IN THE SUPREME COURT OF FLORIDA

JACK J. HOLTON and EXCELSIOR INSURANCE COMPANY OF NEW YORK,

Petitioners,

vs.

Case No. 66,453

H. J. WILSON COMPANY, INC., a Florida corporation,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

JOHN T. ALLEN, JR. of
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I N D E X

CITATIONS OF AUTHORITY

CITATIONS OF AUTHORITY
(Continued)

CITATIONS OF AUTHORITY
(Continued)

STATEMENT OF THE CASE AND FACTS

In this brief, the petitioners, Jack J. Holton and Excelsior Insurance Company of New York, who were defendants in the Circuit Court of Pinellas County and third party plaintiffs in the Circuit Court of Pinellas County, will be referred to as "Holton." Respondent, H. J. Wilson Company, Inc., who was one of three defendants in the Circuit Court of Pinellas County and third party defendant, will be referred to as "Wilson" or "H. J. Wilson Company, Inc." Bert H. Collom, as Personal Representative of the Estate of April Collom, Deceased, and the Estate of Judith Collom, Deceased, who was plaintiff in the Circuit Court of Pinellas County, will be referred to as "Collom." The City of St. Petersburg, who was defendant in the Circuit Court of Pinellas County, will be referred to as either the "City" or "City of St. Petersburg." The following symbols will be used: TR - Transcript of Record filed by petitioner, H. J. Wilson Company, Inc., in the District Court of Appeal of the State of Florida, Second District, in support of its Petition for Writ of Certiorari to the Circuit Court of Pinellas County; A - Appendix of Respondent, H. J. Wilson Company, Inc.; AA - Appendix of Petitioners, Jack J. Holton and Excelsior Insurance Company of New York to their Brief on the Merits; B - Brief on the Merits of Petitioners, Jack J. Holton and Excelsior Insurance Company of New York.

This entire controversy arose when Collom filed a wrongful death action against three defendants in the Circuit Court of Pinellas County, namely, Wilson, City of St. Petersburg, Holton, and Excelsior. The case revolved around a substantial storm which hit the Pinellas County area on May 8, 1979, covering up many storm drains. Mrs. Collom and her child, April, stepped off of one of the culverts and was drowned. See Collom v. City of St. Petersburg, 400 So.2d 507 (Fla. 2nd D.C.A. 1981), and City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). More particular details are now required to present the Statement of the Case and Facts at this juncture.

On May 8, 1979, a torrential rain storm caused extensive flooding in the St. Petersburg area.[1] As a result of this storm, Mr. and Mrs. Collom and their two children were flooded out of their home. During their flight to seek safety, they were forced to wade for a substantial distance in knee deep or hip deep water while attempting to go to the apartment of Mrs. Collom's parents.[2] During their flight, they crossed the north side of Wilson's property and onto Holton's property when April Collom, while walking in water, stepped off the end of an underground drainage system and was drowned.[3] Mrs. Collom drowned while attempting to save her daughter, April.[4]

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1. (TR 47-48)
2. (TR 168-177)
3. (TR 77-78)
4. (TR 79)

By way of a Fourth Amended Complaint dated February 13, 1980,[5] Wilson and the present third party plaintiffs, Holton, Excelsior, and the City of St. Petersburg, were alleged to have caused the death of Mrs. Collom and her daughter through negligence. Count I of the Fourth Amended Complaint sued Wilson for maintaining a dangerous condition and negligently failing to warn of a hazardous and dangerous condition.[6] Count II sued Wilson for constructing and maintaining a public nuisance on its property.[7] Holton was sued for maintaining a hazardous condition upon his property and failing to warn plaintiffs' decedents.[8] Holton was also sued for maintaining a public nuisance upon his property.[9] The City of St. Petersburg was sued for negligently constructing and maintaining the sewer system.[10]

Wilson moved for a summary judgment which was granted.[11] Final summary judgment in favor of H. J. Wilson Company, Inc. was entered on April 8, 1980.[12]

Plaintiff Collom appealed the entry of final judgment in favor of Wilson to the Second District Court of Appeal;[13] the issues presented for review by Collom's brief were:

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5. (TR 1-18)
6. (TR 3-5)
7. (TR 5-8)
8. (TR 10-12)
9. (TR 12-14)
10. (TR 8-10)
11. (TR 21-70)
12. (TR 19-20)
13. (TR 71-102)

1. WHETHER OR NOT THERE WAS SUFFICIENT EVIDENCE OF RECORD TO ESTABLISH THAT THE DEFENDANT, H. J. WILSON COMPANY, INC., DID NOT KNOW OF THE ALLEGED DANGEROUS CONDITION NEXT TO ITS REAL PROPERTY?

2. WHETHER OR NOT THE LEGAL TEST IS THAT THE DEFENDANT KNEW OR IS THE TEST THAT THE DEFENDANT SHOULD HAVE KNOWN OF HIDDEN DANGERS TO UNINVITED LICENSEES?

3. MAY A DEFENDANT BE HELD LIABLE FOR A DEFECTIVE CONDITION WHICH HE OR IT CONSTRUCTED; BUT WHICH DOES NOT LIE UPON THE REAL PROPERTY BELONGING TO THE DEFENDANT?

4. DID THE DEFENDANT, H. J. WILSON COMPANY, INC., MAINTAIN A PUBLIC NUISANCE UPON OR NEXT TO ITS PROPERTY SO AS TO CREATE A CAUSE OF ACTION FOR RECOVERY BY THE PLAINTIFF?

5. DID THE PLAINTIFF PLEAD A CAUSE OF ACTION FOR NUISANCE IN COUNT II OF HIS FOURTH AMENDED COMPLAINT?

6. DID THE DEFENDANTS, H. J. WILSON COMPANY, INC. AND THE HOME INDEMNITY INSURANCE COMPANY CARRY THE BURDEN NECESSARY TO PREVAIL ON THEIR MOTION FOR SUMMARY JUDGMENT? (TR 78)

The summary final judgment in favor of Wilson was "Per Curium" Affirmed by decision dated March 4, 1981, in Collom v. H. J. Wilson Company, Inc., 396 So.2d 1238 (Fla. 2nd D.C.A. 1981).[14]

While Collom's appeal was pending in the Second District Court of Appeal, third party plaintiff, Holton, filed a Motion for Leave to File Third Party Complaint on August 20, 1980.[15] The proposed Third Party Complaint attempted to allege a cause of action against Wilson for indemnity and/or contribution for the benefit of Holton.[16] The Motion for Leave to File Third Party

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14. (TR 103)
15. (TR 104)
16. (TR 105-107)

Complaint was heard by the Honorable Jerry R. Parker on June 24, 1981.[17] Judge Parker denied the motion on the merits and stated as grounds the following:

> Alright. I'm going to deny your Motion to File a Third Party Complaint for these reasons: Houdaille, I think, does away with active and passive negligence. I can't read that case any other way. It goes right to fault and speaks of things such as derivative or technical liability.
>
> As to contribution, I think you've got to have liability before you have a contribution, and I think the Second District has decided that on summary judgment. (TR 110)

The order denying Holton's motion was entered the same day, June 24, 1981.[18]

ON JULY 24, 1984, OVER THREE YEARS AFTER THE SECOND DISTRICT COURT OF APPEAL AFFIRMED THE SUMMARY JUDGMENT IN FAVOR OF WILSON, AND OVER THREE YEARS AFTER THE TRIAL COURT'S DENIAL OF HOLTON'S MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT, DEFENDANTS, HOLTON AND EXCELSIOR, FILED A MOTION FOR RECONSIDERATION OF MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT.[19] The Honorable James B. Sanderlin, upon stipulation of plaintiff, Collom, defendant, City of St. Petersburg, and defendants, Holton and Excelsior, without notice to Wilson, granted the Motion for Reconsideration and granted defendants, Holton and Excelsior, leave to file the proposed Third Party Complaint against H. J.

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17. (TR 108-111)
18. (TR 112)
19. (TR 121-129)

Wilson Company, Inc.[20] The Third Party Complaint was filed against H. J. Wilson Company, Inc. on July 27, 1984.[21] The Court will note that the Third Party Complaint filed is an exact duplicate of the one the Honorable Jerry R. Parker refused leave to file on June 24, 1981.

