should not be destroyed by giving retroactive application to a subsequent overruling case. The court held that Lurie enjoyed a sufficient property right in his dental license to invoke the rule of *Strickland*. 288 So. 2d at 228.

tice dentistry was a "penalty or forfeiture" within the meaning of Florida statutes section 932.29. Therefore, the activities about which Lurie testified while under a grant of immunity could not be used against him in a subsequent administrative proceeding.[9]

An immunity statute enables the state to compel a witness to testify about any matter, even though the testimony may be self-incriminating.[10] Such statutes are a "legislative recognition of the extreme difficulty of proving certain types of crimes."[11] Immunity is granted primarily in cases in which "the only persons capable of giving useful testimony are those implicated in the crime."[12] In exchange for the witness' testimony, the fifth amendment requires that the government[13] refrain from use of matters disclosed therein at a subsequent criminal prosecution of the witness himself.[14] Thus, an immunity grant obviates the need for the privilege against self-incrimination, and, at the same time, allows the government to obtain the testimony it needs.[15]

To satisfy constitutional requirements, however, the grant of immunity must be coextensive with the minimum protection provided by the fifth amendment.[16] Although subject to considerable criticism,[17] the

9. *See* 288 So. 2d at 226. Although the court did not state its holding explicitly, this is clearly the intended result based on application of the holding in *Seymour* to the facts of this case.

10. *See* Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1570 (1963).

11. Headley v. Baron, 228 So. 2d 281, 283 (Fla. 1969).

12. Kastigar v. United States, 406 U.S. 441, 446 (1972). "The crime usually involves several suspects, none of whom could be effectively prosecuted unless at least one of [them] can be induced" to accept immunity and testify against the others involved in the crime. 228 So. 2d at 284.

13. In Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court made the fifth amendment binding on the states through the fourteenth amendment. Thus the *Kastigar* standard is all that is constitutionally required.

14. *See* Kastigar v. United States, 406 U.S. 441, 461 (1972).

15. The power to compel witnesses to testify is "[a]mong the necessary and most important of the powers of the States as well as the Federal Government . . . ." Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94 (1964) (White, J., concurring); *accord,* Blair v. United States, 250 U.S. 273, 281 (1919). The power "assure[s] the effective functioning of government . . . [and compelled] testimony constitutes one of the Government's primary sources of information." 378 U.S. at 93-94.

The fifth amendment privilege against self-incrimination is a limitation on this power, and has been zealously guarded by the courts. Kastigar v. United States, 406 U.S. 441, 444-45 (1972). Immunity statutes "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Id.* at 446. The protection of the immunity grant supplements that of the fifth amendment by precluding the use of self-incriminating statements in a legal proceeding. *See* Note, *supra* note 10, at 1570.

16. Kastigar v. United States, 406 U.S. 441, 449 (1972); *accord,* Murphy v. Waterfront Comm'n, 378 U.S. 52, 54 (1964); Counselman v. Hitchcock, 142 U.S. 547, 585 (1892). *See also* Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896) (upholding federal power to enact immunity statutes).

recent decision of the United States Supreme Court in *Kastigar v. United States*[18] delineated the minimum requirements for coextensiveness. It is now settled that the fifth amendment requires only that an immunity statute prevent the use in any criminal case of both compelled testimony and evidence derived directly or indirectly from that testimony.[19]

The Florida immunity statute in two respects affords broader protection than is constitutionally required. First, the Florida statute provides transactional immunity: the state may not prosecute a witness for *any* criminal activity disclosed by his testimony.[20] Secondly, as a result of *Lurie,* this transactional immunity extends to subsequent civil proceedings.

The statute was construed more narrowly by the Florida Supreme Court in *Headley v. Baron.*[21] In *Headley* a police officer was dismissed from his job after giving testimony, under immunity, concerning a bribery conspiracy. Rejecting the officer's claim that section 932.29 protected him against loss of his job, the court interpreted the phrase "penalty and forfeiture" to relate only "to any penalty or forfeiture which might arise out of or result from a conviction for one of the five crimes named in the statute."[22] Since Headley was dismissed as the result of a subsequent civil proceeding, rather than a criminal prosecution, the "penalty" was not proscribed by the immunity statute.

