IN THE SUPREME COURT OF FLORIDA



CASE NO: 66,263

METROPOLITAN PROPERTY AND
LIABILITY INSURANCE COMPANY,
et al.,

Petitioners,

vs.

CHICAGO INSURANCE COMPANY,

Respondent.

APPEAL FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT, CASE NO. 83-2016

# ANSWER BRIEF OF RESPONDENT

# CHICAGO INSURANCE COMPANY

FERTIG AND GRAMLING
Attorney for Respondent
750 Southeast Third Avenue
Suite 200
Fort Lauderdale, FL 33316
Phone: (305) 763-5020
945-6250

## TABLE OF CITATIONS

## TABLE OF CONTENTS

## PRELIMINARY STATEMENT

Repondent, CHICAGO INSURANCE COMPANY, will hereinafter be referred to as CHICAGO; Petitioner, METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY, will hereinafter be referred to as METROPOLITAN; TRAVELERS INSURANCE COMPANY will hereinafter be referred to as TRAVELERS; and LACAVALLA ENTERPRISES, INC. and GLENN M. TRUEMAN, will be referred to herein as LACAVALLA and TRUEMAN, respectively.

This Brief is accompanied by an Appendix, pursuant to Fla. R. App. P. 9.220, and reference to the Appendix, shall be indicated by the letters "APP" in parentheses, followed by the appropriate page number.

## STATEMENT OF THE CASE AND OF THE FACTS

Respondent, CHICAGO, generally agrees with the Statement of the Case and the Facts as set forth in Petitioner's Brief, but feels compelled to amplify some statements, provide additional necessary facts, and specifically disagree with certain assertions.

Initially, Petitioner, METROPOLITAN, seeks a review of the Fourth District Court of Appeal's opinion granting Respondent, CHICAGO, indemnity from TRUEMAN and his insurer, METROPOLITAN (APP 1-4), and the Fourth District Court of Appeal's Order granting Respondent, CHICAGO, attorneys' fees (APP 5).

No evidence of any negligence on the part of LACAVALLA, CHICAGO'S insured, the owner of the vehicle involved in the accident on or about November 21, 1981, was presented. If fact, no Plaintiff even alleged any negligence on the part of LACAVALLA (APP 6-10).

CHICAGO filed a cross-claim for indemnity (APP 11-15), and the Trial Court denied the same without making any findings of fact (APP 16). Contrary to the Petitioner's assertions, in fact, the Trial Court, subsequently found that the owner of the vehicle was insured by TRAVELERS and CHICAGO, while the driver, TRUEMAN, was only insured by METROPOLITAN (APP 20).

METROPOLITAN'S counsel in reply (APP 17) to correspondence from CHICAGO'S counsel (APP 18-19),

specifically refers to the Trial Court's order of January 28, 1983, which established the priorities or layers of coverage (APP 20-21). This was the same order, which was the subject of CHICAGO'S first Appeal to the Fourth District Court of Appeals, in Case No: 83-338. That appeal was dismissed, without prejudice, to being raised on appeal from a final judgment in this action (APP 22), or after the Trial and final disposition (APP 23).

On August 23, 1983, after all of the Plaintiffs' claims had been settled or disposed of, a hearing was held before the Trial Court. At that time, a judgment was entered against TRAVELERS and CHICAGO (APP 24-39). Next, an undated stipulation and order of dismissal (APP 43-44) was entered into between Plaintiffs and Defendants, with the exception of the Defendant, TRAVELERS, whose counsel was on vacation (APP 40).

The order of dismissal was dated 24 August 1983 (APP 44) and the order of final judgment was dated 31 August 1983 (APP 46). Respondent, CHICAGO, filed its notice of appeal, to the Fourth District Court of Appeals, on September 15, 1983 (APP 47), and it is that Court's rulings (APP 1-5) that Petitioner now asks this Court to review.