Wilson filed a Motion to Dismiss Third Party Complaint and Motion to Rescind Order Permitting the filing of Third Party Complaint on August 27, 1984.[22] On September 6, 1984, a hearing was held on these motions in front of the Honorable James B. Sanderlin.[23] By order of October 3, 1984, the Honorable James B. Sanderlin denied the Motion to Dismiss the Third Party Complaint and granted Wilson twenty days within which to file responsive pleadings to the Third Party Complaint.[24]

At the hearing of September 6, 1984, Judge Sanderlin set the case for trial the first week of December in 1984.[25] Wilson then filed a timely Petition for Writ of Common Law Certiorari to the Second District Court of Appeal.

Wilson raised a number of points in its Petition filed with the District Court as follows: the Circuit Court lacked jurisdiction to consider Holton's claim anew; no action could be brought by Holton for contribution against Wilson because there

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20. (TR 115-116)
21. (TR 117-120)
22. (TR 121-125)
23. (TR 130-166)
24. (TR 167)
25. (TR 164)

is no "common liability" in that Wilson had been exonerated of any negligence in the suit by plaintiff Collom; as a matter of law, no suit for indemnity could be brought against Wilson; Holton failed to timely appeal the trial Court's earlier denial of their Motion for Leave to File Third Party Complaint since the order was a final judgment or at least constituted a post judgment order and thus was appealable under Rule 9.110(b), Fla.R.App.P.[26] All of these points must be considered in ruling upon the merits of this case.

The District Court granted Wilson's Petition for Writ of Certiorari, quashed the order of the lower court denying Wilson's Motion to Dismiss Third Party Complaint, and directed that Wilson be dismissed from the case upon the following reasoning:

1. Wilson's exoneration as to liability to the plaintiff, Collom, was binding on Holton. Therefore, since Wilson was not a tortfeasor, there could be no contribution claim against Wilson by Holton. Sol Walker & Co. v. Seaboard Coast Line Railroad, 362 So.2d 45 (Fla. 2nd D.C.A. 1978).

2. Holton could have appealed the judgment for Wilson, but didn't. Since Holton did not appeal, Holton cannot now proceed against Wilson. Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980).

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26. See Petition of Wilson in Record-On-Appeal from Second District Court of Appeal.

3. The case of Pensacola Interstate Fair, Inc., supra, does not hold that a defendant must first suffer a judgment against him before he can complain of a ruling exonerating a co-defendant from liability to the plaintiff.

4. Therefore, the Third District misconceived the rulings in Pensacola Interstate Fair, Inc. in the Third District's decisions of Mercy Hospital, Inc. v. Marti, 408 So.2d 639 (Fla. 3rd D.C.A. 1981), and Belcher v. First National Bank 405 So.2d 754 (Fla. 3rd D.C.A. 1981).

5. Holton's position is wrong because to adopt Holton's position would mean that even though the judgment exonerating Wilson from liability to the Colloms was entered in 1980 and affirmed in 1981, Holton still retained the right to appeal the same judgment if the Colloms should ever obtain a judgment against Holton.

6. The initial decision to deny Holton the right to proceed in contribution and indemnity against Wilson was "on the merits" and therefore constituted a final judgment which was required to be appealed by Holton at that time. Since no appeal was taken, the judgment became final thus barring Holton from an attempted renewal of the action some three years later.

7. Therefore, based upon the above two stated grounds -- that Holton should have timely appealed the judgment for Wilson against Collom and the initial decision the Court denying Holton's claim was on the merits and constituted a final judgment

-- the trial Court did not have jurisdiction to permit the prosecution of an identical action by Holton against Wilson which had already been barred.

Crucial to the decision sub judice is the precise holding of the District Court:

> During a period of localized flooding, Judith Collom and her daughter, April, were walking across private property in St. Petersburg. They stepped into a storm sewer drainage ditch located on a city drainage easement and were sucked into a pipe and drowned. Bert Collom, as personal representative, brought a wrongful death action against the city, Jack J. Holton and H. J. Wilson Company, Inc., asserting that they had negligently caused the death of his wife, Judith, and his daughter, April. On April 8, 1980, Wilson obtained a final summary judgment against Collom. On appeal, this court affirmed that judgment on March 4, 1981. Collom v. H. J. Wilson Co., 396 So.2d 1238 (Fla. 2d DCA 1981).
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> In the meantime, on August 21, 1980, Holton filed a motion for leave to file a third party complaint against Wilson. The proposed third party complaint attached to the motion alleged that Wilson had negligently caused the condition which resulted in the Colloms' deaths and sought contribution and indemnity. The motion for leave to file third party complaint as not heard until June 24, 1981, when it was denied by a new judge who had been assigned to the case. Holton did not seek to appeal that order.
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> The trial against the remaining defendants was delayed pending appellate activity on other issues. See City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982), approving Collom v. City of St. Petersburg, 400 So.2d 507 (Fla. 2d DCA 1982). On July 24, 1984, Holton filed a motion for reconsideration of his motion for leave to file a third party complaint. Pursuant to stipulation of the parties then in the suit, a third judge more recently assigned to the case entered an order granting Holton the right to file a third party complaint against Wilson. The complaint was identical to the one attached to his original motion for leave to file third party complaint. The case

was then set for trial on December 3, 1984. The court denied Wilson's motion to dismiss the third party complaint on October 3, 1984. This petition is directed to the order of denial.

Both theories of the third party complaint were predicated on allegations of Wilson's negligence in causing the Colloms' deaths. Yet, the final summary judgment of April 8, 1980, exonerated Wilson for negligently causing the Colloms' deaths. Yet, the final summary judgment of April 8, 1980, exonerated Wilson for negligently causing the Colloms' deaths. The judgment entered in favor of his codefendant was binding on Holton. Sol Walker & Co. v. Seaboard Coast Line Railroad, 362 So.2d 45 (Fla. 2d DCA 1978). Holton could have appealed the judgment in favor of Wilson. Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980). Since he failed to do so, he cannot now proceed against Wilson for indemnity or contribution.

In seeking to avoid the effect of the judgment for Wilson against the Colloms, Holton refers to certain cases which have held that his right to appeal that judgment does not accrue until he becomes liable to the Colloms. Mercy Hospital, Inc. v. Marti, 408 So.2d 639 (Fla. 3d DCA 1981), petition for review denied, 418 So.2d 1280 (Fla. 1982); Belcher v. First National Bank, 405 So.2d 754 (Fla. 3d DCA 1981). Unlike the Third District Court of Appeal, we see nothing in Pensacola Interstate Fair, Inc. which holds that a defendant must first suffer a plaintiff's judgment against him before he can complain of a ruling exonerating a codefendant from liability to the plaintiff. In Pensacola Interstate Fair, Inc., one of the appellants successfully appealed a judgment exonerating a codefendant which was entered seven months before the plaintiff obtained a judgment against that appellant. In the underlying opinion approved by the supreme court, the First District Court of Appeal rejected the argument that inchoate contribution claims are not justiciable by appeal until liability has been established. Christiani v. Popovich, 363 So.2d 2 (Fla. 1st DCA 1978). To adopt Holton's view would mean that even though the judgment exonerating Wilson from liability to the Colloms was entered in 1980 and affirmed in 1981, Holton still retains the right to appeal the same judgment if the Colloms should ever obtain a judgment against him.

> In any event, our ruling need not be grounded only on the judgment against the Colloms exonerating Wilson. Several months after the entry of the Wilson judgment, Holton moved for leave to file the same third party complaint as the only now at issue. The record reflects that the order denying this motion was entered on the merits. The judge had concluded that the issue was controlled by this court's affirmance of the Wilson judgment. Since the effect of that order was to fully dispose of a claim against a party no longer in the case, it was not interlocutory and could have been appealed. See Orlovsky v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th DCA 1981). Yet, no appeal was taken.
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> * * * * * * * *
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> Since the trial court rejected Holton's motion to file a thirty party complaint against Wilson in 1981, it does not now have jurisdiction to permit the prosecution of the same third party complaint three years later. Therefore, we grant certiorari, quash the order denying Wilson's motion to dismiss the third party complaint, and direct that Wilson be dismissed from the case.