The court in *Headley* expressly overruled its prior decision in *Florida State Board of Architecture v. Seymour,*[23] which had construed the same statute in a very similar situation.[24] Seymour, an architect, testi-

17. *See, e.g.,* Note, *Use and Derivative Use Immunity: A Sufficient Substitute for the Privilege Against Self-Incrimination?,* 26 ARK. L. REV. 580 (1973); Note, *Immunity from Prosecution: Transactional Versus Testimonial or Use,* 17 S.D.L. REV. 166 (1972); Note, *Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards,* 25 VAND. L. REV. 1207 (1972); Note, Kastigar v. United States: *The Required Scope of Immunity,* 58 VA. L. REV. 1099 (1972); 25 U. FLA. L. REV. 394 (1973).

18. 406 U.S. 441 (1972).

19. *Id.* at 453. "Use immunity" and "derivative use immunity" do not prevent subsequent prosecution based on evidence obtained from legitimate independent sources. *Id.* at 461. However, the burden is on the government "to prove that the evidence it proposes to use is derived from" such an independent source. *Id.* at 460.

20. "Transactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege." Kastigar v. United States, 406 U.S. 441, 453 (1972). This type of immunity "not only immunize[s] the witness for any use of his testimony or the fruits thereof in a subsequent trial but it . . . also provide[s] absolute immunity against future prosecution for the offense to which the question relates." Note, *Immunity from Prosecution: Transactional Versus Testimonial or Use,* 17 S.D.L. REV. 166, 173 (1972). *See also* Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892).

21. 228 So. 2d 281 (Fla. 1969).

22. *Id.* at 286; *see* note 2 *supra.*

23. 62 So. 2d 1 (Fla. 1952).

24. 228 So. 2d at 286.

fied under immunity concerning his role in bribing public officials. The supreme court agreed with Seymour's contention that the Board of Architecture's license revocation procedure "effect[ed] a penalty or forfeiture as contemplated by Section 932.29."[25] Unconcerned with the nature of the proceeding,[26] the court stated that the determinative inquiry "is whether or not a proceeding for revocation of an architect's certificate amounts to a prosecution *or* may produce a penalty or forfeiture as contemplated by the statute."[27] Seizing upon the statute's use of the disjunctive "or," the majority in *Lurie* reaffirmed *Seymour* and observed that the immunity granted by section 932.29 is not divisible so as to extend only to criminal prosecution.[28] In overruling *Headley,* the court noted that this broader interpretation of the statute comports well with both legislative intent and fundamental fairness.[29]

Although the courts in several jurisdictions disagree,[30] the result

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25. 62 So. 2d at 3.

26. In *Seymour* the nature of the proceeding was irrelevant because FLA. STAT. § 838.08 (1941), *as amended,* (1973), specifically provided that compelled testimony concerning bribery could not be admitted at any civil or criminal trial. *See* note 28 *infra.* However, § 838.08 was not involved in *Lurie* and was not relied on by the *Lurie* court in concluding that testimony given pursuant to an immunity grant cannot be used at a subsequent civil proceeding.

27. 62 So. 2d at 3 (emphasis added).

28. 288 So. 2d at 226. The court observed:

> As Justice Terrell stated in *Seymour* . . .: "Whether the prosecution, penalty or forfeiture has to do with a civil or criminal action is not material. The statute [932.29, F.S.] makes it applicable to both."

Id., quoting from 62 So. 2d at 3.

The *Seymour* court, in the quoted passage, was referring to FLA. STAT. § 838.08 (1941), concerning compelled testimony relating to bribery, not FLA. STAT. § 932.29 (1967). *See* note 26 *supra.* Therefore, the quotation does not lend support in a strict legal sense to the *Lurie* interpretation of § 932.29. But both the holding in *Seymour* and subsequent readings of the case by Florida courts support the *Lurie* court's broad reading of the immunity statute. The *Seymour* court based its holding primarily on § 932.29. *See* 62 So. 2d at 3. In State Beverage Dep't v. State *ex rel.* Zucker, 116 So. 2d 640 (Fla. 3d Dist. Ct. App. 1959), and Hotel & Restaurant Comm'n v. Zucker, 116 So. 2d 642 (Fla. 3d Dist. Ct. App. 1959), the Third District Court of Appeal extended the *Seymour* rationale to two situations—revocation of liquor and motel operation licenses—that did not involve § 838.08. Likewise in *Headley,* the supreme court interpreted *Seymour* on the basis of § 932.29, failing to mention § 838.08. 228 So. 2d at 282.

