0/A 11-4-91

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IN THE SUPREME COURT OF FLORIDA
CASE NO. 77,247

COX CABLE CORPORATION,

Petitioner,

vs.

GULF POWER COMPANY

Respondent.

PROCEEDING FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT, FOR
DISCRETIONARY REVIEW BY THE SUPREME COURT

ANSWER BRIEF OF THE RESPONDENT, GULF POWER COMPANY

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INTRODUCTION

Respondent, Gulf Power Company, a Third Party Plaintiff, in the trial court and the Appellant in the court below, is referred to as "Gulf Power". Petitioner, Cox Cable Corporation, Third Party Defendant and Fourth Party Plaintiff in the trial court and Appellee in the court below is referred to as "Cox Cable". Burnup & Sims Cable Comm., Inc., Fourth Party Defendant in the trial court is referred to as "Burnup & Sims". Plaintiff, Michael D. Lewis, is referred to by name. Neither Burnup & Sims or Lewis are parties to this appeal. In the interest of uniformity and to prevent confusion, Gulf Power adopts Cox Cable's method of citing to the record on appeal, the supplemental record and the petitioner's Appendix. Citations to the petitioner's Brief on Jurisdicton will be Pet.B.J._____.

STATEMENT OF THE FACTS AND CASE

Respondent finds the petitioner's Statement of the Facts and Case improperly contains argument and legal conclusions. Furthermore, while the portion of the Statement which recites facts is essentially correct in content, it is incomplete. Therefore, pursuant to Rule 9.210(c)Fla.R.App.P., respondent submits the following addition to the facts.

This litigation arose from a contract entered into by Gulf Power and Cox Cable. Among other provisions of the contract, Cox Cable was required to insure the safe installation and maintenance of wires, cables or devices attached to the poles belonging to Gulf and was required to fully indemnify Gulf Power. (R-5, Exhibit A). Pursuant to that contract, Gulf had the contractual right to rely on Cox to provide experienced and qualified employees and contractors thus eliminating any need for Gulf to warn of a condition that would be readily apparent to an experienced worker. After Lewis was injured while installing Cox's appliances, Gulf Power was forced to bring a third party complaint against Cox which contained the allegations reflected in the petitioner's Statement of Facts.

Lewis' complaint against Gulf Power and Gulf Power's complaint against Cox Cable proceeded through the courts, as

reflected in the petitioner's brief, with Gulf Power obtaining summary judgment in its favor against Lewis. Summary judgment was appealed by Lewis and overturned by the First District Court of Appeal. Lewis v. Gulf Power Company, 501 So.2d 5 (Fla. 1st DCA 1987), rev.den., 508 So.2d 14 (Fla.1987). The singular holding of the First District Court of Appeal was that a jury question existed on the sufficiency of any notice that Gulf may have given to Lewis.

As stated in the petitioner's brief, this suit was settled and Gulf continued against Cox in its third party complaint. After the case was remanded, Gulf Power filed the affidavits of Louis J. Rouillier, Bill Convery, and Larry F. Lewis. (R-98, 100, 101) Also found in the record are the affidavits of Larry F. Lewis given June 7, 1989 (R-70), and Richard A. Mueller, of June 9, 1989, (R-201). These affidavits taken, with the written contract between Gulf and Cox, clearly demonstrated Cox's awareness of the potential problems with Michael Lewis' actions. These affidavits also demonstrate Cox's voluntary assumption of the responsibility to remedy the unsafe practices of Burnup & Sims employees. On June 7, 1989, Cox filed a second Motion for Summary Judgment against Gulf Power. On November 27, 1989, Cox amended its second Motion for Summary Judgment against Gulf (R-

205). Cox filed a Memorandum of Law in support of its amended second Motion for Summary Judgment against Gulf (R-207).

On January 29, 1990, Judge Lacey Collier entered a Final Summary Judgment for Cox against Gulf (-216). Cox's second amended Motion for Summary Judgment and the Order by Judge Collier were confined to Gulf's claims for indemnity and breach of contract. Cox's Memorandum of Law in support of the second amended Motion for Summary Judgment and its arguments therein were also confined to the claims for indemnity and breach of contract. Judge Collier's Order does not address Gulf's claim for contribution and obviously does not dispose of a cause of action that was neither argued nor mentioned in the judge's order (R-216). Gulf appealed Judge Collier's Final Summary Judgment as reflected in the petitioner's Statement of the Facts and Case.

Gulf accepts the petitioner's coverage of the First District Court of Appeal's decision with only one distinction. In the portion of its decision concerning the assertion that Section 725.06 Florida Statutes stood as a bar to indemnification, the court held that §725.06 expressly applies in situations where an owner of real property contracts for improvements to property. Gulf Power Company v. Cox Cable Corporation, 570 So.2d 379, 383 (Fla. 1st DCA 1990). Cox then petitioned this Court to accept

jurisdiction based only upon the allegation of express and direct conflict between the First District Court of Appeal's decision on the issue of Gulf's contractual indemnity claim and prior decisions of this Court. The petitioner's initial brief contains arguments on three other separate and distinct issues decided by the First District Court of Appeal. The petitioner has not alleged the existence of conflict concerning the issues between the decision of the district court of appeal of contribution, breach of contract or the applicability of §725.06 Fla. Stat. and prior decisions of the court or of another district court of appeal.