## SUMMARY OF ARGUMENT

As a result of an automobile accident, multiple Plaintiffs filed separate second amended complaints, against the owner of the other vehicle involved, LACAVALLA, his primary insurance carrier, Travelers, and his excess insurance carrier, CHICAGO, as well as the other vehicle's driver, Trueman, and his primary insurance carrier, Metropolitan. The Trial Court found the layers, or priorities of insurance coverage to be Travelers first, CHICAGO second, and Metropolitan third. CHICAGO lead settlement negotiations with all Plaintiffs and resolved all disputes between Plaintiffs and Defendants, reserving its right of appeal. Upon appeal, the Fourth District Court of Appeal, correctly allowed CHICAGO'S indemnity claim, against Metropolitan, the insurer of the active tort-feasor, and awarded attorneys fees to CHICAGO.

Initially, Petitioner questioned the Fourth District Court of Appeal's right to have heard the appeal. Respondent argues that the appellate rights of CHICAGO were initially preserved by the Fourth District Court of Appeal's dismissal of CHICAGO'S first appeal, without prejudice, and subsequently preserved, by written agreement between counsel. The final judgment appealed from, or the subsequent order of dismissal entered by the Trial Court, was a final order appealable by a Defendant

(CHICAGO) who had been aggrieved by the exhoneration of another Co-defendant (Metropolitan), Pensacola Interstate Fair, Inc. v. Popovich, 389 So 2d 1179 (Fla. 1980).

Petitioner next argues that CHICAGO is precluded from indemnity because Trueman was an insured of CHICAGO. Contrary to this argument, CHICAGO presents its private passenger automobile excess liability policy, insuring only Lacavalla, and the Trial Court finding of fact to the same. If, assuming arguendo, Trueman was an insured of CHICAGO, and both the Trial Court and the Fourth District Court of Appeal were incorrect, CHICAGO would be precluded from its indemnity claim. However, if Trueman is insured by Travelers, CHICAGO, and Metropolitan, then all insurance companies would be in the same class and CHICAGO would, by the provisions of its policy, be excess, and therefore still entitled to recovery from Metropolitan. Hartford Accident and Indemnity Company v. Kellman, 375 So 2d 26 (Fla 3rd DCA 1979).

CHICAGO is without fault, has discharged the debt of the active tort-feasor, Trueman, to the Plaintiffs, and is therefore entitled to indemnity from Trueman and his insurance carrier, Metropolitan,

Houdaille Industries, Inc. v. Edwards, 374 So 2d 490 (Fla 1979). If, assuming arguendo, Lacavalla, the owner and CHICAGO'S insured, was also at fault, he and Trueman would become joint tort-feasors and CHICAGO would be precluded from its indemnity claim. However, if Trueman and Lacavalla are joint tort-feasors, then all insurance companies would be in the same class, and CHICAGO would by the provisions of its policy be excess and therefore still entitled to recover from Metropolitan Allstate Insurance Company v. Fowler, 455 So 2d 506 (Fla 1st DCA 1984).

As CHICAGO is entitled to indemnity for damages, so too is it entitled to attorneys fees incurred in defending and settling the underlying law suit, American and Foreign Insurance v. Avis Rent-a-car, 401 So 2d 855 (Fla 1st DCA 1981), and for the successful prosecution of the indemnification action, and for prevailing at the appellate level, Brown v. Financial Indemnity Company, 366 So 2d 1273 (Fla 4th DCA 1979).

The Fourth District Court of Appeal was correct in applying common-law indemnity, and holding that one who is only technically or vicariously liable for damages to another, is entitled to indemnification

from the direct or active tort-feasor. Further, an insurer should be entitled to indemnity from another insurer in cases where the active tort-feasor's limits have not been exhausted in payment to the Plaintiffs.

## ISSUE I

IS THE EXCESS INSURER OF THE OWNER OF A MOTOR VEHICLE, WHOSE POLICY BY ITS TERMS INSURES THE NEGLIGENT DRIVER OF THAT MOTOR VEHICLE, ENTITLED TO INDEMNITY FROM THE INSURER OF THE NEGLIGENT DRIVER?