29. "Such an interpretation is not a strained construction of the Legislature's enactment, but rather one which comports realistically and honestly with the professed immunity grant." 288 So. 2d at 226. The court emphasized that state licensing agencies are bound by the immunity grant since the prosecutor who is authorized to grant it acts for the entire state government. *Id.*

The court also said:

> Fundamental fairness dictates an open and aboveboard agreement between both . . . the state and the witness. No hypocrisy or pretense can be indulged in by the state to break so solemn a pledge when a witness is compelled by law to testify.

Id. at 227.

30. *See, e.g.,* Ullmann v. United States, 350 U.S. 422 (1956); Napolitano v. Ward, 457

reached in *Lurie* is not without support.[31] The statute is plainly susceptible of the interpretation given to it by the court.[32] Moreover, this interpretation, although not constitutionally required, fully supports the policy that an immunity grant should place the witness in substantially the same position as if he had invoked the fifth amendment privilege.[33] Had Lurie not been compelled to testify he could have invoked the privilege both in the prosecutor's office and at the administrative proceeding;[34] no penalty for that invocation could have been imposed.[35] Only by extending immunity to the subsequent civil proceeding could he have been placed in substantially the same position.[36]

By inquiring into the nature of the sanction to be imposed, rather than the nature of the proceeding, the Florida Supreme Court has adopted a sound framework for examining the proper scope of a grant of immunity.[37] The state, in granting immunity, professes to insulate the witness from penalties or forfeitures resulting from his own testi-

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F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972); *In re* Schwarz, 282 N.E.2d 689 (Ill.), *cert. denied*, 409 U.S. 1047 (1972); *In re* Rouss, 116 N.E. 782, 147 N.Y.S. 713 (1917); West Virginia State Bar v. Graziani, 200 S.E.2d 353 (W. Va. 1973).

31. *See* Petition of Specter, 268 A.2d 104 (Pa. 1970); *cf.* Note, *Self-Incrimination: Privilege, Immunity, and Comment in Bar Disciplinary Proceedings*, 72 MICH. L. REV. 84, 111-12 (1973).

32. The language of § 932.29 employs conjunctions in two important places: "[N]o person shall be prosecuted *or* subjected to any penalty or foreiture . . . *and* no [compelled] testimony . . . shall be received against him upon any criminal investigation or proceeding." (Emphasis added.) The reference to penalty or forfeiture is an alternative to prosecution. The statute clearly prohibits criminal prosecution based upon compelled testimony. Thus, the reference to "prosecution" encompasses any penalty or forfeiture resulting from criminal prosecution, since only by adjudication of guilt can one be criminally penalized. Since the statute prohibits any adjudication of guilt based on compelled testimony, "penalty or forfeiture" must relate to other consequences. It seems impossible that one could be penalized as a consequence of a conviction that could never occur. The only other sources of state sanctions, therefore, are civil and administrative proceedings.

33. This policy objective was recognized by the United States Supreme Court in *Kastigar*. *See* 406 U.S. at 462.

34. *See In re* Gault, 387 U.S. 1, 49 (1967).

35. *See* Nelson v. Los Angeles, 362 U.S. 1 (1960); *cf.* Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Malloy v. Hogan, 378 U.S. 1 (1964); State *ex rel.* Vining v. Florida Real Estate Comm'n, 281 So. 2d 487 (Fla. 1973).

36. It is important to note that under either testimonial or use immunity, Lurie's job would not have been protected by the *Headley* rationale since a proceeding to revoke a license to practice dentistry is not a criminal proceeding designed to impose a criminal penalty. Lurie could have retained his job after invoking the fifth amendment privilege as long as the state did not exercise its power to compel him to testify. *See* cases cited in note 35 *supra*. Thus, after the decision to compel Lurie to testify was made, the only way in which the state could prevent Lurie from losing his job, based on this testimony, would be to extend the immunity to civil proceedings.