One final fact which is important to these proceedings occurred in this case after the District Court's decision. On March 2, 1985, Holton and Excelsior settled their case by the execution of a general release,[27] thereby ending the litigation by Collom against Holton and Excelsior. A copy of the release is included in Wilson's Appendix.[28] This event is far-reaching as far as the decision of the Court is concerned. It means that Holton will never suffer a judgment against him by Collom, i.e., can never become a "judgment defendant." Although the general release also purports to release Wilson and the Home Indemnity

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27. (A 5-6)
28. (A 5-6)

Company, which is Wilson's insurance company, the release obviously is an abortive attempt to keep alive Holton's action for contribution against Wilson.[29]

SUMMARY OF ARGUMENT

The Third District has enunciated a rule which would permit a co-defendant to only appeal a judgment exonerating a co-defendant after the defendant has suffered a judgment at the hands of the plaintiff while the District Court in the case sub judice has enunciated a principle which requires the co-defendant to immediately appeal the judgment exonerating a co-defendant without first suffering an adverse judgment. The District Court also ruled initially that Holton's rights to file an action against Wilson for contribution and indemnity was decided on the merits and therefore, Holton was required to appeal within thirty days of the order denying Holton's right to bring an action against Wilson. The District Court's decision is correct and should be approved and the decisions of the Third District disapproved for the following reasons:

1. Plaintiff Collom's appeal of the adverse judgment which was affirmed was binding on Holton because Holton, a co-defendant, under Rule 9.010(f)(2), Fla.R.App.P., was a party appellee to the appeal and could have filed a brief in opposition to the judgment, address the question in oral argument, and fully participate in the appeal -- even by filing a cross-appeal.

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29. See Section 768.31(2)(d), Fla.Stat.

2. Since Wilson has been exonerated by judgment, Wilson is not a joint tortfeasor and therefore is not subject to actions for contribution. Section 768.31(4)(f), Fla.Stat., is totally controlling under the fact of affirmance of the judgment for Wilson. This section provides:

> The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their rights to contribution.

3. The decision of the Supreme Court in Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980), does not hold, as correctly stated by the Second District sub judice, that a co-defendant must suffer a judgment before the co-defendant has the right to appeal a judgment which exonerates a co-defendant. Therefore, the Third District's reasoning in Belcher v. First National Bank of Miami, 405 So.2d 754 (Fla. 3rd D.C.A. 1981), and Mercy Hospital, Inc. v. Marti, 408 So.2d 639 (Fla. 3rd D.C.A. 1981), is incorrect.

4. To adopt the Third District's rule that a co-defendant must suffer an adverse judgment before appealing a judgment exonerating a co-defendant would lead to absurd results including: a District Court being required to decide a decision twice over a span of several years; an appeal involving an exonerated defendant after as much as five to ten years after the entry of the judgment in protracted cases; substantial piecemeal litigation, etc. etc.

5. On the merits, Holton is barred from bringing any action for indemnity under the decision of Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979), in that: there is no special relationship either vicarious, constructive, derivative or technical which would permit such an action; Holton must allege that Wilson is "wholly at fault" whereas the allegations against Holton reveal that Holton is charged with his own independent tort in maintaining a dangerous condition upon his premises and his failure to warn of the dangerous condition; there can be no indemnity between joint tortfeasors.

6. The District Court was correct that the initial decision against Holton was "on the merits" and therefore Holton was required to appeal the decision at that time and was thus later barred from raising the same identical action again three years later.

7. Holton has subsequently settled plaintiff Collom's claim against Holton. Therefore, even if Holton's position is correct that he must become a "judgment debtor" before he can appeal the judgment exonerating Wilson, this appeal has been rendered moot since, because of the settlement, Holton can never become a "judgment debtor" with a right of appeal.

ARGUMENT

INTRODUCTION

The basic facts in this case commenced by plaintiff, Collom, suing three alleged joint tortfeasors -- Wilson, Holton and City of St. Petersburg. Final judgment was entered for Wilson against Collom and affirmed. Neither Holton or the City appealed the lower court's decision. After the affirmance of judgment for Wilson, Holton filed a Third Party Complaint against Wilson seeking contribution and indemnity. The Circuit Court ruled upon the merits and denied Holton's claim upon the basis that Wilson was not a "joint tortfeasor" and therefore an action for contribution could not be brought and the indemnity action was barred by the decision of Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979). Holton did not appeal this decision.

Three years later, Holton filed an identical complaint for contribution and indemnity after obtaining an ex parte order permitting the filing of a Third Party Complaint. A new Circuit Court Judge denied Wilson's Motion to Dismiss the Third Party Complaint. The Second District quashed the decision and ordered Wilson dismissed from the case. On March 2, 1985, Holton settled plaintiff Collom's claim against Holton and Excelsior and executed a release.

These facts raise many more questions on appeal not referenced by Holton and Excelsior in their initial brief on the merits. If this Court is to decide this case on the merits, it must address each of the following points which will be addressed in this brief:

1. Did the exoneration of Wilson from any liability to plaintiff, Collom, bar Holton from any claim of contribution against Wilson?

2. Was Holton required to appeal the judgment for Wilson against Collom failing which Holton was barred from bringing an action for either contribution or indemnity against Holton?

3. Under the facts, was Holton barred from bringing an action for indemnity against Wilson under the decision of Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979)?

4. Did Holton's ultimate settlement with plaintiff, Collom, bar any further action against Wilson?

It is submitted that each of the above questions must be answered adverse to Holton and the decision of the District Court sub judice should be approved. The points raised in this Introduction will be addressed by Wilson in the following argument.

POINT I

THE DISTRICT COURT CORRECTLY RULED THAT HOLTON WAS BARRED BY THE DECISION EXONERATING WILSON THUS BARRING ANY CLAIM FOR CONTRIBUTION.

The District Court initially ruled that since Holton was a party to the action at the time Wilson was exonerated, the judgment in favor of Wilson was binding on Holton:

> Both theories of the third party complaint were predicated on allegations of Wilson's negligence in causing the Colloms' deaths. Yet, the final summary judgment of April 8, 1980, exonerated Wilson for negligently causing the Colloms' deaths. The

> judgment entered in favor of his codefendant was binding on Holton. Sol Walker & Co. v. Seaboard Coast Line Railroad, 362 So.2d 45 (Fla. 2d DCA 1978). Holton could have appealed the judgment in favor of Wilson. Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980). Since he failed to do so, he cannot now proceed against Wilson for indemnity or contribution. (Opinion at 438-439) (A 2-3)

In the Sol Walker decision, supra, cited by the District Court in its opinion, suit was brought against Sol Walker and Seaboard Coast Line R. Co. During the trial, the Judge directed a verdict in favor of Seaboard. Thereafter, Seaboard filed a complaint against Sol Walker for indemnity and contribution. The Circuit Court entered judgment in favor of Seaboard in an amount equal to one-half of the sum of the judgment and attorney's fees and Walker appealed. The District Court held that since Seaboard was a party to the action in which Sol Walker was exonerated, the judgment was binding upon Seaboard thus prohibiting an action for contribution or indemnity by Seaboard against Sol Walker:

> While pointing out that Florida's new Contribution Among Tortfeasors Act did not apply to the case before it, the court observed that had it applied there was a provision in the statute which would have dictated the same conclusion the court reached without the benefit of the statute. The court referred to Section 768.31(4)(f), Florida Statutes (1977), which states:
>
> The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.
>
> In view of Jackson v. Florida Weathermakers, supra, and Liberty Mutual Insurance Co. v. Curtiss, supra, as well as Section 768.31(4)(f), we hold that

> Seaboard's claim for contribution from Florida's Uniform Contribution Among Tortfeasors Act was precluded by the judgment upon directed verdict in favor of Walker entered in the Warder suit to which Seaboard was a party. (362 So.2d 45 at 53)

There is no question that the District Court sub judice was correct in its decision. The decision of this Court in Jackson v. Florida Weathermakers, 55 So.2d 575 (Fla. 1951), fully supports the District Court's decision in both Sol Walker and the case at bar.[30]

It is clear in Florida that in order for a claim for contribution to lie there must exist "common liability" between the person from whom contribution is sought and the person seeking it. Section 768.31, Fla.Stat., the Florida Uniform Contribution Among Tortfeasors Act, expressly requires joint liability in tort for the same injury or wrongful death before there is a right to contribution. Section 768.31(4)(f), Fla.Stat., states:

> The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

The trial court's final summary judgment in favor of H. J. Wilson Company, Inc. entered on April 8, 1980, clearly absolved Wilson of any liability to the plaintiff, Collom, for the deaths

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30. The District Court in Sol Walker cited Jackson v. Florida Weathermakers as support for its decision -- see 362 So.2d 45 at 51.

of Mrs. Collom and April Collom. The trial court's summary judgment in favor of H. J. Wilson Company, Inc. was affirmed "Per Curiam" by the Second District Court of Appeal in Collom v. H. J. Wilson Company, Inc., 396 So.2d 1238 (Fla. 2nd D.C.A. 1981).