CHICAGO is somewhat confused by the question and argument asserted herein by Metropolitan. CHICAGO is the excess insurer of the owner of a motor vehicle, but not the insurer of the negligent driver, and as such, is entitled to indemnity from Metropolitan, the actual insurer of the negligent driver.

The "Private Passenger Automobile Excess Liability Policy" (APP 48), issued by CHICAGO, sets forth its insured as "Anthony D. LaCavalla" and restricts its coverage to owned vehicles described therein, or replacements of a described vehicle (APP 49). The private passenger automobile excess liability policy issued by CHICAGO agrees in part:

> "To indemnify the insured for the amount of loss which is excess of the applicable limits of liability of the underlying insurance. . . .
>
> The provisions of the immediate underlying policy (underlying insurance) are incorporated as a part of this policy except. . . any 'other insurance' provision and any other provisions therein <u>which are inconsistent with the provisions of this policy</u>." (emphasis added). (APP 52).

The Private Passenger Automobile Excess Liability Policy further asserts:

> "If, with respect to a loss covered hereunder, the insured has other insurance, whether on a primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects such loss; . . . This policy shall afford excess insurance over and above such other insurance . . . " (APP 54).

Therefore, it is asserted that any conflict between the underlying insurance provisions and the excess insurance provisions would be resolved by the excess provisions controlling. Further, as the Fourth District Court of Appeal pointed out, it is obvious that TRUEMAN had a policy of insurance with Metropolitan, and as such, there should be no insurance afforded under the CHICAGO policy. CHICAGO has preserved its right to favored status on indemnity from METROPOLITAN because of TRUEMAN'S policy. (APP 4).

Findings of fact made in a lower tribunal are clothed with a presumption of validity and accepted in the most part as fact by appellate courts. As the case at bar was settled prior to trial, there were few facts found in the lower tribunal. That Court did, however, find that LaCavalla was insured by Travellers and CHICAGO and that Metropolitan alone provided coverage for TRUEMAN. (APP 16).

The argument proferred by Metropolitan was not accepted by the appellate court herein, nor the Second District Court of Appeal when the argument was made that Aetna should be the primary policy covering the driver because of additional insured language contained in its policy. Sentry Ins. Co. v. Aetna Ins. Co., 450 So.2d 1233 (Fla. 2nd DCA, 1984).

Metropolitan seeks to distinguish Allstate Insurance Company v. Fowler, 455 So.2d 506 (Fla. 1st DCA, 1984), and the opinion of the Fourth District Court of Appeal herein. (APP 1-4). The distinction is lost, because Allstate v. Fowler, supra, cites a plethora of authority for the proposition that one who is only vicariously liable to an injured person because of the dangerous instrumentality doctrine may recover against an active tort-feasor.

Further, the First District Court in the Fowler Case questioned whether the owner was without fault, and therefore addressed the issue of priority of coverage. The case at bar does not question the lack of fault of the owner and therefore addressed the issue of indemnity.

## ISSUE II

IN AN AUTOMOBILE NEGLIGENCE CASE, THE INSURER OF THE NEGLIGENT DRIVER MUST EXHAUST ITS COVERAGE IN THE SATISFACTION OF CLAIMS PRIOR TO THE EXCESS INSURER OF THE OWNER BEING REQUIRED TO MAKE PAYMENT UNDER ITS POLICLY.

Petitioner argues that Hartford Accident and Indemnity Company v. Kellman, 375 So 2d 26 (Fla 3rd DCA 1979) is a sensible decision, while ignoring the actual holding as it relates to the case at bar. If, as Petitioner now argues, CHICAGO insured Trueman, Hartford Accident and Indemnity Company v. Kellman, supra, would control and CHICAGO by virtue of its "other insurance" language (APP 54) would be excess to Metropolitan's coverage as all three companies, Travelers, CHICAGO and Metropolitan, would now be in the same class.