37. *See* Note, *supra* note 10, at 1583.

mony. It is well settled that some civil sanctions can be penal in nature.[38] Thus, if these penal sanctions are imposed in a civil proceeding as a result of the witness' compelled testimony, the state's "solemn pledge" is broken.[39] Recognizing this potentiality, the witness is faced with an impossible dilemma: he can refuse to testify and face contempt charges or he can supply information which will result in a severe civil sanction.[40] But under the approach adopted by the supreme court, the "criminal" or "civil" nature of the proceeding is irrelevant, and the witness' dilemma is avoided. Those sanctions found penal in nature will not be imposed in either proceeding.

Additionally, the court's broader interpretation of the immunity statute should enhance the effectiveness of the immunity grant. The purpose of the statute is to aid in securing evidence otherwise difficult to obtain.[41] Implicit in the decision to grant immunity is the recognition that some criminals may not be prosecuted in order that prosecution of more significant criminal activity may proceed. Thus, by the very nature of the process, the statute should encourage witnesses to come forward and cooperate. As the *Lurie* court observed, "the state . . . should not be technically 'sharp' or narrow in honoring its immunity commitment" because "[t]o do so would not only debilitate the effectiveness of the immunity grant . . . [but] it would also invariably serve to engender distrust for a state officer's promise."[42] The *Lurie* decision avoids this undesirable result by affording the witness the broadest possible protection. The witness need no longer equivocate in revealing incriminating facts because he fears subsequent prosecution; he can now testify fully and freely, disclosing all relevant information. Witnesses who can provide prosecutors with useful information now have a stronger incentive for seeking immunity in exchange for that information.[43] Particularly affected are those persons licensed and regulated by governmental authorities. Under *Lurie* and *Seymour* revocation of a governmental occupational privilege in a civil proceed-

38. *See, e.g., In re* Ruffalo, 390 U.S. 544, 551 (1968); *In re* Gault, 387 U.S. 1 (1967); Spevack v. Klein, 385 U.S. 511 (1967); State *ex rel.* Vining v. Florida Real Estate Comm'n, 281 So. 2d 487 (Fla. 1973). *See also* Note, *supra* note 10, at 1584-86.

39. It must be noted that this agreement is based on a policy of fundamental fairness between the state and the witness. *See* 288 So. 2d at 227. The state's promise is not constitutionally required to extend so far. *See* notes 19 & 20 and accompanying text *supra.*

40. *See* Note, *supra* note 10, at 1584.

41. *See* note 12 and accompanying text *supra.*

42. 288 So. 2d at 227.

43. There are some restrictions on the immunity grant. The witness obtains immunity only from crimes to which his testimony relates, and there must be a substantial connection between the subject matter testified to and the crime for which immunity is sought. *See* Note, *supra* note 10, at 1579. Also, a witness can be prosecuted for perjury while testifying under immunity. *Id.* at 1580.

ing based on compelled testimony is clearly a penalty or forfeiture prohibited by the immunity statute.

On a policy level, however, the wisdom of the *Lurie* decision is not beyond question. The broader immunity grant will prevent dismissal of a state employee or a state-regulated professional on the basis of his compelled testimony. As Justice Drew argued in dissent, the *Lurie* decision therefore will allow a law enforcement officer to come before a grand jury under immunity, "confess to participation in criminal activities and then effectively bar suspension or removal from office and thereafter . . . remain the symbol of the law . . . ."[44] To avoid this consequence Justice Drew would adhere to the *Headley* construction of the statute.[45]