The District Court's affirmance of the trial court's summary judgment clearly establishes as "the law of the case" that Wilson is not liable to the plaintiff, Collom, for the deaths. The affirmance necessarily means that all of the points raised by Holton are without merit. As stated in the case of South Florida Hospital Corporation v. McCrea, 118 So.2d 25 (Fla. 1960):

> The word "affirmed" so used necessarily means that the appellate court has carefully examined all points raised by all appealing parties and found them to be without merit.

Plaintiff Collom's appeal covered all aspects of Wilson's potential liability including knowledge of the hazardous condition, construction of a defective drainage ditch, and maintenance of a public nuisance upon or next to its property. By affirming the trial court's final summary judgment, the Second District Court of Appeal necessarily relieved Wilson of liability on these points under the South Florida Hospital Corporation case.

Under the law of this case, Wilson is clearly in no way liable to the plaintiff, Collom, for the deaths of Mrs. Collom and April Collom. Thus, under Section 768.31, Fla.Stat., there is no "common liability" and therefore, there can be no claim for

contribution. This concept is clearly illustrated by the case of Liberty Mutual Insurance Company v. Curtiss, 327 So.2d 82 (Fla. 1st D.C.A. 1976). In Liberty, the court held that a party could not seek contribution from another party who has been exonerated of liability by the judgment of a competent court. In discussing the Florida Uniform Contribution Among Tortfeasors Act, the court stated:

> Further, the act forecloses by both necessary implication and specific provision all potential contribution claims by a judgment defendant against codefendants who are exonerated by the judgment.

On the merits, the fact of Wilson's exoneration means that whatever this Court may determine about the rest of the points on appeal, the decision that Holton cannot bring an action for contribution and indemnity against Wilson must control. Therefore, the decision of this Court must be that no action will lie by Holton and Excelsior against Wilson for contribution or indemnity upon the basis that Wilson was exonerated from liability to the plaintiff, Collom.

POINT II

THE DISTRICT COURT CORRECTLY RULED THAT HOLTON WAS REQUIRED TO APPEAL THE DECISION EXONERATING WILSON FROM LIABILITY AND COULD NOT WAIT FOR SUCH AN APPEAL UNTIL AN ADVERSE JUDGMENT WAS ENTERED AGAINST HOLTON.
(As Raised By Holton's Point I)

The obvious reason that this Court has exercised its jurisdiction is to choose between the Second District's ruling

that a co-defendant must timely file within thirty days a notice of appeal from a favorable verdict for a co-defendant or be forever barred from bringing an action in contribution against the exonerated co-defendant and the Third District's rule that a co-defendant may only appeal after he has suffered an adverse judgment at the hands of the plaintiff. These two diverse opinions are represented by the case at bar and the Third District's decision initially in Belcher v. First National Bank of Miami, (hereinafter referred to as Belcher), 405 So.2d 754 (Fla. 3rd D.C.A. 1981), and later, Mercy Hospital, Inc. v. Marti, (hereinafter referred to as Mercy Hospital), 408 So.2d 639 (Fla. 3rd D.C.A. 1981). In the case sub judice, the District Court ruled:

> In seeking to avoid the effect of the judgment for Wilson against the Colloms, Holton refers to certain cases which have held that his right to appeal that judgment does not accrue until he becomes liable to the Colloms. Mercy Hospital, Inc. v. Marti, 408 So.2d 639 (Fla. 3d DCA 1981), petition for review denied, 418 So.2d 1280 (Fla. 1982); Belcher v. First National Bank, 405 So.2d 754 (Fla. 3d DCA 1981). Unlike the Third District Court of Appeal, we see nothing in Pensacola Interstate Fair, Inc. which holds that a defendant must first suffer a plaintiff's judgment against him before he can complain of a ruling exonerating a codefendant from liability to the plaintiff. In Pensacola Interstate Fair, Inc., one of the appellants successfully appealed a judgment exonerating a codefendant which was entered seven months before the plaintiff obtained a judgment against that appellant. In the underlying opinion approved by the supreme court, the First District Court of Appeal rejected the argument that inchoate contribution claims are not justiciable by appeal until liability has been established. Christiani v. Popovich, 363 So.2d 2 (Fla. 1st DCA 1978). To adopt Holton's view would mean that even

> though the judgment exonerating Wilson from liability to the Colloms was entered in 1980 and affirmed in 1981, Holton still retains the right to appeal the same judgment if the Colloms should ever obtain a judgment against him. In any event, our ruling need not be grounded only on the judgment against the Colloms exonerating Wilson. Several months after the entry of the Wilson judgment, Holton moved for leave to file the same third party complaint as the only now at issue. The record reflects that the order denying this motion was entered on the merits. The judge had concluded that the issue was controlled by this court's affirmance of the Wilson judgment. Since the effect of that order was to fully dispose of a claim against a party no longer in the case, it was not interlocutory and could have been appealed. See Orlovsky v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th DCA 1981). Yet, no appeal was taken. (Opinion at 439)

It is obviously Wilson's position that the District Court sub judice was correct in holding that the Third District in Belcher and Mercy Hospital totally miscontrued Pensacola Interstate Fair, Inc. v. Popovich, (hereinafter referred to as Pensacola Interstate Fair), 389 So.2d 1179 (Fla. 1980), in that there is nothing in Pensacola Interstate Fair which suggests that a co-defendant must suffer an adverse judgment before he can appeal a judgment exonerating a co-defendant from liability to the plaintiff. The District Court's analysis is correct that an absurd result would occur if Holton's view was adopted since, under that view, Holton would still have the right to appeal the judgment if the Colloms ever obtained a judgment against him many years later and supposedly obtain a second review of a legal matter already determined by a District Court.

In sum, Wilson's position is that case law, the decision of Pensacola Interstate Fair, applicable Florida Appellate Rules, and legal policy all require the adoption of the rule as enunciated by the Second District in the case at bar.

In the case at bar, certain crucial facts exist. At the time that Wilson obtained the judgment of exoneration, Holton was a party to the litigation. At that juncture, under the specific holding of Christiani v. Popovich, (hereinafter referred to as Christiani), 363 So.2d 2 (Fla. 1st D.C.A. 1978), whose opinion was approved by the Supreme Court in Pensacola Interstate Fair, Holton was aggrieved at the instant judgment was entered in favor of a co-defendant against plaintiff, Collom.[31] Plaintiff, Collom, appealed and the decision was affirmed. At that juncture, under the provisions of Section 768.31(4)(f),

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3. In Christiani, specifically adopted by the Supreme Court in Pensacola Interstate Fair at page 1181, the District Court specifically held that a co-defendant is aggrieved immediately upon exoneration of a co-defendant and must "timely appeal:"

> 'We suggest that a judgment defendant is demonstratably aggrieved by the exoneration of a co-defendant.' (363 So.2d at 6)
> * * * * * * * *
> 'In Florida, therefore, there is no statutory impedement to the judgment defendant contending on timely appeal that the judgment wrongfully termination liability on the part of the exonerated co-defendant.' (Emphasis Supplied) (363 So.2d at 8)
> * * * * * * * *
> 'And any judgment defendant aggrieved by that judgment's exoneration of another must timely appeal if his cohate contribution claim is to be preserved.' (Emphasis Supplied) (363 So.2d at 10)

Fla.Stat., all liability of Wilson to any co-defendant for contribution was extinguished. Section 768.31(4)(f), Fla.Stat., provides:

> The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their rights to contribution.

Christiani is replete with statements by the District Court, again approved by the Supreme Court, that because of Section 768.31(4)(f), Fla.Stat., a co-defendant was immediately aggrieved by the exoneration of a co-defendant and was required to timely appeal. Cardinal to this entire matter is the fact that Holton was himself a party to the appeal which affirmed the exoneration of Wilson in the appeal by plaintiff, Collom. Under Rule 9.010(f)(2), Fla.R.App.P., an appellee is defined as "every party in the proceeding in the lower tribunal other than an appellant." It is academic that Holton was therefore an appellee to the appeal by Collom of the exoneration of Wilson and had the right to file a cross-appeal, file a brief and argue against the affirmance of the judgment for Wilson, and participate in oral argument. How then can it be contended that Holton is not bound by the judgment exonerating Wilson on appeal?? The existence of an appeal by the plaintiff of an adverse judgment of a co-defendant was not present in either Belcher or Mercy Hospital. Again, this is the cardinal pivotal point in this entire question. Therefore, on this basis alone, the decision of the

District Court sub judice should be approved and the rule established in Belcher and Mercy Hospital disapproved.