SUMMARY OF THE ARGUMENT

The petitioner sought review of the First District Court of Appeal's decision when it alleged that a conflict existed between the First District Court of Appeal's decision concerning the enforceability of an indemnity clause in a contract entered into by Gulf Power and Cox Cable and other case law interpreting similar contractual provisions. The petitioner did not allege, nor are there any facts which would lead one to assume, that a conflict exists between the First District Court of Appeals' decision concerning the issues of contribution, breach of contract, and the applicability of Section 725.06 Florida Statutes to the contract. Conflict jurisdiction only arises when a district court of appeals' decision directly and expressly conflicts with a prior decision of this Court, or of another district court of appeal on the same point of law. There being no conflict between the district court of appeals' decision on the above three issues, and decisions of any other appellate court, this court should not allow the petitioner to relitigate those issues on the merits.

The correct standard was applied in determining that the indemnity clause found in the contract between Gulf Power and Cox Cable was sufficient to entitle Gulf to be indemnified for

damages it paid sustained by Mr. Lewis. The indemnity clause in the contract must be constucted to effectuate the intent of the parties. See generally Union Central Life Insurance Co. v. Neuhoff, 24 So.2d 906 (Fla. 1946). The First District Court of Appeal reviewed the contract as a whole and found that the intent of the parties was clear and unambiguous that Gulf Power be indemnified for any damages that arose out of any acts by any person in connection with the attachment of Cox Cable's appliances, cables or other property of Cox Cable to Gulf Power's poles.

Furthermore, since this Court's decision in Charles Poe Masonry v. Spring Lock Scaffolding Rental & Equipment Co, 374 So.2d 487 (Fla. 1979), the district courts of appeal have interpreted language similar to that found in the contract between Gulf Power and Cox Cable as being sufficiently explicit to trigger contractual indemnity. See Marino v. Weiner, 415 So.2d 149 (Fla. 4th DCA 1982) and Mitchell Maintenance Systems v. State Department of Transportation, 442 So.2d 276 (Fla. 4th DCA 1983). This is especially so when joint liability may exist, as is the case in this litigation.

The lower court correctly found that Gulf Power's complaint sufficiently stated a cause of action against Cox Cable for

contribution when Gulf Power alleged negligence on the part of Cox Cable. The foundation for the theory of contribution is negligence on the part of more than one tort feasor. In Florida Power Co. v. Schauer, 374 So.2d 1159 (Fla.4th DCA 1979), the district court held that a cause of action for contribution is stated even when the complaint alleges that the defendant is the sole, proximate cause of the plaintiff's injuries.

It is hornbook law that the provisions of a contract must be construed within the context of the entire document. See Union Central Life Insurance Co. v. Neuhoff, 24 So. 2d 906 (Fla. 1946); Triple E Development Co. v. Florida Gold Citrus Corp., 51 So.2d 435 (Fla. 1951). It is further the duty of the court to place itself in the situation of the parties and from a consideration of the surrounding circumstances, the occasion and the apparent objects of the parties, to determine the meaning and the intent of the language employed. Blackhawk Heating & Plumbing Co. v. Datalease Financial Corp., 302 So.2d 404, (Fla. 1974). The petitioner argues that the First District Court of Appeal erred when it followed the simple rules of contract construction. The petitioner further asserts that the court should only have considered the language found in paragraph (9) and should not have interpreted paragraph (9) consistent with the entire

document. This is clearly in contravention of well-established rules of contract construction.

The First District Court of Appeal was clearly correct when it held that §725.06 Florida Statutes did not apply to the agreement entered into between Gulf Power and Cox Cable. By the inclusion of the term "owners of real property", the legislature expressed its intent to exclude contracts that did not involve owners of real property with those other enumerated parties in the statute. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976). Furthermore, the contract entered into between Gulf Power and Cox Cable is not a construction contract at all. It is plainly a licensing agreement which grants Cox Cable the right to use Gulf Power's poles so that it might provide service to its customers.

This Court should review only that portion of the First District Court of Appeals' opinion which deals with the indemnity provision of the contract entered into by Gulf Power and Cox Cable. The First District Court of Appeal has applied the correct standard in determining that the indemnity provision is enforceable. It is respectfully urged that this Court affirm the action of the First District Court of Appeal in that matter. However, if this Court decides to review other aspects of the First District Court of Appeals' decision, it is clear that the

First District Court of Appeal correctly applied the principles of law which deal with contribution, breach of contract and statutory construction to those issues. It is respectfully urged that this Court also affirm the First District Court of Appeals' action and allow this case to be returned to the trial level so that Gulf Power's claim might be properly litigated.

ISSUE I

WHETHER THE PETITIONER SOUGHT AND WAS GRANTED REVIEW OF THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THE SUPREME COURT ON THE BASIS THAT AN EXPRESS CONFLICT EXISTED BETWEEN THE FIRST DISTRICT COURT OF APPEAL'S DECISION AND PRIOR SUPREME COURT CASES CONCERNING THE ENFORCEABILITY OF INDEMNITY AGREEMENTS IN CASES OF JOINT NEGLIGENCE AND WHETHER THE GRANT OF CERTIORARI REVIEW ON THAT BASIS SHOULD CONFINE REVIEW TO THE ISSUE OF THE ENFORCEABILITY OF THE INDEMNITY CLAUSE IN THE CONTRACT BETWEEN GULF POWER AND COX CABLE.