But Justice Drew's hypothetical should be viewed as an inherent risk of placing the immunity decision within prosecutorial discretion. Under either the narrow or broad construction of the statute, the prosecutor must determine whether immunity is warranted. Presumably prosecutors will understand the consequences of granting immunity and will consider both the state and the public interests in reaching immunity decisions.[46] The possibility that, for example, a self-confessed felon might remain in a position of trust is therefore a substantial factor that will be weighed by the prosecutor in balancing the need for the witness' testimony against the harm to society that might result should he be allowed to escape prosecution.[47] Thus the *Lurie* decision might make prosecutors more cognizant of their responsibility to society. Prior to *Lurie* a prosecutor granting immunity could rely on the possibility of subsequent administrative action to provide an effective alternative to criminal prosecution. With this option no longer available, he must be more diligent in assessing the burdens and benefits of a particular immunity decision. Logically, this increased responsibility could result in fewer, more selective immunity grants.[48] Even so, the immunity granted will more fully effectuate the purpose and policy of

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44. 288 So. 2d at 233 (Drew, J., dissenting).

45. *Id.* at 229. Justice Drew was a member of the majority which decided the overruled *Headley* case.

46. 288 So. 2d at 227. *See* Note, *Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards*, 25 VAND. L. REV. 1207, 1212 (1972).

47. *See* Note, *supra* note 46, at 1212; Note, *supra* note 31, at 111-12.

48. This is not necessarily so, however. Since the crucial factor in the immunity decision is the relative importance of the information sought to be obtained, it can be argued just as strongly that *Lurie* will have little impact on the quantity of immunity grants. Failure to prosecute an admitted criminal seems a greater sacrifice to society than the relinquishment of the right to revoke a governmental privilege based on the incriminating testimony. Thus, in most cases, as long as the evidence is important enough to warrant this greater sacrifice it would appear that it is also important enough to outweigh the additional sacrifice imposed by *Lurie*.

the statute. The state will benefit from an increased flow of useful testimony, and the witness from greater protection from governmental penalties.

Torts—STANDARD OF CARE—PROPERTY OWNER OWES INVITED LICENSEE DUTY TO DISCOVER AND WARN OF HAZARDOUS CONDITIONS ON PREMISES.—*Wood v. Camp*, 284 So. 2d 691 (Fla. 1973).

During the 1962 Cuban missile crisis, the Frank Wood family installed in their front yard an underground bomb shelter that in later years their teenaged son, Frank Layne Wood, used as his own room. On October 7, 1969, Randall Camp, a close friend of young Wood, visited the bomb shelter while Wood was sick in the main house. The shelter exploded, apparently because a faulty valve had allowed propane gas to escape and accumulate. Camp suffered severe and extensive burns, and died five days later. His father, John O. Camp, brought a wrongful death action against Mr. Wood and the gas company. The trial court granted summary judgment for the defendants, citing the limited duty of care a landowner owes to a social guest.[1] The Second District Court of Appeal reversed and remanded in an opinion which seemed to reject the traditional categories of invitee, licensee and trespasser, and which seemed to hold that a landowner owes all persons lawfully on his premises the duty of reasonable care under the circumstances.[2] Wood petitioned the Florida Supreme Court for a writ of

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1. Camp v. Gulf Counties Gas Co., 265 So. 2d 730, 731 (Fla. 2d Dist. Ct. App. 1972).

2. Camp v. Gulf Counties Gas Co., 265 So. 2d 730 (Fla. 2d Dist. Ct. App. 1972). The test applied by Judge Mann, writing for the court, was the test originally used by Lord Denning in Hawkins v. Caulsdon & Purley Urban Dist. Council, [1954] 1 Q.B. 319, 337 (1953): "The duty is not to invitees as a class, nor to licensees as a class, but to the very person himself who is *lawfully* there. What is reasonable care in regard to him depends on all the circumstances of the case." (Emphasis added.) A close reading of this test suggests that it has no application to trespassers because they are not *lawfully* on the land. While it is true that, for tort purposes, trespassers are not always distinguished from licensees by the fact that they are unlawfully on the land, reference to the *Hawkins* case clearly indicates that Lord Denning was not concerned with trespassers when he formulated the test. The *Hawkins* case involved the licensee-invitee distinction, and it was that distinction that Lord Denning did "not believe . . . [to be] well-founded." *Id.* at 330. The *Hawkins* case did not consider or affect the trespasser category. It "consider[ed] simply the law about licensees." *Id.* at 333. Thus it is a mistake to conclude that Lord