Let us briefly analyze Christiani. In Christiani, Fair had obtained a summary judgment from which the plaintiff, in a separate appeal, and the cross-claimants, Christianis and Midway, had also appealed. The record clearly reflects that the co-defendants filed a timely appeal within thirty days of the entry of final summary judgment for Fair. At this juncture, one wonders how the Third District could read Christiani as requiring the filing of an appeal only after suffering an adverse judgment at the hands of the plaintiff. Further, Gulf Power received a directed verdict on liability whereupon at that juncture the co-defendants, Christianis and Midway, filed their appeal within thirty days from the judgment for Gulf Power. The plaintiff settled the lawsuit with Christianis and Midway during the appeal and therefore, the Court had before it the consolidated appeals of the co-defendants, Christianis and Midway, from the final summary judgment entered for defendant Fair and from the judgment entered on directed verdict for defendant, Gulf Power.[32]

On the question of the right to appeal by the co-defendants of a judgment exonerating a co-defendant, the District Court ruled: "the judgment defendant must be allowed an appeal to test the correctness of the adjudication by which he lost his

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32. For all facts stated as to Christiani opinion, see 363 So.2d 2 at 4-5.

contribution claim against the exonerated defendant;"[33] "a judgment defendant is demonstratably aggrieved by the exoneration of a co-defendant;"[34] "a co-defendant must 'timely appeal' the judgment exonerating a co-defendant;"[35] "the absence of a crossclaim is not determinative of the corrective effect of a judgment exonerating a co-defendant or of the judgment defendant's right to appeal;"[36] "the Florida Contribution Act makes the judgment exonerating a co-defendant conclusive on contribution issues under Section 768.31(4)(f), Fla.Stat.;"[37] "any judgment defendant aggrieved by that judgment exoneration of another must timely appeal if his incohate contribution claim is to be preserved."[38]

The Supreme Court, speaking through Justice Overton in Pensacola Interstate Fair, approved the decision and "indepth opinion" written in Christiani holding that, "we choose to follow the view that allows a judgment defendant the right of an appeal from a judgment which adversely affects his or her right against exonerated defendants."[39] The Supreme Court never once said that the Florida Appellate Rules which require appeals from judgments from their rendition within thirty days was being amended or that

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33. 363 So.2d 2 at 7
34. 363 So.2d 2 at 6
35. 363 So.2d 2 at 8
36. 363 So.2d 2 at 9
37. 363 So.2d 2 at 9
38. 363 So.2d 2 at 10 (Emphasis Supplied)
39. 389 So.2d 1179 at 1181

an existing co-defendant was not required to timely appeal within thirty days of rendition of a judgment exonerating a co-defendant. In this regard, the Second District's decision sub judice is imminently correct. It is impossible to read Pensacola Interstate Fair which specifically and unequivocally adopted the First District's decision in Christiani to mean that a co-defendant must suffer an adverse judgment before he is aggrieved by the exoneration of a co-defendant. To rule in this fashion would conflict with the total orderly procedure established by Florida Appellate Rules and concepts of finality of judgments. It would bring forth the bizarre results suggested by the Second District in its decision in the case at bar. To adopt the view of the Third District would mean hypothetically the following patently unjust results would occur:

1. In protracted litigation, a co-defendant could be exonerated by a judgment of the lower court and then be faced with an appeal five or ten years later. The exoneration of a co-defendant would thus keep that co-defendant in total limbo not knowing whether or not he truly was not responsible for the tort in question and subjecting him to secondary litigation years later. This would contravene the concepts of the finality of judgments if they are not appealed or if appealed and affirmed. See Florida Real Estate Com. v. Harris, 134 So.2d 785 (Fla. 1961), cert. den. App. dismd., 371 U.S. 7, 9 L.Ed.2d 47, 83 S.Ct. 19, reh. den., 371 U.S. 906, 9 L.Ed.2d 167, 83 S.Ct. 203.

2. A co-defendant could have his case appealed by the plaintiff and affirmed. This would mean that he was not negligent to the plaintiff yet, supposedly, under the Third District's concept, a co-defendant could later suffer an adverse judgment and appeal the exonerated co-defendant's judgment again. Therefore, the Appellate Court would again be faced with ruling on the same issues that it had previously ruled upon. Such a situation could give rise to different rulings by two different courts at two separate times on the same issue. This again would violate legal concepts of appellate law. See D.A. Costa v. Dibble, 45 Fla. 225, 36 So. 466 (1902); Florida Real Estate Com. v. Harris, supra.

3. The exoneration of a defendant which was affirmed on appeal in which the co-defendant was a party appellee under Rule 9.010(f)(2), Fla.R.App.P., would permit a co-defendant, if he could appeal after suffering an adverse judgment, two opportunities to appear in the Appellate Court to contest the awarding of the ruling exonerating the co-defendant.

4. The policy would mean protracted litigation and multiplicity of actions and appeals which is condemned by Florida law. See S.L.T. Warehouse Company v. Webb, 304 So.2d 97 (Fla. 1974).

5. The Third District's rule does not envision the procedural aspects of how the rule would ultimately work. If for example there were two co-defendants in a lawsuit and one was

exonerated on motion for summary judgment and the other defendant suffered an adverse judgment at the hands of the plaintiff and the judgment defendant then decided to appeal the judgment exonerating the co-defendant, how procedurally, especially under the Florida Appellate Rules, would the exonerated defendant who had long departed the case, get notice of such an appeal? Would the exonerated co-defendant remain a party to the litigation until it is terminated? What rule of Civil and Appellate Procedure says this is the case? If the exonerated co-defendant was not a party to the proceeding at the time of the appeal by the judgment defendant -- who would appear to contest the appeal? And how does all of this fit within the framework of Rule 9.110(b), Fla.R.App.P., which requires the filing of a notice of appeal within thirty days of the rendition of a final judgment?

The Court's attention is called to the provisions of Rule 9.040(a), Fla.R.App.P., which state:

> COMPLETE DETERMINATION. In all proceedings, a court shall have such jurisdiction as may be necessary for a complete determination of the cause.

The reason for the above stated rule is obvious. At the time of the entry of a judgment for a defendant, he is entitled to a speedy determination of his appellate rights the same as he was in the court below. Courts do not decide matters piecemeal and adoption of the Third District's rule must, under any construction, constitute a mecca for piecemeal litigation and proceedings in which there is no complete determination of the cause in any single proceeding.

The rule in Belcher was spawned inappropriately. Belcher attempted to appeal an order granting summary judgment for a co-defendant, F.N.B.M., but then argued that the summary judgment was correct and that the lower court should have granted Belcher summary judgment. The Appellate Court specifically held that Belcher was attempting a contrivance to get the denial of his motion for summary judgment before the Court since you cannot appeal the denial of a motion for summary judgment.[40] In the crucial footnote 4 of the opinion at page 756, the Third District acknowledges that Pensacola Interstate Fair[41] fails "to address the procedural requirements necessary to appeal a judgment exonerating a co-defendant." While acknowledging that Pensacola Interstate Fair does not address when an aggrieved co-defendant must appeal a judgment exonerating a co-defendant, the District Court then extrapolates without further reference or foundation to the Pensacola Interstate Fair decision, the rule that a co-defendant must become a judgment defendant before the judgment for the exonerated defendant may be appealed. Note the cardinal distinction again referred to in this argument that in Belcher there was no appeal by the plaintiff of the summary judgment for the exonerated co-defendant. This is not the fact in the case sub judice. Mercy Hospital was decided on the basis of Belcher. Mercy Hospital had filed a third party claim against a

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40. 405 So.2d 754 at 755
41. Referred to as the Popovich case by the Third District.

co-defendant seeking contribution. When the co-defendant obtained a summary judgment, Mercy Hospital appealed. The appeal was dismissed on authority of Belcher. Note again that the plaintiff in the case did not appeal the judgment exonerating the co-defendant. Again, these are not the facts in the case sub judice.