In the petitioner's brief on jurisdiction, it set forth the argument as follows:

> The decision of the court below expressly and directly conflicts with the decision with the decision of the supreme court and with decisions of other district courts of appeal on the minimum standards for enforcement of indemnity contracts in cases of joint negligence.

(Pet.B.J.- 5).

In the petitioner's summary of argument in the Brief on Jurisdiction, it states that the decision of the First District Court of Appeal is in direct conflict with Charles Poe Masonry Inc. v. Spring Lock Scaffolding Rental Equipment Co. 374 So.2d 487 (Fla. 1979). The petitioner requests that the Court accept jurisdiction under Article 5, Section 3, (b)(3), Florida Constitution, to resolve the conflict between the decision of the

First District Court of Appeal in this matter and Charles Poe Masonry. As reason for accepting jurisdiction, the petitioner states that the Court should resolve this conflict because these agreements often play an important role in common commercial transactions and the law in Florida should be clarified on the minimum expression of intent necessary to insure enforceability. (Pet.B.J.- 4). There is no other basis for the jurisdiction of the Supreme Court to be invoked. In its conclusion, the petitioner requests this Court to accept jurisdiction and provide guidance on that point of law (Pet.B.J.-9).

This Court granted Cox Cable's petition for certiorari review of the First District Court of Appeal's decision finding that a conflict did exist. This court held in Anson v. Thurston, 101 So.2d 808 (Fla. 1958), that in the constitutional plan for discretionary review in cases alleging conflict, the powers of the Court to review decisions of the district court are limited and strictly prescribed. The Court further stated that conflict jurisdiction should be used to settle issues where there is a "real and embarrassing conflict of opinion and authority." Id. at 811. The Court went on to state that the conflict must be such that one decision would overrule the other if reached by the same court. Id.

In Little v. State, 206, So.2d 9, 10, this Court held that conflict exists when a decision is in direct conflict with other appellate decisions on the same point of law. See also Bankers and Shippers Insurance Company of New York v. Phoenix Assurance Company of New York, 210 So.2d 715 (Fla.1968).

Therefore, a conflict must exist on identical points of law before jurisdiction lies with this Court to review the decision of the court below. The petitioner has not alleged that the First District of Appeal's decisions concerning the issues of contribution, breach of contract and the applicability of Section 725.06 Florida Statutes to the contract between the parties below are in conflict with any prior decision of this Court or any decision of a sister district court of appeal. However, the petitioner now seeks to reargue those decisions as well. Each of the First District Court's holdings concerning breach of contract, contribution or Section 725.06 Florida Statutes were decided on a distinct and separate point of law from that presented in the petitioner's brief on jurisdiction. The Court did not accept jurisdiction of this matter based on any conflict between the district court of appeal's decision in the matters of contribution, breach of contract and the applicability of §725.06 Fla.Stat. but on the issue of the enforceability of indemnity

agreements in cases of joint negligence.

The purpose the Florida Constitution authorizing the Supreme Court to review by certiorari the decisions of district courts of appeal when a direct conflict exists on the same point of law is to reduce to an absolute minimum conflicts in the body of law of the state and to make law announced in decisions of appellate courts of the state uniform throughout. The scope of review in the Supreme Court is limited by such purpose. N&L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960). See also Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Co., 116 So.2d 762 (Fla. 1960).

There being no conflict between the First District Court of Appeal's rulings on the issues of contribution, breach of contract and the applicability of Section 725.06 Florida Statutes to the contract in the case below, this Court should deny the petitioner the right to reargue those points of law on the merits. The grant of certiorari review by way of conflict jurisdiction should not convey to the petitioner the right to relitigate all issues on the merits. Therefore, this Court is urged to strike the arguments of the petitioner which do not expressly and directly address the issue raised in Cox Cable's jurisdictional brief.

ISSUE II

WHETHER THE FIRST DISTRICT COURT OF APPEAL CORRECTLY APPLIED THE EXISTING STANDARD IN DETERMINING THAT THE INDEMNITY CLAUSE FOUND IN THE CONTRACT BETWEEN GULF POWER AND COX CABLE WAS SUFFICIENT TO ENTITLE GULF POWER TO BE INDEMNIFIED FOR THE NEGLIGENT ACTS OF COX CABLE.

The District Court of Appeal correctly applied the current legal standard in determining whether the indemnity clause found in the parties' contract was sufficiently clear and unequivocal to require Cox Cable to indemnify Gulf Power for damages Gulf Power paid to Michael Lewis. Florida courts have taken a narrow view of indemnity contracts which purport to indemnify a party against its own wrongful act. Here, however, the facts are materially different from those in the cases cited by the petitioner. Gulf Power is entitled to indemnification for damages resulting from the injuries suffered by Mr. Lewis. Contracts which would purport to indemnify a party against its own wrongful acts are viewed with disfavor, University Plaza Shopping Center, Inc. v. Stewart, 272 So. 2d 507 (Fla. 1973) and Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487, 489 (Fla. 1979). The petitioner correctly states that Charles Poe Masonry, and its progeny have established as a parameter the requirement that the language in a

contract be "clear and unequivocal" in the context of joint negligence. What the petitioner has not argued, and what the trial court did not consider, is that indemnity clauses must be interpreted in the context of the remainder of the contract in which they are found. If the intent of the parties is clear, then full indemnification is required.