Contrary to Petitioner's assertion, CHICAGO does not insure the active tort-feasor and driver, Trueman (APP 4, 20). CHICAGO is without fault, has discharged the debt of Trueman to a third party, and is therefore, entitled to indemnity. Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979).

Unlike Hartford Accident and Indemnity Company v. Kellman, supra, where the same person wore three hats, the case at bar presents separate entities as in Allstate Ins. Co. v. Fowler, supra. However, as in both, the Hartford and Fowler cases, the Appellate Court chose to follow the common law rule

holding an active tort-feasor responsible for his actions and the consequenses thereof. In the Hartford case, the driver or active tort-feasor, was primarily liable. In the Fowler case, once again, the driver or active tort-feasor would be primarily liable, if as in the case at bar, the owner were to be found without fault.

Contrary to Petitioner's assertion, the case at bar does not present a situation of double or overlapping coverage. CHICAGO is clearly the excess liability insurer of the owner, Lacavalla. Metropolitan is clearly the primary liability insurer of the active tort-feasor, Trueman (APP 20, 21, 48-54). In cases where more than one insurer's policy provides coverage for a loss, the insurance contracts should be reviewed to see if the policies address the ranking or contribution of other insurers, and, if so, as in the case at bar, priorities among the insurers should be decided by reference to the provisions contained in the policies. Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977).

The case at bar is readily distinguishable from State Farm, etc. v. Universal Under. Ins., 365 So.2d 778 (Fla. 1st DCA 1979). In the State Farm case, each policy contained

mutually repugnant escape clauses and the trial court, with agreement of the parties, held that the clauses were not applicable. Had there been an excess clause, surely the court would have honored the policy provisions and found as in the case at bar, no overlapping coverage and that the active tort-feasor was primarily liable.

The "sensibility" of Hartford Accident and Indemnity Company v. Kellman, supra, as argued by Petitioner, will not stand the test of logic. In the case at bar, the owner's primary carrier, Travelers, paid its policy limits and the trial court held that the owner's excess carrier, CHICAGO, was the next level of coverage by virtue of being in the same class, that is insuring the owner (APP 20,21).

Suppose both driver and owner had both primary and excess coverages and that we were to attempt to apply the same class test advocated by Petitioner. If driver's primary carrier paid its policy limits, driver's excess carrier (same class) would be the second level of coverage and owner's primary carrier would become the third level, followed by owner's excess carrier. Conversely, owner's primary carrier could establish the inverse order by volunteering to pay its policy limits for settlement.

mutually repugnant escape clauses and the trial court, with agreement of the parties, held that the clauses were not applicable. Had there been an excess clause, surely the court would have honored the policy provisions and found as in the case at bar, no overlapping coverage and that the active tort-feasor was primarily liable.

The "sensibility" of Hartford Accident and Indemnity Company v. Kellman, supra, as argued by Petitioner, will not stand the test of logic. In the case at bar, the owner's primary carrier, Travelers, paid its policy limits and the trial court held that the owner's excess carrier, CHICAGO, was the next level of coverage by virtue of being in the same class, that is insuring the owner (APP 20,21).

Suppose both driver and owner had both primary and excess coverages and that we were to attempt to apply the same class test advocated by Petitioner. If driver's primary carrier paid its policy limits, driver's excess carrier (same class) would be the second level of coverage and owner's primary carrier would become the third level, followed by owner's excess carrier. Conversely, owner's primary carrier could establish the inverse order by volunteering to pay its policy limits for settlement.

## ISSUE III

THE FOURTH DISTRICT COURT OF APPEAL HAD APPELLATE JURISDICTION TO ENTERTAIN CHICAGO's APPEAL.

Metropolitan once again raises the jurisdictional issue it has raised many times before, and does so knowing that the Fourth District Court of Appeal has ignored its argument previously.