Finally, the Court must determine whose rights it is to protect under such conditions. Wilson suggests that the rights of the exonerated defendant should be paramount and a co-defendant who has notice of a judgment exonerating him as a matter of POLICY should be required to immediately and timely appeal within thirty days the judgment exonerating the co-defendant. In that manner, the exonerated defendant will not be drug throughout the litigation when he stands adjudicated not liable in the proceeding. After all, a judgment comes to and Appellate Court clothed with a presumption of correctness. See Herzog v. Herzog, 346 So.2d 56 (Fla. 1977); Re Estate of Rogers, 149 So.2d 391 (Fla. 1st D.C.A. 1963). By permitting a co-defendant to drag the matter out and wait until he suffers a judgment to contest a judgment for the exonerated defendant flies in the face of this principle. Suffice it to say that adopting the Third District's view cuts totally crossgrain against so many principles of law and so many established Rules of Civil and Appellate Procedure that they are so numerous that Wilson cannot remotely attempt to advise this Court as to all of such violated

precepts of law. The avoidance of multiplicity of suits, the quick determination of an individual's rights, the efficient handling of judicial cases, and the rule that requires a complete determination of a cause at the appellate level if possible, all require -- yes demand -- the adoption of the rule enunciated by the Second District and the rejection of the rule advocated by the Third District. See Contribution: A Judgment Defendant's Right to Appeal the Exoneration of a Co-Defendant, 8 Stetson Law Review, pp. 401-412.

POINT III

HOLTON IS BARRED FROM ANY INDEMNITY ACTION AGAINST WILSON UNDER THE DOCTRINE OF HOUDAILLE INDUSTRIES, INC. V. EDWARDS.

In the District Court, Holton and Excelsior cited no cases which indicated that an action for indemnity would lie under the circumstances of this case. It is strange that Holton and Excelsior do not argue this point in their initial brief on the merits since obviously the point must be decided by this Court if a complete resolution of the merits is to be determined in these proceedings. Since Wilson only has the ability to file one brief, it is important to bring to this Court's attention the arguments that were made in the District Court against Wilson's contention that no action for indemnity would lie under the principles of Houdaille, supra.

Again, no authority for the proposition of bringing the indemnity action has been cited by Holton and Excelsior. They

even admit that a construction of the case of Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979), clearly indicates that no action for indemnity lies under the circumstances of this case. They urge the Court to overturn the final judgment between Wilson and plaintiff, Collom, as a last ditch effort to save their position.

Initially, Holton and Excelsior stressed that the only theory of recovery against Wilson by the plaintiff was on the basis of a land owner's duty and did not involve an active tort independent of a land owner's duty. This, of course, is not true and as a matter of law Holton and Excelsior are incorrect as amply demonstrated by the brief argued by plaintiff, Collom, and the decisions by the Second District and the Supreme Court in Collom v. City of St. Petersburg, 400 So.2d 507 (Fla. 2nd D.C.A. 1981), and City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982), which squarely were decided upon the basis that the City of St. Petersburg designed, constructed and maintained the underground sewer which is the subject of this litigation. Wilson stresses that this factor is really irrelevant to the determination of this matter since a judgment for H. J. Wilson against Collom foreclosed all theories or actions or causes of action which could have been brought under the facts and circumstances of this case. Even though irrelevant, Holton and Excelsior's total foundation for their argument on this point is destroyed by the above cited decisions.

Holton and Excelsior also questioned the ruling in Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979), claiming that it serves as a basis to bring an action for indemnity against Wilson here. Let us briefly analyze the Houdaille case for its conclusions:

1. The Supreme Court held that absent a special relationship, there is no right of indemnity:

> We conclude that, absent a special relationship between the manufacturer and the employer which would make the manufacturer only vicariously, constructively, derivatively, or technically liable for the wrongful acts of the employer, there is no right of indemnification on the part of the manufacturer against the employer. (Opinion at 492)

There is no special relationship between Wilson and Holton and there is no basis for bringing an indemnity action on the basis of vicarious, constructive, derivative, or technical liability.

2. The Supreme Court held that a right of action for indemnity must be brought where the party sued for indemnity is wholly at fault:

> Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another should have been discharged by the other and is allowable only where the whole fault is in the one against whom indemnity is sought. Stewart v. Hertz Corporation. It shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the cost because it was the latter's wrong doing for which the former is held liable. (Emphasis Supplied) (Opinion at 492-493)

Holton is charged for his own independent tort in this case of maintaining a dangerous condition upon his premises and his failure to warn. Under the allegations and factual scenario there is no possible way to say the Wilson is wholly at fault for the negligence of Holton.

3. The Supreme Court held that there is no indemnification between joint tortfeasors:

> Indemnity rests upon the fault of another which has been imputed to or constructively fastened upon the one seeking indemnity, and there can be no indemnification between joint tortfeasors. (Opinion at 493)

At best, Wilson and Holton were asserted to be joint tortfeasors. There is no indemnity which lies between joint tortfeasors. Thus, the bringing of an action for indemnity and contribution assumes inconsistent legal positions.

4. The Supreme Court held that weighing of relative faults between individuals cannot be a basis for indemnity:

> A weighing of the relative fault of tortfeasors has no place in the concept of indemnity for the one seeking indemnity must be without fault. * * Indemnity can only be applied where the liability of the person seeking indemnity is solely constructive or derivative and only against one who, because of his act, has caused such constructive liability to be imposed. (Opinion at 493)

5. Our Supreme Court has held that the terms active-passive or primary and secondary negligence are not a basis for recovery. The proper test is to determine whether or not the party seeking indemnity is himself without fault:

> Florida Wire asserts that the only way to classify a tortfeasor's negligence as active or passive is to weigh the relative fault of the tortfeasor. To agree with Florida Wire's reasoning, however, would be to repudiate our recent holdings in Stewart v. Hertz Corporation and Seaboard Coast Line Railroad Co. v. Smith, which hold that, when determining whether a party is entitled to indemnity, we will not weigh the relative fault of the parties, but rather we will look to the party seeking indemnity to determine whether he is without fault. In making this particular determination, it is immaterial whether the one against whom indemnification is sought is also with fault. (Emphasis Supplied) (Opinion at 493)

When applied to the case at bar, Holton's negligence is the primary focal point of the litigation. Summary judgment for Holton was reversed by the Second District in a recent appellate decision. See Collom v. Holton, 449 So.2d 1003 (Fla. 2nd D.C.A. 1984). The District Court held that there is a genuine issue of material fact as to Holton's negligence, and therefore, it cannot be said that Holton is determined to be totally "without fault."

We have now gone through the scenario established by a unanimous Supreme Court in the Houdaille Industries case, supra. This amply demonstrates that there is no cause of action for indemnity by Holton against Wilson.

Holton cited the District Court to footnote 4 of the Houdaille decision claiming that the existence of active-passive negligence has somehow been revived by this footnote. This, of course, flies in the face of the Supreme Court's decision on the question where in the main part of the body of the opinion, the

Court specifically holds that active-passive negligence is not a basis for indemnity. (See opinion at 493)

In addition, the footnote cited does not stand as a basis for bringing an indemnity action. This footnote in total states:

> We note that the district court, in reversing the summary judgment and determining that a manufacturer of a defective product could seek indemnity against the employer, relied on Sunspan Engineering and Construction Co. v. Spring-LockScaffolding Co., 310 So.2d 4 (Fla. 1975), and Trail Builders Supply Co. v. Reagan, 235 So.2d 482 (Fla. 1970). These decisions, however, do not derogate from the traditional concepts of indemnity. In Sunspan, we expressly stated that our opinion is limited to the holding that the alleged liability of the employer to the manufacturer is not barred by Section 440.11(1) because that statute is unconstitutional as applied. In Trail Builders, we merely held that nothing in the workman's compensation act prohibits the manufacturer from seeking indemnity against an employer, that the workman's compensation act does not preclude a passively negligent third-part tortfeasor from being indemnified by an actively negligent employer in a suit for damages by such employee against the third party. These decisions involve only the right to sue the employer where a cause of action exists in the first instance. Particularly in light of our subsequent decision in Stuart v. Hertz Corporation, it is clear that Sunspan and Trail Builders stand only for the proposition that the immunity of the workman's compensation statute does not protect against an indemnity action so long as such an action is viable in the first place. (Opinion at 494)

In analyzing the footnote, it can readily be seen that the Supreme Court was not sanctioning active-passive negligence as a basis for indemnity actions. In citing the Trail Builders Supply Co. v. Reagan case, 235 So.2d 482 (Fla. 1970), the footnote simply holds that "it is clear that Sunspan and Trail Builders

stand only for the proposition that the immunity of the workman's compensation statute does not protect against an indemnity action so long as such an action is viable in the first place."