It is common knowledge that Cox Cable is not a small business entity. Rather, Cox, at the time that this contract was entered into, was one of the largest cable corporations in the United States. The reason a Burnup & Sims employee was involved in work on or around Gulf Power's poles was that growth experienced by Cox Cable in the cable industry required it to subcontrct much of its work. A corporation of this size is obviously knowledgeable and sophisticated in its business dealing. Cox Cable entered into a voluntary contract which, taken as a whole, includes a promise by Cox Cable to indemnify Gulf Power Company for <u>any and all accidents</u> which may occur in the installation or operation of Cox Cable's devices or lines. The agreement clearly shows that complete indemnification of Gulf Power was contemplated and was part of the consideration of the contract (R-5, Attachment A, page 1). Contemplated indemnification is found throughout the contract and is

demonstrated in the following specific provisions:

> Whereas, complete indemnification of licensor is contemplated hereunder

(R-5, Attachment A, page 1);

> ...[N]ow and at all times the assent by the licensor to that requested by the licensee shall not deprive licensor of <u>full indemnification which is the prime condition of this undertaking</u>.

(R-5, Attachment A, page 2);

> Licensee shall <u>indemnify</u>, protect and save the licensor forever harmless from and against any and all claims and demands for damages to property and injury or death to any persons including but not restricted to employees of the licensee and employees of any contractor or subcontractor performing work for licensee and also including payments made under the Workers' Compensation Law or under any plan for employees disability or death benefits which may arise out of or be caused by the erection, maintenance, presence, use or removal of said attachment or by the proximity of respective cables wires, apparatus and appliances of the licensee or <u>by any act of licensee on or in the vicinity of licensor's poles</u>....
>
> It is understood that the right of entry is granted upon the express condition that <u>all risk</u> thereas to be assumed by the licensee and its employees. Licensee shall carry insurance to protect the parties hereto from and against any and all claims....

(R-5, Attachment A, page 6, 7).

The contract also requires Cox Cable to carry insurance to

protect the parties from any and all claims, demands, actions, judgments, costs, expenses and liabilities of every name and nature which may arise or result directly or indirectly from or by reason of such loss, injury or damage (R-5, Attachment A, paragraph 10). No more could have been done in a business transaction between two sophisticated corporations to insure that both understood that full indemnification of Gulf Power was required by the contract for any damages that could arise from the installation or operation of Cox Cable appliances.

In University Plaza Shopping Center, Inc. vs. Stewart, 272 So.2d 507, 512 (Fla.1973), the Supreme Court required that indemnity clauses contain language which is specific enough that all parties understand that indemnification would be required. Six years later, this Court in Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487, 190 (Fla. 1979), extended the holding found in University Plaza, to cases where the indemnitor and indemnitee were jointly liable. While Charles Poe Masonry extended the holding of University Plaza, it did not alter the holding found in Farber v. Jaksch, 335 So.2d 847 (Fla.4th DCA 1976). Also, subsequent cases decided by the district courts of appeal a more permissive standard when interpreting indemnity clauses in contracts between joint tort

feasors has been applied. In Farber, the district court of appeal found the language in an indemnity clause sufficiently explicit when it stated:

> Lessee shall indemnify lessor and save harmless from suits, actions, damages liability and expense in connection with the loss of life, bodily or personal injury or property damage arising from or out of any occurrence or occasion wholly or in part by any act or omission by the lessee, its agents, contractors, employees and servants.

Id at 848.

This language, combined with requirements that lessee maintain insurance at its own cost and expense, was sufficiently "clear and unequivocal" to make the lessee liable to fully indemnify the lessor for their joint liability where joint liability resulted from the negligence of both the lessor and the lessee. Id.

In Seaboard Coastline Railroad Co. v. City of Jacksonville, 361 So.2d 209 (Fla. 1st DCA 1978), the First District Court of Appeal interpreted yet another indemnity clause. In Seaboard Coastline, the railroad allowed the city to connect its traffic signal to the railroad warning system at a certain intersection. The indemnity clause contained in the contract stated:

> Railroad shall have no responsibility or liability for any loss of life or injury to

> person or loss of or damage to property, growing out of or arising from the irregular operation of trafficking signals of the county and/or the railroad train approaching warning signals resulting from or any manner attributable to the interconnection of the county's traffic signals...and county insofar as it lawfully may agrees to indemnify and save railroad harmless from all such loss, injury or damage.

Id at 211. The Seaboard court held that the indemnity contract was written in "clear and unequivocal" language and placed on the city the sole responsibility for any and all damages arising out of or attributable to the irregular operation of the traffic signal.

In two post Charles Poe Masonry cases, the Fourth District Court of Appeal held that language similar to that found in Farber was sufficiently clear and unequivocal to require the indemnitor to indemnify the indemnitee even though they were jointly responsible for the accident. See Marino v. Weiner, 415 So.2d 149 (Fla 4th DCA 1982); Mitchell Maintenance Systems v. State Department of Transportation, 442 So.2d 276 (Fla 4th DCA 1983); furthermore, United Parcel Service of America, Inc. v. Enforcement Security Corp., 525 So.2d 424 (Fla.1st 1987), rev.den. 525 So.2d 878 (Fla. 1988). See also R.C.A. v. Pennwalt Corporation, 577 So.2d 620 (Fla.3d DCA 1991). United Parcel,

clearly supports the holding found in the case before this Court. In United Parcel, the Court found the following language to be clear and unequivocal:

> Any contrary or inconsistent provision in the attached agreement notwithstanding, Enforcement Security Corp. (hereinafter called vendor) agrees to be responsible for and to indemnify and hold harmless United Parcel Service, Inc.,...from any claims, losses, damages, expenses or liabilities of any kind or nature whatsoever arising or alleged to have arisen in part, out of or in consequence of the work hereunder, which it may incur or sustain by reason of any act or omission of vendor or any employee of vendor in any injury suffered by any employee of vendor including, but not limited to personal injury...except from and against all losses, damages or expense etc. as set forth hereinabove arising out of the sole negligence of UPS.