On January 28, 1983, the trial court entered its Final Summary Judgment establishing the layers of coverage involved herein. (APP 20). The attorneys for Metropolitan and CHICAGO agreed in writing that CHICAGO's right to appeal the Final Summary Judgment of January 28, 1983 would be preserved through settlement negotiations, which CHICAGO was asked to initiate. (APP 17-19). The correspondence between counsel specifically referred to Lumbermen's Mut. Cas. v. Formost Insurance Co., 425 So.2d 1158 (Fla. 3rd DCA, 1983), in preserving the cause of action CHICAGO would have against Metropolitan for indemnity, and reivew of the determination of layers of coverage.

The initial dismissal of CHICAGO's appeal of the Summary Judgment entered January 28, 1983, had come in April (APP 22-23) several months before the correspondence addressed between counsel.

At the hearing on August 23, 1983, after all disputes and controversies had been settled, the parties appeared to resolve

housekeeping matters. Having reviewed the transcript (APP 24-42), it is apparent that the Court entered a judgment against CHICAGO and Travelers only as Metropolitan no longer wished to insure the preservation of CHICAGO's appellate rights as it had previously agreed to do. (APP 17). It is further obvious that after the judgment was entered that a Stipulation and Order of Dismissal was presented. The Stipulation referred to an amicable settlement of all matters and things in dispute between the parties, vice among the parties. Fla. R. Civ. P. 1.210(a) defines parties as plaintiffs and defendants. Had the Stipulation been other than between plaintiffs and defendants it surely would have been entered into among the parties.

If CHICAGO's appeal should have been taken from the Order of Dismissal instead of the Final Judgment, the timely notice of appeal would have adequately vested jurisdiction. (APP 47). Further, Fla. R. Civ. P. 1.540(a) authorizes an appellate court on its own motion to correct an error arising from oversight or omission.

In order to adequately compensate the Plaintiffs herein for their injuries, and in order to resolve this dispute amicably, CHICAGO entered into negotiations and settled all

matters in dispute with the Plaintiffs on behalf of Travelers, CHICAGO, and Metropolitan. It has long been the policy of the courts of this State to promote settlements and the amicable resolution of disputes between parties, plaintiffs and defendants. CHICAGO does not believe that the Appellate Court's earlier Orders of Dismissal (APP 22, 23) should be construed to force this case to trial in the lower tribunal in order to preserve CHICAGO'S right to Appellate review.

Rinek v. State of Florida, Department of Transportation, 442 So.2d 996 (Fla. 3rd DCA, 1983), recognizes that a party should not be forced to trial and final disposition in order to enable it to preserve its appellate rights, and supports CHICAGO's arguments regarding the appealability of the Order of Final Judgment.

The Order of Final Judgment is an appealable final order of a judgment by defendant who has been aggrieved by the exoneration of another co-defendant (Metropolitan) through the trial court's determination of insurance coverage. To hold otherwise would deny CHICAGO its right to indemnification for its losses from the entity legally responsible. Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980).

## ISSUE IV

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN GRANTING CHICAGO'S MOTION FOR ATTORNEYS' FEES.

The Plaintiffs herein were travelling under Second Amended Complaints which both alleged coverage of Lacavalla Enterprises, Inc. by Travelers, CHICAGO, and Metropolitan. (APP 6-7 and 8-10). CHICAGO was quick to crossclaim for identification against Metropolitan and its insured, TRUEMAN. (APP 11-15). The crossclaim alleged and asserted Metropolitan's coverage of TRUEMAN, CHICAGO's coverage of Lacavalla, Lacavalla's purely vicarious liability, and CHICAGO's claim for indemnity, including attorneys' fees and costs. CHICAGO subsequently filed a Motion for Attorneys' Fees with the Fourth District Court of Appeal and that Court properly granted CHICAGO's Motion (APP 5).

In the Motion for Attorneys' Fees by CHICAGO and the award thereof by the Fourth District Court of Appeal, the general rule of indemnity was followed and CHICAGO, as a part of its damages, recovered reasonable attorneys' fees which it had been compelled to pay as a result of suits by or against it in reference to the accident against which it was indemnified by Metropolitan. American and Foreign Ins. v. Avis Rent-A-Car, 401 So.2d 855 (Fla. 1st DCA, 1981); Brown v. Financial Indemnity Co., 366 So.2d 1273 (Fla. 4th DCA, 1979).