This footnote cannot remotely be construed to permit the bringing of an active-passive negligent indemnity action against Wilson here. Holton simply misconstrued the footnote.

POINT IV

THE DISTRICT COURT CORRECTLY RULED THAT SINCE THE INITIAL DECISION AGAINST HOLTON WAS ON THE MERITS, HOLTON WAS REQUIRED TO APPEAL THE DECISION AT THAT POINT AND SINCE NO APPEAL WAS TAKEN, HOLTON WAS BARRED FROM FURTHER ACTION AGAINST WILSON.

The District Court ruled in part that since the initial decision against Holton was on the merits and no appeal was taken that Holton was barred from relitigating its claim:

> In any event, our ruling need not be grounded only on the judgment against the Colloms exonerating Wilson. Several months after the entry of the Wilson judgment, Holton moved for leave to file the same third party complaint as the one now in issue. The record reflects that the order denying this motion was entered on the merits. The judge had concluded that the issue was controlled by this court's affirmance of the Wilson judgment. Since the effect of that order was to fully dispose of a claim against a party no longer in the case, it was not interlocutory and should have been appealed. See Orlovsky v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th DCA 1981). Yet, no appeal was taken. (Emphasis Supplied) (Opinion at 439) (A 3)

In the Orlovsky decision, supra, cited by the District Court in the quotation above, an order was entered dismissing all counts of a complaint against the defendant, Spence. The

plaintiff, Orlovsky, appealed. Consistent with the Court's ruling in the decision under review, the District Court held that since the order completely dismissed Spence from the litigation, it was a final judgment since judicial labor in the suit against Spence had totally ended:

> Initially, we must determine whether this court has jurisdiction to entertain this appeal. As to appellee, Spence, the order completely dismissed him from the case. Consequently, the judicial labor in the suit against Spence has ended. Accordingly, we have jurisdiction to review the dismissal as a final appealable order. See Lets Help Florida v. D.H.S. Films, Inc., 392 So.2d 915 (Fla. 3rd DCA 1980). (Opinion at 1364)

Once Holton's Motion for Leave for Permission to File Third Party Complaint was denied by the Honorable Jerry R. Parker on June 24, 1981, Wilson was no longer a party to any suit related to this cause. In S.L.T. Warehouse Company v. Webb, 304 So.2d 97 (Fla. 1974), the Florida Supreme Court discussed the requirement of finality as a requisite for appeal. The Court recognized that piecemeal appeals are not favored where claims are interrelated and involve the same transaction and the same parties remain in the suit. In determining the appealability of an order, the Court stated:

> Generally, the test employed by the Appellate Court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the Court to effectuate a termination of the cause as between the parties directly affected.

In the present case, the order denying on the merits Holton's Motion for Leave to File Third Party Complaint disposed of all litigation between the parties directly affected Wilson and Holton and, therefore, must be considered a final judgment or at least a post-judgment order which was required to be appealed within thirty days.

The fact that litigation remained pending between Holton and Excelsior and the plaintiff, Collom, does not affect the finality of the order as it relates to Wilson. In Bumby & Stimpson, Inc. v. Peninsular Utilities Corporation, 179 So.2d 414 (Fla. 3rd D.C.A. 1964), the Court in determining the finality of an order for summary judgment where the order left undisposed a pending counterclaim said:

> An order terminating litigation between one party and another is final as to them notwithstanding that in the same case litigation continues between either of those parties and third persons.

In Bumby & Stimpson, a counterclaim remained pending between the parties so the order granting the summary judgment was not a final judgment. In the present case, the Motion for Leave to File Third Party Complaint was the final litigation involving Wilson, Holton and Excelsior. Since the order of June 24, 1981, terminated all litigation between Wilson, Holton and Excelsior, it must be considered a final judgment.

Under the Florida Rules of Appellate Procedure, it is clear that a party must appeal a final judgment within thirty days

after the entry of such judgment. Rule 9.030(b)(1)(A), Fla.R.App.P., grants the District Court of Appeal jurisdiction to review a final decision of a trial court. Such final orders must be appealed within thirty days after the rendition of such order under Rule 9.110(b), Fla.R.App.P. Since Holton did not timely appeal the order of June 24, 1981, the order denying the Motion for Leave for Permission to File Third Party Complaint is final and not subject to further action or appeal.

By asking the Court for reconsideration of their Motion for Leave to File Third Party Complaint over three years after the trial court's earlier denial of such motion, Holton and Excelsior in effect were seeking to have the Honorable James B. Sanderlin, Circuit Judge, overrule the previous final order of the Honorable Jerry R. Parker, Circuit Judge, denying on the merits Holton and Excelsior's Motion for Leave to File Third Party Complaint.

Therefore, either the initial decision on the merits against Holton constituted a final judgment or at the very least a post-judgment order which should have been appealed by Holton. If the Supreme Court agrees with this proposition, then the litigation comes to an end and the District Court's opinion in regard to this holding should be approved. In sum, Holton and Excelsior are barred from relitigating the matter because they suffered a final judgment or should have appealed the post-judgment decision on the merits prohibiting them from bringing an action for contribution or indemnity.

Holton and Excelsior's position in Point II of their Brief on the Merits[42] is incorrect. As the District Court found, the Motion for Leave to File Third Party Complaint as decided on the merits and this was clearly reflected by the transcript of record taken at the proceedings.[43]

Additionally, Holton and Excelsior ignore the fact that their Motion for Leave to File Third Party Complaint was filed and heard after the final judgment entered for Wilson. If no judgment had been entered for Wilson, then Holton would simply have filed a crossclaim for indemnity and contribution. But since the judgment had become final in favor of Wilson ruling that Wilson was not negligent in the case, Holton and Excelsior had to file a motion to file a Third Party Complaint against Wilson. In sum, this was a post-judgment order which was required to be appealed under Rule 9.130(a)(4), Fla.R.App.P.

Therefore, in the case sub judice, the initial decision was not rendered upon the basis of whether or not a third party complaint could be filed but as stated by the District Court "on the merits." Additionally, the motion was a post-judgment order which was required to be appealed at that juncture. These are the two distinguishing characteristics of the case sub judice which distinguish them completely from the decisions of Seaboard Coast Line Railroad Company v. Wainwright, 336 So.2d 1231 (Fla.

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42. (B 19-22)
43. (B 19-22)

1st D.C.A. 1976), and Sears Roebuck and Co. v. Phelps, 317 So.2d 101 (Fla. 4th D.C.A. 1975), cited by Holton.[44]

In Seaboard, supra, Wainwright brought an action against Seaboard in the Circuit Court for the death of his wife, a passenger in an automobile which collided with Seaboard's train at a grade crossing. The collision also killed the driver of the automobile whose administrator, Battle, also sued Seaboard in another action. Seaboard filed a motion for leave to file a third party complaint against Battle in the Wainwright case. The trial court refused to permit Seaboard to file the third party complaint.

The District Court dismissed Seaboard's appeal of the order denying the ability to file the third party complaint against Battle with the District Court specifically emphasizing that the record revealed that the lower court was not determining the matter on the merits. In sum, the lower court did not intend to dispose of Seaboard's claim against Battle by denial of permission for leave to file the complaint, and therefore, the District Court ruled that the order was interlocutory in nature.

The facts in Seaboard are totally different from those in the case sub judice. The trial court deliberately intended to finally dispose of the issues of indemnity and contribution

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44. (B 20-21)

between Holton and Excelsior and Wilson. In his ruling, the trial Judge specifically ruled upon the merits stating:

> Alright. I'm going to deny your Motion to File a Third Party Complaint for these reasons: Houdaille, I think, does away with active and passive negligence. I can't read that case any other way. It goes right to fault and speaks of things such as derivative or technical liability.
>
> As to contribution, I think you've got to have liability before you have a contribution, and I think the Second District has decided that on summary judgment. (TR 110)

Additionally, in Seaboard, the motion was not a post-judgment motion as is the case in the matter at bar. Therefore, Seaboard does not remotely control or speak to the issues ruled upon by the District Court sub judice.