Id at 425. The district court also held that the degree of specificity required for indemnification in cases of joint negligence is less stringent. 525 So.2d 424.

In the case before this Court, the First District held that the language found in the indemnification clause interpreted as a part of a whole contract clearly showed that the intent of the parties was to insure that Gulf Power would be fully indemnified for any damages resulting from the attachment of Cox Cable's appliances to Gulf's poles. 570 So.2d at 382. The lower court

expressly found its ruling consistent with Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co. 374 So.2d 487 (Fla. 1979) and University Plaza Shopping Center, Inc. vs. Stewart, 272 So.2d 507 (Fla. 1973); Mitchell Maintenance Systems v. State Department of Transportation, 442 So.2d 276 (Fla. 4th DCA 1983) and Marino v.Weiner, 415 So.2d 149 (Fla.4th DCA 1982).

While the petitioner concentrates on paragraph (10) of the contract, an indemnity provision is merely one of many clauses found in an agreement between two parties. It is the duty of the court to determine the intent of the parties by reviewing the entire document. Union Central Life Insurance Co v. Neuhoff, 24 So.2d 906 (Fla.1946). Reading paragraph (10) in context with the entire document, it becomes "clear and unequivocal" that the parties contemplated that Cox Cable would indemnify Gulf Power against any and all claims or demands from damages which arose out of or were caused by the erection, maintenance, presence, use, removal or attachment or wires, apparatus, and appliances of Cox Cable to Gulf Power's poles. Therefore, it is respectfully submitted that this Court should affirm the decision of the First District Court of Appeal which found the language sufficiently clear to require Cox Cable to indemnify Gulf Power.

ISSUE III

WHETHER THE DISTRICT COURT OF APPEAL PROPERLY FOUND THAT GULF POWER'S COMPLAINT SUFFICIENTLY STATED A CAUSE OF ACTION AGAINST COX CABLE FOR CONTRIBUTION WHEN GULF POWER CLEARLY ALLEGED NEGLIGENCE ON THE PART OF COX CABLE IN THIS MATTER

Gulf Power's third party complaint stated a cause of action for Contribution against Cox Cable in paragraph (5) when it alleged that Cox Cable's negligence was the sole or proximate cause of the injury to Lewis. It is interesting that the petitioner's brief argues the sanctity of the discretion given to the trial court rather than addressing the issue of whether a claim for contribution was made. Cox argues that Gulf's contention that Cox was "the sole and proximate cause" of Lewis' injuries acted only as a defense to Lewis' claim but was not sufficient to state a claim for contribution. The petitioner cites to Martin v. United States, 162 F.Supp. 441 (E.D.Pa. 1958) and Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (N.C. 1956). While these cases represent doubtful persuasive precedent, the petitioner failed to refer to Florida Power Co. v. Schauer, 374 So.2d 1159 (Fla. 4th DCA 1979). In Schauer, two workmen were injured when a crane lifting a steel beam came in contact with a high intensity power line. Schauer, one of the

workers, sued Florida Power and Light which filed a third party complaint against the architect. Id at 1160. In its complaint, Florida Power and Light alleged that the architect had a duty to design and supervise the addition; that he was negligent in designing the addition and failing to notify Florida Power and Light to de-energize the lines; and that he was the sole proximate cause of plaintiff's injuries. Id. The Fourth District noted that while the suit was pending, this Court decided Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979). Houdaille served to defeat the appellant's claim for indemnity against the architect. However, the Schauer court held:

> ...[T]he Summary Judgment also dismissed appellant's third party complaint for contribution and we find said complaint stated a cause of action for contribution and the proofs offered in support of the summary judgment did not demonstrate that no genuine issue of material fact existed on that question.

Id. at 1160. The trial court's final summary judgment on the issue of contribution was reversed.

A claim for contribution is founded in the allegation that the third party defendant has been negligent and such negligence caused the plaintiff to suffer damages. Section 768.31 Florida

Statutes; and Florida Power Corp. v. Taylor, 332 So. 2d 687 (Fla.2d DCA 1976). Here, Gulf Power has alleged negligence on the part of Cox Cable. The allegation of negligence is separate and apart from any claim for indemnity or breach of contract. Thus, Cox Cable cannot claim surprise or lack of notice. The complaint clearly placed Cox on notice that Gulf Power had alleged negligence on the part of Cox Cable (A-23). The petitioner cites to Dean Co. v. U.S. Home Corp., 523 So.2d 1152 (Fla.2d DCA 1987); enforcing 485 So.2d 438 (Fla.2d DCA 1986), rev.den. 528 So.2d 1184 (Fla. 1988) as controlling. However, Dean is inapposite to the facts of this case. In Dean, the third party plaintiff acknowledged to the court that its only claim was for indemnity. In the case before the Court, Gulf Power asserted to the Court that a claim for contribution had been made.