American v. Avis, supra, suggested that the First

District Court of Appeal believed that there were in indemnification cases two separate types of attorneys' fees; those attorneys' fees incurred in defending the underlying lawsuit, and those attorneys' fees incurred in the successful prosecution of the indemnification action. The First District suggests that the former fees are awardable, while the latter are not.

The Fourth District Court of Appeal, however, in Brown v. Financial, supra, has held that all attorneys' fees are recoverable in an indemnification action and specifically included indemnification for attorneys' fees incurred in the successful prosecution of an indemnification action at the Appellate level.

Unlike American v. Avis, supra, the case at bar does not present a question of whether a self-insurer becomes subject to a claim based on Section 627.428, Florida Statutes (1977), because in the case at bar Metropolitan is an admitted insurance company insuring the driver, TRUEMAN.

By relying on American v. Avis, supra, Metropolitan appears not to contest the award of attorneys' fees incurred in the defense and settlement of the underlying lawsuit except to

the extent that it contends TRUEMAN is an insured of CHICAGO, and to the extent that it contends the award premature.

For the multitude of reasons set forth in ISSUE I of this Brief, it is patent that TRUEMAN is not an insured of CHICAGO. If TRUEMAN were an insured of CHICAGO, then the excess language in the CHICAGO policy (APP 54) would control and contrary to Metropolitan's earlier arguments Metropolitan, Travelers, and CHICAGO would be in the same class and CHICAGO would be the third or excess layer of coverage. Hartford v. Kellman, supra.

In response to Metropolitan's contention that the award of attorneys' fees to CHICAGO was premature in that no determination had been made that CHICAGO's insured was totally without fault as regards the subject accident, CHICAGO asserts that the record is clearly without any evidence of Lacavalla's fault. Further, no negligence on the part of the owner, CHICAGO's insured, Lacavalla, was even alleged by any of the Plaintiffs herein (APP 6-10).

However, if CHICAGO's insured, Lacavalla, was negligent, then contrary to the prior argument of Metropolitan, TRUEMAN and Lacavalla would be joint tortfeasors, and the driver, TRUEMAN, and the owner, Lacavalla, would find themselves in the same class

and the language in CHICAGO's policy would control, making it an excess or third layer of insurance. Allstate v. Fowler, supra. This situation could not exist, however, because Lacavalla is only vicariously liable and the active tortfeasor, TRUEMAN, is responsible and therefore liable to indemnify CHICAGO for all attorneys' fees incurred in defending and settling the underlying lawsuit, successfully prosecuting the indemnification action, and prevailing on the successful prosecution of the indemnification action at the appellate level.

## ISSUE V

THE INSURER OF A PARTY WHO IS ONLY VICARIOUSLY LIABLE TO A THIRD PARTY FOR DAMAGES IS ENTITLED TO INDEMNITY FROM AN INSURER OF THE ACTIVE TORT-FEASUR IN A CASE WHERE THE ACTIVE TORT-FEASOR'S LIMITS HAVE NOT BEEN EXHAUSTED IN PAYMENT TO THE INJURED PARTY.

Under the common law, one who is only technically or vicariously liable for damages to another, is entitled to indemnity from the direct or active tort-feasor. Houdaille Industries, Inc. v. Edwards, supra. There was no fault alleged or proven against Lacavalla. As Lacavalla was only vicariously, constructively, derivatively or technically liable for the wrongful acts of Trueman, it would follow that Lacavalla's insurance company, CHICAGO, was even more removed from the active, primary tort-feasor, Trueman, not at fault, and therefore, entitled to indemnity.