The same distinguishing facts exist between the facts sub judice and the Sears Roebuck and Co. case, supra. The denial of the Motion for Leave to File Third Party Complaint was not on the merits and was not a post-judgment order.

Throughout the brief of Holton, numerous cases are cited on the question under discussion, but no mention is made of the case of Orlovsky v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th D.C.A. 1981), cited by he Court as the basis for its decision that the judgment was final and therefore reviewable, and the record revealed a decision on the merits. This is the case that is in point in regard to whether or not the order was final and appealable, not the decisions cited by Holton and Excelsior in their brief.

Therefore, the Court should rule that the decision of the District Court was correct and that since a final judgment had occurred in the post-trial proceedings which was not appealed by Holton and Excelsior -- Holton and Excelsior could not later attempt to relitigate the identical questions of contribution and indemnity.

POINT V

HOLTON'S SUBSEQUENT SETTLEMENT OF PLAINTIFF COLLOM'S CLAIM BARS HOLTON FROM ANY SUBSEQUENT ACTION AGAINST WILSON.

Holton and Excelsior filed Notice of Invocation of the Supreme Court's Discretionary Jurisdiction on the 23rd day of January, 1985. Thereafter, on March 2, 1985, they settled plaintiff Collom's case against Holton and Excelsior.[45] The general release strangely also included H. J. Wilson Company, Inc. and its insurance company, The Home Indemnity Company. Why the general release would contain such names is only speculative since Wilson and Home Indemnity were conclusively exonerated from liability by the District Court's decision on March 4, 1981, in Collom v. H. J. Wilson Company, Inc., 396 So.2d 1238 (Fla. 2nd D.C.A. 1981).[46]

Holton and Excelsior's main point argued in their Brief on the Merits urges the Supreme Court to hold that the rule in

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45. (A 5-6)
46. (TR 103)

Belcher v. First National Bank, 405 So.2d 754 (Fla. 3rd D.C.A. 1981), and Mercy Hospital, Inc. v. Marti, 408 So.2d 693 (Fla. 3rd D.C.A. 1981), should be adopted by this Court and the rule enunciated in the case sub judice by the Second District disapproved which would permit a co-defendant to appeal an adverse decision exonerating a co-defendant only after the defendant suffered an "adverse judgment" at the hands of the plaintiff. Holton and Excelsior in their Brief on the Merits state:

> However, the Popovich rule cannot be employed by every co-defendant to appeal his case. Rather, there are two essential elements which a remaining co-defendant must demonstrate before his right to appeal against his exonerated co-defendant will obtain. First, the would-be appellant must be a "judgment defendant." Second, the judgment entered in favor of the exonerated party must adversely affect the remaining co-defendant in such a way that it is necessary for him to appeal in order to maintain his cause of action against that party. (Emphasis Supplied) (B 10-11)

By Holton and Excelsior's own argument in light of the record now before the Court, Holton and Excelsior can never become a "judgment defendant" since they have settled with the plaintiff. Their action extinguishes their right to appeal the favorable decision in favor of Wilson against the plaintiff, Collom. In sum, this entire appeal was rendered moot by the execution of the release on March 2, 1981, and it is Wilson's position that opposing counsel should have advised this Court that their actions had rendered these proceedings moot.

It is impossible to comprehend how some four to five years later after Wilson had been totally removed from the litigation that Holton and Excelsior could then appeal the judgment obtained by Wilson against the plaintiff, Collom. Who would defend the appeal? What notice would Wilson have of the appeal? Such an advocated procedure would keep litigants who had obtained final judgments where co-defendants remained in the litigation in total apprehension and uncertainty of their rights until the entire litigation was terminated. As a matter of law and public policy, such a situation cannot be sanctioned by this Court.

Supposedly, without permission of Wilson or Home, Holton and Excelsior added Wilson and Home's name to the release relying on Section 768.31(2)(d), Fla.Stat., which states:

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement or in respect to any amount paid in a settlement which is in excess of what was reasonable.

Holton and Excelsior forget that Wilson has already been exonerated by judgment and that their efforts or ploy to release Wilson and Home is to no legal avail because of the application of Section 768.31(4)(f), Fla.Stat., which states:

> The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among the defendants in determining their right to contribution. (Emphasis Supplied)

Therefore, since Wilson was exonerated by a judgment of the Court, Holton and Excelsior are bound by that determination as to their right to contribution. Their inclusion of Wilson and Home in the release is therefore to no avail.

In sum, since Holton and Excelsior may not under their own admission become a "judgment defendant" even their own advocated rule of appealing the favorable judgment of Wilson against plaintiff, Collom, has been eliminated since, by settlement, Holton and Excelsior can never become a "judgment defendant."

CONCLUSION

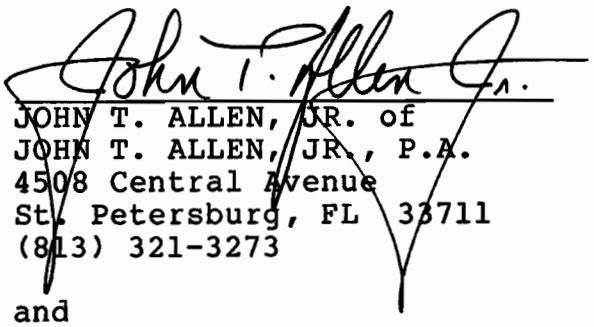
The District Court sub judice held that a co-defendant must timely appeal a judgment exonerating a co-defendant or be barred from its claim of contribution and indemnity. It also ruled that when Holton initially attempted to bring its action for contribution and indemnity, the lower court ruled "on the merits" thus requiring Holton to appeal the lower court's decision. Since Holton did neither, the District Court ruled that Holton could not, three years later, bring an action again for contribution and indemnity.

For policy reasons, the Second District's decision should be approved and the Third District's decisions in Belcher and Mercy Hospital disapproved. To hold otherwise would lead to a multiplicity of suits, piecemeal litigation, substantial and additional expense to litigants, and the requirement of Appellate Courts to possibly determine an issue twice, i.e., once when the plaintiff appeals a judgment for the exonerated co-defendant, and again when another defendant suffers an adverse judgment and likewise appeals the same judgment.

This Court did not say in Pensacola Interstate Fair that a co-defendant must adversely suffer a judgment before the co-defendant has the right to appeal a judgment exonerating a co-defendant. In fact, the Supreme Court's adoption of the First District's decision in Christiani clearly indicates that the appeal rights of a co-defendant attach at the instant of the adjudication of exoneration.

Therefore, for all of the reasons stated in this brief, the decision of the Second District should be approved and the decisions of the Third District disapproved.

Respectfully Submitted,



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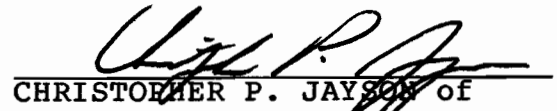

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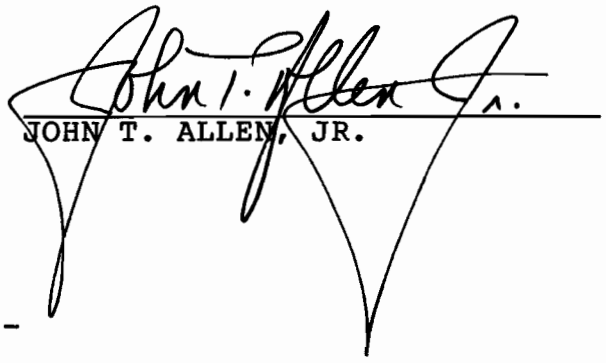
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to J. EMORY WOOD, ESQUIRE, of Butler and Burnette, One Mack Center, Suite 1100, 501 East Kennedy Boulevard, Tampa, Florida 33602-4985, Attorney for Petitioners; DONALD W. GIFFIN, ESQUIRE, 201 East Kennedy Boulevard, Suite 1107, Tampa, Florida 33602; DONALD M. SPANGLER, ESQUIRE, P.O. Box 941, St. Petersburg, Florida 33731; and WILLIAM N. DRAKE, JR., ESQUIRE, P.O. Box 2842, St. Petersburg, Florida 33731, this 3rd day of July, 1985.



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