The true question is not whether a cause of action is artfully stated, but whether a cause of action exists and was not so deficient as to require the trial court to grant summary judgment. The affidavits in this case reveal a clear cause of action and the trial court erred when it granted a summary judgment without acknowledging the existence of the contribution claim. See Dorset House Association, Inc. v. Dorset, Inc., 371 So. 2d 541 (Fla 3d DCA 1979).

Likewise, Bernard Marko & Associates, Inc. v. Steele, 230 So.2d 42 (Fla. 3d DCA 1970) is not controlling. In Bernard Marko, summary judgment was granted and the plaintiff was not allowed to amend his complaint to allege a new fraud theory that was not part of the original complaint. In the case before this Court, Gulf Power clearly alleged a cause of action for negligence against Cox Cable Corporation (A-23). Contribution, therefore, is not a "new" theory in this case.

It is well settled in law, that special caution should be exercised in granting summary judgment in negligence cases. The courts have often held that summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Carbajo v. City of Hialeah, 514 So.2d 425 (Fla.3d DCA 1987). Furthermore, the burden is upon the moving party to conclusively demonstrate that there are no genuine issues of material fact existent at the time of the motion. Clark v. Van De Walle, 332 So.2d 360 (Fla.2d DCA 1976). Indeed, since the introduction of the doctrine of comparative negligence, trial courts have been cautioned to view motions for summary judgment in negligence actions with even greater care than ever before. U.S. Fire Insurance Co. v. Progressive Casualty Insurance Co., 362 So.2d 414 (Fla.2d DCA 1978).

The record clearly shows that Cox Cable, in its motion for summary judgment, did not address paragraph (6) of the third party complaint which alleges negligence on its part. As the Second District Court of Appeal held in Florida Power Corp. v. Taylor, supra, at 692 (interpreting Section 768.32 Florida Statutes), the Florida Statutes provide that where two or more forces become jointly or severally liable in tort for the same injury to persons or property or for the same wrongful death, there is a right of contribution among them even though the judgment has not been recovered against any or all of them. It is without dispute that Gulf Power alleged that Cox Cable was negligent in the performance of its duties under the contract. Thus, Gulf Power stated a cause of action in negligence which gave rise to a right to contribution. Gulf Power clearly had the right to present evidence at trial that Cox Cable was aware of unsafe practices occurring under the direction of its agent, Burnup & Sims, and that Cox Cable had assumed the duty to correct those unsafe practices (R-101). The uncontroverted facts before the trial court show that Cox Cable employees were informed of unsafe practices which had occurred and were continuing during the time Burnup & Sims was attaching Cox's cable to Gulf Power's poles (R-101). Furthermore, Gulf Power had been assured by the

same Cox Cable employees that those unsafe practices brought to their attention would be corrected (R-98). Through the acts of their employees, Cox Cable assumed the duty, as was required under the contract, to carefully and safely install and maintain all cables or devices belonging to Cox Cable. The duty of Gulf Power to warn Michael Lewis arose solely from Cox Cable's failure to insure that experienced personnel were used to erect their equipment.

In the Memorandum of Law before the trial court, Cox Cable asserted that Gulf's duty to warn arose out of its superior knowledge of the danger faced by workers such as Lewis while working on or around its electrical poles (R-207). Again, had Gulf been allowed to litigate its negligence claim, it was prepared to present evidence from employees of Burnup & Sims, Inc., which would show that it had become common knowledge that Michael Lewis did not possess the requisite experience to continue his employment with Burnup & Sims. Furthermore, Burnup & Sims' employees would testify that a decision had been made to terminate Michael Lewis' employment before the accident occurred. If Gulf Power's duty to warn is based upon superior knowledge, it is axiomatic that Gulf's duty would not have existed had Cox carefully performed its duty to provide experienced, well-trained

employees on the job. Gulf's duty to warn subcontractors and employees of Cox Cable was inversely related to the quality and experience of those subcontractors and employees. Had Michael Lewis been an experienced worker, as required by the contract, then Gulf Power would have had no duty to warn Mr. Lewis concerning his unsafe practices. Cox Cable, through provisions of the contract and through the assurances made to Gulf Power, was aware of its duty to supervise the attachment of its appliances to Gulf's poles and to insure that competent workers were employed. Cox negligently breached that duty resulting in Gulf Power's liability to Michael Lewis.

Nowhere in the order granting summary judgment can one find a disposition of Gulf's contribution claim against Cox Cable. Furthermore, it may not even be implied that the court addressed this issue. Cox Cable failed to address the matter in its Motion for Summary Judgment or Memorandum of Law in support of said motion (R-167, 205, 207). The burden or producing evidence that all issues of fact have been resolved is always that of the moving party. McCutcheon v. Seaboard Airline Railroad, 133 So.2d 660, 662 (Fla. 3d DCA 1961). Cox Cable produced no evidence which addressed Gulf's claim that it had performed its duties negligently. With no evidence before it, the court could not

properly consider and address the issue of contribution in its final judgment. However, Judge Collier did issue a final summary judgment which effectively denied Gulf Power's claim for contribution without having considered that issue and the disputed material facts which existed on that issue.

It must be noted that during the hearing on the Motion for Summary Judgment, Gulf Power's counsel brought to the court's attention the fact that an allegation for contribution had been made in the third party complaint (T-14). Gulf Power Company advised the court of the existence of this claim after it became apparent that Cox Cable had concentrated its defense on the contractual indemnity and breach of contract allegation. Nevertheless, the trial court failed to mention the allegation of negligence or claim for contribution in its final judgment. It is respectfully submitted that the holding of the lower court should be affirmed and Gulf's claim for contribution should be remanded for trial.