The common law rule is predicated on notions of fairness that the one who actually causes the damages (Trueman) should be the one who actually has to pay the damages. Similarily, it would seem that the insurer of one who is only vicariously, constructively, derivatively or technically liable, would be entitled to indemnity from one who insures an active tort-feasor.

Indemnity is the right which inures to one, CHICAGO, who discharges a duty owed by it to Plaintiffs, but one who discharges a duty which as between Trueman and CHICAGO, should

have been discharged by Trueman or his insurance carrier, Metropolitan. CHICAGO has been obligated to pay pursuant to the negotiations and settlement of claims stemming from the active negligence or fault of Trueman. By virtue of the discharge of the duty which should have been discharged by Trueman and/or Metropolitan, CHICAGO now has a valid claim for indemnity. Houdaille v. Edwards, supra.

In Allstate v. Fowler, supra the First District Court of Appeal held that the proper method for asserting responsibility among insurers where the insureds are different entities, should be predicated on the common law rule as set out above. The First District determined that the controlling principle should be that if the owner is only vicariously liable because of the dangerous instrumentality doctrine, then his insurer should be entitled to be subsequent in coverage to the insurer of the negligent driver. Federal jurisdisctions have also followed the common law rule of indemnity where one insurer insures an active tort-feasor and the other insurer, insures one who is only vicariously liable. Pacific Employers Ins. Co. v. Hartford Accident and Indemnity Co., 228 F.2d 365 (9th Cir. 1955), cert. denied, 352 U.S. 826 (1956).

The question posed in the case at bar, is not one of relative degrees of fault which would eliminate any claim for indemnity between joint tort-feasors, but whether Lacavalla and CHICAGO were totally without fault. The question must be answered affirmatively as there was no evidence of fault on the part of Lacavalla and, in fact, no negligence or fault on Lacavalla's part was even alleged. It would follow that there could be no fault proven or alleged against CHICAGO, his insurance company, and as Lacavalla was only vicariously, constructively, derivatively or technically liable for the wrongful acts of Trueman, it would follow that CHICAGO would be even more removed from the active, primary tort-feasor, Trueman.

The common law principle of indemnity should apply to an insurance company or other person who is without fault, and discharges or pays an obligation which should have been paid by an active tort-feasor. The insurer of a party who is only vicariously liable to a third party for damages, is entitled to indemnity from an insurer of the active tort-feasor in a case where the active tort-feasor's limits have not been exhausted in payment to the injured party.

## CONCLUSION

The Fourth District Court of Appeal correctly accepted the appeal filed therein by CHICAGO, and was correct in applying common-law indemnity, holding that one who is only technically or vicariously liable for damages to another, is entitled to indemnification from the direct or active tort-feasor. The certified question should be answered in the affirmative, and one insurer should be entitled to indemnity from another insurer in cases where the active tort-feasor's limits have not been exhausted in payment to the Plaintiff. Further, this Court should affirm the Fourth District Court's order, granting CHICAGO'S motion for attorneys fees, and this Court, in turn, should award additional attorneys fees to Respondent, CHICAGO.

RESPECTFULLY SUBMITTED.

FERTIG AND GRAMLING
Attorney for Respondent
750 Southeast Third Avenue
Suite 200
Fort Lauderdale, FL 33316
Phone: (305) 763-5020
945-6250

By: _____
FRANK R. GRAMLING

/als

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: Pallotto, Weir & Hayson, 4600 Sheridan Street, Suite 401, Hollywood, FL 33021; Daniel S. Schwartz, Esquire, Ingraham Building, Suite 240, 25 Southeast 2nd Avenue, Miami, FL 33131; and to Esler & Kirschbaum, P.A., Gary A. Esler, Esquire, 315 Southeast 7th Street, Suite 300, Post Office Box 14364, Fort Lauderdale, FL 33302, this 12th day of March, 1985.

FERTIG AND GRAMLING
Attorney for Respondent
750 Southeast Third Avenue
Suite 200
Fort Lauderdale, FL 33316
Phone: (305) 763-5020
945-6250

By: _____
Frank R. Gramling

/als