ISSUE IV

THE FIRST DISTRICT COURT OF APPEAL FOLLOWED EXISTING LAW WHEN IT REVERSED THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF COX CABLE ON THE ISSUE OF WHETHER COX CABLE FULLY COMPLIED WITH ITS CONTRACTUAL OBLIGATIONS UNDER PARAGRAPH (9) AND WHEN IT HELD THAT A CONTRACT SHOULD BE CONSTRUED AS A WHOLE TO ASCERTAIN THE INTENT OF THE PARTIES.

The petitioner's argument concerning breach of contract asks this Court to ignore long established rules of contract construction and find that individual provisions contained in contracts may only be interpreted by the language found in the disputed provision without the aid of the entire document. The petitioner argues that the Court must only consider the terms found within paragraph (9) of the agreement between the parties when construing this contract. It is true that where the meaning of a contract is clear under ordinary rules of English, a court is powerless to rewrite the clear and unambiguous terms contained therein. Shell v. Bankers' Life Co., 213 So.2d 514, 515, (Fla.3d DCA 1968); National Health Laboratories, Inc. v. Bailmar, Inc., 444 So.2d 1078, 1080 (Fla.3d DCA 1984). However, in the case before the Court, the First District Court of Appeal has correctly held that paragraph (9) must be construed in context

with the entire document. Gulf Power Co. v. Cox Cable Co., 570 So.2d 379, 381-382.

The law regarding the construction of contracts is well settled in Florida. In Union Central Life Insurance Co. v. Neuhoff, 24 So.2d 906 (Fla. 1946), this Court has held that the meaning of a contract will be determined from the entire instrument. In 1951, this Court held that a contract should be considered as a whole in determining the intention of the parties to the instrument. The Court also held that the conditions and circumstances surrounding the parties to a contract and the object to be obtained by execution of the contract should be considered when construing the document. Triple E Development Co. v. Florida Gold Citrus Corp. 51 So.2d 435 (Fla.1951).

Seven years later, this Court held that in construing a contract, the intention of the parties must be determined from an examination of the whole contract and not from separate phrases or paragraphs. Lalow v. Cotomo, 101 So.2d 390 (Fla. 1958). (Emphasis added). In Blackhawk Heating and Plumbing Co. v. Datalease Financial Corp., 302 So.2d 404, 407 (Fla. 1974), the Court held that in construing written contracts, it is the duty of the court to place itself in the situation of the parties and from a consideration of the surrounding circumstances the

occasion and apparent objects of the parties to determine the meaning and intent of the language employed. In Mount Vernon Fire Insurance Co. vs. Editorial America SA, 374 So.2d 1072, 1073 (Fla. 3d DCA 1979), the district court of appeal held that all parts of the contract were to be compared, used and construed in reference to each other and the legal effect of the contract must be determined from the words of the entire contract.

The petitioner argues that the trial court is vested with discretion in what it considers in construing a contract. In Shafer & Miller v. Miami Heart Institute, Inc., 237 So.2d 310, 311 (Fla.3d DCA 1970), cited by Cox Cable as authority to ignore all but the disputed provisions of the contract, the trial judge considered facts outside the contract to find that if liability existed for the injury, that the liability existed because of "an act or omission of the said contractor". 237 So.2d 310, 311 (Fla.3d DCA 1970).

An examination of the record clearly shows that Cox Cable and the trial court confined their examination of the contract to paragraph (9) (R-5, Exhibit A). A clear reading of the contract demonstrates that other paragraphs in the contract relate to the duties assumed by Cox Cable concerning the installation of its cables and devices on the poles belonging to Gulf Power. Among

these duties, are included the duty to make and maintain the attachments in a safe condition and in thorough repair (R-5, Attachment A, paragraph 2). Gulf Power reserved the right to relocate, replace, and remove the facilities in the case of an emergency. However, Cox Cable Corporation assumed the duty to insure the safe maintenance of those attachments at all other times. In paragraph (3) of the same document, Cox Cable agreed to erect and maintain all wires and appliances to be attached to the poles in accordance with the requirements and specifications of the National Electrical Safety Code and the National Electrical Code. Gulf Power Company's reservation of the right to inspect specifically provided that:

> ...such inspections or licensor's lack of inspection shall not operate to relieve licensee of any responsibility, obligation or liability assumed under this agreement, nor shall failure to inspect impose any obligation on the licensor.

(R-5, Attachment A, paragraph 3).

Cox Cable had a non-delegable duty to insure the safe installation and operation of its facilities on Gulf Power's poles. This duty could not be derogated by hiring a contractor of Cox Cable's choice. Gulf Power had no relationship with Burnup & Sims and dealt with Cox Cable on all safety violations

brought to Gulf's attention (R-98). Cox Cable assumed the non-delegable duty to guarantee that Burnup & Sims was performing in a satisfactory manner.

The contract clearly provides that Cox would only use employees who were experienced working with and around energized electrical conductors (R-5, Attachment A). The affidavits and depositions in the record show that Michael Lewis was not such an experienced employee. Cox Cable relies in part on the affidavit of Larry F. Lewis found at (R-205, Exhibit A). In his affidavit, Mr. Lewis, General Manager of Cox Cable, stated that the contract required Cox Cable to utilize employees and contractors who were experienced in working with and around energized electrical conducts. Mr. Lewis further alleged that Burnup & Sims was known to him to be well-qualified in the installation of cable television systems on electrical poles.

While a reading of paragraph (9) in isolation might support Cox Cable's contention that it did not breach the contract, a reading of the remainder of the contract demands a different result. In Mr. Lewis' affidavit, he states that Cox Cable relied solely upon Burnup & Sims to supply its own employees. While Cox may have relied upon Burnup & Sims, Inc. to supply employees, it could not delegate its duty to utilize employees and contractors

who were experienced in working with and around energized electrical conductors. Nor could Cox Cable delegate its duty to safely install and maintain its devices. Consequently, in its contract with Burnup & Sims, Cox Cable retained control over the standard of construction and installation of its cable or other devices (R-205, Attachment B). In an earlier affidavit Mr. Lewis admits that, prior to July of 1981, he was contacted on several occasions by Mr. Roullier and other representatives of Gulf Power regarding instances of unsafe practices performed by Cox's contractor, Burnup & Sims, Inc. On each occasion, Mr. Lewis, as managing agent for Cox Cable, contacted Burnup & Sims in an effort to correct the problems that had occurred and to insure that safe practices would be followed (R-101). Mr. Lewis' affidavit demonstrates that Cox Cable considered itself in control of the practices of Burnup & Sims. Furthermore, the affidavit shows that Cox Cable assumed the duty to correct the violations of safety practices which eventually led to the injury of Michael Lewis. Since the injury occurred, Cox has sought to hide behind the reputation of Burnup & Sims as an experienced contractor even though Cox Cable had actual knowledge of improper or unsafe practices carried on by Burnup & Sims' employees and had the requisite control to correct them.

The petitioner argues that the First District Court of Appeal created a new duty to warn all parties when Cox Cable became aware of deficiencies in their subcontractors' work. 570 So.2d at 382. This is clearly not so. Even reading paragraph (9) without the benefit of the remainder of the contract, it is apparent that Cox Cable had the duty to utilize employees experienced in working around energized electrical conductors. Failure to perform this contractual duty is an obvious breach of contract.

ISSUE V

THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT SECTION 725.06 FLORIDA STATUTES DOES NOT ACT TO BAR GULF POWER FROM SEEKING INDEMNITY FROM COX CABLE BASED UPON THIS CONTRACT.

The petitioner is correct when it states that the agreement between Gulf Power and Cox Cable does not comply with Florida law regulating indemnity provisions in construction contracts. However, Section 725.06 Florida Statutes applies only to contracts entered into by owners of real property and architects, engineers, general contractors, subcontractors, or sub-subcontractors or materialmen, or any combination thereof. There is no indication that the legislature intended for this section to apply to all contracts dealing with any type of construction. As this court so aptly stated,

> "...in matters requiring statutory construction, courts always seek to effectuate legislative intent. Where the words selected by the legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace express intent.

Heredia v. Allstate Insurance, 358 So.2d 1353 (Fla. 1978). (Citations omitted).

Section 725.06 provides in pertinent part:

> ...any portion of any agreement or contract

> for or in connection with any construction, alteration, repair or demolition of a building structure, appurtenance or appliance including moving and excavating connected with or any guarantee of or in connection with any event between an owner of real property and an architect, engineer, general contractor, subcontractor, subcontractor, sub-subcontractor...

§725.06 Fla.Stat. (Emphasis added).

The language found therein is clear on its face and should not be subject to unnecessary interpretation. To include contracts not involving an owner of real property would impermissibly broaden the statutes coverage and defeat the legislative intent. It is a general principle of statutory construction that the mention of one thing implies the exclusion of another. Thayer v. State, 335. So.2d 815, 817 (Fla. 1976). The doctrine of "expressio unius est exclusio alterius" has long been applied to statutory construction cases in Florida. The doctrine has not lost vitality with age. See Thayer v. State, supra; Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987) and DAO v. Department of Health and Rehabilitative Services, 561 So.2d 380 (Fla.1st DCA 1990). The district court correctly held that this statutory provision expressly applies in situations when an owner of real property contracts for improvements to property. 570 So.2d 379, 383 (Fla. 1st DCA 1990). Gulf is not an owner of real

property as the petitioner freely admits.

Furthermore, the agreement between Gulf Power and Cox Cable is not a construction contract at all. Cox Cable sought a license to attach its cables and appliances to the property of Gulf Power. This Court is urged to reject the petitioner's invitation to read into the statute that which the legislature chose to exclude.

CONCLUSION

The petitioner has asserted an incorrect application of law as the basis for its petition to this court. As such, it limited the scope of review in this matter. This Court should only consider that portion of the First District Court of Appeals' deicison which deals with the indemnity provision of this contract. When the Court reviews the decision of First District Court of Appeal, the law upon which that decision is to rest and the arguments of the parties, it is urged to affirm the First District Court of Appeal's decision concerning the enforceability of the indemnity provision. If this Court extends its review to the issues of contribution, breach of contract and statutory construction addressed in the district court of appeals' decision, it should clearly see that the district court of appeal has correctly applied the law to the facts of this case. This Court is respectfully urged to affirm the district court of appeals' judgment remanding this to the trial level.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Mark E. Holcomb, Esquire, of Huey, Guilday, Kuersteiner & Tucker, P.A., Post Office Box 1794, Tallahassee, Florida, 32302, by U.S. Mail, this the 27 day of August, 1991.

J. NIXON DANIEL, III